

Chapter 14: Conditions Of Detention

A Quality Youth Justice Centre Respects Human Rights

Relevant Terms of Reference

- Human Rights Audit of Bimberi Youth Justice Centre

Relevant Human Rights Standards

- Humane Treatment of Children (CROC, OPCAT, UNCAT, POJ r.67, HR Act ss. 10, 11, 19, 20)
- Natural Justice (POJ art 70, SMR r.20)
- Freedom of Association (HR Act s.15),
- Freedom of Movement (HR Act s.13)
- Right to Privacy (HR Act s.12)
- Right to Liberty and Security (HR Act s.18)
- Right to Equality (HR Act s.8)
- Freedom of Expression (HR Act s.14)
- Separation on Legal Status (HR Act s.19)

14.1 Purpose of a youth justice centre

- 14.1.1 One of the driving factors for the Legislative Assembly commissioning this Review was concern about issues at the Bimberi Youth Justice Centre (Bimberi). The Legislative Assembly's resolution Resolution called for a Human Rights Audit (the Audit) of Bimberi, and made specific reference to security, and the use of segregation and restraints on young people.
- 14.1.2 At Chapter 2, we have already summarised the findings across the Report in terms of broad human rights issues covering staffing concerns (Chapter 5), education (Chapter 12) and health (Chapter 13). In this Chapter we focus directly on the conditions of detention at Bimberi, and seek to analyse the factors identified explicitly by the Legislative Assembly: the safety and security of the staff, balanced with the needs of young people; and the necessity to use measures such as force and segregation as last resorts only.
- 14.1.3 It might be said that one of Bimberi's primary obligations is to balance the rights of staff with the rights of young people.
- 14.1.4 These rights are not necessarily always competing or mutually exclusive. In fact, evidence shows that a supportive, therapeutic environment for young people is one that not only best realises their rights, but is also more respectful and consistent with the rights of staff, and in which staff are most able to achieve their duties and aspirations.
- 14.1.5 The Commission believes substantial improvements have been made in the transition from the former Quamby detention centre to Bimberi. Returning six years after the 2005 Human Rights Audit of Quamby (2005 Quamby HR Audit), the Commission was impressed at the level of human rights dialogue demonstrated by all levels of staff, and the significant change the ACT *Children and Young People Act 2008* (CYP Act) and policies were having on the ground. In many areas, we found the recommendations of the 2005 Quamby HR Audit have been followed.

Promising Practice: Bimberi's physical features are significantly better than Quamby, and participants in the Review expressed their belief that a new Centre had directly led to more positive outcomes for young people.

- 14.1.6 However, human rights compliance is not a static circumstance, and constant monitoring is necessary to ensure that a closed facility respects human rights, and provides a therapeutic environment that is safe and secure for staff and residents alike. At times, Bimberi has not achieved these aims.

14.2 Behaviour management and discipline

Human rights standards

- 14.2.7 It is a fundamental principle of justice and the rule of law that any sanction, whether classified as disciplinary or criminal, must be clearly expressed and publicly accessible. The principle of legality is reflected in s.28 of the ACT *Human Rights Act 2004* (HR Act), which requires that any restriction on HR Act rights be set out in Territory law. This requirement applies to the internal management of a correctional facility.
- 14.2.8 In the context of imprisonment, whether of adults or young people, disciplinary measures must be established by law, and that law must set out the:
- Conduct constituting a disciplinary offence;
 - Type and duration of disciplinary sanction that may be applied;
 - Authority competent to impose the sanctions; and
 - Authority competent to consider appeals.
- 14.2.9 No young person should be subject to disciplinary sanction except in strict accordance with the terms of the law and the regulations in force at the relevant time that meet these basic criteria.¹
- 14.2.10 Human rights standards also mandate procedural fairness. A young person has the right to be informed of the offence alleged against them and the right to be heard and given a proper opportunity to present their defence before disciplinary action is taken.² They also have the right to have such action reviewed by an impartial and independent authority.³ As the 2005 Quamby HR Audit noted, it is appropriate in a youth detention environment to ensure that the reasons for a penalty are fully explained and understood. The implementation of the sanction and any conflict over the fairness of the penalty need to be resolved quickly. However, the opportunity to be heard is essential to fair treatment and plays an important part in preventing unnecessary grievances.
- 14.2.11 Disciplinary measures and procedures should maintain the interests of safety and order within the institution, but must also respect the inherent dignity of the young person.⁴ Punishment that is cruel, inhuman or degrading is absolutely prohibited.⁵ In particular, closed and solitary confinement or other punishments that may severely compromise the physical or mental health of the juvenile concerned are prohibited.⁶
- 14.2.12 Disciplinary proceedings within Bimberi could potentially engage a number of rights under the HR Act, including equality, protection from inhuman or degrading treatment, fair trial, privacy and humane treatment.⁷

Best practice

- 14.2.13 Behaviour management systems are most effective when they are well considered, well articulated, consistently applied and reviewable.
- 14.2.14 Discipline (rather than punishment) is a vital part of effective programs: positive behaviours should be mentored and rewarded, destructive behaviours challenged, and alternatives implemented. Positive discipline enables character development and promotes courage, pride and integrity, while setting the tone for all other program interventions. Research shows that effective discipline programs set high expectations for young people, employ graduated sanctions that match the behaviour being challenged and emphasise remedial measures. Research also suggests that systems are well understood by young people who are given opportunities to understand that disciplinary processes are in their own best interests. Roush and McMillan observe that *'effective discipline programs require strong and committed staff members, who must make discipline part of their own lives – not just part of their jobs'*.⁸
- 14.2.15 According to Roush, the behaviour management systems that are most effective:
- Provide structure and dependability, but do not overwhelm young people. They are clear and understandable and are based on general principles (eg cooperation, respect and responsibility) that attempt not only to promote conformity, but also help foster pro-social values and beliefs. Rules and structures provide the foundation for self-discipline and self-control. As Previte notes, *'rules are an institution's way of saying "I care" to youth'*.

1 Rule 70 Protection of Juveniles; Rule 20 SMR.

2 Rule 30.2 SMR.

3 Rule 67 Protection of Juveniles; Principle 30.1 and 30.2 Body of Principles; Rule 29 SMR.

4 Rule 66 Protection of Juveniles.

5 Article 7 ICCPR; s.10 HR Act; Article 3 ECHR; Rule 31 SMR; Principle 6 Body of Principles; Article 37 CROC; Rule 66 Protection of Juveniles.

6 Rule 66 Protection of Juveniles; Article 8 ECHR, Article 17 ICCPR.

7 See sections 8, 10, 12, 19, 21.

8 David Roush and Michael McMillan, *Construction, Operations, and Staff Training for Juvenile Confinement Facilities* (2000)

- Are enforced in a way that is both firm and fair. Young people in the youth justice system are often hypervigilant for injustice and don't cope well with inconsistency, punitive or coercive approaches, or passive endorsement of behaviours.
- Are consistently applied. To operate effectively, facilities need to develop a social order (or culture) which guides everyone in the Centre (including young people, frontline staff and management). Best practice programs instil rules of conduct that apply to everyone in the Centre and encourage the development of respect and dignity.⁹

14.2.16 Similar principles underpin the UK Government's 'Managing Children and Young People's Behaviour in the Secure Estate: A code of practice',¹⁰ which requires that:

- The responsibilities of managers are clearly set out;
- There is a clear statement of acceptable behaviour;
- There is a coherent system of rewards and sanctions;
- There is a planned approach to managing behaviour;
- There is a process for consulting young people;
- There is an independent advocacy service;
- There is a clear complaints procedure; and
- There is a process for diversion, de-escalation and diffusion.

14.2.17 In considering these principles, Smallridge and Williamson recommended the UK Government adopt the Therapeutic Crisis Intervention (TCI) package developed by Cornell University, which assists organisations in de-escalating potential and actual injury to young people and staff, and teaching young people adaptive coping skills. This is discussed further below.

14.2.18 The 2005 Quamby HR Audit found issues with the transparency of the former behaviour management system, and a lack of confidence among young people with the system.

Remissions

14.2.19 The 2005 Quamby HR Audit expressed concerns with the remissions system then in place. Section 127 of the *Children and Young People Act 1999*, then in effect, empowered the Chief Executive to reduce the period of a young person's committal by up to one third of the sentence, unless the Children's Court had ordered otherwise. Remission was discretionary and based on a subjective assessment of good conduct. The Human Rights and Discrimination Commissioner (the Commissioner) had some concerns in relation to procedural safeguards, including the right to be heard before a sanction applied remission was refused, and the right of appeal.¹¹ While noting that the principle of incentives and early release is consistent with the 1985 United Nations' Standard Minimum Rules for the Administration of Juvenile Justice (SMR) and the 1990 United Nations Rules for the Protection of Juveniles Deprived of their Liberty (POJ), the Commissioner found that the lack of transparency and procedural fairness undermined the system.

Current practice

Legislation and policy

14.2.20 Following the recommendations of the 2005 Quamby HR Audit, remissions were removed from the behaviour management system for youth justice. On 23 June 2011, the Government announced proposed reforms to the youth justice system including the introduction of parole and an independent parole board. Based on the limited information available, these proposals seem consistent with the recommendations of the 2005 Quamby HR Audit.

14.2.21 Chapter 8 of the current CYP Act provides the Director-General powers to discipline young people for behaviour breaches in the Centre. Section 287 states that a behaviour breach includes:

- Being in a prohibited area;
- Smoking;
- Taking (in any way) alcohol, a prohibited substance or an unauthorised medicine into the young detainee's body;
- Making, possessing, concealing, knowingly consuming or dealing with a prohibited thing, without the Chief Executive's approval;

9 David Roush, 'Juvenile detention programming' (1993) 57 *Federal Probation* 20–33.

10 United Kingdom Youth Justice Board, *Managing the Behaviour of Children And Young People in the Secure E state* (2006)

11 Principle 30(2) Body of Principles.

- Being disrespectful or abusive towards a youth detention officer in a way that undermines the officer's authority;
- Being disrespectful or abusive towards another person;
- Fighting;
- Theft; and
- Planning, conspiring or attempting, or assisting anyone else planning, conspiring or attempting, to commit a behaviour breach.

14.2.22 A privilege is generally something not listed in the minimum entitlements of young detainees under the CYP Act.¹² Such minimum entitlements include access to food, drink, health care, clothing, exercise and fresh air.

14.2.23 If a youth worker suspects that a young person has committed a behaviour breach, he or she may elect to counsel or warn the young person, or can proceed to make a report. The person who investigates such an allegation must be a different person to the youth worker who makes the report. The report must be in writing and a copy must be given to the young person. A young person must be given the option to contact support people to assist them to respond if they choose.

14.2.24 After the investigation, the Administrator, the person appointed by the Chief Executive to impose behavioural consequences, may similarly elect to warn, counsel or reprimand the young person, or proceed to disciplinary action. This can be in the form of a 'minor behaviour breach' consequence, a formal behaviour breach charge or a referral to the police in the case of alleged criminal conduct.

Minor behaviour breach consequences

14.2.25 Section 297 of the CYP Act provides that the Community Services Directorate (CSD) must develop a behaviour management framework for Bimberi to deal with minor behaviour breaches, which must provide:

- Any behaviour management consequences imposed on a young detainee to be a reasonable and proportionate response to the minor behaviour breach;
- How privileges can be withdrawn for minor behaviour breaches;
- Review by the Director-General (including on request by a young detainee) of decisions to impose behaviour management consequences for minor behaviour breaches.

14.2.26 A minor behaviour breach is defined to include a breach that is not of a serious or persistent nature; does not involve a serious risk to the health or safety of someone else; and does not involve a serious risk, or serious or persistent disruption, to the security or good order at a detention place. Section 298 provides that the following are consequences that may be imposed under the behaviour management framework for such minor breaches:

- A fine, not exceeding \$25;
- A withdrawal of privileges, for not longer than six days;
- A requirement to make an apology to a person affected by the behaviour breach;
- A requirement to perform extra chores, for not longer than two hours.

Disciplinary charges

14.2.27 Rather than deciding to impose a minor behaviour breach consequence on the young person, an Administrator may elect instead to formally impose a disciplinary charge. The Administrator, or subsequent review officer, may, on considering a disciplinary charge, warn or reprimand the young person, or impose a behaviour management consequence. In deciding whether to impose a behaviour management consequence, the relevant presiding officer must consider the age, developmental capacity, rehabilitation needs and any known history of the young detainee.

14.2.28 The consequences for a formal disciplinary charge are more severe, and can include:

- A fine, not exceeding \$250;
- A withdrawal of privileges, for not longer than 60 days;
- A requirement to make an apology to a person affected by the behaviour breach; or
- A requirement to perform extra chores, for not longer than 20 hours.

14.2.29 A young person can choose to accept the disciplinary charge and subsequent consequence, or they can choose to seek a review. The conduct of a review must be consistent with the rules of natural justice, and the young person should be given the opportunity to make submissions in a form acceptable to the reviewer. A hearing may be held, but the emphasis should be on making it as informal as possible. A range of sections of the CYP Act provide generally that the rules of natural justice apply to the conduct of that hearing.

¹² See s.141 of the CYP Act

14.2.30 The first step in a review is undertaken by an internal reviewer, other than the Administrator. That review officer must give the young person the reasons for their decision. The young person can seek further review of the decision, which must be undertaken by a Magistrate appointed under the CYP Act for that purpose. At all stages of review, the young person should be given the option to contact support people. These provisions are supported by the *Children and Young People (Discipline) Policy and Procedures 2008* (Disciplinary Policy), which essentially 'operationalise' the relevant sections of the CYP Act. The Disciplinary Policy seeks to put negative behaviour of young people in context, noting that it may be the product of a negative background and therefore any response must be individualised to the young detainee.

Encouraging positive behaviour

14.2.31 The new behaviour management system under the *Children and Young People (Behaviour Management Framework) Policy and Procedures 2008* (BMS Policy) provides rewards through an incentive points system. This policy also seeks to deal with minor behaviour breaches. The behaviour of a young detainee is assessed on a five point scale (0 to 4) against the following nine domains:

- Nightshift behaviour in room;
- Personal hygiene;
- Respect for others and centre property;
- Attitude/cooperation with directions;
- Centre movements;
- Cabin standards;
- Chores and tasks;
- Participating in centre activities; and
- Extra initiative.

14.2.32 Young people are rewarded for good behaviour and can 'cash points in' for items such as food. The purpose of this behaviour management system is to:

- Promote self-understanding, self-esteem, emotional regulation and positive and pro-social behaviours by young detainees;
- Provide an environment that promotes social and emotional development and psychological resilience in young detainees; and
- Respond to negative or challenging behaviour displayed by young detainees, including behaviour that constitutes a minor behaviour breach or behaviour breach.

14.2.33 The emphasis of the policy is to implement proactive or preventative strategies within Bimberi that focus on the relationship between staff and young detainees and promote positive and pro-social behaviours by young detainees. These include environmental strategies and reinforcement strategies. The policy suggests that the effective use of proactive strategies in working with young detainees will result in less reliance on reactive strategies, which are designed as a response to negative behaviour.

14.2.34 Environmental strategies emphasise a normalised environment in which there is predictability, consistency and boundaries for young detainees. Reinforcement strategies include the use of incentives and rewards to recognise and affirm socially acceptable behaviour by young detainees.

14.2.35 Reactive strategies may be implemented to respond to negative behaviour by young detainees, including behaviour that constitutes a minor behaviour breach or behaviour breach. Reactive strategies include the development of a behaviour management plan, de-escalation practices, and the use of force as a last resort. The policy puts an emphasis on dealing with behaviour through communication and relationship building, ie pro-social modelling.

14.2.36 Under the policy, the senior manager is responsible for ensuring staff receive training in the following areas relevant to working with children, young people and young adults in custody:

- Understanding the needs of children, young people and young adults in custody;
- Cultural awareness;
- Adolescent development and behaviour;
- Communication and relationship building;
- Behaviour management strategies;
- Pro-social modelling;
- Conflict resolution; and
- Giving feedback.

- 14.2.37 The policy contemplates behaviour management plans being developed for individual young people, which will provide the structure in which that young person's negative or challenging behaviour in custody will be responded to and managed. A behaviour management plan does not have the objective of addressing the young person's assessed needs related to the reason for their detention and will not be required for all young detainees. The BMS Policy emphasises that a behaviour management plan developed for a young person must always be subordinate to, and consistent with, the overall case plan for the young detainee. However, the Commission has identified several issues in the application of this policy
- 14.2.38 The Commission supports the BMS Policy's emphasis on de-escalation and individualisation of responses to young people. It is clearly based on human rights principles, and its approach is consistent with best practice.

Application of the BMS Policy

Views of staff

- 14.2.39 During interviews and in written surveys, staff reported that the BMS Policy was complex and difficult to understand. At times, they found it hard to give consistent decisions and were sometimes unsure about how the points system worked. Staff also reported that implementing the BMS Policy, particularly around positive interventions, was difficult during periods of staff shortages. This often resulted in youth workers not being able to properly explain outcomes to young people. The Commission supports the intention of the system, but we can see value in reviewing it in consultation with youth workers and young people, given they have now worked with it for two years.
- 14.2.40 The Commission was also concerned that it appeared that, contrary to the policy, case managers had no input into behaviour management plans

Charge form

- 14.2.41 The Commission also has concerns with the paperwork supporting the BMS and Disciplinary Policies. The current disciplinary charge form does not specifically detail how a young person can contact the Public Advocate or another support person. The only option for further information suggested is a youth worker. We suggest that other alternatives should be provided. On the files surveyed there were very few instances of signatures of young people, suggesting that the requirements of record keeping were not being followed.

Recommendation 14.1: The Community Services Directorate review the *Children and Young People (Behaviour Management Framework) Policy and Procedures 2008* in consultation with youth workers and young people.

Views of young people

- 14.2.42 During interviews and in written surveys, young people reported that they were generally unhappy with the behaviour management system at the Centre, with the majority believing the incentive and discipline system is unfair. Most young people reported having had their privileges withdrawn, a fine or a warning, and reported that they had sometimes been punished as a whole group for the actions of an individual or a small group and, in informal remarks, said that this was unfair.
- 14.2.43 While the CYP Act and BMS Policy seek to reinforce ideals of natural justice, equality and cultural awareness, the area of concern cited most often by young people was inconsistent treatment. Young people often linked this to gender or race issues, yet the Commission is unable to verify these claims. Young people also reported concerns with staff not adequately responding to taunts from other young people about race or sexuality, yet again, the Commission is unable to verify these claims.

Discrimination: gender, race and sexuality

- 14.2.44 The *Discrimination Act 1991* (Discrimination Act) states it is unlawful for a service provider, in the way in which the provider provides those services, to discriminate against any person because of a protected attribute. These attributes include race, sexuality, disability and sex. Further, the Discrimination Act also makes vilification on the basis of race or sexuality unlawful.
- 14.2.45 Participants reported to the Commission two broad areas of concern regarding discrimination. As already touched on, the first issue concerned the perceived different treatment of young people on the basis of gender or race. Secondly, participants reported concerns with staff not intervening when inappropriate comments were made by other young people on the basis of gender or race.

- 14.2.46 In relation to the first issue, while the BMS Policy seeks to emphasise communication, the Commission believes the young people's perceptions of discrimination on the basis of gender, as discussed above, are generally a result of staff not adequately explaining to young people the reason for their decisions. In examining the issues of different disciplinary consequences, the Commission generally found that staff had appropriately responded to the individual needs of the young person in question. The young person's gender was not a specific consideration. However, this hadn't been adequately explained to young people.
- 14.2.47 As detailed above, staff have identified that communication with young people is very difficult during periods of low staff numbers. That is likely contributing to young people's frustrations regarding this issue. Further, often these complaints from young people appeared to be related to the low level of programs available at the Centre. Exacerbating this, some programs had low resources and could only allow a limited number of young people to participate. The low numbers of young females at Bimberi also mean that they require specific attention at times, which the Commission supports.
- 14.2.48 The Commission believes these issues must be addressed, or else the Centre risks young people losing confidence in the BMS Policy and disciplinary systems. Increasing staffing has already been identified as a key recommendation of this Review at Chapter 5. To that we would add better communication strategies and the need to ensure that all programs are open to all young people. This is discussed further in Chapter 9 (programming) in relation to programming and Chapter 10 (individual needs) in relation to needs of young people with particular characteristics.
- 14.2.49 Finally, it should be noted that s.27 of the Discrimination Act does allow special measures to be taken by service providers, where such positive measures are necessary to overcome systematic discrimination. It may therefore be reasonable for Centre management to provide particular programs for girls, given their traditionally very low numbers, and to particular cultural groups like Aboriginal and Torres Strait Islanders. Needs of particular young people are discussed at Chapter 10 (individual needs).
- 14.2.50 The second discrimination issue raised by participants concerned inappropriate comments by staff or young people not being addressed. The BMS Policy identifies cultural awareness as an area in which youth workers must be provided training. However, the race issues identified in Chapter 5 between staff is mirrored in the feedback from young people on behavioural consequences. This is concerning at the outset, as it may demonstrate that staff are not modelling pro-social behaviour. This is perhaps shown by nearly 50% of young people, or nine of the 19 surveyed, reporting occasions when staff had made insulting remarks about them. Nearly a sixth reported that staff had made insulting remarks about their culture, and two reported remarks had been made about their families. The Commission was unable to verify this, or determine the specific nature of such remarks.
- 14.2.51 Nonetheless, of the 18 staff who participated in our survey, 10 respondents reporting feeling that there were problems with *'racism/racial prejudice amongst the young people at Bimberi'*. One young person in particular reported to the Commission that he felt his violent behaviour towards other young people at the Centre was due to staff not intervening when racial taunts were made to him. Another young person alleged to the Commission that staff refused to intervene when homophobic taunts were made by other young people.
- 'Kids being kids they are going to say stuff. I had patience with them, I could understand it was ignorance, but it got to me that the workers did nothing at all to stop it.'*
- 14.2.52 Young female participants also reported to the Commission that they had been subject to derogatory sexual comments by young male residents at Bimberi, and staff had not intervened. In their joint-submission to the Review, the Women's Centre for Health Matters and ACT Women and Prisons Group suggested *'young women have reported being sexually harassed by young men and are subject to degrading name calling, which goes unpunished.'*
- 14.2.53 As a public authority, Bimberi must also act consistently with the right to equality.¹³ The Commission is concerned that if Bimberi is not adequately responding to taunts about race, gender or sexuality, it may not be discharging these obligations. One critical area to improve this would be to provide discrimination, cultural awareness and equity/diversity training to youth workers. Training for young workers is discussed at Chapter 5 (staffing).

Double jeopardy

- 14.2.54 The CYP Act creates a different regime if a young person engages in alleged criminal behaviour at Bimberi. Rather than being dealt with as an internal disciplinary matter, it can become a criminal investigation. However, under s.290, a young person cannot be punished twice. If a prosecution has commenced, then they cannot be punished within the Centre. Equally, if they have been punished within the Centre, they cannot be prosecuted for an offence.

13 S.8 of the HR Act

- 14.2.55 The Commission saw a number of instances where it appeared young people were being 'punished' for behaviour that was the subject of criminal investigation and later prosecution. This response was often described as 'risk management' and undertaken for the good order of the Centre.
- 14.2.56 CSD suggested in response to this issue that a Behaviour Management Plan may be used in cases in which there is more than one breach during an incident. One example provided by CSD was: a young person assaults a staff member and the breach is referred to ACT Police, then as the young person goes to their cabin, they subsequently smash their phone. CSD suggest this is another breach and could be dealt with by way of a behaviour breach. A Behaviour Management Plan is developed by the case manager and unit manager to address a young person's behaviour and is reviewed fortnightly.
- 14.2.57 CSD also noted that in relation to young people segregated after a disciplinary incident, that a segregation direction works alone and is implemented to manage the security and good order of the Centre and to manage the safety and health of the young person subject to segregation and all young people within the centre and staff. Segregation directions are discussed at Part 14.4 below.
- 14.2.58 However, in at least one case considered by the Commission, a young person alleged to have assaulted another was allowed to return to all education classes, bar his two favourites. The Commission could see no evidence that these posed any greater risks to the good order of the Centre than his remaining classes, and in particular his alleged victim did not attend these classes. It is our understanding that this response involved only a single disciplinary incident and so would not fall into the category suggested above by CSD. It appeared to the Commission that the clear reason for this exclusion from his favourite classes was to punish the young person for the alleged behaviour.

Recommendation 14.2: The Community Services Directorate develop a transparent process of decision-making for any restrictions on young people's access to education, vocational classes, mixing or other loss of entitlements on the basis of 'risk management', including those referred to police investigation. This should include objective criteria for decision-making, a clear written statement of reasons for the decision and how a young person can regain entitlement(s).

Therapeutic Crisis Intervention (TCI)

- 14.2.59 Finally, the ACT Government submission to this Review (the Government Submission) states that Bimberi staff are receiving training on TCI. However, as this training does not appear to have been contemplated at the time the BMS Policy was designed, we have concerns as to how it sits with the other policies and procedures relevant to behaviour management and uses of force. It is questionable how effective training on TCI will be with a potentially incongruent behaviour management system in place. At a minimum, it is likely to lead to confusion among staff. Further, there have been concerns raised regarding the restraint holds taught in TCI, which are also discussed below.

Recommendation 14.3: If Therapeutic Crisis Intervention (TCI) is to be adopted at Bimberi, the Community Services Directorate review the Behaviour Management Policy to ensure it is consistent with TCI.

14.3 Use of force/restraints

- 14.3.1 The application of physical force on a person in detention is among the most controversial and critical areas of regulating a closed environment. Many human rights standards, legislative provisions, policies, procedures, best practice guidelines and training aim to strike the balance between the security of a facility and the humane treatment of its detainees. Even then, it is an area that requires ongoing and systematic oversight, as even the best policies and training can become lost in the day-to-day practice and culture of an institution.
- 14.3.2 This approach is reflected in the Optional Protocol to the Convention Against Torture, which Australia has signed but is yet to ratify. However, Australia has already ratified the parent instrument, the United Nations Convention against Torture, Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), which defines torture as the deliberate infliction of severe pain or suffering, mental or physical, by a public official for a specific purpose such as to force a confession or punish a person. Other actions or omissions of lesser severity, whether intended or not, may be considered cruel, inhuman or degrading treatment or punishment. The Convention on the Rights of the Child (CROC) also prohibits the use of torture, and cruel, inhuman or degrading treatment or punishment of children, and there are a number of United Nations Rules and standards concerning the detention of children and young people that endorse this prohibition.¹⁴
- 14.3.3 In many ways, this Review demonstrates why ongoing oversight is critical, particularly in relation to the application of force and use of restraints against detainees. Such issues are all the more important when those in detention are young people, rather than adults.
- 14.3.4 In 2006, the Howard League for Penal Reform released a report on the use of physical restraint, segregation and strip searching in UK secure children's facilities (the Carlile Report).¹⁵ It noted that:
- '...many of the children and young people detained against their will had chaotic and abusive childhoods and that the lack of clear boundaries and examples of good behaviour meant that they often did not know how to manage their own frustration, sadness, irritation, fear or anger.'*¹⁶
- 14.3.5 The same could be said of the young people at Bimberi. Nonetheless, the Carlile Report recommended that 'the use of physical violence or intervention by staff should only be required in the most exceptional circumstances.'¹⁷

Human rights standards

- 14.3.6 Generally, the relevant human rights standards state that use of force by youth workers against young people should be a last resort and only the minimum force needed is permissible. Force might be resorted to in order to prevent young people from inflicting self-injury, injuries to others or serious destruction of property. In such instances, a doctor should be consulted.¹⁸ These obligations are also generally dealt with under a range of provisions of the HR Act, including:
- Humane treatment when deprived of liberty;
 - Protection from torture and cruel, inhuman or degrading treatment;
 - Rights of children in the criminal process; and
 - Protection of children.¹⁹
- 14.3.7 Article 19 of CROC also imposes an obligation on the State to protect the '*child from all forms of physical or mental violence, injury or abuse.*'

Case law

- 14.3.8 In 2001, the European Court of Human Rights considered the issue of use of force in detention in *Keenan v United Kingdom*,²⁰ a case that concerned the suicide of a 28-year-old man in a UK prison. The Court stated, in considering the relevant provision of the European Convention dealing with torture or inhumane treatment:
- 'In respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3.'*²¹

14 Rule 67 Protection of Juveniles; Rule 31 SMR; and Principle 6 Body of Principles.

15 The Lord Carlile of Berriew QC, *An independent inquiry into the use of physical restraint, solitary confinement and forcible strip searching of children in prisons, secure training centres and local authority secure children's homes* (2006), Howard League for Penal Reform.

16 *Ibid.*, 29.

17 *Ibid.*

18 Rule 64 of the POJ states that instruments of restraint and force can only be used where all other control methods have been exhausted and failed. See also rules 33, 34 and 54 of SMR.

19 See sections 19, 10, 20 and 11.

20 (2001) ECHR 242

21 Para 112.

- 14.3.9 A number of recent coronial inquests in the UK and the United States have also considered specific uses of force or restraint.²²

Best practice for achieving standards

Safe restraint?

- 14.3.10 The South Australian (SA) Guardian for Children and Young People has found that *'restraining children is a dangerous practice that can cause significant injury and even death to children and young people.'*²³ While several reports and reviews have noted key principles regarding the use of restraint in closed environments, they have also generally noted the lack of evidence base for many techniques, let alone the practice itself. As Smallridge and Williamson noted in their UK review of restraints: *'No restraint is 100% safe... it is an area of controversy and competing claims and there is little consensus among medical experts about the causes of injury and death associated with restraint use or the relative risks associated with alternative methods of restraint.'*²⁴
- 14.3.11 Nonetheless, a range of coronial inquests and reviews, particularly from the UK, have recommended against the following restraints:
- Basket hold – involves a young person's arms being held across their chest. This has been banned from being used in secure training centres in the UK.
 - Double-seated embrace – was used prior to a 2004 death of a young person in the UK. This embrace involves two officers seated either side of the prisoner restraining him or her by holding the arm on the far side and leaning his head forwards while a third monitors the face.²⁵ This has been banned from being used in secure training centres in the UK.
 - Supine restraint – face up on ground. It carries risk of choking on or inhaling vomit.
 - Prone position – involves the young person being face down on the ground. 'Holding Safely', the Scottish Institute for Residential Child Care's Guide for Residential Care, says of the prone position: *'restraining children in a prone position carries a higher risk of serious harm than other holds done correctly, and as such should always be treated as a final option. Restraining children in a prone position is more likely than other forms, such as standing or seated restraints, to be seen by them as a punishment or as abuse.'*
- 14.3.12 The Carlile Report noted that *'physical intervention carries real dangers in any position, should be avoided if possible, should not be prolonged, should be monitored, and no pressure should be applied to neck, thorax, abdomen, back or pelvic area.'*²⁶
- 14.3.13 Dr Keith McVilly undertook a review of the use of physical restraints in disability services for the Victorian Senior Practitioner (the McVilly Report).²⁷ While it focused on issues relevant to people with disabilities, it nonetheless reviewed literature and best practice on the use of restraints and segregation in closed environments. Many of the institutions identified in the McVilly Report as minimising the use of restraints were ones that had sought to use a range of daily activities, such as occupational therapy, individualised treatment, exercise, spirituality, physical comforts, education and work throughout the residents' day. This suggests that in many ways the frequency and nature of the use of force and restraints in a closed environment illustrates much of its culture and philosophy.
- 14.3.14 The McVilly Report notes that physical intervention involving restraint has been used by the service system to address issues concerning occupational health and safety for staff. However, the report concludes *'there is little if any research evidence to suggest that such strategies are effective.'*²⁸ The report recommended that the Victorian Senior Practitioner,²⁹ in collaboration with appropriate medical authorities with specialist expertise in the field of developmental disability medicine, publish practice guidelines highlighting the dangers of asphyxia and cardiac complications associated with the use of physical restraint, and in particular the prone position, as well as hobble tying,³⁰ basket holds and mechanical restraint.³¹

22 See for example the Coroners' Inquests into the deaths of Gareth Myatt and Adam Rickwood in the United Kingdom.

23 Andrew Day and Michael Daffern, *Inquiry into Policy and Practice in the Use of Physical Restraint in South Australian Residential Facilities for Children and Young People* (2009), Report for the Guardian for Children and Young People, South Australia, 2. This Report includes a list of deaths in the US linked to use of restraint at pages 6-7.

24 Peter Smallridge and Andrew Williamson, *Independent Review of Restraint In Juvenile Secure Settings* (2008), UK Ministry of Justice, 30.

25 Youth Rights UK, 'The death of Gareth Myatt', http://www.youth-rights-uk.org/briefings/gareth_myatt.doc

26 Carlile, above n15, 42.

27 Keith McVilly, *Physical restraint in disability services* (2009), Victorian Government.

28 Ibid, 17.

29 The Senior Practitioner is an officer of the Victorian Department of Human Services and is generally responsible for ensuring that the rights of people who are subject to restrictive interventions and compulsory treatment are protected, and that appropriate standards are complied with in relation to restrictive interventions and compulsory treatment

30 Hobble tying is the term used to describe the prone positioning of a patient, following which their wrists are secured behind their back, their ankles are tied, and their wrists and ankles are subsequently secured together by pulling the shoulders back and bending the legs towards them. From Horsburgh, D, *How, and when, can I restrain a patient?*, <http://pmj.bmj.com/content/80/939/7.full>

31 McVilly, above n27, 8.

14.3.15 Both the Carlile and McVilly reports recommended against pain based restraints. The UK Joint-Committee on Human Rights in their review of restraint similarly stated:

*'There can be no justification for practices which involve the deliberate infliction of pain, such as the so-called distraction techniques, and we therefore recommend their abolition without delay.'*³²

14.3.16 Following the Carlile Report, the UK Government commissioned social workers Smallridge and Williamson to undertake a specific independent review of 'Restraint in Juvenile Secure Settings'.³³ Four years on, they similarly found that 'on the evidence available, we have not felt able to state that any one restraint technique would be completely safe to use on everyone in the juvenile secure estate.'³⁴ Instead, they recommended the establishment of a scheme of accreditation for physical restraints for secure juvenile centres, which the UK Government agreed to.

14.3.17 Faced with similar issues regarding a clear consensus on safe restraints, the SA Guardian for Children and Young People recommended that the SA Government develop practice guidelines for physical restraint.³⁵ A clear theme of all of these reports is that the prone position, double basket and double-seated embrace restraints should be avoided, and that any physical restraint carries inherent risk of harm, particularly given the lack of evidence base about what techniques are safe. All pain-based restraints should be minimised, or generally not used at all. It does not appear any restraint method can be seen as best practice, although the UK's accreditation scheme, coupled with developments in Victoria and South Australia, may offer a way forward.

Recommendation 14.4: The Community Services Directorate develop Practice Guidelines on Safe Physical Restraint, informed by relevant research.

Avoiding force

14.3.18 It seems clear that the best solution of all is to reduce, or avoid the use of restraints. Across the literature reviewed for this Report, we identified the following as factors in reducing the use of restraints:

- An appropriate behaviour management system;³⁶
- Staff resources;³⁷
- Education and training on alternatives and de-escalation;³⁸
- Leadership – '*leaders within a closed environment provide a reference point for the behaviour of all staff and young people within the establishment*';³⁹
- Policy, ethos and cultural considerations;⁴⁰
- Monitoring and review; and⁴¹
- Environment.⁴²

14.3.19 The broad range of areas captured in this list demonstrates that use of force and restraint is reduced through a holistic range of measures, many of which may not be directly linked to uses of force. As such, much of this Report has identified a series of recommendations that, if implemented, should reduce the need for force to be used against young people. Clearly, most important are the behaviour management system, staffing resources, training, oversight and overall culture of the Centre. In the remainder of this section, we seek to examine the use of force in isolation, and identify improvements, but do so conscious that many of the other issues already discussed in this Report are the most important factors in reducing use of force.

32 United Kingdom, *The Use of Restraint in Secure Training Centres* (2008), Parliamentary Joint Committee on Human Rights, 28.

33 Smallridge and Williams, above n24.

34 Ibid, 35.

35 Page 22.

36 McVilly, above n27, 38. Smallridge and Williamson, above n24, 80.

37 McVilly, above n27, 38.

38 Ibid, 38. Smallridge and Williamson, above n24, 84.

39 Smallridge and Williamson, above n24, 84.

40 McVilly, above n27, 38. Smallridge and Williamson, above n24, 82.

41 Ibid.

42 Smallridge and Williamson, above n24, pg 83

Policy, practice and challenges

- 14.3.20 Many reports have identified the definitional issues inherent in assessing and comparing use of force and restraint.⁴³ This can pose difficulties in reporting, oversight and most particularly, assessment from staff, as to when a use of force is occurring.
- 14.3.21 Use of force is specifically governed by Division 6.6.4 of the CYP Act. Use of force is not defined in the Act or in the *Use of Force Policy and Procedure 2008* (the Use of Force Policy). Restraint in the Use of Force Policy is defined as 'body contact or the use of instruments of restraint. Instruments of restraint include restraint belts, flexicuffs, shields, helmets, handcuffs and other approved items.'
- 14.3.22 Section 278 of the CYP Act states that a youth detention officer may use force that is necessary and reasonable to undertake a search, but that it must be done in accordance with Division 6.6.4. Searching is discussed below at Part 14.5. Division 6.6.4 includes requirements that force should be used as a last resort, in accordance with law, and the individual characteristics of the young person should be taken into account in considering a use of force. Sub-section 223(4) provides that a young detainee injured by a use of force must receive a health assessment after force has been used.
- 14.3.23 However, s.224 of the CYP Act suggests use of force may be used in situations that might, arguably, go beyond 'exceptional circumstances' as required by the relevant human rights standards. Use of force may be used under s.224 of the Act and under the Policy:
- To prevent escape from custody;
 - As a process of self defence;
 - To protect another person including a young detainee, a staff member or any other person visiting a detention place from attack or harm and where no other means are available for their protection;
 - To prevent a young detainee from harming him or herself;
 - To enforce a segregation direction, including to move a young detainee to a safe room, after all reasonable steps have been taken to persuade the young detainee to comply with the direction;
 - To undertake a personal or area search, to seize a prohibited thing or a dangerous or harmful article or substance that is reasonably suspected to be in the possession of a young detainee, or to prevent the loss, destruction or contamination of anything seized during a search.
 - To prevent unlawful damage, destruction or interference with property;
 - To prevent or quell a riot or persistent serious disruption to the good order of a detention place;
 - Where a young detainee refuses to comply with a direction and all other reasonable steps have been taken to persuade the young detainee to comply; or
 - To prevent or stop the commission of an offence or behaviour breach.
- 14.3.24 The Commission has concerns with the last three rationale in particular, as these have the potential to allow uses of force for minor incidents. Smallridge and Williamson further elaborate on these factors by suggesting six principles to inform when force should be used in a juvenile setting. They recommended force should be used only to prevent the risk of harm. This might include risk of harm to a 'safe environment', but they cautioned against this being seen in the same light as 'good order of the establishment', a motivation that had been questioned in previous coronial inquests. They caution against force being used for 'mere compliance' and instead require that the safety of the establishment is under real threat.⁴⁴ Similarly, the UK Parliamentary Joint Human Rights Committee criticised amendments to UK law allowing force to be used in secure training centres for the good order and discipline of the centre.⁴⁵ Further, the Carlile Report recommended that 'restraint should never be used primarily to secure compliance':
- 'We were concerned that in some cases there appeared to be a culture where dissent was not tolerated and that physical restraint was used to secure conformity. While firm boundaries and consistency of response by adults in authority are essential, it has to be balanced against a tolerance and appreciation that normal teenage behaviour is testing. Over-reaction, especially if capricious and sudden, can be counter-productive and even dangerous.'*⁴⁶
- 14.3.25 Similarly, the SA Guardian for Children and Young People recommended after her review into physical restraints in residential facilities that the relevant SA law be amended 'such that use of force is not permitted to ensure that the resident complies with a reasonable direction given by an employee of the centre'.⁴⁷

43 See for example Day and Daffern, above n23, 8.

44 Paras 12.23 to 12.41

45 Parliamentary Joint Committee on Human Rights, above n.32, 25.

46 Carlile, above n15, 29

47 Day and Daffern, above n.23, 4.

14.3.26 The Commission found information to suggest that force was being used in Bimberi to achieve compliance, to maintain 'good order' or in responding to minor behaviour breaches. A review of critical incident reports by the Commission found staff using force on young people after asking them to follow directions regarding minor issues, such as:

- To stop swearing; or
- To clean up mess; or
- Not to walk on the grass; or
- After a soccer ball was kicked on the roof.

14.3.27 Often staff justified the use of force because they had given the young person 'three warnings'. In our view, simply repeating an instruction three times does not justify the use of force. These reports suggest staff are not properly utilising de-escalation techniques and that minor behaviour breaches, or disruption to good order, or failure to comply with a direction, are being unreasonably used as rationale to use force.

Promising Practice: Staff and management appear to take their use-of-force reporting seriously, and based on our review of the registers are attempting to record uses of force accurately and promptly.

14.3.28 We are nonetheless acutely aware of the challenging role youth workers have. Young people's behaviour at Bimberi can be at times extremely challenging. However, the literature is clear that improving de-escalation techniques and staff resources will lead to a reduction in the use force, and correspondingly make the work of staff easier. Our aim is for staff to work in an environment in which they have time and space to talk to young people and find out what they're thinking. De-escalation strategies should be accepted as part of the primary role of youth workers, informed by thorough and regular training and debriefing to empower them to do what is expected of them.

Recommendation 14.5: The ACT Government amend the *Children and Young People Act 2008* and *Use of Force Policy and Procedure 2008* to define 'use of force' and remove references to use of force being used to maintain good order, to achieve compliance with a direction, and to prevent a behaviour breach.

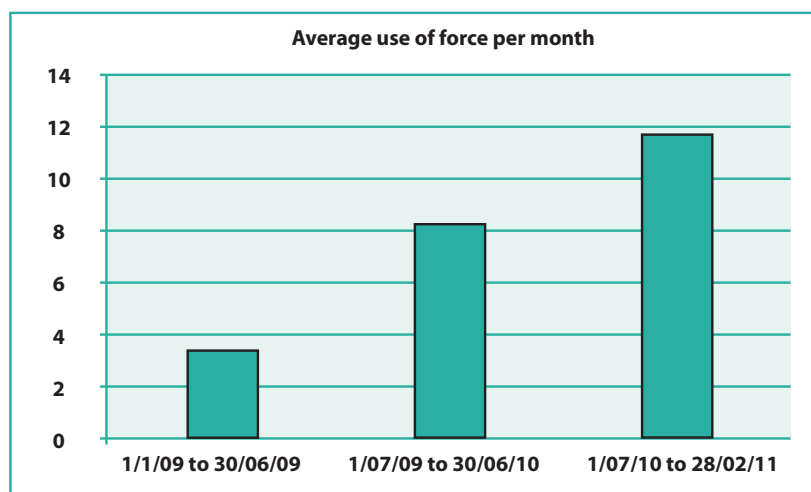
Prevalence

14.3.29 There are two categories of Reportable Incidents under the *Children and Young People (Records and Reporting) Policy and Procedures 2008*. Category One incidents oblige the Senior Manager to notify the Director immediately, while Category Two requires notification following the completion of a report within five working days. Use of force is a Category Two incident. Data provided to the Review by CSD (Figure 14.1) shows that:

- From 1 January 2009 until 30 June 2009, there was one Category One incident and 50 Category Two incidents. Of these, 20 were uses of force.
- From 1 July 2009 to 30 June 2010, there were no Category One incidents and 170 Category Two incidents. Of these, 99 were uses of force.
- From 1 July 2010 to 28 February 2011 there were five Category One incidents and 139 Category Two incidents. Of these, 93 were uses of force.

14.3.30 The average use of force per month has continued to increase, however these figures need to be compared against the number of residents before any firm conclusions can be drawn. During the Review, the Commission asked CSD to provide staff:resident ratio data, either by day, week or month, yet CSD was unable to do so.

Figure 14.1: Average use of force per month



- 14.3.31 Increased uses of force also correspond, at least anecdotally, with the period when staffing numbers were at their lowest. For example, the use of force register reveals multiple uses of force on single days during September 2010, however, again this data needs to be considered against the number of young people in detention.

Views of young people

- 14.3.32 Over half of the young people reported that they had been placed in handcuffs, a restraint belt, or another restraint device while in Bimberi (n=10). Forty-two percent reported that they were physically restrained by staff 'sometimes', and just under 40% of young people reported an injury that was a result of a staff restraint (n=7).
- 14.3.33 The Commission cites these figures with caution, and we do not draw any conclusions from them. We are unable to ascertain the veracity of these claims or the extent of such injuries, and we note the inherent limitations of this data given it is unclear how respondents might define 'restraint' or 'injury'. However, such verification would have been possible, if Bimberi's policy had been to notify a nurse or doctor every time a use of force was used. We discuss health checks and uses of force further below, including to recommend such a change be made to the Policy so in future claims of this nature can be verified.

Views of staff

- 14.3.34 In the Commission's survey with current and former staff, seven of 13 respondents that answered the question reported that they thought that restraints (such as handcuffs) were 'used reasonably'. Six respondents reported that they thought that restraints were used 'about the right amount', and five respondents reported that they thought that restraints were 'not being used reasonably'. As one respondent stated:

'Totally appropriate and necessary. If one detainee was to run off or climb on a roof, others may join in and we would have a total loss of control and a riot on our hands. Dangerous to detainees and staff.'

- 14.3.35 However, more than a third of the respondents felt restraints weren't being used reasonably (n=5), and some staff felt restraints were being used inappropriately:

'Staff have not had sufficient training on when and how to apply restraints.'

- 14.3.36 One staff member who participated in a verbal interview described particular concerns during the worst of the staff shortages, when staff felt isolated with a large group of young people. This participant suggested that staff would 'rush' to use force to restrain a young person, so they could quickly deal with the other young people in their care. They suggested that force might have later been used inevitably, but that staff rushed to use it first. Another experienced staff participant noted a definite change from the use of force at Quamby to Bimberi, particularly during the transitional period, which was coupled with a lack of policies and procedures and a lack of training on new legislation. This could have led to restraints being used prematurely:

'We were all really tired and didn't have time to work on their behaviours. We were in crisis the whole time.'

Specific incidents

- 14.3.37 A number of serious allegations were reported in the Legislative Assembly and media before and during the course of this Review, including allegations regarding use of force. The Commission was also informed of these and other allegations from participants in this Review. CSD provided the Commission with details of the background and subsequent investigations of critical incidents, including whether they were subject to external scrutiny. In the most part, the Commission was satisfied with the level of scrutiny provided by other external agencies to these incidents. However, they do highlight some issues of concern that we believe warrant changes to policy and practice, and which are discussed in the report.
- 14.3.38 In a report obtained by the Commission, one external reviewer questioned if force had been used as a last resort in accordance with the relevant policy, as not all alternative strategies listed had been attempted. Withdrawal from the situation was highlighted as one strategy that should have been attempted and was not.
- 14.3.39 The McVilly Report in Victoria noted that staffing factors have been identified as critical to use of force, though there is a lack of consensus in the literature as to how best to determine optimum staffing numbers. The report notes that while higher staffing levels can correspond to higher uses of force, lower staffing levels can also contribute to staff feeling anxious and consequently more likely to deploy restrictive practices earlier than they might otherwise had they the support (reassurance and security) of other staff close by who could offer assistance if required.⁴⁸
- 14.3.40 Information considered by the Commission in this Report suggests that lower staffing levels have led to an increase in the use of force and restraints at Bimberi. Incident reports, interview responses and survey responses suggest that this is due to staff feeling anxious about being isolated. For example, in at least three incident reports, staff explicitly refer to lack of staff resources as a factor. It does not appear CSD was monitoring any trends in use of force data, and so did not respond directly to what is a concerning spike in use of force numbers. Better record keeping and trend analysis is discussed at Chapter 15 (management and oversight).
- 14.3.41 This lack of monitoring is illustrated by a specific example, in which a young person was allegedly injured after a use of force. We note that Centre management made reports to ACT Policing and Care and Protection Services on the day of the incident. The Care and Protection unit within CSD formally reported the incident to the Public Advocate three weeks later. CSD responded to concerns about this incident by requesting an internal review of the incident. That report, viewed by the Commission, suggests staff shortages were a factor in the incident. On the day, there was only one team leader and four youth worker staff available (in addition, there were two unit managers on duty). One of these youth workers was in the control room. The report suggests that at least one of the unit managers was supervising a wing of young people, due to a lack of staff. Nonetheless, this suggests as little as five staff may have been 'on the floor' for 26 young people resident at the Centre, with at least one unit manager away from their usual work to directly supervise young people. This further supports the Commission's concerns that staff shortages led to increased uses of force.

Recommendation 14.6: The Community Services Directorate track use of force statistics at Bimberi more closely to monitor trends, particularly increases in incidents and uses of force, and respond appropriately.

- 14.3.42 The internal review of this particular incident also raised issues about whether force was used as a last resort, and whether use of force was reasonable in situations involving a failure to comply with a direction or minor behaviour breach.
- 14.3.43 The investigation report made no recommendations for broader actions, such as considering whether other staff might also benefit from greater de-escalation training or if it is appropriate for force to be used for minor behaviour breaches. In the Commission's view, such considerations should be paramount in the mind of independent reviews, and this reinforces our concerns that all incidents of this kind be subject to external review. We would therefore recommend a shorter delay than three weeks in future to notify the Public Advocate of such matters. For example, the Carlile Report recommended that: *'There should be some immediate external and independent scrutiny of every incident of restraint. An incident of physical restraint should be seen as such a serious breakdown that it should be immediately reported and scrutinised by an appropriate independent child care agency.'*⁴⁹
- 14.3.44 Extending the breadth of notifications to the Public Advocate is discussed further at Chapter 15 (management and oversight).

⁴⁸ McVilly, above n.27, 35.

⁴⁹ Carlile, above n15, 12.

- 14.3.45 Additional incidents also came to light which indicate to the Commission suggested changes are needed to policies and procedures regarding use of force. These include:
- An incident report describes a young person being restrained on the ground for ten minutes. This was apparently because he continued to make threats, but a restraint of this length of time raises issues for the young person's safety;
 - A number of incident reports discuss young people being surrounded by four or five staff. On one occasion a young person was surrounded by eight staff. These practices are inconsistent with good de-escalation techniques; and
 - Several respondents reported to the Commission an allegation that a young person confronted a staff member about a use of force, and subsequently was taken by that staff member into a room without CCTV and verbally threatened. The Commission reported these allegations to CSD. Even the threat of use of force can have a substantial impact on the emotional well-being of young people. This incident and subsequent concern reinforced the need for proper debriefing and independent oversight following uses of force. This is discussed further below. We are particularly concerned by the use of a room without a camera by a staff member alone with a young person.

Recommendation 14.7: The Community Services Directorate consider if there are additional areas of Bimberi that should be recorded by CCTV cameras, taking into account the privacy of young people and staff.

- 14.3.46 We are also concerned that several of the incident reports suggest that prone restraint may have been used, with some referring to the 'approved prone restraint'. As detailed above, this has been identified as a dangerous restraint in other jurisdictions. This is discussed further below in relation to training.

Mechanical restraints

- 14.3.47 The Use of Force Policy provides in s.3.2 that 'for the purposes of this policy and procedure, use of force includes body contact and the use of instruments of restraint (restraint belt, flexicuffs, shields, helmets, handcuffs and other approved items). The CYP Act does not otherwise refer to the use of restraints, and does not include the use of restraints as a behaviour management consequence for a behaviour breach. Nonetheless, the Commission received information of restraints being used as standard practice for certain young people under 'special management directions'.
- 14.3.48 The use of restraints is adverted to in the Children and Young People (Admission and Classification) Policy and Procedures 2008 (the Admission Policy), which states:
- '6.74. Following a young detainee's admission, each young detainee must be placed in a room with a camera and be subject to 5 minute observations.'*
- '6.75. If a youth detention officer identifies a need for special management directions (eg. use of non rippable linen and/or clothing), the officer must contact the Manager to seek authorisation for any of the following special management directions:*
- *any other special management directions (such as restrictions on contact or the use of restraints).'*
- 14.3.49 The CYP Act does not specifically refer to 'special management directions'. However, it appears that the use of restraints considered in this policy relates to the use of restraints to prevent an immediate risk of self harm based on observations on admission, which is likely to be consistent with the use of restraints as a use of force under s.224(b)(5).
- 14.3.50 Dr Watchirs, ACT Human Rights and Discrimination Commissioner, visited Bimberi on 18 March 2010, and subsequently wrote on 7 April 2010 to the Chief Executive of CSD raising concerns with the use of restraints within Bimberi:
- 'I am concerned at the distinction made in practice between use of restraints in a crisis situation, where it is treated as a statutory use of force, and in contrast the 'voluntary' acceptance of restraints within the centre by detainees as part of an ongoing behaviour management plan in the aftermath of these [roof] incidents. In the latter case, the strict criteria regarding the criteria and conditions for use of force are not applied. In my view it is not clear that this distinction is authorised under the Children and Young People Act 2008 (CYP Act), and it may result in the use of instruments of restraint against young detainees in circumstances where this imposes a disproportionate limitation on their rights under the Human Rights Act 2004 (HR Act).'*
- 14.3.51 The Government Submission suggests this practice stopped immediately, and CSD suggested to the Commission that manager's directions are only used if staff need to be aware of certain issues relevant to a young person, and are not a disciplinary measure rather an instruction on how to effectively manage the young person in question. However, we reiterate that 'special management directions' are not a valid justification of a routine use of force. We continue to have concerns as the term 'special management direction' still seems to be used in the Centre as a reason or record of restraint.
- 14.3.52 Another aspect of this issue that was repeatedly articulated by participants during this Review was the idea that if a young person was voluntarily consenting to the use of restraints, such restraint was not a use of force. In fact, the Government Submission also suggests that '*young people willingly acceded to the application of flexicuffs for the purpose of escorting from or within the centre. In these instances there is a 'technical' use of force only.*

14.3.53 In the Commission's view, consistent with the relevant human rights standards, legislative provisions and policies, this is not a valid consideration. In a closed environment such as Bimberi any use of restraints should be treated and recorded as a use of force. Further, even if this behaviour was properly recorded as a use of force, its status as reasonable and proportionate remains at question, particularly inside as opposed to outside Bimberi. The Carlile report suggests:

'The Inquiry considers that the use of handcuffs on children in secure institutions is inappropriate.'

14.3.54 The Commission has serious concerns with the suggestion that a young person must be routinely restrained every time they leave a unit at Bimberi. They remain secure within the Centre and are accompanied by youth workers. Their risk of escape seems very low, and suggestions that they are complicit in their restraint adds weight to the argument that such a use of force cannot be categorised as being of last resort. We are also concerned about reports that young people have been left in flexicuffs in their room. At least one incident report confirms this. To restrain a young person while they are alone in their room is clearly a disproportionate and unreasonable limitation on their liberty.

14.3.55 CSD suggested during the Review that based on the advice of the Commissioner, all restraints are now recorded as uses of force.

Recommendation 14.8: The Community Services Directorate:

- Record all uses of restraints, no matter how planned or authorised, in the use of force register
- Ensure that young people not be routinely restrained when they leave units (as opposed to Bimberi itself)
- Consider if mechanical restraints are needed at all within the Centre, where risk of escape is low
- Ensure that all mechanical restraints are removed as soon as practical, when a young person is in their room.

Chemical restraint

14.3.56 Chemical restraint, or restraining a person in detention through the use of medication, is a concern in any closed environment. The McVilly Report defines chemical restraint as *'the use of a chemical substance to control or subdue a person's behaviour, but which excludes any drug prescribed by a registered medical practitioner for the sole purpose of treating a diagnosed physical illness or condition, or by a psychiatrist for the sole purpose of treating a diagnosed mental illness'*.⁵⁰ Rule 55 of the POJ states that 'Medicines should not be administered as a punishment or as a means of restraint'. The Commission received no evidence that chemical restraint was occurring at Bimberi. We have discussed issues concerning consent to health treatment generally in Chapter 13 (health).

Training

14.3.57 Rule 54 of the SMR requires that officers be given special physical training to enable them to restrain aggressive prisoners. In addition, Recommendation 2.4(b) from the 2005 Quamby HR Audit was that all staff attend training in de-escalation techniques. The Commissioner recommended that such training should be mandatory before new staff are allowed on the floor, because of the potential for a situation requiring the use of force to result in serious consequences. In addition, the Commissioner recommended refresher courses on this training should be offered at regular intervals to all staff who are in daily contact with the detainees.

14.3.58 The Government Submission advises that 'a new de-escalation training manual entitled 'Respond to Critical Situations' commenced in 2008 and is currently being used at Bimberi. Staff undertake four days of structured training in responding to challenging behaviours, critical situations and the use of force (including the use of restraints) and post incident management. The training has a strong emphasis on the importance of de-escalation and resolving conflict and negotiation rather than using force.'

14.3.59 On the basis of the current practice of use of force we continue to have concerns with use of force training at Bimberi. The trends and issues of concern detailed already point to a continued lack of use of de-escalation techniques among staff. They also suggest that dangerous techniques, such as the prone restraint, are being used. All restraints carry inherent risks. As such, Smallridge and Williamson recommended that all youth detention staff have consistent and comprehensive training in the awareness of risk factors in restraint, the monitoring of warning signs in young people and the need to take action quickly.⁵¹ They suggested that all training must include:

⁵⁰ McVilly, above n.27, 6.

⁵¹ Smallridge and Williamson, above n.24, 8.

- Risk assessment;
- Recognition of distress or deterioration in physical condition while restraint is being carried out;
- An understanding of the basic physiology of breathing;
- Training in basic resuscitation and airway management; and
- An understanding of psychological/medical conditions which increase the risk of an adverse outcome.

14.3.60 The McVilly report in Victoria recommended that training on use of force include personal accounts of those that have been restrained, concerning their experience of restraint and seclusion.⁵² We see merit in a similar approach being taken for young people. Many of the reviews cited in this part of our Report recount such stories. They also, as discussed below cite the trauma that a use of force can cause to a young person.

Recommendation 14.9: The Community Services Directorate:

- Train youth workers on identifying risk factors in uses of force, including assessing deterioration in physical condition, as well as first aid and resuscitation. There must be a renewed emphasis on de-escalation techniques.
- Amend the *Use of Force Policy and Procedure 2008* and supporting training, to prevent the use of restraint in the prone position, double basket or the double-seated embrace
- Consider including de-identified stories or personal accounts of young people's experiences of being restrained as part of training.

Therapeutic crisis intervention (TCI)

14.3.61 The Government Submission included a reference to Bimberi staff receiving 'Therapeutic Crisis Intervention training'. As detailed above, this package has an emphasis on de-escalation techniques. However, the McVilly Report describes TCI in the following way:

*'Concerns have been raised with respect to the Therapeutic Crisis Intervention (TCI) model developed at Cornell University, New York. This curriculum includes instruction in the use of prone restraints and basket holds, known to contribute to injury of clients and staff... A further criticism is that this curriculum places emphasis on teaching staff the techniques of physical restraint and the use of reactive strategies, with only secondary emphasis on preventative strategies. For these reasons, this programme and others like it could not be considered contemporary in terms of the legal and ethical imperatives guiding support services for people with disability.'*⁵³

14.3.62 Nonetheless, Smallridge and Williamson recommended TCI be introduced further into the secure environments in the UK; although, in doing so, they noted concerns with the inclusion of prone restraints in this package. They therefore recommended that if the UK Government introduce TCI:

*'It need not introduce TCI's stand-alone physical restraint system, which uses prone restraint. Units in the secure estate which use TCI have dispensed with its physical system in favour of their own methods.'*⁵⁴

14.3.63 In addition, the Commission also received information that TCI training has not been provided to Bimberi staff in its entirety, and is concerned that TCI is being implemented in ways that do not reflect the original nature, intent or practice of the program. In particular, Cornell University does not endorse the use of force for moving young people, nor for it to be implemented except where young people are at risk of being harmed or at risk of harming others, and provides that it should only be conducted when it is followed by a therapeutic conversation. Questions were also raised about the accreditation of the trainers being utilised.

14.3.64 Finally, participants reported that for some time three different sets of trainers were teaching use of force, de-escalation and TCI training. Such fragmented delivery of different techniques is likely to lead to confusion.

⁵² McVilly, above n27, 7.

⁵³ Ibid. 48.

⁵⁴ Smallridge and Williamson, above n24, 81.

Recommendation 14.10: The Community Services Directorate, if it continues to use Therapeutic Crisis Intervention, ensure that:

- Any elements which utilise the prone restraint are removed from the program
- The program's non-restraint elements are taught in their entirety
- The training is delivered by an accredited trainer.

Debriefing

- 14.3.65 Smallridge and Williamson note that 'experience of restraint can be emotionally traumatic for both young people and staff. Children and young people can suffer from nightmares and intrusive thoughts arising from their restraint, which may persist for many years. In some cases, just experiencing restraint can cause real harm.'⁵⁵ The Carlile Report noted the potentially negative impact a use of force or restraint can have on a young person's emotional well-being. It cited studies from residential care and mental health care which showed victims reporting feelings of violation and abuse following restraint. Those with a history of abuse would also relate restraint to previous traumas. The report also noted that 'observing a child being restrained can be traumatic and lead to divisive 'them and us' relationships between staff and children.'⁵⁶
- 14.3.66 Most reports reviewed for this Report recommended a form of debriefing after incidents. Smallridge and Williamson recommend the most detailed system of debriefing, which encompasses:
- A formal debriefing with every young person subject to restraint within 48 hours of the incident, with a written record of conclusions and actions taken. The debrief should be done by a member of staff who was not involved in the incident;
 - If the young person wishes it, an independent advocate should be present at the child's formal debrief;
 - To help this, establishments must notify an independent advocate of every restraint within 24 hours of the incident, which should then determine whether the young person wishes an advocate to be present at the debrief;
 - Independent advocates should keep confidential records of its debrief interviews with young people and should use them to report on an establishment's use of restraint annually; and
 - All staff in the secure estate must have the opportunity after a restraint incident to debrief with their manager.⁵⁷
- 14.3.67 The Commission believes greater emphasis on debriefing should be incorporated into the use of force policy and procedures at Bimberi. While the Use of Force Policy refers to debriefing being offered as soon as possible after the incident has occurred, information considered in this Review suggests this is not occurring.

Recommendation 14.11: The Community Services Directorate mandate specific debriefing procedures after a use of force with the young person concerned. Such debriefing should include an independent advocate, if the young person wishes, and be documented by appropriate record-keeping.

Health check

- 14.3.68 Currently the Use of Force Policy gives a young person the option to see a doctor or nurse after a use of force. In contrast, Smallridge and Williamson recommend that it should be a requirement that any restrained young person is seen by a health care professional for examination within 30 minutes of an incident. This is consistent with the relevant human rights standards.⁵⁸ The Commission believes this approach (in addition to the young person retaining the option) would be preferable, given the vulnerability of the young person in such a situation. If the doctor or nurse attempted to see the young person, and the young person refused treatment, then that would be a question of their ability to consent (or not) to treatment. Issues of consent and capacity are discussed in relation to the provision of health care in Chapter 13. We are concerned that on at least one occasion, an incident report refers to a staff member instructing a young person they would only call the doctor if the young person first 'calmed down'.

⁵⁵ Ibid, 40.

⁵⁶ Carlile, above n15, Para 127

⁵⁷ Smallridge and Williamson, above n24, 12.

⁵⁸ Ibid, 91. In particular, this conforms with rule 64 of POJ, which requires the centre director to consult medical and other relevant personnel after a use of force.

Recommendation 14.12: The ACT Government amend the *Children and Young People Act 2008* and *Use of Force Policy and Procedure 2008* to require that a doctor or nurse is notified every time a use of force is used, rather than relying on a young person to request their attendance.

Hospital Transfers

- 14.3.69 As detailed in Chapter 13 (health), the Commission has concerns with the use of restraints as a standard practice when remandees leave the Centre for health appointments. This is discussed further in that section.

14.4 Segregation

- 14.4.1 The use of isolation or segregation in detention has been described as creating a 'prison within a prison',⁵⁹ which can exacerbate the negative effects of the detention environment for young people and undermine progress toward rehabilitation. While in some situations it may be necessary to separate a young person to reduce the risk of harm to that young person or others, there is significant evidence to suggest that segregation itself carries a risk of psychological damage, depending on the extent and duration of the isolation and the individual characteristics of the young person.⁶⁰ Young people who have a history of abuse or trauma are especially vulnerable in segregation, as this isolation can trigger responses to previous traumatic experiences.⁶¹ Young people may also associate segregation with rejection and abandonment, and it can reinforce social anxiety and institutionalisation.⁶² The Royal Commission on Aboriginal Deaths in Custody (RCADIC) warned of the particular risks of solitary confinement for Aboriginal and Torres Strait Islander people in increasing deaths in custody, and recommended that, as a general principle, Aboriginal and Torres Strait Islander detainees should not be confined alone in cells.
- 14.4.2 Although a number of staff participants have asserted that segregation can be used effectively to modify behaviour, evidence suggests that it has no therapeutic benefit, and research has found increases in withdrawal, hostility, aggression, rage and irresistible impulses among those held in disciplinary segregation. These findings have led researchers to conclude that 'there may be a level of restriction that, instead of solving administrative problems, becomes both a mental health issue and a further problem for the prison administration'.⁶³
- 14.4.3 Other studies have found links between staffing issues and increased use of segregation in the context of adolescents in mental health facilities, with higher rates of segregation linked to low morale, staff conflict or disruption, lack of support from or changes in administration. Links have also been made to staff perception of lack of safety and poor communication across disciplinary and team boundaries. When these issues were addressed, there were substantial decreases in the use of seclusion.⁶⁴ It is likely that at Bimberi the improvement of safety and working conditions for staff may also reduce the perceived need for extended periods of segregation as a tool for managing behaviour.
- 14.4.4 Because of the serious nature of segregation, it is critical that the circumstances in which segregation may be used, the manner in which it is implemented, and the mechanisms for review of decisions are clearly delineated and that safeguards are robust and strictly followed. As discussed below, the Commission has real concerns that many practices at Bimberi amount to segregation, but are not being recorded as such, and have not been subject to the safeguards under the CYP Act.

59 Independent Monitoring Board, *A Prison within a Prison' Summary of the conditions reported in Segregation Units in Prisons in England and Wales* (2009).

60 Victorian Quality Council & Chief Psychiatrist's Quality Assurance Committee, *Seclusion Practice: A Review of the Literature and an Examination of Current Concerns V* (2007); WT Garrison, 'Aggressive behaviour, seclusion and physical restraint in an inpatient child population', *Journal of the American Academy of Child and Adolescent Psychiatry* 23 (1984), 448-452

61 Ibid, 29.

62 Howard Bath, 'The physical restraint of children: Is it therapeutic?', *American Journal of Orthopsychiatry* 64 (1994), 40-49.

63 Holly Miller and Glenn Young, 'Prison Segregation: Administrative Detention Remedy or Mental Health Problem?', *Criminal Behaviour and Mental Health* 85 (1997)

64 Michelle A. Fryer, Michael Beech, Gerard J. A. Byrne, 'Seclusion use with children and adolescents: an Australian experience' (2004) *Australian and New Zealand Journal of Psychiatry*, 26-33.

Human rights standards

- 14.4.5 Rule 67 of the POJ provides that:
'All disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned.'
- 14.4.6 Segregation seriously limits rights protected under the HR Act including freedom of association,⁶⁵ freedom of movement,⁶⁶ the right to privacy,⁶⁷ right of children to special protection⁶⁸ and may breach the right not to be subject to torture or cruel, inhuman or degrading treatment.⁶⁹
- 14.4.7 International human rights standards prescribe that segregation should not be used as a punishment or disciplinary measure for young people. The 2005 Quamby HR Audit found that:
'the 'segregation' of juveniles involving a significant loss of association with others plus other loss of privileges is a prima facie breach of the prohibition on inhumane treatment under s.19(1) of the HR Act. In the absence of persistent disruption or threats or actual violence against other detainees or staff it will be difficult to justify the use of 'segregation.'
- 14.4.8 The segregation regime in the CYP Act reinforces this requirement, providing in s.209 that *'to remove any doubt, segregation under this division must not be used for punishment or disciplinary purposes.'* Nevertheless, the Act authorises segregation for other purposes, and it is necessary to ensure that the use of segregation can be justified as a proportionate limitation on human rights in these instances.

Definition of segregation

- 14.4.9 In practice, segregation can range from a few minutes alone in a cabin to weeks or months of separation in a unit without proper access to education or programs. The CYP Act has a broad definition:
*'Segregation of a young detainee means the restriction or denial of the young detainee's opportunity to go into, or be in, a particular part of a detention place or to associate with other young detainees. It may include separate confinement.'*⁷⁰
- 14.4.10 Solitary confinement of a young person in the padded 'safe room' at Bimberi clearly amounts to segregation. However, segregation also includes the restriction of young people to their cabin or unit, or their confinement to the holding cells in the Coree Unit. As discussed below, there is also a practice of using 'time out' to isolate a young person in their cabin for short periods for minor behavioural breaches, which also amounts to segregation.
- 14.4.11 In addition, young people may be locked down in their cabin during the day in response to emergency situations in the Centre, or due to staffing shortages. We note that all young people at Bimberi are routinely secured in their cabins alone each evening for 13 hours, from 7.30pm until they are released at around 8.30am the following morning. As discussed in Chapter 10 (individual needs) the Commission is not aware of any occasion on which the doors between adjoining rooms have been opened to allow Aboriginal and Torres Strait Islander young people to have ongoing contact during the evening. This routine isolation overnight is not considered by staff or management to be segregation, but technically appears to fall within the above definition.

Current practice

Legislation and policy

- 14.4.12 Division 6.6.3 of the CYP Act sets out a regime for segregation of young people in detention. The *Children and Young People (Segregation) Policy 2008* (Segregation Policy) outlines this regime, but does not add to it in substance.
- 14.4.13 The CYP Act authorises the following types of segregation, subject to strict criteria:
- Safe room segregation;
 - Segregation for safety or security;

65 HR Act s. 15

66 HR Act s. 13

67 HR Act s. 12 protects the right to privacy, family, home and correspondence, which is in similar terms to Article 8 of the European Convention on Human Rights. In *BP, R (on the application of) v Secretary of State for the Home Department*, the Court warned that 'there are clear dangers in placing young people in segregation units in relation to their rights enshrined in Article 8:'

68 HR Act s. 11

69 HR Act s. 19

70 CYP Act s. 204

- Protective segregation;
- Segregation for health reasons; and
- Segregation pursuant to an interstate segregation order.⁷¹

14.4.14 In each case, the Chief Executive must make a 'segregation direction' and issue a written notice setting out the direction, the reason for it, when it commences and expires and how it may be reviewed or revoked. The notice must be given to the young person, their parent or nominated person (if over 18 years of age) and the Public Advocate, as soon as practicable. A register of all segregation directions is required to be kept at the Centre, and must be available for inspection by the Commission and other oversight bodies.⁷² All segregation directions are required to be reviewed by the Chief Executive at specified intervals, and a young person subject to a segregation direction can seek external review of the direction by a Magistrate at any time.⁷³

Segregation register

14.4.15 In examining segregation practices at Bimberi, the Commission requested and was given access to the segregation register. However, the Commission notes that the 'register' containing segregation directions is a file folder created on 3 May 2010, and contains printed segregation directions dating back only as far as 9 June 2009, which, in some cases, are not in chronological order. It is not clear to the Commission whether any formal segregation directions were issued between Bimberi becoming operational in December 2008 and the first recorded direction in June 2009, as the Government Submission only reports figures from August 2009. As detailed below, the Commission has formed the view that there were a number of instances of segregation both before and after June 2009 that should have been the subject of segregation directions, and that have not been properly recorded.

14.4.16 The Commission notes that the reasons provided in notices of segregation directions often do not contain any detail of the factual situation leading up to the direction (which is usually contained in a separate incident report), but simply re-state the legislative criteria for making a direction. This practice limits the ability of oversight agencies to make an independent assessment of the justification for the direction. Some segregation direction notices do not clearly record the date or time of the commencement of segregation, and these details are only found in records of subsequent reviews of the directions. The Commission has made recommendations for the improvement of reporting and record keeping in Chapter 15 (management and oversight) In the case of segregation directions, it is critical that they are made and recorded in accordance with the CYP Act, to enable oversight bodies to properly monitor the use of these restrictive powers.

Safe room segregation

14.4.17 Solitary confinement in a 'safe room' or padded cell is the most extreme form of segregation authorised under the CYP Act. In a report on humane cell design prepared for the RCADIC it was noted that padded cells '*can act as a sensory deprivation chamber, and can markedly increase distress, reactance and experienced isolation.*'⁷⁴ As is appropriate for such a method of segregation, there are a high level of safeguards regarding the use of the safe room. The CYP Act allows for solitary confinement of a young person in a designated safe room only where the Chief Executive believes on reasonable grounds that this is necessary to prevent an imminent risk of self-harm. The Chief Executive must have tried or considered less restrictive ways to prevent this risk before making a safe room segregation direction, and must take into account the young person's age, sex, maturity, cultural identity, physical and mental health and any history of abuse.

14.4.18 Once the direction is made, the Chief Executive must revoke it as soon as there is no longer an imminent risk of self-harm, and must review the direction within two hours. When the direction is reviewed the Chief Executive must seek the advice of a health professional and have regard to that advice. Although there is no upper time limit specified on the use of the safe room, the directions must continue to be reviewed, and medical advice sought, every two hours. Where the self-harm crisis continues, as an alternative to making further safe room segregation directions, the Chief Executive may make a direction under s.109 that the young detainee be transferred to a health facility.

14.4.19 A safe room has been designated in the Coree Unit at Bimberi.⁷⁵ The safe room is a padded cell with no furniture, and has camera monitoring and provision for communication with staff and health professionals. The Government Submission reports, and the segregation register confirms, that the safe room has been used only once between August 2009 and February 2011, in a serious case where it appears that self-harming behaviour could not otherwise be contained. The Commission has no evidence to suggest that the safe room has been used on any other occasion.

⁷¹ See ss. 209-215.

⁷²

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⁷⁴ Commissioner Elliott Johnston, QC, *Royal Commission into Aboriginal Deaths in Custody* (1991), Volume 3, para 24.3.103

⁷⁵ Children and Young People (Designation of Safe Rooms) Declaration 2008 (No 1)

Other segregation directions

- 14.4.20 While safe room segregation is tightly controlled, the criteria and safeguards for other segregation directions under the CYP Act are less robust, and segregation is only required to be reviewed after intervals of weeks rather than hours. Young people may be held in segregation under these segregation directions for up to 90 days, and successive orders may be made.⁷⁶

Segregation for health reasons

- 14.4.21 A segregation direction may be made for health reasons where the Chief Executive believes on reasonable grounds that it is necessary or prudent to assess the young detainee's physical or mental health, to protect anyone (including the young detainee) from harm because of the young detainee's physical or mental health, or to prevent the spread of disease. The Chief Executive is required to have regard to the advice of the young person's treating doctor in deciding whether to make such a direction, and in subsequent reviews of the direction. According to the Government Submission, and the segregation register, there was only one segregation direction for health reasons (to prevent transmission of an infectious illness) in the period between August 2009 and February 2011.

Protective custody segregation

- 14.4.22 A segregation direction may be made for protective custody where the Chief Executive believes on reasonable grounds that the segregation is necessary or prudent to protect the young detainee's safety. There have been no reported segregation directions made for protection reasons at Bimberi.

Segregation for safety or security

- 14.4.23 A segregation direction may be made for safety or security where the Chief Executive believes on reasonable grounds that the segregation is necessary or prudent to ensure the safety of anyone else at Bimberi, or security or good order at the Centre. When making a direction under this section the Chief Executive must have regard to any relevant cultural consideration and the likely impact of segregation on the health or wellbeing of the young person. There have been seven reported segregation directions for safety or security reasons between August 2009 and February 2011. Generally, these segregation directions have been made following a serious incident at Bimberi.

Review and extension of segregation directions

- 14.4.24 Where a segregation direction is made for safety and good order, or for protective custody or health reasons a review must be conducted within seven days, and then again within the next seven days. After that, the direction must be reviewed each fortnight. A segregation direction expires after 28 days, but successive further segregation directions may be made which last for 90 days.
- 14.4.25 In the case of segregation on health grounds, the Chief Executive must have regard to the advice of a health professional in reviewing the direction. However, for segregation for protective custody, or of safety and security, there is no requirement to involve a health professional in the decision-making process regarding the order or its review.
- 14.4.26 In practice, the review documentation in the segregation register suggests that a review involves the management team making what appear to be fairly subjective judgements about the progress or attitude of a young person while in segregation. In one case the review form noted a high level of initial progress and compliance by a young person, but that this had deteriorated by the end of seven days, and so it was decided to continue the segregation until behaviour improved. From these records it appears that there has been no involvement of mental health professionals regarding the effect of continued segregation on mental health.
- 14.4.27 The Review Team spoke to a number of young people who had been subject to segregation directions, and a key concern raised was the uncertainty of the duration of the segregation, and the lack of transparency in the process of reviewing the directions, which led to frustration. One young person noted that they were *'disillusioned with the review process, they don't follow through on what they say will happen'*. Another review form reported that a young person was *'fixated on the segregation direction being a punishment for a breach of behaviour and not a way of managing the risk he posed to others'*.
- 14.4.28 Research suggests that uncertainty as to the duration of segregation 'promotes a sense of helplessness' and is a critical factor leading detainees to react to segregation with hostility and aggression. Shalev concludes that *'knowing how long the experience is to last is therefore a clear mitigating factor available to those responsible for placing a prisoner in segregation.'*⁷⁷

⁷⁶ CYP Act s.218

⁷⁷ Sharon Shalev, *A Sourcebook on Solitary Confinement* (2008), Mannheim Centre for Criminology.

- 14.4.29 The Commission considers that the review process for safety or security segregation directions is insufficiently transparent and rigorous. Reviews should seek to objectively assess the continuing risk posed by the young person, acknowledging that Bimberi has a responsibility to help the young person return to the general population as soon as possible, rather than rewarding or punishing attitudinal change. It needs to be understood that segregation by itself is not a useful tool for rehabilitating young people, and is more likely to engender further hostility and anti-social behaviour, particularly if it is seen as open-ended. Mental health professionals should be involved in each review to assess the effects of ongoing segregation on a young person's mental health.

Recommendation 14.13: The Community Services Directorate develop a procedure setting out a structured and transparent process for the review of segregation directions, focusing on objective risk rather than attitude while in segregation. Mental health professionals should be involved in each review to assess the effects of ongoing segregation on young people.

Continuing segregation conditions after orders have been revoked

- 14.4.30 A concerning anomaly that came to light in reviewing the segregation register is that the period of segregation recorded in the segregation register is in several cases less than the periods of time in which those young people have been subjected to some form of segregation. In early instances this is based on the accounts of young people and other participants, and is difficult to verify. However, the Commission observed first-hand the inconsistency in relation to two segregation directions made in 2011. The segregation register records that segregation directions were made in respect of two young people, that these were reviewed once and revoked at the end of a two week period. However, the Review Team had ongoing contact with those young people during the period of the Review, and observed that both remained in the Coree Unit and did not eat with or interact with other young people or attend education or programs (as discussed below) for at least four weeks, and that one young person remained on these restrictions for over eight weeks.
- 14.4.31 This alleged under-reporting of periods of segregation is of great concern because it presents a misleading picture to the Public Advocate and other oversight bodies who review the register, and removes one of the accountability mechanisms for segregation.
- 14.4.32 From the Commission's observations, there was a practice at Bimberi to segregate young people in their units where necessary. However, in recent times, the Coree Unit has taken on the function of a behaviour management unit where young people are segregated, but is also being used as a residential unit for young people seen to be of higher risk. While placement is an issue for management to determine, it creates confusion when a young person is segregated in Coree for the period of the segregation direction, but remains there as a placement decision after the segregation direction is revoked. In these cases the Commission considers that the segregation continues (and must be properly authorised and recorded in accordance with the CYP Act) as long as the young person is restricted in accessing other areas of the Centre and attending education and programs with other young people.

Recommendation 14.14: The Community Services Directorate cease segregating a young person after a segregation direction is revoked. The segregation register must accurately reflect the full duration of any segregation restrictions imposed on young people at Bimberi.

External review

- 14.4.33 Where a segregation direction is made in relation to a young person, the young person can apply to a Magistrate (appointed under s.309 as an external reviewer), for a review of the direction. The Magistrate may reject or hear the application, and may confirm, vary or revoke the direction. The provision for external review is an important safeguard against arbitrary decision making. Nevertheless, in practice a young person in segregation is unlikely to challenge a direction without proactive support and legal assistance. As discussed below at Part 14.13, apart from representation in ongoing criminal matters, legal assistance for young people in Bimberi is very limited, and there is no regular visiting service to assist young people with human rights issues arising in detention. We are not aware of any applications for external review of segregation directions at Bimberi. Recommendations regarding legal services are made at Part 14.13 below.

Conditions of segregation: Access to Education

- 14.4.34 The CYP Act does not regulate the conditions of segregation, apart from requiring that the minimum living conditions

set out in s.141 are maintained, albeit applied as necessary and reasonable for the purpose of the segregation.⁷⁸ The Commission has grave concerns about the lack of education and programs provided to young people while on segregation.

14.4.35 The Government Submission states that:

'In managing young people who are subject to a segregation direction, staff ensure that minimum living conditions are not affected, in particular food, telephone, mail, visitation, clothing, health and hygiene, education and programming and access to cultural and spiritual observance. In addition, every attempt is made to ensure the child or young person continues to have access to as many opportunities within the centre as possible.'

14.4.36 To the extent that the Government Submission suggests that young people subject to a segregation order do attend education or programs, or receive appropriate education while in segregation, this is quite simply untrue. The Review Team spoke to young people who had been segregated this year, who had not attended education for several weeks. One young person stated that: *'There's no education in Coree, it's not fair. Nothing to do, didn't get even a magazine to read until after a week, couldn't go to school just had work brought in after a while.'*

14.4.37 Teachers reported that they had never met these young people. After some weeks teachers were asked to provide some written school work, but could only provide generic materials, having no sense of the young people's literacy or background. As discussed in Chapter 12 (education), on average young people at Bimberi have low levels of literacy and face a range of obstacles in engaging with education. They require significant support with education and being given a bundle of written work is not an adequate substitute for face-to-face teaching.

14.4.38 The Commission considers that the lack of education and other programs exacerbates the dangers of segregation for young people and is likely to slow their progress towards reintegration. As Shalev notes in relation to adult prisoners:

*'Research also strongly suggests that access to programmes in prison positively affects behaviour, whereas the lack of things to do may result in increased violent behaviour. ... programme provision is crucial for prisoners who are isolated for longer periods of time, as they enjoy little or no social contact, experience substantially reduced sensory stimulation, and have very few means to occupy themselves inside their solitary cells.'*⁷⁹

14.4.39 As one young person told us:

'Back in the day [at Quamby] if you lost privileges you still got to go to education and to get out, you just didn't have tv and stuff, now you just stay in your cell. Imagine a month without telly staying in your cell, you just go crazy in that little box.'

14.4.40 Another explained:

'It's like if there is a young boy who hasn't had many visits or phone calls, then gets locked down a lot and doesn't get any exercise, he might just snap and hit a worker, then he is just punished more and led around in chains, it just leads to a cycle of him sitting there in his cell by himself thinking 'fuck this' 'fuck this'. He's going to think the system is just there to hurt him more not to help him.'

14.4.41 The *Education Act 2004* provides that the parents of young people under 17 years of age must ensure that they attend school on every day, and during the times on every day, when the school is open for attendance; and attend every activity of the school (including attendance at an approved educational course) that the school requires the young person to attend. In the Commission's view, CSD, having day-to-day parental responsibilities for the young people in its care, must ensure that young people at Bimberi are able to attend school and programs, even while in segregation. This may require negotiation with the Murrumbidgee Education and Training Centre (METC) and Department of Education (DET) to provide individualised teaching for young people who cannot attend with other students, and must ensure the safety of teachers and other staff. This is discussed further at Chapter 10 (education).

Time Out

14.4.42 Although there is no specific authorisation for the practice of 'time out' in the CYP Act or policies, young people at Bimberi are regularly secured in their cabin for time out for minor behavioural breaches. The Minister reported that:

*'It is my understanding that young residents there sometimes used lockdown, are put in isolation in their rooms as a matter of risk management. There are sometimes operational prompts to do that. It is for poor management and non-compliance... On occasions individual young detainees are separated and confined to their cabins for short periods due to behaviour issues including conflict with other young detainees.'*⁸⁰

78 CYP Act, s. 206.

79 Ibid.

80 ACT, *Parliamentary Debates*, Legislative Assembly, 30 March 2011, 1059 (Joy Burch MLA)

- 14.4.43 It is clear that segregation directions are not being issued for time out, and that no records are being kept of its use. It appears that time out is used both for risk management and for disciplinary reasons. The Commission understands that time out may be a useful tool for behaviour management, and to separate young people after a violent incident or verbal conflict. It would not be appropriate or practicable for a formal written notice to be given on these occasions. The short periods for which time out is used, and the fact that a young person is secured in their own cabin significantly reduces the risk of psychological harm to young people, so it is not comparable to longer periods of segregation, or the use of a padded cell.
- 14.4.44 However, we are concerned that this practice sits outside the CYP Act regime for behaviour management and segregation, and is not specifically authorised, monitored or regulated. It appears from the incident reports that directing a young person to go to time out is often the beginning of an escalating conflict that ends in the use of force against that young person to compel their segregation. This may be justified to ensure safety of other young people or staff, but is unnecessary as a penalty for a minor infraction that could be better dealt with through warnings or loss of incentive points.

Recommendation 14.15: The ACT Government amend the *Children and Young People Act 2008* to authorise the use of 'time out' in a controlled way, where de-escalation techniques and voluntary time out are used first where possible, and the period of time out is strictly limited. A policy and procedure for the use of time out should also be developed as soon as possible.

Use of Segregation where a young person refuses education

- 14.4.45 Another informal segregation practice used at Bimberi is segregation in the Coree Unit for young people who refuse to attend a class or misbehave and have to be removed from class. The Commission has been informed by many participants that in such cases a young person is taken to Coree and placed in a bare holding cell, sometimes without a mattress on the bed, to sit until the end of the school day. Although a young person might wish to go back to school to attend other classes, this is not permitted. The rationale of this practice is to seek to ensure that young people attend all classes during the day, rather than refusing or misbehaving in classes they find difficult or challenging, and 'picking and choosing' those they enjoy.
- 14.4.46 Again, while the Commission is sympathetic to the motivation behind this practice, this is clearly a use of segregation, and does not comply with the CYP Act requirements unless a segregation direction is issued. It is distinguishable from the practice of time out, as in this case segregation is being used to punish a young person and serve as a deterrent, rather than to manage any risk. Further, the time period is longer and the environment more sterile and punitive, which increases the risk of harm for vulnerable young people. In the Commission's view, the desire of young people to pick and choose their classes indicates a need to more effectively structure the education curriculum to build in incentives for participation and to enrich the teaching environment so that young people are more engaged in and motivated by class. This may also require more one-on-one tutoring in challenging areas such as literacy. These issues are discussed further in Chapter 10 (education).

Recommendation 14.16: The Community Services Directorate cease the practice of segregating young people all day in Coree for school refusal as it is not authorised by the *Children and Young People Act 2008*.

'Operational' lockdowns and securing young people overnight

- 14.4.47 As discussed in Chapter 5 (staffing) the doubling in numbers of young people at Bimberi over 2010, in conjunction with an inadequate staffing model and staffing budget, led to significant shortages of staff available to supervise young people. The Government Submission reports that in response to staffing shortages management resorted to '*utilisation of a limited number of operational 'lockdowns' as a last resort to facilitate safe management of the centre. All occasions of lockdown aim to minimise the number of young people involved and the shortest period of time.*'
- 14.4.48 Although management did not regard such operational lockdowns as segregation, the isolation of young people in their cabins for periods of hours during the day falls within the definition of segregation in the CYP Act as a '*restriction or denial of the young detainee's opportunity to go into, or be in, a particular part of a detention place or to associate with other young detainees.*'
- 14.4.49 It appears that during periods of staff shortages such lockdowns may well have been unavoidable to ensure the good order and safety of staff and young people at Bimberi. In the Commission's view, lockdowns should be recorded as instances of segregation in the segregation register to ensure transparency and accountability for the use of operational lockdowns.

The CYP Act and Segregation Policy should be amended to provide criteria and record keeping obligations for the use of operational lockdowns.

Recommendation 14.17: The ACT Government amend the *Children and Young People Act 2008* and *Children and Young People (Segregation) Policy 2008* to provide criteria for the use of operational lockdowns, and to require that details of the duration of and reason for operational lockdowns be recorded in the segregation register.

14.4.50 Securing young people in their cabins each evening also amounts to a technical segregation under the CYP Act, even though this is part of the daily routine for all young people at Bimberi. A number of young people expressed frustration at being secured at 7.30pm each evening, and having to occupy themselves in their cabins for 13 hours until they are released at 8.30am the following morning. This curfew is imposed to allow staff on 12-hour shifts to change shifts at 8pm. One interview participant commented that young people were not secured so early at Quamby, noting that *'under the 8 hour shift you had more flexibility, the unit manager didn't leave until 10 so you could let them stay up and watch State of Origin as a treat.'* The Commission considers that the period for which young people are isolated in their cabins each evening is excessive, particularly if conjoining cabins are not being used (with conjoining doors opened) for Aboriginal and Torres Strait Islander young people (see below for further discussion of this issue). This issue should be reviewed as part of the review of youth worker shifts recommended in Chapter 5 (staffing).

Recommendation 14.18: The Community Services Directorate consider the duration of the period that young people are isolated in their cabin over the evening as a relevant factor in the review of youth worker shifts already recommended.

14.5 Searching

14.5.1 Tensions between young people's right to privacy and a detention centre's desire for security and safety are at the highest in relation to searches. Generally, detention centres will seek to search both the individual and their room and belongings for contraband such as drugs and weapons. The motivations for such actions are sound. Management has a duty of care to keep its staff safe and protect young people from hurting themselves or others. Management must also protect the human rights of staff, most particularly their right to life.⁸¹ Human rights standards apply to all searches, and there are specific rules around the most invasive, such as strip and body cavity searches.

Human rights standards

14.5.2 Article 16 of CROC states that no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation. The European Committee for the Prevention of Torture's Standards further state that:

*'...persons deprived of their liberty should only be searched by staff of the same gender and that any search which requires an inmate to undress should be conducted out of the sight of custodial staff of the opposite gender.'*⁸²

14.5.3 Searching, particularly strip searching, potentially engages the following principles of the HR Act:

- Prohibition against inhuman or degrading treatment;⁸³ and
- Humane treatment while in detention; and⁸⁴
- Privacy.⁸⁵

81 S. 8 of the HR Act

82 CTP Standards, Para 23.

83 S.10(1)(b)

84 S.19

85 S.12

- 14.5.4 Generally, treatment is degrading when it arouses feelings of fear, anguish or inferiority or is debasing, regardless of the intention of the policy or the conduct of the individual officer.⁸⁶ It must attain a minimum level of severity before a breach arises, but the assessment of this minimum is relative and depends on all the circumstances of the case, including the sex, age and state of physical and mental health of the person.
- 14.5.5 Courts have held that strip searching by government officials of adults will not *per se* be a violation of the right to privacy and the prohibition on inhuman or degrading treatment.⁸⁷ However, the conduct of the search can become a violation if, for example, a person is not given the opportunity to remove his or own clothing or the search was carried out in a manner that may have jeopardised a person's health and safety.⁸⁸
- 14.5.6 Similarly, the courts have held that a detention facility is a unique place fraught with serious security dangers and, balancing the significant and legitimate security interests of the institution against the private interests of the inmates, the practice of conducting strip searches of inmates upon reasonable suspicion does not *per se* constitute an unreasonable search.⁸⁹ However, to subject an adult to routine strip searches for general security purposes, has been held to be a violation of the prohibition on inhuman or degrading treatment.⁹⁰ Obviously, such action against young people is even more likely to be a violation of this right.
- 14.5.7 The US Supreme Court recently ruled that the strip searching of a 13-year-old girl by a male vice-principal and a female nurse was a breach of her Constitutional rights, because '*the content of the suspicion failed to match the degree of intrusion*'.⁹¹
- 14.5.8 In relation to room searches, case law establishes that generally detainees should be present during cell searches in low- to medium-security facilities, but may be absent in high security facilities.⁹² In the latter case, cell searches may be conducted in detainees' absence due to intimidation of staff by the detainees, and in the interest of preventing detainees from becoming knowledgeable about general and individual search techniques.⁹³ On this basis, we would submit that young people should be present for searches in Bimberi.
- 14.5.9 The 2005 Quamby HR Audit noted that generally a strip search would automatically follow from a room search, if contraband was found. The 2005 Quamby HR Audit recommended that there should be a clear policy regarding the searching of detainees' cells. If contraband is found, it should be a matter of a structured discretion whether detainees, being either the detainee in whose cell contraband was found, or any other detainee, are strip searched. This should be on the basis of the type of contraband found and reasonable suspicion that the detainee or other detainee(s) may have contraband on their person. Only female staff should search female detainees' cells.

Best practice for achieving standards

- 14.5.10 The Carlile Report considered the practice of searching young people, particularly strip searching. It recommended that strip searching not be used for good order and safety. The Carlile report was particularly concerned about the background to the young people who are held in detention.
- 'The Inquiry was also cognizant [sic] of the sensitive issues surrounding adults in positions of authority compelling a child to remove his or her clothes so as to render them wholly or partially naked. Many of the children sent to penal institutions have been sexually abused, often by adults, in their past.'*
- 14.5.11 The report cited a best practice process including:
- A young person being taken to a private area;
 - A staff member explaining what was going to happen, with no time limit to this;
 - There being a shower room attached to the area, and when the young person is ready, their being invited to go into the shower area and take off their outer clothes, leaving their underwear on and a robe was available to wear;
 - Young people being given a pat down search by a staff member of the same gender and a wand search for metal; and
 - Their clothes being searched.
- 14.5.12 The report went on to note that a manager told the inquiry that if a child refused to be searched, the staff would just sit it out until the child consented. The longest time he could remember was nine hours. No child was ever coerced.

86 European Court of Human Rights in *Ireland v UK* (1978) 2 EHRR 25 para 162; *Soering v UK* (1989) 11 EHRR 439 para 100.

87 See for example Canadian case of *R. v. Kitaiichik* 2002 CarswellOnt 1994 at para 31.

88 Canadian case of *R. v. Golden* [2001] 3 SCR 679, 2000 SCC 83.

89 *Maltby et al. v. A.G. Saskatchewan et al.* (1982), 2 C.C.C. (3d) 153 (Sask. Q.B.); appeal dismissed (1984), 10 D.L.R. (4th) 745 (Sask. C.A.).

90 *Van der Ven v the Netherlands* (2004) 38 EHRR 46 & *Lorse v the Netherlands* (2004) 37 EHRR 3.

91 *Safford Unified School District v. Redding*, 129 S.Ct. 2633 at 2639

92 See *R(Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, at 541-2 and 544-5.

93 *Ibid.*, at 542.

- 14.5.13 The Carlile Report found no evidence that those institutions that utilised the above method had greater problems with security or contraband than those establishments that relied on strip searches.
- 14.5.14 The 2005 Quamby HR Audit recommended that strip searches should only be conducted when there is reasonable suspicion that the detainee may have in their possession a thing that may cause serious damage or threaten the detainee or another person's life. The Audit also recommended that there should be an explicit requirement to take into account the characteristics of the individual concerned to prevent violations of the physical and mental integrity of the person.

Current practice

Searches of the person

- 14.5.15 Changes to the CYP Act and policies reflect the recommendations of the 2005 Quamby HR Audit. Section 252 of the Act contemplates a scanning search, frisk search or ordinary search of a young detainee occurring only if the search is prudent to ensure security or good order at a detention place, or if a youth detention officer suspects on reasonable grounds that the young detainee is carrying a prohibited thing or a weapon.
- 14.5.16 The Children and Young People (Search and Seizure) Policy and Procedures 2008 (the Search Policy) defines the searches in the following way:
- **Body search** is a search conducted by a non-treating doctor of a young detainee's body, including an examination of an orifice or cavity of the young detainee's body;
 - **Frisk search** is a search of a young detainee or other person conducted by quickly running the hands over the young detainee or other person's outer clothing and an examination of anything worn or carried by the young detainee;
 - **Ordinary search** is a search of a young detainee or other person, or of anything in the young detainee or other person's possession, and may include requiring a young detainee or person to remove only the young detainee's overcoat, coat, jacket or a similar article of clothing and any footwear, gloves or headwear, and an examination of anything removed. It also includes asking a young detainee or other person to empty their pockets;
 - **Scanning search** is a search of a young detainee or other person by electronic or other means that does not require the young detainee or other person to remove clothing or be touched by someone else; and
 - **Strip search** is a search of a young detainee, or of anything in the young detainee's possession, and includes requiring the young detainee to remove part or all of the young detainee's clothing (but only either those covering the young detainee's upper or lower half of the body at any given time) and a visual inspection of the young detainee's body and clothing. A strip search does not include examination of the young detainee's body orifices or cavities, with the exception of visual inspection of ears, nose and mouth, which does not involve touching the young detainee.
- 14.5.17 Consistent with the recommendations of the 2005 Quamby HR Audit, s. 248 of the CYP Act states that searches are to be the least intrusive possible. Sections 253 and 261 of the Act require that frisk searches be conducted by a staff member of the same gender. However, a member of a different gender may be present if:
- There is an imminent and serious threat to the personal safety of the young detainee or someone else; and
 - Compliance with the need to have a same sex person present would exacerbate the threat.
- 14.5.18 Sections 261 and 262 further require that strip searches must be conducted in a way that:
- Provides reasonable privacy for the young detainee;
 - Is appropriate, having regard to the young detainee's sexuality and any known impairment, condition or history;
 - Is conducted as quickly as practicable;
 - Is conducted in a private area or an area that provides reasonable privacy for the young detainee;
 - Minimises touching or visual inspection of sensitive areas such as genitals;
 - Is in the presence of someone of the opposite sex to the young detainee, other than;
 - a person with daily care responsibility or a support person; or
 - another youth detention officer present under the general exception concerning imminent and serious threat to personal safety.
- 14.5.19 The Search Policy further requires that a strip search has to be conducted by a minimum of two youth detention officers: the searching officer, who conducts the search, and the observing officer, who observes the searching officer (and not the young person). The searching officer, observing officer and any other youth detention officer who is present for the search must be the same sex as the young person unless the decision-maker for the search reasonably believes that there is an imminent and serious threat to the personal safety of the young detainee and compliance with this requirement would

increase this threat. If a strip search is deemed necessary but is not possible, for example if the young detainee is violent, delaying or ceasing a strip search may be considered. If this occurs, the young detainee must be placed in a sterile location and be appropriately observed, with their contact and movement restricted.

- 14.5.20 Section 251 of the CYP Act requires that if a strip search or body search is to be conducted on a young person, then as far as practicable a person who has daily care responsibility or long-term care responsibility for the young detainee (other than the Chief Executive) must be told about the search:
- Before the search is conducted; or
 - If it is impracticable to tell the person before the search—as soon as practicable after the search.
- 14.5.21 If Bimberi management do believe that a support person is needed, and one cannot be located, or the young person does not consent to their presence, s.255 requires that the strip search be conducted in the presence of another support person, provided the young person agrees they should be present at the search.
- 14.5.22 The Search and Admissions Policies both contemplate a strip search occurring at Admission if there are reasonable grounds, having regard to the young detainee's age, maturity, developmental capacity and known history. The Search Policy further requires that a strip search of a young detainee may occur if:
- The decision-maker reasonably suspects that the young detainee has something concealed on them that is a prohibited thing or may be used by the young detainee in a way that may involve an offence, a behaviour breach, a risk to the safety of a person or a risk to security or good order at a detention place; and
 - A scanning, frisk or ordinary search of the young detainee has been undertaken and has failed to detect the item suspected to be concealed.
- 14.5.23 Section 255 only allows body searches to be undertaken by a doctor in certain, rare situations.

Promising Practice: Analysis of the number of strip searches conducted between Quamby and Bimberi highlights a considerable reduction in the utilisation of the practice of strip searches. During the last six months of operation at Quamby, 858 strip searches were conducted. In the first six months of operation at Bimberi, only 95 strip searches were conducted, an 89% reduction. While the population has increased, strip searching has not returned to the levels seen at Quamby.

Room searches

- 14.5.24 Section 275 of the CYP Act allows management to search any part of a detention place including with the assistance of an electronic device or a search dog. However, under s.277, if it is likely a young person's room has privileged material, then unless urgent circumstances exist regarding a risk of injury, the cell may only be searched in their presence. Privileged material is defined in the Search Policy as information to which client legal privilege attaches, such as confidential information provided by a young detainee to their legal representative, or by a young detainee's legal representative to a young detainee, or between two or more legal representatives.
- 14.5.25 Section 276 provides that if it is known a room does have privileged material, a room search may only take place in the absence of the young person if the young detainee removes the privileged material from the cell; or the privileged material is securely stored.
- 14.5.26 While certain items may be seized during a search, under s.280(5), protected material must be returned to the young person immediately. This includes mail from, or to, a lawyer, Official Visitor or the Commission. Further, a written notice must be given to the person about the items seized, within seven days.

Views of young people

- 14.5.27 Nearly all young people surveyed by the Commission reported having been frisk-searched and strip searched while at Bimberi (n=18). Most young people reported frisk-searches as happening 'often', and strip searches happening 'sometimes'. No young people reported receiving a body cavity search, or being searched using a sniffer dog. Seventy percent of young people reported that staff of the opposite sex were never present (n=13) during a strip-search, with four of the remaining young people reporting that staff of the opposite sex were rarely present. All young people reported being searched when they first arrived at the Centre, with 70% reporting that they were searched with their clothes on.
- 14.5.28 Just under 50% of the young people who answered the question reported that they were present when their room was searched, and two young people reported that legal documents had been removed from their room during a search and were not returned.
- 14.5.29 While the Commission is unable to verify the above claims the data does raise issues for further consideration.

Views of staff

- 14.5.30 In the Commission's survey of current and former staff, ten of all 18 respondents reported that they thought that searching, including strip searching, was *'generally used reasonably at Bimberi'*. Five respondents reported that they thought that strip searches were used *'about the right amount'*, and three reported that they thought that strip searches *'should be used more'*.
- 14.5.31 Most respondents reported that they don't like doing strip searches, but that *'they are necessary due to the amount of contraband'*.
- 14.5.32 One respondent reported:
'People like to hide anything they can on / in their body or in / within their clothing. Searching is a MUST it is there for the workers safety as well as other residents.'
- 14.5.33 One other respondent reported:
'I wonder what is more important - finding a missing pen (often taken for fun by new remand students for a bit of fun and kudos in a boring place) - or the pride and dignity of vulnerable teenagers. Lets think about these incidents strategically and make balanced decisions depending on circumstance and risk - students who have been subjected to sexual assault or other violence may find a strip search incredibly demeaning and do more damage than a little graffiti - why are we here - to keep the walls pristine?'

Challenges

- 14.5.34 We welcome the ACT Government's response to the 2005 Quamby HR Audit recommendations on searching, and in particular the new CYP Act and accompanying policies, which seek to ensure strip searching is only conducted in reasonable circumstances. There has also clearly been a reduction in strip searching when compared to Quamby. Nonetheless, we have identified practice issues during our Review.

Personal searches

- 14.5.35 During this Review, the Commission identified a number of systematic issues in the practice of strip searching. Members of the Review Team audited the search register for four months of each of 2010 and 2011. There were a total of 136 entries for these eight months. We identified several issues:
- There was information in the Register, confirmed verbally by staff, that young people were routinely strip searched on their way to, and from, court. Rarely was anything found. The Commission heard that the vehicles used for transfers were not routinely searched for contraband.
 - We also saw breaches of the Search Policy, most particularly regarding the presence of a member of the opposite sex. Due to staff shortages, either a member of the opposite sex observed the strip search, or the CCTV camera was relied upon. A member of the opposite sex was present in 43% of the entries audited by the Commission, with this number rising to 46% where the gender of the control room officer was unknown.
 - In 15% of audited records, it does not appear the staff involved considered whether a support person should be present, or sought the young person's consent to a support person being present. This part of the form was blank. When those that at least identified that the support was not called, but nonetheless offered no explanation for this, are included the number rises to 59% of audited records.
 - In only 1% of the strip searches audited was any contraband registered as being found. These items were tobacco residue, pens, playing cards and a hair band. All were found in clothing.
 - The same young person was strip searched on five occasions over the period of two weeks. On a number of occasions staff identified that a support person is needed, but none is called or an alternative sought. No contraband was found. This is concerning given the impact strip searching can have on young people, particularly those with a history of trauma and sexual abuse.
 - Some practice raises questions as to whether youth workers have formed reasonable suspicion to strip search, and whether the specific characteristics of young people are being considered prior to forming such suspicion. For example, strip searches often followed automatically from room searches, and in such cases all young people in the wing or unit are strip searched. In June 2010, nine young people were strip searched one after another on the basis of 'suspicion of contraband'.
 - On one occasion, five workers were present in a room during a strip search.
 - Several forms audited by the Commission were undated.
 - Senior staff in the Community Services Directorate see copies of all incident reports and, in doing so, can provide comment to Bimberi management. We support this accountability measure. On four occasions, the Commission saw incident reports to which a CSD senior manager responded by directing Bimberi staff to search more. We can

understand why the senior manager may have had concerns about contraband, but are concerned that such a direction would be given prior to consultation with Bimberi management, particularly as this may be interpreted as lowering the threshold before searches are undertaken. We would prefer to see such items being flagged for discussion between senior Directorate and Bimberi staff.

- Auditing of reports is at times difficult, particularly as the search register forms provide very little details of the reasons for searches. Most of the reports say 'suspicion of contraband' or similar, which gives no description of the reason for the suspicion. In some cases, the Commission was able to find more information in the incident forms relating to the search, but they are not stored together, and so could not easily be compared. Further, the inspection rights for the Public Advocate and Commission do not extend to incident reports, so external scrutiny is hampered.

- 14.5.36 In addition, the nature of the forms made recording searches difficult for staff. Different forms appear to have been used over time, with some placing the tick boxes for the different searches in different places. Some sought to combine 'use of force' and search on the same form, further complicating our audit. On some occasions, the 'body search' box is ticked because the form didn't provide for a strip search box. In reading the remainder of the entry it was clear that a strip search occurred, and Bimberi management confirmed there has never been a body search. Confusion over forms also resulted in registers being incorrectly filed, for example search entries being filed in the use of force register.
- 14.5.37 Finally, we are also concerned by reports that young people are being told they cannot have a contact visit with family or friends unless they first submit to a strip search. It was unclear what risk assessment or reasonable suspicion is being considered before that choice is put to a young person.

Recommendation 14.19: The Community Services Directorate direct staff to:

- Cease conducting strip searching as a matter of routine including when young people go to court
- Record further details about the evidence that lead to the reasonable suspicion for strip searching
- Cease relying on members of the opposite sex to the young person, or CCTV observations, to conduct strip searches
- Give proper consideration to whether a support person should be present or notified prior to a strip search.

Recommendation 14.20: The ACT Government remove 'good order' as a rationale for strip searching under the *Children and Young People Act 2008*.

Is strip searching necessary?

- 14.5.38 The Carlile Report noted that the outcomes of strip searching in the UK '*tended to be tobacco rather than weapons or drugs*'.⁹⁴ For the eight months of strip searching data we considered, our observations would be the same. While at times items might be found during room searches, the most serious we observed being cannabis, the vast majority of strip searches identified no contraband items at all. Even when they did, these tended to be only playing cards or pens.
- 14.5.39 All young people are vulnerable and are entitled to special protection because of their age. The group of young people at Bimberi are particularly so, given their likely backgrounds and experience of a closed environment. Strip searching such young people is a highly invasive measure and one that is likely to make some relive traumatic experiences. As one former resident suggested:
- 'Kids go in at 14 for the first time and are told they have to be strip searched on admission. There should be questions asked about it. We don't allow kids to have sex at 14 but we allow them to be strip searched by adults. They lose their dignity and then they think that if it is ok for people in authority to do that to them, to make them strip, then they aren't worth anything, and they might as well use their sexuality.'*
- 14.5.40 Commission staff heard worrying reports about the impact of strip searching. One participant defended the practice by suggesting that some young people '*get used to it, like going to the doctor*'. In one register entry, after being asked to undertake a strip search, a young person removed all her clothes at once and said 'you love looking at my body, don't ya'. The workers asked her to put her clothes back on and remove them one half at a time.
- 14.5.41 These observations lead us to question if the current strip searching practice should continue in its current form. The Search Policy broadly accords with the best practice elements set out in the Carlile Report: a young person is taken to a private area, a staff member must explain what is going to happen and the young person is invited, when ready, to remove their clothes.

94 Carlile, above n15, 58.

A fundamental difference is that under the Carlile model, the staff member undertakes a frisk search while the young person wears a robe. That is followed by a metal wand check and their clothes are then searched.

- 14.5.42 We question what a 'strip search' would achieve additional to the Carlile Report's endorsed method. The audit undertaken by the Commission found that contraband was only identified in 1% of searches, and in both cases, this was found in the young person's clothes. It does not appear that any legislative reform would be needed to adopt this method, as the CYP Act already provides that an electronic device may be used to assist in a search.

Recommendation 14.21: The Community Services Directorate consider whether the best practice search method described in the Carlile Report be adopted rather than the current strip searching method at Bimberi.

- 14.5.43 Further, issues were raised with the Commission regarding alleged coercion. One young person in particular reported to the Commission that when they requested a support person be present, they were told they would have to wait in one of the Coree cells, which had no television or mattress, until the person arrived. This is not consistent with the Search Policy. Such action may be appropriate when a young person is too upset or violent for a search, but not in circumstances where they have requested a support person.

Recommendation 14.22: The Community Services Directorate require staff to wait with a young person while a support person is called for a strip search.

Unit searches

- 14.5.44 A number of issues were raised by young people in relation to room searches. Some suggested they were done routinely, often with no suspicion. Towards the end of the Review, participants also reported to the Commission that room searches were becoming more common. In particular, it was reported that there had been two room searches in a week with nothing found. It was reported that these searches resulted in lengthy lockdowns, with young people not receiving breakfast until 11am to midday.
- 14.5.45 One young person reported to the Commission that after they returned from a period of segregation in the Coree Unit to their residential unit, they discovered that some personal items including medical cream and correspondence from a lawyer were no longer in their room. Other young people in his unit reported to the young person that staff had come in when they weren't there and had removed items. The young person reported this, and these items were eventually returned, but almost a week later. This appeared to be a clear breach of the Search Policy.

Recommendation 14.23: The Community Services Directorate remind Bimberi management and staff of the obligations of the *Children and Young People (Search and Seizure) Policy and Procedures 2008*, that a young person must be present during a room search if privileged material is likely to be present, and any privileged material found must be immediately returned to the young person. Items seized should be documented and this information provided to the young person.

Soter scanner

- 14.5.46 The Alexander Maconochie Centre (AMC) currently utilises a Soter RS low dosage x-ray machine designed to identify contraband secreted under clothes or within the human body. It was subject to appraisal by the ACT Radiation Council, and was approved for use in ACT Corrective Services in October 2009. This approval limits the use of the Soter RS to no more than 83 scans per detainee per year. Only detainees are to be scanned.
- 14.5.47 A number of staff participants expressed support for the introduction of a Soter scanner at Bimberi, noting that '*anything has got to be better than strip searching*'. CSD confirmed to the Commission that the Directorate is not going to introduce a scanner at Bimberi, as the Radiation Council would likely not approve its use in Bimberi because of concerns about young people's exposure to low-dose radiation.

Use of sniffer dogs

- 14.5.48 Bimberi management also suggested that the use of sniffer dogs is being contemplated at the Centre. The CYP Act allows this currently, but management also identified there may be issues with using such dogs with children and young people. While the Commission can see that such dogs may negate the need for strip searching, we are mindful that such dogs should not be used routinely.

Recommendation 14.24: The Community Services Directorate consult the Commission and other stakeholders prior to any introduction of sniffer dogs.

14.6 Participation*Human rights standards*

- 14.6.1 Protection of children and freedom of expression are both rights enshrined in the HR Act.⁹⁵ Articles 12 and 13 of CROC require that a child capable of forming his or her own views should be given the right to express those views freely in matters affecting the child and this should include those children being heard in any judicial or administrative proceeding affecting them. Similarly, children should have freedom of expression.

Current practice

- 14.6.2 Of the nineteen young people who completed written surveys for the Review, 60% reported that they had little say on the way things were run at Bimberi with most asking for more input into recreational activities, education programs, mixing practices, rewards systems, searches, phone calls and visits and preparation for return to the community.

Promising Practice: The Commission understands that Bimberi has begun holding monthly unit meetings between unit managers and young people to discuss matters of concern.

- 14.6.3 We note that monthly meetings have begun between unit managers and young people. While these meetings are welcome, the Commission believes more must be done to engage young people on the range of matters which affect them in the Centre.
- 14.6.4 We note that the AMC uses a delegate system, with various areas of the detainee population represented by elected peers at monthly meetings. The Commission believes that Bimberi needs to develop a similar system, but with the much lower numbers, we suggest that this could occur with all residents present.

14.7 Food

- 14.7.1 The employment of chefs to prepare meals on site at Bimberi appears to have resulted in a very significant improvement in the quality and freshness of food provided to young people in detention since the 2005 Quamby HR Audit, where poor food quality was of great concern to young people. Around 90% of young people surveyed by the Commission reported that the food at Bimberi was 'good' or 'very good' when cooked by the chefs at the Centre. The only concerns raised with the Commission have been about the quality of catered food when the chefs are on leave, and the need for a further chef position to avoid isolation and allow chefs to take leave entitlements.

Human rights standards

- 14.7.2 International human rights standards provide that the right to adequate food is fundamental and unconditional, and that food should be suitably prepared and presented at normal meal times and be of a quality and quantity to satisfy the standards of dietetics, hygiene and health and, as far as possible, religious and cultural requirements. The reduction of diet should not be used as a disciplinary measure, as it could constitute inhuman or degrading treatment in breach of s.10(1)(b) of the HR Act.

95 See sections 10 and 14

Current practice

- 14.7.3 Section 141 of the CYP Act provides that it is a minimum living condition that young people in detention must have access to sufficient nutritional food and drink to avoid hunger and poor nourishment.
- 14.7.4 Young people at Bimberi get their own breakfast of cereal in their Unit in the morning. Lunch and dinner are provided by chefs in the on-site kitchen and eaten in a cafeteria-style dining area, usually in Unit groups. In 2011, barbecue lunches have been held for all young people and staff on Fridays, and young people are involved in preparing and serving the barbecue and accompanying dishes.

Promising Practice: Young people now prepare a barbeque lunch for staff, young residents and visitors on Friday lunchtimes. Commission staff frequently attended such barbeques and found them an excellent opportunity for staff, young people and others to mix in a more relaxed environment.

- 14.7.5 As noted above, around 90% of young people surveyed by the Commission reported that the food at Bimberi was 'good' or 'very good' when cooked by the chefs at the Centre.
- 14.7.6 We understand that there are currently 1.5 FTE chefs employed at Bimberi over a seven day period. For the most part, there is little handover time between the full-time and part-time chef, and for the rest of the week they work in relative isolation preparing and serving food, and having little contact with other staff at Bimberi. We understand that even when there are occasions such as Friday barbecues where staff get together, chefs are serving food rather than participating in these activities. These staffing arrangements do not allow chefs to take leave without disruption to the Centre or calling upon the other chef to work overtime.
- 14.7.7 Young people and staff consistently reported dissatisfaction about the quality of the catered food provided to young people when chefs are away. A number of young people commented on this in the survey, eg 'Food is good except when the chef is on leave, food brought in packaged is not edible.' We understand that an arrangement was in place with a large institutional caterer which could supply meals at very short notice if the chef was unavailable, but that current management are no longer satisfied with this caterer and have tried alternative options, including getting takeaway and getting youth workers to prepare meals.
- 14.7.8 In the longer term, a better solution may be to increase the FTE hours and employ another chef or cook who could cover leave. With more resources in the kitchen it may be possible to design a program to allow young people to assist the chef and learn vocational skills as cooks or kitchenhands.

Promising Practice: The majority of young people reported that the food prepared by Bimberi chefs was of high quality.

- 14.7.9 We note that the Commission has not sought to review the nutritional value of the food provided at Bimberi, apart from noting the high level of satisfaction of young people with the quality of food prepared on site by the chefs. The CYP Act provides that a policy or operating procedure may include provision for nutritional standards, nutritional advice, or the appointment of a nutritionist.⁹⁶ We consider that it would be useful to seek the advice of a nutritionist (as occurs at AMC) regarding the food offered to young people, where the nutritionist could work with the chefs to ensure that menus offered are providing appropriate nutritional value for young people.

Recommendation 14.25: The Community Services Directorate:

- Consider providing sufficient chef resources to cover leave periods and provide opportunities to offer programs for young people in the kitchen
- Seek the advice of a nutritionist regarding the food provided at Bimberi.

⁹⁶ in s.167

14.8 Classification

- 14.8.1 The reception and treatment of young people when they first arrive in detention is critical, as they are likely to be particularly vulnerable and frightened, and will need assistance in understanding their rights and responsibilities within the Centre, as well as meeting welfare needs. It is also a time when decisions are made regarding risk assessment, classification and placement of a young person, which directly impact on the wellbeing and safety of newly admitted young people and others at Bimberi.
- 14.8.2 One of the driving factors in the decision to build a new youth justice centre was the need to ensure appropriate placement of young people in detention on the basis of gender, age and remand or committal status, in accordance with human rights standards. The 2005 Quamby HR Audit recommended that there should be a separate accommodation unit for new inductees, separate sleeping arrangements for female detainees and appropriate separation of detainees on the basis of age group (those under and over 18 years) and status (remand or under sentence). The ability to separate groups of young people was limited at the Quamby facility, and females and younger males were commonly accommodated together through necessity, as were remanded and sentenced young people.
- 14.8.3 The Bimberi facility has been designed with more residential units with wings that can be managed as self-contained cottages, to maximise flexibility in accommodating different groups of detainees. Nevertheless there have been challenges in managing a larger number of groups with limited staff numbers, and in striking the right balance in risk assessment to allow young people to have opportunities for rehabilitation while maintaining safety and security at the Centre.

Human rights standards

- 14.8.4 Under the HR Act young people on remand or committal are entitled to:
- Special protection because of their vulnerability as a child;⁹⁷
 - Treatment that is appropriate to their age and their status;⁹⁸ and
 - Segregation of accused from convicted persons, except in exceptional circumstances.⁹⁹
- 14.8.5 The POJ sets out a number of requirements for admission, classification and placement of young people, summarised below:
- Young people should not be received without a valid commitment order;¹⁰⁰
 - Parents or guardians must be notified immediately on admission and placement;¹⁰¹
 - On admission young people should be given a copy of the rules of the Centre and a written description of rights and obligations, complaints mechanisms and legal assistance. For young people who cannot read or understand this written material, the information should be conveyed in a way that they can fully comprehend;¹⁰²
 - All young people should be helped to understand the rules, the goals and methodology of the care provided, the behaviour management system, ways to seek information and make complaints and all matters necessary to fully understand their rights and obligations;¹⁰³
 - Classification and placement should take account of the particular needs, status and special requirements of the young person according to their age, personality, sex and type of offence, as well as mental and physical health, and ensure their protection from harmful influences and risk situations. 'The principal criterion for the separation of different categories of juveniles deprived of their liberty should be the provision of the type of care best suited to the particular needs of the individuals concerned and the protection of their physical, mental and moral integrity and wellbeing';¹⁰⁴ and
 - Young people have the right to have personal effects within the centre, and property that cannot be admitted must be properly stored and kept for the young person.¹⁰⁵

97 ss. 11(2) and 20

98 ss. 11(2) and 20(2) and (4)

99 s. 19(2).

100 Rule 20.

101 Rule 22.

102 Rule 24.

103 Rule 25.

104 Rule 28.

105 Rule 35.

Current practice

- 14.8.6 The admission, classification and placement of young people to/in Bimberi is governed by Part 6.4 of the CYP Act and the detailed procedures in the Admission Policy. The Act and Policy are informed by and are generally consistent with the human rights obligations described above.

Admission

- 14.8.7 The Admission Policy notes that the objectives of admission procedures are ‘to establish rapport with the young detainee, minimise the young detainee’s anxiety or distress and provide relevant information to the young detainee to assist their transition into custody.’
- 14.8.8 The procedure requires staff to thoroughly check legal authorisation for detention, and all staff we spoke to were cognisant of this obligation. The steps involved in admission are:
- Welcoming the young person and providing initial information about the Centre;
 - Conducting an induction interview to seek information from the young person about their needs;
 - Collecting personal property, allowing a young person to shower and change into detention clothing;
 - Searching (including strip searching);
 - Notifying parent or carer and allowing a young person to make a telephone call;
 - Arranging an initial health and mental health assessment for the young person; and
 - Recording relevant information in the register.
- 14.8.9 Eight young people reported being treated well on admission to Bimberi, and eight reported that they were treated badly, or neither well nor badly. Most young people (n=14) reported feeling safe on their first night at Bimberi. All young people reported being searched when they first arrived at the Centre, with 70% reporting that they were searched with their clothes on.
- 14.8.10 Most young people reported that they were offered a medical check up on admission and were asked about any health issues that they might have. Almost 90% reported that they saw a doctor or nurse within a day of their admission. Two-thirds reported being offered a shower on admission, and 50% reported being offered a phone call.
- 14.8.11 Most young people reported that issues they presented with on admission (such as letting family know where they were, or feeling upset) were addressed on admission. Twenty percent of young people who identified as having alcohol or other drug issues reported being offered support on admission, and 10% of young people who smoked reported being offered assistance.
- 14.8.12 Most young people reported that they were not informed about issues, supports, or their rights when first admitted, with only one of the young people reporting having received a resident’s handbook (after requesting one). Less than a third of young people reported that they had been told about where in the Centre they were allowed to go. Only 22% (n=4) of young people reported that they understood all of the information given to them on admission.
- 14.8.13 Once a young person is admitted, they are held in the admission cells in Coree and observed every five minutes until they have been fully assessed and given a security classification. The Commission is concerned that the admission cells appear to be very bleak and intimidating, and have no television or other comforts for young people adjusting to detention. One young person described their experience in admissions as follows:
- ‘The mattress in admissions is really uncomfortable like it has slats underneath. They give you other residents’ old clothes and shoes to wear before you get your own, the shoes had holes in the bottom. The admission cells are freezing and you are right there under the camera even when you go to the toilet. Those cells are filthy. Residents are meant to clean them as punishment, but I think staff should clean them up. After that Coree is the first place you go. It is clean, because that is all you can do there is cleaning, but it is intimidating, not welcoming... They don’t tell you anything about how it works when you arrive. There is a book in the library you can read about Bimberi, but most kids don’t read it, some of them can’t even read well.’*
- 14.8.14 Other residents however reported no such concerns.
- 14.8.15 Although the policy and procedures attempt to make the admission experience less intimidating for young people through building rapport and reducing anxiety, the environment of the admission cells is unnecessarily stark and devoid of stimulus, and is likely to reinforce anxiety. It is also unclear why there are no televisions in other cells in Coree, which are used for young people on short-term remand as well as for behaviour management.

- 14.8.16 The Commission considers that as part of the cabin refittings currently scheduled in other Units, the holding/admission cells and the residential cells in Coree should be fitted with televisions that are secured and do not pose a risk of self harm. Televisions in the admissions cells could be used to provide information about the Centre in an accessible format, such as a DVD slideshow with voiceover, as well as being used for entertainment, to assist young people to transition to detention.

Recommendation 14.26: The Community Services Directorate refit the cells in Coree with televisions that are secured and do not pose a risk of self-harm.

Placement

- 14.8.17 The issue of placement and inappropriate mixing of different categories of young people due to the limitations of the Quamby facility was a significant concern raised in the 2005 Quamby HR Audit. This concern was addressed in the drafting of the CYP Act, which provides in s.166 that:
- '(2) In placing a young detainee, the Chief Executive must ensure that—
 - (a) young remandees are segregated from other young detainees;
 - (b) male young detainees are segregated from female young detainees; and
 - (c) a young detainee who is under 18 years old is not placed with an adult.
 - '(3) Subsection (2) does not apply if the Chief Executive believes on reasonable grounds that another placement will be in the best interests of all affected detainees.'
- 14.8.18 When deciding whether another placement would be in the best interests of all affected young people, the Chief Executive must consider the needs and special requirements of the young person because of the young person's age, sex, emotional or psychological state, physical health, cultural background, vulnerability or any other relevant matter; whether the isolation is in the best interests of the young detainee; the desirability of care being suited to the particular needs of the young detainee in order to protect the young detainee's physical and emotional wellbeing; and that it is in the best interests of young detainees to be separated from co-offenders. Security classification is also deemed to be relevant to this consideration.
- 14.8.19 The Government Submission states that:
- 'A fundamental human rights principle applied in a youth justice setting is the separation of different population groups, including separation based on gender, age, remand and sentenced status. Further separation may be required to address high risk, vulnerable children and young people, victims and perpetrators and requirements from the court or police to separate co-offenders to prevent collusion. The design of Bimberi achieves separation objectives by having separate rooms; separated wings in residential buildings with central staff points that allow both observation and management; and the capacity to open up and close down areas to accommodate changes in population.*
- Following early discussions with the Human Rights Commission there was agreement that while the mixing of different cohorts of young detainees in residential units, programs and activities is a prima facie breach of human rights standards, it was conceded that Bimberi would comply with human rights standards if this process is conducted to best meet the needs of individuals.'*
- 14.8.20 The mixing of different young people at Bimberi is particularly challenging, given the mix of gender and classification in a single Centre is a unique issue for the ACT. From the Commission's observations at Bimberi, the criteria for placement in residential units generally appear to be applied appropriately and consistently with human rights standards. Young people of different legal status, gender and age are generally separated into different residential units, although the small number of young women means that young women of all ages and status are accommodated together, which may be unavoidable to prevent isolation. During the day young people from different groups sometimes mix for education, programs and recreation, which is managed appropriately. Importantly, young people who are admitted on remand for short periods are kept separate from the main population until a bail decision is made by the Court to avoid them becoming further entrenched in the detention environment.
- 14.8.21 However, the Commission is concerned that the criteria for separation do not appear to be applied so strictly in the Coree Unit, which is currently being used both for an admissions unit and a de facto behaviour management unit. Remandees and sentenced young people are co-located in this Unit, and there have been occasions when male and female young people have been placed together in this Unit. The Commission is concerned that newly admitted young people who are particularly vulnerable may be mixed with young people who are in the unit for behavioural reasons, including violent behaviour. A preferable course would be to use a separate wing of a residential unit for segregation purposes where possible and to manage other behavioural issues without transferring a young person to another unit.

Recommendation 14.27: The Community Services Directorate segregate young people in a residential unit other than Coree where practicable (other than a direction for safe room segregation), and that young people who are not on a segregation direction be managed within their residential unit as far as practicable.

- 14.8.22 While the Bimberi facility provides greater flexibility in the separation of different categories of young people in residential units, it is clear that the move to smaller group sizes and a new staffing model has caused significant problems with staff isolation and safety. Staff participants reported a common view that staff were left alone with young people as a result of human rights obligations. The Commission rejects the contention that isolation of staff is a necessary result of human rights requirements. In the Commission's view, as discussed in Chapter 5 (staffing), it was the inadequacy of the budget and staffing model rather than human rights considerations that led to staff safety being compromised. The rights of young people and staff should both be prioritised.
- 14.8.23 In the Commission's survey of young people the majority (90%) reported a desire for more mixing between Units, and people reported feeling safe in mixing with young people either 'all the time' (12 of 18 participants) or 'most of the time' (6 of 18 participants). Some young people reported that being confined to a small group all the time was frustrating and that it could exacerbate tensions between units as '*people talk behind each other's backs and that's how fights start*'.
- 14.8.24 Restrictions regarding attending programs and mixing during the day often appear to relate to issues of security classification, discussed below, rather than human rights concerns. Provided that the safety and wellbeing of young people is carefully monitored the Commission supports initiatives such as the Friday barbecue and touch football games where young people from different units are brought together to enjoy communal activities.

Classification

- 14.8.25 The CYP Act requires the Chief Executive to give each young person a security classification as soon as possible after admission, and in determining classification the Chief Executive must consider:
- The reason for the detention, including the nature of any offence for which the young person is detained;
 - The risks posed by the young person if the young person were to escape;
 - The risk of the young person escaping;
 - The risks posed by the young person while at a detention place; and
 - The risks to the young person of being accommodated with particular young people or in particular areas at Bimberi.¹⁰⁶
- 14.8.26 In assessing these risks management has regard to information from the young person's health and mental health assessments and a range of other sources including case managers.
- 14.8.27 The security classification assigned to a young person can significantly limit opportunities for participation in programs and in obtaining leave from the centre to attend important family events or for work or training reasons as part of their rehabilitation. Security Classification is based on status (sentenced or remand), level of risk (low, medium, high) and particular risk alert relating to being 'at risk' (A), having health issues (H), risk to security (S), or having escaped or attempted to escape from custody (E). See Table 14.1 below:

Table 14.1: Security classification based on status

| Status | Risk | Risk Alerts |
|--------------|------------|-------------|
| Remand (R) | 1 (Low) | A, H, S, E |
| Remand (R) | 2 (Medium) | A, H, S, E |
| Remand (R) | 3 (High) | A, H, S, E |
| Sentence (S) | 1 (Low) | A, H, S, E |
| Sentence (S) | 2 (Medium) | A, H, S, E |
| Sentence (S) | 3 (High) | A, H, S, E |

¹⁰⁶ CYP Act s.90

- 14.8.28 Thus the policy and procedure states that a young remandee displaying non-compliant behaviour and a history of a prior escape from custody may be classified as R/3/E, while a sentenced young detainee nearing completion of their sentence who has a record of positive behaviour and progress in custody may be classified as S/1.
- 14.8.29 The Commission is concerned that young people on remand are often denied opportunities for both programs and leave based on their security classification. The Commission has been informed that in practice remandees are automatically classified as high risk upon admission, and are required to 'work their way down' the classification ladder before they can have access to many opportunities. In discussion with Bimberi management, it was asserted that it would almost never be appropriate to grant a remandee leave to participate in work or education outside the Centre, regardless of the individual circumstances of that young person.
- 14.8.30 Treating remandees less favourably than sentenced young people is inconsistent with the stipulation in the CYP Act that 'the young remandee must be presumed innocent of any offence for which the young remandee is remanded in custody; and the detention is not imposed as punishment of the young remandee.' Similarly, the Children and Young People (Treatment of Convicted and Non-Convicted Young Detainees) Policy and Procedures 2008 requires that 'every effort should be made to ensure that a non-convicted young detainee's family and community relationships are supported and promoted and that the young detainee's education, employment, housing and other social integration needs are not detrimentally affected by the period of detention.'

Recommendation 14.28: The Community Services Directorate classify remandees on objective considerations of individual risk. Young people on remand should be given access to programs and opportunities for leave on at least an equivalent basis to sentenced young people.

- 14.8.31 Another concern raised by a number of participants is that security classifications have been infrequently reviewed, and that it takes an inordinately long time for all young people to progress in their classification and gain access to many programs. One young person who had been transferred from Bimberi to AMC noted that re-classification occurred much more quickly at AMC: *'There is more trust. It only takes three weeks to get to minimum security here if you behave well.'*
- 14.8.32 The Commission notes the statement in the Government Submission that as part of the change management program at Bimberi 'The classification processes for young people [have] also been revised to enhance holistic risk assessments within a multi-disciplinary framework to facilitate greater participation in skills programs by young people.' In practice we understand that classifications are now being reviewed more regularly, with input from case managers, key workers and health professionals. Programs are also being reviewed to develop modified versions of activities such as woodwork and metal work that can be made accessible to young people with higher security classifications.
- 14.8.33 Finally, the RCADIC recommended that a preference be given to providing Aboriginal and Torres Strait Islander detainees adjoining cells. Section 183 of the CYP Act states that decisions about young detainees should be taken in a way that takes into consideration the young detainee's cultural practices. The *Children and Young People (Aboriginal and Torres Strait Islander Young Detainees) Policy and Procedures 2008* states that the placement of Aboriginal and Torres Strait Islander residents in adjoining rooms must be positively considered. We understand the inclusion of such rooms at Bimberi was the direct result of the Aboriginal and Torres Strait Islander community being consulted on the design, and in response to the recommendations of the 2005 Quamby HR Audit. However, the Commission is very concerned of reports by participants that despite the high numbers of Aboriginal and Torres Strait Islander residents, these rooms were not being utilised for such purposes, and the doors between adjoining rooms are routinely locked. We believe this is inconsistent with the Royal Commission's findings, and the CYP Act, and must be addressed.

Recommendation 14.29: The Community Services Directorate:

- Continue recent initiatives to review classifications more regularly, to facilitate greater access of young people to a full range of programs
- Implement the *Children and Young People (Aboriginal and Torres Strait Islander Young Detainees) Policy and Procedures 2008* in relation to the use of adjoining rooms for Aboriginal and Torres Strait Islander young people where possible.

14.9 Communication

14.9.1 The ability to maintain contact with the outside world is critically important for young people detained at Bimberi.

Human rights standards

14.9.2 Article 14 of CROC states that '*no child shall be subjected to arbitrary or unlawful interference with his or her correspondence*'. Rule 59 of POJ states that young people should be allowed to communicate with their families, friends and other persons or representatives of reputable outside organisations. In relation to specific communication, Principle 18 of the United Nations *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (BOP) gives special protection for detained or imprisoned persons to communicate, without delay or censorship and in full confidentiality, with legal counsel, and such communication may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order. Rule 78 further provides protection for young people to contact family members, legal counsellors, humanitarian groups or others where possible in order to make a complaint.

14.9.3 The searching or monitoring of young people's communication also engages the right to privacy and protection of family in the HR Act.¹⁰⁷

Correspondence

14.9.4 The 2005 Quamby HR Audit noted that some measure of control over detainees' correspondence is not of itself incompatible with international standards, as long as it is reasonable and proportionate in the circumstances.¹⁰⁸ Grounds for censorship of detainees' correspondence must be sufficiently defined, so as to protect individual detainees from arbitrary or abusive interference in their relations with others. There should be individualised justification for each item of correspondence that is censored.¹⁰⁹

14.9.5 The Audit recommended that a clear policy be developed on the searching of correspondence. It should be clear what content is inappropriate to justify a letter not being forwarded to a detainee. This should include forwarding letters to detainees even if sections with inappropriate content are deleted, unless the letter is offensive in its entirety.

Phone calls

14.9.6 The 2005 Quamby HR Audit recommended that there needed to be greater flexibility and transparency in considering requests for telephone contacts with friends, and other members of the community. The Audit recommended that a telephone system be installed that would allow detainees longer and more outgoing calls on their designated days. The Audit also recommended improvements should be made for protecting privacy when detainees are making or receiving telephone calls. Protections were also missing when detainees made or received welfare or legal telephone calls.

Current practice

14.9.7 The 2005 Quamby HR Audit recommendations are now included in the new CYP Act and corresponding policies. Minimum living conditions are set down in s.141 and include reasonable access to telephone, mail and other facilities for communicating with people in the community, and reasonable opportunities to contact a lawyer.

14.9.8 Section 197 explicitly requires CSD to balance the needs of security of the centre with the privacy of young people. The Act differentiates between ordinary communication and protected communications. Phone calls and correspondence other than with certain legal bodies, such as lawyers and the Commission, may be monitored, provided that the parties are informed.¹¹⁰ Ordinary mail may be opened, but only if management suspects it may:

- Undermine security or good order at a detention place;
- Revictimise a victim;
- Circumvent any process for investigating complaints or reviewing decisions under this Act; or
- Not be in the best interests of the young detainee.

¹⁰⁷ Sections 11 and 12.

¹⁰⁸ *Silver v UK* (1983) 5 EHRR 137 (para. 45).

¹⁰⁹ *Demirtepe v France*, App. No.34821/97; (2001) 31 EHRR 28, holding censorship of prisoners' letters to be not in accordance with the law where it fell outside the scope of the regulation.

¹¹⁰ See sections 199, 200.

- 14.9.9 Communication with legal entities is described as protected. Bimberi management may only open protected mail if they reasonably suspect that the mail contains something that may physically harm the young person, or a prohibited thing, and then they must do so in the presence of the young person.¹¹¹
- 14.9.10 Young people are able to make phone calls directly from their units. There is now also a *Children and Young People (Visits, Phone Calls and Correspondence) Policy and Procedures 2008* (Visits, Phone Calls and Correspondence Policy). It provides that young people can have a minimum of one phone call at admission, and four phone calls a week to family. These entitlements must not be affected by action taken under the Behaviour Management or Discipline Policies and Procedures and may only be restricted or limited in accordance with the criteria in those policies and procedures.

Views of young people

- 14.9.11 Telephone and hard copy mail was not a typical area of concern for young people. Nonetheless, only half of those surveyed reported being offered a phone call on admission. This was also an issue during the 2005 Quamby HR Audit. More positively, ongoing connections were generally seen as being reasonable.
- 14.9.12 Over 40% of young people surveyed by the Commission reported that they had had restrictions placed on both phone calls and visits with their families, with all of these young people reporting that they believed this was unfair. In some cases, these restrictions were because young people had already reached their four free phone call limit for the week, but in other cases, young people reported that it was because they were segregated or subject to another disciplinary matter.
- 14.9.13 The other major challenge identified by the Commission was that the free call phone available for young people to call the Commission was malfunctioning for the initial period of the Review. This was restored, but several weeks after being notified to Bimberi, and only when a key staff member returned to work.

Recommendation 14.30: The Community Services Directorate:

- Remind Bimberi staff that all young people should be offered a phone call at admission, and that young people must receive their minimum entitlements to call family, even when subject to disciplinary action or segregation
- Regularly test young people's phones to ensure outgoing calls are operating correctly, and ensure a number of staff across all shifts are trained in using the phone system.

- 14.9.14 The Commission also shares concerns put by oversight agencies to this Review that while young people can call them, it is difficult for agencies (and others) to call young people back. This is further discussed at Chapter 15 (management and oversight).

Email and internet access

- 14.9.15 The 2005 Quamby HR Audit recommended that young people have access to email, with suitable protections in place. Since then, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, has noted *'the unique and transformative nature of the Internet not only to enable individuals to exercise their right to freedom of opinion and expression, but also a range of other human rights, and to promote the progress of society as a whole.'*¹¹² The right to freedom of expression, is enshrined in s.16 of the ACT HR Act.
- 14.9.16 The Commission notes that limited email and internet access is available to detainees at the AMC. It is unclear why a similar level of monitored email and internet access is not available to the young people at Bimberi. While AMC has had some problems with internet and email access, this has generally been related to detainees accessing staff logins. Clearly, young people should not be given unfettered access to the internet, given the potential for inappropriate content to be accessed. However, these considerations apply equally to adults at AMC, and we understand have been largely overcome by the use of a 'white list' of sites. Ensuring witnesses are not intimidated is also crucial, but the AMC policy and procedure also seeks to address this.
- 14.9.17 Such access would be consistent with young people's right to freedom of expression, and access to information and news, discussed further below. It would also assist in their education needs, as discussed at Chapter 12 (education).

¹¹¹ See s.202

¹¹² Frank La Rue, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression', *United Nations General Assembly Human Rights Council, Seventeenth session: Agenda item 3* (2011), 1.

Recommendation 14.31: The Community Services Directorate consider providing properly monitored and supervised email and Internet access to young people at Bimberi.

14.10 Clothing

Human rights standards

- 14.10.1 The CYP Act requires the Chief Executive to ensure that young people are provided with sufficient suitable clothing, which must not be likely to degrade or humiliate them and must as far as practicable be clean and hygienic.¹¹³ In addition, human rights standards prescribe that when detainees are removed from or leaving Bimberi for any purpose, they should be allowed to wear their own clothing or other inconspicuous clothing.¹¹⁴

Current practice

- 14.10.2 The Admission Policy provides that all young detainees will be issued with a set of clothing and personal hygiene items upon admission. Young men and women are issued with tracksuit style clothing and t-shirts which are in different colours for young people on remand and those sentenced.
- 14.10.3 In the Commission's survey, most young people reported that they were allowed to wear their own clothes when leaving the Centre or going to court. Of 18 who responded, 12 (two thirds) reported that they 'always wore their own clothes' when taken outside the Centre, and 6 (one third) reported that they 'sometimes wore their own clothes'. Over 80% of young people reported being unhappy about the quality of their footwear (n=15), and 43% felt that their clothes were 'bad'. Given the level of dissatisfaction with the shoes provided to young people, it would be useful to obtain the advice of a podiatrist on the suitability of these shoes for young people at Bimberi.
- 14.10.4 One young person complained that the cold weather clothing (zip jacket over short sleeved top) was not sufficiently warm outside during Canberra winter, and requested that young people be issued with warm gloves. This is a reasonable request, in the Commission's view, as we understand that young people may spend extended periods outside during the day.
- 14.10.5 Of particular concern were the reports we heard from a number of sources that young people coming in on admissions were being allocated second hand shoes worn by other detainees. One survey participant reported that *'When you come in you get other people's clothes and shoes and hats. If you don't want to wear used clothes or shoes they just say too bad'*. A parent noted that on admission her child was offered either a pair of shoes of mismatched size, or a pair in the right size with the bottom torn open. Staff participants suggested that the use of second hand shoes was a reflection of budgetary constraints, and the lengthy approval procedures for obtaining supplies. After an initial delay a young person would be issued with their own new pair of shoes, but would have to wear second hand shoes in the interim. We understand that this issue has recently been resolved, with supplies being increased to ensure that there are sizes available at admission.
- 14.10.6 The Commission considers that it is unacceptable and not fulfilling the requirement that clothing be clean and hygienic to issue detainees with shoes that have been worn by other detainees. Training shoes cannot be effectively washed and sterilised like hats and clothing. Where it is not possible to issue a young person with new shoes in the correct size immediately, the young person should be allowed to wear their own footwear until new shoes can be obtained for them.

Recommendation 14.32: The Community Services Directorate:

- Issue all young people upon admission with new footwear in their size. If this is not practicable young people must be allowed to wear their own footwear until new footwear can be obtained for them
- Seek advice from a podiatrist on the quality of footwear supplied to young people at Bimberi
- Review the adequacy of winter clothing for young people and consider supplying gloves to young people during the colder months.

113 s.168

114 Rule 36 Protection of Juveniles and Rule 17 SMR.

14.11 Visits

- 14.11.1 It is an essential part of both private life and the rehabilitation of young people in detention that their contact with the outside world be maintained as far as practicable by allowing friends and family to visit them in detention.¹¹⁵ As noted in the Visits, Phone Calls and Correspondence Policy and Procedures, *'[c]ontact and support from family members and significant people can help support young detainees during their period at a detention place and also contribute to young detainees' rehabilitation and successful reintegration into the community following their release from custody.'*

Human rights standards

- 14.11.2 International human rights standards provide that detainees have the right to receive regular and frequent visits, not less than once a month and to communicate in writing or by telephone at least twice a week, unless legally restricted.¹¹⁶ This is a minimum standard, and more frequent visits should be provided wherever possible. The CYP Act provides a higher minimum entitlement that one family member or significant person may visit a young detainee for at least 1 hour each week.

Current practice

- 14.11.3 We understand approved visitors are able to visit young people at Bimberi by pre-arrangement every afternoon/evening except Wednesday. Parents have reported that it can be difficult to get to visits on time after work during the week but were appreciative of a new visiting time on Saturday morning that is now being offered, in addition to the evening visits on weekends. One parent noted that 'the visiting hours now strike a fair balance for families.'
- 14.11.4 The visiting area is a large open space with café-style tables and an outdoor play area for young children. The visiting area also contains a secure visiting area for non-contact or 'boxed' visits and a barbeque facility. Although the Government Submission reports that the *'barbeque can be used by families to celebrate special occasions with residents,'* young people noted that this requires them saving a considerable number of incentive points, and one stated that *'it is so hard that you would be released by the time you got enough points.'* A young person told us that their family was not able to bring in a birthday cake on a visit, and that at that time no celebration was organised by staff. We understand that efforts are now being made to recognise young people's birthdays at Bimberi.
- 14.11.5 Visits in the main visiting area are voice recorded, but the private visits area for legal visits is not subject to recording. The relevant human rights standards do contemplate confidential visits subject to reasonable conditions for the security of the centre.¹¹⁷ One parent reported her concerns about being recorded talking to her child, as she felt that her child was less able to speak freely about problems experienced in detention knowing that management could be listening: *'I would like more confidentiality in speaking to my child.'* The Commission understands that there needs to be a level of security around visits, but it may be appropriate to allow parents to use the private visit area on request where there are no security concerns in relation to that visit.
- 14.11.6 Young people surveyed reported that their visitors are generally treated 'well' (8 of 18 responses) or 'ok' (9 of 18 responses), but the majority noted that visits only 'sometimes' started on time (12 of 18 responses). Family members we spoke to had mixed views of reception staff at Bimberi, some had been treated respectfully, but others, particularly younger visitors, considered that reception staff were not welcoming towards them. One young woman noted that she was not able to take a bottle in for her baby during a visit with a family member.

115 *X v UK*, App.No.054/80; 30 DR 113 and Rule 59 Protection of Juveniles.

116 See Rules 59-61 Protection of Juveniles, Rule 26.5 Beijing Rules, Rule 37 SMR, Rule 20 Vienna Guidelines, articles 9(3) and 16 CRC.

117 See Principle 29 of the BOP for example 'detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment subject to reasonable conditions to ensure security and good order in such places'

- 14.11.7 It is clear that staffing shortages affected visits, with a number of participants reporting that visits were cancelled due to lack of staff, particularly during 2010. Both family members and young people reported frustration and disappointment when booked visits were cancelled without warning. The Commission understands that this issue has now been resolved with the recruitment of more staff.
- 14.11.8 Overall the Commission is satisfied that Bimberi management take the obligation to facilitate visits for young people seriously and that the Centre provides appropriate opportunities for family and friends to visit young people in conditions that are generally welcoming to visitors. The Commission is, however, surprised that the Centre's front desk continues to be staffed by an MSS contractor. The Commission generally found these staff to be friendly, courteous and helpful. However, it is unclear why the position which is the first contact members of the community have with Bimberi, and is in many ways the public face of the Centre, is staffed by a contractor. We would see merit in this position being staffed by an experienced CSD employee, familiar with all aspects of the Centre's operation.

Recommendation 14.33: The Community Services Directorate consider placing a permanent employee in the position of front desk attendant at Bimberi.

- 14.11.9 One key obstacle for families and friends visiting young people at Bimberi is the difficulty of accessing the Centre by public transport. Only one ACTION bus route goes to Bimberi, with only one bus service (no 82) scheduled each afternoon, which does not coincide with visiting times. To catch this bus a visitor would be left waiting for an hour before and after the visit. One family member reported having to walk with her young child from Flemington Road, a distance of approximately one kilometre, along Morisset Road, which is a narrow potholed road without a pedestrian footpath. The Commission considers that it is vital that ACTION work with Bimberi management to provide a useful public transport service to the Centre that is effectively co-ordinated with visiting times during the week and on weekends.

Recommendation 14.34: The Territory and Municipal Services Directorate work with Community Services Directorate to provide a public transport service to Bimberi that is co-ordinated with visiting times during the week and on weekends.

14.12 Access to information and news

Human rights standards

- 14.12.1 Human Rights standards require that young people should have the opportunity to keep themselves informed regularly of the news.¹¹⁸ Related to this, Rule 25 of the POJ provides that young people should be helped to understand the regulations governing the closed facility.¹¹⁹ If they have low literacy skills, information should be conveyed in another manner to enable full comprehension.¹²⁰
- 14.12.2 The 2005 Quamby HR Audit generally found that Quamby's practices regarding access to news accorded with these obligations, but recommended that weekend newspapers be delivered. However, in relation to the provision of information on rights and responsibilities, the Audit found that the communication to young people about their rights was inconsistent and many did not have a copy of the resident's handbook. The Audit recommended that young people be informed of their rights and obligations, as well as the operating rules.

Current practice

- 14.12.3 Much of the 2005 Quamby HR Audit recommendations are reflected in the CYP Act and Policies. Section 141 of the CYP Act states that minimum living conditions at Bimberi include '*reasonable access to news and education services and facilities to maintain contact with society*'. Section 176 further obliges Bimberi management to provide reasonable access to '*newspapers, radio and television broadcasts and other mass media (including the internet) for news and information*'. However, this latter access is not a minimum living condition, and therefore can be taken away in disciplinary proceedings.

118 See in particular Rule 62 of the POJ

119 See also Rule 41, Principle 28 of the Body of Principles, Rule 40 SMR, and art. 17 CRC.

120 Rule 24 Protection of Juveniles and Rule 35 SMR

- 14.12.4 The Admission Policy states that on admission, all young people are to be given 'initial information about the detention place (including the young detainee's rights and obligations) and the young detainee's legal circumstances.'
- 14.12.5 In the Commission's survey, most young people reported that they were not informed about issues, supports, or their rights when first admitted, with only one of the young people reporting having received a resident's handbook (after requesting one). Management informed us that this was because the sturdy paper on which the resident's handbook is printed can pose a risk of self harm, so cannot be left with young people, and noted that many young people have difficulty comprehending the written material in any case.
- 14.12.6 Less than a third of young people reported that they had been told about where in the Centre they were allowed to go. Only 22% (n=4) of young people reported that they understood all of the information given to them on admission. Most young people reported, however, that they were often told by their case manager about what services were available, and how to stay in contact with family and friends using the phone system. Over half of the young people reported that felt informed about the Official Visitor and her role.
- 14.12.7 When consulted previously about the development of policies at Bimberi, the Commission recommended that CSD develop a DVD summarising the resident's handbook, to be shown at admission. We continue to believe this is the optimal approach. Admission is a traumatic time for a young person, and they may not comprehend completely what they are told and what is provided to them. Literacy is also an issue for some young people. A DVD shown at admission would address some of these issues, and we would encourage the video to be shown regularly throughout the Centre as a form of refresher information session.

Recommendation 14.35: The Community Services Directorate take further measures to properly inform young people at Bimberi of their rights and obligations at the Centre. This could include the development of a DVD to be shown at admission and at regular intervals during a young person's time at the Centre.

- 14.12.8 More positively, young people felt that they had reasonable access to news media, with more than half of the young people reporting that they were able to read the paper or watch the news each day. However, all young people reported that they were never able to access internet, with most believing that they were unable to use computers. As detailed above, consistent with their right to external news and information and the CYP Act, the Commission believes that young people should be given limited internet access.

14.13 Access to lawyers

- 14.13.1 Young people in Bimberi have a range of legal needs which extend beyond the obvious requirements for legal representation in relation to criminal charges, bail hearings and appeals. Young people have legal rights in relation to the conditions of their detention under both the HR Act and the CYP Act, but they require legal advice and representation to be able to effectively enforce these rights, for example to seek external review of disciplinary breaches and segregation directions. In addition, young people in detention have a range of unmet legal needs for advice and assistance with civil and administrative matters which may play an important role in their rehabilitation. For example, young people in detention are often victims of crime as well as offenders, and may have entitlements to victims compensation that they are unaware of. Young people often need assistance with accrued fines, and consumer contract issues, and may need advice regarding their rights in mental health proceedings, or as parents in care and protection proceedings.
- 14.13.2 In many jurisdictions, such as NSW and Victoria, there are specialist children's legal services within the Legal Aid Commissions who visit all young people in custody regularly to assist them with their legal needs. In these jurisdictions, Legal Aid often takes an active role in advocating for law reform for young people in custody and pursuing test case litigation to challenge conditions of detention. In the ACT, however, it appears that the provision of legal services to young people in custody is more reactive and focuses primarily on the provision of representation in criminal proceedings.

Human rights standards

- 14.13.3 International human rights standards for juveniles focus on ensuring that young people in detention receive appropriate legal representation and are able to communicate confidentially with their lawyers regarding their criminal matters. The POJ states in rule 18 that:

'Juveniles should have the right of legal counsel and be enabled to apply for free legal aid, where such aid is available, and to communicate regularly with their legal advisers. Privacy and confidentiality shall be ensured for such communications.'

Current practice

- 14.13.4 Young people on remand in Bimberi may be represented in their criminal matters by ACT Legal Aid or Aboriginal Legal Service (NSW/ACT) (ALS). These services are generally provided free of charge. Alternatively, young people and their families may obtain their own private legal representation. Solicitors may visit young people at Bimberi by appointment at any suitable time, and are not restricted to public visiting hours. The Commission has been informed that staffing shortages during 2010 and early 2011 also affected legal visits, and that some legal visits were cancelled at short notice, affecting the ability of solicitors to effectively represent their clients. The Commission understands that this issue has now been resolved with the recruitment of new staff at Bimberi.
- 14.13.5 Solicitors may speak confidentially with clients in the private visitors rooms at Bimberi. However, on some occasions the Commission has observed a solicitor speaking to clients in the main visiting area, which is subject to voice recording. The Commission notes from the survey results there was some confusion among young people surveyed as to their rights to communicate confidentially with their lawyer. Although the majority knew of this right, five out of 16 young people reported a belief that it was not possible to speak to a lawyer in private, and one did not know whether this was possible.
- 14.13.6 There is currently no general visiting legal service for young people at Bimberi, and young people who do not have active representation would need to contact Legal Aid or ALS to make an appointment for a solicitor to attend the Centre.
- 14.13.7 Although the legal services provided to young people at Bimberi appear to comply with minimum human rights standards, and provide effective representation in criminal matters, the Commission considers that a regular visiting legal service would better meet the legal needs of young people at Bimberi. A visiting solicitor could seek to speak to all young people held in segregation, or who have been given a disciplinary notice to advise on rights of external review. By engaging proactively with young people, it is likely that a visiting legal service would uncover a range of unmet needs for legal assistance. Legal assistance could be included in a case management plan where a young person has significant legal issues to be resolved while in detention.

Recommendation 14.36: The Community Services Directorate fund Legal Aid ACT or a Community Legal Centre to provide legal advice and minor assistance to young people in Bimberi in relation to internal applications and appeals.

14.14 Transfers to Alexander Maconochie Centre

- 14.14.1 One of the major changes to the ACT justice system since the 2005 Quamby HR Audit has been the construction of the AMC. For the first time, the ACT now has its own adult prison. The Commission observed that this has led to a change in policy in the youth justice system, as it is now easier for young people who turn 18 years of age to be transferred from Bimberi to AMC. We have noted a clear preference from Bimberi management to transfer many young adults.

Human rights standards

- 14.14.2 In relation to young people's rights, CROC states that a child capable of forming his or her own views should be given the right to express those views freely in matters affecting the child and this should include those children being heard in any judicial or administrative proceeding affecting them. Similarly, children should have freedom of expression.¹²¹
- 14.14.3 These rights are not lost as adults. The right to fair trial and freedom of expression are both enshrined in the International Covenant on Civil and Political Rights (ICCPR).¹²² The right to fair trial requires that a person have procedural fairness and natural justice. Freedom of expression includes the freedom to impart and receive information and ideas of all kinds, whether orally, in writing, in print, through art or another medium. These rights are also legally enforceable under the HR Act.¹²³ These rights would be engaged by a decision to transfer a young person to AMC.

121 Article 12 and 13

122 Articles 14 and

123 See sections 16 (Freedom of Expression) and 21 (Fair Trial)


- 14.14.4 A transfer to AMC without proper process might engage other rights. Depending on the circumstances, such a transfer could be a further imposition on a detainee's right to liberty. This is on the basis that the conditions of detention at AMC are likely to be stricter than those at Bimberi. Generally, any impact on this right must also accord with the rules of procedural fairness.¹²⁴
- 14.14.5 The Commission has observed that such transfers have also been based on the behaviour of the young person, and so could be interpreted as disciplinary action. Article 30 of the BOP states that *'a detained or imprisoned person shall have the right to be heard before disciplinary action is taken. He or she must also have the right to bring such action to higher authorities for review.'*
- 14.14.6 In contrast, the Commission is mindful that there are also various human rights mandating that children and adults be separated while in detention. This is discussed at Part 14.8 in relation to classification and mixing of young people at Bimberi. On some occasions, transferring a resident from Bimberi to the AMC may be necessary for these purposes.
- 14.14.7 Issues concerning the treatment of those young people who commit crimes when under 18 years of age, but become adults in Bimberi, are complex. Nonetheless, it seems clear that residents at Bimberi should at least be given the opportunity to be heard on such transfers prior to their imposition.

Current practice

- 14.14.8 Section 111 of the CYP Act provides that CSD may transfer a young detainee aged between 18 and 21 years of age at Bimberi to AMC, but in doing so, must consider:
- The young detainee's views and wishes;
 - The young detainee's maturity and any known history;
 - The young detainee's developmental capacity;
 - If the young detainee is serving a sentence—the time remaining to be served by the young detainee;
 - The behaviour of the young detainee, particularly if it presents a risk to the safety of other young detainees or staff at the detention place;
 - Whether the young detainee is likely to be vulnerable in a correctional centre;
 - The availability of services or programs appropriate for the young detainee at the correctional centre;
 - Whether the young detainee is more likely to be rehabilitated in the detention place or correctional centre.
- 14.14.9 These requirements are reflected in the *Children and Young People (Transfers) Policy and Procedures 2008*. This Policy refers generally to decisions at Bimberi being reviewable and such information being provided to young people and parents. However, a specific review process for transfers to an adult correctional facility are not contemplated.¹²⁵
- 14.14.10 The Commission interviewed a number of young people who were either approaching 18 years, or had turned 18 years of age. All were anxious about the prospect of being transferred to AMC and all were confused about the rationale for a decision being made by CSD to make such a transfer.
- 14.14.11 The Commission also interviewed detainees at AMC who had been subject to such a transfer upon turning 18 years of age. All were confused about the reasons for their transfer and generally felt the decision-making process had not been fair. In one case, a young person was involved in a fight after turning 18 years of age, and was put in segregation overnight. In the morning, he asked if he would be transferred to AMC. He alleges that no information on this was provided to him, despite several requests. Convinced he would be sent to AMC, and therefore with nothing to lose, he decided to break further rules and began attempting to climb onto the roof. Management later confirmed that it was not planned that he be sent to AMC, but that his attempts to climb on the roof precipitated the Centre management's decision, and a transfer ensued.
- 14.14.12 These transfers are generally done on very short notice and can be completed within hours. The Commission saw little information that the factors identified in the CYP Act were taken into consideration in any detail, and in particular there appeared to be very little opportunity for residents to be heard on whether they should stay.
- 14.14.13 More concerningly, the Commission also heard many reports from staff and young people of residents over 18 years being threatened with a transfer to AMC if they did not do what was asked. As one staff member reported:
'We need staff to stop telling them they're going to AMC and using it as a threat for everything they do.'

¹²⁴ The 2005 Quamby HR Audit noted that the increase in the number of days in detention caused by disciplinary proceedings would engage the right to liberty and attracts the minimum guarantees for a fair trial citing *Re Fulton's Application for Judicial Review* [2001] H.R.L.R. 11

¹²⁵ As an administrative decision, it might be that a review is possible under the *Administrative Decisions (Judicial Review) Act 1989*. However, this is not an easily accessible avenue for a young person in Bimberi.



14.14.14 The Commission also noted very little transfer of information or transition planning around such transfers. Young people alleged that staff at AMC knew virtually nothing about them on arrival. The Commission believes that young people subject to potential transfer to AMC deserve procedural fairness and natural justice. There should be greater clarity around the process of determining a transfer, and young people should be given a meaningful opportunity to put their views, and if unhappy with the process, they should have clear rights of internal and external review. These could be based on the existing provisions regarding segregation and disciplinary decisions. No transfer should take place until review rights are exhausted. If a young person chooses, an advocate should be available to assist them to present their views.

Recommendation 14.37: The ACT Government amend the *Children and Young People Act 2008* and *Children and Young People (Transfers) Policy and Procedures 2008* in regards to transfers to adult correctional facilities to provide:

- For a resident to put their views meaningfully, with the aid of an advocate if they choose
- That the Public Advocate must be notified prior to a decision being made
- Clearer review rights for the resident based on the existing behaviour management or segregation review process, which includes ultimately appealing to the Childrens Court
- Clear transition planning with information provided to Alexander Maconochie Centre including case plan and health information.