

# Chapter 2: Human Rights Audit Of Bimberi

## 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)
- Liberty and Security (HR Act s.18)
- Equality (HR Act s.8)
- Freedom of Expression (HR Act s.14)
- Legal status (HR Act s.19)
- Consent to Medical Treatment (HR Act s.10(2))
- Rights to Health and Education (ESCR)

## 2.1 Introduction

- 2.1.1 Throughout this Report, the Commission seeks to apply the required of international human rights instruments, informed by evidence-based best practice. We see these as complementary standards. Human rights instruments and case law provide a minimum benchmark that must be met, and any limits imposed on human rights must be authorised by ACT law and be reasonable and proportionate.<sup>1</sup> Complementing this approach, evidence-based practice provides the detail of not only how such benchmarks can be reached, but also how they can be exceeded and the best outcomes achieved for young people and the ACT community.
- 2.1.2 This Report brings together two key areas of the Commission – the experience and expertise of the Children & Young People Commissioner, and his team, with the human rights law knowledge and skills from earlier audits of the Human Rights & Discrimination Commissioner, and her team.
- 2.1.3 The original Legislative Assembly resolution that led to this Report sought an Inquiry by the Children & Young People Commissioner into Bimberi and the broader youth justice system, and a corresponding Human Rights Audit of the Bimberi Youth Justice Centre (Bimberi). To more effectively achieve this task, the Commission combined disciplines and conducted an Inquiry and Human Rights Audit into the youth justice system, including Bimberi, as a joint Review, utilising best practice and human rights standards.
- 2.1.4 Throughout this Report, we cite and apply relevant human rights standards across the whole youth justice system, informed by best practice in youth justice. These are most particularly relevant to staffing issues (Chapter 5), the delivery of education (Chapter 12), the provision of health services (Chapter 13), and the conditions of detention in Bimberi (Chapter 14). Conditions of detention cover issues of behavior management; use of force; restraints; segregation; searches; classification; communication; and food and clothing. We have deliberately placed these considerations at the end of the Report, reflecting the principle that detention should be a last resort.
- 2.1.5 However, we are mindful of the Legislative Assembly's request for a comprehensive human rights audit of Bimberi alone. In this Chapter, we compile elements of such an audit, summarising the findings of the remainder of the Report across all areas relevant to Bimberi, including conditions of detention, the provision of education and health services, and industrial conditions.
- 2.1.6 We also summarise the human rights relevant to all major participants in the system and at Bimberi – staff, young people, their families, and victims of crime.

## 2.2 The ACT Human Rights Act 2004

2.2.1 Young people, their families and staff at Bimberi are entitled to enjoy all rights under the *Human Rights Act 2004* (the HR Act). Section 40B of the Act obliges all public authorities in the ACT, which includes all ACT Government agencies, to act compatibly with human rights and, when making decisions, to give proper consideration to human rights. Generally, very few rights are absolute and s.28 of the HR Act states that rights may be limited by ACT laws in certain circumstances.<sup>2</sup> However, such exceptions must clearly be expressed in law and must be reasonable and proportionate. In deciding whether a limit is reasonable, s.28(2) provides that the following factors must be considered:

- The nature of the right affected;
- The importance of the purpose of the limitation;
- The nature and extent of the limitation;
- The relationship between the limitation and its purpose; and
- Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

2.2.2 Rights relevant to the various stakeholders at Bimberi are discussed below.

## 2.3 International instruments

2.3.1 There is a range of international human rights standards relevant to an Audit of this kind. Section 31 of the HR Act provides that such instruments may be used to interpret those rights enshrined in the HR Act. Those most relevant to the youth justice system include:

- United Nations (UN) Rules on the Protection of Juveniles Deprived of their Liberty (the POJ);<sup>3</sup>
- UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules);<sup>4</sup>
- UN Convention on the Rights of the Child 1989 (the CROC);
- UN Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines); and<sup>5</sup>
- UN Guidelines for Action on Children in the Criminal Justice System (the Vienna Guidelines).<sup>6</sup>

2.3.2 There are also standards which apply generally to any person held in a closed environment:

- UN Standard Minimum Rules for the Treatment of Prisoners (the SMR);<sup>7</sup>
- UN Basic Principles for the Treatment of Prisoners (the BTP);<sup>8</sup> and
- UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (the BOP).<sup>9</sup>

2.3.3 Locally, in 1999 the Australian Juvenile Justice Administrators (AJJA) released the Standards for Juvenile Custodial Facilities. The Commission is aware that AJJA has developed new standards relevant across the youth justice system, but understands that these are yet to be publicly released. In undertaking this Audit, the Commission has also been mindful of the recommendations of the Royal Commission into Aboriginal Deaths in Custody (the RCIADIC).

## 2.4 Inspections of youth detention centres

2.4.1 Rule 72 of the POJ requires that regular inspections of youth detention centres should be undertaken by independent inspectors. This rule requires that inspectors should have unrestricted access to all persons employed by or working in any facility where juveniles are or may be deprived of their liberty, to all juveniles, and to all records of such facilities. The Commission has inspection powers under s.137(e) of the *Children and Young People Act 2008* (the CYP Act), and was given such access as part of this Audit.

2.4.2 These requirements have been further enhanced by the recent adoption of the Optional Protocol to the Convention Against Torture (the OPCAT). OPCAT is an international agreement which builds on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT). It was adopted by the United Nations in 2002 and entered into force in 2006. The aim of OPCAT is to prevent the mistreatment of people in detention. Places of detention include prisons, youth detention centres, immigration detention centres, and other places where people are deprived of their liberty, such as mental health facilities and aged care facilities.

<sup>2</sup> Most relevantly to this Report, the right against torture and the right to life are both considered as absolute in International law.

<sup>3</sup> Adopted by General Assembly resolution 45/113 of 14 December 1990.

<sup>4</sup> Adopted by General Assembly resolution 40/33 of 29 November 1985.


<sup>5</sup> Adopted by General Assembly resolution 45/112 of 14 December 1990.

<sup>6</sup> Annexed to Economic and Social Council resolution 1997/30 of 21 July 1997.

<sup>7</sup> Approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

<sup>8</sup> Adopted by General Assembly resolution 45/111 of 14 December 1990.

<sup>9</sup> Adopted by General Assembly resolution 43/173 of 9 December 1988.

- 
- 2.4.3 Australia is a party to the CAT and signed the OPCAT on 19 May 2009, but has not yet ratified this instrument. A proposal for ratification of the OPCAT is under consideration by the Australian Government. By signing the OPCAT, Australia has agreed to allow inspections of places of detention by the UN and relevant local independent bodies. Once the Australian Government ratifies the OPCAT, the ACT Government will be required to participate in regular annual inspections or audits of a range of facilities, including Bimberi.
- 2.4.4 It has been six years since the then ACT Human Rights Office audited the former Quamby Youth Detention Centre (2005 Quamby Audit). In many ways, the concerns and issues raised in the lead up to this Report demonstrate why regular independent human rights auditing is required. The OPCAT is discussed further throughout this Report, including our recommendation that CSD schedule regular internal and external audits of Bimberi.

## 2.5 Rights engaged at Bimberi

### *Rights of young people*

- 2.5.1 Several rights of young people under the HR Act are likely to be engaged during their time at Bimberi:
- Section 8: Right to equality. This right provides that all young people at Bimberi should be treated equally without discrimination, including because of their race, colour, sex, disability or other status. The particular needs of young people with specific attributes are discussed at Chapter 10.
  - Section 10(1): Prohibition on torture, cruel, inhuman or degrading treatment or punishment. The prohibition on torture, cruel, inhuman or degrading treatment or punishment is absolute and no derogation is permitted even in times of public emergency. This right is applicable across all policies and practices at Bimberi, but particularly in relation to behaviour management.
  - Section 10(2): No medical treatment without free consent. This is most relevant to the provision of health care to young people at Bimberi. This right is particularly complex for young people, as the parental right to determine whether or not a child receives medical treatment terminates when the child achieves sufficient understanding and intelligence to enable him or her to understand fully what is proposed (the Gillick competence).<sup>10</sup>
  - Section 11(1): Protection of the family. The International Covenant on Civil and Political Rights (the ICCPR) and the HR Act recognise the family as the basic unit of society. This right is most likely to be engaged in relation to phone calls, correspondence and visits to young people.
  - Section 11(2): Protection of the child. Young people have special protection under the HR Act by virtue of their inherent vulnerability.
  - Section 12: Privacy and reputation. Young people at Bimberi are entitled to their privacy, particularly in relation to searches of their bodies, cabins and correspondence.
  - Section 16: Freedom of expression. Young people at Bimberi are free to express themselves, particularly in relation to participating in decision-making in the Centre, and having the opportunity to be heard during disciplinary proceedings.
  - Section 19: Humane treatment of those deprived of liberty. Perhaps the most critical right of all for young people at Bimberi, whether on remand or sentenced, is that all young people must be treated humanely.
  - Sections 19(2) & (3): Segregation of accused from convicted prisoners and appropriate treatment. This elaborates further on the right to humane treatment, which provides that remandees are entitled to be presumed innocent until convicted and should receive protection consistent with this status.
  - Section 20: Children in the criminal process. Section 20 specifies the additional guarantees afforded to a child or young person under the age of 18 years who is held in detention. An accused young person must be detained separately from accused adults and be treated in a way that is appropriate to their age and status. They must be brought to trial as quickly as possible rather than within a 'reasonable time', which is the case for adults. Similarly, a young person who is convicted of a criminal offence must be treated in a way that is appropriate to their age and status. The CROC elaborates the rights of children who are deprived of their liberty in more detail, including the principle that detention should be a measure of last resort.
  - Section 27: Rights of minorities. This section is relevant to the Audit's examination of the treatment of Aboriginal and Torres Strait Islander young people, or those from different ethnic, religious or linguistic minorities. This is discussed in detail at Chapter 10.

---

<sup>10</sup> See House of Lords decision *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

### Rights of staff

- 2.5.2 Staff at Bimberi are also entitled to have their human rights protected. The safety and security of staff must be a primary consideration in the operation of the Centre. Consistent with this, Chapter 5 of this Report focuses on staff rights across the whole youth justice system. It does so, cognisant of the following particular rights of staff:
- Section 9: Right to life. Staff are entitled to work in a safe environment, without their physical safety being put at risk. These protections in an industrial context are regulated in further detail by occupational health and safety law, such as the *Work Safety Act 2008*. The Commission has some concerns whether requirements for staff safety are being met, most particularly in relation to low staffing numbers making youth workers feel unsafe, and the lack of appropriate supports to protect against bullying and discrimination.
  - Section 8: Right to equality. All staff have the right to be treated equally, and should not be discriminated against on any ground. The HR Act notes such grounds can include race, colour, sex, discrimination and national origin. The Commission is concerned by reports from staff of alleged racism and bullying.
  - Section 16: Freedom of expression. Staff should be consulted on industrial issues that affect their work.
- 2.5.3 Further, there are also specific international human rights standards for staffing in youth justice. The POJ include standards for recruitment, remuneration, qualifications, management and training of youth justice personnel. In particular, Rule 82 of the POJ notes that *'the proper management of detention facilities depends on their integrity, humanity, ability and professional capacity to deal with juveniles, as well as personal suitability for the work'*. The Beijing Rules also require that staff in youth justice reflect the diversity of young people who come into contact with the system, and that efforts be made to ensure the fair representation of women and minority groups in youth justice agencies.<sup>11</sup> In the ACT context this requires that particular consideration be given to the recruitment of Aboriginal and Torres Strait Islander workers, given the significant over-representation of Aboriginal and Torres Strait Islander young people in the youth justice system.<sup>12</sup>
- 2.5.4 Concerns and issues for staff are discussed further at Chapter 5. In summary, we believe that low staff numbers at Bimberi, combined with a lack of sufficient resources, support, and training, have undermined efforts to comply with the human rights of all participants. A key recommendation of this Report is that staffing numbers and resources are increased as a matter of priority. We note that in recent times, the ACT Government has funded more staffing resources at Bimberi.

### Rights of families

- 2.5.5 Families play a vital part in the life of young people and can profoundly affect their life experiences and outcomes. Families can provide young people with a sense of belonging and stability, can provide them with social capital and can lead to positive outcomes (such as emotional and physical wellbeing and social connectedness) and reduce the likelihood of current and future criminal behaviour. The importance of families is enshrined in the HR Act, which recognises the family as the basic unit of society.<sup>13</sup> As noted above, this right is most likely to be engaged in relation to phone calls, correspondence and visits between family members and young people at Bimberi.
- 2.5.6 A number of human rights documents highlight the importance of contact with families and their continued involvement in the life of the young person. For example, Rule 30 of the POJ states that detention facilities should be decentralised and small scale to facilitate access and contact between the juveniles and their families, and to encourage and enable visitation and communication between young people and their families or significant others. Article 20 of the CROC further recognises the special protection a young person removed from their family environment deserves.
- 2.5.7 Families as stakeholders in the youth justice system are discussed at Chapter 3.

### Rights of victims of crime

- 2.5.8 The Commission is aware that the rights of victims of crime in the system must also be respected. A victim of crime is a person who has suffered harm because of a criminal act or offence. Harm can include physical or mental injury, emotional suffering, economic loss, or substantial impairment of their fundamental rights. Victims' rights are discussed at length at Chapter 3. The right to life under s.9 and right to liberty and security under s.18 of the HR Act are the rights most relevant to victims of crime.
- 2.5.9 The CROC requires governments to promote the physical and psychological recovery and social reintegration of a child victim of any form of abuse, neglect or exploitation.<sup>14</sup>

<sup>11</sup> Beijing Rules, rule 22.

<sup>12</sup> See also RCIADC rec.178

<sup>13</sup> Section 11 of the HR Act

<sup>14</sup> Article 39 of the CROC.

- 2.5.10 The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power provides a framework for governments to acknowledge and act upon victims' interests, especially within criminal proceedings. It states that victims of crime have rights of access to justice and fair treatment, restitution, assistance, and compensation. In the ACT there is victims of crime legislation, the *Victims of Crime Act 1994* (the VOC Act), which establishes a set of 'governing principles' or guidelines for the treatment of victims by public officers in the criminal justice system.
- 2.5.11 We note that young people detained at Bimberi may also be victims of crime, and deserve access to the same rights and services as other victims.

## 2.6 Audit summary

### Education

- 2.6.1 At Chapter 12 (education) of this Report we consider the provision of education to young people in the youth justice system. The right to education is enshrined in the International Covenant on Economic, Social and Cultural Rights (the ESCR). In applying young people's rights to the conditions for young people at Bimberi, we identify several issues of concern across school-based, vocational and living skills education. Overall we found that education was frequently interrupted by security and staff shortage issues, and that teachers at the Bimberi school, the Murrumbidgee Education and Training Centre (METC), have had to work with reduced resources.

### Rights engaged

- Right to education;<sup>15</sup>
- Primary education must be available and free to all, and governments should provide different forms of secondary education, including vocational education, available and accessible to every young person;<sup>16</sup>
- Young people deprived of liberty should not be denied the economic, social or cultural rights to which they would otherwise be entitled;<sup>17</sup>
- Every juvenile of compulsory school age has the right to appropriate education designed to prepare him or her for return to society. Young people who are illiterate or have cognitive or learning difficulties should have the right to special education. Particular attention should also be given to young people with particular cultural or ethnic needs;<sup>18</sup>
- Any certificates awarded to young people while in detention should not indicate in any way that the young person was institutionalised;<sup>19</sup>
- Young people should have access to an adequately stocked library;<sup>20</sup>
- A detained or imprisoned person shall have the right to obtain, within the limits of available resources, if from public sources, reasonable quantities of educational, cultural and informational material, subject to reasonable conditions to ensure security and good order in the place of detention or imprisonment;<sup>21</sup>
- Every young person has the right to receive vocational training in occupations likely to prepare him or her for future employment. Generally speaking, young people should be able to choose the type of work they wish to perform. Vocational programs should be suited to individual needs, interests and market-place opportunities, provide positive learning experiences, and systematically assess and improve the numeracy levels, literacy levels and the work-place knowledge, experience and qualifications of young people;<sup>22</sup> and
- Rights enshrined in the HR Act:
  - right to equality;
  - freedom of expression; and
  - protection of family and children.<sup>23</sup>

15 Article 13 of the ESCR.

16 Articles 28 and 29 of the CROC.

17 Rule 13 of the POJ.

18 Rules 38 and 39 of the POJ.

19 Rule 40 of the POJ.

20 Rule 41 of the POJ, Rule 40 of the SMR, and art 17(c) of the CROC.

21 Principle 28 of the BOP.

22 See Rule 41 of the SMR and AJJA Standards Part 4.2.

23 Sections 8, 16 and 11 of the HR Act.

Table 2.1: Summary of major school-based education issues identified

Subject Area	Discussion	Assessment	Report Section
Difficulties in delivering education	Education frequently interrupted by security and staff shortage issues. For several months during 2010 young people were placed in lockdown during the middle of the day to allow staff breaks.	Unreasonable limitation on the right to education, particularly right to have education tailored for young people in detention.	12.3
Resources	Teachers at the Bimberi school, the Murrumbidgee Education and Training Centre (METC), have insufficient supports for classroom teaching.	Unreasonable limitation on the right to education, particularly right to have education tailored for young people with learning difficulties.	12.3
Integration and collaboration between METC and Bimberi	METC is not fully integrated within Bimberi, with several areas in which communication could improve, including: <ul style="list-style-type: none"> <li>• Poor induction;</li> <li>• Lack of shared planning;</li> <li>• Lack of input into decision-making about METC;</li> <li>• Lack of input into decision-making about individual young people; and</li> <li>• Limited communication.</li> </ul>	Unreasonable limitation on the right to education, particularly right to have education tailored for young people in detention.	12.3
Library and research resources	While Bimberi has a library with a range of written material, young people do not have sufficient access to information technology to facilitate their education.	Access to library right not limited, but rights to education and expression perhaps unreasonably limited by lack of internet access.	12.3
General curriculum	Limited opportunities in Bimberi for young people who have already completed Year 10.  Access to vocational programs involving tools is sometimes denied by Bimberi management due to security.  Lack of provision of day release for school because it is a security issue for Bimberi management.	Potential unreasonable limitation on right to appropriate education designed to prepare for return to society.	12.4 and 12.5
Specific needs for rehabilitation	Programs lacking include: <ul style="list-style-type: none"> <li>• Therapeutic services to help young people address their offending behaviour;</li> <li>• Programs to support the cultural needs of Aboriginal and Torres Strait Islander students; and</li> <li>• Wider education needs, such as legal education and sexual health.</li> </ul>	Potential unreasonable limitation on the right to appropriate education designed to prepare for return to society. Right to equality also engaged.	12.3

Table 2.2: Summary of major vocational education and living skills issues identified

Subject Area	Discussion	Assessment	Report Section
Vocational training generally	Ad hoc and not provided on an ongoing or strategic basis. Vocational training not viewed as a fundamental part of Bimberi.	Potential unreasonable limitation on right to vocational training aimed at employment.	12.5
Security overriding delivery of vocational training	Resulted in prevention or delay of material and equipment being obtained for vocational programs, making it difficult for teachers to plan classes (eg nails not used in woodwork classes).  Metalwork room not used for considerable time.  Young people excluded from vocational programs in which they may have access to tools, without clear criteria or stated reasons for such decisions.	Potential unreasonable limitation on right to vocational training aimed at employment.	12.5
Living Skills	No formally developed living skills programs at Bimberi focusing on helping young people to develop their domestic skills. However, the Commission is aware that young people are required to keep their units neat and tidy, to wash their own clothes, to make the occasional meal in their unit and, through an incentive scheme, are encouraged to take on domestic tasks throughout the Centre.	Despite general requirements to perform domestic chores, lack of living skills program unreasonably limits right to rehabilitation.	12.6

## Health

- 2.6.2 At Chapter 13 (health) of this Report we consider the provision of health care to young people in the youth justice system. We note that human rights principles determine a minimum standard of equivalence, which generally requires that the level of service provided in a closed environment is consistent with that available in the community. However, evidence suggests that specialised intensive services for young people in custody will provide long-term benefits to those young people and the community.
- 2.6.3 The right to health care is enshrined in the ESCR, to which the Australian Government is a signatory. A joint research project between the ANU and the then ACT Department of Justice and Community Safety, funded by an Australian Research Council linkage grant, recommended the inclusion of specific economic, social and cultural rights including education and health care in the HR Act. The ACT Government is currently considering this recommendation.
- 2.6.4 The ACT Government submission to the Review notes that the promotion of the holistic health and wellbeing of children and young people in detention is vital to their rehabilitation and reintegration into the community. It advises that Justice Health (formerly known as the Corrections Health Program) has been providing services at Bimberi since it opened in December 2008. In relation to young people at Bimberi, the following rights and issues were identified.

## Rights engaged

- Right to health generally, which has been defined to include the right to control one's health and body, including sexual and reproductive freedom; and the right to be free from interference, such as the right to be free from non-consensual medical treatment.<sup>24</sup>
- Equivalence - young people in detention should receive adequate medical care, both preventative and remedial, including dental, ophthalmological and mental health care;<sup>25</sup>
- Health services should detect and treat any physical or mental illness, substance abuse or other condition that may hinder a young person's re-integration;<sup>26</sup>
- Prompt medical attention;<sup>27</sup>
- Examination by a doctor on admission;<sup>28</sup>
- A doctor who believes a young person is suffering because of continued detention, a hunger strike or any condition of detention should report this immediately;<sup>29</sup>
- Health information should be kept on a confidential file;<sup>30</sup>
- The involvement of Aboriginal Health Services in the provision of health and medical advice, assistance and care with respect to Aboriginal detainees and the funding arrangements necessary for them to facilitate their greater involvement;<sup>31</sup>
- Rights enshrined in the HR Act:
  - right to life;
  - right to liberty and security;
  - prohibition of torture and inhuman or degrading treatment or punishment;
  - humane treatment while in detention, including special protection of remandees;
  - protection of the family and children;
  - right to privacy;
  - freedom of thought, conscience and religion; and
  - right to equality.<sup>32</sup>

24 Article 12 of the International Covenant on Economic, Social and Cultural Rights (ESCR) includes this right. This definition is drawn from General Comment 14 of the UN ESCR Committee. The World Health Organisation also declared in 1946 that the highest attainable standard of health is a fundamental right of every human being, without distinction of race, religion, political belief, economic or social condition.

25 Rule 49 of the POJ.

26 Rule 51 of the POJ.

27 Rule 51 of the POJ. See also Rule 24 of the SMR.

28 Rule 50 of the POJ. See also Rule 24 of the SMR and Rule 24 of the BOP.

29 Rule 52 of the POJ. See also Rule 25 of the SMR.

30 Rule 19 of the POJ.

31 RCIADC Part 127(C).

32 Sections 9,18,10,19,11,12 and 8 respectively of the HR Act

Table 2.3: Summary of major health issues identified

Subject Area	Discussion	Assessment	Report Section
Throughcare and aftercare	Provision of primary care at Bimberi is generally good, but becomes difficult for young people exiting Bimberi to access.	Equivalence satisfied while in Bimberi, but concerns raised with release arrangements.	13.3
Nursing hours	Number of nursing hours at Bimberi has been reduced since Quamby.	Potential unreasonable limitation on right to equivalence and prompt health care.	13.3
Access to doctors and nurses	During periods of chronic staff shortages, it was difficult for doctors and nurses to see young people.	Unreasonable limitation on rights to equivalence and prompt health care.	13.3
Interaction between Bimberi management and health professionals	On some occasions, clinical decision-making was overruled by Bimberi management. This led to confusion regarding the provision of alcohol and other drug (AOD) treatments, and delay in young people receiving medical treatment.	Unreasonable limitation on rights to equivalence and prompt health care.	13.3
Delivery of medication	Difficulties identified with youth workers delivering such medication on time during staff shortages.	Unreasonable limitation on rights to equivalence and prompt health care.	13.3
Second opinions, family involvement and consent	Health Directorate policies/procedures exist on capacity and consent, however, lack of guidance around the provision of second opinions and family involvement in clinical decision-making for young people at Bimberi.	Engages consent to medical treatment right under HR Act. It is questionable whether the current policy and procedures represent a reasonable limitation.	13.3
Use of restraints	Reports of young people being restrained when leaving Bimberi for external health appointments.	Right to liberty, rights of remandees and special protection of child right engaged. Current procedures appear unreasonably limited.	13.3
Conflicting mental health philosophies	Divergent and at times conflicting philosophies among mental health service providers at Bimberi.	Potentially unreasonably limits rights to equivalence and continuity of health care.	13.4
Information sharing	Issues concerning the provision of critical information between health professionals and other staff at Bimberi.	Young people's safety potentially put at risk, but any change must be balanced with their right to privacy.	13.4
Counselling	A lack of general and specific AOD counselling services at Bimberi.	Potentially unreasonably limits rights to equivalence and continuity of health care.	13.5

## 2.7 Conditions of detention

- 2.7.1 Six years after the 2005 Quamby Audit, the Commission was impressed at the level of human rights dialogue occurring at all levels of the organisation, and the significant impact the CYP Act and policies were having on the ground. In many areas, we found that the recommendations of the 2005 Audit have been followed.
- 2.7.2 However, human rights compliance is not a static condition 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.

### *Behaviour management and discipline*

- 2.7.3 Youth justice detention centres such as Bimberi inevitably require a system to effectively manage the behaviour of the young people who reside there. It is a fundamental principle of justice and the rule of law that any sanction imposed under such a system, whether classified as disciplinary or criminal, must be clearly expressed and transparent. Human rights standards also mandate procedural fairness. As the 2005 Quamby 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 which is a part of the rehabilitative process and plays an important part in preventing unnecessary grievances.

### Rights engaged

- 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.<sup>33</sup>
- There is also the right to have such action reviewed by an impartial and independent authority.<sup>34</sup>
- The 2005 Quamby Audit expressed concerns with the remissions system then in place.

**Table 2.4: Summary of major behaviour management system issues identified**

Subject Area	Discussion	Assessment	Report Section
Remissions	Remissions system removed. Welcome Government's proposals to move to independent parole board.	No limitation on rights	14.2
BMS Policy	New Behaviour Management System Policy contemplates a behaviour management plan being developed for young people that provides the structure in which a young person's negative or challenging behaviour in custody is responded to and managed.	No limitation on rights.	14.2
Staffing levels	Participants raised concerns about how the policy is being implemented in practice, and whether it is possible to reach its goals with the current staffing levels.	Undermines intent of policy and may unreasonably limit right to procedural fairness.	14.2
Discrimination	Concerns raised by young people regarding discrimination, particularly on the grounds of gender, race and sexuality.	May unreasonably limit right to equality.	14.2
Double jeopardy	Contrary to the CYP Act and policies, young people may be being both punished internally and charged for alleged criminal offences within the Centre.	Unreasonable limitation on rights to procedural fairness and freedom from double jeopardy.	14.2

### Use of force/restraints

2.7.4 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. 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.

### Rights engaged

- Force may 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;<sup>35</sup>
- Obligation on the State to protect the '*child from all forms of physical or mental violence, injury or abuse*';<sup>36</sup>
- Prohibition against torture; and<sup>37</sup>
- Rights enshrined in the HR Act:
  - 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.<sup>38</sup>

33 Rule 30.2 of the SMR.

34 Rule 67 of the POJ; Principle 30.1 and 30.2 of the BOP; Rule 29 of the SMR.

35 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.

36 See Article 19 of CROC.

37 See CAT, OPCAT, Rule 67 Protection of Juveniles; Rule 31 SMR; and Principle 6 Body of Principles.

38 See sections 19, 10, 11 and 20.

Table 2.5: Summary of major use of force and restraint issues identified

Subject Area	Discussion	Assessment	Report Section
Restraint techniques	Issues identified with the restraint techniques being utilised at Bimberi, based on recent research from the United Kingdom.	Potentially unreasonably limits rights to life, freedom from torture and liberty.	14.3
De-escalation	Evidence that de-escalation techniques are not being implemented as often as they should.	Potentially unreasonably limits rights to life and liberty, and for force to be last resort.	14.3
Staff shortages	The use of force also seems to have increased during periods of staff shortage, suggesting this was due to staff having insufficient time to use de-escalation techniques.	Unreasonable limitation on right for force to be used as last resort.	14.3
Force to ensure compliance or in relation to minor behavior breaches	We are concerned that force is permitted under the CYP Act, the policy, and in practice, in relation to minor behaviour breaches or to achieve compliance with routine directions.	Potentially unreasonably limits right that force be used as last resort.	14.3
Recording of uses of force and restraint	It appears the use of force policy is not being followed, including in relation to the recording of uses of restraints.	Undermines auditing efforts, particularly in relation to the OPCAT.	14.3
Restraints used as routine behavior management technique or without risk assessment	Restraint use has also been used as a routine for some young people when they are escorted around the Centre. Similarly, restraints have been used on remandees attending medical appointments without a prior risk assessment to determine if such force is needed.	Unreasonable limitation on right that force be used as last resort, and specific rights of remandees.	14.3

### Segregation

2.7.5 The use of isolation or segregation in detention has been described as creating a ‘prison within a prison’,<sup>39</sup> 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.<sup>40</sup>

### Rights engaged

- 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; and
- Rights enshrined in the HR Act:
  - freedom of association;
  - freedom of movement;
  - the right to privacy;
  - right of children to special protection; and
  - the right not to be subjected to torture or cruel, inhuman or degrading treatment.<sup>41</sup>

39 UK Independent Monitoring Boards, *A Prison within a Prison: Independent Monitoring Boards Summary of the conditions reported in Segregation Units in Prisons in England and Wales* (2009).

40 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

41 HR Act sections 15, 13, 12, 11, 10 and 19.

**Table 2.6: Summary of major segregation issues identified**

Subject Area	Discussion	Assessment	Report Section
Safe room seldom used	As is appropriate for such a method of segregation, there are a high level of safeguards regarding the use of the safe room. These safeguards have been complied with and the safe room has rarely been used.	Reasonable limitation on rights.	14.4
Segregation Direction Reviews	The review process for safety or security segregation directions is insufficiently transparent and rigorous.	Unreasonable limitation on rights of liberty, association and procedural fairness.	14.4
Lack of appropriate recording	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.	Undermines auditing efforts, and transparency of segregation orders.	14.4
Education during segregation	Provision of education during segregation, despite being mandated in relevant policies, did not occur in practice.	Unreasonable limitation on rights to education.	14.4
Time Out	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. They have also been segregated in holding cells all day for refusing education.	No provision in ACT law for limitation on rights of liberty, association and procedural fairness.	14.4
Operational Segregation	There was also a lack of adequate recording of young people being secured in their units for operational reasons, for example staff shortages.	Unreasonable limitation on rights of liberty, association and procedural fairness.	14.4

## Searches

2.7.6 Tensions between young people's right to privacy and a detention centre's desire for security and safety are 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 generally 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.<sup>42</sup> Human rights standards apply to all searches, and there are specific rules around the most invasive, such as strip and body cavity searches.

## Rights engaged

- Article 16 of the CROC further 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;
- Generally, treatment is degrading when it arouses feelings of fear, anguish, inferiority and is debasing regardless of the intention of the policy or the conduct of the individual officer.<sup>43</sup> 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;
- 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. This is reflected in s.260 of the CYP Act, which requires that all staff present for a strip search, whether conducting the search or observing, are the same gender as the young person unless exceptional circumstances apply; and
- Rights enshrined in the HR Act:
  - inhuman or degrading treatment<sup>44</sup> and humane treatment while in detention; and <sup>45</sup>
  - privacy.<sup>46</sup>

42 Section 8 of the HR Act.

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

44 Section 10(1)(b).

45 Section 19.

46 Section 12.

Table 2.7: Summary of major searches issues identified

Subject Area	Discussion	Assessment	Report Section
Reduction from Quamby to Bimberi	The number of strip searches conducted in Bimberi has reduced significantly from when Quamby was operational.	Encouraging sign towards reasonable limitation of rights engaged by strip searching.	14.5
Strip searching increasing, nonetheless	In reviewing the search register and hearing from staff and young people, it appeared that strip searching was again returning to a state of routine at Bimberi, and that at times the relevant policies were not being followed. This included young people being routinely strip searched on their way to and from court.  Further, strip searches often followed automatically from room searches, and in some such cases, all young people in the wing or unit were strip searched.	Unreasonable limitation on rights to humane treatment and privacy.	14.5
Presence of opposite sex	Suggestion of presence of a member of the opposite sex during strip searching, either in person or via the CCTV camera.	Unreasonable limitation on rights to humane treatment and privacy, and contrary to CYP Act.	14.5
Support person	At times, staff did not consider whether a support person should be present, or seek the young person's consent to a support person not being present.	Unreasonable limitation on rights to humane treatment and privacy.	14.5
Alternatives to strip searching	Alternatives used in other jurisdictions (eg UK method using a gown) may provide the same level of security and compliance as a conventional strip search, but do so in a manner which is more respectful of the young person.	More reasonable limitation on humane treatment and privacy.	14.5
Room searching	Suggestion that young people were not present during room searches and had protected material removed (eg legal documents).	Unreasonable limitation on right to privacy.	14.5

### Classification

- 2.7.7 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 Audit. 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 mean that young women of all ages and status are accommodated together, which may be unavoidable to prevent isolation.
- 2.7.8 However, the Commission is concerned about the nature of the cells in the admission unit, Coree. 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.

## Rights engaged

- The POJ set 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;<sup>47</sup>
  - Parents or guardians must be notified immediately on admission and placement;<sup>48</sup>
  - 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;<sup>49</sup>
  - 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;<sup>50</sup>
  - 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 which ensure their protection from harmful influences and risk situations;<sup>51</sup> 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.<sup>52</sup>
- Rights enshrined in the HR Act:
  - special protection because of their vulnerability as a child;<sup>53</sup>
  - treatment that is appropriate to their age and their status;<sup>54</sup> and
  - Segregation Of Accused From Convicted Persons, Except In Exceptional Circumstances.<sup>55</sup>

**Table 2.8: Summary of major classification issues identified**

Subject Area	Discussion	Assessment	Report Section
Admission	The majority of young people surveyed reported being treated well on admission, and most reported feeling safe on their first night at Bimberi. Young people generally felt that the issues they presented with on admission (such as letting family know how they were feeling) were addressed.	No limitation of rights.	14.8
Mixing across the Centre	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.	Generally, no limitation on rights or such limitations were reasonable. See below for specific concerns.	14.8
Cells in the Coree (Admission) Unit	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.	Unreasonable limitation on rights to treatment appropriate to age, and freedom from inhumane treatment.	14.8

47 Rule 20.

48 Rule 22.

49 Rule 24.

50 Rule 25.

51 Rule 28.

52 Rule 35.

53 Sections 11(2) and 20.

54 Sections 11(2) and 20(2) and (4).

55 Section 19(2).

Table 2.8: Summary of major classification issues identified, *continued*

Subject Area	Discussion	Assessment	Report Section
Mixing in Coree	Criteria for separation does 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.	Unreasonable limitation on right for remandees not to be mixed with sentenced young people.	14.8
Security classifications	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.	Unreasonable limitation on right for remandees to be treated consistently with their status as innocent.	14.8
Accommodation for Aboriginal and Torres Strait Islander young people	Conjoining rooms not used appropriately in practice for Aboriginal and Torres Strait Islander young people.	Not compliant with recommendations of the RCIADC that Aboriginal and Torres Strait Islander young people be accommodated in conjoining cells.	14.8

### Communication, participation, visits and access to news

2.7.9 The rights of young people to communicate in a closed environment are broad. They span the right to communicate externally with friends, family, lawyers and oversight bodies, and the right to keep abreast of current affairs via news media. The right to communication also includes the right to have a say in the matters which affect young people at Bimberi. Overall, the rights to keep connected with family and others were upheld, but the Commission believes that more must be done to ensure that young people can articulate their views on decision-making in the Centre. Access to legal services could also be improved.

#### Rights engaged

- Young people 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;<sup>56</sup>
- In relation to participation and communication, articles 12 and 13 of the 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;
- In relation to mail and phone calls, article 14 of the CROC states that '*no child shall be subjected to arbitrary or unlawful interference with his or her correspondence*'. Rule 59 of the POJ states that young people should be allowed to communicate with family, friends and representatives of external organisations;
- In relation to specific communication, Principle 18 of the BOP gives special protection for a detained or imprisoned person to communicate, without delay or censorship and in full confidentiality, with legal counsel. 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;
- Young people should have the opportunity to keep themselves informed regularly of the news;<sup>57</sup>
- Young people should be helped to understand the regulations governing the closed facility.<sup>58</sup> If they have low literacy skills, information should be conveyed in a manner to enable full comprehension;<sup>59</sup>
- Rule 18 of the POJ states that young people should have the right of legal counsel and be enabled to apply for free legal aid, and to communicate regularly with their legal advisers; and
- Rights enshrined in the HR Act:
  - protection of family and children;<sup>60</sup>
  - freedom of expression;<sup>61</sup> and
  - right to privacy.<sup>62</sup>

<sup>56</sup> See Rules 59-61 of the POJ, Rule 26.5 of the Beijing Rules, Rule 37 of the SMR, Rule 20 of the Vienna Guidelines, articles 9(3) and 16 of the CROC.

<sup>57</sup> See in particular Rule 62 of the POJ.

<sup>58</sup> See also Rule 41, Principle 28 of the BOP, Rule 40 of the SMR, and art. 17 of the CROC.

<sup>59</sup> Rule 24 of the POJ and Rule 35 of the SMR.

<sup>60</sup> Section 11.

<sup>61</sup> Section 16.

<sup>62</sup> Section 12.

**Table 2.9: Summary of major communication issues Identified**

Subject Area	Discussion	Assessment	Report Section
Visiting area	Visiting area is 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 visits and a barbeque facility.	Reasonable limitations on right, if there are restrictions	14.11
Visiting times	Parents report difficulty visiting during week but appreciate new visiting Saturday morning visits (in addition to weekend evening visits). Young people surveyed report visitors generally treated 'well'.	Reasonable limitation. Better protects rights for young people to engage with family.	14.11
Public transport	Only one ACTION bus route to Bimberi, with only one bus service scheduled each afternoon. Does not coincide with visiting times. To catch bus visitor must wait for hour before and after visit.	Potentially limits rights for young people to engage with family and community.	14.11
Participation	Young people have insufficient participation opportunities in decision-making currently.	Unreasonable limitation on freedom of expression and participation rights.	14.6
Access to phone calls	Young people often reported limited access to phone calls, particularly in relation to disciplinary matters.	Unreasonable limitation on rights for young people to engage with family.	14.9
Phone call system	Phone system was not working properly for free calls to oversight agencies.	Unreasonable limitation on freedom of expression and independent oversight.	14.9
Explanation of rights and responsibilities	Young people reported that they were not provided with a copy of the residents handbook, which explains their obligations and rights in the Centre.	Unreasonable limitation on freedom of expression and ability to understand rights generally.	14.12
Access to news media	Young people felt that they had reasonable access to news media.	No limitation.	14.12
Access to lawyers	Young people in Bimberi provided free legal representation in criminal matters. Young people may obtain private legal representation also. Solicitors may visit Bimberi by appointment at any suitable time, and are not restricted to public visiting hours. Special protection for phone conversations with lawyers and oversight bodies	No limitation.	14.13
Staff shortages limited access to lawyers in practice	Staff shortages affected legal visits - some legal visits were cancelled at short notice, affecting the ability of solicitors to represent their clients.	Unreasonable limitation on access to justice.	14.13
Visiting legal service	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 Aboriginal Legal Service to make an appointment.	Potentially unreasonably limits access to justice and procedural fairness.	14.13

### *Food and clothing*

- 2.7.10 The employment of chefs to prepare meals on site at Bimberi appears to have resulted in a significant improvement to the quality and freshness of food provided to young people in detention since the 2005 Quamby Audit, where poor food quality was of great concern to young people. Similarly, young people were generally happy with the quality of clothing, with some exceptions. However, the greatest area of concern was in relation to footwear.

### Rights engaged

- Right to adequate food is fundamental and unconditional, it 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.<sup>63</sup>
- When detainees are removed from or leaving Bimberi for any purpose, they should be allowed to wear their own clothing or other inconspicuous clothing.<sup>64</sup>
- Rights enshrined in the HR Act:
  - right to life;<sup>65</sup>
  - freedom from inhumane or degrading treatment;<sup>66</sup>
  - right to humane treatment when in detention;<sup>67</sup> and
  - rights of minorities.<sup>68</sup>

**Table 2.10: Summary of major food and clothing issues identified**

Subject Area	Discussion	Assessment	Report Section
Food provision	Young people were generally very happy about the quality of food at Bimberi. However, young people and staff reported dissatisfaction about the quality of the catered food provided to young people when chefs are away.	No limitation, rights not engaged. However, we note that young people were more satisfied with food when chef on site.	14.7
Warm clothing	Lack of warm clothing identified by young people.	Engages right to humane treatment while in detention. Insufficient evidence to determine if reasonable.	14.10
Quality of footwear	Young people unhappy with quality of footwear, and suggestion of recycling of old shoes.	Potentially unreasonable limitation on right to humane treatment while in detention.	14.10

### Conclusion

- 2.7.11 The Commission found that many policies and procedures had changed significantly in the six years since the 2005 Quamby Audit. These changes reflect the recommendations of that Audit, and the requirements of the HR Act and accompanying human rights standards. This has entailed significant time and resources, and we welcome these changes.
- 2.7.12 The construction of Bimberi was also motivated in part by the desire for a Centre that could better provide a human rights compliant environment. We also welcome the Government's investment, and the resulting Centre.
- 2.7.13 However, in practice there continue to be some unreasonable limitations on human rights of young people at Bimberi. This has been largely driven by the lack of staffing numbers and resources, discussed throughout this Report and in particular in Chapter 5. These limitations also reflect the need for regular human rights auditing, to ensure that any gap between human-rights-compliant policies and actual practice can be quickly identified and addressed.

<sup>63</sup> Rule 37 of the POJ and Rule 20 of the SMR.

<sup>64</sup> Rule 36 of the POJ and Rule 17 of the SMR.

<sup>65</sup> Section 9.

<sup>66</sup> Section 10(1)(b).

<sup>67</sup> Section 19.

<sup>68</sup> Section 27.