
Memorandum of Advice

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Subject: Searches of children and young people in custody in custodial facilities in Tasmania



Contents

| | | |
|-----|--|----|
| 1. | Introduction | 3 |
| 2. | Summary of Recommendations | 4 |
| 3. | Role of the Commissioner for Children and Young People | 5 |
| 4. | Terminology | 6 |
| 5. | What prompted this Advice? | 6 |
| 6. | This is not a new issue | 7 |
| 7. | Briefings from Tasmanian Government agencies | 9 |
| 8. | Current Tasmanian legislation, policies, procedures and practice | 10 |
| | <i>8.1 Children and young people can be held in custody in various custodial settings</i> | 10 |
| | <i>8.2 Different rules for searches apply in different custodial settings</i> | 11 |
| | 8.2.1 Searches where a child or young person is a watch-house detainee in a reception prison | 12 |
| | 8.2.2 Searches where a child or young person is a watch-house detainee in police custody | 14 |
| | 8.2.3 Searches where a child or young person is in custody in a detention centre | 15 |
| 9. | Human rights standards, principles and rules | 16 |
| 10. | What can we learn from others? | 18 |
| | <i>10.1 Impact of searches</i> | 18 |
| | <i>10.2 Managing risk in custodial settings</i> | 20 |
| | <i>10.3 Approaches in other jurisdictions</i> | 22 |
| | 10.3.1 Northern Territory | 22 |
| | 10.3.2 Australian Capital Territory | 23 |
| 11. | Discussion and recommendations | 25 |



1. Introduction

This Advice is intended to assist Tasmanian Government agencies to better promote and protect the wellbeing and best interests of children and young people in their custody in custodial facilities, by ensuring relevant legislation, policies and procedures regarding searches, particularly strip searches, are in line with well-established human rights standards and principles and contemporary best practice.

While recent media reports relating to the practice of routine strip searching of children at Hobart Reception Prison have, in part, led to my decision to provide this Advice, I have determined its scope should be broader in focus to encompass the circumstances of all children and young people held in custody in custodial facilities who may be subjected to searches (including in police watch-houses, reception prisons and detention centres). Additionally, while this Advice has a particular focus on strip searches, it is necessary to consider strip searching within a continuum of alternative available search types, from the least intrusive to the comparatively more intrusive.

This Advice considers when and why searches of children and young people may occur in custodial facilities in Tasmania by outlining the different legislative frameworks and authorities, policies and procedures. It is apparent that different rules apply to searches of children and young people in custody across different custodial settings. It is in my opinion necessary and desirable for there to be a consistent approach to all searches, including strip searches, of children and young people across all custodial facilities where they may be detained (including in police watch-houses, reception prisons and detention centres).

Data recently released by the Department of Justice shows that, in the 2018 calendar year, 218 minors in custody of the Tasmania Prison Service were subject to a strip search by Tasmania Prison Staff.¹ Furthermore, data released by the Department of Communities Tasmania shows that a total of 203 unclothed searches were conducted on children and young people at Ashley Youth Detention Centre during the period 1 June 2018 to 30 November 2018. No contraband was found as a result of any of those searches.²

As I have made very clear in my public comments on this issue, I believe the practice of routine strip searching of children and young people in custody in custodial settings is not acceptable, and that a proportionate risk-based approach to all searches would be more in line with human rights principles and standards. This Advice explains the basis for my view and suggests a way forward, which I believe can be achieved in a way that appropriately maintains and promotes the safety and security of custodial environments for children and young people, staff, visitors and others.

¹ https://www.justice.tas.gov.au/_data/assets/pdf_file/0007/460636/Strip_search-of-minors-statistics-2018.pdf

² Department of Communities Tasmania, Right to Information Decision – Public Disclosure Log Right to Information No.: RTI201718-020-CT, 21 February 2019 https://www.dhhs.tas.gov.au/_data/assets/pdf_file/0008/366299/RTI201819-020-CT.pdf; As I understand it, this data relates only to searches undertaken at Ashley Youth Detention Centre. This data relates to total numbers of searches, not total numbers of individuals.



2. Summary of Recommendations

In summary, the recommendations I make in this Advice at Part 11 are as follows:

Recommendation 1:

- a. The practice of *routine* strip searching of children and young people in custody cannot be justified and should cease.

- b. Legislation authorising searches of children and young people in custody in all custodial premises in Tasmania should reflect the fundamental human right standard that searches of children and young people in custody should be conducted only *when reasonable, necessary and proportionate to a legitimate aim*.

Recommendation 2:

The legislative bases for all searches of children and young people in custody in Tasmania should be clarified and consolidated to provide a single, unambiguous point of reference.

Recommendation 3:

Consideration should be given to introducing in legislation applicable to all searches of children and young people in custody:

- a statement as to guiding principles;
- a clearly stepped out hierarchy of searches; and
- clear criteria to guide a determination of which type of search is permissible and justified in particular circumstances.

The principles, hierarchy of searches and criteria to guide decision making should reflect fundamental human rights standards and principles, including that searches of children and young people in custody should be conducted *only when reasonable, necessary and proportionate to a legitimate aim* and should be developed by agencies in consultation with stakeholders.

Recommendation 4:

Consideration should be given to investing in alternative security strategies or technologies such as body scanners which would further minimise reliance on more invasive searches such as strip searches.

Recommendation 5:

Having regard to relevant human rights standards, and no matter the type of search conducted, the use of force should be limited to circumstances of last resort and, if force is required, there should be clear lines of authorisation.



Recommendation 6:

Regulations should clearly outline the way in which searches of children and young people in custody are to be conducted so as to promote the dignity and self-respect of the child or young person concerned and to minimise any associated trauma, distress or other harm.

Recommendation 7:

The key elements of the legislative and regulatory framework governing searches of children and young people in custody should be provided to children and young people in an accessible format before a search is conducted. This information should explain their right to make a complaint and the process for doing so.

Recommendation 8:

All searches of children and young people in custody in custodial settings should be recorded on a search register. Search registers should be available for inspection or review by independent statutory officers with relevant monitoring or inspectorate functions.

3. Role of the Commissioner for Children and Young People

The statutory office of Commissioner for Children and Young People is established under the *Commissioner for Children and Young People Act 2016* (CCYP Act). The Commissioner's functions, which are set out in section 8(1) of the CCYP Act, include:

- advocating for all children and young people in the State generally;
- researching, investigating and influencing policy development into matters relating to children and young people generally;
- promoting, monitoring and reviewing the wellbeing of children and young people generally;
- promoting and empowering the participation of children and young people in the making of decisions, or the expressing of opinions on matters, that may affect their lives; and
- assisting in ensuring the State satisfies its national and international obligations in respect of children and young people generally.

In performing these and other functions under the CCYP Act, the Commissioner is required to do so according to the principle that the wellbeing and best interests of children and young people are paramount and must observe any relevant provisions of the *United Nations Convention on the Rights of the Child*.³

The Commissioner is required to give special regard to the needs of children and young people who are vulnerable or disadvantaged for any reason. The Commissioner's work must also be performed according to the principle that the views of children on all matters affecting them

³ CCYP Act, s3(1)



should be given serious consideration and taken into account and that children are entitled to live in a caring and nurturing environment and to be protected from harm and exploitation.⁴

While the Commissioner's statutory functions do not allow the Commissioner to initiate an investigation or review of a specific decision made in respect of an individual case or specific circumstances, the Commissioner can investigate or otherwise deal with any matter affecting the wellbeing of children generally when it is raised through a matter relating to a specific child.⁵

Section 11(2)(e) of the CCYP Act provides a general power to the Commissioner to advise and make recommendations, in relation to the rights and wellbeing of children and young people, to Ministers, State authorities and other organisations.⁶

Legislation, policy and procedures relating to the searching of children and young people in custody have the capacity to affect the rights and wellbeing of Tasmania's children and young people generally.

4. Terminology

For the purposes of this Advice:

- The terms "child" and "young person" mean a person who has not attained the age of 18 years.⁷
- The term "search" means a personal search of a child or young person's body and may include but is not limited to a pat down search, frisk search, scanner or wand search, or strip search.
- The term "strip search" means a search during which a child or young person may be required to remove most or all of their clothing and may involve a visual examination of the person's clothes or body. A strip search is sometimes called an unclothed search or a personal unclothed search. A strip search does not include touching of the person's body or a body cavity search.
- The term "body cavity search" means a search of a child or young person's rectum or vagina.

5. What prompted this Advice?

On 12 January 2019, *ABC News* reported an incident involving the strip searching of a 13-year-old Aboriginal girl at the Hobart Reception Prison. An online news article included a statement from the Department of Justice that, 'all people who are taken into custody are strip searched,'

⁴ CCYP Act, s3(2). "Vulnerable", in relation to a child or young person, is defined in section 4 of the CCYP Act to include a child or young person who is the subject of proceedings under the *Youth Justice Act 1997*.

⁵ See s14(1)(a) and s14(2)(c) of the CCYP Act.

⁶ I should note that the CCYP Act does not provide the Commissioner with any function or power to provide legal advice.

⁷ CCYP Act, s4.



and 'in this instance, all procedures for the strip search of a minor were followed.'⁸ Concerns were subsequently expressed in the media and to me about the alignment of the apparent practice of routine strip searching of all children and young people admitted to reception prisons with well-established human rights principles and the impact of strip searching on children and young people generally.

In February 2019, the *Mercury* reported a subsequent incident involving an 11-year-old boy detained and strip searched at the Hobart Remand Centre. The 15 February article reported that '[a] Department of Justice spokesman said any person coming into the custody of the Tasmanian Prison Service was strip searched as part of the reception process and in accordance with the Directors Standing Order, which states searches are done "in order to maintain the safety and security of the prison and prevent suicide, self-harm and contraband from entering".'⁹ The article referred to a partially redacted copy of the relevant Director's Standing Order which is available on the Department of Justice website.¹⁰

As earlier indicated, although generally speaking I cannot initiate a review of a particular incident relating to the individual child, I can investigate any matter affecting the wellbeing of children generally when it is raised through the circumstances of a particular child.

Because I do not believe that the routine strip searching of children and young people is consistent with fundamental human rights principles, I decided to look into the relevant legislation, policies and procedures.

6. This is not a new issue

It is important to note that there has been previous consideration of approaches to searching, and especially strip searching, of children and young people in Tasmania:

- In 2012 former Commissioner for Children Aileen Ashford raised concerns about the strip searching of children and young people by police under the *Misuse of Drugs Act 2001*. Tasmania Police subsequently reviewed their protocols and amended the Tasmania Police Manual to introduce stringent requirements governing the strip searching of children and young people under that Act. These new requirements did not however affect the policies or protocols of other agencies in custodial settings.
- Following a review of youth justice in 2013, a number of amendments were made to the *Youth Justice Act 1997* (YJ Act). Section 19 of the *Youth Justice (Miscellaneous Amendments) Act 2013*, which I understand has never commenced, would insert a new section 25A into the YJ Act to provide for additional requirements regarding searches of youths in custody in custodial premises to be prescribed by regulation. The term

⁸ Koch A, 'Aboriginal girl traumatised after police strip search in Hobart', *ABC News*, 12 January 2019, <https://www.abc.net.au/news/2019-01-12/claims-aboriginal-girl-traumatised-after-police-strip-search/10709932>

⁹ Kinniburgh C, '11-year old boy strip searched and locked up in Hobart', *Mercury*, 15 February 2019, <https://www.themercury.com.au/news/scales-of-justice/11-year-old-boy-strip-searched-and-locked-up-in-hobart/news-story/2b274f8e944c2c33d62b32e1996aaead>;

¹⁰ Tasmania Prison Service, Director's Standing Order DSP – 1.10 Searching, https://www.justice.tas.gov.au/_data/assets/pdf_file/0005/439421/1-10-Searching-Redacted.pdf



'custodial premises' would mean a prison, detention centre, police station or watch-house. According to the Clause Notes for the Bill, regulations could include detailed requirements for how, where and by whom a search is conducted, as well as specific requirements for different kinds of searches (for example frisk searches, strip searches, body cavity searches).¹¹ During debate on the Bill, the then Minister for Children announced a review of the practice of searching young people in custody.

On 28 October 2013, Children and Youth Services in the then Department of Health and Human Services, invited public comment in response to the *Personal Searches of Young People in Custodial Premises Consultation Paper*. In her response to that paper, former Acting Commissioner for Children Elizabeth Daly emphasised the human rights principles that must inform the practice of personal searches of young people in custody and the inherently harmful nature of routine personal unclothed searches of this vulnerable cohort. Acting Commissioner Daly advocated for the practice of routine personal unclothed searches of young people in custodial premises to cease and recommended that such searches should only be conducted where there is a belief based on reasonable grounds that a young person poses a particular risk and that the search may reveal an item that could be used to realise that risk.¹² As far as I am aware, the outcomes of that consultation process were not made public.

- In 2017, Tasmania's Ombudsman undertook an own motion investigation into strip searching procedures for women at the Hobart Reception Prison.¹³ That investigation led to a number of recommendations including in relation to training for officers involved in searches in remand centres, and the type of information provided to women prior to a search being conducted. In his November 2017 report of that investigation, the Ombudsman noted the routine strip searching of all detainees, including juveniles, who enter the Hobart Reception Prison, and said:

whether that procedure of blanket strip searches for all who are taken into custody is justifiable, including those being held for questioning or who will be bailed when sober, is not so clear. It comes down to the balance between security and dignity. Security considerations are very real and include concerns about suicide, self-harm and the potential threat that smuggled weapons or drugs pose to correctional and police officers, other detainees and court staff.¹⁴

The Ombudsman suggested that Tasmania Prison Service review whether a blanket requirement of strip searching is required at Hobart Reception Prison (although he did not make this a formal recommendation). In the same report, the Ombudsman also made the following relevant comment:

¹¹ http://www.parliament.tas.gov.au/bills/Bills2012/pdf/notes/51_of_2012-Clause%20Notes.pdf

¹² Commissioner for Children, *Commissioner for Children Tasmania Annual Report 2013–2014*, 11.

¹³ Ombudsman Tasmania, *Investigation into the strip searching procedures for women at the Hobart Reception Prison*, 20 November 2017, https://www.ombudsman.tas.gov.au/_data/assets/pdf_file/0003/397416/Own-motion-investigation-report.pdf

¹⁴ Ombudsman Tasmania, *Investigation into the strip searching procedures for women at the Hobart Reception Prison*, 20 November 2017, 12, https://www.ombudsman.tas.gov.au/_data/assets/pdf_file/0003/397416/Own-motion-investigation-report.pdf



The Director said that in hindsight, the transfer of the Hobart and Launceston watch-house facilities to the TPS seems to have been a poorly thought out plan. He said that at the time of the transfer, proper consideration does not appear to have been given to the supporting legislation, division of responsibilities, juveniles or issues such as police officers being expected to perform the role of correctional officers but with no training as a correctional officer or instruction in correctional standing orders.¹⁵

7. Briefings from Tasmanian Government agencies

In this section I summarise information from Tasmanian government agencies that has assisted my consideration of relevant issues.

- a. On 24 January 2019, I wrote to relevant Ministers to request a briefing on:
- the legislation, policies and procedures governing the strip searching of children and young people aged less than 18 years who are held in a watch-house or Correctional facility such as the Hobart Reception Prison; and
 - the circumstances in which, and the legislative basis upon which, it is permissible to detain in either a reception prison or watch-house a child or young person aged less than 18 years.

On 26 February 2019 I received a briefing from representatives of Tasmania Police, the Department of Justice and the Tasmania Prison Service on matters relevant to the above. During that briefing I was advised that work was underway to develop a risk assessment process to be undertaken prior to a search of a child or young person held in a reception prison. This would inform correctional officers of the level of risk and the appropriate level of search required to mitigate that assessed risk.

In March 2019 I sought, and subsequently received, additional information from the Department of Justice and Tasmania Police regarding the legislative basis upon which a child or young person who is transferred to a reception prison following their arrest by police and pending interview or Court may be strip searched.

- b. On 21 February 2019, the Secretary of the Department of Communities Tasmania wrote to me in relation to unclothed searches at Ashley Youth Detention Centre (AYDC). Specifically the Secretary advised that the current procedure governing unclothed searches contained several safeguards. She also noted that:

The procedure is, of course, subject to the requirements of the Act. To ensure that is the case in practice, I have directed the Deputy Secretary, Children to ensure that detention centre staff are aware that all searches are subject to the detention centre manager's discretion, and the exercise of that discretion can be limited by the Act depending on the circumstances. For example, the decision may need to be based on reasonable grounds,

¹⁵ Ombudsman Tasmania, *Investigation into the strip searching procedures for women at the Hobart Reception Prison*, 20 November 2017, 29, https://www.ombudsman.tas.gov.au/_data/assets/pdf_file/0003/397416/Own-motion-investigation-report.pdf



or on the opinion that it is necessary in the interests of security or good order of the detention centre.

- c. On 26 February 2019, the Department of Communities Tasmania provided me with a copy of the following information it had disclosed pursuant to a right to information request relating to unclothed searches at AYDC:
- Ashley Youth Detention Centre Standard Operating Procedure #7; and
 - search data for the period 1 June 2018 to 30 November 2018¹⁶ (this data is publicly available).

By letter dated 29 April 2019, the Secretary invited me to provide comment on an amended draft search procedure for AYDC.

- d. On 15 March 2019, further media reports indicated that the Department of Justice had disclosed statistics in response to a right to information request regarding the strip searching of minors in the custody of the Tasmania Prison Service in the 2018 calendar year.¹⁷ Those statistics are available on the Department of Justice website.¹⁸

8. Current Tasmanian legislation, policies, procedures and practice

In this section of my Advice I outline:

- a. possible pathways for a child or young person taken into custody following an arrest; and
- b. my understanding of the legislation, policy, procedures and practice relating to searches which apply to a child or young person in custody depending on the custodial setting in which they find themselves.

8.1 Children and young people can be held in custody in various custodial settings

Where a person is arrested by police they can be detained while investigations are carried out or until they can be taken to Court.¹⁹ During this time in custody, the person can be transferred to the custody of a correctional officer of a reception prison.²⁰ Further, the YJ Act requires that a

¹⁶ Department of Communities Tasmania Right to Information Decision – Public Disclosure Log Right to Information No.: RTI201718-020-CT https://www.dhhs.tas.gov.au/_data/assets/pdf_file/0008/366299/RTI201819-020-CT.pdf

¹⁷ Holmes A, 'Forty-six children aged 13 and under strip searched after being taken into police custody in Tasmania in 2018', *The Examiner*, 15 March 2019, <https://www.examiner.com.au/story/5957303/dozens-aged-13-and-under-strip-searched-in-2018/>; Kinniburgh C, 'Outcry grows over strip searches of minors with calls to end 'state-sanctioned physical abuse'', 15 March 2019, <https://www.themercury.com.au/news/scales-of-justice/outcry-grows-over-strip-searches-of-minors-with-calls-to-end-statesanctioned-physical-abuse/news-story/df5c357d2c2a6434335b81c7c594c3d5?login=1>

¹⁸ https://www.justice.tas.gov.au/_data/assets/pdf_file/0007/460636/Strip-search-of-minors-statistics-2018.pdf

¹⁹ The power to detain a person to enable investigations or pending their appearance in court is contained in section 4(2) of the *Criminal Law (Detention and Interrogation) Act 1995*.

²⁰ Transfer to the custody of a correctional officer of a reception prison is permitted under section 16(2)(c) the *Criminal Law (Detention and Interrogation) Act 1995*.



youth not admitted to police bail is to be detained in a watch-house while waiting to be taken to Court.²¹ I am advised that reception prisons have been approved as watch-houses²² and that where a reception prison is available it is used for the purpose of detention at every opportunity.²³ I understand that children and young people transferred to a reception prison in this context are commonly referred to as “watch-house detainees”.

In practice, it is my understanding that children and young people who are arrested and detained by police in the North and South are transferred as soon as possible to a reception prison pending their appearance in Court, while in the North-West children and young people are generally detained in a police watch-house unless transferred to the Launceston Reception Prison.

If a Court remands a child or young person in custody or sentences them to a period of detention then they may be detained at AYDC or at another detention centre established under the YJ Act.²⁴ I acknowledge, as was noted by the Custodial Inspector in his 2018 report of his inspection of AYDC, that while the Minister has declared otherwise adult prisons to be detention centres for the purposes of the YJ Act, “it would be extremely rare in practice for a young person to be detained for any length of time in an adult custodial centre.”²⁵

8.2 Different rules for searches apply in different custodial settings

As I hope is apparent from this section of my Advice, a number of different legislative frameworks, authorities, policies and procedures relating to searches apply to children and young people across the variety of custodial premises I have briefly described above.

There is variability in when, why and how children and young people in custody may be searched depending on their custody status and where they are detained. As I understand it, for example, a child or young person in custody may be strip searched as they move between, or in and out of custodial settings. I have set out some examples below, which are not intended to be exhaustive.

²¹ Section 25 of the YJ Act.

²² Under section 3 of the YJ Act **watch-house** means –

(a) a building or part of a building at a police station used for the confinement of persons under arrest or otherwise lawfully detained in custody; and

(b) a place approved by the Minister under subsection (2) ;

Section 3(2) of the YJ Act provides that, “[t]he Minister, in writing, may approve a place as a watch-house”. I have been advised that in 2000 the Minister for Health and Human Services (who then had administrative responsibility for the YJ Act) approved the Hobart Remand Centre and the Launceston Remand Centres (as they were then known) as watch-houses.

²³ Tasmania Police Manual, 7.3.2 <https://www.police.tas.gov.au/uploads/TPM-RTI-18-December-2018.pdf>

²⁴ See section 123 and section 125 of the YJ Act.

²⁵ Custodial Inspector, *Inspection of Ashley Youth Detention Centre in Tasmania, 2017 – Health and Wellbeing Inspection Report*, October 2018, p10 https://www.custodialinspector.tas.gov.au/data/assets/pdf_file/0003/451614/FINAL-AYDC-Health-and-Wellbeing-Inspection-Report-30-October-2018-PDF.PDF



8.2.1 Searches where a child or young person is a watch-house detainee in a reception prison

I have been advised that once a child or young person is transferred to a reception prison as a watch-house detainee, they are subject to the provisions of the *Corrections Act 1997* (the Corrections Act).

I note that the Corrections Act includes a number of guiding principles, which, to the extent they apply to children and young people who are watch-house detainees in custody in reception prisons, are of relevance. These include that procedures should be fair, equitable and have due regard to personal dignity and individuality, as far as is consistent with the need for appropriate levels of security and control.²⁶

I have also been advised that under the Corrections Act, the Director of Corrective Services (the Director) may order a correctional officer to undertake a search of persons in a prison (not limited to prisoners). Under section 22(1A)(2), the Director may, for the security and good order of the prison or the prisoners or detainees²⁷, at any time, order a correctional officer to –

(a) search or examine, or search and examine, a prisoner or detainee, a visitor to the prison, a correctional officer or any person appointed or employed for the purposes of this Act or any other person in the prison; or

...

(c) conduct any search or examination, or search and examination, under this subsection at random.

The Director may make standing orders for the management and security of prisons and for the welfare, protection and discipline of prisoners and detainees²⁸ and may also make correctional standing orders in respect of the welfare, protection and management of persons in custody who have been arrested and detained by police and transferred to the custody of a correctional officer of a reception prison (for example pending interview or an appearance in Court)²⁹. Correctional officers at a reception prison must ensure that all persons so transferred are treated in accordance with any correctional standing orders made by the Director.³⁰ If a search in a reception prison is conducted under the above provisions, a police officer may be called upon to assist.³¹

²⁶ Corrections Act, s4.

²⁷ Section 3 of the Corrections Act defines a prisoner as 'a person who is subject to an order of a court by which he or she is sentenced to a term of imprisonment and includes a person declared as a dangerous criminal under section 19 of the Sentencing Act 1997'. Section 3 of the Corrections Act defines a detainee as 'a person, other than a prisoner, who is subject to an order of a court by which he or she is remanded or otherwise committed to prison'.

²⁸ Section 6(3) of the Corrections Act.

²⁹ Section 16(2)(c) and section 17(2) of the *Criminal Law (Detention & Interrogation) Act 1995*.

³⁰ Section 17(1) of the *Criminal Law (Detention & Interrogation) Act 1995*.

³¹ All police officers are correctional officers by virtue of section 5(6) of the Corrections Act.



Director's Standing Order 1.10 provides for categories of searches and their authorisation requirements.³² I am advised that searches of watch-house detainees are currently undertaken in accordance with this DSO, which relevantly provides that:

8.1.7.2 All watch-house detainees are required to be strip searched on admission to a watch-house and Part 6, Division 3 of the Youth Justice Act (1997) allows for the strip searching of young people detained at a watch-house.

8.1.7.3 A young person in custody at a watch-house is likely to be particularly vulnerable during a strip search and therefore every effort must be made to minimise the potential negative impact of a search on a young person.

8.1.7.4 If a young person refuses to be strip searched reasonable force may be approved in accordance with Standing Order 1.02 (Use of Force) by the relevant Superintendent.

DSO 1.10 uses the following terminology when describing strip searches:

Full search (half/half technique) – a strip search involving the visual search of a person which involves the removal of all items of clothing and the bending at the waist and parting of the buttock cheeks.

Modified Strip Search – A full Strip Search, without the bending at the waist and parting of the buttock cheeks.

Strip search (non-compliant) – A prisoner who refuses to obey a lawful direction given by a correctional officer to be strip searched or who is non-compliant during a strip search may be subjected to a strip search using force in accordance with Director's Standing Order 1.02 Use of Force.

I have been advised that Director's Standing Order 1.35 – Watch-house Detainees, defines the roles and responsibilities of the Tasmania Prison Service and Tasmania Police regarding the custody, management and care of watch-house detainees. That DSO is not publicly available.

Data recently released by the Department of Justice shows that, in the 2018 calendar year, 218 minors in custody of the Tasmania Prison Service were subject to a strip search by Tasmania Prison Staff (135 at the Hobart Reception Prison and 83 at the Launceston Reception Prison). Sixty (60) of the total 218 minors who were subject to a strip search were Indigenous. The data also indicates that 46 minors who were subject to a strip search were aged less than 14 years (3 were 11 years old, 6 were 12 years old and 37 were 13 years old). The data does not include information as to how many of these minors were "watch-house detainees" as opposed to detainees under the YJ Act, nor does it include information as to whether any contraband was found.³³

I have been advised that work is currently underway within the Department of Justice to develop a risk assessment process to be undertaken prior to a search of a child or young person held in

³² Tasmania Prison Service, Director's Standing Order DSO – 1.10 Searching https://www.justice.tas.gov.au/_data/assets/pdf_file/0005/439421/1-10-Searching-Redacted.pdf; For the purposes of DSO 1.10, a watch-house detainee is a person detained in custody by a police officer pending an interview, bail decision or court appearance, or a person held in a place of safety under the authority of section 4A of the *Police Offences Act 1935*.

³³ https://www.justice.tas.gov.au/_data/assets/pdf_file/0007/460636/Strip_search-of-minors-statistics-2018.pdf



a reception prison to inform correctional officers of the level of risk and the appropriate level of search required to mitigate that assessed risk.

8.2.2 *Searches where a child or young person is a watch-house detainee in police custody*

Police may search children and young people in their lawful custody in certain circumstances. I am advised that the power of police generally to search arrested persons comes from section 58B of the *Police Offences Act 1935*:

58B. Search of accused person in custody

(1) If a police officer believes on reasonable grounds that it is necessary to search a person who is in lawful custody, a police officer may search that person –

(a) for the purpose of ascertaining whether there is concealed on that person or in that person's clothing a weapon or other article capable of being used to inflict injury or to assist that person to escape from custody; or

(ab) for the purpose of removing into safe keeping any other articles belonging to, or in the possession of, the person; or

(b) for the purpose of obtaining evidence relating to the commission of the offence or preventing the loss or destruction of such evidence.

(2) Subsection (1)(b) does not authorise a police officer to require a person to remove any clothing unless there are reasonable grounds for believing that the removal may provide evidence of the commission of an offence.

(3) A police officer may take and retain –

(a) any weapon or article found as a result of the search under subsection (1)(a) ; and

(b) any article of clothing removed under subsection (2) .

(4) A police officer may use such force as is reasonably necessary for the purposes of exercising powers under this section.

(5) Nothing in this section prevents a search of a person in lawful custody in any circumstances where it is otherwise lawful to search the person.

I am advised that searches of children and young people by police officers held in a police watch-house are informed by a risk assessment process.

Police have broad search powers under other legislation including the *Misuse of Drugs Act 2001*. In 2012 specific protocols in relation to searches of children and young people under that Act were developed incorporating advice from the Commissioner for Children at the time and included into the Tasmania Police Manual (TPM). The TPM requires among other things that a strip search of a person under 18 years of age must only be conducted when authorised by law and if the member conducting the search believes on reasonable grounds that the seriousness and urgency of the circumstances require a strip search. Police officers are required, by order,



to obtain authorisation from an inspector prior to conducting a strip search of a person aged less than 18 years.³⁴

8.2.3 Searches where a child or young person is in custody in a detention centre

Searches of children and young people who are detainees under the YJ Act are permitted under section 131(2) of that Act:

s131(2) The detention centre manager may –

(a) cause a detainee to submit to a search for the presence of weapons, metal articles, alcohol, articles capable of being used as weapons, drugs or any other things which the regulations prohibit from being taken into a detention centre –

(i) as soon as possible after the detainee is admitted to the centre or returns after temporary leave of absence; and

(ii) at any time when the manager believes on reasonable grounds that the detainee may have in his or her possession any weapon, metal article, alcohol, article capable of being used as a weapon, drug or other thing which the regulations prohibit from being taken into a detention centre; and

(b) if in the manager's opinion it is necessary to do so in the interests of the security or good order of the detention centre, cause a detainee to submit to a search and the examination of the detainee and of any thing in his or her possession or control;

A standard operating procedure applies to searches of children and young people detained at AYDC. According to the Department of Communities Tasmania, the current procedure provides that:

... searches may be conducted on return to the centre or where the manager's opinion is that it is necessary in the interests of security of the centre. Searches of the person include clothed searches by 'pat down' or metal detecting wand and 'unclothed searches'.³⁵

Data recently released by the Department of Communities Tasmania in response to an application for assessed disclosure under the *Right to Information Act 2009* shows that a total of 203 unclothed searches were conducted on children and young people during the period 1 June 2018 to 30 November 2018. No contraband was found as a result of any of those searches. I note with concern that 113 (more than 50 per cent) of those strip searches related to Aboriginal and Torres Strait Islander children and young people.³⁶

As noted above, the Secretary of the Department of Communities Tasmania has directed the Deputy Secretary Children to ensure that detention centre staff are aware all searches are subject to the detention centre manager's discretion and the exercise of that discretion can be limited by the YJ Act depending on the circumstances.

³⁴Tasmania Police Manual, 120, <https://www.police.tas.gov.au/uploads/TPM-RTI-18-December-2018.pdf>

³⁵ Department of Communities Tasmania, Right to Information Decision – Public Disclosure Log Right to Information No.: RTI201718-020-CT, 21 February 2019; https://www.dhhs.tas.gov.au/_data/assets/pdf_file/0008/366299/RTI201819-020-CT.pdf;

³⁶ Department of Communities Tasmania, Right to Information Decision – Public Disclosure Log Right to Information No.: RTI201718-020-CT, 21 February 2019 https://www.dhhs.tas.gov.au/_data/assets/pdf_file/0008/366299/RTI201819-020-CT.pdf; As I understand it, this data relates only to searches undertaken at AYDC. This data relates to total numbers of searches, not total numbers of individuals.



9. Human rights standards, principles and rules

Australia is a signatory to a number of international human rights instruments of relevance to the detention and treatment of children and young people in custody.³⁷

The practice of searching, and especially strip searching, children and young people in custody engages a number of children's rights including the right to have their best interests protected and promoted, the right to be protected from violence, abuse or neglect, the prohibition against inhuman or degrading treatment, and the prohibition against arbitrary or unlawful interference with their privacy.

In examining the practice of searching children and young people in custodial settings and relevant legislation and policy, it is appropriate to do so taking account of well-established standards and principles set out in relevant human rights instruments and rules including the United Nations *Convention on the Rights of the Child* (CRC), the United Nations *Rules for the Protection of Juveniles Deprived of their Liberty* (the Havana Rules), the United Nations *Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules) and the United Nations *Standard Minimum Rules for the Treatment of Prisoners* (the Nelson Mandela Rules).

The four key principles of the CRC which help guide interpretation of the CRC as a whole are: the child's right to non-discrimination (Article 2), the child's right to have their best interests taken into account as a primary consideration in all actions and decisions that affect them (Article 3), the child's right to life, survival and development (Article 6), and the child's right to have a say in all matters affecting them and for their views to be taken into account (Article 12). The CRC also includes other Articles of relevance to the practice of searches in custodial settings:

- Article 16 – no child shall be subjected to arbitrary or unlawful interference with his or her privacy.
- Article 19 – governments should ensure that children are properly cared for and protect them from physical or mental violence, abuse, neglect, maltreatment or exploitation.
- Article 20 – a child temporarily or permanently deprived of their family environment shall be entitled to special protection and assistance.
- Article 37(c) – every child deprived of their liberty shall be treated with humanity and respect for their inherent dignity, and in a manner which takes into account the needs of persons of their age.
- Article 37(a) – no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.
- Article 40 – children in conflict with the law are to be treated in a manner consistent with the promotion of the child's sense of dignity and worth.³⁸

³⁷ A summary of international law relevant to juvenile justice is available from the [United Nations Interagency Panel on Juvenile Justice](http://www.ipji.org/resources/international-standards/) - <http://www.ipji.org/resources/international-standards/>

³⁸ UN *Convention on the Rights of the Child*, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>



The Nelson Mandela Rules 'set out what is generally accepted as being good principles and practice in the treatment of prisoners and prison management'.³⁹ Rule 1, which is a basic principle and rule of general application, requires that:

All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification. The safety and security of prisoners, staff, service providers and visitors shall be ensured at all times.

The Nelson Mandela Rules require searches to be 'conducted in a manner that is respectful of the inherent human dignity and privacy of the individual being searched, as well as the principles of proportionality, legality and necessity' (Rule 50) and that they must 'not be used to harass, intimidate or unnecessarily intrude upon a prisoner's privacy' (Rule 51). Rule 52, which is particularly relevant to strip searches and body cavity searches, provides that:

Intrusive searches, including strip and body cavity searches, should be undertaken only if absolutely necessary. Prison administrations shall be encouraged to develop and use appropriate alternatives to intrusive searches...

In 2017, following careful analysis of relevant human rights standards and principles, the Australian Children's Commissioners and Guardians (ACCG) concluded that **searches of a child or young person in youth justice detention should be conducted only when reasonable, necessary and proportionate to a legitimate aim:**

Children and young people in youth justice detention have the right not to be subjected to arbitrary or unlawful interferences with their privacy, and to be treated with humanity and respect for their inherent dignity, and in a manner that takes into account their age. All searches, and particularly internal body searches and strip/unclothed searches, interfere with the privacy of children and young people. Where a search is permitted, it must be lawful, reasonable and proportionate to a legitimate aim. Governments should take steps to ensure that, when a search must occur, less intrusive search methods are preferred, such as electronic wand or other types of screening.⁴⁰

I note also that the Havana Rules provide that force can only be used in exceptional cases, where all other control methods have been exhausted and failed, and only as explicitly authorised and specified by law and regulation. The ACCG has expressed the view that **the use of force on a child or young person should be prohibited, except when necessary to**

³⁹ Nelson Mandela Rules, <https://www.ohchr.org/Documents/ProfessionalInterest/NelsonMandelaRules.pdf>. The Beijing Rules provide that the Nelson Mandela Rules shall be applicable as far as relevant to the treatment of juvenile offenders in institutions, including those in detention pending adjudication.

⁴⁰ Australian Children's Commissioners and Guardians, *Statement on Conditions and Treatment in Youth Justice Detention*, November 2017, page 19, https://www.humanrights.gov.au/sites/default/files/document/publication/ACCG_YouthJusticePositionStatement_24Nov2017.pdf



prevent an imminent and serious threat of injury to the child or others, and only when all other means of control have been exhausted.⁴¹

10. What can we learn from others?

The practice of searching children and young people in custodial environments has been considered in research and by a number of inquiries and reviews in Australia and elsewhere. Many have criticised over-reliance on strip searching as being inherently harmful and have urged a cessation of routine strip searching in favour of evidence informed, risk-led approaches to better safeguard and promote children and young people's rights and wellbeing while in custody.

10.1 Impact of searches

The experience of being strip searched can be humiliating and distressing and has the potential to re-traumatise children and young people who have been sexually abused. It has been said that '[s]trip searches, even when conducted professionally and privately, often cause feelings of disgust, annoyance, trauma, and humiliation, similar to the experiences of victims of sexual abuse and rape.'⁴² Children and young people subjected to these searches may suffer trauma, anxiety, fear, shame, guilt, powerlessness and stress.⁴³

It is acknowledged that many children and young people in conflict with the law have experienced trauma, abuse and neglect; they may have cognitive difficulties and may find it difficult to regulate their emotions. As the ACCG said in their 2017 *Statement on Conditions and Treatment in Youth Justice Detention*:

It is well recognised that children and young people are continuing to develop physiologically, psychologically and emotionally, and this must be taken into account when responding to their criminal offending. In addition, the small group of children and young people who enter the youth justice system experience increased vulnerability in a range of ways. Many children and young people in youth justice detention have a history of trauma, neglect and abuse, and child protection involvement. They are also more likely to experience family violence, have mental health problems or a disability, engage in drug and alcohol misuse, be disengaged from school and experience homelessness. Aboriginal and Torres Strait Islander children and young people experience intergenerational trauma and the continuing impacts of dispossession, colonisation and discrimination. Children and young people from refugee backgrounds may have experienced war and conflict, which can be compounded by experiences of displacement and the loss of family networks.⁴⁴

⁴¹ Australian Children's Commissioners and Guardians, *Statement on Conditions and Treatment in Youth Justice Detention*, November 2017, 18,

https://www.humanrights.gov.au/sites/default/files/document/publication/ACCG_YouthJusticePositionStatement_24Nov2017.pdf.

⁴² Daphne Ha, *Blanket Policies for Strip Searching Pretrial Detainees: An Interdisciplinary Argument for Reasonableness*, 79 *Fordham L. Rev.* (2011), p2725, <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=4723&context=flr>

⁴³ Ha, *ibid*, from p2740.

⁴⁴ Australian Children's Commissioners and Guardians, *Statement on Conditions and Treatment in Youth Justice Detention*, November 2017, 9,

https://www.humanrights.gov.au/sites/default/files/document/publication/ACCG_YouthJusticePositionStatement_24Nov2017.pdf.



Lord Carlile's 2006 landmark report of his inquiry into children's prisons in the United Kingdom identified young people in custody as vulnerable by virtue of their detention but also given that many have suffered past abuse. His report emphasised the demeaning and dehumanising nature of strip searching in custodial settings:

Within the custodial context a strip search is more than just the removal of clothes for a visual inspection. It is a manifestation of power relations. A strip search involves adult staff forcing a child to undress in front of them. Forcing a person to strip takes all control away and can be demeaning and de-humanising. This power is compounded by the threat, or actual use of, force to those showing any reluctance to strip.⁴⁵

Strip searches may also lead to behavioural problems rather than prevent them. This is particularly the case for children who have a history of childhood trauma. Seen this way, the use of strip searching can undermine rather than help children and young people's wellbeing.⁴⁶ For children who are on remand, the sense of being 'in limbo' can intensify pre-existing vulnerabilities.⁴⁷

The WA Inspector of Custodial Services said in 2008 in relation to the use of routine strip searching at Banksia Hill Detention Centre:

The extensive use of routine strip searches is a breach of human rights and dignity, at odds with the otherwise individual-focused care of detainees maintained by the centre.⁴⁸

In a March 2019 report on strip searching in Western Australian prisons, the WA Inspector of Custodial Services was clear about the harm that can be caused by strip searching and found that:

Strip searches are humiliating and degrading, and research shows that they can cause harm. This is particularly true for people who have experienced trauma or abuse which is common among prisoners. Almost half of the staff responding to our survey had observed negative emotional responses from people being strip searched. Because of the harm caused, international standards and conventions seek to minimise strip searching.⁴⁹

The Inspector also pointed out that there is an 'obvious conflict between the entrenched practice of strip searching and trauma informed practice in the context of custodial services.'⁵⁰

⁴⁵ 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*, The Howard League for Penal Reform, 2006, 58, <https://howardleague.org/wp-content/uploads/2016/03/Carlile-Report-pdf.pdf>

⁴⁶ Jessica Feierman and Riya Shah *Protecting Personhood: Legal Strategies to Combat the Use of Strip Searches on Youth in Detention* 60 Rutgers L. Review 67 2007-2008, 92 -99 and 95-96.

⁴⁷ K Richards & R Renshaw, *Bail and remand for young people in Australia: A national research project*, AIC: Canberra, 2013,3.

⁴⁸ Office of the Inspector of Custodial Services (WA), *Report of an Announced Inspection of Banksia Hill Juvenile Detention Centre*, report no. 58, December 2008, 13.

⁴⁹ Office of the Inspector of Custodial Services (WA), *Strip Searching in Western Australian Prisons*, March 2019,ix, <https://www.oics.wa.gov.au/wp-content/uploads/2019/04/Strip-Searches-Review.pdf>

⁵⁰ Office of the Inspector of Custodial Services (WA), *Strip Searching in Western Australian Prisons*, March 2019, 2, <https://www.oics.wa.gov.au/wp-content/uploads/2019/04/Strip-Searches-Review.pdf>



10.2 Managing risk in custodial settings

The rationale put forward is that searches are necessary to prevent contraband such as controlled substances or dangerous items from entering custodial premises. It is also argued that these searches are necessary to ensure a child or young person does not self-harm or harm others.

In noting this, it is useful to refer to the comments made by the Western Australian Inspector of Custodial Services in the 2008 *Report of an Announced Inspection of Banksia Hill Juvenile Detention Centre*:

Strip searching is an invasive procedure, at the high end of the management options available and its use needs to match the identified risk. The inspection found that the identified risk from contraband was not at all sufficient to warrant the high incidence of strip searching in the centre.

In a more recent report relating to strip searching in Western Australian prisons, the Inspector of Custodial Services found that strip searches are not an effective method of locating contraband and that the extent to which people were strip searched depended more on location than on risk therefore lacking an objective basis.⁵¹ The Inspector also noted that by 2018, Banksia Hill Detention Centre was conducting strip searches about five times less frequently than in 2015 and that there had been no increase in contraband found during all searches.⁵²

In this context it is important to note that Department of Communities Tasmania data for the period 1 June 2018 - 30 November 2018 indicate that no contraband was found as a consequence of 203 strip searches.

In its final report, the Royal Commission into Institutional Responses to Child Sexual Abuse recommended that state and territory governments review legislation, policy and procedures to ensure:

15.4 d. best practice processes are in place for strip searches and other authorised physical contact between staff and children, including sufficient safeguards to protect children such as:

- i. adequate communication between staff and the child before, during and after a search is conducted or other physical contact occurs
- ii. clear protocols detailing when such practices are permitted and how they should be performed. The key elements of these protocols should be provided to children in an accessible format
- iii. staff training that highlights the potential for strip searching to re-traumatise children who have been sexually abused and how the misuse of search powers can lead to sexual humiliation or abuse.

⁵¹ Office of the Inspector of Custodial Services (WA), Strip Searching in Western Australian Prisons, March 2019,iii, <https://www.oics.wa.gov.au/wp-content/uploads/2019/04/Strip-Searches-Review.pdf>

⁵² Office of the Inspector of Custodial Services (WA), Strip Searching in Western Australian Prisons, March 2019,11, <https://www.oics.wa.gov.au/wp-content/uploads/2019/04/Strip-Searches-Review.pdf>



State and territory governments should consider implementing strategies for detecting contraband, such as risk assessments or body scanners, to minimise the need for strip searching children.⁵³

The Tasmanian Government has accepted the above recommendation in principle.^{54,55}

The Royal Commission into the Detention and Protection of Children in the Northern Territory (NT Royal Commission) also made a number of recommendations in its November 2017 final report in relation to strip searching:

Recommendation 13.7

The Youth Justice Act (NT) and Youth Justice Regulations (NT) be amended to regulate the use of strip searches to the following effect:

- provide that strip searches only be conducted where there is a reasonable belief that the search is necessary to prevent a risk of harm to detainees or staff of the youth detention centre
- stipulate that any strip search be conducted by two members of staff of the same gender as the detainee
- stipulate that a detainee must not be stripped of clothing and searched in the presence of another detainee, unless it cannot be avoided, and
- stipulate that the strip search be conducted having the detainee remove the top half of his or her clothing for the inspection and then re-dress before removing the bottom half of his or her clothing, colloquially known as the 'half and half'.

Recommendation 13.8

Territory Families investigate the provision of body scanners, including their suitability for use on children and young people to limit or eliminate reliance on strip searches...

Recommendation 13.9

Territory Families investigate the use of pat down searches in conjunction with metal detector wands as an alternative to strip searches.⁵⁶

The NT Royal Commission's recommendations were implemented through amendments to the NT youth justice legislation in 2018 – further discussion about these amendments is below.

⁵³ Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Volume 15 Contemporary Detention Environments*, Recommendation 15.4, https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_15_contemporary_detention_environments.pdf

⁵⁴ Tasmanian Government Response - Royal Commission into Institutional Responses to Child Sexual Abuse, June 2018, page https://www.justice.tas.gov.au/_data/assets/pdf_file/0010/418186/Tasmanian-Response-Child-Abuse-Royal-Commission.pdf

⁵⁵ Tasmanian Government, *Protecting Our Children – Implementing the Recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse First Year Action Plan 2018-19* https://www.justice.tas.gov.au/_data/assets/pdf_file/0006/453264/First-Year-Progress-Report_Royal-Commission-Final-Report.pdf

⁵⁶ <https://www.royalcommission.gov.au/sites/default/files/2019-01/rcnt-royal-commission-nt-final-report-volume-2a.pdf>



10.3 Approaches in other jurisdictions

While I am not, for the purpose of this Advice, providing a comprehensive jurisdictional analysis of the legislation and policy governing the searches of children and young people in custody in other states and territories, it is useful to consider the approaches that have been taken by the Northern Territory and the ACT.

10.3.1 Northern Territory

In 2018, the Northern Territory amended its youth justice legislation in response to the NT Royal Commission's recommendations regarding searches of children and young people detained in a detention centre.⁵⁷

The relevant provisions of the *Youth Justice Act 2005 (NT)* as amended now provide for a hierarchy of searches, with a strip search (defined in the NT as a 'personal search') permitted where the superintendent of the detention centre believes on reasonable grounds that the search is necessary to prevent a risk of harm to the detainee or another person and the detainee has already undergone a pat down search. Force may only be used where the person conducting the search believes on reasonable grounds that the use of force is necessary to prevent a serious and imminent risk to the safety of the detainee or another person.

It is useful to consider the relevant provisions in the *Youth Justice Act 2005 (NT)* which are set out below (with my emphasis added):

161 Search of detainees

- (1) The superintendent or a member of the staff of a detention centre may direct a detainee to submit to a **screening search or a pat down search**:
 - (a) when the detainee is admitted to the detention centre; and
 - (b) on the detainee temporarily leaving, and returning to, the detention centre; and
 - (c) on the detainee being transferred from the detention centre to a custodial correctional facility or another detention centre.
- (2) The superintendent of a detention centre may direct a detainee to submit to a **screening search or a pat down search** if the superintendent believes on reasonable grounds that a screening search or a pat down search of the detainee is necessary:
 - (a) to ensure the safety of any person who is within the precincts of the detention centre, including the detainee; or
 - (b) to ensure the security of the detention centre.
- (3) The superintendent of a detention centre may direct a detainee to submit to a **personal search** if:
 - (a) the superintendent **believes on reasonable grounds that the search is necessary**

⁵⁷ Youth Justice Legislation Amendment Bill 2018 (NT); see also the Youth Justice Legislation Amendment Bill 2019 which made subsequent amendments to section 161(1) and 161(2).



to prevent a risk of harm to the detainee or another person; and

- (b) the detainee has already submitted to a pat down search under subsection (2).
- (4) **Force** may not be used to conduct a personal search unless the person conducting the search **believes on reasonable grounds** that the use of force is necessary to prevent a **serious and imminent risk** to the safety of the detainee or another person.

Note for subsection (4)

See section 10 in relation to the use of force.

- (5) A search of a detainee must be conducted in accordance with the Regulations.
- (6) In this section:

pat down search means a search conducted by feeling clothing from the outside for objects concealed in or beneath the clothing.

personal search means a search of a person that may include:

- (a) requiring the person to remove the person's clothes; and
- (b) an examination of the person's body (but not of the person's body cavities) and of those clothes.

screening search means a search by equipment that is designed to carry out the search without touching the person.

The Youth Justice Regulations 2006 (NT) require searches to be conducted having regard for the dignity and self-respect for the detainee and set out the way in which personal searches must be conducted. Importantly, the regulations also require the Superintendent to keep a search register and set out details that must be recorded in the register in relation to each search.⁵⁸

10.3.2 Australian Capital Territory

The ACT changed its laws in relation to searches of children and young people in 2008. The approach adopted by the ACT was developed in the context of its obligations under the *Human Rights Act 2004* (ACT).

Part 7.2 – 7.5 of the *Children and Young People Act 2008* (ACT) legislation describes the circumstances in which various types of searches (eg frisk, screening through to strip searches or body searches) may be undertaken. Importantly, section 248 provides as follows:

s248 A person conducting a search of a young detainee under this chapter must ensure, as far as practicable, that the search —

⁵⁸ See reg 73 and 74 <https://legislation.nt.gov.au/Legislation/YOUTH-JUSTICE-REGULATIONS-2006>



(a) is the least intrusive kind of search that is necessary and reasonable in the circumstances; and

(b) is conducted in the least intrusive way that is necessary and reasonable in the circumstances.

Under Part 7.4 of the *Children and Young People Act 2008* (ACT), the director-general may direct a youth detention officer to strip search a young detainee:

- s254 - on admission to a detention place if the director general **believes on reasonable grounds** that the strip search is necessary for an “initial assessment”;⁵⁹ or
- s258 - if the director-general **suspects on reasonable grounds** that the young detainee has something concealed on the young detainee that
 - i. is a prohibited thing; **or**
 - ii. may be used by the young detainee in a way that may involve an offence, a behaviour breach, a risk to the personal safety of the young detainee or someone else, or a risk to the security at a detention place; **and**
 - iii. a scanning search, frisk search or ordinary search of the young detainee has failed to detect the thing.

The ACT legislation also provides that, as far as practicable, force is only to be used as a last resort (s223). As is the case in the NT, the Act also makes provision for there to be a register of searches, however the matters required to be included in the register are far more extensive than in the NT.⁶⁰

Importantly, the Children and Young People (Search and Seizure) Policy and Procedures 2018 (ACT) provides detailed guidance to decision makers by outlining the following:

- a) general criteria for making a decision to conduct a personal search of a child or young person and rules for conducting these searches – these criteria and rules apply to all personal searches;
- b) specific decision making criteria are outlined for undertaking scanning, frisk and ordinary searches, strip searches and body searches; and
- c) rules for the conduct of specific types of personal searches.

⁵⁹ Under section 160 of the *Children and Young People Act 2008* (ACT), an initial assessment is undertaken as soon as practicable after each young detainee is admitted to a detention place to identify any immediate physical or mental health needs or risks (including risk of self-harm) and safety and security risks.

⁶⁰ See section 195 of the *Children and Young People Act 2008* (ACT) and the Children and Young People (Search and Seizure) Policy and Procedures 2018 (ACT), 6.118, <https://www.legislation.act.gov.au/ni/2018-448/>



Significantly, the *Bimberi Headline Indicators Report 2017-18* presented by the Minister for Children, Youth and Families to the Legislative Assembly of the Australian Capital Territory in 2018, indicates that strip searches on induction to Bimberi reduced from 50 per cent in 2016-17 to just 7 per cent in 2017-18.⁶¹

It is evident that the tests in relation to strip searches in the ACT and the NT differ, especially in their use of the concepts of “suspects on reasonable grounds” and “believes on reasonable grounds”. However both jurisdictions require the decision maker’s state of mind to be based on reasonable grounds (albeit in relation to different things). In *George v Rockett* (1990) 70 CLR 104, the High Court in a joint judgement said this:

"When a statute prescribes that there must be "reasonable grounds" for a state of mind – including suspicion and belief – it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person...that requirement opens many administrative decisions to judicial review and precludes the arbitrary exercise of many statutory powers: see for example *Attorney General v Reynolds* (1980) AC 637.

11. Discussion and recommendations

There is no doubt that searches in custodial settings are required to prevent dangerous contraband from entering or being moved around custodial environments so as to ensure the safety of all persons within those environments. This sentiment is echoed in discussions I have had in the course of my individual advocacy role for young people detained under the YJ Act. It must however be acknowledged that searches can be invasive and embarrassing and may re-traumatise children and young people with a history of abuse.

In my opinion, the current situation in which the legislation, policies, and practice applicable to searches of children and young people in custody varies across custodial settings is confusing and, as such, is unacceptable. It would be preferable if the legislative bases for all searches of children and young people in custody in custodial settings in Tasmania were clarified and consolidated to provide a single, unambiguous point of reference. This would promote transparency and consistency of practice across custodial premises and in turn assist children and young people to be aware of their rights and obligations with regard to searches.

As previously noted, section 19 of the *Youth Justice (Miscellaneous Amendments) Act 2013*, which has never commenced, would insert a new section 25A into the YJ Act to provide for additional requirements regarding searches of youths in custody in custodial premises (defined as a prison, detention centre, police station or watch-house) to be prescribed by regulation. While this provision would certainly go some way to promoting consistency of practice, its operation and application are constrained by the existing legislative authorities applicable to the searches of children in custodial settings. As outlined in this Advice, and notwithstanding this new provision, it would appear that without amendment, the current legislative frameworks

⁶¹ https://www.communityservices.act.gov.au/data/assets/pdf_file/0009/1274481/2017-18-Bimberi-Headline-Indicators-Report_1.pdf



would continue to permit routine strip searching of children and young people in reception prisons and detention centres.⁶²

Legislation authorising searches of children and young people in all custodial settings in Tasmania should reflect the fundamental human right standard that searches of children and young people in custody should **be conducted only when reasonable, necessary and proportionate to a legitimate aim**. This is consistent with the position of the Australian Children's Commissioners and Guardians (ACCG)⁶³ and with the following standards relating to searches in the Custodial Inspector's Inspection Standards for Young People in Detention in Tasmania:

8.4.1 Searches of a young person should be conducted safely and only when reasonable and necessary and must be proportionate to the circumstances.

8.5 Young people are subject to searching measures that are appropriately assessed and proportionate to risk.⁶⁴

It should be noted that adoption of this test does not mean that a strip search cannot be undertaken; rather, that it can only be undertaken in circumstances where it can be shown to be reasonable, necessary, and proportionate. Seen from this perspective the practice of *routine* strip searching of children and young people in custody in custodial settings cannot be justified and should cease.

Recommendation 1:

- a. The practice of *routine* strip searching of children and young people in custody in cannot be justified and should cease.
- b. Legislation authorising searches of children and young people in custody in all custodial premises in Tasmania should reflect the fundamental human right standard that searches of children and young people in custody should be conducted only *when reasonable, necessary and proportionate to a legitimate aim*.

Recommendation 2:

The legislative bases for all searches of children and young people in custody in Tasmania should be clarified and consolidated to provide a single, unambiguous point of reference.

Legislation should also outline other principles, criteria and other requirements to assist decision makers, reflecting and operationalising the overarching principle I have outlined above. What this means in practice is that consideration should be given to introducing in legislation applicable to all searches of children and young people in custody in custodial premises:

⁶² It also appears that the application of s25A may not cover those children or young people charged with prescribed offences; a situation which would benefit from further consideration.

⁶³ACCG Statement on Conditions and Treatment in Youth Justice Detention (2017);

https://www.humanrights.gov.au/sites/default/files/document/publication/ACCG_YouthJusticePositionStatement_24Nov2017.pdf

⁶⁴ Custodial Inspector, Inspection Standards for Young People in Detention,

https://www.custodialinspector.tas.gov.au/_data/assets/pdf_file/0004/463648/FINAL-Inspection-standards-for-young-people-in-detention-in-Tasmania-April-2019.pdf



- guiding principles – so, for example as a general rule, searches undertaken should be the least intrusive kind of search that is necessary, reasonable and proportionate in the circumstances and be conducted in the least intrusive way that is necessary and reasonable in the circumstances;
- a clearly stepped out hierarchy of types of searches, moving from the least intrusive types of searches such as wand or scanning searches through to other forms of searches which are comparatively more intrusive such as strip searches; and
- clear criteria to guide a determination of which type of search is permissible and justified in particular circumstances.

As I have described in this Advice, other jurisdictions such as the ACT and the NT have adopted an approach similar to that which I have outlined above.

It is beyond the scope of this Advice to outline precisely what the principles and criteria should be; rather it is perhaps appropriate that these be developed by agencies in consultation with stakeholders.

Recommendation 3:

Consideration should be given to introducing in legislation applicable to all searches of children and young people in custody:

- a statement as to guiding principles;
- a clearly stepped out hierarchy of searches; and
- clear criteria to guide a determination of which type of search is permissible and justified in particular circumstances.

The principles, hierarchy of searches and criteria to guide decision making should reflect fundamental human rights standards and principles, including that searches of children and young people in custody should be conducted *only when reasonable, necessary and proportionate to a legitimate aim* and should be developed by agencies in consultation with stakeholders.

Recommendation 4:

Consideration should be given to investing in alternative security strategies or technologies such as body scanners which would further minimise reliance on more invasive searches such as strip searches.

Recommendation 5:

Having regard to relevant human rights standards, and no matter the type of search conducted, the use of force should be limited to circumstances of last resort and, if force is required, there should be clear lines of authorisation.

Regulations should clearly outline the way in which searches are to be conducted so as to promote the dignity and self-respect of the child or young person concerned and to minimise any associated trauma, distress or other harm (examples of matters which might be included are: who can be present, who can undertake the search, where the search can occur, the process by which the search may be undertaken, and any particular training requirements of those involved).



Recommendation 6:

Regulations should clearly outline the way in which searches of children and young people in custody are to be conducted so as to promote the dignity and self-respect of the child or young person concerned and to minimise any associated trauma, distress or other harm.

Consistent with Recommendation 15.4d of the Royal Commission into Institutional Responses to Child Sexual Abuse, the key elements of the legislative framework governing searches of children and young people in custody should be provided to children and young people in an accessible format before a search is conducted and they should be advised of their right to make a complaint and the process for doing so.

Recommendation 7:

The key elements of the legislative and regulatory framework governing searches of children and young people in custody should be provided to children and young people in an accessible format before a search is conducted. This information should explain their right to make a complaint and the process for doing so.

All searches should be recorded on a search register, which should include details such as but not limited to:

- the factors taken into account to determine the reasonableness of conducting a particular search
- the steps undertaken to ensure that all necessary approvals were obtained
- the details of those present
- the details of any relevant object voluntarily handed over or located as a consequence of the search
- the manner in which the search was undertaken
- whether force was used and the type of force
- any comment or objection made by the child or young person to the search.

Search registers should be available for inspection or review by independent statutory officers with relevant monitoring or inspectorate functions.

Recommendation 8:

All searches of children and young people in custody in custodial settings should be recorded on a search register. Search registers should be available for inspection or review by independent statutory officers with relevant monitoring or inspectorate functions.

I encourage Government to consider the reforms that would be necessary to operationalise this Advice and I look forward to further opportunities for discussion.

Leanne McLean

Commissioner for Children and Young People

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