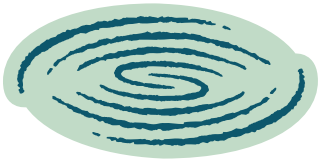

OFFICE OF THE INSPECTOR
OF CUSTODIAL SERVICES

Legal and Administrative Context Review Paper

Banksia Hill Directed Review

August 2013

Contents

1 Introduction

1.1 On the evening of Sunday 20 January 2013, an extremely serious incident of mass disorder occurred at Banksia Hill Juvenile Detention Centre ('Banksia Hill'), a facility managed by the Department of Corrective Services ('the Department'). This was by far the most serious incident of this type in Western Australia since what is generally known as the 'Casuarina Prison riot' of Christmas Day 1998. Although the incident had some very specific dynamics and features which set it apart from previous prison 'riots' in Western Australia (for example, staff and detainees were not targeted with violence), the term 'riot' is an apt description of the incident.

1.2 Banksia Hill is the state's only juvenile detention centre and at the time, housed 185 males and 21 females. The incident began just before 6.00 pm when three male detainees absconded from one of the units and then used some loose pavers and debris to break another detainee out of his cell. After the first assisted break out, the situation escalated with more and more detainees being assisted to break out of their cells.

1.3 In total, sixty one detainees escaped from their cells and a significant number of detainees caused damage to their cells. Due to the nature of the incident and the extent of the damage, it has not been possible to put a precise figure on the number of detainees involved in the incident. Department-supplied figures put the number of detainees involved in the riot at around 73, all male, but it is more likely that, in total, somewhere between one-half and two-thirds of Banksia Hill's male detainees were actively involved to some degree, and also some of the females.

1.4 Extensive damage was caused to parts of the buildings at Banksia Hill, including 106 cells, as well as to some equipment and personal property. The worst of the damage resulted from windows being attacked from both the outside and the inside.

1.5 The consequences for the detainees were dramatic, with 73 of the male detainees being immediately transferred in the early hours of 21 January 2013 to a nearby adult prison, Hakea Prison ('Hakea'). Within the next three weeks the majority of the remaining male detainees at Banksia Hill were subsequently transferred to Hakea while the damage caused by the riot was repaired and security upgrades implemented. The female detainees continued to be housed at Banksia Hill along with a small number of male detainees under 15 years of age and some older male detainees who needed to be held there for specific purposes.

1.6 On 24 January 2013 the Minister for Corrective Services ('the Minister') directed the Inspector of Custodial Services ('the Inspector') under section 17(2)(b) of the

Inspector of Custodial Services Act 2003 to carry out a full investigation into all aspects of the incident including:

- the context of the incident;
- facts of any contributing/causal factors;
- security and integrity of the cells;
- security systems and infrastructure;
- security practices and protocols for all staff;
- adequacy of crisis/emergency management planning and crisis/emergency management response;
- temporary housing of juvenile detainees at Hakea Prison; and
- to report to Parliament on the findings at the conclusion of the review.

1.7 In addition, the Minister also asked the Inspector 'to review staffing levels at the facility and report on the management of the incident and its impact on staff'.

1.8 The terms of reference for this Directed Review of the riot at Banksia Hill ('the Inquiry') require the Inspector to carry out 'a full investigation into all aspects of the incident' including the specific areas identified. This Legal and Administrative Context Review Paper ('the Paper') is one of a suite of six Papers prepared as part of the Inquiry and in support of the Inspector's Report to Parliament.

2 Overview

2.1 There is a real risk that during the examination of the substance and detail of a major incident of this sort, that basic principles and governing legal frameworks can be overlooked. There is evidence to suggest that the Department has lost sight of legal frameworks on occasions.[1] In addition, there is also a risk that reactions to riot at Banksia Hill on 20 January 2013 will lead to an erosion of accepted legal principles and standards, either in the short term or in the longer term.

2.2 During the course of this Inquiry, however, there has been a sustained focus and attention placed on legal and custodial issues arising from the decision taken by the Department to transfer the male detainees to Hakea and to declare Units 11 and 12 within that facility to be a detention centre. The detention centre at Hakea is known as the Hakea Juvenile Facility ('Hakea JF'). The nature of the detention at Hakea JF and considerable reduction in programmes and recreation for the detainees attracted considerable media attention and resulted in other action being taken which included:

- Landmark proceedings commenced in the Supreme Court of Western Australia, by the legal guardian of one of the detainees who was transferred from Banksia Hill to Hakea. These proceedings challenged the lawfulness of the various decisions made by the Department in transferring the detainees to Hakea and sought prerogative relief and declarations of invalidity with respect to those decisions;
- Unprecedented action taken by the President of the Children's Court of Western Australia to clarify whether, as a matter of law, the harshness of the conditions under which a young offender has been held on remand/and or would serve a sentence of detention at Hakea JF could be taken into account when sentencing young offenders. In each case coming before the Children's Court in the months following the transfer to Hakea JF, the Judge or Magistrate concerned has sought specific evidence and material from the Department to enable a decision to made about the extent of harshness caused to the particular child concerned; and

[1] Office of the Inspector of Custodial Services (OICS), *Report of an Announced Inspection of Banksia Hill Juvenile Detention Centre,* Report No. 76 (January 2012). This report raised serious concerns regarding the use of regression and the degree to which departmental policies and practices in the area of managing poor behaviour appeared to be out of line with the letter and spirit of the YOA. In *The Department of Corrective Services v RP* [2012] WACC 5 [94], his Honour Judge D J Reynolds voiced some major concerns regarding the treatment of RP ('psychological subjugation' and 'cruel and inhumane' treatment). Already, in the course of this Inquiry, questions have been raised as to whether the practice of unscheduled lockdowns of detainees and the use of restraints by custodial officers is compliant with the law.

- Concerns expressed to the Department by the Chairman of the Supervised Release Review Board that the functions of the Review Board were affected by the lack of availability for detainees of necessary assessment, treatment, remedial and educational programs.

2.3 Many of the views expressed in this Paper about the conditions of detention for the detainees at Banksia Hill and Hakea JF and the need for compliance with both law and practice have been echoed in the course of the legal proceedings above, in submissions to this Inquiry and more generally.

3 Conclusions

3.1 The *Young Offenders Act 1994* (YOA) was drafted against the background provided by a number of international standards which have particular relevance to the interpretation of the provisions of the YOA. In addition, there is a national set of model service standards for juvenile custodial facilities which embodies many of the international standards.[2] The Department accepts that the management of its youth custodial facilities shall be consistent with the principles of these model standards.

3.2 Young persons in detention are entitled to the same 'rights' as any other citizen, with the qualification that those rights are subject to the legislative and administrative rules that relate to their detention. Unlike legislation in some other Australian jurisdictions, the YOA does not prescribe specific 'rights' available to detainees. Sections 6 and 7 of the YOA list a set of 'objectives' and a list of 'general principles of juvenile justice' which reflect international standards, as well as making provision for specific matters.

3.3 The purpose of detention is to provide an environment for young people who are sentenced or on remand, which is safe and secure but which also satisfies certain standards. These are that young people, while they are in custody, will not be subject to abuse or harassment, will be given sufficient opportunities to participate in education and rehabilitative programmes and will be able to participate in regular physical and passive recreational and leisure activities. It is arguable that when the environment at a detention centre does not meet these standards, the centre is not fulfilling its purpose.

3.4 The Department has developed a complicated array of Youth Custodial Rules, Standing Orders, Operational Procedures and other notices and instructions, designed to provide guidance to youth custodial officers. However, the layer upon layer of these rules and procedures can be difficult to unravel for those who must apply them, let alone the detainees who are subject to them.

3.5 The usefulness and reliability of the rules and procedures is not assisted by the apparent lack of regular review. Youth Custodial Services is currently operating with Standing Orders which are dated 30 June 2009 and are still headed so as to apply to 'Banksia Hill Detention and Rangeview Remand'. The current Youth Custodial Rules are expressed as being 'effective from 27 August 2012'. However, they were not published by the Department and readily available to staff and detainees until 5 March 2013.

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[2] Australasian Juvenile Justice Administrators, *Standards for Juvenile Custodial Facilities,* Revised Edition (1999).

3.6 Although some steps have been taken by the Department to review its rules and procedures, the Inquiry has shown that there remains cause for considerable concern about the efficacy of those reviews and whether some of the rules and procedures are in fact compliant with the law and national and international practice.

3.7 From 20 January to 12 February 2013 all detainees at Banksia Hill and Hakea JF had been kept in a 23 to 24 hour lockdown. Scheduled and unscheduled lockdowns have continued since that time. There is an apparent lack of authority for the use of scheduled or unscheduled lockdowns (beyond that for unlock and lockup times) and no accountability for their use as part of a daily regime for the detainees. Having regard to the objectives of the YOA and the general principles of juvenile justice this is an untenable position.

3.8 The use of mechanical restraints is only authorised in the circumstances provided by s 11D(1) of the YOA. Those circumstances concern the application of restraints during an immediate period when a detainee is imminently presenting a risk of physical injury to himself or others, on medical grounds and during external escorts. Currently, there appears to be no authority for use of mechanical restraints on detainees as part of a management regime designed to maintain order and custody within the detention centres.

3.9 The practice of routine strip search of detainees before and after social visits, without a proper evaluation of whether the search is needed in a particular case or situation, appears to be contrary to the intent of r 86(2) of the *Young Offenders Regulations 1995* and international standards.

4 Juvenile Justice Framework

International Obligations

4.1 The YOA is the primary legislation applying to young people who commit offences and is binding on the Department.[3] The YOA governs the treatment of young persons who come into contact with the criminal justice system in Western Australia and it covers a wide range of matters including diversion from court, court proceedings, sentencing options, the establishment of detention centres and some aspects of detention centre management.

4.2 Importantly, the YOA embodies many of the fundamental principles of juvenile justice found in a number of international human rights treaties and instruments, some of which are binding on the Australian Government at an international level. Although none of these international instruments are part of Australian domestic law, when a country with a federal system of government ratifies an international treaty it applies to all levels of government.

4.3 Accordingly, the Government of Western Australia should guard against the passing of laws that breach Australia's international obligations or picking and choosing which international obligations will apply in Western Australia.

Binding International Standards

4.4 Australia is signatory to two international Conventions relevant to the rights of young people. These are the United Nations *International Covenant on Civil and Political Rights* (ICCPR) which was ratified by the Australian government in August 1980, subject to certain reservations and the United Nations *Convention on the Rights of the Child* (CRC) which was ratified in December 1990. The principles of the ICCPR and the CRC are binding on Australia as part of international law but not binding on the courts as part of domestic law.

4.5 Article 2(2) of the ICCPR requires Australia to take all necessary legislative and other measures to give effect to the rights in the Convention. The ICCPR is scheduled to the *Australian Human Rights Commission Act 1986* (Cth) and the Australian Human Rights Commission is responsible for monitoring compliance with it.

4.6 Relevantly, Article 10 of the ICCPR states that:

> 1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

[3] A 'young person' means a person who has not reached the age of 18 years, or a person to whom the YOA applies because that person commits or allegedly commits an offence before reaching the age of 18 years (ss 3 and 4 of the YOA).

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

   (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

4.7 Although accepting the principle stated in paragraph 1 of Article 10 and the general principles of the other paragraphs of that Article, in relation to paragraphs 2(b) and 3 (second sentence) the obligation to segregate was accepted only to the extent that such segregation is considered by the responsible authorities to be beneficial to the juveniles or adults concerned.

4.8 The CRC recognises that children require special protection in preserving their basic human rights because of their vulnerability to exploitation and abuse. Australia's obligations under the CRC apply to all persons who are under the age of 18 years in Australia regardless of citizenship or immigration status.

4.9 Some of the CRC Articles which are relevant to this Inquiry are:

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 19

2. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

3. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and

follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Other International Standards

4.10 The basic principles in the above two conventions affecting the rights of the child are supplemented by a number of other United Nations instruments. Among these are the *Standard Minimum Rules for the Administration of Juvenile Justice* 1985 (Beijing Rules), the *Guidelines for the Prevention of Juvenile Delinquency* 1990 (Riyadh Guidelines) and the *Rules for the Protection of Juveniles Deprived of their Liberty* 1990 (Havana Rules).

4.11 These three instruments do not have the same status as the CRC. They are not regarded as treaties but they are internationally accepted minimum standards to which States should have regard when setting up or amending their existing juvenile justice system. Setting policies and drafting legislation that incorporates the minimum standards assists States to comply with the obligations imposed upon them by the CRC.

4.12 The Beijing Rules are expressly acknowledged in the Preamble to the CRC. Relevantly, the Rules state that:

- the juvenile justice system shall emphasise the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence (Rule 5.1);
- juveniles under detention pending trial shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults (Rule 13.4); and
- while in custody, juveniles shall receive care, protection and all necessary individual assistance - social, educational, vocational, psychological, medical and physical - that they may require in view of their age, sex and personality (Rule 13.5).

4.13 The Havana Rules also acknowledge the Beijing Rules in a statement of 'Fundamental Perspectives' and rules 28 to 30 relevantly provide that:

- The detention of juveniles should only take place under conditions that take full account of their particular needs, status and special requirements 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;
- In all detention facilities juveniles should be separated from adults, unless they are members of the same family. Under controlled conditions, juveniles may be brought together with carefully selected adults as part of a special programme that has been shown to be beneficial for the juveniles concerned; and Open detention facilities for juveniles should be established. Open detention facilities are those with no or minimal security measures.

4.14 The Riyadh Guidelines require that emphasis be placed on prevention policies that facilitate the successful socialisation and integration of all children, in particular through the family, the community, peer groups, schools, vocational training and work, as well as through voluntary organisations. Prevention programmes should include support for particularly vulnerable families and the involvement of schools in teaching basic values, including information about the rights and responsibilities of children and parents under the law.

Relevance of International Standards

4.15 Wilkie has summarised the application of the international standards relevant to young people which are binding on Australia as follows:[4]

> Two principal United Nations ("UN") human rights treaties are relevant here. The International Covenant on Civil and Political Rights ("ICCPR") was ratified by Australia in 1980 and has since been incorporated into Federal law [(Cth) Human Rights and Equal Opportunity Commission Act 1986, Sch 2]. The Convention on the Rights of the Child ("CROC") was ratified in 1990 but has not yet been incorporated. Both treaties are binding on the Australian Government at an international level. Federal legislation, policy or practice which is inconsistent with either will be in breach.
>
> It is more complex to ascribe a legal obligation to a State in the federation such as ours to respect international treaties… Nevertheless, the general rule is that a country cannot rely on its internal laws as a reason for breaching its international obligations. This general rule applies equally to unitary and federal states.
>
> Australian practice is… [that] a treaty is invariably circulated to all State and Territory Governments for comment and approval prior to ratification. Whether this procedure legally binds the States has yet to be tested. Until now the moral and political obligation has been sufficient to ensure that that no State government has wilfully defied international standards to which the Federal Government has acceded with the State's approval.[5]

4.16 Wilkie adds that, although such instruments as the Beijing Rules, the Riyadh Guidelines and the Havana Rules 'do not have the status of international law, they are highly authoritative and persuasive'.[6]

4.17 During the course of this Inquiry landmark court action was taken by the legal guardian of one of the detainees who was transferred from Banksia Hill to the adult Hakea Prison in the early hours of the morning following the riot and who had been detained there since that time. In that case, *Wilson v Joseph Michael Francis, Minister for Corrective Services for the State of Western Australia* ('the Wilson case'), the applicant challenged the lawfulness of the decisions made by the Department and the Minister for Corrective Services ('the Minister') to transfer the detainees to Hakea Prison and later declare parts of that prison to be

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[4] Wilkie M, *Crime (Serious and Repeat Offenders) Sentencing Act 1992: A Human Rights Perspective* (1992) 22 UWAL Rev, 187.
[5] Wilkie, ibid, 191-192.
[6] Wilkie, ibid, 192.

a detention centre.[7] Reference was made to the application of the principles in international instruments and the court confirmed they were principles which aided the construction of legislation. In a decision delivered on 3 May 2013, Martin CJ, said, in part:

> … it must be emphasised that these principles are principles of statutory construction. Ratification of an international treaty does not inhibit the legislative capacity of any of the polities within the Australian federation. Accordingly, if a legislature chooses to legislate in terms which are inconsistent with Australia's international obligations, as a matter of domestic law it is free to do so - see, for example, *Polites v Commonwealth* (1945) 70 CLR 60, 68 - 69, 77, 80 - 81; *Zhang v Zemin* (2010) 79 NSWLR 513 [125] per Spigelman CJ.
>
> The questions which must be determined in these proceedings are whether:
>
> (a) the decision to transfer 73 detainees from Banksia Hill to Unit 5 at Hakea prior to its being declared a detention centre under the Act; and
>
> (b) the decision to declare Units 5, 11 and 12 of Hakea, at various times and in different permutations, to be a detention centre in accordance with s 13 of the Act,
>
> exceeded the powers conferred upon the relevant decision-makers and the delegate by the Act. If and to the extent that the relevant provisions of the Act are ambiguous, the presumption that the legislature intended that the Act be consistent with Australia's obligations under international law may assist in resolving the ambiguity.
>
> The question before the court is not the question of the extent to which the regime for the management and treatment of juvenile detainees in Western Australia complies with the Convention or other more specific international standards. Those issues would only be relevant if and to the extent that they shed light on the resolution of ambiguity in the construction of a particular provision of the Act.[8]

4.18 As the YOA was drafted against the background provided by these international standards they have particular relevance to the interpretation of the provisions of the YOA.

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[7] [2013] WASC 157.
[8] Ibid, [125-127].

National Standards

4.19 The Department is a member of the Australasian Juvenile Justice Administrators group ('AJJA') which is made up of Australian and New Zealand youth justice administrators. Part of the work of the AJJA is to develop and promote national standards for youth justice. In November 1998 the AJJA adopted a set of model service standards for juvenile custodial facilities. The resulting *Australasian Juvenile Justice Administrators: Standards for Juvenile Custodial Facilities* ('AJJA Standards') list 46 standards grouped into 11 major areas of service, including basic entitlements to safety, respect, dignity and privacy, rights of expression, admission standards, personal and social development, family and community contacts, health and behaviour management.[9]

4.20 Following each of the standards set out in the document are references to the relevant United Nations instruments. The AJJA Standards state that these references 'are meant to indicate the moral - and possibly legal – authorities on which the AJJA's standards are based'.[10]

4.21 Importantly, the AJJA Standards are acknowledged by the Department and its Youth Custodial Rules recognise that 'The management of youth custodial facilities shall be consistent with the principles of these standards'.[11]

Statutory Scheme

The YOA

4.22 As mentioned above, the YOA embodies many of the fundamental principles of juvenile justice found in these international treaties and instruments. Sections 6 and 7 of the YOA list a set of 'objectives' and a list of 'general principles of juvenile justice' which reflect international standards, as well as making provision for specific matters. Appendix 1 contains extracts of the most relevant provisions for current purposes. The 'objectives' of the YOA include:

- Setting out provisions embodying the general principles of juvenile justice for dealing with young people who have or are alleged to have, committed offences (s 6(b));
- Ensuring young people's legal rights are observed (s 6(c)); and
- Ensuring that young people are dealt with in a manner that is culturally appropriate and which recognises and enhances their cultural identity (s 6(f)).

4.23 The 'general principles' in s 7 of the YOA include:

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[9] Revised Edition (1999).
[10] Revised Edition (1999) 7.
[11] Youth Custodial Rule 102, 3.

- A young person who commits an offence is not to be treated more severely because of the offence than the person would have been treated if an adult (s 7(c));
- Detention of a young person in custody, if required, is to be in a facility that is suitable for a young person and at which the young person is not exposed to contact with any adult detained in the facility, although a young person who has reached the age of 16 years may be held in a prison for adults but is not to share living quarters with an adult prisoner (s 7(i));
- Punishment of a young person for an offence should be designed so as to give the offender an opportunity to develop a sense of social responsibility and otherwise to develop in beneficial and socially acceptable ways (s 7(j));
- In dealing with a young person for an offence, the age, maturity, and cultural background of the offender are to be considered (s 7(l)); and
- A young person who commits an offence is to be dealt with in a way that —

  (i) strengthens the family and family group of the young person; and

  (ii) fosters the ability of families and family groups to develop their own means of dealing with offending by their young persons; and

  (iii) recognises the right of the young person to belong to a family (s 7(m)).

4.24 The reference in s 6(b) to the 'general principles of juvenile justice' is to the principles which are described in s 7 (see the definition in s 3 of the YOA).

4.25 Section 13 of the YOA provides that the Minister may, by order, declare a place to be detention centre, or vary or revoke such an order. The order does not have effect until after it is published in the *Western Australian Government Gazette* ('the Government Gazette')(s 13(3)).

4.26 Sections 11C and 11D of the YOA govern the use of force and restraints on detainees by custodial officers. The use of force must be no more than 'prescribed force' in the management, control and security of a detention centre and it must only be used in the 'prescribed circumstances'.

4.27 Part 9 of the YOA, dealing with detention centres, contains provisions as to the appointment of visiting justices, the investigation of and procedure relating to detention offences, the transfer of an offender from a detention centre to a prison and the removal of detainees for medical treatment.

4.28 Fundamentally, young persons in detention are entitled to the same 'rights' as any other citizen, with the qualification that those rights are subject to the legislative and administrative rules that relate to their detention. In other words, young persons in detention possess those rights that are consistent with the good management, control and security of the detention centre.

4.29 Notably, and unlike legislation in some other Australian jurisdictions, the YOA does not prescribe specific 'rights' available to detainees. For example, Queensland's *Youth Justice Act 1992* (YJA) and *Youth Justice Regulations 2003* (YJR) establish for detainees the right to be given certain information on entry to a detention centre and if necessary to have that information orally explained (YJA s 267 and YJR r 14), the right to help in gaining access to a lawyer (YJA s 275), the right to complain about matters affecting them (YJA s 277), the right to make and receive telephone calls at all reasonable times (YJR r 30), the right to send and receive correspondence (YJR r 31) and the right to health services and medical treatment (YJR r 33).

4.30 Section 181 of the YOA provides that the Chief Executive Officer of the Department (CEO), with the approval of the Minister, may 'make rules for the management, control, and security of detention centres generally or a specified detention centre and for the management, control, and security of detainees and the management of officers of the Department'. These rules, made under the authority of the YOA and known as the Youth Custodial Rules, have statutory force and leave a great deal of discretion with the Department to decide on the mass of detail relevant to the conduct of daily life in a detention centre. The Youth Custodial Rules are supplemented by other Departmental orders and instructions designed to provide guidance on their use.

Regulations

4.31 The *Young Offenders Regulations 1995* (the Regulations) are second in the tier of authority and are also binding on the Department. In relation to the management of detention centres the Regulations contain specific provisions dealing with such matters as the hearing and determination of detention offences, detainee gratuities and privileges, confinement of detainees, search and seizure procedures and the responsibilities and discipline of youth custodial officers and other employees.

Rules and Administrative Procedures

4.32 The Department has developed a complicated array of rules and administrative procedures in order to implement the statutory framework. These include (in rank order): Youth Custodial Rules (formerly the Juvenile Custodial Rules) Standing Orders, Operational Procedures, Youth Custodial Services Instructions and Superintendent/Assistant Superintendent's Notices. These derive their authority from the YOA and must be compliant with it.

Youth Custodial Rules

4.33 At the time of the commencement of this Inquiry the Juvenile Custodial Rules (JCRs) which applied to the management, control and security of young people in detention were dated 17 July 2008 and, it appeared, had not been reviewed since

that time. During the course of the Inquiry however, the JCRs were replaced with newly named Youth Custodial Rules (YCRs). The YCRs are shown as being signed by the relevant parties on 27 August 2012 and expressed as being 'effective from 27 August 2012'. However, the YCRs were not published on the Department's Intranet and readily available to staff and detainees until 5 March 2013.

4.34 The Department explained that the rules being used by Youth Custodial Services staff between 27 August 2012 and 20 January 2013 were the JCRs dated July 2008. According to the Department, although the new YCRs had been signed in August 2012, they needed to be formatted into online templates before being published online and staff being informed. It is evident however, that the JCRs continued to apply beyond 20 January 2013 as the replacement YCRs were not published by the Department until 5 March 2013.

4.35 Accordingly, for the purposes of this Paper, except as otherwise indicated, reference will be made to the JCRs as these were the rules which applied at Banksia Hill before the incident of 20 January 2013 and at Banksia Hill and Hakea JF, at least up until 5 March 2013.

4.36 There are 42 current YCRs, extending over multiple pages and some of them are supplemented by appendices. Each rule is signed by the CEO and the Minister and is effective from the date of signature. The YCRs (like the former JCRs) are divided into the following subject categories:

- 100 - Officers
- 200 - Management, control and security of detention centres
- 300 - Assessment, security classification and supervision level of detainees
- 400 - Custody, removal and release of detainees
- 500 - Detention centre visits
- 600 - Communication involving detainees
- 700 - Health care and wellbeing of detainees
- 800 - Authorised absences
- 900 - Non Australian detainees

4.37 Section 181(3) of the YOA provides that the CEO must publish the rules 'in such manner as is appropriate to bring relevant rules to the attention of persons affected by them'. According to YCR 101 copies of the rules are issued to the Superintendent, Assistant Superintendent and Shift Manager at Banskia Hill as well as to the Gate House. Copies (except for those restricted to staff only) are also issued to the Banksia Hill Library for use by detainees. Electronic copies of the rules are also available for departmental staff on the Department's Intranet (CSinet) and electronic copies (except for those restricted to staff only) are accessible on the Department's public website.

Standing Orders

4.38 The 21 Standing Orders (SOs) also extend over multiple pages and are for distribution to staff only. The SOs currently in use are dated 30 June 2009 and are headed so as to apply to 'Banksia Hill Detention and Rangeview Remand'. They are signed by the then Director, Juvenile Custodial Services and the Superintendents of Banksia Hill and the former Rangeview Remand Centre.

4.39 According to the Department, the SOs 'are in part derived from and refer to the Juvenile Custodial Rules and generally outline more specific processes that need to be undertaken in each centre for the management, control and security of youth in custody'.[12]

4.40 The SOs include such matters as the centre timetable, unit management, hierarchy of accommodation, detainee behaviour management, visits, escorts, searches and the use of force and restraints on detainees.

Operational Procedures

4.41 There are currently 35 Operational Procedures (OPs) issued under the approval of the Superintendent which are for distribution to staff only and give further guidance in relation to matters covered by the SOs.

4.42 Examples include procedures relating to the gatehouse, lockup and unlock, escorts from the centre, admission and discharge, visits, meals, laundry, personal property, used of trained dogs to search and video recording of incidents.

Notices and Instructions

4.43 From time to time the Director of Youth Custodial Services or the Superintendent or Assistant Superintendent also issue notices or instructions to staff, which, it appears, are designed to introduce a new or alter an existing practice, policy or procedure.

4.44 Some examples of these notices and instructions are an instruction dealing with changes to the approved list of restraints, an instruction dealing with lost property belonging to detainees, a notice as to procedures for the allocation of overtime to staff and a notice as to requests for psychological assessment and counselling.

Volume and reliability of rules and administrative procedures

4.45 During the course of his 2005 inquiry into the management of prisoners in Western Australia, the Hon. Denis Mahoney, Special Inquirer, referred to the plethora of rules and administrative procedures with which prison officers had to comply. He said, in part:

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[12] Department of Corrective Services, CSinet, *Youth Custodial Services (YCS) Standing Orders.*

> ... It is appropriate that there be Rules to specify how things are to be done and to provide guidelines for officers to follow.
>
> The administrative procedures prescribed must be able to be understood, to be applied, and to be adhered to. Complaints were made during the Inquiry that illustrate the deficiencies that occurred in relation to each of these. Prison officers are required to comply with:
>
> - Acts of Parliament;
> - Regulations made under Acts of Parliament;
> - Director General's Rules;
> - Policy Directives;
> - Operational Instructions;
> - Superintendent's Circulars;
> - Standing Orders;
> - Local Orders; and
> - Unit Orders.
>
> As at the commencement of the Inquiry, the Director General's Rules alone numbered 17 and extended over multiple pages. The Policy Directives issued by the Director General numbered 55 and again extended over multiple pages. One of the previously superseded Rules referred to in evidence, namely Rule 2B (subsequently replaced by Rules 13 and 14) extended over some 50 pages. Officers complained, with some apparent justification, that it was not possible for officers required to make day to day decisions to have available ("to have a pocket large enough to contain") all of these Rules; and that they had difficulty in reconciling even, for example, the provisions of the important Rules 13 and 14.[13]

4.46 The position with respect to Youth Custodial Services appears to be no better. The volume of YCRs (currently numbering 42) which youth custodial officers 'must observe' (s 11A(a) of the YOA) and other administrative procedures relating to the management of detainees, is extremely and, perhaps unnecessarily, large.

4.47 Youth custodial officers must constantly balance the need for security and control against the safeguards that apply in relation to the care and treatment of young people in custody. A proper understanding of and access to the rules and related administrative procedures is therefore an essential part of maintaining that balance in the daily regime of a detention centre. The YCRs, SOs, OPs and other notices and instructions are aimed at providing relevant guidance to youth

[13] Hon. Denis Mahoney, *Inquiry into the Management of Offenders in Custody and the Community* (November 2005) [5.103-5.105].

custodial officers. However, the fact that all of these modes of guidance are in use presents layers upon layers of rules which can be difficult to unravel for those who must apply them, let alone the detainees who are subject to them.

4.48 The usefulness and reliability of the rules and administrative procedures is not assisted by the apparent lack of regular review. SO 1 provides that a regular review of and updates of JCRs and SOs 'shall be undertaken in order to maximise currency of the contents'.[14] This has not occurred. Youth Custodial Services is currently operating with SOs which are dated 30 June 2009 and are still headed so as to apply to 'Banksia Hill Detention and Rangeview Remand'. Despite the fact that units 11 and 12 at Hakea have been declared to be a detention centre since early February 2013, it appears that no steps have been taken by the Department to amend the SO's so that it is clear that they apply equally to Hakea JF.

4.49 The JCRs have been reviewed and republished as the YCRs. They are expressed as being 'effective from 27 August 2012'. However, they were not published by the Department until 5 March 2013. The Department informed this Inquiry that, at the time of the riot, a complete suite of policies and procedures was not in place at Banksia Hill. Specifically there were no security, drug or searching strategies in place.[15]

4.50 In a previous inspection report the Inspector raised significant concerns about the degree to which Departmental policies and practices in the area of managing poor behaviour of detainees appeared to be out of line with the letter and spirit of the YOA as well as concerns about the data, documentation and record keeping practices of the Department.[16] Despite some resistance to the inspection findings, at that time, the management team at Banksia Hill acknowledged the various rules and orders needed a complete review and a substantial rewrite.

4.51 Although some steps have been taken by the Department with the review and publication of the YCRs, the Inquiry has shown that there remains cause for considerable concern about the efficacy of the review of rules and procedures and whether some of them are in fact compliant with the law and national and international practice. See in particular the comments below relating to the practices of lockdown and the use of restraints.

4.52 In addition, the detention of young people within Hakea Prison grounds appears to have caused confusion about the proper application of rules and procedures to the detainees housed in Units 11 and 12. As described below, Units 11 and 12 of Hakea Prison have been gazetted as a detention centre following a declaration made by the Minister under s 13 of the YOA. They are no longer part of a prison.

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[14] SO 1, 5.1.
[15] See this Inquiry's *Security Review Paper,* Chapter 6.
[16] OICS, *Report of an Announced Inspection of Banksia Hill Juvenile Detention Centre,* Report No. 76 (January 2012) [1.18].

However, the Superintendent of Hakea Prison issued a Local Order pursuant to section 36(3) of the *Prisons Act 1981* which sets out detailed provisions governing the 'accommodation, daily routine, welfare, and other management issues regarding juvenile detainees' within Units 11 and 12, including a time table for the detainees 'structured day'.[17]

4.53 Section 36(3) of the *Prisons Act 1981* allows the Superintendent of a prison to 'issue such orders to **officers and prisoners as are necessary for the good government, good order, and security of the prison of which he is the Superintendent'** (emphasis added). 'Prisoners' are those persons committed to a prison and the Superintendent of Hakea Prison would seem to have no authority to make orders prescribing the day to management of detainees within Units 11 and 12.

[17] Department of Corrective Services, Local Order 106, 12 February 2013.

5 The Transfer of Detainees and the Legal Status of Hakea JF

The Initial Transfer

5.1 Hakea Prison is close to Banksia Hill and at the time of the incident it had an unoccupied unit (Unit 5). Unit 5 was free because its occupants had recently moved to Units 11 and 12 at Hakea Prison (part of a 640 bed expansion for adults). Units 11 and 12 sit slightly apart from the rest of the prison, within the same perimeter but separately fenced. Unit 5 was the self-care unit at Hakea Prison and probably the best of the older units in the prison.

5.2 On the night of 20/21 January, some detainees were initially placed in Unit 12 which meant they were in the same compound as the adults in Unit 11. However, it appears that all detainees were transferred to Unit 5 the next day.

Subsequent Transfers

5.3 By 25 January 2013, a decision was made to transfer all of the remaining male detainees at Banksia Hill to Hakea Prison and that Units 11 and 12 would both be required for this purpose.

5.4 On 1 February 2013, by a combination of the *Prisons (Hakea Prison) Order (No. 2) 2013* and the *Young Offenders (Detention Centre) Order (No. 2) 2013,* Units 5, 11 and 12 were gazetted as a detention centre.[18] In effect, therefore, parts of Hakea Prison were artificially 'excised' from the prison and turned into a detention centre. None of those units could therefore be used for adult prisoners.

5.5 Unit 5 was subsequently re-declared to be part of the prison by the combination of the *Prisons (Hakea Prison) Order (No. 3) 2013* and the *Young Offenders (Detention Centre) Order (No. 3) 2013.*[19]

5.6 Within the next two weeks the majority of the remaining male detainees at Banksia Hill were transferred to Hakea JF while the damage caused by the riot was repaired and security upgrades implemented. The transfer was completed on 7 and 8 February 2013. A small number of male detainees under 15 years of age and some older male detainees who needed to be held there for specific purposes, remained at Banksia Hill along with the female detainees.

Legality of Transfers

5.7 The statutory obligation provided by the YOA is that remanded or sentenced young people are to be detained or serve their sentence in a detention centre (ss. 118A and 21 of the YOA). Section 118A(4) permits the court, at the time of

[18] Government Gazette, Friday 1 February 2013, No. 17, 447-8.
[19] Government Gazette, Tuesday 5 February 2013, No. 23, 851-852.

sentencing, to direct that a young person between 16 and 18 years old, serve the sentence in a prison and section 178 of the YOA permits the court to direct that a young person between 16 and 18 years old who is already serving a sentence of detention in a detention centre, be transferred to a prison. Clearly, there were no such orders on the night in question and, at that time, no part of Hakea Prison was gazetted for use as a juvenile detention centre.

5.8 Section 13 of the YOA provides that the Minister may, by order, declare a place to be detention centre, or vary or revoke such an order. Pursuant to s. 13(3), the order does not have effect until after it is published in the Government Gazette. However, the gazettal of a declaration that units within an adult prison be a detention centre was a first for Western Australia and it represented a significant change in the detention environment for the young people in custody.

5.9 Units 5 and 12 at Hakea Prison were first gazetted as a detention centre on Tuesday, 22 January by the combination of the *Prisons (Hakea Prison) Order 2013*, the *Young Offenders (Banksia Hill Detention Centre) Order 2013* and the *Young Offenders (Detention Centre) Order 2013*. [20]

5.10 The legality of the initial transfer of 73 detainees was considered by the court in the Wilson case. One of the grounds of challenge in that case was based on the assertion that the initial transfer of detainees was not authorised by s. 178 of the Act and was in contravention of s 118A. Martin CJ concluded that there was no basis for this assertion. He said:

> These proceedings have been brought on behalf of a young offender who was under a sentence of detention at the time he was transferred to Unit 5 at Hakea. The question of whether that transfer contravened s 118A, as the applicant asserts, turns upon whether it could be said that his transfer in the circumstances of urgency which prevailed at the time, and his detention within a prison for a little over 24 hours until the place at which he was detained became a detention centre by virtue of the Minister's declaration, had the consequence that he had not served his sentence in a detention centre. Until the riot, the young person concerned had served his sentence at Banksia Hill. As from the gazettal of the Minister's declaration on 22 January 2013, he has served the remainder of his sentence in a detention centre at Hakea. In my view, given the circumstances which prevailed on 21 January 2013, it cannot fairly be said that his accommodation for a little over 24 hours in a place which was legally characterised as a prison contravened the statutory direction that he should serve his sentence in a detention centre. The proposition that s 118A should be construed so as to conform with practical reality is reinforced by s 118A(3), which makes specific provision for the

[20]Government Gazette, Tuesday, 22 January 2013, No.9, 235-7.

> circumstance in which it is not practicable to immediately transport a young person to a detention centre.
>
> Examples more extreme than the riot which occurred at Banksia Hill can easily be imagined. If a detention centre was entirely destroyed by natural disaster, such as fire, flood or earthquake, could it be supposed that s 118A of the Act should be construed so as to require detainees to be held at that place, at their peril, until such time as another place had been declared to be a detention centre and the Minister's order to that effect published in the *Government Gazette*? When pressed with this question, counsel for the applicant conceded that the Act should not be construed as having that effect. Implicit in that concession is the acceptance of the proposition that the provisions of the Act pertaining to the detention of young persons (including s 19 and s 21 which relate to the detention of young persons on remand) should be construed as being subject to unexpected emergencies of the kind to which I have referred, in which event the safety and security of the detainees should be considered to be the paramount consideration.[21]

5.11 The applicant in the Wilson case also challenged the lawfulness of the Minister's decisions to declare Units 5, 11 and 12 at Hakea Prison, at various times and in different permutations, to be a detention centre under the YOA. One of the grounds for that challenge was that the facility was 'unsuitable' for the detention of young persons and that therefore the decisions did not accord with the requirements of the general principle in s 7(i) of the YOA.

5.12 The court held that the ordinary use of the word 'suitable' invites the consideration of a wide range of circumstances in determining whether a particular place is appropriate for the detention of young people. That consideration is essentially a matter of evaluation and assessment, after which individual persons might reach differing conclusions. It was held that, in the circumstances prevailing at the time, the Minister had given proper consideration to whether Hakea JF was suitable for the detention of young persons within the meaning of s 7(i) of the YOA. Martin CJ said:

> It was clear to all engaged in this process of assessment that, in many respects, all of the alternatives considered, including the placement of detainees in units at Hakea, involved outcomes which were, in a number of respects, less than optimal, and which resulted in a diminution in the quality of the facilities and services which had been available to detainees at Banksia Hill. However, in the circumstances which prevailed following the riot, some deterioration in the accommodation and services available

[21] *Wilson v Joseph Michael Francis, Minister for Corrective Services for the State of Western Australia* [2013] WASC 157 [178-179].

> to detainees was inevitable. In those exceptional circumstances, the question which the Minister was required to address was the question of which of the various alternatives best conformed to the objectives and principles specified in the Act, or, put another way, having regard to those objectives and principles, which was the least worst alternative…
>
> In the exceptional circumstances which prevailed following the riot, accommodation had to be found for the detainees who had to be removed from Banksia Hill. There were a limited number of alternatives available. The identification of a place suitable for the detention of young persons within the meaning of s 7(i) of the Act required the Minister, through his advisers, to carefully consider those alternatives broadly by reference to the objectives and principles of the Act. That is precisely what occurred. Following that process it was concluded that utilisation of the units at Hakea was the alternative which best conformed to the objectives and principles of the Act. The applicant does not contend that some other conclusion should have been reached. In the circumstances which then prevailed, that conclusion established that the units at Hakea were 'suitable' for the detention of young persons, because there was no better alternative. In those unusual circumstances, nothing more was required of the Minister.[22]

5.13 It is important to understand that the matter before the court in the Wilson case concerned the circumstances which prevailed at the time the decisions were taken and whether the decision makers exceeded the power conferred upon them by the YOA. The Supreme Court was considering four specific questions. These related to the legality of the initial decision to transfer the 73 detainees to Hakea Prison and the three subsequent decisions to declare Units 5, 11 and 12, at various times and in different permutations, to be a detention centre.

5.14 Although the decisions in relation to the transfer and declaration of Units 11 and 12 as a detention centre were found to be lawful and valid the Chief Justice also held that it was not the task of the Court to assess the appropriateness of the custodial regime put in place for the detainees in the weeks following the riot. He said:

> The regime which immediately followed the riot, which included locking down detainees for 23 hours each day, extensive use of physical restraints (flexible handcuffs) and strip searching was maintained for several weeks following the riot. Any assessment of the appropriateness of that regime and its duration must take account of the security risks created by the riot and its aftermath, including in particular the unexpected relocation of

[22] *Wilson v Joseph Michael Francis, Minister for Corrective Services for the State of Western Australia* [2013] WASC 157 [159-162].

> detainees to a facility which was not designed for their use, and the seriousness of the offences with which the detainees had been charged, or in the case of sentenced detainees, of which they had been convicted. Assessments of that character are best made by the department and the Inspector of Custodial Services, not the court.[23]

The Purpose of a Detention Centre

5.15 The YOA (ss. 19, 21, 118A, 118 and 178) draws a clear distinction between a prison created under the *Prisons Act 1981* and a detention centre created under the YOA. However, the YOA is less clear in identifying the characteristics which distinguish a detention centre from a prison.

5.16 In an article addressing the operations of the Kariong Juvenile Correctional Centre in New South Wales, Dambach illustrated the distinction between detention and imprisonment as follows:

> The distinction between detention and imprisonment was dealt with in the immigration case of *Al-Kateb v Godwin, 2004*, where the majority concluded that unlawful non-citizens are not imprisoned but are held or detained for the purpose of their removal, which was considered to be less punitive. McHugh J stated (at [45]) that the:
>
> … law requiring the detention of the alien takes it character from the purpose of the detention. As long as the purpose of the detention is to make the alien available for deportation or to prevent the alien from entering Australia or the Australian community, the detention is non-punitive.
>
> Therefore, when assessing the true nature of a detention order, it is important to look at the purpose of detention. The purpose for detaining children in juvenile detention centres is clearly outlined on the Juvenile Justice website, with the rationale for custodial services being to 'provide age and gender appropriate programs that aim to address the offending and developmental needs of young people in custody'.[24]

5.17 International standards recognise that young persons in custody should be kept separate from adults, detained in 'open' facilities with minimal security measures and treated in a way which does not subject them to cruel, inhuman or degrading treatment. The aim of detention should be the young persons' reformation and social rehabilitation.[25]

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[23] Ibid, [11].
[24] Dambach N, 'Kariong Juvenile Correctional Centre: countless contraventions of international law' (2008) 14(1) *Australian Journal of Human Rights* 184.
[25] ICCPR, Article 10; CRC, Articles 3 and 39; Beijing Rules, 13.4, 13.5 and 26.3; RPJDL, Rules 29 and 30.

5.18 The AJJA Standards relevantly also require that a detention centre should provide:

- an environment in which young people, staff and others feel safe, secure and not threatened by any form of abuse or harassment (Standard 1.1);
- specialised programs that assist young people to understand why they offend and what measures they can take to stop or reduce their offending (Standard 4.3);
- a broad range of coordinated physical and passive recreational and leisure activities that are enjoyable and improve the fitness levels , skills, self-esteem and community integration of young people (Standard 4.5);
- disciplinary responses to unacceptable behaviour are in accord with international principles, local laws, and the centre's policies and procedures, which are applied in an impartial and fair manner (Standard 7.3);
- a physical environment that is safe and secure and that has due regard to the rehabilitative expectations of custodial care… (Standard 9.1); and
- a sufficient number of trained staff to ensure that young people are treated as individuals and are assisted with their involvement in the centre's programs and activities (Standard 10.4).

5.19 The Department has accepted that the management of its detention centres will be consistent with the AJJA Standards.[26]

5.20 The YOA does not identify the characteristics which distinguish a detention centre from a prison. It seems clear however, that the purpose of a detention centre is to provide an environment for young people who are sentenced or on remand, which is safe and secure but which also satisfies certain standards. These are that young persons, while they are in custody, will not be subject to abuse or harassment, will be given sufficient opportunities to participate in education and rehabilitative programmes and will be able to participate in regular physical and passive recreational and leisure activities. It is arguable that when the environment at a detention centre does not meet these standards, the centre is not fulfilling its purpose.

5.21 During the course of the Inquiry, the President of the Children's Court, his Honour Judge D J Reynolds, expressed the view that Hakea JF did not satisfy the requirements for a juvenile detention centre. In *The State of Western Australia v BAJG* [27](BAJG case), when dealing with the sentencing of three young persons, Judge Reynolds heard evidence about the conditions for detainees at Banksia Hill and Hakea JF, including evidence of a high level of lockdown time, the over-use of

[26] YCR 102, 3.
[27] Unreported, the Children's Court of Western Australia, KT35/12, Reynolds J, 27 March 2013.

restraints and strip-searches, inadequate education time and a lack of rehabilitation programmes. He described the juvenile detention facilities as being in 'a state of crisis'[28] and said:

> The first thing I want to say is that the Hakea Detention Centre is in the Hakea Prison. The two units - unit 11 and unit 12 - were built for an adult prison population in an adult prison. To get to those units from outside, you need to enter and then move through the adult prison itself. Space in and about the units is no doubt very limited. The two units were not intended to be and are not a facility. Rather, they were built as part of a facility, namely the Hakea adult prison facility, so in that sense they could not be properly described as a facility.
>
> The point is also to be made that the detention units in Hakea prison would have the feel of a prison, and not that of a juvenile detention centre, and that is the point Mr Tyers has mentioned on behalf of NJG. Whatever you call a place, and in this case, whatever you call the detention centre, it does not change what it actually is in reality, and by reference to its physical construct.
>
> When that is considered in combination with the regimes including in particular the paucity of education programs, recreational programs and rehabilitation programs, and also including the extensive lockdowns in a cell, and outside of a cell but locked in a unit, which I have mentioned, the facility and its conditions or regimes are very harsh and onerous for young detainees in my view. Also in my view, the facility and its regimes do not satisfy the requirements and properly serve the purposes of the statutory framework in the Young Offenders Act for a juvenile detention centre.[29]

[28] Transcript of Proceedings, *The State of Western Australia v BAJG* (Unreported, the Children's Court of Western Australia, KT35/12, Reynolds J, 27 March 2013) 46.
[29] Ibid, 55.

6 Detention conditions – compliance with law and practice

Duty of Care

6.1 Apart from any rights that may be enshrined in legislation there is an established common law duty to exercise reasonable care for the safety of persons detained in custody. The High Court of Australia confirmed this duty of care is owed to prisoners in view of their special and vulnerable status while in prison. [30] There might be a breach of that duty of care for example, if unsafe conditions in a prison or detention centre cause injury to the person in custody or if that person was assaulted in circumstances where the prison or detention centre has not taken sufficient steps to provide protection. A breach of the duty of care entitles the prisoner or detainee is to sue for damages.[31]

6.2 The duty of care is heightened when a detainee has been assessed as having special needs or being 'at risk' for any reason. The duty to protect detainees is not absolute, however. It requires custodial officers to do what is reasonable in all of the circumstances, not to prevent injury at all costs. Nonetheless, a person in custody has been taken from his or her usual environment and is unable to access usual sources of assistance and support. He or she is dependent on custodial officers for all aspects of personal welfare.

6.3 The obligation to exercise reasonable care for the safety of detainees is reflected in the Department's current YCR 102 dealing with the Youth Justice Service's Philosophy and which among other things provides that:

> 5.3 The fundamental principles of this philosophy are to provide young people in youth custodial facilities with:
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> 5.3.1 a safe and secure environment
> 5.3.2 living conditions that meet duty-of-care requirements
> 5.3.3 privacy and dignity
> 5.3.4 programs and services that meet their educational, vocational and gender and age-related needs
> 5.3.5 adequate health services
> 5.3.6 adequate recreation facilities
> 5.3.7 an acknowledgement of the complexities of cultural diversity of the population and the wider community.

[30] See *State of New South Wales v Bujdoso* [2005] HCA 76. In that case it was held that the State was under a duty to adopt reasonable measures to reduce the risk of harm to a person who was bashed when prison authorities knew he was a likely target of other prisoners.
[31] See *L v Commonwealth* (1976) 10 ALR 269.

Lockdowns

6.4 In a previous inspection report relating to Banksia Hill the Inspector found that young persons were spending up to 14 hours[32] per day in their cells and that this was exacerbated by unscheduled lockdowns due to staffing issues.[33] One of the recommendations made by the Inspector following the inspection was that the Department reduce the number of scheduled and unscheduled lockdowns of detainees. The Department supported this recommendation in principle and commented that although it would ensure that lockdowns were kept to a minimum, there was no alternative to the practice of lockdowns within its existing resources, so as to ensure the safety and security of the centre.[34]

6.5 A number of submissions to the Inquiry raised concerns about the frequent and lengthy periods of lockdown of detainees at Banksia Hill before the riot of 20 January 2013 and at both Banksia Hill and Hakea JF after 20 January 2013. These lockdowns were said to relate to security needs and staffing issues.[35]

6.6 In the BAJG case and others cases dealt with by the Children's Court in March and April 2013, evidence was presented by the Department in the form of detention management reports (DMRs) in relation to the custodial regimes at Banksia Hill and Hakea JF. This evidence confirmed that from 20 January 2013 to 12 February (23 continuous days) all detainees had been kept in a 23 to 24 hour lockdown. In the BAJG case, Judge Reynolds said, in part:

> I regard that as exceptionally harsh and I also am of the view that it is clearly inconsistent with the objectives and principles in the Young Offenders Act and it is clearly inconsistent with the statutory framework of the Young Offenders Act. Can I make the point that in my view, and particularly when it is imposed against young people that cannot be said and there is no basis to say that they had anything to do with the incident, it can give rise to a feeling of grievance and also a feeling of anger, which is very counterproductive.
>
> It also, in my view, constitutes something that can be properly said to be inhumane. It shows a lack of empathy for children. It is also my view that it is a serious breach of duty of care owed to the children in the detention centre.[36]

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[32] 13 hours overnight and one hour after school.
[33] OICS, *Report of an Announced Inspection of Banksia Hill Juvenile Detention Centre,* Report No. 76 (January 2012) [1.17, 3.21 and 3.34].
[34] Ibid., [Appendix 1, 61].
[35] Submission 5, Scales Community Legal Centre; Submission 7, Aboriginal Legal Service of Western Australia Inc; Submission 8, Youth Affairs Council of Western Australia, Submission 9, Legal Aid Western Australia; Submission 10, Commissioner for Children and Young People Western Australia.
[36] Transcript of Proceedings, *The State of Western Australia v BAJG* (Unreported, the Children's Court of Western Australia, KT35/12, Reynolds J, 27 March 2013) 47.

6.7 Judge Reynolds also commented on the custodial regime then being applied at Hakea JF for the young persons in question and concluded that the lockdowns equated to a 'daily average per week of 17 and two-third hours per week'. He said, in part:

> That figure, it seems to me, would be dependent on there being no staff shortages…
>
> Then in addition to this 17 and two-thirds hours per day per week on average, there will be periods of time when people have been locked in their cell or within the unit but outside the cell, but at the same time secure in a limited space having meals. So it can be seen from all of that that the extent of the lockdowns is extremely extensive, harsh and onerous and not what one should expect at a juvenile detention centre.
>
> So my comment on all of that is that this extremely high level of lockdown time is completely contrary to the legislative framework in the Young Offenders Act. While the act makes it clear that one of the purposes of detention is punishment, the act also makes it clear that another one of the purposes of detention is rehabilitation. Lockdowns of this magnitude are not only contrary to the purpose of rehabilitation but, even worse, they will likely result in already-damaged children becoming even more so.[37]

6.8 Evidence presented during the Wilson case also confirmed the extent of lockdowns of detainees at Banksia Hill and Hakea JF. Martin CJ said:

> It is clear that the staffing issues at Banksia Hill had not been resolved prior to the riot, and 'rolling lockdowns' were being used as a means of managing those shortages.
>
> In the immediate aftermath of the riot, detainees at both Hakea and Banksia Hill were locked down for 23 hours each day for several weeks. During this period, planning was undertaken with a view to restoring a structured daily schedule at each of the two facilities. It was approximately three weeks before such schedules were restored, and detainees were locked down almost continuously throughout this period…
>
> In very general terms, it can be seen that detainees are scheduled to be locked down for a little over 12 hours each night and approximately three hours during the day, leaving a maximum of between eight and nine hours each day when detainees are not locked down.

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[37] Transcript of Proceedings, *The State of Western Australia v BAJG* (Unreported, the Children's Court of Western Australia, KT35/12, Reynolds J, 27 March 2013) 50.

However, it is clear from the evidence that there continue to be occasions upon which that maximum period of 8-9 hours is not achieved, because of the persistence of rolling or unscheduled lockdowns. Essentially, the programme for each day, and the extent to which education, recreation, remedial programmes and visits can be provided has to be assessed and reviewed each day, in the light of the number of staff who have attended for work.[38]

Lawfulness of lockdowns

6.9 The YOA does not contain any provision which authorises the CEO or Superintendent of a detention centre to order the lockdown (lockup in their cells) of all detainees for a period of time for reasons relating to the management or security of the centre.

6.10 Part 9 of the Regulations contains provisions dealing with the imposition of confinement, as a way of dealing with a detainee who has committed a detention offence (r 74(1)) or 'in order to maintain good government, good order or security in a detention centre' (r 74(2)). The Regulations give the Superintendent power to order that a detainee be confined to his or her sleeping quarters or a designated room.

6.11 The Part 9 Regulations and the supporting YCR 206 appear to only apply to the management of disruptive behaviour of individual detainees in circumstances where there is a need for that individual to be 'confined from other detainees'.[39] This type of 'management confinement' is also one of the punishments that can be imposed following the conviction of a detainee for a detention offence (s. 173 YOA Act). The 'management confinement' of detainees was discussed in the report relating to the inspection of Banksia Hill in 2011.[40]

6.12 Section 181 of the YOA provides that the CEO, with the approval of the Minister, may 'make rules for the management, control, and security of detention centres generally or a specified detention centre and for the management, control, and security of detainees and the management of officers of the Department'. However, none of the JCRs in place at the time dealt with the issue of lockdowns.

6.13 SO 4 (June 2009) prescribes a centre timetable for Banksia Hill and Rangeview Remand Centre. The timetable provides for the scheduled unlock of detainees commencing at 7.15 am and lockup for the evening commencing at 8.00 pm. Provision is made for a late lockup between 8.00 pm and 11.00 pm 'dependant on availability of staffing'. An Assistant Superintendent's Notice issued for

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[38] *Wilson v Joseph Michael Francis, Minister for Corrective Services for the State of Western Australia* [2013] WASC 157 [79-82].

[39] The stated purpose of confinement in YCR 206, clause 2.

[40] OICS, *Report of an Announced Inspection of Banksia Hill Juvenile Detention Centre,* Report No. 76 (January 2012) [4.26-4.28].

Banksia Hill in September and November 2012 changed unlock and lockup times to 7.30 am and 7.15 pm respectively.[41]

6.14 The Local Order 106 issued for Hakea Prison (see the comments above about the application of this order) attaches a timetable for the 'Structured Day' for detainees in Units 11 and 12. In contrast to SO 4 it shows a scheduled unlock of detainees at 7.15 am and lockup procedures for the evening commencing at 6.20 pm.

6.15 Apart from these timetables relating to unlock and lockup times, there are no other administrative procedures (including the revised YCOs) that make provision for the management of scheduled or unscheduled lockdowns of detainees.

6.16 As mentioned above, International Standards recognise that young persons in custody must be treated in a way which does not subject them to cruel, inhuman or degrading treatment.

6.17 Section 7(j) of the YOA provides that 'punishment of a young person for an offence should be designed so as to give the offender an opportunity to develop a sense of social responsibility and otherwise to develop in beneficial and socially acceptable ways'.

6.18 In *Bekink v R*, [42] an adult prisoner in Casuarina Prison had been sentenced to three years imprisonment with eligibility for parole. Prior to his being sentenced there had been a riot in the prison and the authorities responded by imposing a lockdown on half of the prisoners in the prison. There was no particular reason why one half was chosen rather than the other. The lockdown was imposed to offset structural changes to make the prison more secure and not to punish prisoners. There was a shortage of beds in the prison at the time. The prisoner was included in the lockdown despite any misconduct on his part. In fact, the lockdown had already commenced before he was imprisoned. Up until the time of his appeal the prisoner had been subjected to the lockdown for about three months.

6.19 The court allowed fresh evidence to be adduced to establish the harsh conditions applicable to the prisoner's imprisonment. Ipp J noted that the prisoner was confined to his cell for 21 hours per day and that he had no recreational or physical activity apart from walking up and down the corridor together with other prisoners. He stated that 'Confinement in a cell for a substantial period is a severe form of punishment. This is recognised by the *Prisons Act 1981 (WA)*

[41] Department of Corrective Services, Banksia Hill *Assistant Superintendent Notices* 14/2012 and 17/2012.
[42] [1999] WASCA 160.

which provides for confinement as a form of punishment for offences committed in prison.'[43] Ipp J went on to add that:

> … the lockdown conditions are very close to those imposed on persons who have committed prison offences, yet the prisoners in the lockdown category are subject to those conditions without having committed prison offences and have to endure them for a longer period than offenders who are sentenced to solitary confinement under the *Prisons Act*. This means that the lockdown conditions are significantly more severe than those contemplated by the Parliament as the ordinary conditions of imprisonment when it passed the *Prisons Act*.[44]

6.20 *Bekink's* case illustrates the view which was taken of an oppressive lockdown regime in an adult prison. Section 7(c) of YOA provides that a young person who commits an offence is not to be treated more severely because of the offence than the person would have been treated if an adult. Such a regime applied in a detention centre can only be regarded as even more oppressive and contrary to the principles in s 7 of the YOA as well as international principles requiring that children not be subjected to cruel, in human and degrading treatment.

6.21 In addition, it is of grave concern that there is an apparent lack of authority for the use scheduled or unscheduled lockdowns (beyond that for unlock and lockup) in the detention centres and no proper accountability for their use as part of a daily regime for the detainees. The imposition of lockdowns as part of a 'management regime' can be arbitrary and lengthy. The reasons for lockdowns are not recorded and no accurate record is kept of the times involved.[45] Having regard to the objectives of the YOA and the general principles of juvenile justice this is an untenable position.

Physical Restraints

6.22 A number of submissions to this Inquiry also raised concerns about the routine handcuffing of detainees as a security measure during escorts within Banksia Hill before the riot of 20 January 2013 and at both Banksia Hill and Hakea JF after 20 January 2013.[46]

6.23 In the BAJG case and others cases dealt with by the Children's Court in March and April 2013, the DMRs presented by the Department confirmed that from 20 January 2013 to 12 March 2013 detainees were mechanically restrained (hand-cuffs)) for any movements within the detention centres. It was said that 'for all Youth Detention Centres the use of mechanical restraints can be deemed

[43] [1999] WASCA, 4.
[44] Ibid, 7.
[45] See this Inquiry's *Emergency Management Review Paper,* Chapter 5.
[46] Submission 5, Scales Community Legal Centre; Submission 7, Aboriginal Legal Service of Western Australia Inc; Submission 8, Youth Affairs Council of Western Australia.

necessary by the Shift Manager during any occasion which may threaten the wellbeing of the young person and/or Youth Custodial staff. The decision is made to ensure the security and good order of the Youth Detention Centre'.

6.24 International Standards discourage the use of restraints against detainees except in extreme circumstances. Rule 64 of the Havana Rules provides that 'instruments of restraint and 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. They should not cause humiliation or degradation, and should be used restrictively and only for the shortest possible period of time'.

6.25 The AJJA Standards draw upon the Havana Rules and provide as follows:

> 7.7 Use of Force
>
> Standard
>
> Force or instruments of restraint are used on a young person only in response to an unacceptable risk of escape, immediate harm to the young person, or immediate harm to others, and are used for the shortest possible period of time, and in such a way as to avoid or minimise feelings of humiliation or degradation.[47]

6.26 Reflecting these standards, ss 11C and 11D of the YOA authorise the use of force and the use of restraints by youth custodial officers on detainees. Section 11C(1) and (2) provide that the use of force must be no more than 'prescribed force' in the management, control and security of a detention centre and it must only be used in the 'prescribed circumstances'.

6.27 ln this regard, r 71 of the Regulations provides that 'prescribed force' means the degree of physical force which is the minimum required to control a detainee's behaviour in the circumstances. Regulation 72 provides that 'prescribed circumstances' means an immediate period when a detainee is imminently presenting a risk of physical injury to himself or herself, other detainees or staff. Regulation 72 further provides that:

- as soon as the imminent risk has passed and the detainee has been 'stabilised' then the prescribed circumstances for the use of force no longer exist;
- if prescribed force is used the detainee must be examined by medical staff as soon as practicable after the incident; and
- written reports are to be provided by the staff involved in the use of force and by the medical staff who conduct the examination.

[47] Revised edition (1999), 48.

6.28 Section 11D(1) of the YOA authorises the use of restraints by youth custodial staff. It provides that the CEO or a Superintendent may authorise and direct the restraint of a young offender where, in his or her opinion, such restraint is necessary:

(a) to prevent the young offender injuring himself or herself, or any other person; or

(b) upon considering advice from a medical practitioner, on medical grounds; or

(c) to prevent the escape of a young offender during his or her movement to or from a facility or detention centre, or during his or her temporary absence from a facility or detention centre.

6.29 Appendix 2 of JCR 102 set out Standards for Juvenile Custodial Facilities based on the AJJA Standards. Clause 7.7 of Appendix 2 in relation to the use of force states:

> Force or instruments of restraint are used on a young person only in response to an unacceptable risk of escape, immediate harm to the young person, or immediate harm to others, and are used for the shortest possible period of time, and in such a way as to avoid or minimise feelings of humiliation or degradation.

6.30 JCRs 207 ('Use of Force) and 208 ('Use of Restraints') governed the use of force and restraints at Banksia Hill and Hakea on detainees until their replacement by the publication of revised YCR's in March 2013. JCR 208 defines the term 'use of restraints' for the purposes of the rule as referring 'to the use of an appliance or device (mechanical restraint) but may also include the use of medication used to assist in controlling the behaviour of a detainee'. YCR 208 refers to section 11D(1) of the Act and cites the three circumstances in which the restraint of a detainee may be authorised.

Restraint to prevent injury – s 11D(1)(a) of the YOA

6.31 With reference to the authority to restrain so as to prevent a detainee injuring himself or any other person, JCR 208, Clause 2, contained notes that provided:

> Note (i) The application of mechanical restraint shall be limited to that immediate period when the detainee is imminently presenting a risk of physical injury to themselves, other detainees or staff. As soon as the imminent risk has passed, and the detainee has stabilised, then the use of mechanical restraint shall cease.
>
> Note (ii) In the event that mechanical restraint being [sic]required, then only that degree of restraint which is deemed to be the

minimum required to control a detainee's behaviour shall be applied.

6.32 JCR 208 also provided as follows:

- Where a detainee is held in mechanical restraints he or she must be checked as soon as practicable but within one hour by a nurse or medical officer, and at half hourly intervals thereafter (Clause 3);
- A detainee held in mechanical restraints must be under continuous supervision of an Officer to ensure that injury is not being caused (Clause 5);
- A detainee held in mechanical restraints for the purposes of section 11D(1)(a) or (b) (to prevent injury or on medical grounds) shall be considered to be 'at risk' as outlined in Rule 703 (Clause 6);
- The restraints applied must be approved for use in Juvenile Custodial Services facilities (Clause 7);
- ln all cases the use of restraints must be authorised by the Superintendent. In the event of an emergency, restraints may be used without prior authority provided the authority of the Superintendent is sought as soon as practicable after the event (Clause 8);
- The Superintendent (or delegate) must be notified verbally as soon as is practicable when restraints are used and a written record (including the reason for using such restraint) must be provided (Clause 9);
- The Superintendent (or delegate) must ensure that written records are kept of the use and circumstances when restraints are employed (Clause 10);
- All persons present who witness or are directly involved when the restraints are applied must complete a report detailing their personal involvement or their personal descriptive observations of what occurred (Clause 10.1); and
- The restraints must be applied in such a manner that they are effective, but care must be taken to ensure that the restraints do not cause physical injury (Clause 11).

Restraint on medical grounds – s 11D(1)(b)of the YOA

6.33 JCR 208 confirmed that the use of restraints on these grounds (as for their use to prevent injury) shall be used as a last resort and that restraint involving the use of medication must not be used unless it is first approved by a medical practitioner (s 11D(2)).

Restraint to prevent escape – s 11D(1)(c) of the YOA

6.34 Standing Order 18 provides additional guidance for custodial officers in relation to JCRs 207 and 208. Clause 2 of Standing Order 18 provides that mechanical restraints could be utilised in the following circumstances:

- When the use of prescribed force is required to restrain a detainee;
- To maintain the custody of a detainee;
- To prevent injury to the detainee or another person;
- On medical grounds; or
- On external escorts from the centre.

6.35 The second dot point above appears to separately authorise the use of mechanical restraints so as 'to maintain the custody of a detainee' within the confines of the detention centre. However, there is no authority for this in s 11D of the YOA or in JCR 208.

6.36 Section 11D(1)(c) allows the use of restraints 'to prevent the escape of a young offender **during his or her movement to or from a facility or detention centre, or during his or her temporary absence from a facility or detention centre'** (emphasis added). The word 'facility' is not defined in the YOA or Regulations. When used in this context it appears to refer to a building or complex of buildings designed for a specific purpose (such as a court complex) and not to a detention centres which is facility declared as such under section 13 of the Act. It seems clear therefore that s 11D(1)(c) is intended to apply to external escorts of detainees only.

Improper use of restraints

6.37 In February 2103, in *The State of Western Australia v JAB*, [48] Judge Reynolds made reference to the management issues arising from detainees being located at Banksia Hill and Hakea JF and the conditions for the detainees at both facilities. He referred to the use of restraints on detainees who were not involved in the incident and said:

> The material provided by DCS includes a directive given to staff at BHDC on 1 February 2013 that 'the escorting of detainees within the centre will continue with restraints except in the circumstances listed above'. One of the circumstances listed above in that directive is that 'detainees within a secure room during interview (psych, legal etc) are not to be restrained unless requested to do so by the interviewer'.
>
> I have already referred to the fact that after the incident at BHDC restraints were used on detainees who were not involved in the incident on 20 January 2013.
>
> Section 11D(1) of the YO Act provides as follows:
>
> 11D. Use of restraints

[48] [2013] WACC 3.

(1) The chief executive officer, or a superintendent, may authorise and direct the restraint of a young offender where in his or her opinion such restraint is necessary —

(a) to prevent the young offender injuring himself or herself, or any other person; or

(b) upon considering advice from a medical practitioner, on medical grounds; or

(c) to prevent the escape of a young offender during his or her movement to or from a facility or detention centre, or during his or her temporary absence from a facility or detention centre.

Section 11D(1) clearly requires the chief executive officer or superintendent to be satisfied that restraint is necessary in the case of the particular individual restrained. A separate consideration is required for each particular individual. In my view the direction to which I have just referred is not authorised by s 11D(1) of the YO Act. The particular circumstance referred to is also unlawful because it purports to give authority to someone who does not have any under the YO Act to decide whether a young detainee is restrained. I do not think that a psychologist would want to interview a detainee when the detainee was restrained but interviews would not necessarily be limited to psychologists.[49]

6.38 The use of mechanical restraints is only authorised in the circumstances provided by s 11D(1) of the YOA. Those circumstances concern the application of restraints during an immediate period when the detainee is imminently presenting a risk of physical injury to himself or others, on medical grounds and during external escorts. Currently, there appears to be no authority for the CEO or Superintendent to authorise the routine mechanical restraint of one or more detainees as part of a management regime designed to maintain order and custody within the detention centre. The routine handcuffing of detainees as a security measure during escorts within the detention centres both before and after 20 January 2013 was unlawful and contrary to the Department's own procedures in JCR 208.

6.39 Aside from the legal position, the practice of routine restraint of detainees every time they were escorted within Banksia Hill and Hakea JF between 20 January 2013 and 12 March 2013 lacked justification. In the closed environment of a detention centre and in circumstances where escorts are made in the company of youth custodial officers, the routine use of restraints on detainees was neither reasonable nor proportionate.

[49] [2013] WACC 3, 36-37.

Additional concern

6.40 As mentioned above, during the course of this inquiry the JCRs were amended and replaced by the newly named YCRs. The former JCR 208 ('Use of Restraints') no longer exists. The renamed YCR 208 deals with 'Major Detention Centre Disturbances'. The former JCR 207 has been renamed YCR 204 and is now restricted for publication to staff only. YCR 204 now applies to both the use of force and restraints and demonstrates a lack of understanding of the relevant legislative provisions as well a careless approach to review. YCR 204 defines the 'use of force' as meaning:

> ...the application of any personal (physical) contact or other device (referred to in s.3.2.1), imposed (forced) on a detainee, **other than where required under a routine escort or management regime described in s. 5.** Principally relates to unplanned events that require immediate response (emphasis added).

6.41 The reference to clause 3.2.1 should clearly be a reference to clause 2.1 of YCR 204 which sets out the types of approved instruments of restraint. The words emphasised above appear to be an attempt to authorise the use of force and restraints for routine escort within the detention centre and as part of a management regime. This is contrary to section 11D of the YOA. In any event, as it is drafted, YCR 204 is incomplete. YCR 204 concludes at clause 3 and does not include the mentioned clause 5 relating to a 'routine escort or management regime'.

6.42 In addition, the elaborate but important provisions of JCR 208 relating to the reporting and recording of the use of mechanical restraints in each case (see 6.29 above), seem to have disappeared.

Strip Searches

6.43 The use of strip-searching at Banksia Hill was examined in a June 2008 inspection of Banksia Hill which found:

> In the majority of cases, strip-searches were undertaken as part of routine procedure rather than in response to suspicion or information received. The use of strip-searching as a routine practice at Banksia Hill cannot be justified from a risk management perspective – it should be targeted based on reasonable suspicion. 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.[50]

[50] OICS 2008, *Report of an Announced Inspection of Banksia Hill Juvenile Detention Centre*, Report No. 58 (December 2008) [2.38].

6.44 At the time of the inspection in 2008, detainees at Banksia Hill were routinely strip-searched on every entry into and exit from the centre. Strip-searches were conducted on detainees arriving from Rangeview, despite having been strip-searched there prior to travelling in a secure vehicle (staffed by juvenile custodial officers) and disembarking in the secure sally port at Banksia Hill. This double search process was said to be unnecessary, as there should have been no opportunity after strip-searching at Rangeview for a detainee to access any contraband, weapon or self-harm implement prior to arriving at Banksia Hill. There was no clear risk to be mitigated by a second strip-search.[51]

6.45 The 2008 inspection report commented on the review of strip search practices in Queensland and stated:

> Strip-search practices have recently been reviewed in Queensland following detainee complaints that were taken up by legal and advocacy groups.[52] Consequently, Queensland's youth detention centres now take a more balanced approach, reducing routine strip-searches to new admissions from the community; although in practice they are nearly always carried out on court returns due to reasonable suspicion of contraband. Most significantly, routine strip-searches were abandoned after visits and before detainees travel to court, with negligible change in contraband found in the centres.[53] Western Australian practices should be reviewed to establish less-invasive alternatives where circumstances permit.[54]

6.46 Following the 2008 inspection the Department agreed to review the practices and procedures relating to the strip searching of detainees. However, it appears that little has changed. In the BAJG case and others cases dealt with by the Children's Court in March and April 2013, the DMRs presented by the Department confirmed that from 20 January 2013 to 12 March 2013 detainees were strip searched when transferring from one detention centre to another (Hakea JF to Banksia Hill and vice versa) and on leaving or returning to the detention centre (for example, for court appearances). The DMRs also confirmed

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[51] Ibid., [2.32].

[52] In Queensland, a young person legally challenged the Department of Communities that she was being routinely strip-searched rather than for reasonable suspicion. While the case did not reach court, it prompted that department to obtain Crown Law advice to the effect that blanket strip-searches were unlawful and that strip-searches should only be undertaken upon reasonable suspicion of contraband, assessed on a case-by-case basis. This had been the substance of recommendations from an earlier review known as 'the Forde Inquiry' – Queensland Government, *Report of the Commission of Inquiry into the Abuse of Children in Queensland Institutions* (31 May 1999) – and legislative change to *Juvenile Justice Regulations 2003* (Qld) reg 26.

[53] This information is from statistical and verbal evidence gathered by the Queensland Youth Detention Inspection Team (members of which participated in the inspection of Banksia Hill) over a period of monitoring unclothed searches as an area of focus.

[54] OICS 2008, *Report of an Announced Inspection of Banksia Hill Juvenile Detention Centre*, Report No. 58 (December 2008) [2.34].

that detainees were strip searched before and after social visits at Hakea JF up until 5 March 2013 when the search prior to the visit was discontinued.

6.47 Regulation 82(1) of the Regulations authorises the Superintendent to search any detainee in accordance with the provisions in Part 10 of the Regulations and take from them any illegal or unauthorised thing found on them.

6.48 Regulation 85 states the circumstances in which detainees may be searched and provides:

> (1) A detainee should be searched —
>
> (a) on admission to the detention centre;
>
> (b) immediately before discharge from the detention centre;
>
> (c) on leaving or returning to a detention centre; and
>
> (d) when transferring from one detention centre to another.
>
> (2) A detainee may be searched at any time, and in such a manner, as is considered necessary at the time by the superintendent.

6.49 Regulation 85(2) accordingly gives the Superintendent a wide discretion to search a detainee, at any time, where such a search is 'considered necessary at the time'. The manner of search is qualified by r 86 which provides that:

> (1) A detainee may be searched using either a "pat" or "strip" search depending on the circumstances surrounding the requirement of the search.
>
> (2) A detainee should be "strip" searched if there are circumstances giving rise to a reasonable suspicion that the detainee may be in possession of an item that could —
>
> (a) jeopardise the safety, good order or security of the detention centre; or
>
> (b) be used for self harm.
>
> (3) At least 2 officers must be present during a search of a detainee.
>
> (4) A detainee must not be "strip" searched in the sight or immediate presence of a person of the opposite gender.
>
> (5) Where practicable, a detainee should not be "strip" searched in the immediate presence of another detainee.
>
> (6) Any search of a detainee must be conducted with due regard to the decency and self-respect of the detainee.

(7) Despite subregulation (4), a superintendent may direct that a search is to be carried out in the presence of a medical practitioner or a nurse.

(8) Whenever a detainee is "strip" searched, each officer taking a role in that search must forward a written report of the search to the superintendent.

6.50 The former JCR 212 supplemented these Regulations along with SO 17 and OP 28. Notwithstanding the provisions of r 86(2), SO 17 makes strip search mandatory for detainees in the circumstances set out in r 85(1) (admission and discharge, transfer between detention centres and departure or return to a detention centre), on placement into an observation cell and 'on such other occasions and in such manner as the Superintendent considers necessary'. All such strip searches are to be recorded.

6.51 SO 17 nonetheless provides for pat searches of detainees in other circumstances, including random pat searches after social visits. The practice of pat searching after social visits was confirmed by the Department as a minimum requirement, in the evidence it presented in the BAJG case and others cases dealt with by the Children's Court in March and April 2013. It was also said that 'if Youth Custodial staff have concerns regarding the social visit, they may determine that a strip search is required. An example of such concerns is when a visitor has a history of passing contraband during social visits'.

6.52 Article 16 of the CRC 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.

6.53 Strip searches are invasive and even if conducted appropriately, they can be embarrassing and raise considerable feelings of anguish or inferiority, particularly for more vulnerable young detainees. It is clear that the conduct of a strip search, upon the reasonable suspicion set out in r 86(2), could not be regarded as unlawful or unreasonable. However, to subject detainees to routine strip searches before and after social visits, without a proper evaluation of whether it was needed in a particular individual case or situation was unreasonable and contrary to the intent of r 86(2) and international standards.

Right to Legal Advice

6.54 Concerns were raised in a number of submissions to the Inquiry about the difficulties experienced by legal practitioners gaining access to their client detainees both at Banksia Hill before 20 January 2013 and at Hakea JF after that date. It was said that visiting hours for lawyers (and others, including family

members) were vastly reduced and they were not permitted to visit over weekends or outside official visiting hours.

6.55 International standards focus on ensuring that young persons in detention receive appropriate legal representation and are able to communicate confidentially with their lawyers regarding criminal matters. Rule 18(a) of the Havana Rules states that:

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

6.56 This right to legal advice is reflected in the former JCR 501 (Visits) which relevantly provided that where reasonable notice to visit had been given to the Superintendent or their delegate, a legal practitioner could enter the detention centre and interview a detainee within the view of, but not the hearing of, a staff member.

6.57 JCR 501 did not specify particular times for visits by legal practitioners and neither does the new YCR 501. Although SO 12 (June2009) provides that detainees at Banksia Hill may have up to four hours of social visits per week (Monday to Sunday) and prescribes twice daily afternoon sessions Monday to Friday and four afternoon periods each on Saturday and Sunday, it makes no specific provision for visits by legal practitioners.

6.58 It is clear that during the period of continuous lockdown at Banksia Hill and Hakea JF (20 January to 12 February) no visits at all were permitted. Nonetheless, any restriction on the right of a legal practitioner to visit a client detainee, provided reasonable notice of the visit was given, would be appear to be contrary to the provisions of JCR 501.

Education and other Rehabilitative Programmes

6.59 Concerns about the severe limitations on the education programmes for detainees at Hakea JF and the absence of rehabilitative programmes were raised by Judge Reynolds in the BAJG case and also by the Chairman of the Supervised Release Review Board, the Honourable M J Murray, QC. These concerns were echoed in a number of the submissions made to the Inquiry.[55]

6.60 In the BAJG case, Judge Reynolds said, in part:

[55] Submission 5, Scales Community Legal Centre; Submission 7, Aboriginal Legal Service of Western Australia Inc; Submission 8, Youth Affairs Council of Western Australia, Submission 9, Legal Aid Western Australia.

> In relation to education, on the material provided there are only about nine hours of schooling per week. Mr Hawkins' instructions from JAB are that it is actually, in practice, less than that. Whether it is five or nine, for the purpose of making this point it does not matter. It is grossly inadequate.
>
> … The point I wish to make is that while rehabilitation is not just about education - rehabilitation requires many other types of programs for personal development - education is crucial…
>
> Can I also make a point that JAB has been in custody for 83 days. I think BAJG has been in custody for 94 days, and NJG I think has been in custody for 94 days. For each and every one of them the report says that they have not actually participated in any program. There are programs mentioned, taking up a fair amount of space in the report, but none of them have actually been offered and none of them actually been delivered to any of BAJG, NJG and JAB within the whole of the time that each of them has been in custody on remand respectively, in the order of three months, give or take. I find that appalling and, again, it is inconsistent and contrary to the requirements of the Young Offenders Act.[56]

6.61 The Chairman of the Supervised Release Review Board wrote to the Department in March 2013 expressing his concern that the functions of the Review Board were affected by the lack of availability for detainees of necessary assessment, treatment, remedial and educational programs. The Honourable Mr M J Murray said, in part:

> I must tell you that we are still able to function, although with increasing difficulty because we are encountering cases where, despite your assurances of the availability of necessary assessment, treatment and remedial and educational programs, it is being reported to us that young offenders have not had access to programs, etc which are necessary if they are able to mount convincing cases for supervised release.
>
> Not to put too fine a point on it, we are having to take greater risks with the making of our orders, in some cases, than we would ordinarily regard as desirable.[57]

6.62 The *School Education Act 1999* requires compulsory aged students to attend school, or participate in an educational programme of a school, on the days on which the school is open for instruction, unless a written arrangement has been entered into for the student (ss 23 and 26). Since 2008, education has been

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[56] Transcript of Proceedings, *The State of Western Australia v BAJG* (Unreported, the Children's Court of Western Australia, KT35/12, Reynolds J, 27 March 2013) 51-52.

[57] The Honourable Mr M J Murray, Chairman, Supervised Release Board Western Australia, letter to the Department (20 March 2013).

compulsory for students from the beginning of the school year they turn 6 years 6 months, until the end of the year in which they turn 17.

6.63 Regulation 26 of the *School Education Regulations 2000* provides that the minimum hours prescribed for the instruction of children in primary or secondary school education programmes is at least 4 hours 10 minutes per day and at least 25 hours and 50 minutes per week.

6.64 Young people in detention are unable to attend external school programmes but their right to continue their education is recognised both internationally and nationally. Article 28 of the CRC recognises the right of all children to an education and rules 38 and 39 of the Havana Rules affirm that right for juveniles in detention. They require that education and training in detention be integrated into the mainstream education system and that these programs take account of different cultural backgrounds and the special needs of detainees with literacy or learning difficulties.

6.65 Section 7(j) of the YOA provides that the 'punishment of a young person for an offence should be designed so as to give the offender an opportunity to develop a sense of social responsibility and otherwise to develop in beneficial and socially acceptable ways'. One of the principles to be applied in the sentencing of young offenders is that the rehabilitation of the offender is facilitated by giving him or her opportunities to engage in educational programmes (s 46(5) YOA). These provisions are reflected in the current YCR 102 dealing with the Youth Justice Service's Philosophy.

6.66 In the BAJG case and others dealt with by the Children's Court in March and April 2013, the DMRs presented by the Department confirmed that at Banksia Hill prior to 20 January 2013, detainees were involved in an education programme from 9.00 am to 3.00 pm each week day apart from Wednesday afternoon, which was reserved for staff training. At Hakea JF that programme was reduced to 'one structured on a rotational basis with which involves each unit wing being placed in a classroom for 2 hours each day, Monday to Friday'. The Department explained that the reduction in education programme time was 'due to room availability'.

6.67 Given the *School Education Regulations 2000* requirement that the minimum hours prescribed for the instruction of children in primary or secondary school education programmes is at least 4 hours 10 minutes per day, the provision of two hours per day is grossly inadequate.

6.68 Rehabilitation is not just about education. It requires other types of recreational and remedial programmes for personal development and which might also assist sentenced detainees to apply for supervised release in terms of Part 8 of the YOA. The provision of recreational and remedial programmes is recognised in YCR

102 and in the AJJA Standards.[58] The information provided in the BAJG case confirms that at Hakea JF, in the period up until 27 March 2013, no rehabilitative programmes for detainees had been delivered by the Department.[59] Recreational activities however, had commenced and was said to consist of 3 hours indoor and one hour outdoor recreation on Monday, Thursday, Friday, Saturday and Sunday and 2 hours indoor recreation on Tuesday and Wednesday.[60]

6.69 The failure to ensure that detainees are able to access and participate in rehabilitative programmes is contrary to s 7(j) of the YOA and to relevant national and international standards.

[58] Revised edition (1999) 27-28.
[59] For example, these include such programmes as 'Pathways to Health', Save-A-Mate', 'HALO (Remand)', 'Health In Health Out, 'Career Explorations' and 'Lets Talk About Sex'.
[60] Socialising with peers, playing card and board games, listening to music and playing table tennis.

Appendix A: Selected Provisions of the Young Offenders Act 1994

Part 2 — Objectives and Principles

6. Objectives

The main objectives of this Act are —

(a) to provide for the administration of juvenile justice; and

(b) to set out provisions, embodying the general principles of juvenile justice, for dealing with young persons who have, or are alleged to have, committed offences; and

(c) to ensure that the legal rights of young persons involved with the criminal justice system are observed; and

(d) to enhance and reinforce the roles of responsible adults, families, and communities in —

(i) minimising the incidence of juvenile crime; and

(ii) punishing and managing young persons who have committed offences; and

(iii) rehabilitating young persons who have committed offences towards the goal of their becoming responsible citizens; and

(e) to integrate young persons who have committed offences into the community; and

(f) to ensure that young persons are dealt with in a manner that is culturally appropriate and which recognises and enhances their cultural identity.

7. General principles of juvenile justice

The general principles that are to be observed in performing functions under this Act are that —

(a) there should be special provision to ensure the fair treatment of young persons who have, or are alleged to have, committed offences; and

(b) a young person who commits an offence is to be dealt with, either formally or informally, in a way that encourages the young person to accept responsibility for his or her conduct; and

(c) a young person who commits an offence is not to be treated more severely because of the offence than the person would have been treated if an adult; and

(d) the community must be protected from illegal behaviour; and

(e) victims of offences committed by young persons should be given the opportunity to participate in the process of dealing with the offenders to the extent that the law provides for them to do so; and

(f) responsible adults should be encouraged to fulfil their responsibility for the care and supervision of young persons, and supported in their efforts to do so; and

(g) consideration should be given, when dealing with a young person for an offence, to the possibility of taking measures other than judicial proceedings for the offence if the circumstances of the case and the background of the alleged offender make it appropriate to dispose of the matter in that way and it would not jeopardise the protection of the community to do so; and

(h) detaining a young person in custody for an offence, whether before or after the person is found to have committed the offence, should only be used as a last resort and, if required, is only to be for as short a time as is necessary; and

(i) detention of a young person in custody, if required, is to be in a facility that is suitable for a young person and at which the young person is not exposed to contact with any adult detained in the facility, although a young person who has reached the age of 16 years may be held in a prison for adults but is not to share living quarters with an adult prisoner; and

(j) punishment of a young person for an offence should be designed so as to give the offender an opportunity to develop a sense of social responsibility and otherwise to develop in beneficial and socially acceptable ways; and

(k) a young person who is dealt with for an offence should be dealt with in a time frame that is appropriate to the young person's sense of time; and

(l) in dealing with a young person for an offence, the age, maturity, and cultural background of the offender are to be considered; and

(m) a young person who commits an offence is to be dealt with in a way that —

(i) strengthens the family and family group of the young person; and

(ii) fosters the ability of families and family groups to develop their own means of dealing with offending by their young persons; and

(iii) recognises the right of the young person to belong to a family.

[Section 7 amended by No. 82 of 1994 s. 20; No. 78 of 1995 s. 145; No. 29 of 1998 s. 20.]

Part 3 — Administration

11A. Duties of all officers and employees

Every officer, person or employee appointed under section 11 —

(a) must observe all rules made under this Act; and

(b) must make such returns and reports to the chief executive officer as the chief executive officer may from time to time direct; and

(c) must make any records relating to any young offender available, upon request of the chief executive officer, to the chief executive officer or a delegate of the chief executive officer.

[Section 11A inserted by No. 58 of 2004 s. 7.]

[Section 11A. Modifications to be applied in order to give effect to Cross-border Justice Act 2008: section altered 1 Dec 2009. See endnote 1M.]

11C. Use of force

(1) A person who is appointed under section 11(1) or (1a) as a custodial officer is authorised to use no more than prescribed force in the management, control and security of a facility or detention centre.

(2) A person who is appointed under section 11(1) or (1a) as a custodial officer must not use force on a young offender unless that force is used in the prescribed circumstances.

[Section 11C inserted by No. 58 of 2004 s. 7.]

11D. Use of restraints

(1) The chief executive officer, or a superintendent, may authorise and direct the restraint of a young offender where in his or her opinion such restraint is necessary —

(a) to prevent the young offender injuring himself or herself, or any other person; or

(b) upon considering advice from a medical practitioner, on medical grounds; or

(c) to prevent the escape of a young offender during his or her movement to or from a facility or detention centre, or during his or her temporary absence from a facility or detention centre.

(2) Restraint involving the use of medication must not be used on medical grounds unless the approval of a medical practitioner is obtained first.

(3) If restraint is used in relation to a young offender for a continuing period of more than 24 hours, the use and the circumstances must be reported as soon as practicable to the chief executive officer by the superintendent who has overall responsibility for the young offender at the time.

[Section 11D inserted by No. 58 of 2004 s. 7.]

11E. Assistance by prison officers

(1) A prison officer may, upon the request of the chief executive officer or a superintendent, assist in the exercise or performance of any power or duty conferred or imposed by this Act.

(2) A prison officer who is assisting —

(a) has the powers; and

(b) is subject to the responsibilities; and

(c) is to receive the protection from liability,

which in like circumstances would be conferred or imposed on a custodial officer appointed under section 11(1) or (1a), in addition to the powers and duties conferred and imposed on that prison officer by or under any other law.

(3) A prison officer who is assisting may use such force as can be used by a custodial officer appointed under section 11(1) or (1a) and, with the approval of the chief executive officer, may use such control weapons as are necessary in the circumstances.

[Section 11E inserted by No. 58 of 2004 s. 7.]

Part 4 — Young persons in custody before being dealt with for an offence

19. Detention of young offenders apprehended by police

(1) The Commissioner of Police is to make rules, orders, or regulations under section 9 of the *Police Act 1892* in respect of the

apprehension of young persons for offences and their detention in custody and a member of the Police Force is to have regard to any such rules, orders, or regulations.

(2) A young person in custody who is not released on bail, whether or not bail has been refused under the *Bail Act 1982*, is, subject to subsection (3) and section 49, to be taken to and placed in a detention centre as soon as practicable after the person's apprehension.

(3) A young person may be held in the custody of the police until arrangements can be made for the person to be taken to and placed in a detention centre in accordance with subsection (2).

21. Young person in custody awaiting trial

(1) Subject to the *Bail Act 1982*, a young person may be detained in a detention centre during the period for which the person has been remanded by a court, or during the period of the person's detention on committal for trial in the Supreme Court or the District Court.

(2) If a young person reaches the age of 18 years while detained in a detention centre as described in subsection (1), the court, upon the application of the chief executive officer, may direct that the person be transferred to a prison under the *Prisons Act 1981* and treated as an adult prisoner on remand.

Part 7 — Sentencing and related matters

Division 8 — Custodial sentence

118A. Where sentence of imprisonment to be served

(1) If —

(a) as a result of a sentence imposed by a court a young person is to be imprisoned; and

(b) the young person is under 18 years old at the time when under that sentence he or she is to be imprisoned,

then, unless a direction has been made under section 118(4), the young person is to serve that sentence in a detention centre and not in a prison until a direction is made under section 178.

(2) If —

(a) as a result of a sentence imposed by a court a young person is to be imprisoned; and

(b) the young person has reached the age of 18 years at the time when under that sentence he or she is to be imprisoned,

then the young person is to serve that sentence in a prison.

(3) If it is not practicable to immediately transport a young person to a detention centre in accordance with subsection (1), the offender may be held in a prison or a lock-up until transport to a detention centre is practicable.

[Section 118A inserted by No. 78 of 1995 s. 143; amended by No. 47 of 1999 s. 43.]

Part 9 — Detention centres

169. Right of certain persons to enter detention centre

A person who is —

(a) an independent detention centre visitor appointed under section 41 of the *Inspector of Custodial Services Act 2003*; or

(b) a judge or magistrate of the Children's Court; or

(c) a justice of the peace authorised by a judge or magistrate of the Children's Court,

may, upon providing satisfactory proof of the person's identity to the superintendent, enter and examine a detention centre at any time.

[Section 169 amended by No. 75 of 2003 s. 56(1); No. 59 of 2004 s. 141.]

169A. Investigation of an alleged incident at a detention centre

(1) The chief executive officer may authorise an internal investigation into an alleged incident in a detention centre.

(2) The chief executive officer may specify that an internal investigation may be carried out by a particular person, or a person who occupies a particular position or a position within a class of positions in the Department.

(3) An alleged incident may relate to a non-detainee as well as to a detainee.

(4) An authorised person may require a person who is appointed under section 11(1) or (1a) to —

(a) attend an interview at a time nominated by the authorised person; and

(b) provide all information known by that person that relates to the alleged incident; and

(c) declare any direct or indirect interest related to the alleged incident that the person has or acquires, that conflicts or may conflict with the person's duties.

(5) A person who is appointed under section 11(1) or (1a), who does not comply with a requirement under subsection (4) commits an offence.

Penalty: $500.

(6) Despite subsection (5), a person is not required, under the authority of this section, to provide any information or declare any interest that might tend to incriminate the person, and before any person is questioned under this section the authorised person must advise the person accordingly.

(7) In this section —

authorised person means a person authorised to conduct an internal investigation into an alleged incident in a detention centre under subsection (2).

[Section 169A inserted by No. 58 of 2004 s. 37.]

170. Detention offences

A detainee who —

(a) disobeys a rule of the detention centre or an order of a person having authority to give the order; or

(b) uses insulting or threatening language or behaves in an insulting or threatening manner; or

(c) prefers a false or frivolous complaint; or

(d) does any act or omission of insubordination or misconduct subversive of the order and good government of the detention centre; or

(e) breaches a condition or restriction of any leave of absence from a detention centre; or

(f) assaults a person; or

(g) escapes or prepares or attempts to escape from lawful custody; or

(h) is in possession of or under the influence of drugs not lawfully issued to the detainee or not taken as prescribed; or

(i) is, without the permission of the superintendent, in possession of glue containing toluene or another intoxicant; or

(j) does not submit for the purpose of having a body sample taken when required under this Act to do so; or

(ja) refuses or fails to wear when required under this Act to do so a device for the purpose of having a body sample taken or detecting the presence of a substance in the body of the detainee; or

(k) is in possession of a weapon or a facsimile of a weapon; or

(l) wilfully breaks, damages or destroys property; or

(m) behaves in a disorderly or riotous manner,commits a detention offence.

[Section 170 amended by No. 58 of 2004 s. 38.]

171. Detention offence charge, procedure on

(1) A charge of a detention offence alleged to have been committed by a detainee may be made by any officer or a person who is authorised to exercise a power set out in clause 15 of Schedule 2 to the *Court Security and Custodial Services Act 1999* and is to be brought immediately to the attention of the superintendent.

(2) The superintendent is to confer, where practicable, with the detainee, a responsible adult and any other person whose participation is likely to be of benefit in considering how to deal with the allegation.

(3) After conferring, where practicable, in accordance with subsection (2), the superintendent, having regard to the nature of the alleged offence and to the alleged circumstances, is to —

(a) suspend further action with respect to the charge on the detainee's undertaking to be of good behaviour for a stated period not exceeding 2 months, at the end of which period the charge is to be withdrawn if the undertaking has been observed; or

(b) direct that the charge be withdrawn or that a further or different charge be laid; or

(c) hear and determine the charge; or

(d) refer the charge to a visiting justice for hearing and determination.

[Section 171 amended by No. 47 of 1999 s. 44.]

172. Visiting justice may deal with referred charges

(1) A visiting justice may hear and determine any charge of a detention offence that is referred to the visiting justice by the superintendent.

(2) Without limiting the power of the superintendent to refer matters to a visiting justice, the superintendent is to so refer a matter if the detainee elects to have the matter dealt with by a visiting justice.

173. Detention offences, dealing with

(1) When hearing and determining a charge that a detainee has committed a detention offence, the superintendent or a visiting justice may, if the detainee admits the charge or the charge is found to be proved, deal with the matter in any of the ways provided for in subsection (2).

(2) The ways in which a detention offence may be dealt with are —

(a) by giving the detainee a caution; or

(b) by reprimanding the detainee; or

(c) by ordering that the earliest release day for the sentence that the detainee is serving or, if the person is serving more than one sentence, the earliest release day for any of those sentences, is altered within the limits imposed by subsection (3); or

(d) by ordering that the detainee's gratuities are cancelled —

(i) for a period not exceeding 3 days if the order is made by the superintendent; or

(ii) for a period not exceeding 7 days if the order is made by a visiting justice;or

(e) by ordering that the detainee be confined to the detainee's sleeping quarters, or to a designated room —

(i) for a period not exceeding 24 hours if the order is made by the superintendent; or

(ii) for a period not exceeding 48 hours if the order is made by a visiting justice;or

(f) by making orders under more than one of paragraphs (c), (d) and (e).

(3) The earliest release day for a sentence cannot be altered under subsection (2)(c) so as to make it later than it would otherwise have been by more than —

(a) 3 days if the order is made by the superintendent; or

(b) 14 days if the order is made by a visiting justice,

but this subsection does not prevent the earliest release day as altered from being again altered upon a charge of another detention offence.

(4) The superintendent or a visiting justice may suspend an order made by that superintendent or visiting justice under subsection (2) on the detainee's undertaking to be of good behaviour for a stated period not exceeding 2 months, at the end of which period the order is to be of no further effect if the undertaking has been observed.

[Section 173 amended by No. 58 of 2004 s. 39.]

174. Detention offence charges, hearing of

(1) The hearing and determination of a charge of a detention offence under this Part is to be in the presence of the detainee charged and in accordance with the procedure prescribed in the regulations.

(2) The person hearing the charge is not bound by the rules of evidence but may admit any evidence considered to be relevant to the charge and may decline to admit repetitious material.

(3) A detainee is not to be represented by a legal practitioner in the proceedings.

175. Visiting justice may direct prosecution for detention offence

If a charge of a detention offence is referred to a visiting justice and the visiting justice thinks it appropriate having regard to the nature and particulars of the alleged offence and the extent of the powers given by section 173, the visiting justice may decline to deal with the matter and direct the superintendent to commence a prosecution in a court of summary jurisdiction for the detention offence.

[Section 175 amended by No. 84 of 2004 s. 80.]

176. Early discharge from detention

The superintendent in charge of the detention centre in which a person is serving a sentence of detention may authorise the discharge of the person from detention at any time during the period of 3 days immediately before the day when the person would be due to be released upon the expiry of the sentence.

178. Transfer of offender from detention centre to prison

(1) If an offender is in a detention centre serving a sentence of detention or a sentence of imprisonment, the chief executive officer may apply to the Children's Court, constituted so as to consist of or include a judge, for a direction under subsection (3).

(2) An application under subsection (1) cannot be made in respect of an offender who is under 16 years old.

(3) On an application under subsection (1), the Court may direct that the offender be transferred to a prison under the *Prisons Act 1981* to serve the unserved portion of the sentence in a prison.

(4) A direction under subsection (3) can only be made —

(a) in the case of an offender who is under 18 years old, if the Court is satisfied that the offender should be transferred to a prison because —

(i) the offender's behaviour in the detention centre (including when serving a previous sentence) is or has been a significant risk to the safety or welfare of other people in custody in, or of the staff of, the centre; or

(ii) of the offender's antecedents; or

(iii) of any other reason the Court thinks is relevant;or

(b) in the case of an offender who has reached the age of 18 years and is serving a sentence of detention —

(i) if the offender has a substantial period of the sentence of detention to serve; or

(ii) if the court is satisfied that the offender should be transferred to a prison because of any of the factors referred to in paragraph (a); or

(c) in the case of an offender who has reached the age of 18 years and is serving a sentence of imprisonment, if the court thinks fit.

(5) If a direction is made under subsection (3) in respect of an offender serving a sentence of detention —

(a) the *Prisons Act 1981* applies to and in respect of the offender while in prison; and

(b) Part 8 and Division 8 of Part 7 continue to apply to the sentence of detention.

(6) If the Court decides to make or refuse to make a direction under subsection (3), the offender or the chief executive officer may appeal against the decision under and subject to Part 3 of the

Criminal Appeals Act 2004 which, with any necessary changes, applies as if the direction were an order that might be made as a result of a conviction.

[Section 178 inserted by No. 78 of 1995 s. 144; amended by No. 84 of 2004 s. 76.]

[Section 178. Modifications to be applied in order to give effect to Cross-border Justice Act 2008: section altered 1 Dec 2009. See endnote 1M.]

179. Medical treatment, removal for

(1) In this section —

medical officer means an officer of the Department who is registered under the *Health Practitioner Regulation National Law (Western Australia)* in the medical profession;

medical treatment includes psychiatric treatment as defined in section 3 of the *Mental Health Act 1996*.

(2) If the superintendent of a detention centre is advised by a medical officer, or is for any other reason of the opinion, that a detainee at the detention centre requires medical treatment that cannot, by reason of impracticality or urgency, be administered within the detention centre, the superintendent is to order that the detainee be removed from the detention centre for the purpose of receiving the treatment and, unless the detainee has ceased to be in lawful custody, returned to the detention centre after treatment.

(3) If a detainee is to be removed to a hospital under the authority of the order —

(a) before making the order the superintendent is to ensure that the person in charge of the hospital agrees to the removal of the detainee to the hospital; and

(b) upon making the order the superintendent is to inform the person in charge of the hospital of the date when the detainee is entitled to be discharged from lawful custody.

(4) When the detainee is fit to be discharged from hospital, the person in charge of the hospital is to give the superintendent notice accordingly and, unless the detainee has ceased to be in lawful custody, the superintendent is to arrange for the return of the detainee to the detention centre.

(5) The superintendent may appoint an officer under the superintendent's control or a person who is authorised to exercise a power set out in clause 2 of Schedule 2 to the *Court Security and Custodial Services Act 1999* to take charge of the detainee while

absent from the detention centre under an order made under subsection (2) and is required to do so —

(a) if the superintendent considers that the security of the hospital or other place of treatment might otherwise be jeopardised or the detainee might otherwise escape; or

(b) unless the chief executive officer, with the consent of the Minister, otherwise orders, if the detainee is a person referred to in subsection (6).

(6) If the detainee is a person —

(a) who is undergoing a sentence of imprisonment for life; or

(b) whose release is to be determined by the Governor,

the superintendent is to give the chief executive officer notice when the detainee is removed from or returned to a detention centre under an order made under this section.

(7) While a person is absent from a detention centre under an order made under subsection (2) the person is to be regarded as being detained in custody at the detention centre, and —

(a) if the person escapes or attempts to escape from the place where the order authorises the person to be it is to be regarded as escaping or attempting to escape from custody at a detention centre, as the case requires; and

(b) the person in charge of the place where the detainee is for the time being does not have the authority to release the detainee from custody.

[Section 179 amended by No. 69 of 1996 s. 94; No. 47 of 1999 s. 45; No. 22 of 2008 Sch. 3 cl. 55; No. 29 of 2008 s. 41(2); No. 35 of 2010 s. 166.]

180. Death of detainee, coroner to investigate

(1) The superintendent is to give the chief executive officer notice of the death of a detainee and the chief executive officer is to cause notice of the death to be given to a coroner.

(2) If a coroner is informed under subsection (1) of the death of a detainee the coroner is to investigate the death.

[Section 180 amended by No. 2 of 1996 s. 61.]

181. Rules for detention centres, CEO may make

(1) The chief executive officer may, with the approval of the Minister, make rules for the management, control, and security of detention

centres generally or a specified detention centre and for the management, control, and security of detainees and the management of officers of the Department.

(2) Rules made under this section may —

(a) confer a discretionary authority on any person or class of persons;

[(b) deleted]

(c) confer on persons who are prison officers under the *Prisons Act 1981*, or such of those persons as are specified in the rules, such functions under this Act as are specified in the rules.

(3) The chief executive officer is to publish rules made under this section in such manner as is appropriate to bring relevant rules to the attention of persons affected by them.

(4) The chief executive officer is to take reasonable steps to have rules made under this section, so far as they affect detainees, made known —

(a) to every detainee who is illiterate; and

(b) in a language that the detainee understands, to every detainee who does not understand English.

(5) If there is any inconsistency between a rule made under this section and a regulation, the rule has effect, to the extent of the inconsistency, subject to the regulation.

[Section 181 amended by No. 58 of 2004 s. 40.]

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