

Inspector's Overview

Why we did this review

On 14 December 2017 Amnesty International Australia (Amnesty) wrote to Western Australia's Minister for Corrective Services, Hon Fran Logan MLA, alleging that a young person (whom we call 'John') had been ill-treated in the Intensive Support Unit (ISU) at Banksia Hill Detention Centre (Appendix A). On 12 January 2018, Amnesty again wrote to the Minister, alleging that 'Richard' had also been ill-treated in the ISU (Appendix A).

Two working days later, on 16 January 2018, Amnesty launched a concerted media campaign. It alleged that the ISU regime amounted to torture and prolonged solitary confinement, drew parallels with the disgraced Don Dale Detention Centre in the Northern Territory, and called for the ISU to be closed. Amnesty headlined its campaign with details of its allegations about John and Richard.

On 19 January 2018, the Minister for Corrective Services Hon Fran Logan MLA directed me to review Amnesty's allegations about John and Richard's treatment. I accepted the direction on agreed terms of reference (Appendix B).

Amnesty's allegations relate to the period following some serious incidents of disorder at Banksia Hill on 4 and 5 May 2017 through to the end of 2017. The May 2017 incidents involved 16 boys who threatened staff and other young people, and caused fires and other substantial damage (Chapter 1). Many other young people at Banksia Hill, both male and female, were frightened by these events. The incidents were only brought to an end when the Department of Justice (the Department) deployed its Special Operations Group who used flash bombs and chemical agent to regain control.

The damage was such that the site was unsafe for young people and staff for some days until broken glass and debris could be cleaned up. One unit was totally uninhabitable and another was badly damaged. The site was also not secure as cells and fences had been breached.

These events came on top of numerous other serious incidents in the second part of 2016 and the early part of 2017. The situation was high risk, high cost, and completely unsustainable (Chapter 2; OICS, 2017). One of the responses to the May 2017 incidents was to introduce an 'Intensive Support Unit' (ISU) to separately manage the small number of young people who had been involved in multiple incidents, and who were identified as 'ringleaders' or 'troublemakers'. They included John and Richard. The Department also transferred responsibility for the centre from its youth justice branch to its prisons branch, and abandoned a very poorly managed 'Banksia Hill Transformation' project (OICS, 2018; OICS, 2017).

In order to restore stability, ensure the safety of young people and staff, and rebuild staff morale and confidence after the May 2017 incidents, the new management team imposed a restrictive regime across the whole site. Activities and programs for all young people were limited, and their movements and interactions were tightly controlled. The regime was particularly tight in the ISU. The aim was to loosen the restrictions as the centre stabilised (OICS, 2018). Most of the young people had not been involved in the incidents, and they paid a high price for the misbehaviour of a few.

Given the events of 2016–2017, a restrictive regime was the only prudent short term option, and it undoubtedly helped to improve stability (OICS, 2018). It was also better to take measures that would ensure the young people could stay at Banksia Hill rather than run the risk of further damage that might have led to young people being transferred to an adult prison, as happened in 2013 (OICS, 2013). However, benefits for a majority of detainees could never justify any abuses of a minority. I was therefore keen to undertake this review despite having already reported on Banksia Hill, on average, more than once a year in recent years.

What we found

Amnesty's allegations involve a number of specific claims about each young person (Chapter 4) and a general claim that they have been held in conditions of prolonged solitary confinement, in breach of state legislation and international law (Chapter 5).

The evidence does not support the majority of these allegations. However, we have identified areas for improved record keeping and communication. It is also clear that a comprehensive review of legislation and other governance documents is required in relation to the use of special regimes and confinement.

In summary, our findings and recommendations, and the Department's responses, are as follows:

1. The ISU is not separate or remote from the rest of Banksia Hill. It is in the North-West corner of the site, close to the education centre, the health centre and other accommodation (paras 3.1 – 3.2).
2. Advocates have likened the cells in the ISU to dog kennels and parking bays, and said they are just five square metres in size. With the exception of crisis case and short term stay cells (which are around 7 square metres) almost all the cells are 8.4 square metres in size, the same as those in standard accommodation units. Nobody would pretend they are spacious, but cells in adult prisons are often smaller, and the majority are now occupied by two adults (OICS, 2016). No cells in Banksia Hill are currently double-bunked (para 3.3).
3. The evidence does not support the claim that John attempted self-harm more than 100 times from May to December 2017. His level of self-harm has in fact fallen markedly from 2016 and early 2017. Banksia Hill is not blasé about self-harm, or failing to identify and monitor risk (para 4.1).
4. There is no evidence that Banksia Hill failed to inform John's mother of a large number of self-harm attempts from May to December 2017. However, we cannot say when she was contacted, how often, or why (para 4.1). The Department has accepted and actioned our recommendation to improve its processes for notifying caregivers and recording those notifications (Recommendation 2).
5. Education has been substandard for all detainees for too long. It was particularly restricted immediately after the May 2017 incidents (OICS, 2018). However, there is no evidence that John and Richard have been 'denied' education. Both have completed some courses (para 4.2).

6. Like all detainees, Richard might well have benefitted from greater access to programs, services and psychological counselling. However, there is no evidence to support claims that he was 'denied' access (paras 4.3 – 4.4).
7. There is no evidence that John was regularly strip-searched during his time in the ISU (para 4.5).
8. In response to concerns in our earlier reports, Banksia Hill has greatly reduced the use of strip-searching and has improved its processes. We commend this, and strongly support its proposal to trial full body scanners (para 4.3).
9. Departmental records on the use of restraints are inadequate, but we have concluded that, for a significant time, John and Richard were handcuffed when they were out of cell. Poor records meant that the Department cannot show its use of restraints was justified (para 4.6). It has accepted and actioned our recommendation that all uses of restraints, and the reasons for their use, should be recorded (Recommendation 3).
10. There is no evidence of John being 'deprived' of meals (para 4.7).
11. There is no evidence that Richard was fed through a 'grille'. However, if a young person is disruptive, it is standard practice for meals to be passed through a hatch or for the young person to stand at the back of the cell. This is necessary and appropriate if properly regulated. However, there is no specific evidence of when and why these processes were used for Richard (para 4.7).
12. There are no records to support or refute the claims about bedding in relation to John or Richard (para 4.8). The Department has accepted that the removal of bedding should only occur when a young person is at risk or in a short term holding cell (Recommendation 4).
13. On some days Richard did not shower, but it is not clear whether he declined to shower or was denied access (para 4.9).
14. There is no evidence that Richard was held in cell without electricity for two weeks (para 4.10) and there is no ability for the detention centre to turn off the electricity for individual cells.
15. A comprehensive review is required of the legislation and governance documents relating to confinement and all forms of restricted management regimes. *The Young Offenders Act 1994* (the Act) and the *Young Offenders Regulations 1995* (the Regulations) that govern confinement are obsolete, outdated, and inconsistent. They fail to meet international standards and do not prevent the application of regimes that are equivalent to (or more onerous than) confinement provided they are badged differently. This leaves government, as well as children, exposed (para 5.4). The Department has agreed that it is 'timely to review the legislation' (Recommendation 5).
16. For around ten days after the May 2017 incidents, John and Richard's time out of cell fell short of what is required for young people in 'confinement' under the Act and Regulations. However, as a matter of law, these protections did not apply to John and Richard because they were not being held in 'confinement' under the Act. They were, instead, being held on a 'Personal Support Plan'. Their placement in the ISU did not therefore breach the technical requirements of state law (paras 5.2 – 5.3 and 5.5).

17. For around ten days after the May 2017 incidents, John and Richard were probably being held in conditions that amounted to 'solitary confinement' under international law as they did not have at least two hours out of cell per day (para 5.9).
18. John and Richard have not been held in 'prolonged' solitary confinement as defined by international law (solitary confinement for more than 15 consecutive days) (para 5.10).
19. The Minister and his office staff acted promptly and appropriately in response to Amnesty's allegations. Amnesty's correspondence was immediately forwarded to the Department for investigation. (paras 1.4 – 1.6). The Minister and I were also in regular contact and he was genuinely concerned to know if there had been abuses and breaches of law.
20. Some of the commentary has suggested the Minister was unresponsive. That would be unfair. Only two working days elapsed from Amnesty's letter about Richard to their media release. A month had elapsed since their letter about John, but the nature and extent of the allegations were such that it would take time to investigate and reply. And once the Minister had decided to refer the matter formally to me, it would not have been appropriate for him to respond in detail (paras 1.5 – 1.6).
21. The Department immediately referred the allegations about Richard to its Investigation Services Branch (ISB). However, it did not refer Amnesty's mid-December 2017 letter about John to the ISB for two months. It said that this was because it was already conducting an inquiry into similar allegations raised by John's mother in a letter dated 4 December (para 1.4). It has accepted that it needs to improve its record keeping in relation to both investigations and outcomes (Recommendation 1).

Some broader reflections

This review has shown the value of Ministers being able to direct a review by an independent body with an intimate knowledge of the issues and a reputation for apolitical public reporting. As a courtesy, I have kept the Minister informed of our progress but, as required by the *Inspector of Custodial Services Act 2003*, we have had complete autonomy in how we have conducted the review and how we will report.

Unfortunately, passions in this case have run high, and many people have already formed opinions. As a result, there is a risk that our findings will be disregarded by those who do not like them. However, we are confident in our evidence, analysis, and findings. We have also given all parties the opportunity to provide more detail.

That said, we are not a court of law. We have examined documents, independently probed Departmental records, interviewed people, held meetings, and received submissions (para 1.11). But we have not examined witnesses under oath, or had the benefit of submissions from legal counsel on issues of fact or law. Nor are we privy to full details of any legal advice that the Department has because it declined to provide it to us, citing legal professional privilege (para 5.2). If John and Richard's treatment reaches the courts (and it has been suggested that it may), the evidence will be further tested, and the court may adopt a different interpretation of the law and of the facts (para 1.12),

It has been unusual and discomforting to be reviewing the deeply personal circumstances of two vulnerable and troubled young people alongside a running social media commentary. Advocates have every right to advocate, but the boundaries of social media are notoriously blurred and risky. We have been particularly concerned at the content and tone of some of the social media. The young people's anonymity has been compromised, allegations have been presented as facts, and some of the commentary has been inappropriate and threatening (paras 1.8 – 1.9).

Initially, we had reservations about publishing some of the details in this report because we did not want to compromise the young people's privacy. However, all the most sensitive matters have already been made public in mainstream and social media, especially in relation to John, so we have reported in full. But it is vitally important that young people are not stigmatised and are able to 'get on with their lives'. When we spoke with John and Richard, it was clear that they wanted their concerns to be heard, but they were also concerned that the outside commentary might impact on them after release.

This report needs to be read alongside our other reports. Banksia Hill has made positive progress in stability, safety, morale, and governance since May 2017. This is a tribute to staff and management, and everyone who spoke to us, including the young people's advocates, recognised this. But the centre still faces serious challenges. Most of these can be traced back to the decision of the former government in 2009 to make Banksia Hill the state's only juvenile detention centre. Since that time, it has never enjoyed a significant period of stability or strong performance. One centre cannot adequately cater for so many young people, so much diversity, and such high levels of need. The recommendations of our other recent reports remain relevant and need to be actioned (OICS, 2018; OICS, 2017).

At the time of writing, John (who will be 19 in August) has just been transferred to an adult prison, after receiving further custodial sentences for his role in the incident on 5 May 2017. In many respects, he has 'outgrown' Banksia, and some of his supporters have welcomed the move. However, the reality is that he will have less space, less privacy, less personal attention, and less to do in the adult setting. The state does not have a comprehensive strategy for addressing the needs of young men and women in prison, and more needs to be done in this space (OICS, 2017a; OICS, 2017b).

Finally, I am disappointed that we have not been able to report earlier. We provided the draft report to the Department in mid-April 2018 (three months after the Minister directed the review). We then received feedback from the Department and finalised the substance of this report in May. However, the *Inspector of Custodial Services Act 2003* requires that our reports sit in Parliament for a minimum of 32 days after we have lodged them, and that, as far as possible, our reports should be tabled on a sitting day. The earliest this could be arranged was mid-August 2018, seven months from the date of the direction.

Neil Morgan
14 June 2018