



Stripping children of their dignity

Review of the Tasmanian Youth Justice Amendment (Searches in Custody) Bill 2020

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Human Rights Law Centre

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The Human Rights Law Centre acknowledges the people of the Kulin and Eora Nations, the traditional owners of the unceded land on which our offices sit, and the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people since colonisation and demand justice for First Nations peoples.

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1. Executive Summary

- 1.1 The Human Rights Law Centre welcomes the opportunity to provide feedback on the draft *Youth Justice Amendment (Searches in Custody) Bill 2020* (Tas) (**the draft Bill**) as set out in this submission, which is also endorsed by Amnesty International Australia.
- 1.2 Strip searches involve forcing children as young as ten to remove their clothing in front of adult prison guards and police officers. Forcing children to routinely remove their clothes over and over again is deeply harmful. They are invasive, dehumanising and unnecessary.
- 1.3 Strip searches of children and young people in prisons should be abolished. At the very least, they should be significantly limited to circumstances of absolute necessity, and informed by an individualised, risk-based approach (rather than on a routine basis).
- 1.4 There is no reason for the Tasmanian Government to allow such a damaging and degrading practice to continue. Evidence from Australia and around the world shows that routine strip searches do not have a deterrent effect, and that reducing strip searches do not increase the amount of contraband in prisons.
- 1.5 The current *Youth Justice Act 1997* (Tas) is worded too broadly and permits the routine strip searching of children and young people in prisons. Data shows that it allowed for 203 strip searches to be performed over a 6 month period in 2018, with no contraband located.
- 1.6 The draft Bill seeks to amend the *Youth Justice Act 1997* (Tas), but is problematic and should be rejected because it would still allow for the routine strip searching of children and young people. Alarming, the draft Bill:
 - (a) Retains a relatively broad discretion for when strip searches can take place, by permitting a strip search when there is a belief on reasonable grounds that the search is necessary for one or more of the reasons articulated in the provision. Strip searches should only ever be permitted in circumstances where there is reasonable intelligence indicating that the child or young person is carrying dangerous contraband, and there should be an explicit prohibition on the practice of routine strip searching in the law.
 - (b) Leaves the decision making as to what is the least intrusive kind of search to the person performing the search, instead of clearly stating that a strip search is the search of last resort. The law should provide that less intrusive searches – like the use of a scanner, wand or pat down search – must be used before a strip search takes place, and that a strip search should only take place if a less intrusive search has taken place and the detention centre manager still believes there is reasonable intelligence which indicates that they are carrying dangerous contraband.
 - (c) Allows authorised officers to use the force that is reasonable and necessary in the circumstances to conduct the search. This is inconsistent with provisions in the Northern Territory, which specifically provide that force may not be used to conduct a strip search unless the person conducting the search believes on reasonable grounds

that the use of force is necessary to prevent a serious and imminent risk to the safety of the young person or another person.

- (d) Does not contain a legislative provision mandating that a search register be kept with the details of the person performing the strip search, the reasons for undertaking the strip search and the basis for forming the reasonable suspicion for the strip search. Such provisions are integral in the law (and not in the regulations) to ensure greater transparency and accountability.

1.7 In May 2019, the Commissioner for Children and Young People in Tasmania provided a comprehensive advice to the Tasmanian Government recommending that the practice of routine strip-searching of children and young people should cease, The Tasmanian Government accepted these recommendations in June 2020, either in total or in principle. The draft Bill in its proposed form would, however, undermine these Government commitments.

1.8 As the draft Bill could still allow for the practice of routine strip searching to take place – and potentially expands the harmful practice – the Human Rights Law Centre **recommends** that the Tasmanian Parliament reject the draft Bill. The Human Rights Law Centre **recommends** that new provisions be drafted which prohibit the routine strip searches of children and young people, and strictly limit the circumstances in which strip searches can otherwise take place.

2. Recommendations

2.1 The Human Rights Law Centre **recommends** that the Tasmanian Parliament reject the draft Bill.

2.2 The Human Rights Law Centre **recommends** that the Tasmanian Government look at best practice laws that exist in other jurisdictions – notably the Northern Territory and the ACT – and draft new laws which provide that:

- (a) The practice of routine strip searching of children and young people be prohibited.
- (b) Children and young people should only be strip searched as a last resort, in circumstances where there is reasonable intelligence which indicates that they are:
 - (i) carrying dangerous contraband;
 - (ii) that dangerous contraband may be used by the child or young person in a way that poses a serious and imminent risk to the safety of the youth or another person; and
 - (iii) all other less intrusive search alternatives (such as pat down searches, scanners and wands) have been exhausted.
- (c) All strip searches of children and young people must be authorised by a manager.
- (d) Force must not be used to conduct a strip search unless a manager forms the view that there is reasonable grounds that the use of force is necessary to prevent a serious and imminent risk to the safety of the youth or another person.
- (a) The reasons for undertaking the strip search, and the basis of the reasonable

intelligence, must be documented, to ensure transparency and accountability. The details of the person who performed each search, the date, location and other relevant details of each strip search should also be documented.

3. Background

- 3.1 On 4 December 2018, the Human Rights Law Centre submitted a Freedom of Information application to the Tasmanian Department of Health and Human Services to obtain data on the number of children being subjected to routine strip searches. That data showed that 203 strip searches had been conducted on children over a six month time period, with no contraband located. Of particular concern was that the data showed that a disproportionately high number of Aboriginal and Torres Strait Islander children being searched, with Aboriginal and Torres Strait Islander children accounting for over 50 per cent of the strip searches undertaken.
- 3.2 In early 2019, *ABC News* reported an incident involving the strip searching of a 13-year old Aboriginal girl at the Hobart Reception Prison.¹ *The Mercury* reported a subsequent incident involving an 11-year-old boy detained and strip searched at the Hobart Remand Centre.²
- 3.3 Following these instances, the Commissioner for Children and Young People in Tasmania decided to look into the relevant legislation, policies and procedures. On 7 May 2019, the Commissioner for Children and Young People in Tasmania provided an advice to the Tasmanian Government which made the following recommendations:
- (a) Recommendation 1(a): The practice of routine strip searching of children and young people in custody cannot be justified and should cease.
 - (b) Recommendation 1(b): Legislation authorising searches of children and young people in custody in all custodial premises in Tasmania should reflect the fundamental human rights standard that searches of children and young people in custody should be conducted only when reasonable, necessary and proportionate to a legitimate aim.
 - (c) Recommendation 2: The legislative bases for all searches of children and young people in custody in Tasmania should be clarified and consolidated to provide a single, unambiguous point of reference.
 - (d) Recommendation 3: Consideration should be given to introducing in legislation applicable to all searches of children and young people in custody:
 - a statement as to guiding principles;
 - a clearly stepped out hierarchy of searches; and
 - clear criteria to guide a determination of which type of search is permissible and justified in particular circumstances.

¹ Ainsley Koch, Aboriginal girl 'traumatised' after police strip search in Hobart, *ABC News*, 12 January 2019 www.abc.net.au/news/2019-01-12/claims-aboriginal-girl-traumatised-after-police-strip-search/10709932.

² Kinniburgh C, '11-year old boy strip searched and locked up in Hobart', *The Mercury*, 15 February 2019, www.themercury.com.au/news/scales-of-justice/11yearold-boy-stripsearched-and-locked-up-in-hobart/newsstory/2b274f8e944c2c33d62b32e1996aaead.

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

- (e) Recommendation 4: Consideration should be given to investing in alternative security strategies or technologies such as body scanners which would further minimise reliance on more invasive searches such as strip searches.
- (f) Recommendation 5: Having regard to relevant human rights standards, and no matter the type of search conducted, the use of force should be limited to circumstances of last resort and, if force is required, there should be clear lines of authorisation.
- (g) Recommendation 6: Regulations should clearly outline the way in which searches of children and young people in custody are to be conducted so as to promote the dignity and self-respect of the child or young person concerned and to minimise any associated trauma, distress or other harm.
- (h) Recommendation 7: The key elements of the legislative and regulatory framework governing searches of children and young people in custody should be provided to children and young people in an accessible format before a search is conducted. This information should explain their right to make a complaint and the process for doing so.
- (i) Recommendation 8: All searches of children and young people in custodial settings should be recorded on a search register. Search registers should be available for inspection or review by independent statutory officers with relevant monitoring or inspectorate functions.

3.4 In June 2020, the Tasmanian Government responded to the advice of the Commissioner for Children and Young People and accepted recommendations 1(a), 2 and 4, 5, 7 and 8.³ The Tasmanian Government accepted all the other recommendations *in principle*.⁴

3.5 While there appears to have been a reduction in strip searches of children in Tasmania (with rates of strip searches dropping to about 35 per cent, or about 70 children and young people, between 1 July 2019 and the end of February 2020),⁵ the Human Rights Law Centre remains concerned about laws which permit the practice of routine strip searching to take place, because 35 per cent is still too many children and young people being strip searched.

4. Deficiencies in the current Tasmanian laws

4.1 The *Youth Justice Act 1997* (Tas) is currently worded in a way that is too broad. Pursuant to section 131(2) of that Act, the manager of a detention centre in Tasmania may:

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

³ Tasmanian Government, Letter from Government in Response to the Commissioner for Children and Young People advice regarding personal searches (24 June 2020).

⁴ *Ibid.*

⁵ Ellen Coulter and Kate Ainsworth, Push to ban strip searches in custody for children, replace with body scanning, ABC News, 30 June 2020, www.abc.net.au/news/2020-06-30/push-to-ban-strip-searches-in-custody-for-children/12407694.

- temporary leave of absence; and
 - (ii) at any time when the manager believes on reasonable grounds that the detainee may have in his or her possession any weapon, metal article, alcohol, article capable of being used as a weapon, drug or other thing which the regulations prohibit from being taken into a detention centre; and
 - (b) if, in the manager's opinion, it is necessary to do so in the interests of the security or good order of the detention centre, a detainee must submit to a search and examination.
- 4.2 As the Freedom of Information data obtained by the Human Rights Law Centre demonstrated, these laws are not working to limit the circumstances in which strip searches are taking place with 203 strip searches conducted on children over a six month time period, with no contraband found.

5. The draft Bill

- 5.1 Specific and targeted legislative amendments are needed in Tasmania in order to clarify and limit exactly when a strip search can take place and the safeguards surrounding this.
- 5.2 The draft Bill does not do this, and rather adds additional strip search powers to the legislation by introducing the following provisions:

25A. Search of youths in, or in transit between, custodial facilities

- ...
- (3) An authorised officer may conduct –
 - (a) a search of a youth, who is in custody, that is conducted in a custodial facility; and
 - (b) a search of a youth, who is in custody, while the youth is in transit between custodial facilities.
 - (4) A detention centre manager may cause a search under subsection (3) of a youth to be carried out.
 - (5) A search of a youth to which this section applies may only be conducted if the authorised officer carrying out the search believes on reasonable grounds that the search is necessary for one or more of the following:
 - (a) to obtain evidence relating to the commission of an offence or to prevent the loss or destruction of evidence in relation to the commission of an offence;
 - (b) to ensure security or good order of the custodial facility in which the search is being conducted or of a vehicle in which the youth is in transit;
 - (c) to ensure the safety of the youth or other persons;
 - (d) to remove into safe keeping any articles belonging to, or in possession of, the youth;
 - (e) to ascertain if there is concealed on the youth, in or beneath that youth's clothing, a weapon or other article capable of being used as a weapon, to inflict injury or to assist that youth to escape from custody;
 - (f) to ascertain if there is concealed, on or in the youth, drugs or any other things which the youth is prohibited by law from taking into, or having possession of, in the custodial facility in which the youth is situated or one of the custodial facilities between which the youth is in transit;
 - (g) the purposes, specified in the Act under which the search is carried out, for which the search may be carried out.
 - (6) An authorised officer conducting a search to which this section applies must ensure, as far as practicable, that the search –
 - (a) is the least intrusive kind of search that is necessary and reasonable to achieve the purposes of the search; and
 - (b) is conducted in the least intrusive way that is necessary and reasonable to achieve the purposes of the search; and
 - (c) is carried out in circumstances that accord reasonable privacy to the youth being searched.
 - (7) An authorised officer conducting a search, to which this section applies, of a youth must ensure, as far as is reasonable and practicable, that the officer only conducts the search, if –
 - (a) the officer is the same gender as the youth, or

- (b) where the youth presents as, or informs the officer that the youth is, transsexual, transgender or intersex – the officer is of the gender that the youth requests to conduct the search.
- (8) An authorised officer conducting a search to which this section applies may use the force that is reasonable and necessary in the circumstances to conduct the search.
- (9) In the event of an inconsistency between the application of this section, and the application of a provision of another Act, or instrument made under an Act, to a search to which this section applies, the provision of this section applies to the extent of the inconsistency.
- (10) Nothing in this section is to be taken to authorise the carrying out of a body cavity search of a youth by a person that is not specifically authorised under a provision of an Act or an instrument made under an Act.

25B. Matters related to searches of youths under section 25A

- (1) The regulations may prescribe requirements in relation to the establishment and maintenance of registers in which details of the conduct of some or all of the searches to which section 25A applies are to be recorded.
- (2) An authorised officer may seize an object found during a search under section 25A(3) –
 - (a) that may be evidence relating to the commission of an offence; or
 - (b) that may prejudice the safety of any person or the safety or good order of the facility; or
 - (c) to remove the object into safekeeping.
- (3) An object that is seized under subsection (2) –
 - (a) in a custodial facility that is a detention centre, or while in transit to a custodial facility that is a detention centre, must be dealt with in accordance with the regulations or instructions issued under section 124; or
 - (b) in a custodial facility that is a watch-house or prison is to be dealt with in accordance with the instructions of the person in charge of the custodial facility or in accordance with any regulations, orders or instructions, made or given under an Act, that apply in relation to the facility.

6. Concerns with the draft Bill

Routine strip searching must be prohibited

- 6.1 The draft Bill retains the current strip search power in section 131 of the *Youth Justice Act 1997* (Tas) (although modifies it slightly) and adds additional provisions that consolidate strip search powers and allow for authorised officers – including prison guards and police officers – to strip search children in custodial facilities across Tasmania.
- 6.2 While consolidating the legislative bases for searches of children in custody was recommended by the Commissioner for Children and Young People,⁶ the draft Bill seems to focus primarily on this and less on legislating a proportionate, risk-based approach to strip searches in line with best practice and international human rights principles and standards.
- 6.3 Pursuant to the draft Bill, the threshold test that must be met in order to perform a search is that the authorised officer must believe on reasonable grounds that the search is necessary for one or more of the following reasons articulated in the section. There are a number of reasons articulated in the section, including broad provisions that allow for searches in order to ensure security or good order of the custodial facility.
- 6.4 The Commissioner for Children and Young People recommended that the “practice of routine

⁶ Recommendation 2 of the Memorandum of Advice published by the Commissioner for Children and Young People on searches of children and young people in custody in custodial facilities in Tasmania on 7 May 2019.

strip searching of children and young people in custody in cannot be justified and should cease”⁷ and that Tasmanian laws (not just procedures) “should reflect the fundamental human rights standard that searches of children and young people in custody should be conducted only when reasonable, necessary and proportionate to a legitimate aim.”⁸

- 6.5 The Tasmanian Government accepted the former recommendation and accepted the latter in principle.⁹ The Tasmanian Government indicated that they intended to undertake legislative reform to respond to the latter recommendation, with a view to including criteria which restrict how and when a search is conducted to “reflect the fundamental human rights standard that searches of children and young people in custody should be conducted only when reasonable, necessary and proportionate to a legitimate aim.”¹⁰
- 6.6 Given the breadth of the draft Bill, it would likely allow for the practice of routine strip searching of children in Tasmania to continue. This is problematic, as it undermines prior Government commitments and the sentiment behind these reforms.
- 6.7 While we understand that the intention is for comprehensive policy and procedure to sit beneath the draft Bill, which will provide that strip searches should not be conducted on a routine basis, and acknowledge that this is a step in the right direction, it is our experience that safeguards set out in policy and procedure will not be effective in meeting the aim of prohibition.
- 6.8 It is integral that safeguards are clearly set out in the legislation because history shows that safeguards in policies and procedures are not effective. The Northern Territory Royal Commission into the abuses at the Don Dale youth prison found that protections contained in policies and procedures are subject to interpretation and can often be ambiguous. Specific legislative obligations must be placed on individuals to ensure compliance with appropriately-worded laws and to remove all uncertainty between legislation and policy.¹¹
- 6.9 In order to fully realise the recommendations made by the Commissioner for Children and Young People, the draft Bill should explicitly prohibit the practice of routine strip searching and provide that children should only be strip searched as a last resort in circumstances where there is reasonable intelligence which indicates that they are carrying dangerous contraband.

Strip searches must be the last resort

- 6.10 While the draft Bill states that, as far as practicable, the search must be the least intrusive kind of search that is necessary and reasonable to achieve the purposes of the search, this leaves the decision making as to what is the least intrusive kind of search to the person performing

⁷ Recommendation 1(a) of the Memorandum of Advice published by the Commissioner for Children and Young People on searches of children and young people in custody in custodial facilities in Tasmania on 7 May 2019.

⁸ Recommendation 1(b) of the Memorandum of Advice published by the Commissioner for Children and Young People on searches of children and young people in custody in custodial facilities in Tasmania on 7 May 2019.

⁹ Tasmanian Government, Letter from Government in Response to the Commissioner for Children and Young People advice regarding personal searches (24 June 2020).

¹⁰ Tasmanian Government, Letter from Government in Response to the Commissioner for Children and Young People advice regarding personal searches (24 June 2020).

¹¹ See Royal Commission into the Protection and Detention of Children in the Northern Territory (Final Report, 2018) 264.

the search.

- 6.11 This is inconsistent with the recommendations made by the Commissioner for Children and Young People that consideration be given to introducing legislation that includes “a clearly stepped out hierarchy of types of searches, moving from the least intrusive types of searches such as wand or scanning searches through to other forms of searches which are comparatively more intrusive such as strip searches” and “clear criteria to guide a determination of which type of search is permissible and justified in particular circumstances”.¹²
- 6.12 The Tasmanian Government accepted this recommendation in principle and that implementation would be primarily through policy and operational procedures.¹³ For the reasons stated above, it is integral that safeguards are clearly set out in the legislation.
- 6.13 The draft Bill should instead clearly state that a strip search is the search of last resort. It should provide that less intrusive searches – like the use of a scanner, wand or pat down search – must be exhausted before a strip search can take place, and that a strip search should only take place if a less intrusive search has taken place and the detention centre manager still believes there is reasonable intelligence which indicates that the child or young person is carrying dangerous contraband.

Use of force must be prohibited

- 6.14 Alarming, the new provisions provide that authorised officers may use the force that is reasonable and necessary in the circumstances to conduct the search.
- 6.15 This is at odds with the advice of the Commissioner for Children and Young People that “the use of force should be limited to circumstances of last resort and, if force is required, there should be clear lines of authorisation.”¹⁴
- 6.16 This recommendation was accepted by the Tasmanian Government,¹⁵ yet the draft Bill is inconsistent with best practice provisions in the Northern Territory which specifically provide that force may not be used to conduct a strip search unless the person conducting the search believes on reasonable grounds that the use of force is necessary to prevent a serious and imminent risk to the safety of the detainee or another person.

The law must require transparency and accountability

- 6.17 While section 25B(1) of the draft Bill provides that the regulations **may** prescribe requirements in relation to the establishment and maintenance of registers in which details of the conduct of

¹² See Memorandum of Advice published by the Commissioner for Children and Young People on searches of children and young people in custody in custodial facilities in Tasmania on 7 May 2019.

¹³ Tasmanian Government, Letter from Government in Response to the Commissioner for Children and Young People advice regarding personal searches (24 June 2020).

¹⁴ Recommendation 5 of the Memorandum of Advice published by the Commissioner for Children and Young People on searches of children and young people in custody in custodial facilities in Tasmania on 7 May 2019.

¹⁵ Tasmanian Government, Letter from Government in Response to the Commissioner for Children and Young People advice regarding personal searches (24 June 2020).

some or all of the searches are to be recorded, this is an insufficient safeguard.

- 6.18 The Commissioner for Children and Young People recommended that all searches of children and young people in custody in custodial settings should be recorded on a search register,¹⁶ and this recommendation was accepted by the Tasmanian Government.¹⁷
- 6.19 The maintenance of a register of strip searches must be a mandatory requirement and there should be a specific legislative duty on people performing strip searches to record the search and the reasons for it to ensure greater transparency and accountability.
- 6.20 Reliance on regulations like proposed in the draft Bill is risky, and a specific legislative requirement is the best practice approach adopted in the ACT.

7. Best practice models

- 7.1 The Human Rights Law Centre recommends that the Tasmanian Government look to best practice examples of legislative safeguards when drafting laws to limit the circumstances in which children and young people are being subjected to strip searches.

The Northern Territory

- 7.2 In response to the Royal Commission into abuses at the Don Dale youth prison, the Northern Territory government introduced section 161 of the *Youth Justice Act 2005* (NT) provides that searches of children in prison can only take place in the following circumstances:
- (1) The superintendent or a member of the staff of a detention centre may direct a detainee to submit to a screening search:
 - (a) when the detainee is admitted to the detention centre; and
 - (b) on the detainee temporarily leaving, and returning to, the detention centre; and
 - (c) on the detainee being transferred from the detention centre to a custodial correctional facility or another detention centre.
 - (2) The superintendent of a detention centre may direct a detainee to submit to a screening search or a pat down search if the superintendent believes on reasonable grounds that the detainee may have an article that is not permitted to be in the detainee's possession.
 - (3) The superintendent of a detention centre may direct a detainee to submit to a personal search if:
 - (a) the superintendent believes on reasonable grounds that the search is necessary to prevent a risk of harm to the detainee or another person; and
 - (b) the detainee has already submitted to a pat down search under subsection (2).
- 7.3 Section 161(6) defines a pat down search to mean a search conducted by feeling clothing from the outside for objects concealed in or beneath the clothing, a personal search to mean a search of a person that may include: requiring the person to remove the person's clothes and an examination of the person's body (but not of body cavities) and of those clothes and a screening search to mean a search by equipment.

¹⁶ Recommendation 8 of the Memorandum of Advice published by the Commissioner for Children and Young People on searches of children and young people in custody in custodial facilities in Tasmania on 7 May 2019.

¹⁷ Tasmanian Government, Letter from Government in Response to the Commissioner for Children and Young People advice regarding personal searches (24 June 2020).

- 7.4 Section 161(4) of the Northern Territory laws provides that force may not be used to conduct a personal search unless the person conducting the search believes on reasonable grounds that the use of force is necessary to prevent a serious and imminent risk to the safety of the detainee or another person.
- 7.5 The *Youth Justice Regulations 2006* (NT) also require the Superintendent to keep a search register and set out details that must be recorded in the register in relation to each search.¹⁸

The Australian Capital Territory

- 7.6 In the ACT, section 254 of the *Children and Young People Act 2008* (ACT) provides that the director-general may direct a youth detention officer to strip search a young detainee if the director-general believes on reasonable grounds that the strip search is necessary for an initial assessment. Safeguards exist for strip searches on admission to prison for a person who has daily or long-term care responsibility or a support person to be present for the search.¹⁹
- 7.7 Outside of an initial assessment, section 258 of the *Children and Young People Act 2008* (ACT) provides that the director-general may direct a youth detention officer to strip search a young detainee only if —
- (a) the director-general suspects on reasonable grounds that the young detainee has something concealed on the young detainee that—
 - (i) is a prohibited thing; or
 - (ii) may be used by the young detainee in a way that may involve an offence, a behaviour breach, a risk to the personal safety of the young detainee or someone else, or a risk to the security at a detention place; and
 - (b) a scanning search, frisk search or ordinary search of the young detainee has failed to detect the thing.
- 7.8 Section 223 of the *Children and Young People Act 2008* (ACT) provides that, as far as practicable, force is only to be used as a last resort.
- 7.9 Section 195 of the *Children and Young People Act 2008* (ACT) also makes provision for there to be a register of searches.

International human rights law guidance

- 7.10 When conducting strip searches, prison officers must respect the prohibition of torture, inhuman and degrading treatment,²⁰ as well as the right of all persons deprived of their liberty to be “treated with humanity and with respect for the inherent dignity of the human person.”²¹
- 7.11 Strip searches should be undertaken only when absolutely necessary. The United Nations Standard Minimum Rules for the Treatment of Prisoners (**the Mandela Rules**) provide that “intrusive searches, including strip and body cavity searches, should be undertaken only if absolutely necessary. Prison administrations shall be encouraged to develop and use

¹⁸ *Youth Justice Regulations 2006* (NT), r 74.

¹⁹ See *Children and Young People Act 2008* (ACT) ss 254 and 255.

²⁰ Article 5 of the Universal Declaration on Human Rights, Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and Article 1 of the UN Convention against Torture.

²¹ Article 10, International Covenant on Civil and Political Rights, see also Rule 1 of the revised Standard Minimum Rules for the Treatment of Prisoners.

appropriate alternatives to intrusive searches.” The Mandela Rules also state that searches should not be used to harass, intimidate or unnecessarily intrude upon a person’s privacy.²²

- 7.12 In 2017, the Australian Children’s Commissioners and Guardians concluded that searches of children and young person in youth prisons should be conducted only when reasonable, necessary and proportionate to a legitimate aim:

Children and young people in youth justice detention have the right not to be subjected to arbitrary or unlawful interferences with their privacy, and to be treated with humanity and respect for their inherent dignity, and in a manner that takes into account their age. All searches, and particularly internal body searches and strip/unclothed searches, interfere with the privacy of children and young people. Where a search is permitted, it must be lawful, reasonable and proportionate to a legitimate aim. Governments should take steps to ensure that, when a search must occur, less intrusive search methods are preferred, such as electronic wand or other types of screening.²³

- 7.13 The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (**the Havana Rules**) provide that force can only be used in exceptional cases, where all other control methods have been exhausted and failed, and only as explicitly authorised and specified by law and regulation. The Australian Children’s Commissioners and Guardians has expressed the view that the use of force on a child or young person should be prohibited, except when necessary to prevent an imminent and serious threat of injury to the child or others, and only when all other means of control have been exhausted.²⁴

- 7.14 The Special Rapporteur on Torture has stated that strip searches can constitute ill-treatment when conducted in a disproportionate, humiliating or discriminatory manner, and that inappropriate touching and handling amounting to sexual harassment during searches is common.²⁵ When conducted for a prohibited purpose or for any reason based on discrimination and leading to severe pain or suffering, strip searches amount to torture.²⁶ Specifically in relation to children, the Special Rapporteur on Torture has stated that routine strip searches should be abolished and that strip searches should not be performed without reasonable suspicion.²⁷

8. Abuse thrives behind bars

- 8.1 Legislation clearly articulating the circumstances when a strip search can take place is needed to avoid strip searching being used to control or punish children and young people in prison. This has been identified as a concern by the Office of the Inspector of Custodial Services in Western Australia (**OICS**), who found that the practice of strip searching can be used to try

²² United National Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), rules 50-53.

²³ Australian Children’s Commissioners and Guardians, Statement on Conditions and Treatment in Youth Justice Detention, November 2017, 19, www.humanrights.gov.au/sites/default/files/document/publication/ACCG_YouthJusticePositionStatement_24Nov2017.pdf.

²⁴ Australian Children’s Commissioners and Guardians, Statement on Conditions and Treatment in Youth Justice Detention, November 2017, 18, www.humanrights.gov.au/sites/default/files/document/publication/ACCG_YouthJusticePositionStatement_24Nov2017.pdf.

²⁵ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/31/57, 5 January 2016 [23].

²⁶ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/31/57, 5 January 2016 [23].

²⁷ Juan E. Mendez, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/HRC/28/68 (5 March 2015), [86(f)].

and “modify behaviour”²⁸ and control or punish people in prison. In a custodial staff survey conducted by the OICS, approximately 15 per cent of respondents had stated that they observed a search being conducted to change a person’s behaviour.²⁹

- 8.2 A child is extremely vulnerable during a strip search. This is especially the case because of the power imbalance in a prison context where refusal or resistance to being strip searched can result in institutional charges, loss of privileges and in some cases, the use of physical force.³⁰ With children and young people, many of whom have been victims of family violence, sexual assault or other forms of trauma, it is absolutely paramount that the legislation behind strip-searching has sufficient safeguards and restrictions to ensure their protection.

Impact on children in prison

- 8.3 Being subjected to routine strip searches can be humiliating and degrading for any person, and is especially harmful to children. This is particularly the case in light of the high number of young people in detention who have experienced physical and sexual abuse. Subjecting this cohort to such an invasive practice on a routine basis can be incredibly harmful and re-traumatising. This is because strip searches “often cause feelings of disgust, annoyance, trauma and humiliation, similar to the experiences of victims of sexual abuse and rape.”³¹

- 8.4 An inquiry into youth prisons in the United Kingdom highlighted that:

Within the custodial context a strip search is more than just the removal of clothes for a visual inspection. It is a manifestation of power relations. A strip search involves adult staff forcing a child to undress in front of them. Forcing a person to strip takes all control away and can be demeaning and de-humanising. This power is compounded by the threat, or actual use of, force to those showing any reluctance to strip.³²

- 8.5 As found by the Northern Territory Royal Commission into the abuses at the Don Dale youth prison, trauma experienced in childhood becomes embedded in the personality and physical, emotional, physiological, mental and intellectual development of the child or young person.³³
- 8.6 As the majority of children and young people in the Ashley Youth Detention Centre have been subject to a child protection notification, and a significant number have histories of child abuse or neglect,³⁴ routine strip searching can compound previous trauma and have lifelong impacts.
- 8.7 Due to the ongoing impacts of colonisation and systemic racism, Aboriginal and Torres Strait Islander children and young people are over-represented in Tasmanian prisons. This massive inequality exists not because Aboriginal and Torres Strait Islander children commit more

²⁸ Office of the Inspector of Custodial Services, *Strip searching practices in Western Australian prisons* (March 2019), 12.

²⁹ *Ibid.*

³⁰ Jessica Hutchison, “It’s Sexual Assault. It’s Barbaric”: *Strip Searching in Women’s Prisons as State-inflicted Sexual Assault* (2020) 35(2) *Journal of Women and Social Work*, 160, 163.

³¹ Daphne Ha, *Blanket Policies for Strip Searching Pretrial Detainees: An Interdisciplinary Argument for Reasonableness*, 79 *Fordham L. Rev.* (2011), 2725.

³² Lord Carlile of Berriew QC, *An independent inquiry into the use of physical restraint, solitary confinement and forcible strip searching of children in prisons, secure training centres and local authority secure children’s homes*, The Howard League for Penal Reform, 2006, 58, howardleague.org/wp-content/uploads/2016/03/Carlile-Report-pdf.pdf

³³ Human Rights and Equal Opportunity Commission, 1997, *Bringing them home – Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (13 October 2016) 170.

³⁴ Commissioner for Children Tasmania, *Alternatives to Secure Youth Detention*, 26 July 2013, 63.

crimes, but because of the operation of discriminatory laws and policies that result in Aboriginal and Torres Strait Islander children being targeted by police, harmed through contact with the legal system and denied culturally relevant and community based supports.

- 8.8 Nationally, Aboriginal and Torres Strait Islander children constitute over half (54%) of the youth detention population, making them 24 times more likely to be incarcerated.³⁵ In Tasmania, Aboriginal and Torres Strait Islander young people are almost 4 times as likely as non-Indigenous young people to be under youth justice supervision.³⁶
- 8.9 Alarming, the data obtained by the Human Rights Law Centre in 2018 showed that a disproportionately high number of Aboriginal and Torres Strait Islander children were being strip searched, with Aboriginal and Torres Strait Islander children accounting for over 50 percent of the strip searches undertaken.
- 8.10 Approximately 24% of children and young people under youth justice supervision in Tasmania are girls.³⁷ Many girls in prison have histories of physical and sexual abuse,³⁸ and unnecessarily strip searching girls who become entangled in the prison system is abhorrent and unnecessary.

9. Strip searches are ineffective

- 9.1 There is limited evidence that strip searches act as a deterrent, with prisons that have reduced or eliminated the use of strip searches not reporting an increase in the amount of contraband entering prisons.
- 9.2 This is the case in Tasmania, with the data for the period 1 June 2018 - 30 November 2018 indicating that no contraband was found as a consequence of 203 strip searches.
- 9.3 Previously, the Human Rights Law Centre obtained data which showed that in one month, 403 strip searches were conducted on children at two youth prisons in New South Wales. Only one item – a ping pong ball – was found as a result of these strip searches.³⁹
- 9.4 During the Northern Territory Royal Commission into the abuses at the Don Dale youth prison, body search registers for Don Dale for the period between January 2007 and June 2015 were reviewed. 4,898 strip searches were conducted and only 29 resulted in contraband being found.⁴⁰ The body search registers for the Alice Springs youth prison for the period between November 2008 and August 2016 were also reviewed, and out of 1,478 strip searches, only 12 items were found.⁴¹ These numbers demonstrate that children are being subjected to a

³⁵ Australian Institute of Health and Welfare (2015) Youth Detention Population in Australia 2015, Bulletin 131.

³⁶ Australian Institute of Health and Welfare, Youth justice in Australia 2018–19 (15 May 2020).

³⁷ Australian Institute of Health and Welfare, Youth justice in Australia 2018–19 15 (May 2020).

³⁸ Lubica Forsythe and Kerryn Adams, 'Mental Health, Abuse, Drug Use and Crime: Does Gender Matter?' (Trends and Issues in Crime and Criminal Justice, No 384, Australian Institute of Criminology, 2009) 5.

³⁹ Human Rights Law Centre, Children in prison subject to 100s of unnecessary strip searches (Media release, 29 July 2019). www.hrlc.org.au/news/2019/7/29/children-in-prison-subject-to-100s-of-unnecessary-strip-searches.

⁴⁰ Northern Territory, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report* (2017) vol 2A, 255.

⁴¹ *Ibid.*

significant number of strip searches, and identifying minimal contraband.

- 9.5 Routine strip searching of women has also proved ineffective in identifying contraband. The Human Rights Law Centre's *Total Control: Ending the routine strip searching of women in Victoria's prisons* report found that thousands of strip searches are conducted on women in Victoria's prisons. In over 6,200 strip searches, only six items were discovered: four tobacco or nicotine products, a "small quantity of gum" and one unidentified object.⁴²
- 9.6 Similarly, in Western Australia, the Office of the Inspector of Custodial Services has found that the reduction in strip searching at Melaluca Remand and Reintegration Facility and Wandoo Rehabilitation Prison (both women's prisons) has not lead to an influx of drugs being brought into those facilities.⁴³

More effective alternatives exist

- 9.7 As recommended by the Commissioner for Children and Young People, and accepted by the Tasmanian Government,⁴⁴ consideration should be given to alternative security strategies or technologies such as body scanners which would minimise reliance on more invasive searches such as strip searches.⁴⁵ These alternatives are more effective in identifying contraband entering prisons, and are far less traumatic for children and young people.
- 9.8 The Office of the Inspector of Custodial Services in Western Australia has made similar recommendations, and said that full body scanners and other new technology should be implemented to reduce the reliance on strip searching.⁴⁶
- 9.9 This sentiment is echoed by the recommendation made by the Royal Commission into Institutional Responses to Child Sexual Abuse that state governments consider implementing strategies for detecting contraband, such as risk assessments or body scanners, to minimise the need for strip searching of children.⁴⁷
- 9.10 This approach is consistent with Rule 20 of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (**the Bangkok Rules**), which provide that alternative screening methods, such as scans, should be developed to replace strip searches, in order to avoid the harmful psychological and possible physical impact of invasive body searches.

⁴² Human Rights Law Centre, *Total Control: Ending the routine strip searching of women in Victoria's prisons* (2017), www.hrlc.org.au/reports/2017/12/5/report-total-control-ending-the-routine-strip-searching-of-women-in-victorias-prisons.

⁴³ Office of the Inspector of Custodial Services, *Strip searching practices in Western Australian prisons* (March 2019), 9.

⁴⁴ Tasmanian Government, Letter from Government in Response to the Commissioner for Children and Young People advice regarding personal searches (24 June 2020).

⁴⁵ Recommendation 4 of the Memorandum of Advice published by the Commissioner for Children and Young People on searches of children and young people in custody in custodial facilities in Tasmania on 7 May 2019.

⁴⁶ Office of the Inspector of Custodial Services, *Strip searching practices in Western Australian prisons* (March 2019), 29.

⁴⁷ Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report: Contemporary detention environments (Volume 15) 117–188 and recommendation 15.4.