

Strip searches conducted after an incident at Frank Baxter Youth Justice Centre

A special report under section 31 of the *Ombudsman Act 1974*

8 June 2021

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**NSW Ombudsman
Level 24, 580 George Street
Sydney NSW 2000**

**Phone: 02 9286 1000
Toll free (outside Sydney Metro Area): 1800 451 524
National Relay Service: 133 677**

**Website: www.ombo.nsw.gov.au
Email: nswombo@ombo.nsw.gov.au**

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ABN 76 325 886 267

Level 24, 580 George Street, Sydney NSW 2000

T 02 9286 1000

Tollfree 1800 451 524

www.ombo.nsw.gov.au



The Hon Matthew Mason-Cox MLC
President
Legislative Council
Parliament House
SYDNEY NSW 2000

The Hon Jonathan O'Dea MP
Speaker
Legislative Assembly
Parliament House
SYDNEY NSW 2000

Dear Mr President and Mr Speaker

Pursuant to section 31 of the *Ombudsman Act 1974*, I am providing you with a report titled *Strip searches conducted after an incident at Frank Baxter Youth Justice Centre*.

I draw your attention to the provisions of s 31AA of the *Ombudsman Act 1974* in relation to the tabling of this report and request that you make the report public forthwith.

Yours sincerely

A handwritten signature in black ink, appearing to read "Paul Miller". The signature is written in a cursive, flowing style.

Paul Miller
NSW Ombudsman

8 June 2021

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Foreword

On any one day, between 190 and 300 young people ranging in age from 10 years to 21 years and 6 months are held in 6 youth justice centres across NSW. This number is currently closer to the historically lower end of this range, as more young people who might otherwise be held in a centre are being supervised within the community.¹

These centres are run by Youth Justice NSW (**YJNSW**), which was formerly part of the Department of Families and Community Services. YJNSW is separate from Corrective Services NSW (**CSNSW**), which manages the adult corrections system and which was formerly part of the Department of Justice.

After a merger in July 2019, YJNSW and CSNSW are now part of a combined Department of Communities and Justice. However, they continue to be run separately, by different staff and under different legislation, policies and procedures.

There is, however, an exception to this separation. After an incident at Frank Baxter Youth Justice Centre (**the centre**) in mid-2019 during which NSW Police had to assist authorities to regain control of the centre, a Memorandum of Understanding (**MOU**) was entered into between YJNSW and CSNSW. That MOU allows the Commissioner of CSNSW (**the Commissioner**), through a special unit called the Security Operations Group (**SOG**), to be called in to take control of a youth justice centre for the purpose of quelling a riot or disturbance.

When this happens, the MOU provides that CSNSW officers who attend the centre bring with them all the same powers for the children and young people as they have for adult prisoners in an adult correctional centre. In effect, the youth justice centre becomes legally 'cloaked' as an adult correctional centre for so long as the CSNSW officers have control of it, so that the children and young people in that centre may lawfully be treated by those officers in the same way as an adult prisoner in an adult correctional facility.

As we found in our recent investigation, this can include being subjected to full naked body (**FNB**) strip searches, something which would not otherwise be permitted in a youth justice centre.

1. At the end of March 2021, there were 200 young people in custody: NSW Bureau of Crime Statistics and Research, *New South Wales Custody Statistics Quarterly Update March 2021*, p. 6, https://www.bocsar.nsw.gov.au/Publications/custody/NSW_Custody_Statistics_Mar2021.pdf.

In November 2019, 3 young people climbed onto the roof of several buildings at the centre, gained access to building materials and tools, and refused to come down. While they were on the roof, they made a series of serious threats to the safety of staff.

CSNSW took control of the centre under the MOU with YJNSW, and officers from the SOG were called in. Soon after, these officers entered the centre and spoke to the 3 young people, and they came down from the roof without further incident. The young people were handcuffed and officers conducted a pat down search of each of them. No weapons or contraband was found.

The young people were then taken to cells and subjected to FNB strip searches. Nothing was found.

The investigation that has led to this report focussed on the decision to conduct those strip searches and the manner in which they were conducted.

We did not consider, nor do we make any adverse comment about, the decision to call in CSNSW officers or their handling of the disturbance itself. Indeed, the available evidence indicates that the CSNSW officers who responded to the incident acted professionally and effectively. It is relevant in this regard to note that no force was used to bring the young people down from the roof or to secure their compliance.

It is indisputable that there will be circumstances where it is necessary to conduct searches of young people in youth justice centres, such as when there is a risk they have hidden something that they may use to harm themselves or others. In some cases, a search may require the removal of clothing. However, the process for deciding to conduct a search and selecting which search is conducted must be proportionate. The decision maker should consider the impact of the search on the young person, where possible taking into consideration any particular circumstances of that person, and then decide on the most reasonable and appropriate method of search.

Close consideration of incidents of this nature raises questions around whether there is a need for further legislative guidance and protections when searching young people in detention.

I have made recommendations for legislative and policy changes to make sure that young people are not, in any circumstances, subject to the kind of FNB strip searches that may be conducted in adult prisons. I have also made recommendations for additional legislative safeguards around the other type of strip searches that can be conducted on young people in detention. These are ultimately issues for relevant ministers and the Parliament.

I have also made recommendations aimed at changing the way searches are recorded by YJNSW. An effective electronic method of recording and reporting on searches involving the removal of clothing is an essential accountability measure. It allows offices such as mine and the Inspector of Custodial Services to understand where, when and why searches are conducted. I note that the Inspector of Custodial Services has previously raised concerns about the routine use of strip searches in youth detention.²

Proper recording of searches will also provide an essential internal accountability mechanism, allowing YJNSW to effectively track how searches are being used and identifying areas for improvements to procedures and training.

We have done everything we can to anonymise this report, although in the circumstances it is not possible to assure that the identities of the 3 young people featured in this report will not be identifiable. I also appreciate that the searches conducted of the 3 young people will have been a confronting, and potentially traumatic, experience for them. I have considered those matters carefully when deciding whether to issue a public report. On balance, I consider that the need for public transparency warrants this matter being reported, and hope that doing so will contribute to ensuring that there are improved systems and safeguards in place in the future.

2. NSW Inspector of Custodial Services, *Use of force, separation, segregation and confinement in NSW juvenile justice centres*, November 2018, pp. 159-160. NSW Inspector of Custodial Services, *Making Connections: Providing Family and Community Support to Young People in Custody*, 15 June 2015, p. 10.

1. Executive summary

This report is made under s 31 of the *Ombudsman Act 1974* and sets out the findings and recommendations I made in my final report to the Department of Communities and Justice (DCJ) on 30 April 2021, after an investigation into 3 strip searches conducted at Frank Baxter Youth Justice Centre (**the centre**). The report also addresses a number of related issues, such as the appropriateness of strip searching young people in youth justice centres, as well as the need for a digital record of all searches requiring the removal of some or all of a young person's clothing.

Referral from the Inspector

On 15 January 2020, the Inspector of Custodial Services made a referral to our office under s 26 of the *Inspector of Custodial Services Act 2012*. The Inspector reported that CSNSW officers, while attending a disturbance at the centre in November 2019, 'may have carried out unauthorised strip searches' of 3 young people.

We asked the Inspector to provide us with any footage of the incident. After reviewing the footage, we decided to conduct an own-motion investigation.

A brief description of one of the searches is included in **section 4** of this report.

1.1. What did we consider?

In this investigation we considered whether:

- The strip searches of the young people by CSNSW officers were contrary to law.
- The strip searches complied with relevant policies and procedures.
- The strip searches preserved the privacy and dignity of the young people and/or were otherwise unjust, unreasonable, oppressive or otherwise wrong.
- Adequate training had been provided to CSNSW officers and YJNSW staff in relation to searching young people.
- Adequate records were kept in relation to the conduct of the searches.

We did not consider whether it was appropriate to call in CSNSW officers, or any conduct of CSNSW officers or YJNSW staff preceding the 3 strip searches (other than to the extent that the events that led to the searches were relevant to an assessment of risk, which might warrant the conduct of searches).

1.2. Contact with the young people involved

We attempted to contact the 3 young people subjected to the strip searches so that we could tell them that we were conducting the investigation, seek their views about what took place, and talk to them about the possibility of a report to Parliament.

We spoke with one young person and he indicated that he understood why this matter is of public interest and that we may make the report public. We reassured him that any public report would be carefully prepared to reduce the risk of him or any of the other young people being identified, while noting that complete anonymity would not be possible.

1.3. A preliminary note on terminology

The terminology used in legislation and in practice to describe different types of searches varies across agencies and jurisdictions and has changed over time. As a result, there can be potential for the terms to mislead.

1.3.1. A strip search by any other name

In the youth justice context, a ‘partially clothed body search’ is a term used to distinguish that type of search from other ‘strip searches’, even though a partially clothed body search still involves the removal of each (and ultimately every) item of clothing, including undergarments – just not all at the same time, so the person is only ever partially naked.

Those searches that YJNSW now calls ‘partially clothed body searches’:

- were previously called ‘strip searches’ – this changed in 2018, when legislation was introduced to differentiate those searches from other forms of strip searches (that is, full naked body strip searches), which were at the same time banned in youth justice centres
- are still called ‘strip searches’ in some other jurisdictions
- would be considered ‘strip searches’ in other contexts, for example if they were conducted by the NSW Police Force (**NSWPF**) under the *Law Enforcement (Powers and Responsibilities) Act 2002 (LEPRA)*.

In our view, a common sense understanding of the term ‘strip search’ includes what YJNSW calls a ‘partially clothed search’.

1.3.2. Terminology used in this report

To avoid confusion and euphemistic language in this report, we have deliberately used terminology that reflects a common sense understanding of the term ‘strip search’.

Throughout this report we use the following terminology:

Pat down search	PCB strip search (PCB refers to 'partially clothed body')	FNB strip search (FNB refers to 'fully naked body')	Body cavity search
Searching by running the hands over the outer garments of a person.	Requiring a person to remove all of their clothing from the top of their body and then (once reclothed) to remove all the clothing from the bottom of their body, and visually examining their body and physically examining their clothes.	Requiring a person to remove all of their clothing, usually all at once, and visually examining their body and physically examining their clothes.	A search of the internal cavities of a person's body.

Where it is not necessary to differentiate between the 2 kinds of strip searches (PCB or FNB), or we are referring to strip searches in a general sense, we just use the term 'strip search'.

A more detailed explanation of the terminology is set out in **section 3.2**.

1.4. Our conclusions on key issues

1.4.1. Young people in detention can be, but should not be, subject to FNB strip searches

The *Children (Detention Centres) Regulation 2015 (CDC Regulation)* does not allow YJNSW to conduct FNB strip searches of children and young people in detention, and instead permits only PCB strip searches under certain conditions.

However, the FNB strip searching of young people by CSNSW officers (in circumstances where they have been called in to respond to a riot or disturbance in a youth justice centre) has been authorised under s 26 of the *Children (Detention Centres) Act 1987 (CDC Act)* by the operation of an internal DCJ MOU.

That section provides for the Secretary of DCJ (**the Secretary**) (on behalf of one part of DCJ: YJNSW) to enter into an MOU with the Commissioner (on behalf of another part of DCJ: CSNSW) for the latter to respond to riots and other disturbances at youth justice centres. Activation of the MOU gives the Commissioner control of the centre and authorises CSNSW officers to exercise 'the same functions ... in relation to the control of detainees at the detention centre as they have in relation to the control of inmates in a correctional centre'.

The effect of the MOU is that CSNSW officers who are called into a youth justice centre operate under the same legislation and policy as YJNSW staff, as well as the legislation and policy that directs and guides their work in adult correctional centres. As a result, for so long

as the Commissioner has control of a youth justice centre, CSNSW officers are permitted to search young people either using powers of YJNSW staff or using the same powers they would have when dealing with adult inmates. This includes strip searching children and young people as if they were adults in an adult correctional centre.

However, as the NSW Government recognised when it made amendments to the CDC Regulation in 2018, FNB strip searches of children and young people are neither necessary nor appropriate and do not reflect good public policy. In our view, the practice of FNB strip searching of young people is not consistent with the principles of trauma informed practice, as an FNB strip search is almost always a confronting and humiliating experience.

An individual's reaction to being searched can be significantly compounded by that person's prior life experience. Many young people in detention have experienced serious past trauma in their lives. This is one of the key reasons why several independent oversight agencies – as well as several recent royal commissions – have expressed significant concern about the impact of strip searches on young people.

In addition, the purpose of any search is to detect contraband and unauthorised property.³ Strip searches are generally not considered a necessary and effective method of detection. Several recent inquiries into the issue have found that only a very small percentage of strip searches result in any contraband or unauthorised property being found.

The recommendations made in this report are aimed at ensuring alternative searching methods are used for young people when appropriate, including pat down searches in conjunction with metal wands or body scanners.

1.4.2. Searches should only be conducted when necessary and with appropriate safeguards in place

There will be circumstances where it is necessary to conduct a search of a young person that involves the removal of their clothes. It is essential that there are clear, consistent and appropriate rules in place to make sure that the power to strip search is only used when it is necessary and its use is governed by clear, legislated controls.

The relevant MOU between YJNSW and CSNSW did not provide any guidance about how CSNSW powers should be exercised in a youth justice centre or in what circumstances CSNSW powers should be preferred over YJNSW powers.

3. CSNSW, Custodial Operations Policy and Procedures – 17.1 Searching inmates, 16 December 2017, p. 5.

Similarly, the relevant YJNSW and CSNSW searching policy and procedures fail to outline under what circumstances, if any, a young person could be subject to an FNB strip search (rather than a PCB strip search), and if they were, how and by whom the search would be conducted.

While the MOU has recently been amended to provide some additional guidance around roles and responsibilities, there is still a need for effective and consistent statutory rules relating to searching young people, regardless of which agency is responsible for conducting the search.

1.4.3. CSNSW searched the 3 young people in an oppressive way

The 3 young people who were searched had access to tools and other building materials during their time on the roof of the centre. They had also made earlier threats towards YJNSW staff. It was clearly necessary and reasonable to conduct some form of search to make sure that the young people had not hidden anything that could pose a risk to the safety of staff and the young people themselves.

The CSNSW officers had already completed a pat down search of the young people. They then followed the FNB strip searching procedure used in adult prisons. In our view, conducting the FNB strip searches was oppressive because:

- It was disproportionate to the risk posed.
- It did not take into account whether there was any potential detrimental impact of the searches on the particular young people.
- It did not assess the options of conducting less intrusive searches to determine the appropriate search needed.
- It did not sufficiently maintain the young people's privacy and dignity.

The CSNSW officers also required the young people to complete a number of steps in the FNB strip search process that appear to have been unnecessary and inconsistent with policy. For example, it is a policy requirement that, before inspecting between a person's buttocks, the officer must hold a reasonable suspicion that contraband is secreted in that area. Nothing in the evidence showed that the officers had such a reasonable suspicion. These elements of the searches, which can form part of an FNB strip search in an adult correctional setting, increased the risk that the searches would have a detrimental impact on the young people, while serving no clear operational purpose.

1.4.4. Strip searching the young people in view of operational CCTV cameras was wrong

All 3 young people were searched in cells with operating closed-circuit television (**CCTV**) cameras. CSNSW policies for adult centres appear to suggest that strip searches are to be conducted in private and recorded only on body worn camera or hand-held camera.

YJNSW's Searching Young People Policy (**YJNSW policy**) requires that strip searches (PCB) be conducted in private and out of view of CCTV cameras. YJNSW had several searching rooms available at the centre that were not monitored by CCTV. Despite the availability of these rooms, the searches were conducted in the cells.

Recording the searches with CCTV was inconsistent with policy and an unnecessary invasion of the detainees' privacy. The body worn camera footage provided a sufficient record of the searches and did not show the young people's entire naked body for extended periods.

1.4.5. YJNSW should maintain a digital record of strip searches

When we required information about the number of PCB strip searches conducted in the last 3 years, YJNSW stated that the search records are paper-based and held at each youth justice centre.

A central source of data about strip searches would allow YJNSW to effectively monitor their use, as well as providing an essential source of information for external accountability.

2.

Findings and recommendations

2.1. Findings

I made the following findings under the Ombudsman Act:

1. It was unreasonable within the meaning of s 26(1)(b) for CSNSW and YJNSW to fail to recognise the particular vulnerability of children and young people in detention and, accordingly, make sure that there were legislative and policy safeguards in place dealing with the searching of children and young people by CSNSW officers under the MOU.
2. It was oppressive within the meaning of s 26(1)(b) for CSNSW to conduct FNB strip searches of the 3 detainees as the searches were disproportionate to the risk posed, did not take into account the potential impact of the searches on the detainees, did not consider the appropriateness of conducting less intrusive searches, and did not sufficiently maintain the privacy and dignity of the detainees.
3. It was wrong within the meaning of s 26(1)(g) for CSNSW to strip search the 3 detainees in view of operating CCTV cameras.

I did not make any adverse findings about the CSNSW officers who undertook the strip searches.

2.1.1. 'Unreasonable' and 'oppressive' conduct

Under s 26 of the Ombudsman Act, the Ombudsman may report if he or she finds that conduct was 'unreasonable, unjust, oppressive or improperly discriminatory'.

None of those terms is defined in the Act, and in the context of an Ombudsman investigation they should be applied according to their ordinary, or dictionary, meaning.

Accordingly, in expressing an opinion that conduct was 'unreasonable', the common meaning of that term is being applied, rather than the doctrine of legal unreasonableness that may be applied by the courts in judicial review proceedings.

Similarly, in expressing an opinion that conduct was 'oppressive', that term's ordinary meaning is applied. It is acknowledged, however, that 'oppressive' and the related term 'oppression' may be used differently in a variety of contexts. A standard definition of 'oppressive' from the Oxford English Dictionary is:

exercise of authority or power in a burdensome, harsh, or wrongful manner; unjust or cruel treatment of subjects, inferiors, etc; the imposition of unreasonable or unjust burdens.

It is in this ordinary sense that the term 'oppressive' is used in the Ombudsman Act, and in this report. The conduct of an agency may be oppressive, in this ordinary sense, even though it was done lawfully, honestly and for proper purposes.

2.2. Recommendations

The following recommendations are aimed at providing clarity around the searches that may be conducted when CSNSW takes control of a youth justice centre. The recommendations are also aimed at ensuring CSNSW adheres to YJNSW search policies and procedures when it has control of part or all of a centre.

It is timely for the Government and Parliament to carefully consider whether there is a need for additional legislative certainty around when, why and how both YJNSW staff and CSNSW officers conduct searches of young people that involve the removal of clothing.

The recommendations relating to record keeping are designed to make sure that future consideration of PCB strip searches is informed by accurate data. These changes will also help to make sure that oversight bodies have access to accurate, real-time information about strip searches conducted in all youth justice centres.

The power to conduct an FNB strip search is one of many available to CSNSW officers. The investigation that informed this report only considered the relevant 3 strip searches and the appropriateness of conducting FNB strip searches of young people in youth justice centres. Recommendations 7 and 8 are aimed at ensuring CSNSW and YJNSW consider the application of other 'adult system' powers in the youth detention system when the MOU is activated, to make sure that they are not used inappropriately.

Finally, recommendation 9 is in recognition of the similarities between the activation of the MOU under s 26 of the CDC Act and the activation of s 26A of that Act for transporting National Security Interest (NSI) detainees. As with s 26, an officer authorised under s 26A has:

- the functions and immunities of YJNSW staff for a detainee, and
- the functions and immunities of a CSNSW officer for an inmate under the *Crimes (Administration of Sentence) Act 1999 (CAS Act)*.

Issues relating to searches that may be conducted when CSNSW officers take control of a youth justice centre can also arise when CSNSW officers take custody of NSI detainees for the purposes of transporting them. The recommendations relating to strip searching young people should also be considered in that context.

I made the following recommendations after the investigation:

Legislative change

1. The responsible minister consider legislative amendment to expressly prohibit the FNB strip searching of children and young people in detention, including by CSNSW officers.
2. The responsible minister consider legislative amendment to provide that searches of young people, who are in the custody or care of YJNSW, by CSNSW officers and YJNSW staff be conducted only in accordance with clause 11A of the *Children (Detention Centres) Regulation 2015*.
3. The responsible minister consider amending clause 11A of the *Children (Detention Centres) Regulation 2015* to expand the current provisions to provide that:
 - a. Where a search is necessary, the search method used should be the least intrusive method required to achieve the purpose of the search.
 - b. Searching officers must inform young people of the reason for the search.
 - c. PCB strip searches should not be conducted routinely, and only when an officer forms a reasonable suspicion that:
 - i. there is contraband hidden on the body of the person, and/or
 - ii. there is an imminent risk to the health and safety of staff and/or young people.
 - d. PCB strip searches should not involve the removal of more clothing than is reasonably necessary for the purpose of the search.
 - e. Searching officers must inform young people of the reason for the removal of particular clothing.
 - f. PCB strip searches should not involve any more visual inspection than is reasonably necessary for the purpose of the search.
 - g. PCB strip searches should be conducted in private.

MOU and policy and procedural changes

4. The MOU between CSNSW and YJNSW and all associated policies and procedures be amended to provide that:
 - a. CSNSW officers must not conduct FNB strip searches of young people.
 - b. CSNSW officers should only use the search methods outlined in clause 11A of the *Children (Detention Centres) Regulation 2015*.
 - c. CSNSW officers should adhere to YJNSW search policy and procedure when searching young people, including ensuring no searches are conducted in rooms monitored by CCTV.

- d. There is a documentary record of the precise point in time at which the control of a youth justice centre is assumed by CSNSW officers, and a documentary record of the precise point in time at which CSNSW is satisfied that good order has been restored and control of the centre is passed back to YJNSW.

Training

5. CSNSW officers who may deal with young people under the MOU receive training about conducting searches in line with YJNSW's search policy and procedure.

Record keeping

6. YJNSW establish a system to capture digital records of all searches and ensure that the Ombudsman has live access to these records and related reports.

Broader considerations

7. CSNSW and YJNSW undertake and publicly release a comprehensive analysis of all relevant functions and powers that CSNSW has, and all relevant policies and procedures it may apply, for inmates in adult correctional facilities, and include a comparison of these against the corresponding functions, powers, policies and procedures that YJNSW has for young people in detention.
8. That, having regard to this comparison, the Secretary and the Commissioner determine whether any other amendments to the MOU should be made in the context of the recommendations in this report, and in particular whether any of the functions, powers, policies or procedures of for adult inmates should be disapplied or modified for young people in detention (including for the use of force).
9. CSNSW and YJNSW make sure that the recommendations in this report are also considered in the context of s 26A of the *Children (Detention Centres) Act 1987* relating to the conveyance of national security interest detainees.

I have asked the Department of Communities and Justice to provide me with an update on what it will be doing in response to these recommendations by 30 July 2021. I will continue to monitor implementation and may report to Parliament on progress at a later stage.

3.

Background

3.1. Frank Baxter Youth Justice Centre – recent history

The centre is in Kariong on the NSW Central Coast and has capacity to hold 120 boys and young men aged from 16 years up to 21 years and 6 months. It is the largest youth justice centre in NSW.

Four months before the November 2019 incident, there was a violent disturbance at the centre on 21 July 2019. The riot started when 6 young people used makeshift weapons to overpower staff.⁴ They took a security pass from a staff member and used it to access other areas within the centre. Seven young people were admitted to hospital and several staff were also injured. There was also extensive property damage to the centre. It took 21 hours for the NSWPF to regain control.⁵

After the July riot, the Minister for Families, Communities and Disability Services engaged former NSWPF Assistant Commissioner Lee Shearer APM to conduct an independent review. Ms Shearer made 63 recommendations aimed at improving the wellbeing and safety of the young people at the centre, as well as ensuring the centre was safe and secure.⁶

An MOU was then entered into⁷ to allow for CSNSW officers to respond to future disturbances at youth justice centres, instead of police officers.

3.2. Search terminology

3.2.1. What is an FNB strip search in an adult correctional centre?

The *Crimes (Administration of Sentences) Regulation 2014* (CAS Regulation) states:

46 Searching of inmates and cells

- (1) A correctional officer may, at the times the governor directs and at other times the correctional officer considers appropriate—
 - (a) search an inmate (including by means of a strip-search or the use of an electronic or X-ray scanning device), and
 - (b) search an inmate's cell and any property in the cell.
- (2) Except in the case of an emergency, an inmate must not be strip-searched by or in the presence of a person of the opposite sex.
- (3) The searching of an inmate and the inmate's cell must be conducted with due regard to dignity and self-respect and in as seemly a way as is consistent with the conduct of an effective search.

4. These were not the same young people involved in the incident in November.

5. Inspector of Custodial Services, *Inspection of Six Youth Justice Centres in NSW*, December 2020.

6. Lee Shearer APM, *Ministerial review into the riot at Frank Baxter Detention Centre 21 and 22 July 2019*.

7. Under s 26 of the *Children (Detention Centres) Act 1987*.

- (4) An inmate must not resist or impede the conduct of a search carried out under this clause.

Note—

Failure by an inmate to comply with this subclause is a correctional centre offence.

- (5) In this clause, strip-search means a search of a person or of articles in the possession of a person that may include—
- (a) requiring the person to remove all of his or her clothes, and
 - (b) an examination of the person's body (but not of the person's body cavities) and of the clothes. (emphasis added)

3.2.2. What is a PCB strip search in a youth justice centre?

The CDC Regulation states:

11A Searching of detainees

- (1) For the purpose of ensuring the security, safety and good order of a detention centre, a juvenile justice officer may—
- (a) search a detainee, and
 - (b) search a detainee's room and any property in the room.
- (2) A search of a detainee may be conducted by the following means only—
- (a) running a hand-held metal detector (of a kind approved by the Secretary) over the detainee's outer garments,
 - (b) a pat-down,
 - (c) a partially clothed search.
- (3) A pat-down of a detainee means—
- (a) searching the detainee by running the juvenile justice officer's hands over the detainee's outer garments, and
 - (b) examining anything worn or carried by the detainee that is conveniently removed by the detainee.
- (4) A partially clothed search of a detainee means any of the following—
- (a) requiring the detainee to remove clothes from the top or bottom half of the detainee's body for examination of the clothes (and repeating the process for the other half of the detainee's body),
 - (b) visually examining the detainee's body,
 - (c) requiring the detainee to open the detainee's mouth to enable it to be visually examined,
 - (d) examining the detainee's removed clothes by touch.
- (5) However, a juvenile justice officer conducting a partially clothed search may not—

- (a) require the detainee to remove all of the detainee's clothes at once, or
 - (b) search the detainee's body cavities (other than the detainee's mouth), or
 - (c) examine the detainee's body by touch.
- (6) A search under this clause must be conducted with due regard to the dignity, self-respect and well-being of the detainee and as quickly as is reasonably practicable.
- (7) A search under this clause must be conducted in accordance with any directions of the Secretary about the conduct of searches under this clause, including in relation to the times at which and the circumstances in which a search may be conducted.
- (8) Except in the case of an emergency, a pat-down or partially clothed search of a detainee must be conducted—
- (a) by a person of the same sex as the detainee (or by a person of the sex chosen by the detainee in the case of a transgender or intersex detainee), and
 - (b) in the presence of another person (who, in the case of a partially clothed search, is able to observe the person conducting the search only and not the detainee).
- (9) A partially clothed search of a detainee must not be conducted as part of the general routine of a detention centre, except in the case of a detainee being admitted to a detention centre or returning to a detention centre following day leave or overnight leave.

The YJNSW policy states that a partially clothed body search:

... involves visual examination of the upper body after removal and searching of upper garments, followed by visual examination of the lower body after return of the upper garments and the removal and searching of lower garments. The employee conducting the search must view both sides of the young person's body, including genitals. The visual search of the genital area must be thorough but swift, to minimise the young person's embarrassment as far as possible.⁸

It goes on to state:

During a partially clothed body search, employees are not permitted:

- to touch the body of the young person
- to direct the young person to raise his or her legs (unless to check the soles of his or her feet), part his or her buttocks, or handle his or her genitalia.

3.3. The investigation

In January 2020, the Inspector of Custodial Services wrote to us about the incident at the centre on 24 November 2019. The Inspector was

8. YJNSW, Searching Young People Policy, February 2019.

concerned that CSNSW officers 'may have carried out unauthorised strip searches' and that despite assurances from CSNSW and YJNSW that new protocols had been put in place, she was concerned that similar searches may happen again. The Inspector provided us with the footage she had viewed in January 2020.

After we reviewed the information provided by the Inspector, including CCTV footage of the incident, we formally began an investigation under s 13 of the Ombudsman Act on 14 July 2020.

On 30 July 2020 we issued a notice of investigation under s 16 of the Ombudsman Act to the Secretary and the Commissioner, specifying the subject of investigation as:

an investigation into the following conduct of Youth Justice and Corrective Services NSW of the Department of Communities and Justice and their staff while performing duties at Frank Baxter Youth Justice Centre:

1. performance of search functions on juvenile inmates under the *Crimes (Administration of Sentences) Act 2001* and *Crimes (Administration of Sentences) Regulation 2014*, *Children (Detention Centres) Act 1987* and *Children (Detention Centres) Regulation 2015* from November 2019 to date
2. compliance with relevant child protection legislation and Child Safe Standards in performing searches from November 2019 to date.

Information was required from CSNSW and DCJ as well as individual staff in accordance with notices issued under s 18 of the Ombudsman Act.

On 25 November 2020, DCJ (YJNSW and CSNSW) was provided with an opportunity to comment on a statement of provisional findings and recommendations (**provisional statement**) arising from this investigation.

No adverse provisional findings were proposed against individual CSNSW officers involved in the strip searches. However, we also provided a redacted version of the provisional statement to those officers. This was to provide them with an opportunity to correct any inaccuracies in our account of what took place, as well as an opportunity to provide any additional comment. We did not receive any responses from the officers.

On 15 December 2020, the Law Enforcement Conduct Commission (**LECC**) tabled its final public report into the way in which the NSWPF conducts strip searches. We wrote to the Secretary to advise that we would be considering the LECC report in the course of finalising our investigation.

On 20 January 2021 we received a detailed submission from DCJ. It responded to our provisional conclusions, findings and recommendations. DCJ's responses were carefully considered when preparing the final investigation report, as well as this report.

The central argument of DCJ's response was that, while strip searching young people in YJNSW centres should be avoided wherever possible, there will still be circumstances where the risk posed by an incident or the actions of a young person will mean that it is necessary for CSNSW officers to conduct a strip search.

For the searches that are the subject of this investigation, DCJ stated:

... the risk the detainees had concealed contraband, that could then be used to injure themselves, staff or other detainees was apparent, provided CSNSW officers with a reasonable suspicion of concealment and a legitimate purpose for the search process.

More broadly, DCJ stated:

While it is accepted that the strip searching of children and young people is confronting and should be avoided wherever possible, it is an appropriate escalated response necessary to safeguard the youth system, including during this critical incident response the subject of the Ombudsman's review (emphasis added).

...

It is agreed that strip searching of young detainees should be avoided wherever possible. However, it is a necessary to acknowledge that strip searching is also an escalated safeguard, for use only in exceptional circumstances, to maintain safety, security, good order and discipline in a custodial environment (emphasis added).

DCJ did not provide any comment on how officers would determine when an 'escalated safeguard' would be necessary or identify 'exceptional circumstances' that would justify the use of an FNB strip search. DCJ also did not address how PCB strip searches, which still ultimately result in the removal of all items of clothing, would be inadequate to detect contraband.

Under s 25 of the Ombudsman Act, I was required to provide the Minister for Counter Terrorism and Corrections and the Minister for Families, Communities and Justice with an opportunity to consult on a draft of this report before it was made final. The ministers took up that opportunity and I met with them on 6 April 2021. After the meeting, the ministers wrote on 12 April 2021 restating the views they had expressed during the meeting. This is included at **Appendix A**.

On 30 April 2021, I issued my final report to DCJ, CSNSW and YJNSW, as well as to both ministers.

4.

The 3 searches

On the evening of 24 November 2019, 3 young people, 2 aged 17 and 1 aged 18, climbed onto the roof of a unit at the centre. They threw items at and made threats towards YJNSW staff.

In accordance with the MOU, YJNSW contacted the Commissioner and asked that the SOG attend the centre to take control, which they did. After a period of negotiation, the young people came down from the roof and were then handcuffed by CSNSW officers and submitted to a pat down search. No other force was used, and no contraband was found on the young people after the initial search.

Three teams of CSNSW officers took the detainees to be strip searched in observation cells in the Admissions area and Operations area. Each cell was fitted with CCTV cameras that recorded the searches. No contraband was found on the young people during the strip searches.

The following is a summary of one of the searches. The description is based on both body worn camera and CCTV footage. The searches of the other 2 young people generally followed substantially the same procedure. (A different element of one of the searches is addressed in **section 4.2** below.)

Jeremy⁹

When Jeremy was searched, one CSNSW officer (**CSO1**) stood in front of him giving him directions. A second CSNSW officer (**CSO2**) stood behind Jeremy, observing the search and searching each item of clothing as it was removed. The third CSNSW officer (**CSO3**) stood behind CSO2, wearing a body worn camera that recorded the search and also inspecting each item of clothing as it was removed.

CSO1 instructed Jeremy that he would be undergoing a strip search. CSO1 stated that he would be providing instructions which must be followed precisely and that Jeremy should not 'get ahead' of him. CSO1 stated that Jeremy should not lift up his hands unless instructed to by CSO1 and that if he did so, this may be taken as a sign of aggression and force might be used. Jeremy confirmed that he understood this.

CSO1 then told Jeremy that the handcuffs would be removed and to keep his hands by his side. He was asked if he understood this. Jeremy confirmed that he did. CSO2 then removed the handcuffs. The CSNSW officers did not touch Jeremy at any other point during the search.

Jeremy put his hands at his sides. CSO1 asked Jeremy whether he had anything he should not have and Jeremy confirmed that he did not.

Jeremy went to scratch his nose and CSO1 instructed him to keep his hands down and repeated his direction that he was not to lift up his hands. CSO1 asked again whether Jeremy understood this and he

9. The young person's name has been changed.

confirmed that he did. CSO1 asked for a second time whether Jeremy had anything he should not have and Jeremy confirmed that he did not.

CSO1 told Jeremy to open his mouth and then visually inspected Jeremy's mouth and gums, as well as his ears. Jeremy was then instructed to remove each item of clothing, show them to CSO1 and then pass them underhand to CSO2. CSO2 and then CSO3 inspected each garment.

Once Jeremy had removed all clothes other than his underwear, CSO1 instructed Jeremy to pull his underwear down to his ankles, bend over and turn his underwear inside out. As Jeremy did this CSO3 observed Jeremy's buttocks area. CSO2 gave a thumbs up signal to CSO1 to confirm that there was no contraband. CSO1 then inspected Jeremy's genital area. This involved requiring Jeremy to lift his penis with 2 fingers. CSO1 then inspected Jeremy's feet and toes.

CSO1 allowed Jeremy to pull up his underwear. Jeremy was instructed to kneel at the end of the cell, and to remain in this position until CSO1 told him to get up and that if he got up before he was told to, it may be taken as a sign of aggression. Jeremy's shirt and pants were left in the cell while his shoes were removed. The officers left the cell, and Jeremy got up and put on the rest of his clothes.

4.1. The strip searches were conducted with lawful authority

Section 26 of the CDC Act enables the Secretary and the Commissioner to enter into an MOU to respond to riots and disturbances at youth justice centres.¹⁰ Under an MOU, the Secretary may ask the Commissioner to assist with a riot or disturbance that has started, or that appears imminent, at a detention centre.

When the MOU is activated, the Commissioner:

- gains control and management of the detention centre
- has and may exercise the functions of the Secretary for the detention centre, and
- has the same functions and immunities for the control of detainees at the detention centre as he or she has for the control of inmates in a correctional centre.¹¹

Section 3 of the CDC Act provides that 'a reference to a function includes a reference to a power, authority and duty'. The CAS Act provides that 'function includes a power, authority or duty'.

10. CDC Act s 26.

11. CDC Act s 26(3)(a).

12. CDC Act s 3(2)(a).

13. CAS Act s 3.

CSNSW officers authorised by the Commissioner for the purposes of the CDC Act:

- have and may exercise the functions of a juvenile justice officer for the detention centre
- have the same functions and immunities for the control of detainees at the detention centre as they have for the control of inmates in a correctional centre.¹⁴

In practice this means that CSNSW officers are empowered to apply CSNSW policies, such as those that apply to strip searching adult inmates, to young people in youth justice centres.

At the time of the Frank Baxter disturbance in November 2019, an MOU of the kind permitted by s 26 of the CDC Act had just been entered into between the Secretary and the Commissioner.¹⁵ The November 2019 MOU, and an earlier MOU signed in July 2019, were the initial MOUs entered into under s 26.¹⁶

The MOU mirrors many of the provisions in s 26 of the CDC Act, including that:

... any correctional officer deployed by CSNSW to the Centre:

- a) has and may exercise the functions of a juvenile justice officer in relation to the Centre, and
- b) has the same functions and immunities in relation to the control of detainees at the detention centre as they have in relation to the control of inmates in a correctional centre.

4.1.1. The introduction of s 26

Section 26 was introduced into the CDC Act in 2006. It was one of a number of amendments that were introduced shortly after an incident at the Acmena Youth Justice Centre on 29 January 2006, in which the NSWPF had been called out to quell a disturbance.

When the amending Bill was introduced, the Parliamentary Secretary, the Hon Paul McLeay MP, delivering the second reading speech on behalf of the Attorney General, said:

This new strategy of utilising the resources and expertise of the Department of Corrective Services will free up police resources for their main law enforcement functions.

14. CDC Act s 26(3)(b).

15. *Memorandum of Understanding Between Secretary of Department of Communities and Justice, representing the Youth Justice division and the Commissioner for Corrective Services NSW relating to CSNSW Assistance in Dealing with Riots or Disturbances*, signed 26 July 2019. This MOU replaced an earlier MOU made on 22 July 2019 that dealt only with the Commissioner providing assistance in relation to the Centre.

16. Letter from Michael Coutts-Trotter, Secretary, DCJ to Nicole Lawless, A/Deputy Ombudsman, 10 December 2020.

The Department of Juvenile Justice is well equipped and has trained staff who are able to properly manage and control most incidents that may arise in juvenile detention centres. It is only on rare occasions that the Department of Juvenile Justice may require the assistance of the Department of Corrective Services to quell a disturbance. If Department of Corrective Services officers were called to a juvenile detention centre in the event of a disturbance, these officers would be able to use their skills to quickly and effectively restore good order and discipline, and ensure the safety of Department of Juvenile Justice staff, juvenile detainees and the local community in the same way that this service is provided to adult correctional centres.¹⁷

In relation to the use of force, the Parliamentary Secretary stated in his second reading speech:

A Department of Corrective Services officer may use force in accordance with clause 50 of the Children (Detention Centre) Regulation for the purposes of preventing or quelling a serious disturbance or imminent serious disturbance in a detention centre.¹⁸

Clause 50 of the CDC Regulation was the provision regulating the use of force on detainees by juvenile justice officers.

The specific reference to this clause seems to suggest that the intention, or at least the expectation, at that time was that CSNSW officers would (when operating in a youth justice centre) rely only on the use of force powers that normally apply in those facilities, with all of their associated restrictions and safeguards, rather than relying on whatever additional powers might apply in adult correctional facilities. The same considerations could be applied to other extraordinary and intrusive powers, such as conducting a strip search.

4.1.2. The Commissioner was given command and control of the centre in accordance with the CDC Act and the MOU

Before CSNSW officers are authorised to exercise functions at a youth justice centre, the Secretary or the Executive Director of YJNSW must request the assistance of the Commissioner in dealing with a riot or disturbance that has arisen, or that appears to be imminent, at a youth justice centre.¹⁹

17. New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 May 2006, the Hon Mr Paul McLeay MP, Children (Detention Centres) Amendment Bill 2006, Second Reading.

18. *Ibid.*

19. *Memorandum of Understanding Between Secretary of Department of Communities and Justice, representing the Youth Justice division and the Commissioner for Corrective Services NSW relating to CSNSW Assistance in Dealing with Riots or Disturbances*, signed 26 July 2019, cl 3 and 4. The MOU requires the request to be made in writing, although this is not a requirement of the CDC Act.

On 24 November 2019, after being told a disturbance was taking place at the centre:

- The Centre Manager contacted the Duty Director YJNSW, and the Duty Director went to the Centre.
- The Duty Director contacted the Executive Director YJNSW.
- The Executive Director then contacted the Commissioner to ask for assistance in dealing with the disturbance.

The Commissioner agreed to provide assistance and directed the SOG team to attend the centre.

4.1.3. The searches were guided by CSNSW policy and relevant statutory instruments

YJNSW staff had informed the CSNSW officers that the detainees had been seen with a shifting spanner and other tools. The CSNSW officers were aware that the roof the young people had been on during the late afternoon and evening was undergoing building works. It is not clear if YJNSW staff had told the CSNSW officers that the young people had been throwing scaffolding and building materials.

The threshold test set out in the CAS Regulation for when searches may be conducted is when a governor directs and at other times when the CSNSW officer considers it 'appropriate' to do so.²⁰ The CSNSW policy states that officers can conduct strip searches where it is 'deemed necessary'.

The evidence suggests that senior operational staff from both CSNSW and YJNSW formed a shared understanding that strip searches, in accordance with the operation of the MOU, would be performed by the CSNSW officers.

Based on the information provided by YJNSW staff, and despite having already completed pat down searches that did not identify any contraband, it was open in all the circumstances for the CSNSW officers to have formed a view that the young people could have had contraband on their person. The General Manager, SOG told us that searching the young people was 'necessary due to the risk to staff'.²¹ The forming of such a view appears to meet the requirements of the CAS Regulation to conduct a search.

20. CAS Regulation cl 46.

21. General Manager, SOG, Statement of Information (Written), 16 September 2020

4.2. The 3 young people were searched in an oppressive way

The action of a public authority may be oppressive where it has a disproportionate impact on the rights of an individual, even if it is pursuing a particular and legitimate aim. In considering whether the FNB strip searching of young people when the MOU was activated had a disproportionate impact on the rights of the young people, it is relevant to consider:

1. Was the search conducted for a legitimate purpose that justified limiting a right to dignity and privacy?
2. Could a less intrusive searching method reasonably have been used to achieve the same outcome?
3. Having regard to these matters and to the possible consequences of the search for the young people, was the right balance struck between maintaining the privacy and dignity of the young people and the reasons for conducting the search?

All searches encroach on an individual's fundamental rights to privacy, dignity and bodily integrity. A pat down search, for example, if conducted without lawful authority, can amount to the tort of battery or false imprisonment.²² Strip searches are at the further end of the searching spectrum as they are particularly invasive even though they make no physical contact.

The level of potential for trauma and adverse impacts on the person searched means that strip searches should only be conducted to achieve a sufficiently important purpose that cannot reasonably be achieved by other means. A PCB strip search provides sufficient opportunity for all items of clothing and all parts of the body to be examined to the same standard as an FNB strip search but with greater dignity for the person being searched.

4.2.1. There was a legitimate purpose for searching the young people

The evidence shows that the CSNSW officers were searching for tools and related building items. The General Manager, SOG, when describing the purpose of the search, stated:

... the detainees had gained access to the accommodation area which contained an unknown number of tools involved in the construction and repair of major damage²³

22. *Attalla v State of NSW* [2018] NSWDC 190; *Wainwright v Home Office* [2003] UKHL 53, [9] and [58].

23. Statement of Information (Written), General Manager, SOG, 16 September 2020.

The Senior Assistant Superintendent, in a memo recording the incident the following day, stated the young people had access to a building site and had been sighted with a screwdriver and a wrench.²⁴ Similarly, the Assistant Superintendent's memo noted that the young people had entered a construction site and 'were armed with a wrench and other tools from the construction site'.²⁵

Conducting a search of some kind served the legitimate purpose of identifying and removing any contraband and ensuring the safety of staff and young people in the centre.

4.2.2. Less intrusive search methods were available to CSNSW

The 3 searches of the young people followed the process outlined in CSNSW Policy. This included requiring the detainees to:

- remove all items of clothing one at a time and hand them to the CSNSW officers
- lift their scrotum and penis
- bend over, and in one case, part their buttocks for inspection with a flashlight.

Given the nature of any possible items that might reasonably have been suspected to be concealed by the detainees, the search need not have been as extensive or invasive as it was, and could have ended at an earlier stage, without compromising the safety of staff and detainees. There was no reason why, after each detainee's clothes had been removed and examined, the detainees then needed to have their genitalia or buttocks area inspected.

The Royal Commission into Institutional Responses to Child Sexual Abuse (**Child Abuse Royal Commission**) recommended that state and territory governments consider implementing strategies for detecting contraband, such as risk assessments or body scanners, to minimise the need to strip search children.²⁶ This may be considered to apply equally to young people.

In this case, there should, at a minimum, have been some consideration of alternatives to an FNB strip search, such as the use of a wand or PCB strip search, and some consideration of whether it was necessary to conduct all the elements of the FNB strip search, given the basis of the search was a belief the young people may have held onto construction materials once they came off the roof.²⁷

24. Memo from Senior Assistant Superintendent to General Manager, SOG, *Frank Baxter Juvenile Justice Centre*, 25 November 2019.

25. Memo from Assistant Superintendent to General Manager, SOG, *SOG Response to Frank Baxter Juvenile Justice Centre*, 25 November 2019.

26. Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse (Final Report, 2017), vol 15, pp. 15–16.

27. We note that CSNSW has begun to roll out the use of X-ray body scanners for adult correctional centres.

4.2.3. Additional unnecessary step in one search

CSNSW Policy provides for officers to include an additional step in a strip search, requiring a person to bend over, squat or part their buttocks. They may only do this if they reasonably suspect that the inmate has secreted contraband.

When searching one young person, CSNSW officers required him to bend over and part his buttocks, and then used a flashlight to inspect his buttocks area.²⁸

By that stage of the search the CSNSW officers had already completed a pat down search, a search of all items of clothing, and were close to completing a visual inspection of the young person's fully exposed body. There is nothing in the evidence produced to us as part of the investigation to suggest the CSNSW officers could have held any reasonable suspicion that he had something secreted within his buttocks.

For this aspect of the search, DCJ submitted:

Under CSNSW operational policy, an officer may only instruct a detainee to bend over, squat or part their buttocks as part of a search, if there is a reasonable suspicion that the detainee has something secreted in that part of their body.

[Young person] had stated he would kill any worker, he wanted to go to prison and would assault anyone to get there. He also stated he had a screwdriver and would stab anyone who came near him. In the circumstances, a reasonable suspicion was found to extend this part of the search process to this detainee.

There is no contemporaneous record to show that any of the officers formed such a reasonable suspicion. The audio recording of the incident does not show there was any consideration of the young person's conduct before the decision was made to require him to bend over and spread his buttocks. Instead, the officers undertook the additional step as part of the search without any discussion.

The CSNSW policy states that when this aspect of a search is conducted, a report must be submitted to the governor detailing why this type of search was conducted and the results of the search.²⁹ No report relating to the search has been produced.

28. Body Worn Camera Footage, AXON Body 2 X81425614, 24 November 2019 and CCTV footage, Admissions Cell 4, 24 November 2019.

29. CSNSW, Custodial Operations Policy and Procedures – 17.1 Searching inmates, 16 December 2017, p. 14.

4.2.4. The right balance was not struck between the privacy and dignity of the young people and the purpose of the search

When searches are conducted, there should be an appropriate balance struck between protecting the privacy and dignity of the young people and the purpose of the search. On this occasion, this did not occur.

In particular:

- There was no consideration given to the potentially traumatic impact the searches may have on the young people.
- There were less intrusive methods of search available – including a wand search, a PCB strip search or only those stages in the FNB strip search process that were reasonably necessary.
- There was not enough evidence to justify searching particular parts of the young peoples' bodies.

Using a different searching method would have been less confronting for the young people while still ensuring safety and good order.

The reason for the search should be appropriately considered and decisions linked to evidence of the risk faced by staff and the young person. As noted by the Royal Commission into the Protection and Detention of Children in the Northern Territory (**NT Royal Commission**):

A policy or practice that applies the most intrusive search as a matter of course where there are other less intrusive options available for searching a detainee cannot be reasonable.³⁰

DCJ submitted that the FNB strip searches of the 3 young people were not oppressive. It argued that oppression was not made out as:

- There was a legitimate purpose for conducting the search, namely the risk posed by the young people concealing contraband.
- The risk was due to the young people having access to building materials and tools and also by the threats made to staff.
- While the strip searches can be 'confronting and should be avoided wherever possible' they are 'an appropriate escalated response necessary to safeguard the youth justice system'.
- The searches were lawful and in accordance with CSNSW policy.

DCJ did not explain how the items being searched for could be secreted on the bodies of the young people and only detectible as a result of an FNB strip search. Nor did DCJ address whether the same contraband could have been detected by less intrusive searches, such as a PCB strip search that could have still required the removal of all items of clothing (just not all at once) and the visual inspection of the genitals of the young people.

30. Northern Territory, Royal Commission into the Protection and Detention of Children in the Northern Territory (Final Report), 17 November 2017, p. 257.

4.3. It was wrong to strip search the detainees in view of CCTV cameras

CSNSW officers are directed to conduct strip searches ‘away from public view’³¹. This includes not conducting strip searches in places that can be seen by children visiting a correctional centre, other inmates or staff. This suggests strip searches should be conducted in areas that provide a reasonable degree of privacy. The policy allows strip searches to be recorded with either a handheld video camera or body worn camera in certain circumstances.

The procedures in the policy include this example of words that an officer conducting a search could use when conducting a strip search:

‘Due to your conduct today...a strip search will be occurring, and a video camera will be used to record the search. This will be focused on the back of your head and shoulders unless contraband is located or an incident occurs.’³²

Making a video recording ensures there is a record of the search, while also providing as much privacy as possible to the inmate being searched.

The policy is silent on whether searches can be conducted in view of recording CCTV cameras. However, the policy provisions outlined above about privacy and the appropriate use of a video camera – including where it should be focused during a search – would be redundant if searches were intended to be conducted in view of operational CCTV.

4.3.1. There were search rooms available that would have ensured the privacy of the detainees

YJNSW policy requires that each centre has a search room or area out of view of other employees and young people, and free of excess furniture and non-fixed items. If the room is used regularly for partially clothed body searches, it must not have CCTV installed. If a search is conducted in a room other than a search room, YJNSW policy provides that:

If the room is normally under camera surveillance, the employee conducting the search must ensure that the cameras are turned off during the search.

The centre has designated search rooms, without CCTV cameras. Unlike the designated search rooms, cells (or holding rooms) in the Admissions and Operations areas have CCTV cameras.

31. CSNSW, Custodial Operations Policy and Procedures – 17.1 Searching inmates, 16 December 2017.

32. Ibid, pp 12, 18.

YJNSW staff told one CSNSW officer that designated search rooms were available. He does not appear to have told the other officers about the search rooms and left it to them to decide where the searches would take place. They chose to conduct the searches in the cells with CCTV cameras.

One group of CSNSW officers walked past the searching room when taking one young person to a cell. A YJNSW staff member walking with them asked if they wanted to use the room, but the CSNSW officers said that they would conduct the search in the cell.

The CSNSW officers had access to, and used, body worn cameras. These provide an adequate, less intrusive record than CCTV, as they generally capture sound and video of the back of the torso of the person being searched. This record would likely have shown if the officers involved acted appropriately when conducting the search. In contrast, the CCTV footage in the cells captured a fullfrontal image of each of the young people without any sound. This was a far more significant intrusion on the detainee's dignity and provided a limited accountability or safety mechanism for the searching officers as no sound was recorded.

Guidance on the use of search rooms should be incorporated into consolidated policy, procedure and training developed to guide the work of CSNSW officers operating under the MOU.

DCJ has suggested that:

Due to the serious nature of this incident response, it was critical for the detainees to be secured in cells immediately and searched to maintain the safety and security of staff and to minimise movement of the detainees. The search was conducted in compliance with the requirements of the COPP [Custodial Operations Policy and Procedures], in an area away from public view.

YJNSW has acknowledged the privacy of the young detainees could have been better maintained and that a more appropriate location for the searches could have been identified, away from CCTV cameras.

DCJ's submission did not address the evidence that showed YJNSW staff offering the CSNSW officers the use of the searching rooms. YJNSW did not have control and management of the centre at the time the decision was made to search the young people – CSNSW did. The responsibility to maintain the privacy and dignity of the young people therefore remained with CSNSW. DCJ's response also failed to recognise that by the time the young people were being moved to the cells, they were under control, compliant and did not appear to present an immediate threat.

5.

Policy considerations

5.1. Young people should not be subject to FNB strip searches

This case raises an important question of public policy – should FNB strip searching of young people be permissible in any circumstances?

In 2018, after the Child Abuse Royal Commission made a series of recommendations about best practice processes for strip searches and other authorised physical contact between staff and children in detention, the CDC Regulation was amended to provide for 3 permissible types of searches of young people. These are:

- **Metal detecting wands** – running a metal detecting hand wand over the detainee’s outer garments.³³
- **Pat down searches** – running the hands over the outer garments of the detainee and examining anything worn or carried by the detainee that is conveniently removed by the detainee.³⁴
- **PCB strip searches** – requiring a detainee to remove only the clothing from the top or bottom half of the detainee’s body at any one time. After the removal of those clothes, the officer visually examines that half of the detainee’s body from which the clothing has been removed and inspects the removed clothing. The detainee then puts the removed clothing back on and the process is repeated for the other half of the detainee’s body. The inside of the detainee’s mouth is also examined.³⁵

In contrast to the search powers of YJNSW staff, CSNSW officers can lawfully conduct the following kinds of searches on adult inmates:

- **Pat down searches**³⁶
- **FNB strip searches** – a search that may include the removal of all the person’s clothes at the same time, leaving them entirely naked, and an examination of the person’s body (but not body cavities)³⁷ and clothes.
- **Low-dose X-ray body scans** – using a low dose X-ray body scanner to scan the body.³⁸

33. CDC Regulation cl 11A(1).

34. CDC Regulation cl 11A(3).

35. CDC Regulation cl 11A and YJNSW, Searching Young People Policy, February 2019, p. 6.

36. CAS Regulation cl 46 and CSNSW, Custodial Operations Policy and Procedures – 17.1 Searching inmates, 16 December 2017, pp. 8–11.

37. CAS Regulation cl 46 and CSNSW, Custodial Operations Policy and Procedures – 17.1 Searching inmates, 16 December 2017, pp. 11–18. Body cavity searches may be conducted by Justice Health at the request of CSNSW. CSNSW require a suspicion that the inmate has internally secreted contraband – see CSNSW, COPP, 17.4 – Internal secretion of contraband, 16 December 2017.

38. CAS Regulation cl 46 and CSNSW, Custodial Operations Policy and Procedures – 17.1 Searching inmates, 16 December 2017, pp. 19–21.

A CSNSW officer may conduct a search (including by means of a strip search or the use of an electronic or X-ray scanning device) at the governor's direction or at any other time the CSNSW officer considers appropriate.³⁹

5.1.1. The traumatic impact of strip searches on young people

Being strip searched can be a confronting experience for anyone. In the recent case of *Minogue v Thompson*, Richards J noted that strip searches in a maximum security facility were 'inherently demeaning, despite being a routine part of prison life'.⁴⁰ This impact may be greater for young people, including those in youth justice centres. A number of independent oversight agencies have expressed significant concern about the impact of strip searches on young people:

Strip searching is an invasive and humiliating procedure for anyone, but especially so for vulnerable adolescents. It may invoke hostile or violent reactions or emotional trauma⁴¹

A strip search is inherently intrusive and humiliating. This is particularly the case for a young person in the early stages of puberty who is required to undress in front of an adult stranger. The experience is likely to be especially traumatising for the many young people in detention who have been victims of sexual abuse.⁴²

Many [of the young people] who experienced a strip search ... described their experience as humiliating and degrading.⁴³

The experience of being strip searched can be humiliating and distressing and has the potential to re-traumatise children and young people who have been sexually abused. Children and young people subjected to these searches may suffer trauma, anxiety, fear, shame, guilt, powerlessness and stress.⁴⁴

The negative subjective experience of strip searches may be damaging to the young person's perceptions of law enforcement and authority more generally, diminishing trust, and discouraging cooperation even in the long term.⁴⁵

The traumatic impact of a strip search can be exacerbated by a young person's history and experience. The latest data from the Young People in Custody Health Survey shows that approximately 47.8% of young people in custody have experienced some traumatic event in

39. CAS Regulation cl 46.

40. *Minogue v Thompson* [2021] VSC 56 at [139].

41. NSW Inspector of Custodial Services, *Making Connection Providing family and community support to young people in Custody* (Report, 15 June 2015), p. 25.

42. WA Inspector of Custodial Services, *Report of an announced inspection of Banksia Hill Juvenile Detention Centre* (Report, April 2015), p. 50.

43. LECC, *Report on the monitoring of NSW Police Force misconduct matter investigation – Strike Force Blackford* (Report, July 2020), p. 16.

44. LECC, *Inquiry into NSW Police Force strip search practices* (December 2020), p. 103.

45. *Ibid* pp. 104–105.

their life, with 68.2% reporting at least one form of childhood abuse or neglect, and over a quarter having experienced some form of severe abuse or neglect.⁴⁶ Such trauma may also influence the young person's future actions and their view of those in positions of authority.⁴⁷

The evidence suggests that CSNSW was aware, before conducting FNB strip searches of the 3 young people, that doing so was not consistent with the way in which young people in detention are searched. Immediately before the FNB strip search, a CSNSW officer addressed the young people and stated:

Listen in, what's going to happen is Corrective Services is going to strip search you. You will not have been searched like this before ...

However, there was no risk assessment conducted, no consideration given to the history of the young people, nor any consideration given to the potentially detrimental impact of the FNB strip searches on them.

5.1.2. Strip searches are not generally an effective method of detection

The purpose of a strip search is to detect contraband and unauthorised property.⁴⁸ There have been questions raised in recent years around whether it is an effective method of detection. When reviewing the adult correctional system, the Western Australian Inspector of Custodial Services noted that:

From 2014 almost 900,000 strip searches of prisoners were conducted. Only 571 items of contraband have been located. Most items found were not drugs or weapons related ...⁴⁹

This was a rate of less than one item for every 1,500 strip searches.

Similarly, the NT Royal Commission found that only 29 items of contraband were discovered in 4,898 strip searches conducted on young people between January 2007 and June 2015 at the Don Dale Youth Detention Centre. This is approximately one item in every 169 searches⁵⁰ At the Alice Springs Youth Detention Centre, between November 2008 and August 2016 only 12 of 1,478 strip searches resulted in contraband being found.⁵¹

46. YJNSW, 2015 Young People in Custody Health Survey, p. xxii, <https://www.justicehealth.nsw.gov.au/publications/2015YPICHSReportwebreadyversion.PDF>.

47. WA Inspector of Custodial Services, *Strip searching practices in Western Australian prisons* (Report, March 2019), p. 2.

48. CSNSW, Custodial Operations Policy and Procedures – 17.1 Searching inmates, 16 December 2017, p. 5; YJNSW, Searching Young People Policy, February 2019, pp. 7–8.

49. WA Inspector of Custodial Services, *Strip searching practices in Western Australian prisons* (Report, March 2019), p. 7.

50. Northern Territory, Royal Commission into the Protection and Detention of Children in the Northern Territory (Final Report, 17 November 2017), p. 255.

51. *Ibid.*

Several oversight bodies have made recommendations aimed at ensuring alternate searching methods are used for young people when appropriate, including pat down searches in conjunction with metal wands or body scanners.⁵²

There will be circumstances where it is necessary to require young people to remove articles of clothing as part of a search to ensure the safety and security of both young people and staff. Such a search should always be the last option chosen and should only be used in circumstances where it is the only practicable method of identifying contraband and maintains the dignity of the young person.

DCJ has maintained that strip searches are an effective and necessary tool for ensuring the safety and security of custodial environments. While acknowledging that FNB strip searching could be confronting and should be avoided wherever possible, DCJ submitted that:

- it has a duty of care to staff and young people which requires it to make sure that the custodial environment is safe.
- FNB strip searches are effective at locating items that pose a risk to safety, security, good order and discipline.
- This is particularly the case in responding to critical incidents where there are threats of violence to staff or self-harm to young people or where the security of the centre is at risk.
- The law and operational policy allow for CSNSW to conduct FNB strip searches in such circumstances.

CSNSW and YJNSW certainly have a clear duty of care for staff, adults and young people in detention.⁵³ This duty is particularly important given the degree of control that YJNSW staff and occasionally CSNSW officers have over the lives of young people in detention. In *PWJ1 v State of NSW* the court stated:

It is not axiomatic that a duty with precisely the same content [as adults] will apply to young offenders. On the contrary, it may be that the content of that duty is somewhat stricter. Put differently, the duty owed to juvenile offenders would likely require greater diligence on the part of the authority which is charged with the care and management of juveniles in the juvenile justice system⁵⁴

52. Ibid p. 266 and WA Inspector of Custodial Services, *Strip searching practices in Western Australian prisons* (Report, March 2019), p. 29.

53. *New South Wales v Budjoso* (2005) 227 CLR 1; *Watt v State of NSW* [2018] NSWSC 1926 at [178]–[180].

54. *PWJ1 v State of NSW* [2020] NSWSC 1235.

There is also a specific duty of care for the young people in their care to make sure that they do not suffer unnecessary trauma. This is an important part of making sure that YJNSW is a Child Safe Organisation in accordance with the Child Safe Standards.⁵⁵ The 10 standards were recommended by the Child Abuse Royal Commission in 2018.⁵⁶

The decision to use any invasive searching method, whether it is an FNB strip search or PCB strip search, should be the last of several options, which should be trauma informed and conducted in a manner that is least likely to negatively impact the young people in their care.

DCJ submitted that FNB strip searching is effective. While there is no question an FNB strip search *may* detect contraband, the evidence from the various inquiries outlined above cast doubt on their overall efficacy. Importantly, simply stating that the method is effective does not address the fact that other searching methods, such as a PCB strip search or a pat down search, may be equally effective in detecting the same contraband, thereby rendering an FNB strip search unnecessary.

5.2. The importance of legislative safeguards

In our view, legislation should provide a complete statutory foundation for all searches of young people, including those conducted under the MOU.

5.2.1. How CSNSW strip search adult inmates

CSNSW officers do not have to hold a reasonable belief or suspicion before deciding to conduct a strip search. The only statutory requirement is that they consider it ‘appropriate’ to conduct the search.⁵⁷ However, they are still exercising discretion in line with the objects of the CAS Act and like all statutory discretionary powers, the power to conduct a strip search must be exercised reasonably.⁵⁸

The Custodial Operations Policy and Procedures (COPP) 17.1 provides that strip searches are routinely conducted:

- when adult inmates arrive from outside the correctional centre (from court, another correctional centre, or in circumstances where they have contact with the public)
- after contact visits.⁵⁹

55. Office of the Children’s Guardian, *A guide to Child Safe Standards*, 2020, <https://www.kidsguardian.nsw.gov.au/ArticleDocuments/838/ChildSafeStandardsGuide.pdf.aspx?Embed=Y>.

56. Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse (Final Report, 2017), vol 6.

57. CAS Regulation cl 46.

58. *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 350, 363 and 370; *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 564–5.

59. CSNSW, COPP – 17.1 Searching inmates, 16 December 2017, p. 11.

COPP 17.1 also provides that CSNSW officers can conduct strip searches on adult inmates where it is 'deemed necessary'.⁶⁰ COPP 17.1 states that a search may be necessary when an inmate is:

- confined to their cell
- placed in an assessment cell
- suspected of carrying contraband.⁶¹

Inmates involved in a riot or disturbance at an adult correctional centre are likely to be searched after CSNSW has regained control, as they may be either suspected of carrying contraband or then confined to their cells.

COPP 17.1 provides detailed guidance on how CSNSW officers are to conduct strip searches.⁶² A strip search must be conducted by at least 2 officers (unless there are exceptional circumstances).

One officer must stand in front of, and the other officer behind, the inmate. The officer in front of the inmate must provide instructions to the inmate about how the search will be conducted and warn them that failure to comply may lead to the use of force. Officers must then visually inspect the inmate's:

- mouth, ears, nostrils and hair
- clothes – the inmate removes one item at a time and gives it to the officer behind them to search
- hands and underarms
- buttocks and pubic regions – the inmate is asked to lift their penis and then their scrotum (if male), and abdomen or skin folds (if applicable); the inmate can be asked to bend over, squat or part their buttocks if the searching officers *reasonably suspect* that the inmate has secreted contraband
- soles of their feet.⁶³

Officers then instruct the inmate to get dressed, and any contraband that has been located is seized. COPP 17.1 requires officers to complete all steps. Unlike a police strip search, for which under LEPR there must be no removal of clothing or visual inspection greater than what is reasonably necessary for the search, CSNSW officers must, if they decide to conduct a strip search, carry out a full strip search after all steps of the process described in the policy. The exact sequence of the procedure can be varied depending on the circumstances.⁶⁴

60. Ibid.

61. Ibid.

62. For specialist teams, the COPP is supplemented by the Local Operating Procedure (LOP). The Security Operations Group LOP, however, provides only limited further guidance on the method for searching inmates and largely repeats the policy in the COPP.

63. CSNSW, Custodial Operations Policy and Procedures – 17.1 Searching inmates, 16 December 2017, pp. 12–16.

64. Ibid p. 12.

Additional considerations apply where CSNSW officers are strip searching female, transgender and intersex inmates.⁶⁵

The policy also allows for CSNSW officers, in exceptional circumstances, to use force to cut an inmate's clothing off if they refuse to comply with a search.⁶⁶

COPP 17.1 does not require CSNSW officers to consider which elements of a search are necessary or reasonable. As a result, it is our understanding that strip searches are carried out largely the same way each time an inmate is searched.

The footage of the 3 searches that are the subject of this investigation shows that those searches were conducted in a manner consistent with the COPP 17.1 procedure.

5.2.2. How YJNSW conduct PCB strip searches of young people

The CDC Regulation provides the starting point for YJNSW PCB strip searches. It states that a 'partially clothed search' means any of the following:

- requiring the detainee to remove clothes from the top or bottom half of their body so the clothes can be examined, and then repeating the process for the other half of their body
- visually examining the detainee's body
- requiring the detainee to open their mouth so it can be visually examined
- examining the detainee's removed clothes.⁶⁷

It also states that YJNSW staff conducting a partially clothed search may not:

- require a detainee to remove all their clothes at once
- search the detainee's body cavities, other than their mouth
- examine the detainee's body by touch.⁶⁸

A partially clothed search must be conducted with due regard to the dignity, self-respect and wellbeing of the detainee and as quickly as reasonably practicable.⁶⁹

65. Ibid p. 15.

66. Ibid p. 17.

67. CDC Regulation cl 11A(4).

68. CDC Regulation cl 11A(5).

69. CDC Regulation cl 11A(6).

Except in an emergency, partially clothed searches must be conducted:

- by a person of the same sex as the detainee
- in the presence of another person who can observe the person conducting the search only and not the detainee.⁷⁰

A PCB strip search must not be conducted as part of the general routine of a centre, except when a detainee is being admitted to a centre or returning after day leave or overnight leave.⁷¹

The YJNSW policy states that staff are not permitted to direct the young person to raise their legs – except to check the soles of their feet – squat, part their buttocks or handle their genitalia.⁷²

The policy requires that, before a search, the reasons for the search and the type of search to be used need to be clearly explained to the young person. PCB strip searches must be performed in a private room, out of sight of all other people.

5.2.3. How searches may be conducted when the MOU is in force

While youth justice legislation and policy provides that young people cannot be FNB strip searched, under the MOU, CSNSW officers can exercise both the powers of a CSNSW officer (that ordinarily only apply to adult correctional facility inmates) and of a YJNSW officer with respect to a young person. The MOU does not provide any guidance about how those powers should be exercised or when one set of powers should be preferred over the other.

When the MOU was established, no amendments were made to relevant YJNSW policy and procedures or to COPP 17.1 to outline whether a young person could be strip searched by CSNSW officers and, if they were, how the search would be conducted. Nor were any of the safeguards that applied to searches by NSWPF officers adopted.

The lack of legislative and policy controls has resulted in young people in this case being searched in the same manner as adult inmates while the centre was under the control of CSNSW and with significantly fewer protections than when young people had been searched by the NSWPF in the centre just a few months earlier.

70. CDC Regulation cl 11A(8).

71. CDC Regulation cl 11A(9).

72. YJNSW, Search Young People Policy, February 2019, p. 6.

CSNSW officers and YJNSW staff need coherent, uniform and consistent guidance on conducting searches when the MOU is activated. Such guidance should provide clarity to both CSNSW officers and YJNSW staff on:

- the relevant considerations when contemplating a PCB strip search
- how a search should be conducted
- who is responsible for conducting the search.

The CDC Regulation and YJNSW policy and procedure already contain between them many of the essential safeguards. To provide greater certainty, all the safeguards should be expressly stated in either the CDC Act or CDC Regulation.

Other jurisdictions have taken this approach. For example, legislation in the Australian Capital Territory specifies that searches of young people are to be conducted in the least intrusive manner appropriate in the circumstances.⁷³ Similar provisions are being considered in Tasmania.⁷⁴ Further, in Queensland and the ACT, officers must inform the detainee of the reason why the removal of a particular piece of clothing is necessary.⁷⁵

DCJ submitted that the existing safeguards in both the CDC Regulation and YJNSW policy and procedure are sufficient guidance for PCB strip searches. DCJ argued that any legislative or regulatory changes would have a 'prohibitive effect and compromise the security, safety and good order'.

DCJ did not explain how it would be detrimental or 'prohibitive' to express in legislation the requirements that are currently specified in policy and procedure. Doing so would remove doubt around when, why and how a PCB strip search can and will be conducted. It would also be a logical evolution after the addition of safeguards into the CDC Regulation in 2018. DCJ did not elaborate on how legislative clarity would compromise the security, safety and good order of a youth justice centre. Other jurisdictions have introduced clear legislative provisions, and there is no evidence to suggest that these have undermined the safety of centres.

DCJ also does not support prohibiting CSNSW from conducting FNB strip searches of young people when the MOU is in force and permitting them only to conduct PCB strip searches under the same rules as apply to YJNSW staff.

The recently updated MOU still provides for CSNSW officers to conduct FNB strip searches.

73. *Children and Young People Act 2008* (ACT) s 248(a) and (b).

74. Proposed amendments in Youth Justice Amendment (Searches in Custody) Bill 2020 (Tas) cl 4.

75. *Youth Justice Regulation 2016* (Qld) cl 25(3)(a) and 26(2)(b) and *Children and Young People Act 2008* (ACT) ss 259(2)(a)–(b) and 265(1)(a) and (b).

5.3. Searches should only be conducted when necessary and with appropriate safeguards in place

Both FNB strip searches and PCB strip searches have the potential to cause trauma and should only be conducted when clearly necessary. The United Nations Standard Minimum Rules for the Treatment of Prisoners (**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 appropriate alternatives to intrusive searches. Intrusive searches shall be conducted in private and by trained staff of the same sex as the prisoner.

The Mandela Rules are intended for adult inmates. For young people, the Mandela Rules state:

1. The rules do not seek to regulate the management of institutions set aside for young persons such as juvenile detention facilities or correctional schools, but in general part I [which includes the rule quoted above] would be equally applicable in such institutions.
2. The category of young prisoners should include at least all young persons who come within the jurisdiction of juvenile courts. As a rule, such young persons should not be sentenced to imprisonment.⁷⁷

The above rule is reinforced by the Australasian Juvenile Justice Standards, which require that:

The least intrusive developmentally appropriate options are deployed in responding to security and safety risk posed by children and young people in custody.⁷⁸

The NT Royal Commission recommended that personal searches of young people should only be conducted where there is a reasonable belief that the search is necessary to prevent a risk of harm to detainees or staff at the centre.⁷⁹ A personal search of a juvenile detainee in the Northern Territory is the equivalent of a PCB strip search.⁸⁰

76. United Nations, Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), December 2015, r 52.

77. United Nations, Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), December 2015, Preliminary Observation 4.

78. Australasian Juvenile Justice Administrators, *Juvenile Justice Standards 2009* r 9.3, p. 10.

79. Northern Territory, Royal Commission into the Protection and Detention of Children in the Northern Territory (Final Report, 17 November 2017), p. 266.

80. *Youth Justice Regulations 2006* (NT) cl 73(4).

In the ACT, only 1% of new admissions to the Bimberi Youth Justice Centre were strip searched.⁸¹ A 'strip search' in the ACT is the equivalent of a PCB strip search in NSW⁸² This is in stark contrast to NSW, where all new admissions to youth justice centres are subject to a routine PCB strip search.

The Child Abuse Royal Commission, after considering evidence of the traumatic impact of searches and hearing the accounts of former detainees, recommended changes to the practice of strip searching in youth detention facilities.⁸³ These included ensuring that there were adequate safeguards to protect children, such as:

- adequate communication between staff and children before and during the search
- clear protocols around how searches are to be performed
- staff training about the potential to re-traumatise young people.

The NSW Government accepted the recommendations of the Child Abuse Royal Commission, and many are now reflected in the CDC Regulation and YJNSW policy and procedure, which:

- only allow PCB strip searches
- restrict routine PCB strip searches to new admissions and returns from day/overnight leave that is not supervised by YJNSW staff
- permit PCB strip searches only after a risk assessment has been completed and with the approval of the Unit Manager or Centre Manager.⁸⁵

YJNSW policy recognises that traumatic events:

... can have an impact on physical, emotional, cognitive and social development and as a result young people may have limited capacity to regulate their emotions, and may perceive certain situations as threats, triggering feelings of anger, shame and fear.

For these reasons subjecting young people to unnecessary searching, especially partially clothed body searches, can be demeaning and humiliating. For young people who have experienced physical and sexual abuse, a partially clothed body search can be highly traumatising or threatening.⁸⁶

81. Bimberi Headline Indicators (Report, September 2019), p.3, http://www.parliament.act.gov.au/_data/assets/pdf_file/0010/1427428/Bimberi-Youth-Justice-Centre-Bimberi-Headline-Indicators-Report-September-2019.pdf.

82. *Children and Young People Act 2008* (ACT) ss 254, 258, 259 and 589.

83. Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse (Final Report, 2017), vol 15, pp. 15–16.

84. NSW Government, NSW Government response to the Royal Commission into Institutional Responses to Child Sexual Abuse (June 2018), pp. 35–36.

85. YJNSW, Searching Young People Policy, February 2019.

86. *Ibid* p. 5.

The policy goes on to state that YJNSW staff conducting searches must:

... where possible take the time to ensure that they are familiar with the young person's history, so that they are well aware of the trauma considerations/risks/responses involved in such a search.

...

understand that a refusal to be searched may be a trauma related response and not defiance.⁸⁷

The MOU between CSNSW and YJNSW made significant changes to the way riots and disturbances at youth justice centres were handled. This did not appear to include considering whether powers that were intended to apply to the searching of adults should apply to children and young people and, if so, the policy rationale for deviating from YJNSW policy and procedure.

After the November 2019 disturbance, a senior officer within the SOG sent an email to CSNSW senior staff:

SOG staff under no circumstances will be involved in the strip searching of youth detainees.

This is due to a combination of a complaint that was received around the Frank Baxter response and *the inconsistencies which currently exist around the management of these offenders during the MOU by CSNSW staff* (emphasis added).

Both management teams have therefore decided that once the detainees are restrained by SOG staff and escorted to a pre identified location, detainees under all circumstances will be received by Youth Justice staff for the purpose of containment and searching if required.⁸⁸

In order to ensure there are clear safeguards in place, we recommend that, at a minimum, the MOU, CSNSW policy and the SOG's procedures are amended to clearly state:

- the roles and responsibilities of CSNSW officers and YJNSW staff when the MOU is activated
- that CSNSW officers must not FNB strip search young people
- that CSNSW officers may only conduct searches in line with the CDC Regulation and YJNSW policy and procedure.

DCJ has advised that:

Notwithstanding that the MOU (and associated operational protocols of CSNSW and YJNSW) were complied with as intended, this critical incident has provided the opportunity for review. The MOU was developed with good intent, absent practical application at that time. This incident presents an opportunity for ongoing continual improvement and to improve and strengthen existing practices in this area.⁸⁹

87. Ibid.

88. Email from General Manager, SOG, to CSNSW senior staff, 16 December 2019.

89. Letter from Michael Coutts-Trotter, Secretary, DCJ to Nicole Lawless, A/Deputy Ombudsman, 20 January 2021 – enclosing Appendix 1 Factual review, p. 25

A review of the MOU has now been completed and a new MOU was signed on 8 March 2021. The relevant segment now states:

10. In accordance with the EPM [the Emergency Procedure Manual for the youth justice centre]:
 - a) when correctional officers remove a detainee involved in the riot or disturbance from the incident area, they must hand over the Young Person to Youth Justice officers.
 - b) Youth Justice officers must establish a surrender area and carry out partially clothed body searches of the detainees within that area, in accordance with the Act and Youth Justice policies and procedures. For avoidance of doubt, correctional officers must not carry out searches of detainees, unless under the circumstances specified in clauses 11 and 12.
 - c) Youth Justice officers (and not correctional officers) process each Young Person involved in the riot or disturbance.
 - d) Correctional officers may assist in conducting searches of the incident area, for the purpose of preserving the scene and collection of evidence.
11. CSNSW correctional officers may only conduct a partially clothed search of a detainee involved in the riot or disturbance if there are reasonable grounds to do so due to the following:
 - a) there are no Youth Justice Staff available to carry out the search; and/or
 - b) where the risk posed by the detainee requires the correctional officers to carry out the search.
12. CSNSW correctional officers must not conduct a full strip search of the detainees involved in a riot or disturbance, unless the risk posed by the detainee requires the CSNSW correction officers to do so.

This is a positive development, but we believe there is still more change required. The MOU provides no guidance on what circumstances would constitute such a risk that an FNB strip search would be required, nor is there any criteria guiding how this decision will be made or who should make it. There is no requirement to record the reasons why CSNSW chose to conduct a strip search, or why they chose to conduct an FNB rather than a PCB search. There is a requirement in the new MOU for CSNSW officers to have reasonable grounds to conduct a PCB strip search, but there is no such requirement for an FNB strip search. We also note that on the same day, 8 March 2021, the Joint Protocol for the transport of National Security Interest detainees was entered into by CSNSW and YJNSW (pursuant to s 26A of the CDC Act). The Protocol provides a framework within which searches of NSI detainees can take place in the course of transporting them. Like the new MOU, the Protocol states that 'CSNSW correctional officers must not conduct a full strip search of the detainee unless the risk posed by the detainee requires the CSNSW correctional officers to do so, in accordance [with] CSNSW Policy and Procedures.' The recommendations relating to strip searching young people in a youth justice centre are relevant to, and should also be considered in, the context of transporting NSW detainees.

6.

Training and recording

6.1. Relevant CSNSW officers should be trained to search young people

CSNSW officers training at the Brush Farm Corrective Services Academy are taught to conduct pat down and strip searches. Apart from this initial training, CSNSW officers learn how to conduct searches while performing their duties.

There are separate training programs available to members of the SOG on how to use body worn cameras. This program does not cover the method of searching but rather how to use the body worn camera and the circumstances in which it should be used.

There is no training available to CSNSW officers that deals with appropriate searching methods for young people. There is also no training available for any specific trauma-informed considerations when contemplating and conducting searches on young people. This means that CSNSW officers, including those in specialist units such as SOG, are only familiar with searching adult inmates.

YJNSW staff must complete an Induction Training and Assessment Program when they start in their roles.⁹⁰ This includes teaching them how to complete PCB strip searches on young people. They must also complete a practical assessment on PCB strip searches.⁹¹

DCJ has indicated that YJNSW staff are provided with refresher training when required. After this incident and recent revisions to the YJNSW operational protocol around detainee handover and surrender areas, training has been provided on the protocols, particularly around handing young people back to YJNSW staff to be searched. YJNSW has recently established a suite of training drills that are being deployed in centres. These include a module on searching. To date, 122 YJNSW staff have completed the training and it will be rolled out to more staff during 2021.⁹²

It is encouraging that this training has been rolled out to YJNSW staff. However, if CSNSW officers are going to be responsible for conducting strip searches under the MOU, they should be provided with the same training as YJNSW staff, as well as completing the practical assessment. This will make sure that all those who search young people are mindful of issues around prior life experience and vulnerability, and the importance of trauma-informed practice when working with young people. Both YJNSW staff and CSNSW officers should be provided with training about their respective roles and responsibilities when the amended MOU is activated.

90. Letter from Michael Coutts-Trotter, Secretary, DCJ to Paul Miller, A/Ombudsman, 14 August 2020, p. 7.

91. YJNSW, Overview ITAP entry Level Skills assessment – Conduct a Partially Clothed Body Search (undated); YJNSW Assessment Scorecard: IAA-024 – Conduct a Simulated Partially Clothed Body Search (undated).

92. Letter from Michael Coutts-Trotter, Secretary, DCJ to Nicole Lawless, A/Deputy Ombudsman, 20 January 2021 – enclosing Appendix 1 Factual review, p. 12.

DCJ has told us:

CSNSW policy is being reviewed to incorporate information from searching YJNSW detainees. This review includes references to the YJNSW EPM [Emergency Procedures Manual], policy and procedures. Once the MOU review has been completed ... and the draft protocol finalised [for s 26A of the CDC Act] ... a further review of operational policies and procedures will be undertaken to determine any other updates required and training needs.⁹³

Any review of policy, procedure and relevant training should consider the findings and recommendations made in this report. It is also important that any policy and training relating to operating in youth justice centres adheres to the Child Safe Standards.

6.2. Changing how strip searches are recorded

As part of this investigation, we asked YJNSW about the number of PCB strip searches conducted in all youth justice centres from 1 July 2017 to 30 June 2020. YJNSW told us this information is manually entered into and stored in physical logbooks at each centre.

This was not part of the core conduct that was the subject of this investigation, and as such there is not a related finding. However, this is an important accountability measure, and a number of the recommendations in this report are aimed at ensuring better centralised recording of information about PCB strip searches conducted in youth justice centres.

YJNSW policy requires each centre to maintain a search register. The register includes:

- date and time of search
- officer approving the search
- location of the search
- young person searched
- searching officers
- reason for the search
- any items found
- any action taken after the search.

YJNSW policy requires that these paper records of search are available to certain staff from DCJ, Official Visitors, the Inspector of Custodial Services and the Ombudsman on request.

93. Letter from Michael Coutts-Trotter, Secretary DCJ to Nicole Lawless, A/Deputy Ombudsman, 5 February 2021.

In providing answers to questions on notice after a recent Budget Estimates Committee hearing, YJNSW advised that it was ‘developing a comprehensive IT strategy to ensure digital services needs are met’.⁹⁴ This would include digitising paper-based custodial records including search registers. In response to questions on notice, YJNSW advised that this would require ‘significant investment in new mobile computing and software development. These items will be included in YJNSW’s IT Strategy.’⁹⁵ YJNSW did not provide the Committee with a timeframe for completing these changes.

The only publicly available data about the number of strip searches of young people in NSW are from an information access request from the Human Rights Law Centre. The statistics were provided in response to an application to access information under the *Government Information (Public Access) Act 2009*. They showed that 403 PCB strip searches were conducted at Frank Baxter and Cobham youth justice centres in one month. These centres have a combined capacity for 225 detainees, the total capacity across all centres in NSW being 400. The current number of young people in detention is currently far lower than capacity.

Not having an easily accessible source of data about searches of young people makes it very difficult to analyse why, how and when YJNSW staff are conducting PCB strip searches and other searches. This prevents YJNSW from being able to draw together important information such as:

- trends in the types of searches being conducted
- the frequency of contraband finds
- the types of contraband seized.

It also prevents effective external scrutiny and oversight. While the Ombudsman or the Inspector may review the search records for an individual centre when they visit, this process does not lend itself to identifying issues or trends.

The Inspector of Custodial Services has previously recommended that:

... Juvenile Justice works with the NSW Ombudsman to develop a system of notification of preplanned use of force of young people and strip searching of young people.⁹⁸

94. The Hon Gareth Ward MP, Minister for Families, Communities and Disability Services, Answers to questions on notice to Portfolio Committee No. 5 – Legal Affairs: Budget Estimates 2019–20, 13 April 2020, p. 26.

95. Ibid.

96. Victoria Pengilly, ‘Juvenile prison guards strip searches cause mental health problems, former inmates claim’, *Australia Broadcasting Corporation Online* (Online, 29 July 2019), <https://www.abc.net.au/news/2019-07-29/juvenile-inmates-say-constant-strip-searches-bad-mental-health/11354752>.

97. Figure is calculated from individual capacities that are listed on the YJNSW website. YJNSW, Youth Justice NSW Centres (Web Page), <http://www.juvenile.justice.nsw.gov.au/Pages/youth-justice/about/youth-justice-centres/youth-justice-centres.aspx>.

98. NSW Inspector of Custodial Services, *Use of force, separation, segregation and confinement in NSW juvenile justice centres* (Report, November 2018), p. 161.

YJNSW marked this recommendation as 'supported' and 'complete', stating that:

The NSW Ombudsman already has access to JJNSW's central electronic recording system, CIMS, that contains clear records and is easily accessible.

We are notified of any periods of segregation or separation that extend beyond 24 hours through the Client Information Management System (**CIMS**). However, there is no information included on CIMS about PCB strip searches, unless the search is mentioned as part of a report or recorded as a case note. Including this information on CIMS and developing a notification system similar to that in place for separation and segregation would make sure that there is an appropriate level of accountability.

DCJ told us that recording searches in CIMS would require staff to be able to enter search information into tablets. While CIMS is not currently compatible with tablets:

YJNSW is working with the Department's Information and Digital Services (IDS) to undertake a broad review of CIMS to identify current and future system requirements, assess the system's longevity, and provide recommendations on whether a renovation, restructure or replacement solution is necessary. A Request for Quote process for a vendor to undertake this review is on the market with a closing date of 12 February 2021. It is anticipated this review will be completed by 30 June 2021. It is critical that the outcomes and advice received from this review guide the future approach and timeframe required to enhance CIMS, including achieving the system capability of capturing search records. It is noted that a system enhancement to the scale that is anticipated will require significant financial investment and involve a long term transitional project.¹⁰⁰

We will continue to monitor this work and hope it will result in a system that provides an effective digital record of all searches.

99. YJNSW, *Response to the ICS Report on Use of Force, Separation, Segregation and Confinement*, <http://www.custodialinspector.justice.nsw.gov.au/Documents/NSW%20Government%20Response%20to%20the%20ICS%20Report%20on%20Use%20of%20Force,%20Sepaation,%20Segregation%20and%20Confinement.pdf>.

100. Letter from Michael Coutts-Trotter, Secretary DCJ to Nicole Lawless, A/Deputy Ombudsman, 5 February 2021.

Glossary

Term	Definition
Body cavity search	Search of the internal cavities conducted by a medical practitioner. In adult correctional settings, such searches are conducted where, on reasonable grounds, CSNSW believe that an inmate has secreted contraband in an internal body cavity. ¹⁰¹
CAS Act	<i>Crimes (Administration of Sentences) Act 1999</i>
CAS Regulation	<i>Crimes (Administration of Sentences) Regulation 2014</i>
CCTV	Closed-circuit television
CDC Act	<i>Children (Detention Centres) Act 1987</i>
CDC Regulation	<i>Children (Detention Centres) Regulation 2015</i>
the centre	Frank Baxter Youth Justice Centre
Child Abuse Royal Commission	Royal Commission into Institutional Responses to Child Sexual Abuse
CIMS	Client Information Management System
Commissioner	Commissioner of CSNSW
COPP	Custodial Operations Policy and Procedure
CSNSW	Corrective Services NSW
DCJ	Department of Communities and Justice
ERT	Emergency Response Team, YJNSW
FNB strip search or full naked body strip search	A search that may include the removal of all of the person's clothes and an examination of the person's body (but not body cavities) and clothes
LECC	Law Enforcement Conduct Commission
LEPRA	<i>Law Enforcement (Powers and Responsibilities) Act 2002</i>
LOP	Local Operating Procedure
Mandela Rules	United Nations Standard Minimum Rules for the Treatment of Prisoners
Metal wand searches	Searching by running a metal detecting hand wand over the detainee's outer garments
MOU	Memorandum of understanding
NT Royal Commission	Royal Commission into the Protection and Detention of Children in the Northern Territory
NSWPF	NSW Police Force

101. See CSNSW, Custodial Operations Policy and Procedure – 17.4 Internal secretion of contraband, 16 December 2017. The term 'body cavity search' is not defined in this COPP, however, this document provides policy for how the search is to be conducted.

Term	Definition
Pat down search	Searching by running the hands over the outer garments of the detainees. YJNSW refers to these searches as 'pat down searches' whereas CSNSW calls them 'pat searches'
PCB strip search or Partially clothed body search or partially clothed search	Searching by requiring a detainee to remove only the clothing from the top or bottom half of the detainee's body at any one time. After the removal of those clothes, the officer visually examines that half of the detainee's body from which the clothing has been removed and inspects the removed clothing. After this, the detainee puts on the removed clothing and the process is repeated for the other half of the detainee's body. ¹⁰²
Provisional statements	A statement of provisional findings and recommendations arising from this investigation
Secretary	Secretary of the Department of Communities and Justice
SOG	Security Operations Group, CSNSW. The SOG is responsible for responding to disturbances and riots at correctional and youth justice centres.
Strip search	FNB strip search or PCB strip search
YJNSW	Youth Justice NSW
YJNSW policy	YJNSW Searching Young People Policy

102. CDC Regulation cl 11A.

Appendix A:

Letter from the
Minister for Families,
Communities and
Disability Services,
and the Minister for
Counter Terrorism and
Corrections, dated
12 April 2021



The Hon Gareth Ward MP
Minister for Families, Communities
and Disability Services

The Hon Anthony Roberts MP
Minister for Counter Terrorism
and Corrections

EAP21/3771

Ms Nicole Lawless
Acting Deputy Ombudsman
NSW Ombudsman's Office
Level 24, 580 George Street
SYDNEY NSW 2000

Dear Ms Lawless,

Thank you for your correspondence dated 9 March 2021 regarding the NSW Ombudsman's draft report regarding a formal investigation inquiring into three strip searches conducted by Corrective Services NSW (CSNSW) at the Frank Baxter Youth Justice Centre on 24 November 2019.

Thank you for your invitation, in accordance with section 25 of the *Ombudsman Act, 1974*, to engage in consultation with the Ombudsman and his Office, prior to the issuance of a final report. A meeting was held on 6 April 2021 between Ministers, the Acting Ombudsman and yourself. We welcome the opportunity to raise some of our concerns about the findings and recommendations in the draft report.

Firstly, the activation of the CSNSW Special Operations Group (SOG) is an extraordinary response in situations that threaten the safety, security and good order of detention centres. It needs to be acknowledged that CSNSW presence in detention centres is not a routine occurrence and is reflective of an elevated risk to staff and detainees. Staff from Youth Justice and CSNSW have a difficult job under challenging circumstances and therefore need to be provided with adequate support and resources to offer a level of safety, which activation of the SOG is a key element.

It must be acknowledged that there was legitimate purpose for searching the detainees and the search was lawfully conducted. Searches by custodial officers are a critical element within a security context. It is one tool within a suite of security functions that fall under static and dynamic security measures and which underpin the maintenance of safety and security of correctional centres and of those living and working within the custodial environment.

The risk presented by the detainees, included:

- significant verbal threats of violence towards staff
- detainees throwing roof material, wood, scaffolding items/steel pipes, screws and bolts at staff; and
- one detainee was observed brandishing a shifting spanner, screw driver and/or wrench. He stated he would kill any worker; he wanted to go to prison and would assault anyone to get there. He also stated he had a screw driver and would stab anyone who came near him.

52 Martin Place, Sydney NSW 2000
GPO Box 5341, Sydney NSW 2001

In view of the above, the risk the detainees had concealed contraband, that could be used to injure themselves, staff or other detainees was apparent, and provided a reasonable suspicion of concealment and a legitimate purpose for the search process. Due to the nature of the risk presented, and the serious incident response, it was critical for the detainees to be immediately searched and all potential weapons or articles which could be used to harm self or others detected prior to securing the detainees within cells. The searches were conducted in compliance with the requirements of the CSNSW operational policy, in an area away from public view. We therefore consider that an apology to the detainees would be inappropriate.

We understand that the Department of Communities and Justice has made submissions to the Ombudsman reflective of the recent changes to the MOU as well and policy and procedures. These are designed to further clarify and enhance policy and procedure with respect to searching.

We also do not agree with the Ombudsman's comments that 'the manner in which CSNSW searched the three detainees was oppressive'. Youth Justice falls part of the Department of Communities and Justice and is closely aligned to Community Services which is responsible for child protection across the state. The alignment demonstrates the importance of child safety in the delivery of youth justice services.

Finally, we believe that the Ombudsman missed an opportunity to commend Corrective Services NSW and Youth Justice NSW staff for managing this very serious incident without use of force, and without injury to any person.

Thank you once again for providing this opportunity to engage in consultation.

Yours sincerely,



THE HON GARETH WARD MP
Minister for Families, Communities
and Disability Services

12 April 2021

THE HON ANTHONY ROBERTS MP
Minister for Counter Terrorism and
Corrections

12 April 2021

