Office of the Ombudsman
and Health Complaints Commissioner

Investigation into the unlawful detention of a young person following the contravention of a supervised release order

3 March 2014

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A. The Complaint

1 YP complained to my Office on 19 September 2012 about his detention at the Ashley Youth Detention Centre. YP was being detained because he had allegedly breached a supervised release order (SRO).

Background

2. YP was sentenced in the Magistrates' Court of Tasmania to 10 months' youth detention, commencing in February 2012. He was 14 years old at the time. Under s 109(1) of the *Youth Justice Act 1997* (the Act), a youth serving a period of detention under a detention order must be released under a SRO on the earliest release date. This date is either the day after the youth has completed 50 per cent of his or her detention order or three months, whichever is the longer.

3. Section 111 of the Act relevantly provides:

> *(1) A supervised release order is subject to the condition that the youth must not commit another offence, including a prescribed offence, which if committed by an adult could be punishable by imprisonment.*
>
> *(2) A supervised release order is also subject to the special conditions specified in the order which are reasonable in the circumstances.*

4. YP was released from Ashley on a SRO in mid July 2012. The order contained 11 conditions, including that he:

- attend educational, employment, personal development, health and other programs as directed by the assigned Youth Justice Worker;
- obey the reasonable and lawful instructions of the assigned Youth Justice Worker; and
- reside at a place of residence as directed by the assigned Youth Justice Worker and not change that address without the permission of the assigned Youth Justice Worker.

5. YP was required to attend a specialised educational program run by the Department of Education. The program is specifically designed for students who are either unwilling or unable to function successfully in mainstream education. On 26 July, 1 August and 2 August 2012 YP failed to attend this educational program.

6. On 2 August 2012 YP's Youth Justice Worker sent him a warning notice regarding his failure to attend the educational program on 26 July 2012. The Youth Justice Worker reminded YP that failure to comply with the conditions of a SRO may result in an application being made to the Area Director to 'review or contravene [sic] the Order'.[1]

7. Section 117 of the Act is the relevant provision which allows the Secretary to review a SRO if a condition is contravened. That section provides:

> *117 Contravention of supervised release order other than by further offence punishable by detention or imprisonment*
>
> *(1) This section applies to a contravention of a supervised release order by the youth contravening –*
>
> *(a) a special condition to which a supervised release order is subject; or*
>
> *(b) the condition to which a supervised release order is subject by committing an offence, including a prescribed offence, in respect of which a court has imposed a sentence that does not include a detention order or a term of imprisonment.*
>
> *(2) In the case of a contravention to which this section applies, the assigned youth justice worker must provide to the Secretary a written report on the contravention.*
>
> *(3) On receiving the report, the Secretary must –*
>
> *(a) notify the youth and his or her guardian, unless one cannot be found after reasonable inquiry, that the Secretary is considering taking action in respect of the contravention of the supervised release order relating to the youth; and*
>
> *(b) allow the youth and his or her guardian an opportunity to make submissions to the Secretary in respect of the matter at the time and place specified in the notice.*

[1] In response to a draft of this report, the Department indicated that it will review and revise the warning notice template to specifically identify the possibility of suspension of the SRO.

(4) After complying with subsection (3), the Secretary may do one or more of the following:

(a) postpone the decision as to what action, if any, is to be taken by reason of the contravention of the supervised release order;

(b) order that no further action be taken in respect of the contravention of the supervised released order;

(c) amend the special conditions to which the supervised release order is subject;

(d) suspend the supervised release order;

(e) if the youth, or his or her guardian on behalf of the youth, has made submissions to the Secretary in respect of the matter or is 19 years of age or more, cancel the supervised release order.

(5) As soon as practicable after making a decision under subsection (4), the Secretary must provide a written copy of it to –

(a) the youth; and

(b) the guardian, unless one cannot be found after reasonable inquiry

8. Following YP's further failure to attend the educational program on 2 August 2012, the Youth Justice Worker prepared a report for the Area Manager of Youth Justice North, regarding the contravention of the SRO. The Area Manager and the Area Director agreed that a meeting would be arranged with YP and his guardians on Wednesday 8 August 2012 to review YP's SRO. On 3 August 2012 both of YP's guardians were notified of the proposed meeting and invited to attend.

9. YP was to be informed of the meeting on Monday 6 August 2012. On the morning of that day, the Youth Justice Worker received a telephone call from a Constable of Tasmania Police. The Constable informed her that YP's guardians had contacted Police over the weekend regarding YP's behaviour, and had advised that they were unaware of his whereabouts. YP had not received permission to change his place of residence.

10. Following this phone call, a meeting was held at Youth Justice between the Area Director, the Area Manager, a Senior Youth Justice Worker, and the Youth Justice Worker. They discussed the Youth Justice Worker's report concerning the breach of the SRO and the information conveyed by the Constable. The following is an excerpt from a summary of that meeting contained in a chronology of events the Area Manager compiled on 2 October 2012 at the request of this office:

> *[The Youth Justice Worker] outlines the telephone conversation with Const … prior to the meeting and expresses concern that [YP's] whereabouts are unknown and he is reported to be with known offenders in Hobart. Previous advice from Child and Adolescent Mental Health Services (CAMHS) and … Psychologist is cited, in that [YP] requires clear and immediate consequences for his negative and non-compliant behaviours. [Area Manager] expresses concern that [YP] has been escalating his aggressive and non-compliant behaviour at both … [his guardian's] homes. There is also concern that he is associating with known offenders and his whereabouts are currently unknown. The meeting agrees that the current situation presents a risk to [YP's] personal safety as well as a risk to the community from offending behaviours by [YP] and his current cohort.*
>
> *The Area Director determines that a warrant be issued so that [YP] can be located and the contravention of his SRO can be dealt with under s 117(3) of the Act. This is deemed to be the most appropriate action in light of the fact that [YP's] whereabouts are unknown and he associating [sic] with known drug users and offenders.*

11. The Area Director issued a warrant to arrest YP on 7 August 2012. Youth Justice received information regarding YP's whereabouts later in the day and informed Tasmania Police, who arrested him that evening. YP was then taken into custody and returned to Ashley.

12. A meeting was held between the Area Director, the Area Manager, the Ashley Forensic Health Services Nurse, YP's guardian and YP at Ashley on 15 August 2012. At that meeting YP was given the opportunity to provide an explanation for his non-attendance at the educational program. YP allegedly offered some explanation for his non-attendance, but did not claim to have been unwell. The Area Director did not accept YP's explanation and advised him that the decision had been made to suspend his SRO until 31 October 2012 in accordance with s 117(4)(d) of the Act.

13. A little over a month later YP made a complaint to this office regarding his detention. My investigation officer made informal inquiries, which highlighted a number of matters of concern. He wrote to the Secretary of the Department of Health and Human Services, Mr Matthew Daly, on 25 September 2012 requesting further information. The Secretary responded on 18 October 2012, raising various issues regarding the circumstances of YP's detention.

14. By way of a letter dated 24 October 2012, my investigation officer outlined to the Secretary his preliminary view that YP's detention was potentially unlawful. A number of other issues relating to YP's detention were also raised and a response was requested.

15. Meanwhile, the Area Director and the Area Manager met with YP and his guardian at Ashley on 26 October 2012. YP was released that day, five days earlier than the period of detention imposed as a result of the breach of the SRO (due to expire on 31 October 2012). Following his release the SRO remained in operation until YP's detention order expired.

16. This office did not receive a response from the Secretary to my investigation officer's letter of 24 October 2012 until 22 February 2013. The Department has advised that at the time it was reviewing what had happened and seeking legal advice on necessary amendments to resolve similar scenarios in the future, but has expressed regret for the delay in formally responding to the correspondence.[2]

Jurisdiction

17. The Department of Health and Human Services, of which Youth Justice Services is a part, is a public authority as defined by s 4 of the *Ombudsman Act 1978* (the Ombudsman Act). Pursuant to s 12, I have jurisdiction to investigate any administrative action taken by, or on behalf of, that public authority.

[2] The Department further noted that its delay in this regard had not affected YP's release date, which by that time had already passed.

B. Methodology

18. The following documents were obtained and reviewed:

- YP's Youth Justice file;
- the Youth Justice files of three other young people that have been returned to custody since 2006 as a result of their SROs being suspended or cancelled pursuant to section 117 of the Act;
- relevant SRO policies;
- policies relating to the delegation of powers under the Act;
- copies of the current instruments of delegation relevant to the administration of the Act, and those that were in force in 2009 and 2011; and
- briefing correspondence from the Department to the Office of the Solicitor General, and the advice received in response, relating to Part 5 of the Act and issues arising directly or indirectly from YP's complaint.

19. In addition, the following tasks were undertaken:

- responses were sought from the Secretary and Departmental employees to a range of issues arising from YP's complaint; and
- inquiries were made of Tasmania Police regarding YP's arrest on 7 August 2012.

Interviews were not considered necessary, given the issues were relatively straightforward and the Department would have the opportunity to respond to all the issues raised during the investigation and to comment on a draft of this report.

C. The Investigation

20. Preliminary inquiries were made pursuant to s 20A of the Ombudsman Act for the purposes of ascertaining whether the complaint should be investigated. Those inquiries indicated that the Department had not complied with mandatory legislative requirements regarding the detention of YP nor had it provided him with procedural fairness. In those circumstances, I decided to formally investigate the matter.

21. On 20 February 2013 I gave notice to the Secretary of my intention to carry out an investigation. The notice was in the following terms:

> … I write to give notice under s 23(1) of the *Ombudsman Act 1978* (the Act) that I intend to carry out an investigation under the Act into the actions of the Department of Health and Human Services surrounding the arrest and detention of …[YP] under Part 5 of the *Youth Justice Act 1997* and the general process regarding the suspension or cancellation of supervised release orders under that Part.

22. My investigation focussed on seven principal issues, namely:

(i) the lack of lawful authority for YP's detention;

(ii) that the Act's mandatory notice requirements had not been followed;

(iii) the circumstances surrounding the issue of the Arrest Warrant;

(iv) the lack of information provided to YP about his appeal rights;

(v) the delay in providing YP with a copy of the written decision to suspend his SRO;

(vi) the excessive period of detention imposed for the breach of the SRO; and

(vii) a suggestion that the SRO could be cancelled if YP failed to comply with subjective conditions while in detention, when there was no lawful authority to do so.

(i) No lawful authority for YP's detention

23. The Area Director signed and issued YP's arrest warrant on 7 August 2012. The Area Director also signed the decision of 15 August 2012 to suspend YP's SRO pursuant to s 117(4)(d) of the Act until 31 October 2012.

24. The former Secretary, Ms Alice Burchill, issued a delegation on 9 August 2011, which was current at the time of these events. The delegation limited the power to suspend or cancel a SRO to the Chief Executive Officer of Child and Youth Services (as it was then called). The Area Director had a delegation to make decisions pursuant to ss 117(4)(a) – (c) but those sub-sections do not include the power to suspend or cancel a SRO.

25. The Area Director did have a delegation to issue the arrest warrant under s 120. As no valid decision had been made to suspend the SRO, however, it could not have been lawfully issued in any event. In my view, it was inappropriate that the Area Director could issue an arrest warrant when he did not hold a delegation to suspend or cancel a SRO.

26. During the investigation, the Secretary alerted my office to the fact that the Area Director was not a delegate for the purposes of s 117(4)(d) at the time the decision to suspend the SRO was made. Area Directors previously had this delegation but Ms Burchill's delegation of 9 August 2011 altered this arrangement. In correspondence to this office dated 22 February 2013, Mr Daly advised that, "[w]hile that change of delegations was to be communicated to relevant staff, this case has brought to light that the Practice Manual used by Children and Youth Services did not reflect the delegation change in the SRO procedures."

27. On 21 February 2013, following YP's complaint, the Secretary issued a new instrument of delegation under the Act. The power to make a decision to detain a young person or to issue an arrest warrant is now only delegated to the Deputy Secretary for Children.[3]

28. As will be demonstrated, the lack of lawful authority was not the only significant error regarding YP's detention. The list of errors this report highlights demonstrates that, even if there had been a lawful delegation, the detention of YP would still have been unlawful or oppressive due to failures to comply with other mandatory legislative requirements.

29. Unfortunately, the failures arising from the handling of YP's case do not appear to be the first time the requirements concerning the suspension or cancellation of a supervised release order have not been followed. According to the Department there have been at least three other occasions since

[3] In addition, in response to a draft of this report, the Secretary advised that he had directed a comprehensive review of all Children and Youth Services' (CYS) policies and procedures with a view to ensuring that whenever possible links to original source documents (such as instruments of delegation) are incorporated. This will provide additional safeguards against administrative errors, as amendments to a source document, such as an instrument of delegation, will be accessible directly from policy and procedure documents.

2006-2007 where a youth has been returned to custody following a decision under s 117. The earliest was from 2006 and the last prior to YP was in 2009. All three cases demonstrate further serious contraventions of the Act.

(ii) Mandatory notice requirements not followed

30. Even if the Area Director had the appropriate delegation, the decision to suspend would still have been unlawful. When a young person contravenes a condition of their SRO, the Secretary (or his or her delegate) can take certain actions under s 117 of the Act, with the potential consequences including suspension or cancellation of the SRO. That section, as quoted above, has mandatory steps that must be followed. The first step, following an alleged contravention, involves the youth justice worker preparing a report about the contravention for the Secretary under s 117(2).

31. The Youth Justice Worker provided a written report on 3 August 2012 to the 'Manager of Community Youth Justice' concerning YP's contraventions of the special conditions contained in his SRO. The Youth Justice Worker's report outlined correctly the procedure contained in ss 117(3) and (4), although the report was addressed to the Manager of Community Youth Justice rather than to the Secretary as is required by s 117(2).

32. The contraventions detailed in the report only related to YP's failure to attend the educational program. I am satisfied that YP did not attend the program on the days specified in the report and that there was no evidence of a medical certificate to excuse that non-attendance.

33. The next step in the s 117 process required the Secretary (or his lawful delegate) to notify YP, and his guardian/s if they could be located, that he was considering taking action with respect to the contravention. The Secretary had also to afford YP and his guardians the opportunity to make submissions at a time and place specified in the notice. The notice could have been either oral or in writing but it was required to be given before any other steps could be taken.

34. The Youth Justice Worker provided oral notification on Friday 3 August 2012 to YP's guardians regarding a proposed meeting on Wednesday 8 August 2012. The meeting was to discuss YP's non-attendance at the educational program and to review his SRO.

35. In my view, the Youth Justice Worker's oral notification of the meeting on 8 August 2012 to YP's guardians did not satisfy the requirements of s 117(3). The Youth Justice Worker did not have a delegation so the requirements of s 117(3) were not strictly complied with. If notification was only to be given

orally, then the notification should have been given by the Secretary or his delegate.

36. It appears to have been the Youth Justice Worker's intention to notify YP on Monday 6 August 2012. In the event, Tasmania Police contacted the Youth Justice Worker that day informing her that YP's whereabouts were unknown.

37. Rather than complying with the mandatory notice requirements under s 117(3), a necessary precursor to making a decision to suspend or cancel an order and to issuing an arrest warrant, the Area Director issued an arrest warrant on 7 August 2012. YP was therefore denied the opportunity to provide an explanation for his failure to attend the educational program prior to his arrest.

(iii) The arrest warrant

38. Section 120(1) of the Act provides:

> *If a supervised release order is suspended or cancelled, the Secretary must issue a warrant to arrest the youth who is or was subject to the order and return the youth –*
>
> *(a) if the youth is less than 19 years of age when the order is suspended or cancelled, to the custody of the Secretary at the detention centre from which he or she was released under the order; or*
>
> *(b) if the youth is 19 years of age or more when the order is suspended or cancelled, to the custody of the Director of Corrective Services at the prison specified in the warrant.*

39. Thus the Secretary or his delegate cannot issue an arrest warrant under s 120 until a decision has been made under s 117(4) to either suspend or cancel a SRO. Despite this, an arrest warrant was issued and executed on 7 August 2012 - eight days before the decision was made on 15 August 2012 to suspend YP's SRO.

40. File notes and emails on YP's Youth Justice file indicate that he repeatedly communicated his frustration at not knowing why he was back in detention. YP was, however, verbally informed of the reasons for his detention. YP phoned the Youth Justice Worker the day after he was arrested to ascertain why he was in detention. The Youth Justice Worker recorded in her file note of that conversation that:

> *[YP] said that he does not understand why he is back in Ashley, he said he thought he was being really good and not reoffending, and now he is back in Detention (sic). I explained to [YP] that he has been returned to Ashley as he has not been complying with the conditions of his Supervised Release Order. I said that it was explained to him that he was required to attend [the educational program](unless he had a medical certificate specifying that he could not attend), and also to reside at a specified address. I said that he had not been attending [the educational program] and has also not been at home since Saturday night.*

41. Notably, YP's failure to reside at his home was not a reason the Area Director later relied upon in the written decision when suspending the SRO. So although YP made inquiries while in detention to discover the reason for his arrest prior to 15 August 2012, he was never afforded the right to respond to those reasons prior to his arrest as required by s117(3)(b) of the Act.

42. It appears that the arrest warrant was used as an instrument to locate YP. Mr Daly wrote in his letter of 18 October 2012:

> *…the situation was escalated on 6 August, when I am advised [the Youth Justice Worker] received a telephone call from … Police, advising that both [YP's guardian's] had contacted them over the preceding weekend to advise they were unaware of [YP's] whereabouts. Subsequent information was received that [YP] was in the company of young people known to Youth Justice Services. These young people are known drug users and habitual offenders. Information was also received that [YP] had travelled to …. In light of this information, and growing concerns for [YP]'s safety and that of the wider community, a decision was made by the delegate to issue a warrant on 7 August 2012. The rationale behind this decision was [YP's] contravention of condition 4 of the SRO, together with the urgency to locate [YP] and ensure his safety, bearing in mind his age and vulnerability.*

43. It seems to me inappropriate to use an arrest warrant as a tool to locate a young person. It is also apparent from the above excerpt that irrelevant considerations, such as YP's associates, were taken into account when determining to issue the warrant (the SRO did not specify that YP could not associate with particular individuals). Finally, I am not satisfied that an individual's age and vulnerability could be a persuasive consideration when making an administrative decision to deprive a youth of his or her personal

liberty. Arguably, it would be a significant reason not to detain a young person.[4]

(iv) No information provided about appeal rights

44. My office asked the Secretary whether YP was advised of his appeal rights under s 118 of the Act. That section provides:

> *118. Appeal against suspension or cancellation of supervised release order*
>
> *(1) Within 14 days after receiving a copy of the decision of the Secretary under section 117(4)(d) or (e), the youth may appeal to the Court against that decision.*
>
> *(2) An appeal is to be instituted, heard and determined in accordance with the regulations.*
>
> *(3) On the hearing of an appeal, the Court may –*
>
> *(a) confirm the decision of the Secretary; or*
>
> *(b) revoke the decision of the Secretary and take any action specified in section 117(4)(b), (c) or (d).*
>
> *(4) The decision of the Secretary under section 117(4)(d) or (e) has effect until it is revoked by the Court under this section.*

45. Mr Daly responded as follows:

> *[YP] was not advised of his appeal rights in relation to the decision made under section 117(4) of the Youth Justice Act 1997. I am advised that this was a regrettable oversight as opposed to a deliberate omission.*

46. In response to a more specific question about whether YP was verbally advised of his appeal rights at the meeting on 15 August 2012, the Department stated on 2 May 2013,

[4] In response to a draft of this report the Secretary stated that YP's non-compliance with his SRO provided technical grounds for lawful return to custody by a delegate of the Secretary, but acknowledged that errors had been made when exercising the statutory powers under the Act and weaknesses in procedure had been identified. The Secretary also advised that in February 2013 he had directed that the Department liaise with Tasmania Police in relation to locating youths if similar circumstances arise in the future.

> *… staff do no recall whether this occurred. File notes do not specifically stipulate and staff memory is limited due to time lapse.*

47. Mr Daly advised that the Department has template notices for use when notifying a young person under s 117(3), which include information on appeal rights. Of the templates provided, only the s 117(5) decision template made any reference to the right to appeal the decision to the Magistrates Court. This template did not appear to be used for the decision regarding the suspension of YP's SRO.

48. It is axiomatic that individuals should be advised of their appeal rights in relation to administrative decisions, particularly when the individual is under the age of eighteen and the result of the decision is the deprivation of his or her liberty. Unfortunately, the failure to advise YP of his appeal rights in writing does not appear to be an isolated instance. The same oversight appears to have been repeated in the other three youth justice files my office considered in which a young person's SRO was suspended or cancelled under s 117(4).

Recommendation 1

That a young person's appeal rights under s 118 be clearly set out in written decisions under s 117(4) to suspend or cancel a SRO, and also be verbally brought to the attention of the young person at the time the decision is made.

49. In light of the particular vulnerability of young offenders and the Department's demonstrated failures to follow mandatory legislative requirements, I would also recommend that Departmental staff record all future meetings with young people at which they are given the opportunity to provide submissions. I note that, while this already appears to be a Youth Justice policy, it also does not appear to have been complied with. The Community Youth Justice Practice Manual provides, with respect to the submission process for a SRO breach:

> ***Young Person and Guardian can make submissions in respect to the contravention***
>
> …
>
> *The Young person/guardian must be given reasonable opportunity to make submissions to the proceedings [s117.(3)(b)]*
>
> *Submissions from the young person or their guardian or support person may be in person, verbal or in writing or in any other form i.e. audiotape, video recording.*

The submission to the Area Director takes place in the form of a meeting where the following procedure is followed: [s.117(3)(b)]

- *The meeting is attended by the young person, the family, YJW [Youth Justice Worker], the Area Coordinator, Area Manager and Area Director.*
- *The meeting is recorded and transcribed later.*

50. The meeting of 15 August at which YP was given the opportunity to provide submissions - despite the fact he had already been arrested and detained - was not recorded. There is no evidence that the other three cases this office considered were recorded either. There were no transcriptions of any recordings on any of the files.

Recommendations 2 and 3

Youth Justice follow its practice manual in that it ensures all meetings in which a young person or their guardian has the opportunity to provide submissions under s 117(3)(b) are recorded.

I also recommend that the practice manual be reviewed, that it give more practical guidance as to how a young person is to be notified in the event of a possible breach, and provide clarity as to what constitutes a contravention of an SRO.[5]

(v) Delay in providing a copy of the written decision

51. Section 117(5) provides that the Secretary must provide a copy of the written decision to the young person concerned as soon as practicable after it is made. It appears YP did not receive a written copy until at least 20 days after he was detained and then only after he requested it.

52. The written decision was signed on 15 August 2012 and YP signed an acknowledgement slip during the meeting on 15 August 2012 indicating he had received a copy of it. Although he would have seen the decision and it would have been discussed with him at the meeting on 15 August 2012 it appears, however, that a copy was not given to YP at the time of the meeting. Instead a copy was scanned and emailed to Ashley on the same day and Youth Justice assumed Ashley would provide it to YP.

[5] In response to a draft of this report the Department indicated that it intends to expand on this recommendation with an additional review of the practice manual to ensure it is clear when the lifting of a suspension of a SRO should be considered.

53. The Department has indicated with respect to the decision attached to the Ashley email that, "Although it was not specifically expressed that this should be given to [YP], this was the expectation and usual process". It was only on 27 August 2012, however, when YP requested a copy of the decision, that it became apparent that he did not have a copy.

54. This considerable delay is concerning, given the appeal provisions in s 118. Section 118(1) provides that a youth may appeal a decision within 14 days after receiving a copy of it. In YP's case, even had he known his rights, and presuming there had been a lawful delegation, he could not have commenced an appeal until at least 20 days after he was detained.

55. In addition, section 118(4) provides that the decision of the Secretary has effect until it is revoked by the Court. So, if a Magistrate had revoked the decision, YP still would have been detained for 20 days plus the time it would have taken for the matter to proceed to hearing. It is imperative that a young person is provided with a copy of the written decision (and advised of his or her appeal rights) as soon as practicable. This ensures a young person has the ability to instigate an appeal as soon as possible as well as allowing the process to be concluded quickly.

56. Of the other three Youth Justice files my office considered, only one contained evidence that a written decision had been provided in accordance with s 117(5). The young person received a letter on 15 July 2008 headed 'Notice of Suspension of Supervised Release Order'. Again, however, the letter contained no reference to that young person's appeal rights.

57. It may be that the remaining two youths did receive written decisions but there is no record on the Department's physical or electronic files to this effect. There are, in contrast, records of reports prepared pursuant to s 117(2) and warrants issued pursuant to s 120, though it is not clear if all warrants were executed. This either demonstrates poor record keeping or further serious failures to follow the mandatory requirements of s 117, specifically s 117(5).

(vi) Excessive period of suspension

58. In his decision on 15 August 2012, the Area Director stated:

> *The order has been suspended on the grounds that you failed to comply with conditions 3 and 4 of the Order, in that you failed to attend [the educational program] as directed on 26 July, 1 August and 2 August 2012.*

59. The suspension of YP's SRO was backdated to commence on 7 August 2012 and to remain in effect until 31 October 2012. Essentially, YP was to be detained for almost three months for failing to attend school on three occasions.

60. In my view, this was excessive and contradicted the general principles of youth justice as provided for in the Act. Section 4 sets out the objectives of the Act, which include 'to specify the general principles of youth justice'. Section 5(1) of the Act contains these general principles and s 5(1)(g) in particular provides that:

> (1) *The powers conferred by this Act are to be directed towards the objectives mentioned in section 4 with proper regard to the following principles:*
>
> …
>
> *(g) detaining a youth in custody should only be used as a last resort and should only be for as short a time as is necessary;*

61. There is a range of options available to the Secretary, or his lawful delegate, when making a decision about the contravention of a SRO. In this instance, returning YP to detention for the matters outlined above was certainly not, in my view, the last resort. Even if detention was considered appropriate, the duration certainly does not seem to me commensurate with the gravity of the contravention.

62. It appears, however, that other considerations were also taken into account when the decision was made to suspend YP's SRO, despite these reasons not being referred to in the s 117(5) written decision. Mr Daly in his letter to this office dated 18 October 2012 stated,

> *The decision to further suspend …[YP's] SRO was made on the basis of his non-compliance with condition 4 of the Order, in that he did not attend the designated education program as scheduled and directed by his Youth Justice Worker. However also informing this decision were reports of …[YP's] escalating aggressive behaviours in the homes of …[his guardians], together with concerns associated with his apparent "disappearance" on 4 August 2012.*

63. If YP's escalating aggressive behaviours and his apparent "disappearance" on 4 August 2012 informed the decision to detain YP, those considerations should have been referred to in the decision. The failure to note these further reasons in the decision meant YP was not fully informed about the reasons

for his detention, and only served to make the Department's already unlawful detention appear more oppressive and unjust.

(vii) A suggestion that the SRO could be cancelled if YP failed to comply with subjective conditions while in detention, when there was no lawful authority to do so.

64. The Area Director's written decision contains the following:

> *3. The reinstatement of the Supervised Release Order is conditional on the following:*
>
> *a. That you actively work toward, and maintain, Yellow Status under the Ashley Youth Detention Centre Behaviour Development Model;*
>
> *b. That you attend all required programs whilst in custody at Ashley Youth Detention Centre;*
>
> *c. That you demonstrate respectful behaviour toward Ashley staff and other young people at the Centre; and*
>
> *d. That you attend, and engage in, appointments with psychologist … as required.*
>
> *If I am satisfied that you have demonstrated a commitment to achieving the above goals, I will remove the suspension of your Supervised Release Order on 31 October 2012. If however, I am advised that you have not demonstrated this commitment, I will review the suspension. One of the possible outcomes of this review is the cancellation of your Supervised Release Order.*

65. It is unclear on what basis the Area Director could have reviewed the suspension and potentially cancelled the SRO. The only means by which a SRO can be cancelled is if:

- the Court makes a detention order for an offence committed by a person in respect of whom a SRO is in force; or
- the Secretary or his delegate makes a decision to cancel pursuant to s 117(4)(e).

66 A further contravention of the SRO while YP was in detention would not have been possible, as s 120(2) provides that the order has no effect while it is suspended.

67. Even if the Area Director had the legal authority to impose conditions precedent to the reinstatement of the SRO, it is my view that at least some of the conditions outlined in the Area Director's written decision are unfairly and inappropriately subjective. I consider it pertinent to have regard to the reasonableness of the conditions as though they were properly authorised, as they further demonstrate that the Secretary should not be empowered to make decisions under s 117 in the absence of some system of oversight and review.

68. There is no clear indication (or explanation) as to what 'engage in' means in condition d or 'actively work towards' requires in condition a. These conditions contrast with the more reasonable conditions outlined in YP's SRO. Moreover, under s 111(2), a special condition in a SRO has to be reasonable in the circumstances. In my view, the conditions with which YP was required to comply by Youth Justice prior to his SRO being reinstated were not reasonable.

69. In his letter to this office dated 18 October 2012, Mr Daly advised that:

> *The inclusion of these conditions is based on previous advice from mental health professionals, that …[YP] requires strong boundaries and clear expectations regarding his behaviour.*

70. If that is the case, it appears Youth Justice failed to critically examine the reasonableness and enforceability of the conditions.

D. Amendments to Section 117

71. During this office's inquiries into YP's complaint, the Secretary indicated that an amendment to s 117 was under consideration. In his letter dated 22 February 2013 Mr Daly advised:

> *As the Act is currently drafted, it appears a non-compliant youth who avoids being notified can avoid any consequences such as amendment or suspension of the SRO. In the interests of the safety of youths and the community, the Minister is considering an amendment to section 117 during debates on the Youth Justice (Miscellaneous Amendments) Bill … As with existing provisions in the Act (e.g. section77), this means that an SRO can still be amended or suspended if notice cannot be reasonably given.*

72. Parliament passed the *Youth Justice (Miscellaneous Amendments) Bill,* and it received royal assent on 18 July 2013. It included amendments to s 117(3) and (5), which now read:

> *(3) On receiving the report, the Secretary must* ***take reasonable steps to***[6] *-*
>
> > *(a) notify the youth and his or her guardian, unless one cannot be found after reasonable inquiry, that the Secretary is considering taking action in respect of the contravention of the supervised release order relating to the youth; and*
> >
> > *(b) allow the youth and his or her guardian an opportunity to make submissions to the Secretary in respect of the matter at the time and place specified in the notice.*
>
> *(5) As soon as practicable after making a decision under subsection (4), the Secretary must* ***take reasonable steps to***[7] *provide a written copy of it to –*
>
> > *(a) the youth; and*
> >
> > *(b) the guardian, unless one cannot be found after reasonable inquiry.*

73. The Secretary refers to section 77 as an existing provision that has a similar low threshold in relation to the service of notice. It is important to note, however, that section 77, which deals with contraventions of community service orders, still affords a youth the right to be heard.

74. Under s 77(4) the Court can issue an arrest warrant if a young person fails to appear at the hearing of an application regarding a contravention of a community service order. The Court can also issue an arrest warrant if reasonable efforts have been made to serve the application on the young person but have been unsuccessful.

75. The arrest warrant is issued to ensure the young person is present before the court. Section 77(9) provides:

> *The Court must not make an order under subsection (5) unless the youth is present before the Court.*

The youth therefore still has an opportunity to put her or his side of the story or at the very least hear the Court's decision and its reasons when it

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6 My emphasis.

7 And again.

makes an order. There are a range of options for orders under s 77(5), including an increase in the number of hours of community service. It may in some circumstances involve a revocation of the community service order to be replaced with an order for detention, but only as a last resort. Importantly, any of the orders made under s 77(5), including an order for detention, must be made when the youth is present before the court.

76. In contrast, under the amendments to s117 outlined above, the first time a young person may find out a decision has been made to detain them for up to half the period of the original detention order (in YP's case, five months) is potentially when they are arrested. In such a scenario, he or she would have no opportunity to offer a defence or put forward any mitigating factors to inform any decision regarding a possible sanction.

77. In addition, where previously it was mandatory for the Secretary to provide a young person with a written copy of the decision as soon as practicable after it was made, the Secretary need now only take reasonable steps to provide it. An appeal can only be lodged under s 118 within 14 days after receiving a copy of the decision. Under these amendments, a youth could be denied any right of appeal if a written copy of the decision is not provided.

78. The Department contends that the amendment is not designed to have the adverse consequences anticipated above. Rather, it is designed to address the possibility that a young person cannot be found, in which case the decision cannot reasonably be provided to him or her. On the other hand, the Department further contends, if the youth is found the decision can, of course, reasonably be provided and the suspension of the SRO reviewed immediately.

79. The Department maintains that the current amendment will mean that there will be no incentive for youths to remain disengaged and untraceable while on SROs. The Department argues that this is because the ability to issue a warrant increases the likelihood that police coming across the youth will be empowered to bring the youth to detention where suspension can be reviewed (rather than having no power to arrest and the youth continuing to avoid their legal obligations).

80. Nevertheless, it is my view that the amendments to s 117, rather than remedying the current deficiencies with the legislation, exacerbate them. In my view, the Department should be seeking to strengthen the safeguards in the legislation rather than weakening them. Mr Daly outlined in his letter of 22 February 2013 the safeguards regarding the contravention of SROs:

> *The Secretary is required to grant an SRO to a youth after a defined period in custody. This expedites the reintegration of youth offenders*

into the community, without the need for court review. However, such an 'automatic' administrative release scheme brings with it the need for the Secretary to expeditiously review and amend or suspend SROs for non-compliance, subject to the safeguards of a notification process and appeal rights. Other safeguards include the Commissioner for Children's advocacy for detainees,[8] the provision of information to youth about consequences for non-compliance, and other operational policy and practice that works towards ensuring the youth understands their responsibilities.

81. This report is evidence that all of the safeguards listed above were insufficient to stop a young person being unlawfully detained for 81 days. The involvement of my Office only served to ensure YP was released five days before the unlawful suspension period of the SRO ended. Ultimately, the unlawful detention occurred because the Department did not understand its legislative responsibilities and failed to respond appropriately when concerns were highlighted.[9]

80. YP's complaint demonstrates that stronger safeguards are required for a young person's personal liberty than are currently provided under the Act. In determining what those safeguards should be, it is pertinent to consider how other jurisdictions in Australia deal with contraventions of the equivalents of SROs.

E. Comparison of equivalent Supervised Release Order legislation in other jurisdictions

81. When compared to other Australian jurisdictions, it would appear that the Tasmanian regime regarding the breach of SROs other than by re-offending is the one most likely to lead to arbitrary and unfair results. Where equivalent legislative schemes such as SROs exist in other states or territories, it is a magistrate or an independent board or tribunal that makes the decision to

[8] YP had in fact raised concerns about his detention with the Commissioner for Children. The Commissioner, however, has no power to investigate or enquire into practices and procedures in relation to the care and protection of children other than at the request of the Minister (s79, *Children Young Persons and Their Families Act 1997*) and was not aware of the contraventions of the Act affecting YP's situation.

[9] The Department, in response to a draft of this report, advised that additional training will be provided to CYS staff in relation to the interpretation of legislation and legal requirements. In addition, it advised this report will be discussed with the staff involved and other relevant employees so appropriate lessons can be learned.

detain a young person following a breach of a SRO equivalent. Tasmania is the only state that gives the power to a state service employee to return a youth to detention for potentially half of their original sentence.

82. Notably, in other jurisdictions, when a magistrate is not making the decision to detain but rather a board or tribunal is, its chairperson must be an experienced legal practitioner or in South Australia, a judge. There is no equivalent requirement in Tasmania that the decision maker - the Secretary or his delegate - have any legal training or background.

83. Western Australia, of all the states apart from Tasmania, appears to offer the least protection to young people against the arbitrary exercise of power with respect to breaches of SRO equivalents. The Western Australian *Young Offenders Act 1994* gives the Chief Executive Officer the power to suspend a supervised release order and subsequently issue an arrest warrant where there has been a breach of an order other than by re-offending. However, the CEO must then refer the matter to the Supervised Release Review Board which can confirm, vary, or remove the suspension.

84. The application of s 117 has failed in Tasmania. An independent decision maker with an understanding of the application of the law and its operation needs to be actively involved in the process of deciding whether to suspend or cancel a SRO.

Recommendations 4 and 5

The Youth Justice Act 1997 be amended to give the power to suspend or cancel a SRO to a magistrate or independent tribunal chaired by a person with significant legal experience. [10]

I would also recommend that the practice manual be amended to clarify when an application to suspend a SRO ought to be made.

[10] The Department has now indicated that it accepts in principle my recommendation concerning amendments to the Act. The Secretary has noted that proceeding with the recommended amendment will require evaluation and advice, followed by Cabinet's approval. I would request that the Department consult with my office as to progress in this regard.

F. Conclusion

85. The Department of Health and Human Services unlawfully detained YP for 81 days. The Area Director who made the decision under s 117(4) to suspend YP's SRO and subsequently detain him for almost three months had no delegation from the Secretary to make that decision. In addition, had the Area Director been appropriately delegated the necessary powers, the subsequent actions of the Department would still have rendered the decision unlawful as well as unreasonable and/or oppressive.

86. I am satisfied that the relevant officers acted in what they considered to be the best interests of YP. The Department has advised that the inadvertent errors made remain matters of deep regret and following receipt of a draft of this report, the Secretary arranged for its Director - Strategy, Program Development and Evaluation, Ms Susan Diamond, and the Deputy Secretary – Children, Mr Tony Kemp to meet with YP's guardian. The Secretary advises that the outcome of that meeting was positive. Mr Kemp also met with YP, and it is again reported that the outcome was positive.

87. Nevertheless, the repeated failures highlighted in this report demonstrate that the Act, before and after the amendment to s 117, does not properly safeguard young people's personal liberty. The following failures or poor administrative practices were identified as a result of YP's complaint:

- the Secretary had not delegated to the Area Director the power to detain YP, which made his detention unlawful;
- the mandatory notice requirements were not followed;
- there is little or no evidence to demonstrate that the mandatory notice requirements were satisfied in any of the three other files this office considered;
- an arrest warrant was issued without a decision having been made to suspend the SRO, contrary to the requirements of the Act;
- the decision to suspend the SRO was made eight days after YP was detained, meaning he had been detained without lawful reasons and without a formal explanation for at least that period;
- the period of the suspension of the SRO was excessive, unfair and ignored the general principles of the Act - 81 days detention for failing to attend school on three days is not, in my view, justifiable;
- Subjective conditions were placed on the SRO's reinstatement, with the suggestion the SRO could be cancelled if those conditions were

breached despite there being no power to cancel a suspended SRO in those circumstances;

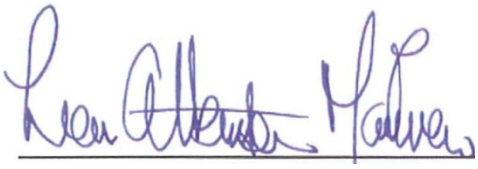
- YP was not notified of his appeal rights;
- there is no evidence that other young people who have had their SROs suspended or cancelled since 2006 were notified of their appeal rights;
- the Department failed to follow its procedure manual in that it did not record the meeting on 15 August 2012 when YP was informed that his SRO was suspended, nor is there evidence of transcripts on any of the other Youth Justice files this office examined;
- YP was not given a written copy of the decision until after he requested it on 27 August 2012, 20 days after he had been detained; and
- there is only a record of one of the other three young people who have had SROs suspended or cancelled since 2006 receiving a copy of a written decision.

88. The Secretary is entrusted under the Act with the power to detain a young person against their will if they contravene an SRO. Parliament enacted processes and protections in the Act to ensure that power was not exercised arbitrarily but, in this instance and others which were considered, those processes and protections failed. In my view, the amendments to s 117 only serve to weaken those protections.

89. The numerous and significant issues that have arisen from YP's complaint are a compelling argument that the power to return a young person to detention should be actively overseen by a magistrate or independent tribunal. Although appeal rights exist under s 118, YP's complaint and the long list of failures listed above demonstrate that these rights can go unnoticed and decisions can go unchallenged. Independent oversight is required to ensure that a young person's personal liberty is only restricted when there is lawful authority for doing so; when other possibilities have been explored and exhausted, and to ensure the process, when it is necessary, is fair.

90. The Secretary has accepted in principle all five recommendations of this report. In addition, the Department has identified of its own initiative further areas where it could improve its processes as a result of YP's complaint. I have highlighted these throughout the report and the Department is to be commended for its proactive response. Although the inclusion of independent oversight in the decision making process of s117 is a matter

ultimately for Parliament it is encouraging to note the Department's in principle support for the recommendation.



Leon Atkinson-MacEwen

OMBUDSMAN

3 March 2014