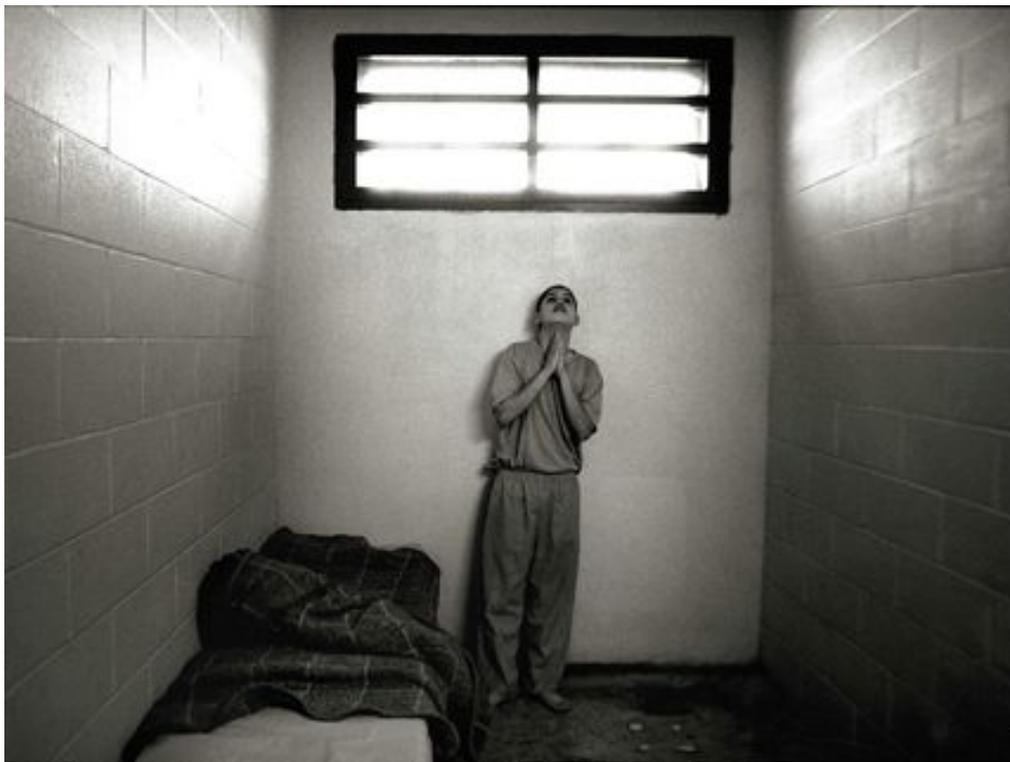


Solitary Confinement - A Breach of Human Rights

Draft 8/12/2020



Contents

Executive Summary	3
Management Reasons for Solitary Confinement	6
Legal Obligations Regarding Solitary Confinement	8
How is it a breach of OPCAT?	9
Australian Legislation and Common Law	11
Solitary Confinement Internationally	18
Health Impacts of Solitary Confinement	20
International Opposition to Solitary Confinement	25
Alternatives and Reform to Solitary Confinement	26
Appendix	33

Executive Summary

The use of solitary confinement in correctional facilities carries profound physical and mental ramifications the Australian Government must consider. Despite this, solitary confinement practices are routinely imposed within Australian detention facilities, violating Australia's international human rights obligations.

Solitary confinement is the isolation of a person in a cell for at least 22 hours a day without meaningful human contact. Prolonged solitary confinement is confinement for a time period over 15 consecutive days.¹ During this isolation period, there is often little or no access to natural light, fresh air or human contact. Restrictions are typically imposed on a prisoner's access to work and educational programs, and privileges such as visits, phone calls, or television access are also reduced.²

Australian detention facilities currently use solitary confinement to ensure prison safety and restrict incarcerated persons from being a threat to others, maintain good order and management of the prison, and deter negative behaviour with the threat of discipline. Australian states and territories often use different labels for solitary confinement, including 'segregation', 'separate confinement', 'isolation' or 'non-association'.³ Regardless of the label, the practice is detrimental to the wellbeing of inmates and the Australian Government must prohibit the use of solitary to ensure international treaties are upheld.⁴

Australia ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1989, which defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as punishing him for an act committed or suspected of committing".⁵ Under this accepted definition, prolonged solitary confinement is considered torture.

¹ United Nations Office on Drugs and Crime, The United Nations Standard Minimum Rules for the Treatment of Prisoners, GA Res 70/175, UN Doc A/RES/70/175 (8 January 2016, adopted 17 December 2015) rule 44 ('The Nelson Mandela Rules').

² The University of Queensland, *Legal perspectives on solitary confinement in Queensland* (2020) 9.

³ The University of Queensland, *Legal perspectives on solitary confinement in Queensland* (2020) 6.

⁴ Human Rights Law Centre (n 1).

⁵ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) arts 1, 2, 11.

More recently, in December 2017, the Australian Government ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('*OPCAT*'). As described by the Commonwealth Ombudsman, *OPCAT* seeks to reduce the likelihood of mistreatment, ensuring mechanisms are established to ensure that conditions and treatment within detention facilities are "respectful, safe and humane".⁶ The United Nations (UN) has also expressed that 'solitary confinement should only be used in very exceptional cases, for as short a time as possible and only as a last resort' and that solitary confinement for more than 15 days at a time should be prohibited.⁷

Extensive research has demonstrated the harmful effects of solitary confinement on prisoners, particularly to those who are exposed to prolonged periods of segregation. The research of Dr Sharon Shalev found that 'all studies of prisoners' held in solitary confinement for more than 10 days demonstrated negative mental and physical health effects.⁸ Despite its impact, punitive isolation is routinely used by Australian states and territories and there is a lack of national oversight regarding the practice.

This paper analyses the severity and significance of the issue and highlights alternatives to solitary confinement as well as necessary safeguards. While solitary confinement is used to manage some of the most complex and challenging situations that arise in custody, the use of prolonged solitary confinement has become more than an interim measure to ease safety concerns.

There are several alternative practices to solitary confinement that can be used in Australian correctional facilities. A compelling alternative is the introduction of alternative management procedures. This would involve training staff to identify and humanely de-escalate dangerous situations. Correctional facilities should place greater focus on managing prisoner wellbeing and underlying reasons for disorderly conduct which results in solitary confinement. Correctional facilities should also include social reasoning as a response to safety concerns, as this would complement the implementation of the Barlinnie Special Unit model that has seen success in behavioural changes in the past, such as the Special Care Unit in Long Bay Gaol. Prisoners

⁶ Commonwealth Ombudsman, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (2019) 1.

⁷ International Psychological Trauma Symposium, *The Istanbul Statement on the Use and Effects of Solitary Confinement* (December 2007) 2 ('The Istanbul Statement'); The Nelson Mandela Rules, UN Doc A/RES/70/175 (n 1) rule 45(1).

⁸ Sharon Shalev, *A Sourcebook on Solitary Confinement* (2008) 21.

must be given agency to ensure better outcomes, this could include peer mentoring programs or training in safe de-escalation tactics. This will also help to support policy to strengthen reintegration programs for prisoners. To ensure that these alternatives are duly implemented, it must be supported by legal reform that abolishes punitive solitary confinement.

Management Reasons for Solitary Confinement

Solitary confinement is used as a management tool in an effort to;

- 1) Ensure prison safety and restrict incarcerated persons from being a threat to others.
- 2) Maintain good order and management of the prison.
- 3) Deter negative behaviour with the threat of discipline.

This is reflected in state legislation across Australia. For example, in NSW, solitary confinement may be used when “necessary to secure the personal safety of another, the security of the correctional centre or good order and discipline within a correctional centre.”⁹ Meanwhile, reasons for solitary confinement in Victoria are defined as “the management, good order or security of the prison,¹⁰ and Queensland as a “punishment for breach of discipline”¹¹.

This report outlines the detrimental effects solitary confinement has on physical and mental well-being. Solitary confinement causes significant psychological effects and increases the risk of harm for individuals who endure it. Research has demonstrated that isolation can have effects as severe as physical torture.¹² In contrast, the effectiveness of solitary confinement to ensure general prison safety, and as a means of punishment to deter negative behaviour is questionable.

Although the purpose of solitary confinement is not punitive, research has found that most countries will use solitary confinement for punishment and discipline. There is little evidence to support the belief that solitary confinement helps to maintain good order or prison safety.¹³ In Colorado, prison staff saw a reduction in assaults and attacks on staff after the use of solitary confinement was restricted by 85%.¹⁴ This reduction in violent behaviour, which was achieved without the use of solitary confinement, may be linked to the improved mental well-being of inmates and their ability to engage socially. Solitary confinement has negative psychological

⁹ *Crimes (Administration of Sentences) Act (No 93) 1999* (NSW) s 10(1) (*‘Crimes (Administration of Sentences) Act’*).

¹⁰ ‘OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people’, *Victorian Ombudsman* (2019) 100.

¹¹ The University of Queensland, *Legal perspectives on solitary confinement in Queensland* (2020) 15.

¹² Jeffrey Metzner and Jamie Fellner, ‘Solitary Confinement and Mental Illness in U.S. Prisons: A challenge for medical ethics’ (2010) *The Journal of the American Academy of Psychiatry and the Law* 38(1) 104.

¹³ Southern Poverty Law Center, *Solitary Confinement: Inhumane, Ineffective, and Wasteful* (4 April 2019) < https://www.splcenter.org/sites/default/files/com_solitary_confinement_0.pdf >

¹⁴ *Ibid.*

effects, therefore, a reduction in its use can result in the improvement of mental well-being for inmates.

Solitary confinement is also ineffective as a way of controlling negative behaviour. As found in a study exploring the effect of exposure to short-term solitary confinement among violent prisoners, short-term solitary confinement does not play a role in reducing future misconduct within the prison.¹⁵ Thus, detainment facilities are not made safer in the long term. Additionally, detainees who experienced solitary confinement are also likely to engage in anti-social behaviours when they are released.¹⁶ If solitary confinement has little ability to control long term negative behaviour, then alternatives which may, are surely preferable.

Further, research has indicated that solitary confinement is not cost-effective, rather it is a time consuming tool which instead exacerbates the issues it aims to discipline.¹⁷ Solitary confinement units do not save money, in fact the cell typology of most Australian prisons is expensive given they require additional staff and facilities to accommodate solitary confinement practices, in comparison to the innovative architecture and rehabilitation programs found internationally.¹⁸

Finally, solitary confinement does not reduce the likelihood of reoffending after release. In fact, multiple studies in America indicate that solitary confinement increases the risk of recidivism, and increases the risk of violent offending.¹⁹ Further study and research needs to be undertaken to assess the full effects of solitary confinement on detainees after they are released.

¹⁵ Robert G. Morris, 'Exploring the Effect of Exposure to Short-Term Solitary Confinement Among Violent Prison Inmates' (2015) *Journal of Quantitative Criminology* 32(1) 1.

¹⁶ T Kupers, 'What to do with the survivors? Coping with long-term effects of isolated confinement' (2008) 35(8) *Criminal Justice Behaviour* 16.

¹⁷ Craig Haney, *Restricting the Use of Solitary Confinement* (2018) 1.

¹⁸ Slattery, *Unlocking the Cost of Incarceration* (2019) 3.

¹⁹ Mimosa Luigi et al, 'Solitary Confinement of Inmates Associated With Relapse Into Any Recidivism Including Violent Crime: A Systematic Review and Meta-Analysis' (2020) *Journal of Trauma, Violence, and Abuse* 14.

Legal Obligations Regarding Solitary Confinement

Long-term and indefinite solitary confinement violates the Universal Declaration of Human Rights, Article 5²⁰ and the International Covenant on Civil and Political Rights, Article 7.²¹ Both of these articles articulate that no one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment. The Convention Against Torture (CAT), Article 1²² outlines torture as, “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as punishing him for an act committed or suspected of committing”. Under this accepted definition solitary confinement falls into the category of torture. Article 2 and Article 11 of CAT states that each party must take effective legislative, administrative, judicial or other measures to prevent these acts of torture. Australia has implemented legislation that regulates solitary confinement, however as this report shows, such measures are inadequate.

In 2011, the UN Special Rapporteur and expert on torture Juan Mendez called all countries to prohibit solitary confinement for prisoners except in exceptional circumstances.²³ He further suggested that it should be completely banned for juveniles and people with mental disabilities.²⁴ He stated, “[c]onsidering the severe mental pain or suffering solitary confinement may cause, it can amount to torture or cruel, inhuman or degrading treatment or punishment when used as punishment, during pre-trial detention, indefinitely or for a prolonged period”.²⁵ He continued, “[s]ocial isolation is one of the harmful elements of solitary confinement and its main objective. It reduces social contact to an absolute minimum”.²⁶ Mendez suggested that solitary confinement for shorter terms or legitimate disciplinary reasons can amount to cruel, inhuman or degrading treatment or punishment where the physical conditions of prisons (e.g. sanitation, access to food and water) violate the inherent dignity of an individual and cause severe mental and physical suffering.²⁷

²⁰ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 Dec 1948) art 5.

²¹ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 7.

²² *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) arts 1, 2, 11.

²³ UN, ‘Solitary confinement should be banned in most cases, UN expert says’ (Median Release, UN News, 18 October 2011).

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

The regulations of solitary confinement have not only been condemned on an international level, but a domestic level. The Commonwealth Ombudsman found that prolonged solitary confinement amounts to cruel, inhuman, or degrading treatment or punishment.²⁸ As solitary confinement causes considerable mental suffering, human dignity is likely to be compromised, and therefore this is an ‘inhuman’ means of detention.²⁹

How is it a breach of OPCAT?

The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (‘OPCAT’) was ratified by the Australian Government in December 2017. The Protocol reaffirms that torture and other cruel, inhuman or degrading treatment or punishment are prohibited and constitute serious violations of human rights. The Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment stated that the mental and physical suffering or humiliation that occurs from solitary confinement amounts to cruel, inhumane or degrading treatment or punishment, which is prohibited by OPCAT.³⁰

As described by the Commonwealth Ombudsman, OPCAT seeks to reduce the likelihood of mistreatment, ensuring mechanisms are established to ensure that conditions and treatment within detention facilities are “respectful, safe and humane”.³¹ Despite the international consensus on solitary confinement, it appears that solitary confinement is often the preferred behavioural management tool in Australian detention facilities, rather than the exception.³² This is a breach of Australia’s obligations under OPCAT.

²⁸ Micheal Manthorpe, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)* (Commonwealth Ombudsman Report No 3, September 2019) 6.

²⁹ The University of Queensland, *Legal perspectives on solitary confinement in Queensland* (2020) 65.

³⁰ Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Interim Report of The Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Report a/68/295) 16.

³¹ Commonwealth Ombudsman, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (2019) 1.

³² Victorian Ombudsman, *OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people* (2019).

Case Study: Solitary Confinement and OPCAT in Victoria

Victorian Ombudsman, OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people (2019)

In 2019, the Victorian Ombudsman investigated the implementation of OPCAT in Victoria, focusing on the confinement of children and young people aged between 15 and 25 years of age.³³

Findings:

- There was an inconsistent application of solitary confinement in the three facilities inspected and they were ‘disturbed’ at a culture which prioritised security over the health of inmates.³⁴
- Secure Welfare was the only facility that appeared to adopt a “consistently therapeutic ethos in which seclusion was used as a last resort and kept to a minimum, [despite being] somewhat undermined by the bleak, custodial-like conditions”.³⁵ In comparison, at Port Phillip Prison they found a concerning number of instances of prolonged confinement, which is prohibited by international standards known as the Mandela Rules.³⁶
- There has been a disproportionate use of isolation on Aboriginal young people, and at a systemic level their experiences were “particularly disturbing”.³⁷
- Staff at the facilities had a limited understanding about the dangers of isolation, its impact on mental health and resulting behaviour. In many of the cases reviewed, they found the justification of separation to be questionable and punitive.³⁸ For example, “young people were often separated for weeks in circumstances where there appeared to be little or no ongoing risk of harm to others; victims were separated for the same time as perpetrators, sometimes for months; and good behaviour did not appear to result in less separation”.³⁹

³³ Victorian Ombudsman, *OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people* (2019).

³⁴ Ibid 7.

³⁵ Ibid 7.

³⁶ Ibid 8.

³⁷ Ibid 7.

³⁸ Ibid 8.

³⁹ Ibid 8.

Ultimately the report emphasised that while official procedures acknowledge children and young people should only be isolated as a last resort and for the minimum time necessary, this does not translate into practice.⁴⁰ This means many of the practices in Victorian youth justice and prison systems are likely to be contrary to law, and incompatible with OPCAT and Victoria's human rights legislation. It urges that a cultural shift is needed, along with alternative tools to solitary confinement, including therapeutic spaces, trauma-informed behavioural management, training in mental health and de-escalation techniques.⁴¹

Australian Legislation and Common Law

In Australia, there is limited and inconsistent regulation surrounding solitary confinement. Each state confers broad discretion on the prison administration to make orders. There is a limited amount of Australian case law that engages with solitary confinement, which suggests a general lack of judicial oversight of the implementation of, and conditions within, solitary confinement.⁴²

In *R v Davies*,⁴³ the court recognised the “intense severity” of solitary confinement and determined that 12 months of solitary confinement could equate to 2 years of regular imprisonment. This notion was also seen in *Callanan v Attendee X [2013] QSC 340*; *Callanan v Attendee Y [2013] QSC 341*; *Callanan v Attendee Z [2014] 2 Qd R 1*, where the attendees were subject to certain management rules, which included solitary confinement. Due to the notion that solitary confinement was part of the sentencing, the sentence was reduced due to the harsh impacts it had on the attendees.⁴⁴

There have also been findings by the Coroner regarding oversights into mental health referral and inhuman cell conditions in solitary confinement. This was seen specifically in the inquest into the Death of LP.⁴⁵ It was found that due to a lack of specialist mental health treatment there was a 10 minute delay in medical response after LP's epileptic seizure. The coroner also found

⁴⁰ Ibid 9.

⁴¹ Ibid 9.

⁴² *Prisoners Legal Service, The University of Queensland, Legal perspectives on solitary confinement in Queensland (2020)* 34.

⁴³ (1978) 68 Cr App R 319, 322.

⁴⁴ Ibid.

⁴⁵ Coroner's Court of South Australia, Deputy State Coroner Anthony Ernest Schapel, 19 November 2010) 15.

that LP's cell was uninhabitable.⁴⁶ A similar finding was found in the inquest into the Death of W.⁴⁷ Coroners have also found that the death of FJTF in NSW was directly linked to psychosis and depressive symptoms developed after having many periods of limited human contact.⁴⁸

Furthermore, in *Binse v Williams*,⁴⁹ the Court noted that solitary confinement, "consequences of an erroneous decision... may be disastrous in terms of security relevant policy concerns." Solitary confinement has been condemned at common law and has been restricted in each State's legislation.

New South Wales

The *Crimes (Administration of Sentences) Act (No 93) 1999* (NSW) was introduced after the decision in *Sleiman and Hamzy v Commissioner of Corrective Services & Anor*⁵⁰ where it was held that deprivation of a prisoner's residual liberty is subject to strict limitations and confirmed that unlawful deprivation must give rise to relief. Under this legislation, the Commissioner may direct that an inmate be held in **segregated custody** if of the opinion that such segregation is necessary to secure the personal safety of another, the security of the correctional centre or good order and discipline within a correctional centre.⁵¹

The Commissioner may also direct an inmate to be held in **protective custody** if of the opinion that the association of the inmate with other inmates constitutes or is likely to constitute a threat to the safety of the inmate.⁵² The governor of a correctional centre may exercise these powers given to the Commissioner but must notify the Commissioner of the fact and grounds on which a direction was given.⁵³ An inmate given a segregated or protective custody direction is to be detained in isolation from all other inmates or in association only with such other inmates as the Commissioner may determine.⁵⁴ An inmate in this form of custody is not to have a reduction in diet or be deprived of any rights other than those determined by the Commissioner or for which

⁴⁶ *Prisoners Legal Service, The University of Queensland, Legal perspectives on solitary confinement in Queensland (2020)* 41.

⁴⁷ Coroner's Court of New South Wales, Deputy State Coroner Sharon Freund, 11 November 2015

⁴⁸ Coroner's Court of New South Wales, Deputy State Coroner Teresa O'Sullivan, 13 July 2018

⁴⁹ [1998] 1 VR 381, 394.

⁵⁰ [2009] NSWSC 304.

⁵¹ *Crimes (Administration of Sentences) Act (No 93) 1999* (NSW) s 10(1) ('*Crimes (Administration of Sentences) Act*').

⁵² *Ibid.*, s 11(1).

⁵³ *Ibid.*, s 10(2), 11(3).

⁵⁴ *Ibid.*, s 12(1).

are necessary for the holding in segregated or protective custody.⁵⁵ This legislation provides that directions must be in writing and include grounds on which it is given.⁵⁶

The Commissioner must review the segregated or protective direction and make a direction to revoke, confirm or amend the terms of the direction.⁵⁷ If the custody will exceed 6 months, the Commissioner must give written notice to the Minister.⁵⁸ If custody exceeds 14 days, the inmate may apply to the Review Council for a review of the direction.⁵⁹ If the governor is satisfied beyond a reasonable doubt that the inmate is guilty of a correctional centre offence the governor may impose **confinement** to a cell for up to 7 days, with or without deprivation of withdrawable privileges.⁶⁰ The Visiting Magistrate may make a similar order but for up to 28 days.⁶¹

For solitary confinement for children, the relevant legislation is the *Children (Detention Centres) Act (No 57) 1987* (NSW). If the centre manager of a detention centre believes on reasonable grounds that a detainee should be **segregated** to protect the personal safety of that or any other detainee or person, they may direct to segregate the detainee.⁶² The nature and duration should be reasonable considering the individual qualities of the detainee.⁶³ It should not exceed three hours except with the approval of the Secretary.⁶⁴ The detainee should be provided some means of occupying themselves.⁶⁵ Moreover, a detainee found guilty of misbehaviour may be **confined** to a place for a period not exceeding 12 hours or, in the case of a detainee of or over 16 years, not exceeding 24 hours.⁶⁶ The detainee should be provided with some means of occupying themselves.⁶⁷ The place of confinement shall not be less favourable than the physical environment of other places occupied by detainees in the detention centres, unless otherwise appropriate.⁶⁸ The detainee shall be visible to and able to communicate with a juvenile justice officer at all times.⁶⁹

⁵⁵ Ibid., s 12(2).

⁵⁶ Ibid., s 13.

⁵⁷ Ibid., s 16.

⁵⁸ Ibid., s 18.

⁵⁹ Ibid., s 19.

⁶⁰ Ibid., s 53(1)(c).

⁶¹ Ibid., s 56(1)(c).

⁶² Ibid., s 19(1).

⁶³ Ibid., s 19(1)(a).

⁶⁴ Ibid., s 19(1)(b).

⁶⁵ Ibid., s 19(1)(c).

⁶⁶ Ibid., s 21(1)(d).

⁶⁷ Ibid., s 21(2)(a).

⁶⁸ Ibid., s 21(2)(b).

⁶⁹ Ibid., s 21(2)(c).

Queensland

Solitary confinement is governed by the *Corrective Services Act 2006* (QLD). Here, the chief executive may make a **safety order** where a prisoner may be accommodated separately from other prisoners.⁷⁰ If a deciding officer is satisfied on the balance of probabilities that a prisoner has committed a minor breach of discipline, or is satisfied beyond reasonable doubt that a prisoner has committed a major breach of discipline, they may order the prisoner to undergo **separate confinement**.⁷¹ The period of separate confinement must not be more than 7 days.⁷² There are three ways in which a prisoner can be subject to separate confinement in Queensland. These include: 'as punishment for a breach of discipline (7 days); being placed on a safety order (1 month), and being placed on a maximum security order (MSO) (6 months).'⁷³ This Act also permits consecutive safety orders and MSOs to be implemented, thus prisoners can spend months or years in solitary confinement.⁷⁴ Further, there is no limit to the number of consecutive orders that can be made.⁷⁵

The *Corrective Services Regulation 2017 (Qld)* states that prisoners experiencing separate confinement must have access to reticulated water, and a toilet and shower facilities that, as far as practicable, are constructed to prevent interaction with other prisoners⁷⁶ Prisoners must be provided the opportunity to exercise in the fresh air, for at least two daylight hours a day, unless a doctor or nurse has advised that this would not be in the interests of the prisoner's health.⁷⁷ Mandatory review procedures apply in respect of safety orders and MSOs, such as health assessments by a doctor or nurse.⁷⁸ If the Chief Executive is aware of, or believes the prisoner has, a mental health condition or intellectual disability, they must inform a health practitioner before making an MSO, however, this notification has no legal effect.⁷⁹

The *Human Rights Act 2019 (Qld)* also has implications for the use of solitary confinement within Queensland. This is particularly relevant through the following rights:

⁷⁰ *Corrective Services Act 2006* (QLD).

⁷¹ *Ibid.*, s 118.

⁷² *Ibid.*, s 121(2).

⁷³ Prisoners Legal Service, The University of Queensland, Legal perspectives on solitary confinement in Queensland (2020) 15.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*, 17.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*, 18.

- Humane treatment when deprived of liberty (s 30(1)).
- Protection from torture and cruel, inhuman and degrading treatments (s 29(1)).
- Right to life (s 16) and liberty and security of persons (s 29(1)).
- Right to privacy and reputation (s 25(a)).

The University of Queensland, *Legal perspectives on solitary confinement in Queensland* (2020)

This report details the results of a two-year research project by the University of Queensland and the Prisoners' Legal Service, providing empirical research pertaining to the experience of prisoners held in solitary confinement, as well as including a review of case law regarding the use of solitary confinement in Queensland.

Findings:

- While the term 'solitary confinement' is not used in Australian legislation, many detainees are subjected to conditions comparable to a UN definition of the practice. In fact 'separate confinement' is the standard approach to managing prisoners' behavioural and mental health issues in Queensland. This situation remains largely unchecked due to inadequate legislative and procedural safeguards.⁸⁰
- The report details the traumatic lived experiences of prisoners in Queensland, including prisoners with serious mental health problems placed in solitary confinement for 'behaviour they can't really control'; prisoners routinely self-harming and obsessive-compulsive behaviours as a 'coping strategy'; and prisoners often becoming hypersensitive to noise, afraid of being in open spaces, and experiencing extreme sensory deprivation.⁸¹
- They argue there are a myriad of alternatives to solitary confinement that can address relevant safety concerns. International best practice demonstrates that there are alternative behaviour management strategies and the establishment of specialist mental health units that remove the need to employ solitary confinement practices.⁸²
- Further, in the exceptional situation where solitary confinement is necessary, conditions can be improved e.g. providing in-cell exercise and education programs, or increasing technology accessibility to simulate outdoor experiences.⁸³

⁸⁰ The University of Queensland, *Legal perspectives on solitary confinement in Queensland* (2020) 6.

⁸¹ *Ibid* 7.

⁸² *Ibid* 7.

⁸³ *Ibid.*, 7.

The report recommends that Queensland Corrective Services eliminate the use of practices amounting to solitary confinement and that it immediately commences meaningful engagement with relevant non-government organisations about solitary confinement reform. It also recommends an amendment to Corrective Services Act 2006 (Qld), ensuring that prisoners receive a comprehensive mental health evaluation by an external mental health professional within 24 hours of a decision to separate them from the general prison population; mandate that no prisoner be held in solitary confinement within 60 days of their release date; and require that correctional authorities apply to a court for authority to separate a prisoner from the general prison population for more than 48 hours.⁸⁴

South Australia

Solitary confinement in South Australia is governed by the *Correctional Services Act 1982* (SA). Here, CE may direct a prisoner be kept separately,⁸⁵ but the direction must not exceed 30 days.⁸⁶

Tasmania

Under the *Corrections Regulations 2018* (Tas) a director may order that a detainee be subject to separate confinement.⁸⁷

Victoria

For Adult inmates, the relevant legislation in Victoria is the *Corrections Regulations Act 2009* (Vic). Here, the Secretary may order the separation of a prisoner from other prisoners,⁸⁸ but the time of confinement must be no longer than necessary.⁸⁹ Further, it stipulates that solitary confinement may not be used for children as a disciplinary measure,⁹⁰ and cannot be used if it would exacerbate a prisoner's mental or physical disabilities.⁹¹ In April 2019, an amendment

⁸⁴ Ibid., 8.

⁸⁵ *Correctional Services Act 1982* (SA) s 36(2).

⁸⁶ Ibid., s 36(3).

⁸⁷ *Corrections Regulations 2018* (Tas) s 8(1)(a).

⁸⁸ *Corrections Regulations 2009* (Vic) s 27(1).

⁸⁹ Ibid., s 27(2).

⁹⁰ Ibid., s 53(4)(c) and s 50(5)(b).

⁹¹ Ibid., s 32(5)(a)

was made to the Act allowing for the indefinite solitary confinement of all prisoners 'for the management, good order or security of the prison'.⁹²

Additionally, the *Children, Youth and Families Act 2005* (Vic) provides that a child or young person may only be isolated at a youth justice centre if all other reasonable steps have been taken to prevent the child or young person from harming themselves, any other person, or from damaging property.⁹³ During the time of isolation, a child or young person must be closely supervised and observed at intervals of no longer than 15 minutes.⁹⁴

Western Australia

Under the *Prisons Act 1981* (WA), the chief executive officer may order the **separate confinement** of a prisoner for a period not exceeding 30 days.⁹⁵ Where a minor prison offence is determined by a superintendent, they may impose confinement in the prisoner's sleeping quarters for not more than 72 hrs.⁹⁶ Where a minor prison offence is determined by a visiting justice, they may impose separate confinement in a punishment cell for a period not exceeding 7 days, and/or confinement to the prisoner's sleeping quarters for a period not exceeding 7 days, and/or separate confinement in a punishment cell for specific hours during a weekend or two weekends.⁹⁷ A court of summary jurisdiction that convicts a prisoner of an aggravated prison offence may impose separate confinement in a punishment cell for a period not exceeding 28 days.⁹⁸ A prisoner undergoing this punishment shall spend 48 hrs out of the punishment cell after each period of 7 days in separate confinement.⁹⁹ This policy is currently under review two Indigenous men were held in solitary confinement for 2 months consecutively.

Solitary Confinement Internationally

Courts in New Zealand, America, Canada, the United Kingdom and the European Court of Human Rights have held that solitary confinement conditions engage and may breach human rights. These include the right to humane treatment when deprived of liberty, the right to be free

⁹² Victorian Ombudsman, *OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people* (2019) 100.

⁹³ *Children, Youth and Families Act 2005* (Vic) s 488(2).

⁹⁴ *Ibid.*, s 488(5).

⁹⁵ *Prisons Act 1981* (WA) s 43(1).

⁹⁶ *Ibid.*, s 77(1)(e).

⁹⁷ *Ibid.*, s 78(1).

⁹⁸ *Ibid.*, s 79(1)(a)(iii)

⁹⁹ *Ibid.*

from cruel, inhuman and degrading treatment, the right to life, liberty and security of person, and the right to be free from arbitrary interference with one's family.¹⁰⁰ The European Court of Human Rights claims 'complete sensory isolation, coupled with total social isolation, can destroy the personality and constitutes a form of inhuman treatment'.¹⁰¹

In America, *Ashker v Brown*¹⁰² prohibited solitary confinement for indefinite terms and prohibits the use of "gang affiliation" as a reason to place someone in isolation. New Jersey also recently passed a law that restricts the use of 'isolated confinement' to no more than twenty days, and only for people between the ages of 21 and 65.¹⁰³ It also bans its use for inmates who are pregnant, postpartum, LGBTQIA+ or deemed to have a serious medical or psychological condition.¹⁰⁴ The law, which applies to both prisons and jails, also directs the prison system to provide recreational and rehabilitative interventions during the short time when people in solitary are allowed out of their cells.¹⁰⁵ Further, in 2019, Nebraska also passed a similar law to restrict the use of solitary for vulnerable populations, including minors in adult prisons.¹⁰⁶ Now, activists are campaigning to end solitary confinement in juvenile detention, where youth of colour are heavily overrepresented. This is evident through Scout Richters, legal and policy counsel for American Civil Liberties Union, Nebraska, saying that 'young Nebraskans in the juvenile justice system need education, treatment and rehabilitation'.¹⁰⁷

Canada reviewed its practice of solitary confinement as it breached the *Canadian Charter of Rights and Freedoms*. New legislation, introduced in 2019, called for Structured Intervention Units (SIUs) to replace solitary confinement in Canadian prisons, and provide further protections for prisoners with mental illness. This focuses on mental health assessments and appropriate treatment rather than punitive measures.¹⁰⁸ In the case of the *British Columbia Civil Liberties Association v Canada (Attorney-General)*,¹⁰⁹ Fitch J concluded there is a sufficient causal connection between segregation and risk of self-harm.¹¹⁰ Legal criticism of the potential psychological and physical harm caused by social deprivation suggests institutions ought to

¹⁰⁰ The University of Queensland, *Legal perspectives on solitary confinement in Queensland* (2020) 61.

¹⁰¹ Ireland v. The United Kingdom (1997) ECtHR 5310, [71].

¹⁰² *Ashker v Brown* (2015) N.D. Cal.

¹⁰³ Michelle Chen, 'The Growing Fight Against Solitary Confinement', (2020) *The Progressive*.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ [2018] BCSC 62.

¹¹⁰ Prisoners Legal Service (n 107) 41.

provide important standards of care expected for prisoners. Such an argument calls for a critical review of how solitary confinement affects existing mentally-ill inmates. The right to humane treatment in detention instils a standard of care and safety provided by institutions, and social deprivation would infringe such rights.

The European Court of Human Rights (ECHR) has stated that solitary confinement ‘can destroy personality and constitute a form of inhuman treatment which cannot be justified by the requirements of security or any other reason.’¹¹¹ ECHR has emphasised that certain procedural safeguards need to be in place during solitary confinement such as monitoring a prisoner’s physical well-being and having access to judicial review.¹¹² ECHR suggests that the level of isolation experienced by an individual is essential to its assessment of whether it constitutes torture or cruel, inhuman or degrading treatment or punishment.¹¹³ The Court suggests that absolute prohibition from outside visitors causes suffering “exceeding the unavoidable level inherent in detention”.¹¹⁴ However, detention where a prisoner can still receive and write letters, use television, books and newspapers, have regular contact with prison staff, or communicate with lawyers regularly, only represents partial isolation, which does not violate part 3 of the European Convention on Human Rights.¹¹⁵ The Court has also emphasised that solitary confinement, even when only partial, cannot be imposed indefinitely.¹¹⁶

The Istanbul Statement on the Use and Effects of Solitary Confinement states that ‘as a general principle solitary confinement should only be used in very exceptional cases, for as short a time as possible and only as a last resort.’¹¹⁷ This aligns with other international bodies and emphasises the evidence of psychological and physiological effects of solitary confinement, that occur within only a few days.

¹¹¹ *Ilaşcu and others v Moldova and Russia* (2004). Application No. 48787/00, Eur Court HR [432].

¹¹² Juan Mendez, Special Rapporteur, *Torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/66/258 (5 August 2011) [35].

¹¹³ *Ibid* [36].

¹¹⁴ *Ibid*.

¹¹⁵ *Ibid*.

¹¹⁶ *Ibid*.

¹¹⁷ Prisoners Legal Service, The University of Queensland, *Legal perspectives on solitary confinement in Queensland* (2020) 10.

Health Impacts of Solitary Confinement

An overwhelming body of evidence shows that solitary confinement inflicts extensive and often permanent physiological, neurological and physical damage. Electroencephalography (EEG) studies - which examine electrical activity in the brain - have found that experiences of prolonged social isolation produce the same impairments as would be found in victims of violent head trauma.¹¹⁸

Physical Health Impacts

The link between poor mental health and poor physical health as a result of solitary confinement has been made apparent in recent studies. A concept known as 'somatization' describes the expression of psychological distress through physical or somatic symptoms of illness. Thus, prisoners experiencing distress while in solitary confinement are at a markedly increased risk for physical illnesses as well.¹¹⁹

During solitary confinement, prisoners spend excruciatingly long periods in one room, with no access to larger spaces to stretch and exercise. Evidence demonstrates an exacerbation of musculoskeletal disorders when in solitary confinement. Certain pre-existing musculoskeletal conditions, such as arthritis and bursitis, have been shown to worsen during time in solitary confinement.¹²⁰ Commonly cited musculoskeletal issues in prisoners muscle atrophy, intervertebral disc bulging, and various levels of muscle pain. These ailments are common and are often worsened by the lack of proper medical care given to prisoners in solitary confinement.¹²¹

Specific symptoms and illnesses can appear as a result of solitary confinement, particularly the deprivation of certain basic necessities and proper conditions. Poor air quality and lack of natural light exposure can be a cause of certain skin conditions, such as seborrhoeic dermatitis, fungal skin infections, and complications from vitamin D deficiency.¹²² Again, many of these conditions remain untreated in solitary confinement, in part due to the lack of medical care

¹¹⁸ Atul Gawande, 'Hellhole: The United States holds tens of thousands of inmates in long-term solitary confinement. Is this torture?', (2009) *The New Yorker*.

¹¹⁹ Justin Strong et al, 'The body in isolation: The physical health impacts of incarceration in solitary confinement' (2020) 15(10) *PLOS ONE* 1.

¹²⁰ *Ibid.*, 3.

¹²¹ *Ibid.*

¹²² *Ibid.*

provided. Increased feelings of stress and hopelessness attributable to the absence of proper medical care are observable, and this cycle can ultimately result in further cardiovascular sequelae as a result of the stress. Cases of hypertension, cardiac arrhythmias and other serious cardiovascular complications can occur as a result.¹²³

Mental Health Effects

Solitary confinement can severely and permanently damage the mental health of individuals without any prior history of mental illness, as well as severely exacerbating existing mental illnesses of those subject to confinement. It must be noted that solitary confinement alone, even if there is no physical brutality or unhygienic conditions, can produce “emotional damage, declines in mental functioning, and even the most extreme of psychopathology such as depersonalisation, hallucination and delusions”.¹²⁴

Prisoners in solitary confinement experience profound social and sensory isolation.¹²⁵ It has long been understood in relevant literature and studies that placement in solitary confinement, even if only for a few days, can result in serious physiological harm.¹²⁶ While the effects of solitary confinement differ among individuals, all will experience difficulty in thinking and concentration, obsessional thinking, agitation, irritability and difficulty tolerating external stimuli.¹²⁷

Following the creation of the ‘penitentiary system’ in the United States in the earlier nineteenth century, a major body of clinical literature has developed, which has documented the regularity of psychiatry disturbances created by the stringent conditions of confinement.¹²⁸ These psychiatric disturbances often present as an agitated confusional state, and in severe cases as a florid delirium, “characterised by severe confusional, paranoid, and hallucinatory features, and also by intense agitation and random, impulsive, often self-directed violence.”¹²⁹ Such distress is frequently observed in individuals with no prior history of mental illness, and in the case of an

¹²³ Justin Strong et al, ‘The body in isolation: The physical health impacts of incarceration in solitary confinement’ (2020) 15(10) PLOS ONE 11.

¹²⁴ Thomas Benjamin and Kenneth Lux, ‘Solitary Confinement as punishment’ (1977) 13 *California Western Review* 265, 268.

¹²⁵ Prisoners Legal Service, The University of Queensland, *Legal perspectives on solitary confinement in Queensland* (2020)

¹²⁶ Stuart Grassian, ‘Psychiatric Effects of Solitary Confinement,’ (2006) 22 *Washington University Journal of Law & Policy* 328.

¹²⁷ Prisoners Legal Service, The University of Queensland, *Legal perspectives on solitary confinement in Queensland* (2020) 10.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

existing condition, result in a severe exacerbation of their illness.¹³⁰ Further, even in instances where overt psychiatric illness does not develop, such a confinement still imposes significant psychological pain during the period of isolation and significantly impacts the prisoner's capacity to successfully matriculate into the broader prison environment.¹³¹ The extreme level of social and sensory deprivation has significant impacts on prisoners' mental health due to the constant loneliness and lack of stimulation. This can often lead to hypersensitivity to noise, a fear of open spaces and a reluctance to reintegrate. Stuart Grassian, a Harvard psychiatrist, described many prisoners in solitary confinement as "the most severely psychotic people I have seen in my entire 25 years of psychiatric practice".¹³²

Such findings are echoed in the *Legal perspectives on solitary confinement in Queensland* (2020) report by the Prisoners Legal Service. Reporting the lived experiences of prisoners, it found:

- That prisoners with serious mental health problems were being placed in solitary confinement 'for behaviour they can't really control'.¹³³
- That prisoners were 'doing things with their faeces', routinely self-harming, and engaging in obsessive-compulsive behaviour as a 'coping strategy'.¹³⁴
- That prisoners in solitary confinement often become hypersensitive to noise, afraid of open spaces, and reluctant to be released from isolation.¹³⁵
- That prisoners experience profound loneliness, boredom, and extreme sensory deprivation, including their complete removal from grass, air and colour.¹³⁶

The adverse effects that result from solitary confinement occur within seven days but could be irreversible, particularly after prolonged periods. While some acute mental health symptoms will be alleviated upon release from solitary confinement, some prisoners do experience permanent harm caused by confinement.¹³⁷ An example of this is a prisoner at Woodhill Close Supervision Centre whose mental health deteriorated while in confinement, leading him to cut off his ears

¹³⁰ Ibid, 329.

¹³¹ Ibid.

¹³² Andrew Gumbal, 'The Scorched Earth Solution: Solitary Confinement in America', (2013) *Los Angeles Review of Books*.

¹³³ Prisoners Legal Service, The University of Queensland, *Legal perspectives on solitary confinement in Queensland* (2020) 7.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid., 10.

with a prison issued razor, despite being prescribed antipsychotic, anti-depression and anti-anxiety drugs to help him cope with the pressures of confinement.¹³⁸

Furthermore, prison community safety is undermined by the significant mental health consequences of solitary confinement. Heightened disordered and anti-social behaviour due to solitary confinement increases the difficulty of reintegration to the wider prison population and the community upon release.¹³⁹ The solitary confinement population experiences higher rates of homicide, suicide, and drug abuse, as well as high rates of recidivism after being released into the community.¹⁴⁰ Solitary confinement does not provide prisoners with the treatment or skills they need to live as productive citizens.¹⁴¹

Ultimately, solitary confinement is not a humane or effective method of rehabilitation and exacerbates behavioural or mental health issues rather than addressing them.

Vulnerable prisoners

It is widely documented and acknowledged that solitary confinement has especially harmful impacts on prisoners with an existing mental illness. However, it is crucial to highlight that other prisoners are particularly vulnerable to the negative consequences of solitary confinement. These include prisoners with cognitive impairment, Indigenous prisoners, LGBTQI+ prisoners, and women.¹⁴² Evidence from Queensland, Western Australia and international data reveals that these groups are more likely to experience solitary confinement.¹⁴³ The correctional system was designed for them, and solitary confinement regimes function as an extension of this architecture, therefore failing to respond to the biological differences of women and special needs of other groups. It has been found that women are more likely to develop mental illness in solitary confinement, and are at greater risk of self-harm, suicide and abuse from prison guards compared to the general prison population.¹⁴⁴ Research revealed that Indigenous prisoners appear to be 'affected more' by solitary confinement as they experience the disconnect more strongly and are affected more by their removal from nature.¹⁴⁵

¹³⁸ Kevin Thakrar, 'What is the Impact of segregation and solitary confinement on prisoners?'

¹³⁹ Prisoners Legal Service (n 23) 10.

¹⁴⁰ Michelle Chen, 'The Growing Fight Against Solitary Confinement', (2020) *The Progressive*.

¹⁴¹ Prisoners Legal Service, The University of Queensland, Legal perspectives on solitary confinement in Queensland (2020) 50.

¹⁴² *Ibid.*, 13.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*, 46.

A wealth of research particularly highlights the vulnerability of young people to the adverse mental health effects associated with solitary confinement. Children and young people are still developing mentally, physically, neurologically, and socially. As such, depriving them of this development has profound long-term impacts on their mental health, according to the Royal College of Paediatrics and Child Health. Subjecting young people and children to the isolation that is associated with solitary confinement during critical stages of development exposes them to serious risks of long-term psychiatric and developmental harm.¹⁴⁶ This vulnerability is being exacerbated when in solitary confinement heightening the risks of depression, anxiety, psychological trauma or cognitive-developmental issues, as the experience is likely to be significantly more traumatic and damaging.¹⁴⁷ The College recommends that “the use of solitary confinement on children and young people in the youth justice system is abolished and prohibited”.¹⁴⁸

COVID-19

As a result of the recent COVID-19 pandemic, it is a common response from prison institutions to institute widespread solitary confinement to control the spread from incoming prisoners. Utilising widespread solitary confinement for all prisoners in response to COVID-19 is inhumane, and is a substantial violation of the United Nations Convention Against Torture¹⁴⁹ (as described below).

This strategy has several drawbacks on face value. Instituting prison-wide solitary confinement prevents access to rehabilitation services, family visits and prisoner socialisation. This, in turn, creates an increased risk of mental health issues and may increase the risk of violence in the inmate population. Institution of this practice is cruel, unusual and outdated, and social distancing measures that do not involve solitary confinement must be discussed and implemented to prevent the spread.

¹⁴⁶ Stuart Grassian, ‘Psychological Effects of Solitary Confinement’ (1983) 140 *American Journal of Psychiatry* 332;

¹⁴⁷ Sharon Shalev, ‘Solitary Confinement is No Place for Children’ (6 February 2019) *Probono Australia* .

¹⁴⁸ *Ibid.*

¹⁴⁹ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability¹⁵⁰ has expressed their concern for prisoners with disabilities and the possible response of prisons to COVID-19. This is an issue of utmost concern, as isolation conditions may cause extreme levels of neglect and exploitation of those with special needs within the prison system. Individuals with cognitive disabilities also may find it difficult to understand why they are being placed in solitary confinement, and this may lead to mental health complications. If prisons take action to place all inmates in solitary confinement, even inmates with disabilities, this would be in breach of the Standard Minimum Rules for the Treatment of Prisoners, which indicates that solitary confinement must not be imposed on prisoners with mental or physical disabilities if their condition would be exacerbated as a result.¹⁵¹

International Opposition to Solitary Confinement

UN bodies have concluded that solitary confinement should only be used in very exceptional cases, for as short a time as possible and only as a last resort, and that solitary confinement for more than 15 days at a time should be prohibited.

In 2006 five United Nations experts warned that prolonged solitary confinement violates the rights of the detainees under the *International Covenant on Civil and Political Rights* ('*ICCPR*').¹⁵² It is not just the UN that has opposed the use of solitary confinement, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has warned the Council of Europe about the application of solitary confinement regimes and the harmful consequences on an individual's mental and physical health.¹⁵³ Further, in 2008, the UN Committee Against Torture expressed concern over prolonged isolation in Australia's supermax facilities.¹⁵⁴

¹⁵⁰ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Statement of Concern, March 2020).

¹⁵¹ United Nations Office on Drugs and Crime, *The United Nations Standard Minimum Rules for the Treatment of Prisoners*, GA Res 70/175, UN Doc A/RES/70/175 (8 January 2016, adopted 17 December 2015) rule 45 ('The Nelson Mandela Rules').

¹⁵² UN Commission on Human Rights, 'Report on the situation of detainees at Guantanamo Bay' para. 53.

¹⁵³ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *The CPT standards*, CPT/Inf/E (2002) 1- Rev. 2006, para. 56.

¹⁵⁴ Human Rights Law Resource Centre, *Australia's Compliance with the Convention against Torture Report to the UN Committee against Torture* April (2008) 15.

The UN has established standard minimum rules for the treatment of prisoners, known as the Mandela Rules. These rules suggest that solitary confinement be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only under authorisation by the relevant authority.¹⁵⁵ The following Mandela Rules are relevant to solitary confinement:

- Mandela Rule 43 states that in no circumstances should restrictions or disciplinary action amount to torture or other cruel, inhuman or degrading treatment or punishment. The rule prohibits indefinite solitary and prolonged solitary confinement.¹⁵⁶
- Mandela Rule 44 defines solitary confinement as the confinement of prisoners for 22 hrs or more a day without meaningful human contact.¹⁵⁷ It further defines prolonged solitary confinement as solitary confinement for a time period over of 15 consecutive days.¹⁵⁸
- Mandela Rule 58 states that imprisonment should be 'used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life.'¹⁵⁹ Solitary confinement contradicts this goal and does not foster rehabilitation or reintegration.

Alternatives and Reform to Solitary Confinement

A wide body of literature and international best practice reveal effective alternatives to solitary confinement as well as how to reintegrate prisoners who have been subject to prolonged periods of solitary confinement. Adopting alternatives to solitary confinement will limit the mental and physical consequences from this practice.

Alternative Management Approaches

Research has recognised the need for more preventative steps to be taken before Solitary Confinement becomes an option. Chen¹⁶⁰ recommends that more staff need to be trained in humane de-escalation methods to reduce instances of Solitary confinement becoming an option for punishment. If the staff can anticipate and then de-escalate a situation which may lead to

¹⁵⁵ Ibid rule 45.

¹⁵⁶ United Nations Standard Minimum Rules for the Treatment of Prisoners (The Mandela Rules), GA Res 2015/20 UN ESC Res, 3rd Comm, 70th sess, Agenda item 106. UN Doc A/C.3/70/L.3 rule 43.

¹⁵⁷ Ibid., rule 44.

¹⁵⁸ Ibid.

¹⁵⁹ Prisoners Legal Service, The University of Queensland, Legal perspectives on solitary confinement in Queensland (2020) 11.

¹⁶⁰ Michelle Chen, 'The Growing Fight Against Solitary Confinement', (2020) *The Progressive*.

solitary confinement, both the prisoners and guard will be safer. There should also be an increase in mental health staff on-site so that when de-escalation instances occur, prisoners can talk to a professional about what may have spurred on the problem and gain useful tips in avoiding it from happening again.

The University of Queensland, Australia, has also recommended that the USA's strategy of Positive Behaviour Management System be reviewed as a potential solution to solitary confinement for young prisoners¹⁶¹. In this method, juvenile offenders are rewarded for good behaviour, while antisocial behaviour is penalised by taking privileges away as an alternative to using solitary confinement. Rather than just being a system of punishment, this method promotes good behaviour from inmates and rewards them accordingly, instead of solely using scare tactics to promote good behaviour.

De-escalation rooms are another useful preventative tool. De-escalation rooms provide a space for inmates to go if they are irritated or are showing signs of aggression. These rooms are set up to ensure the safety of the inmate and provide a calm atmosphere for them to get a hold of their emotions so that when they come out, they can cooperate with staff, return to the inmate population or undergo a mental health examination or therapy. The focus of these rooms is to provide a humane setting which supports stabilization and provides respite from otherwise harsh, dark and overcrowded prison spaces.¹⁶²

Finally, Immediate Accountability Resolution should be implemented in prisons to promote accountability for anti-social behaviour. Within this method, after an incident of misbehaviour occurs it is up to both correctional staff and the inmate involved to come up with an appropriate punishment (which does not include solitary confinement)¹⁶³. While accountability of behaviour is taken, the inmate is given agency in what their punishment should be. This means that a constructive punishment may be administered while that inmate remains in the general population of the prison.

¹⁶¹ Prisoners Legal Service, The University of Queensland, Legal perspectives on solitary confinement in Queensland (2020) 72.

¹⁶² Laura Maiello-Reidy & Marayca López, 'Prisons and the mentally ill: why design matters', (2017), <<https://www.penalreform.org/blog/prisons-and-the-mentally-ill-why-design-matters/>>, accessed 20 November 2020.

¹⁶³ Prisoners Legal Service, The University of Queensland, Legal perspectives on solitary confinement in Queensland (2020) 72.

Social Response to Safety issues

Prisoners have the right and entitlement to safety inside prison according to the United Nation's pocketbook for International Human Rights Standards for Prison Officials.¹⁶⁴ However, solitary confinement according to legislation cannot be used as a punishment for a breach of safety. To maintain safety within a prison social response is integral. Open discussions with individuals will allow a greater understanding of the dynamics that are occurring in the centre, as well as allow inmates to have their concerns acknowledged. Issues of tension should be treated with an agreement on behaviour and a plan for behavioural change. This could be helped by the use of family and personal support to incite behavioural changes. Social responses could include peer mentoring and encouragement through support staff that are trained to help in this area. Social responses allow for a holistic approach for the prisoner to engage and change, rather than be isolated and allows for a rapid reintegration into the prison community. This alternative process is supported by therapeutic housing.

Therapeutic housing as an alternative

'Therapeutic housing' could be implemented as an alternative to segregation or solitary confinement. A 'therapeutic housing' model is a social arrangement, which allows prisoners to live within small communities with the intention to learn new behaviours. This provides prisoners with increased responsibility as well as out-of-cell time, educational and employment opportunities.¹⁶⁵ The housing focus on rehabilitation and ongoing mental health treatment, such as access to psychiatrists and psychologists. These areas are supplemented with high levels of support, supervision and care. Staff providing supervision, support and care are highly trained. They have training in regards to suicide awareness, risk assessment and psychiatric screening, with regular mental health assessments by internal and external medical staff.¹⁶⁶

Moreover, therapeutic housing provides coordinated therapeutic activities including psychotherapy, education programs, and art therapy with the aim to increase interaction among prisoners and prepare them for successful reintegration into the prison population and wider community upon release. This model was taken from the Barlinnie Special Unit experiment, where it was found that placing prisoners into an environment designed for rehabilitation

¹⁶⁴ Office of the United Nations High Commissioner for Human Rights, 'HUMAN RIGHTS AND PRISONS A Pocketbook of International Human Rights Standards for Prison Officials' (2005) 8.

¹⁶⁵ Prisoners Legal Service, The University of Queensland, Legal perspectives on solitary confinement in Queensland (2020) 8, 73.

¹⁶⁶ *Ibid.*

resulted in a reduction in the levels of assaulting and disruptive behaviour.¹⁶⁷ The difference in this form of housing is that the prisoners were given autonomy, upon entry into the unit, the prisoners gain a responsibility to form their daily routine, together with others and the running of the community.¹⁶⁸ The Special Unit was a personal problem-oriented unit to provide support and allow expressiveness.¹⁶⁹ Barlinnie was at the forefront of rehabilitation based approaches.

New South Wales implemented a similar approach in the 1980s in Long Bay Gaol. The Special Care Unit was a 20-bed self-contained unit within the NSW Department of Corrective Services.¹⁷⁰ The unit was designed to assist inmates with behavioural and psychological problems and to adapt to the prison environment, with the long-term goal of facilitation of rehabilitation into society.¹⁷¹ The benefits appeared to derive from the environment that was unique to the Special Care Unit in comparison to the main prison system. This included the Special Care Unit having a high degree of mixed staffing and better conditions, such as more visits and phone calls, as well as the opportunity to wear their clothes.¹⁷² The program was seen as a success but was not continued. It was challenged on the basis of being too expensive, and was also seen as too different to corrective services normal behaviour.

Legal Reform

Currently, the law in all Australian states and territories allows for solitary confinement. Legal reform needs to be undertaken to combat the negative mental and physical effects of solitary confinement. Australia should follow Norway's lead by abolishing punitive solitary confinement. This has already been suggested by Prisoner Legal Services to the Queensland Government.¹⁷³ Solitary confinement should not be used to punish detainees, as the effects of confinement are far more detrimental to the detainee. Solitary confinement should also not be used for prisoners with mental illnesses as confinement exacerbates these illnesses. A compulsory mental health evaluation by an external mental health professional within 24 hours of a decision for solitary confinement can help to reduce exacerbated mental health issues.

¹⁶⁷ David Cooke, 'Containing Violent Prisoners- An Analysis of Barlinnie Special Unit' *British Journal of Criminology* (1989) 29(2) 129, 139.

¹⁶⁸ *Ibid.*, 140.

¹⁶⁹ *Ibid.*

¹⁷⁰ Don Porritt et al., NSW Department of Corrective Services, 'Evaluation of the Special Care Unit' (1988) 5.

¹⁷¹ *Ibid.*, 7.

¹⁷² *Ibid.*, 26.

¹⁷³ Prisoners Legal Service, The University of Queensland, Legal perspectives on solitary confinement in Queensland (2020).

Concrete restrictions must be implemented to govern the amount of time a prisoner can be held in solitary confinement. Decisions to place an individual in solitary confinement should be subject to judicial review to be able to challenge the administrative decisions. This is a right of detainees. A judge should be the one to determine whether these conditions have been met.¹⁷⁴ This is important in ensuring that the criteria for holding a person in solitary confinement is strictly applied. It is not to be taken lightly. The effects of solitary confinement are extremely serious on the mental and physical health of detainees.

Solitary confinement affects a prisoner's reintegration into society and therefore, a mandate should be implemented. This mandate should prevent a prisoner from being held in solitary confinement within 60 days of their release date.¹⁷⁵ Domestic legislation should reflect Australia obligations under international human rights treaties. This is extremely important in reflecting Australia's commitment to international obligations for the protection of human rights.

Reintegration of Prisoners

Australia needs to strengthen and direction reintegration programs towards reducing stresses that lead to violent or disruptive behaviour.¹⁷⁶ Prisoners who have experienced solitary confinement must have more contact with people, particularly when moving back into the general prison system. Emphasis should also be put on therapeutic interventions.

It is also recommended that Australia implement 'step-down' programs for prisoners. 'Step-down' programs are for prisoners who have experienced prolonged solitary confinement. They encompass reintegrative stages which allow prisoners to demonstrate good conduct and adjustment. The 'step-down' program includes mental health, case management and security practitioners.¹⁷⁷ Increased social interactions and legal visits are encouraged as well as access to privileges earned by prisoners and increased out-of-cell time. US trials reveal positive results in terms of decreased rates of violence and recidivism and integration back into the community.¹⁷⁸

¹⁷⁴ Ibid., 48.

¹⁷⁵ Ibid., 8.

¹⁷⁶ Michelle Chen, 'The Growing Fight Against Solitary Confinement', (2020) *The Progressive*.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

Improving Conditions Within Solitary Confinement

Where solitary confinement is an absolute necessity, in exceptional circumstances only after all therapeutic alternatives have been attempted, several steps can be taken to reduce the negative consequences of solitary confinement. These include:

- Establishing clear and consistent criteria for isolation, as well as an appropriate procedure for appeal¹⁷⁹
- Account for prisoners' vulnerability when deciding whether separation is appropriate¹⁸⁰
- Increasing the number of meaningful conversations that prisoners take part in and the range of activities available for prisoners¹⁸¹
- Improve in-cell education, exercise and work opportunities¹⁸²
- Increase access to audiobooks, music and audio-programs, with the potential for outdoor simulations.¹⁸³ Studies reveal the role of nature simulations on technology in reducing violent offences.
- Prisoners should be monitored daily by medical staff and reviewed by external health care professionals, with a particular emphasis on mental health examination and care¹⁸⁴
- Prisoners demonstrating serious psychiatric symptoms should be transferred to secure mental health units without delay¹⁸⁵
- Prisoners should be permitted to inform their friends, family and lawyers of their placement in solitary confinement within 18 hours¹⁸⁶
- Prisoners should be able to meet with lawyers under the same conditions as those in the regular prison population
- Constant monitoring of prisoners in solitary confinement

There should be a stronger focus upon criminal rehabilitation rather than retribution. Such is only possible through the better treatment of prisoners as imposing the measure of solitary

¹⁷⁹ Scarlet Kim, Taylor Pendergrass, Helen Zelon, 'Boxed In: The True Cost of Extreme Isolation in New York's Prisons', (2012) *New York Civil Liberties Union*, 49-50.

¹⁸⁰ Ibid.

¹⁸¹ Prisoners Legal Service, The University of Queensland, Legal perspectives on solitary confinement in Queensland (2020) 7.

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Ibid., 12.

¹⁸⁵ Ibid., 43.

¹⁸⁶ Ibid.

confinement has been described as a condition in which 'animals get treated better'¹⁸⁷.

Therefore, it is our recommendation that the Australian Government prohibit the use of solitary confinement and instead prescribe alternative tools for use.

¹⁸⁷ Ross, m., 2020. *'Animals Get Treated Better': Life In Solitary Confinement*. [online] Abc.net.au. Available at: <<https://www.abc.net.au/news/2018-09-11/life-in-solitary-confinement/10203686>> [Accessed 2 December 2020].

Appendix

Organisations and individuals working to end solitary confinement

Human Rights Law Centre

Email: admin@hrlc.org.au

Stuart Grassian, M.D.

Email: stgrassian@aol.com

Royal College of Pediatrics and Child Health

Email: health.policy@rcpch.ac.uk

Prisoners Legal Service

Ph: 02 8688 3888

Solitary Watch

Email: info@solitarywatch.com