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Solitary Confinement within Juvenile Detention Centres in Western Australia

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Abstract

This article examines the use of solitary confinement of juveniles within the Western Australian justice system. Examining the legal framework, it points to the issues of inadequate accountability and oversight. Often manifesting itself under different names such as regression or simply confinement, it still results in extended periods of social isolation, minimal environmental stimulation and minimal opportunity for social interaction.

The negative consequences of such confinement on children and young people are briefly examined before it is considered within the international human rights framework, specifically, in light of Australia's international obligations and their stated commitment to the Convention on the Rights of the Child, the Beijing Rules and Havana Guidelines.

Keywords

Convention on the Rights of the Child – solitary confinement – confinement – juveniles – detention – international obligations – Australia

Introduction

This article looks at the practice of separating juveniles within a detention centre, in order to detain them on their own and prohibit contact with other

detainees. To most, this practice is known as solitary confinement and many would question whether it should be used on those under 18 years of age. The practice is not referred to as solitary confinement in the Western Australian context; however it is routinely used in juvenile detention centres. This article examines the legal framework that makes this possible, and asks to what extent this practice breaches our international obligations.

As noted above, the term “solitary confinement” is not used in any West Australian legislation. However, segregation and isolation are used to control and at times punish, prisoners and juvenile detainees. In the Prisons Act 1981 (WA) and the Young Offenders Regulations 1995 (WA), this type of segregation is referred to as ‘separate confinement’ (Prisons Act 1981 (WA), s. 43) or simply ‘confinement’ (Young Offenders Regulations 1995 (WA), reg. 74). Confinement is not defined in either legislation; however, each set of legislation and corresponding regulations and rules provide procedures for how and when it may be used.

1 The Legal Framework for Juvenile Detainees

The main statute that governs the treatment of juvenile detainees in Western Australia is the Young Offenders Act 1994 (WA) (YOA), and its corresponding regulations: Young Offenders Regulations 1995 (WA) (YOR). In addition to the YOA and YOR, there are three other sets of rules that govern juvenile detainees. These are the Youth Custodial Rules (previously the Juvenile Custodial Rules), Standing Orders, and Operational Procedures (OICS, 2012). All of these rules derive their authority from the YOA and the YOR, and must be consistent with their objectives and general principles (Young Offenders Act 1994 (WA), ss.196 and 181).¹

The objectives and general principles are stated in sections 6 and 7 of the YOA. These sections recognise that juveniles in the justice system should be afforded higher levels of protection (Young Offenders Act 1994 (WA), ss. 6 and 7). They specifically recognise that juvenile offenders should be treated differently from adult offenders, and that juveniles require the consideration of specific matters that only affect children (Young Offenders Act 1994 (WA), s. 7). This was reiterated in the second reading speech for the YOA, when the then Attorney General stated that although the juvenile justice system has the same underlying objectives as the criminal justice system, the criminal justice system must

¹ If there is any inconsistency between a rule made by the CEO and the Regulations, the Regulations prevail.

be modified to accommodate the specific factors relevant to children; these include age and maturity; a recognition that much juvenile offending is transitory and minor; and that young offenders should not be given a greater punishment than an adult for a similar offence (Parliamentary Debates, 1994).

Finally, in addition to the legislation and the three sets of rules, there is a national set of model service standards for juvenile custodial facilities that embodies many of the international standards (AJJA, 1999). Although not binding,² the Western Australian Department of Corrective Services agrees that the management of juvenile detention centres should be consistent with the principles of these model standards (OICS, 2013b).

This three-layered system of laws, rules and standards govern the treatment of juveniles in juvenile detention centres, and in so doing, govern the use of solitary confinement.

2 Solitary Confinement (Legal Framework)

In the YOA and the YOR, there are specific sections dealing with confinement (Young Offenders Act 1994 (WA), s. 173, Young Offenders Regulations 1995 (WA), ss. 73–80). Under the YOA, there are two instances in which confinement may be used. First, it can be used as punishment for a detention offence; and secondly, it can be used on the basis that it is required for the ‘good government, good order or security’ of the detention centre.

2.1 *Confinement for a Detention Offence*

Confinement is one of the options open to the superintendent or visiting justice, when sentencing a detainee for committing a detention offence. This is a formal sanction imposed for a proven wrongdoing. Detention offences are listed under s. 170 of the YOA. Under this section, detention offences are broadly defined. Some offences partially overlap with criminal law, in areas such as assaults, property damage and disorderly or riotous behaviour. However, the majority involve misbehaviour of a disciplinary rather than a criminal nature, such as disobeying rules, using insulting or threatening language and acts of insubordination or misconduct which impact on the order and security of the detention centre.

If the detainee admits the charge that has been laid against them under s. 170 or the charge is proven, the superintendent has a variety of options in

² This is implemented by way of locally developed internal processes and followed by formal external accreditation.

dealing with the offence (Young Offenders Act 1994 (WA), s. 173(2)). One of these options is confining a detainee in their sleeping quarters or a designated room. They are able to confine the detainee for a period not exceeding 24 hours.³ The superintendent must record and maintain the order, and a written management regime must be created (Young Offenders Regulations 1995 (WA), reg. 77(2)). If the confinement is to take place in a designated room (not their sleeping quarters), the superintendent must assess the room to ensure that it is the appropriate size, and sufficiently ventilated and lit so that the detainee can be confined in that room without injury to health. Once the detainee is confined, they are subject to continuous monitoring for the first 30 minutes. They are also further entitled to 30 minutes of fresh air, exercise and staff contact every three hours (Young Offenders Regulations 1995 (WA), reg. 76). Under the Juvenile Custodial Rules, detainees are to be given adequate warm clothing, bedding and reading materials, and these items are only to be withdrawn if they are presenting a risk to the safety and wellbeing of the detainee (OICS, 2012, [4.23]).

2.2 *Confinement on the Basis of Good Government, Good Order or Security*

The superintendent can impose confinement on a detainee on the basis of ‘good government, good order or security of the [detention] centre.’⁴ This type of confinement does not appear in the YOA; however, the YOA does authorise the Superintendent to make regulations, ‘to order that a detainee be confined to the detainee’s sleeping quarters, or to a designated room ... to maintain good government, good order or security in a detention centre’(Young Offenders Act 1994 (WA), s. 196(2)(e)). The superintendent is able to manage disruptive behaviour other than by charging with a detention offence when the behaviour is considered disruptive to the safety of employees and detainees, and/or disruptive to the management of the detention centre, but does not warrant the laying of a detention offence (OICS, 2012, [4.7]). This is a less formal management option and under Juvenile Custodial Rule 209, good behaviour management practices must be exhausted prior to imposing a formal management option, such as a charge of a detention offence (OICS, 2012). There are different options open to the superintendent when managing this type of disruptive behaviour, and confinement is one of them. In imposing any type of sanction

3 If the charge is heard by a Visiting Justice, the detainee may be confined for up to 48 hours (ii).

4 A Visiting Justice may also impose confinement under this section, Young Offenders Regulations 1995 (WA), reg. 74(2).

under this section, the superintendent must take into account the nature of the conduct, the surrounding circumstances, the age of the detainee and the maturity and intellectual capacity of the detainee (OICS, 2012, [4.7]).

If confinement is imposed, the superintendent must make and maintain a record of the order to confine the detainee (Young Offenders Regulations 1995 (WA), reg. 79(1)). Moreover, they must inform the detainee of the reason for their confinement, however they only need to do so orally not in writing. Where the confinement is ordered to take place in a designated room, the room used must be assessed by the superintendent to be of an appropriate size and sufficiently ventilated and lit that the detainee can be confined in that room without injury to health (Young Offenders Regulations 1995 (WA), reg. 79(2)(3)). Unlike when confined under a detention offence, a detainee is only entitled to exercise for one hour every 6 hours when the confinement is 12 hours or longer. Under section 196 of the YOA, the superintendent is limited to confining a detainee for no more than 24 hours when doing so on this basis.

2.3 *Confinement under an Individual Regression Regime*

The final way in which confinement may be imposed on a detainee is under an Individual Regression Regime (“Regression”). Regression is the ‘last resort’ when managing persistent, difficult and disruptive behaviour (OICS, 2012). Regression does not appear in the YOA, the YOR or the Youth Custodial Rules. The primary legal basis for regression is Standing Order 9 and it states that regression is to be used as a ‘tool that is only utilised to manage serious incidents and ongoing poor or inappropriate behaviour’ (OICS, 2012, [5.36]). Regression provides a specific regime within which the behaviour of the individual detainee can be addressed and modified. It is an opportunity for detention centre staff to engage with the detainee to develop better coping mechanisms to improve their behaviour (OICS, 2012, [5.5]). Regression is a three-stage process and confinement forms part of the first two stages.

The broad parameters of the three stages are set out in Operational Procedure 3 (OICS, 2012, [5.13]). At stage one, the aim is to separate the detainee and allow them to settle and be assessed with a view to other potential interventions (OICS, 2012, [5.15]). This is the main confinement stage. The purpose of stage two is to provide an uncluttered, controlled and low stimulation setting within which staff can actively engage with detainees (OICS, 2012, [5.20]). In stage three, the detainee is expected to demonstrate their learning in an environment that is less controlled.

The shift manager has the authority conditionally to regress a detainee, subject to the approval of the Assistant Superintendent. The Standing Orders emphasise that the goal is developing a regime that is targeted to the needs of

the individual and that this regime be clearly documented, implemented and tracked (OICS, 2012, [5.8]).

3 Solitary Confinement (In Practice)

3.1 *Banksia Hill Juvenile Detention Centre*

There is only one juvenile detention and remand centre in Western Australia: Banksia Hill Juvenile Detention Centre. It is located in Canning Vale (20 kilometres south of the Perth central business district) and was opened in 1997. It is owned and run by the Department of Corrective Services (DCS). It was originally built to accommodate 120 male and female detainees between the ages of 10 and 18 years (OAGWA, 2013).

Between 2010 and 2012, Banksia Hill underwent a significant upgrade (“the redevelopment project”) and its capacity was increased and its function expanded. The redevelopment project amalgamated Rangeview Juvenile Remand Centre (“Rangeview”) and Banksia Hill into one detention centre, catering for both *remand* and *sentenced* male and female detainees from 10 to 18 years old (OAGWA, 2013). The capacity of Banksia Hill was increased by 85 per cent, from 120 beds to 222 beds, the same capacity of Banksia Hill and Rangeview combined (OAGWA, 2013). The redevelopment project was completed in September 2012, and from October 2012, all juvenile detainees in Western Australia, sentenced and unsentenced, were housed at Banksia Hill.

In January 2013, an incident at Banksia Hill resulted in extensive damage to the facility and the immediate transfer of about 100 detainees to a separate wing of the Hakea adult prison. Following on from this incident, which the Inspector of Custodial Services described as ‘predictable’ (OICS, 2015), there were further reforms of the Banksia Hill facility. These reforms included the creation of a security team with a greater focus on security procedures and intelligence gathering. In addition there was ‘significant expenditure’ on strengthening the physical infrastructure of the facility. (OICS, 2015)

Banksia Hill’s confinement cells are in the multi-purpose Harding Unit (“Harding”). Harding has four wings: A wing is the orientation wing for new detainees; B wing has the observation cells for at-risk detainees; C wing is the regression wing, and D wing has the cells for short-term accommodation for arrestees (OICS, 2013, Figure 1). Harding also includes multi-purpose cells for time-out or short-term confinement (OICS, 2015, [6.13]).

3.2 *Harding*

The cells that are used for confinement are generally the same whether the reason for confinement is for committing a detention offence, for the good order

and security of the detention centre or regression (stage one). The cell will generally be a multi-purpose cell in the Harding unit (OICS, 2015). Multi-purpose cells are sparsely furnished. They have a toilet, a sink and a concrete plinth. The cell is under constant camera surveillance and there is a communication device to the control area. A vinyl-covered mattress is generally supplied during the day, with sheets, blankets and pillow provided only at night (OICS, 2012, [4.23], [5.15]).

For confinement due to a detention offence, detainees are strip searched prior to placement in a cell. Belts, shoes and other items of clothing that might be injurious are removed, and clothing designated for use in the cells is worn (OICS, 2012, [4.23]). Contrary to s. 2.4 of Juvenile Custodial Rule 211, Appendix 1 to Juvenile Custodial Rule 210 suggests that the provision of reading material is purely discretionary (OICS, 2012). With regards to exercise, the Juvenile Custodial Rules contradict the YOR in setting a lesser requirement of one hour during the first 12 hours (excluding sleeping time) and one hour every 24 hours thereafter (OICS, 2012).

For confinement due to good order and security, there is no entitlement to reading materials and access to such materials is purely discretionary (OICS, 2012, [4.28]). When placed in confinement, detainees must be searched but, unlike those in detention offence confinement, the rules do not require strip-searching. Like detention offence confinement, Appendix One of Juvenile Custodial Rule 210 contradicts the YOR in setting a lesser requirement of exercise for detainees: one hour during the first 12 hours and then just one hour every 24 hours (OICS, 2012; Young Offenders Regulations 1995 (WA), reg. 79(4)). Finally, the YOR requires the superintendent to maintain a record of any order for confinement; however, unlike detention offence confinement, there is no need for a written management regime (Young Offenders Regulations 1995 (WA) reg 79(1)).

3.3 *Regression*

For confinement due to regression, Operational Procedure 3 states that detainees are allowed normal bedding but that this can be removed if they are non-compliant (OICS, 2012, [5.15]). Provided they meet behavioural expectations, detainees may have one phone call to one parent or caregiver, daily. Unlike detainees in detention offence confinement, those in regression are only entitled to two exercise periods of 30 minutes per day (OICS, 2012, [5.16]).

At stage one, detainees have no access to education activities, reading material, television or radio. However, letter-writing material may be made available. Operational Procedure 3 refers to the possibility of interaction between detainees if a number of them are under regression at the same time; however

in practice, stage one involves isolation, with the possibility of interaction only in stage two and three (OICS, 2012).

Harding D wing is the main location for stage two and three. The cells in D wing have a toilet but no showers. The environment remains sparse and, at least in the beginning of stage two, it is no different from stage one (OICS, 2012, [5.19]). Only basic personal items are allowed and exercise entitlements are the same as for stage one; that is, two exercise periods of 30 minutes per day. However, detainees have more access to positive activities as stage two progresses; for example, education once they have completed any allocated work. Moreover, although detainees have no television or radio access, they may earn radio privileges or access to newspapers during recreation and meals. Also reading materials are allowed in this stage and good behaviour may be rewarded with canteen access once a week. Finally, in stage three, detainees only sleep in D wing but participate in activities with mainstream detainees (OICS, 2012).

In regression, detainees can be rewarded by progress upwards through the stages, by demonstrating appropriate and compliant behaviour. However, they can also be regressed back to an earlier stage in the event of inadequate progress or poor behaviour (OICS, 2012, [5.13]).

3.3.1 Regression – Solitary Confinement

With confinement for a detention offence, the legislative requirements are firm, clear and readily accessible. The YOA provides very clear and detailed formal procedures, requirements as to proof, and limitations on the extent of punishment. With confinement for good order and security, the procedures are less clear and less accountable. Unlike with detention offence charges, there is no requirement to put the reason for the confinement in writing, the detainee does not get the reason in writing, and there is no hearing. Under this type of confinement, the detainee has less legal protections than when charged with a detention offence. However, there are still procedural requirements imposed and there is still a clear time limit on the time a detainee is in confinement. There is a clear understanding in the YOA and YOR, that if imposing confinement on a detainee, a child, it will only be under certain conditions and that a record has to be kept of such confinement.

Our own inquiries put to the Department of Corrective Services in the form of a request for all the records of such confinements have revealed that no such records exist. We asked for all records of confinement under s. 74 of the YOR, that is, for either a detention offence or for the good government, good order or security of the centre. The Department of Corrective services responded to our inquiry with the following assurance –

... have reviewed the Total Offender Management system for statistics on the outcome of punishment and no confinements were recorded ... have sought advice from the Director of Youth Custodial Services at Banksia Hill Detention Centre who advised that there are no relevant documents as it is not utilised as a management option.⁵

This is not the case for regression. First, regression is not in the YOA or the YOR. Under Standing Order 9, regression is a 'tool that is ... utilised to manage serious incidents and ongoing poor or inappropriate behaviour' (OICS, 2012, [5.7]). There is no specific criterion as to what amounts to a 'serious incident' or 'inappropriate behaviour.' It is not clear what triggers regression and how this is differentiated from a detention offence. As such, it is entirely at the discretion of the shift-manager and the assistant superintendent to regress a detainee.

Secondly, the length of confinement under regression is unregulated and so can be much longer than the 24-hour limitation imposed on the other two types of confinement. In an audit conducted in 2011 by the Office of the Inspector of Custodial Services, it was found that between January 2008 and March 2011, there were 498 detainees placed in stage one of regression (OICS, 2012, [5.26]–[5.29].) Of those 498, the total time spent in Harding B ranged from one hour to 14 days. The mean stay was just over two days. In more than half the cases (285 or 57 per cent), the stay was over 24 hours. In 73 cases (15 per cent) the stay exceeded 72 hours, and in 17 cases (3 per cent) it was over seven days. In the same audit, 241 detainees on regression had their initial stays at Harding B (initial confinement, settling, and assessment) analysed. It was found that over 50 per cent of detainees (127 or 52 per cent) were held for longer than 24 hours. 56 (22 per cent) were held longer than 48 hours and 21 (10 per cent) longer than 72 hours. Five (two per cent) were held longer than seven days. The mean was just under two days (OICS, 2012, [5.30]).

Finally, using regression as a tool to 'manage ... ongoing poor or inappropriate behaviour' blurs the boundaries between regression and punishment. In the same 2011 audit, it was found that detention centre staff had difficulty distinguishing between regression and punishment (OICS, 2012 [5.36]). On more than one occasion custodial officers saw regression as punishment (OICS, 2012 [5.11]). This blurring of the boundary is further exacerbated by regression often being triggered by incidents that could result in the charging of a detention offence and detainees being put in the same cells and under the same conditions as when confined for a detention offence.

5 This is in response to the authors' request received through FOI of Department of Corrective Services and dated 6 June 2014.

Possibly due to this lack of regulatory oversight, broad discretion, and use as punishment – regression is a common response to misbehaviour, more so than charging with a detention offence. As stated above, in the audit conducted in 2011, in the period from 1 January 2008 to 30 March 2011, there were 498 detainee placements into regression. During the 2010–2011 financial year, there were only 43 detention offence charges (OICS, 2012, [5.26]) and according to the Department none of these resulted in confinement (OICS, 2012, [4.42]).

3.3.2 Regression – International Law

The main component of regression is solitary confinement. Particularly in stage one, regression is characterised by the separation and isolation of the detainee. The aim is to separate and settle the detainee and this is achieved by segregating and confining. Detainees have no access to radio, television, or reading material, and they are excluded from educational programmes. The cell is very sparse and bedding is only provided at night if the detainee is compliant. Detainees are only entitled to contact the primary care-giver once a day, provided they meet behavioural expectations. They are only entitled to exercise for 30 minutes, twice a day, in a small outdoor space that is not unlike a cage (OICS, 2012). It is a very intrusive and restrictive regime and this is the salient issue with regression: it amounts to the use of solitary confinement with children. This alarming fact is further compounded by the much lower level of regulatory oversight that is imposed on this type of confinement, and the amount of discretion given to the shift manager.

So the question to be asked is: if regression is essentially solitary confinement and it is being used with juvenile detainees, frequently and with little regulatory oversight, how does this align Australia's international obligations?

4 International Law

4.1 *Solitary Confinement – Definition*

Isolation, segregation, separate confinement, or administrative segregation are all terms used to broadly describe a form of confinement where a prisoner or detainee is held alone in a cell from 22 to 24 hours a day, commonly with one hour of solitary exercise per day (The Istanbul Statement, 2007). There is no universally agreed upon definition of “solitary confinement” and the exact conditions vary from jurisdiction to jurisdiction (UN General Assembly, 2011). However, despite this variation, most solitary confinement regimes share a number of common elements.

First, it is important to understand that solitary confinement no longer requires complete and total isolation to be classed as solitary confinement. Complete and total isolation is not practised anywhere (Smith, 2006). This is due both to humanitarian reasons and practical reasons. Few isolation units have been able successfully to prevent all forms of interpersonal communication (Hanley, 2003). Detainees in solitary confinement have some form of regular and routine contact with staff, especially at meal times and when being taken to the exercise yard/cage. In addition, the physical layouts of most such units have adjoining cells connected by plumbing, heating vents and ventilation. These ducts typically allow for some minimal form of communication between prisoners. Solitary confinement is no longer about sensory deprivation but about individual social isolation and possibly perceptual deprivation.

SMITH, 2006

The United Nations' Special Rapporteur for Torture, Juan E. Mendez, stated that solitary confinement has three common characteristics – social isolation, minimal environmental stimulation and minimal opportunity for social interaction (UN General Assembly, 2011). Social isolation refers to the reduction of socially and psychologically meaningful contact (UN General Assembly, 2011). There is very little to no *social* interaction; no social interaction with other prisoners, religious chaplains, education or other treatment personnel. Rather, interaction is reduced to incidental contact with detention centre personnel during meal times and when being taken to the exercise yard (Conley, 2013). The individual is removed from the company of others and deprived of most forms of meaningful and sympathetic social interaction, as well as physical contact (Shalev, 2008). There is also a reduction in environmental stimulation. This reduction is not only quantitative but it is also qualitative. Work, education or other diversion such as reading material, radio or television is withheld or restricted. When work is allocated, it is often conducted inside the cell and is usually simple and monotonous, for example stuffing envelopes (Shalev, 2008). Finally, the available stimuli and the occasional social contacts are seldom freely chosen, are generally monotonous, and are not typically empathetic (UN General Assembly, 2011).

A fourth and additional element of solitary confinement was identified in the Solitary Confinement Handbook (Shalev, 2008). This was lack of control. There is a rigid regime and an exceptionally high level of control over all aspects of detainees' lives, and this leads to them rapidly losing the ability to assert autonomy and make decisions over their own lives (Shalev, 2008). This results in complete dependence on staff by detainees for all their basic needs.

Finally, solitary confinement may be imposed for a variety of reasons and still come under the definition of solitary confinement. It may be imposed on a prisoner as punishment, to manage a challenging prisoner or where a prisoner is deemed to be a threat to prison order or security, as part of the pre-trial process or for the prisoner's own protection, either at their request or at the discretion of the prison authorities (Shalev, 2008).

These four elements provide a broad definition of what constitutes solitary confinement. Conversely, without these four elements, it is likely that confinement will not be considered to be *solitary* confinement. For example, in the European Court of Human Rights, where a detainee can receive visitors and write letters (*Ocalan v. Turkey*, ECHR, 46221/99, 12 May 2005, 196), have access to television, books and newspapers and regular contact with prison staff (*Rohde v. Denmark* ECHR, 69332/01, 21 July 2005, 97) or visit with clergy or lawyers on a regular basis (*Ramirez Sanchez v. France*, ECHR, 59450/00, 4 July 2006, 105 and 135), isolation is "partial", and the minimum threshold of severity – which the European Court of Human Rights considers necessary to find a violation of the prohibition of torture and inhuman or degrading treatment or punishment – is not met (European Convention on Human Rights, 1953, art. 3). Nevertheless, the Court has emphasised that solitary confinement, even where the isolation is only partial, cannot be imposed on a prisoner indefinitely (*Ramirez Sanchez v. France*, ECHR, 59450/00, 4 July 2006, 145).

The importance of defining solitary confinement and identifying it as such lies in the international legal framework that applies to solitary confinement. Once deemed to be solitary confinement, a number of international instruments, international case law and customary law come into play.

4.2 *Solitary Confinement – Legal Framework*

There is unequivocal evidence that solitary confinement has a profound impact on the psychological and physical health and wellbeing of a detainee, particularly for those with pre-existing mental health disorders (Shalev, 2014 and Hanley, 2003, 130). As such, the use of solitary confinement can amount to torture and other cruel, inhuman and degrading treatment or punishment (UN General Assembly, 2011).

The extent of the psychological damage varies and will depend on individual factors, environmental factors, the regime imposed, the context of isolation and its duration (Shalev, 2014, 10). For this reason the assessment of whether solitary confinement amounts to torture and other cruel, inhuman or degrading treatment or punishment takes into consideration all relevant circumstances on a case-by-case basis (UN General Assembly, 2011). These circumstances include the purpose of the application of solitary confinement, the conditions,

length and effects of the treatment and, of course, the subjective conditions of each victim that make him or her more or less vulnerable to those effects.

Determining whether solitary confinement amounts to torture or cruel, inhuman or degrading treatment or punishment is important because there is a prohibition against it. This prohibition is considered customary international law (Conley, 2013, 426), which makes it an international obligation independent of the Human Rights covenants and treaties that a country may be signatory to. In the case of Australia, we are also a party to a number of treaties which explicitly prohibit torture or inhuman and cruel treatment. The International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture (CAT), and the Convention on the Rights of the Child (CRC) all expressly prohibit torture and other cruel, inhuman and degrading treatment or punishment.

In the ICCPR, Article 7 states that, '[n]o one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.' Under Article 10(1), '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.' In addition, Article 10(3) holds that '[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation'.

In the CAT, Article 16 (1) states that –

[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1 ... [i]n particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

Moreover, under Article 37 of the CRC:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.
- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances ...

In addition, the ICCPR, CAT and CRC are supplemented by international instruments. The United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR) and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules) are particularly relevant. The SMR were adopted by the Economic and Social Council in 1957 and the Havana Rules were adopted by resolution 45/113 in the General Assembly in 1990.

Both instruments deal in similar ways with the use of solitary confinement. They both limit it and require that the physical and mental health of the detainee not be harmed. Under rule 31 of the SMR, 'Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences.' In addition, under rule 32 (1), punishment by close confinement or reduction of diet is not to be inflicted unless the medical officer has examined the prisoner and certified in writing that he is fit to sustain it.

Under paragraph 67 of the Havana Rules, '[a]ll disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including ... solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned.' In its General Comment No. 10, the Committee on the Rights of the Child reiterated this Rule and linked it with the CRC by stating that –

[a]ny disciplinary measure must be consistent with upholding the inherent dignity of the juvenile and the fundamental objectives of institutional care; disciplinary measures in violation of article 37 of CRC must be strictly forbidden, including corporal punishment, placement in a dark cell, closed or solitary confinement, or any other punishment that may compromise the physical or mental health or well-being of the child concerned.

CRC, 2007

Although not directly binding, the SMR are widely accepted as the universal norm for the humane treatment of prisoners (UN General Assembly, 2011). The Havana Rules relate specifically to juveniles in detention and are considered

by the UN General Assembly to be the minimum standards for the treatment of juveniles deprived of their liberty. Whilst these instruments do not represent the only interpretation of international obligations, they do represent the most persuasive interpretation of what should be done to ensure compliance with the CRC, the ICCPR and the CAT (HREOC, 2004). They represent international consensus on what principles should govern the detention and treatment of children generally. Moreover, the findings and General Comments issued by treaty bodies are written by a Committee composed of experts from a wide range of countries charged with the specific purpose of interpreting and applying the provisions of the treaty and are thus highly significant (HREOC, 2004).

4.3 *Solitary Confinement and Juveniles*

The international community have been unequivocal in their prohibition of solitary confinement for juveniles. The Preamble of the CRC recognises that, given their physical and mental immaturity, juveniles need special safeguards and care, including appropriate legal protection. Article 19 of the CRC requires State Parties to ‘take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence ...’ In its General Comment No. 8, the Committee on the Rights of the Child indicated that, ‘There is no ambiguity: “all forms of physical or mental violence” does not leave room for any level of legalized violence against children’(CRC, 2007). There are few if any forms of confinement that appear to produce so much psychological trauma and in which so many symptoms of psychopathology are manifested. Thus, the mental health implications for juveniles are very significant.

The Committee against Torture recommended that persons under the age of 18 should not be subjected to solitary confinement (CAT, 2009, 8). The Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has pointed out that prolonged solitary confinement may amount to an act of torture and other cruel, inhuman or degrading treatment or punishment and recommended that solitary confinement should not be used in the case of minors or the mentally disabled (Subcommittee on Prevention of Torture, 2010, 185). As stated above, the Committee on the Rights of the Child, in its General Comment No. 10 (2007), emphasised that –

disciplinary measures in violation of article 37 [of the CRC] must be strictly forbidden, including ... closed or solitary confinement or any other punishment that may compromise the physical or mental health or well-being of the child concerned.

Moreover, the Committee has urged States parties on a number of occasions to prohibit and abolish the use of solitary confinement against children (CRC, 2001, CRC, 2003, CRC, 2004).

The Special Rapporteur on Torture, Juan E. Méndez, stated that:

Considering the severe mental pain or suffering solitary confinement may cause when used as a punishment, during pre-trial detention, indefinitely or for a prolonged period, for juveniles or persons with mental disabilities, it can amount to torture or cruel, inhuman or degrading treatment or punishment.

UN GENERAL ASSEMBLY, 2011

He further stated that, with regards to juveniles, the imposition of solitary confinement, *of any duration*, is cruel, inhuman or degrading treatment and violates article 7 of the International Covenant on Civil and Political Rights and article 16 of the Convention against Torture (emphasis added).

4.4 *Australia's International Obligations*

Australia, as a party to the CRC, the ICCPR and the CAT, has voluntarily committed to comply with their provisions in good faith and to take the necessary steps to give effect to those treaties under domestic law (Vienna Convention on the Law of Treaties, 1980).

The High Court of Australia and the Federal Court of Australia have often referred to the international body of law to assist in their interpretation of international rights and obligations as they apply to Australia (*Mabo v. Queensland* (1992) 175 CLR 1, 42 ; *Dietrich v. The Queen* (1992) 177 CLR 292, 305–307; *Johnson v. Johnson* (2000) 201 CLR 488, 38; *Commonwealth v. Bradley* (1999) 95 FCR 218; *Minister for Immigration and Multicultural Affairs v. Ibrahim* (2000) 174 ALR 585, 5). Moreover, in *Minister for Immigration and Ethnic Affairs v. Ah Hin Teoh* (1995), the High Court of Australia held that:

It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute ...

But the fact that the Convention [on the Rights of the Child] has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law. Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, at least in those cases in which

the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, prima facie, intends to give effect to Australia's obligations under international law.

MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS V. AH HIN TEOH (1995) 183 CLR 273, 287

The High Court also held that ratification of a treaty raised a legitimate expectation that an executive decision-maker will act consistently with its terms:

... ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as "a primary consideration". It is not necessary that a person seeking to set up such a legitimate expectation should be aware of the Convention or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it.

MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS V. AH HIN TEOH (1995) 183 CLR 273, 287

In *Wilson v. Joe Francis*, Chief Justice Martin applied the decision in the *Minister for Immigration and Ethnic Affairs v. Ah Hin Teoh* (1995) and summarised the impact of ratifying a treaty on Australian law:

... As a result of ratification, Australia has undertaken a commitment, binding under international law, to implement the obligations imposed by the Convention through domestic legislation and policies.

WILSON V. JOE FRANCIS [2013] WASC 157

As a result of these decisions, it is now established in Australia that where there is ambiguity as to the meaning of provisions in domestic legislation, they should be interpreted by courts in a manner that ensures, as far as possible, that they are consistent with the provisions of Australia's international obligations. Where there is any ambiguity as to the minimum requirements for complying with an international obligation, there is a substantial body of international jurisprudence to assist in the interpretation. Most of the minimum standards required by international treaties are quite clear from the words of the

treaty itself and in addition we have a range of rules and guidelines to assist in clarification.

Conclusion

There are many reasons why Australian jurisdictions should not be using solitary confinement on juveniles. Quite apart from the breach of Australia's international obligations, there is irrefutable evidence of the damage that this type of detention has on children and young people. Whether it is called "confinement" or "regression", this practice amounts to long periods of social isolation, minimal environmental stimulation and minimal opportunity for social interaction. Existing mechanisms of accountability regarding this practice are under-utilised, leaving young people vulnerable to what can be a deeply traumatic experience with long term negative impacts.

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