

## Appendix C: Queensland Human Rights Commission submission



# Use of separation involving children

---

Submission to Queensland Inspector of Detention Services

22 September 2023

## Background

1. This submission will outline the international and Queensland human rights law principles regarding the use of separation involving children in detention.
2. 'Separation', which involves a young person being held in a separate locked room away from other detainees, can have a profound impact on individuals particularly when separation occurs for prolonged periods.
3. Under the Youth Justice Regulation (YJ Regulation), a child in a youth detention centre may be held in a separate, locked room when the child is ill, at their request, for routine security purposes under the direction of the chief executive, for the child's protection or the protection of another person or property, or to restore order in the detention centre.<sup>1</sup> Observations of a child must occur when they are kept separately.<sup>2</sup>
4. The YJ Regulation however places time limits on the use of separation. An executive director must approve separation of more than 2 hours, the chief executive must be informed of the separation after 12 consecutive hours, and approvals separations of more than 24 hours, and then after each 24 hour period elapses.<sup>3</sup>
5. The Commission is aware of the 2019 report of the Queensland Ombudsman which identified several issues with this regime, including how time in separation is calculated, the lack of an external review process and that there is no upper limit on the total time separated.<sup>4</sup>

## Terminology

6. While Queensland youth justice laws and the Department of Youth Justice<sup>5</sup> exclusively use the term 'separation', other terms used both in Australia and overseas for a person being held alone in a locked cell include 'solitary confinement', 'segregation' and 'seclusion'.

---

<sup>1</sup> *Youth Detention Regulation 2016* s 21(1).

<sup>2</sup> *Youth Detention Regulation 2016* s 21(4).

<sup>3</sup> *Youth Detention Regulation 2016* s 21(2)-(3).

<sup>4</sup> Queensland Ombudsman, *The Brisbane Youth Detention Centre Report*, March 2019, [https://www.ombudsman.qld.gov.au/ArticleDocuments/217/The\\_Brisbane\\_Youth\\_Detention\\_Centre\\_report.pdf.aspx](https://www.ombudsman.qld.gov.au/ArticleDocuments/217/The_Brisbane_Youth_Detention_Centre_report.pdf.aspx)

<sup>5</sup> We use the shortened title Department of Youth Justice to refer to the Queensland Department of Youth Justice, Employment, Small Business and Training.

7. Solitary confinement is the terminology used in the Mandela Rules, to refer to a situation where a person is involuntarily locked in a cell for at least 22 hours a day with limited or no association with other detainees.<sup>6</sup>
8. *Prolonged* solitary confinement is defined as a period longer than 15 consecutive days. This has been set as the limit between 'solitary confinement' and 'prolonged solitary confinement' because at that point '... some of the harmful psychological effects of isolation can become irreversible'.<sup>7</sup>
9. We use the broader term 'separation' to include all circumstances where children are held separately from others, and will refer to the term 'solitary confinement' to mean any involuntary separation for more than 22 hours per day. We acknowledge that not all forms of separation may be solitary confinement, particularly when the child has freely chosen to be kept separately.

## Meaningful human contact

10. The Mandela Rules refer to 'meaningful human contact' being a relevant factor in determining whether a person is in solitary confinement. A group of academics in their guidance on the Mandela Rules suggest that:

Meaningful interaction requires the human contact to be face to face and direct (without physical barriers) and more than fleeting or incidental, enabling empathetic interpersonal communication. Contact must not be limited to those interactions determined by prison routines, the course of (criminal) investigations or medical necessity.<sup>8</sup>

11. *Meaningful* human contact therefore requires more than being escorted to a yard for solitary exercise or being provided with a food tray.

## Protected human rights

12. The Department of Justice and its officers are public entities under the *Human Rights Act 2019* with obligations to:
  - a. act and make decisions in a way that is compatible with human rights; and

---

<sup>6</sup> United Nations Standard Minimum Rules for the Treatment of Prisoners ('Nelson Mandela Rules'), UN Doc A/RES/70/175, rule 44.

<sup>7</sup> Mandela Rules 43 and 44. Also UN General Assembly, *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment* UNDOC A/66/268 (August 2011), 9.

<sup>8</sup> Penal Reform International Head Office and Human Rights Centre University of Essex, *Essex Paper 3: Initial guidance on the interpretation and implementation of the UN Nelson Mandela Rules*, 2017, 88-89.

b. give proper consideration to human rights when making the decision.<sup>9</sup>

13. A decision or action is compatible with human rights if it does not limit any human rights, or limits a human right only to the extent that is reasonably and demonstrably justifiable.<sup>10</sup> If a limitation on a right is established, section 13 of the HR Act sets out criteria a public entity must use to establish that limitation is justified.
14. The following sections set out the rights engaged where children are subject to separation and solitary confinement, but is not an exhaustive list. The other rights that may apply depending on the circumstances and the profile of the individual detainee could include:
  - Right to equality before the law (s 15)
  - Cultural rights, including the rights of Aboriginal and Torres Strait Islander peoples (s 27, 28)
  - Right to protection of family (s 26(1))
  - Right to health treatment without discrimination (s 37)
  - Right to education (s 36).

## Torture, cruel, inhuman or degrading treatment

15. Depending on the circumstances, the ongoing involuntary separation of a child from others in a locked cell may amount to torture or cruel, inhuman or degrading treatment or punishment under s 17 of the HR Act.
16. Torture involves the intentional infliction of severe physical or mental pain or suffering for a prohibited purpose, while cruel, inhuman or degrading treatment ('other ill-treatment') do not require intention or purpose. While all rights under the HR Act are subject to reasonable limitation under s 13, the prohibition against torture and other ill-treatment internationally is considered a non-derogable right that cannot be limited.<sup>11</sup>
17. At international law, indefinite solitary confinement and prolonged solitary confinement are prohibited for any prisoner and are considered to amount to torture or other ill-treatment.<sup>12</sup> International standards also prohibit the imposition of any period of solitary confinement on prisoners with mental or physical

---

<sup>9</sup> *Human Rights Act 2019* (Qld) s 58(1).

<sup>10</sup> *Human Rights Act 2019* (Qld) ss 8 and 13.

<sup>11</sup> UN Committee Against Torture, General Comment 2. See also UN Human Rights Committee, General Comment 20.

<sup>12</sup> Mandela Rules, Rule 43; UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (UN Doc A/HRC/43/49, 20 March 2020) [57].

disabilities when it would exacerbate their conditions, or the imposition of solitary confinement on children as a disciplinary measure.<sup>13</sup>

18. The United Nations Special Rapporteur on Torture has noted that the 'threshold at which treatment or punishment may be classified as torture or other ill-treatment is lower in the case of children', because they experience pain and suffering differently to adults 'owing to their physical and emotional development and their specific needs'. In the Special Rapporteur's view, the imposition of solitary confinement of any duration on children will always constitute other ill-treatment or even torture.<sup>14</sup>
19. In *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273, the adult applicant challenged a decision of the respondent to continue a six monthly order which would mean his continued solitary confinement more than seven years. The applicant had been initially placed in solitary confinement due to the significant risk of violence he posed. The Court found that the applicant had led insufficient expert evidence in relation to his own experience to demonstrate that the right to torture, cruel, inhuman or degrading treatment was engaged. However, a different conclusion may be reached for children, given the different impact of prolonged solitary confinement on growing, developing minds. The reason for solitary confinement in *Owen-D'Arcy* is also distinguishing, given a common reasons for separation in youth detention centres is lack of sufficient staffing.

## Humane treatment when deprived of liberty

20. Section 30(1) HR Act requires that all persons deprived of liberty be treated 'with humanity and with respect for the inherent dignity of the human person.' The right recognises the particular vulnerability of persons in detention.<sup>15</sup>
21. Modelled on Article 10(1) ICCPR, the right to humane treatment places a positive obligation on the State to ensure that persons detained by it do not suffer any hardship or constraint more than that which is a consequence of the imprisonment itself.<sup>16</sup> The Explanatory Notes refer to this right as providing 'certain minimum standards of treatment' for incarcerated persons.<sup>17</sup> It is the 'starting point' for consideration of detainee rights.<sup>18</sup>

<sup>13</sup> Mandela Rules, Rule 44; United Nations Rules for the Protection of Juveniles Deprived of their Liberty ('Havana Rules'), Rule 67.

<sup>14</sup> UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (UN Doc A/HRC/28/68, 5 March 2015) [33], [44].

<sup>15</sup> *Castles v Secretary of the Department of Justice* (2010) 28 VR 141 (**Castles**), [93], [108].

<sup>16</sup> See also rule 57 Mandela Rules - 'the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation.'

<sup>17</sup> *Human Rights Bill 2018*, Explanatory Notes, p25.

<sup>18</sup> *Castles* at [108].

22. The right to humane treatment protects against treatment that lacks humanity or is demeaning, which falls short of being cruel or grossly derogatory.<sup>19</sup> It mandates 'good conduct' where s 17 of the HR Act (as described in the above section) prohibits 'bad conduct'.<sup>20</sup>
23. Solitary confinement, particularly of children, is likely to be found to limit the right to humane treatment when deprived of liberty, requiring justification by the authority imposing that care. However, any length of separation may amount to inhumane treatment, depending on the specific circumstances in which the detainee is confined, including:
  - a. Detainees in solitary confinement must still be provided sufficiently clean accommodation including sanitary fixtures such as a lavatory and wash-basin.
  - b. All detainees should live in accommodation with sufficient light to enable the detainee to work or read, and reasonable airflow.<sup>21</sup>
  - c. Whether the person has access to at least one hour of suitable exercise in the open air daily, and access to physical and recreational training during the period of exercise.<sup>22</sup>
  - d. Solitary confinement should not be used as a substitute for proper medical or psychiatric care, and those with mental illness may have their condition exacerbated by solitary confinement.
24. In addition, whether separation constitutes inhumane treatment when deprived of liberty would require consideration of the specific rights and needs of children because they are children. This would include, for example, access to education and connection with family. The specific rights of children and young people are discussed in more detail below.
25. In *Taunoa v AG*,<sup>23</sup> the New Zealand Court of Appeal considered the separate confinement of prisoners under a behaviour management regime introduced after prisoner protests. Prisoners were subject to significant restrictions which were only progressively lifted based on behaviour. The 'cumulative conditions' of those subject to the greatest restrictions was found to breach the equivalent right to humane treatment when deprived of liberty. These included spending 22-23 hours confined to their cells, limited contact with other prisoners, limited access to natural light and no ability to exercise in the yard.<sup>24</sup>
26. In Queensland, the court in *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 held that a prisoner who had been subject

---

<sup>19</sup> *Owen-D'Arcy* at 323 [236].

<sup>20</sup> *AG v Grant* at [121].

<sup>21</sup> Mandela Rules 14, 15 and 16.

<sup>22</sup> Mandela Rule 23.

<sup>23</sup> [2008] 1 NZLR 429

<sup>24</sup> See also *British Columbia Civil Liberties Association v Canada (Attorney-General)* [2018] BCSC 62 in which the Supreme Court of British Columbia found the safeguards around the use of segregation were inadequate to protect the rights of prisoners.

to many years of solitary confinement had been subject to inhumane treatment when deprived of liberty, and that treatment was not justified by corrective services. More detail on that case is discussed below.

## Rights of children and young people

27. The right in s 26 of the HR Act, encompasses the protection of families as a fundamental unit, and the protection of children in their best interests, and is modelled on Articles 23(1), 24(1) and 24(2) of the *International Covenant on Civil and Political Rights* (ICCPR).
28. While in custody, children and young people should receive care, protection and all necessary individual assistance – social, educational, vocational, psychological, medical and physical – that they may require in view of their age, sex and personality and in the interest of their development.<sup>25</sup> Where frequent or prolonged separation interferes with the provision of this care, protection and assistance it may amount to an unreasonable limitation of a child's right to protection in their best interests.
29. The UN Committee on the Rights of the Child has called for disciplinary matters that constitute torture or other cruel, inhuman or degrading treatment to 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'.<sup>26</sup> The Royal Commission into the Protection and Detention of Children in the Northern Territory similarly suggested that the isolation for the purposes of behaviour management or punishment be prohibited.<sup>27</sup>
30. In one case involving a 16-year-old Aboriginal man heard by the UN Human Rights Committee, despite his separate confinement in a 'safe cell' which was intended to provide a less stressful, more supervised environment, this was negated by his psychological development worsening.<sup>28</sup> Key issues with his confinement included the lack of possibility of communication, combined with his exposure to artificial light for prolonged periods and the removal of his clothes and blanket.
31. In the Victorian case of *Certain Children*, the court observed that 'with a markedly reduced ability for children to socially mix with their peers, and instead limited to infrequent communication with youth justice staff, their social needs could not be met'. Further, that the:

...use of isolation by lockdown and handcuffing detrimentally affects the inherent dignity of children and the fundamental rehabilitative objectives of care

<sup>25</sup> Beijing Rules, Rule 26.

<sup>26</sup> UN Committee on the Rights of the Child, *General Comment 10: Children's Rights in Juvenile Justice*, UNDOC CRC/C/GC/10 (25 April 2007).

<sup>27</sup> Royal Commission into the Detention and Protection of Children in the Northern Territory, Final Report, Findings and Recommendations, Recommendation 14.1

<sup>28</sup> *Brough v Australia*, HRC, Communication No 1184/2003 (17 March 2006)

in detention under the CYF Act. Such measures may compromise the physical or mental health or well-being of detainees.

32. In *Certain Children* the court heard medical evidence about the negative consequences for children from prolonged periods of separation including risk of 'profound psychological damage.'<sup>29</sup>

## Adverse impacts of separation

33. The use of separation on children has been widely criticised by human rights organisations, legal experts, and child advocacy groups due to its potential for causing severe psychological and emotional harm. Regular or prolonged separation is known to create both immediate and long-term negative effects including psychological distress, self-harm and suicidal ideation, sleep disturbances, reduced physical activity, feelings of social isolation, and emotional detachment.
34. The Istanbul Statement on the Use of Solitary Confinement<sup>30</sup> is a statement of 24 international experts adopted in 2007 which calls on States to limit the use of solitary confinement to 'very exceptional' cases, for a short time and as a last resort. The Statement quotes research that between 1 in 3 and 90% of people detained in solitary confinement experience adverse symptoms, and that harms are caused to even those who have not been previously mentally ill.
35. The Statement includes that when a person is placed in isolation even for a few days this 'may cause serious psychological and sometimes physiological ill effects' including psychosis. On this basis, the Istanbul Statement calls for an absolute prohibition on the use of solitary confinement on children under the age of 18.
36. Some further reasons why prolonged separation, should not be used on children are as follows:
- **Developmental considerations:** Children's brains and emotional development are still maturing, making them more vulnerable to the adverse effects of isolation and extreme confinement. Solitary confinement can have lasting negative impacts on their mental health and emotional wellbeing.
  - **Counter to rehabilitation:** Solitary confinement does not provide opportunities for rehabilitation or addressing the underlying issues that may have led to a child's problematic behaviour. When the mental health of children is adversely affected and they become habituated to being

---

<sup>29</sup> See *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251, [253] and [453] (John Dixon J).

<sup>30</sup> International Psychological Trauma Symposium, The Istanbul Statement on the Use and Effects of Solitary Confinement (December 2007) 2 ('The Istanbul Statement').



isolated and anti-social, the less likely that a young person will be able to successfully reintegrate back into society. Therefore, keeping children separated for prolonged periods ultimately reduces the safety of the general community once the young person is released.

- **Not the least restrictive option:** There are alternative methods for managing and rehabilitating young offenders that focus on education, counselling, therapeutic and family-based interventions, restorative justice programs which are likely to be more effective in addressing the underlying behaviours while minimising harm to children.

## Is the use of separation reasonable and justifiable?

37. The Committee for the Prevention of Torture, a European-based organisation, has developed five tests for assessing whether solitary confinement is reasonable:
- Proportionate (is the harm/potential harm caused by, or to, the prisoner sufficiently serious to warrant solitary?)
  - Lawful (competent authority? procedures followed? prisoner able to make representations?)
  - Accountable (are there full records of the decision process and the daily regime?)
  - Necessary (are only the least restrictive measures applied? are these individualised and flexible?)
  - Non-discriminatory (is solitary confinement used disproportionately with a specific group of prisoners?)<sup>31</sup>

## Discrimination

38. The use of separation involving minors may also raise issues under the *Anti-*

<sup>31</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Solitary Confinement of Prisoners: Extract from the 21<sup>st</sup> General Report of the CPT, published in 2011*, CPT/Inf(2011)28-part 2, <<https://rm.coe.int/16806cccc6>> as summarised by Dr Sharon Shalev, *Shining a light on the prison's darkest corner: a human rights-centred approach to monitoring solitary confinement units*, Penal Reform International (10 December 2019) <[https://www.penalreform.org/blog/shining-a-light-on-the-prisons-darkestcorner/#\\_ftn1](https://www.penalreform.org/blog/shining-a-light-on-the-prisons-darkestcorner/#_ftn1)>.

*Discrimination 1991*, when the complainant has a protected attribute. Depending on the particular profile of the individual relevant attributes may include, for example, sex, race, impairment, gender identity or sexuality.

39. As all detainees are children, a case could be made that the use of frequent or prolonged separation or solitary confinement could be indirect discrimination on the basis of age. That is, a child may be less equipped to comply with a condition imposed on them that they must be kept separately, if it could be established that an adult person was able to cope with the situation.
40. Where a young person has particular vulnerabilities and needs that are not addressed, these instances may also amount to indirect discrimination. For example, a failure to provide period products to girls (sex discrimination), or adequate mental health services to a detainee (impairment discrimination).

## Queensland case law

41. Prior to the *Human Rights Act 2019*, courts in Queensland have sometimes grappled with the lawfulness of the use of solitary confinement involving adults.
42. In *Callanan v Attendee X* [2013] QSC 340, the Queensland Supreme Court reduced the sentences of three accused members of Queensland Criminal Motorcycle Gangs because their imprisonment would include prolonged periods of solitary confinement. The relevant QCS policy for motorcycle gang members limited 'out of cell time' to a minimum of only two hours a day, equating to up to 22 hours per day in solitary confinement for the duration of their sentence.
43. The Court cited several international law authorities, including those detailed above, and noted that such confinement can have profound, adverse impact on the health of prisoners, particularly their mental health.<sup>32</sup>
44. The Queensland Supreme Court and Court of Appeal also considered the then UN Standard Minimum Rules as well as the Standard Guidelines for Corrections in Australia in *Garland v Chief Executive, Department of Corrective Services*<sup>33</sup>. This case involved a judicial review by a prisoner on consecutive maximum security orders. However, the court did not find that his treatment was inhumane or in breach of international or national guidelines.
45. The case of *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 is the first major decision reviewing the use of solitary confinement on an adult prisoner since the HR Act passed into law. A prisoner applied for judicial review of two related decisions to continue his separation from

---

<sup>32</sup> It should be noted that the Mandela Rules were updated in 2015 after this decision was made, including changes to the rules concerning solitary confinement. See also Canadian Court of Appeal decision in *British Columbia Civil Liberties Association v Canada (Attorney-General)* [2019] BCCA 228

<sup>33</sup> [2004] QSC 450; [2006] QCA 568. The requirements of procedural fairness in making such orders was also considered in *McLaren v Rallings & Ors* [2015] 1 Qd R 438.

others, after being held in solitary confinement for more than 7 years. While the court determined that the applicant adduced insufficient expert evidence to show the effects of solitary confinement in order to engage s 17, the court accepted that the effect of the confinement on the applicant was 'stultifying'.

46. The court found that the right to humane treatment in s 30 was limited because the prisoner was subject to hardship beyond that experienced by virtue of detention. In applying the criteria for assessing proportionality under s 13, the court accepted there was a legitimate aim in making a maximum security order and that there was a rationale connection to that purpose. However, the respondents did not discharge the onus on it to demonstrate the limitation was reasonable as it did not provide evidence that there were no less restrictive alternatives available. The decision maker also failed to satisfy the procedural limb of s 58, including because a decision to not allow him to associate with any others did not sufficiently consider his right to humane treatment.
47. While the above Queensland cases relate to adults, not children, the same principles apply. While Queensland courts have yet to consider this issue in relation to children, the HR Act likely requires even greater consideration of the human rights of children separated from others, as was the case in the Victorian case of *Certain Children* referred to earlier in this submission.