

THE PRACTICE OF SOLITARY CONFINEMENT OF CHILDREN IN JUVENILE DETENTION IN VICTORIA: A HUMAN-RIGHTS BASED ARGUMENT FOR PROHIBITION

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When I'm locked in my cell for 23 hours, I feel like I am losing my mind. It is lonely, boring and depressing.

– Andrew Pound's (pseudonym) evidence to the Supreme Court of Victoria (2017).¹

In 2017, Victoria's practices surrounding the solitary confinement of detained children were found by the Supreme Court to have breached the Charter of Human Rights and Responsibilities Act 2006 (Vic), including the right to be treated with 'humanity and with respect for the inherent dignity of the human person' when deprived of liberty. This was in the context of children aged between 15 and 18 being held in a precinct of the Barwon maximum security adult prison from November 2016. This article contextualises the Supreme Court's findings by outlining the problematic use of solitary confinement of children in juvenile detention in Victoria in the years preceding the judgment (since 2010) and following. Numerous investigative reports have raised concerns about solitary confinement that is extremely detrimental to children. Through the findings of investigative reports, this article demonstrates that the use of solitary confinement in Victoria violates Australia's international human rights law obligations. It argues that, consequently, the practice should be prohibited, as consistent with the 2015 recommendation by the United Nations Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

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¹ *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children & Others [No 2]* (2017) 52 VR 441, 554 [367].

CONTENTS

I	INTRODUCTION AND OVERVIEW.....	130
II	INTERNATIONAL LAW ON SOLITARY CONFINEMENT.....	133
III	SUPREME COURT OF VICTORIA'S DECISIONS IN THE CERTAIN CHILDREN CASES.....	136
IV	THE PRACTICE OF SOLITARY CONFINEMENT IN VICTORIA.....	138
	A <i>USE OF SOLITARY CONFINEMENT IS NOT ONLY A LAST RESORT</i>	140
	B <i>USE OF PROLONGED SOLITARY CONFINEMENT</i>	142
	C <i>INADEQUATE RECORD-KEEPING</i>	143
	D <i>LACK OF APPROPRIATE AUTHORISATION</i>	144
V	A CALL FOR PROHIBITION OF SOLITARY CONFINEMENT OF CHILDREN.....	145
VI	CONCLUSION.....	148

I INTRODUCTION AND OVERVIEW

Public knowledge about the use of solitary confinement and other harmful practices in juvenile detention facilities,² particularly in the Northern Territory, Queensland and Victoria,³ has increased in recent years. For instance, practices in the Northern Territory's Don Dale Centre, exposed by the ABC in July 2016,⁴ prompted a Royal Commission. At the time the Royal Commission was announced (within 12 hours of the ABC's report), there were calls for it to have national coverage and investigate juvenile detention in every state and territory.⁵ This was in part because of the ABC's exposure of

² Such as the use of restraint and capsicum spray: see generally Jodie O'Leary, 'Protecting Children from Harm in Juvenile Detention' (2016) 41(4) *Alternative Law Journal* 239.

³ For a discussion on Western Australia (which has not received as much media attention), see Llifen Palacios Nunez and Anna Copeland, 'Solitary Confinement within Juvenile Detention Centres in Western Australia' (2017) 25(3-4) *International Journal of Children's Rights* 716.

⁴ See, eg, Elizabeth Grant, Rohan Lulham and Bronwyn Naylor, 'The Use of Segregation for Children in Australian Youth Detention Systems: An Argument for Prohibition' (2017) 3 *Advancing Corrections* 117; Kate Fitz-Gibbon, 'The Treatment of Australian Children in Detention: A Human Rights Law Analysis of Media Coverage in the Wake of Abuses at the Don Dale Detention Centre' (2018) 41(1) *UNSW Law Journal* 100.

⁵ Greens Victoria, 'Royal Commission into youth detention should be national: Greens' (Media Release, 27 July 2016) <<https://greens.org.au/vic/news/media-release/royal-commission-youth-detention-should-be-national-greens>>; Matt Doran and James Dunlevie, 'Four Corners: PM Turnbull to set up royal commission into mistreatment of children in detention', *ABC News* (online, 26 July 2016)

concerning practices in Queensland in August 2016,⁶ as well as a series of complex circumstances in Victoria which culminated in a riot at the Parkville detention centre later in the same year.⁷ This riot led to children being moved to a maximum security adult prison in Barwon.

It was Victoria's decision to move children to the Barwon Prison that led to a very significant finding of the Victorian Supreme Court: that is, the human rights of the children — incorporated into domestic law by the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*') — had been violated.⁸ Their rights are first that '[e]very child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child',⁹ and second that 'all persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person'.¹⁰ The Court identified several practices detained children were subjected to in Barwon that breached human rights but central to the finding was the use of prolonged solitary confinement. Justice Dixon summarised the finding as follows:

Put simply, combined effects of the extensive use of isolation, the handcuffing, the requirement to take children through the adult prison to get outdoors, the physical high security prison environment, its lack of natural light and fresh air, the noise, the visible presence of prison officers, the lack of privacy, education,

<<https://www.abc.net.au/news/2016-07-26/turnbull-calls-for-royal-commission-into-don-dale/7660164>>; Fergus Hunter, 'Malcolm Turnbull rejects calls for royal commission into juvenile justice system to go national', *Sydney Morning Herald* (online, 27 July 2016)

<<https://www.smh.com.au/politics/federal/malcolm-turnbull-rejects-calls-for-royal-commission-into-juvenile-justice-system-to-go-national-20160727-gqemi4.html>>. These calls were not heeded and the focus of the Royal Commission remained on the Northern Territory child protection and juvenile justice systems. For details about this Royal Commission, see generally Taylah Cramp and Anita Mackay, 'Protecting Victims and Vulnerable Witnesses Participating in Royal Commissions: Lessons from the 2016–2017 Royal Commission into the Protection and Detention of Children in the Northern Territory' (2019) 29 *Journal of Judicial Administration* 3.

⁶ O'Leary (n 2).

⁷ The history is summarised by Judith Bessant and Rob Watts, 'Child Prisoners, Human Rights, and Human Rights Activism: Beyond "Emergency" and "Exceptionality" — An Australian Case Study' in Gabriel Blouin-Genest, Marie-Christine Doran and Sylvie Paquerot (eds), *Human Rights as Battlefields: Changing Practices and Contestations Human Rights Interventions* (Springer Nature, 1st ed, 2019) 105–108.

⁸ This was in a series of decisions: *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* (2016) 51 VR 473 ('*Certain Children Garde J Decision*'); *Minister for Families and Children v Certain Children by their Litigation Guardian Sister Marie Brigid Arthur* (2016) 51 VR 597 ('*Certain Children Appeal*'); *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children & Others [No 2]* (2017) 52 VR 441 ('*Certain Children Dixon J Decision*').

⁹ *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*') s 17(2).

¹⁰ *Ibid* s 22(1).

stimulation, time out of doors, confined outdoor space, in combination with the youth of the detainees, meant that their detention in Grevillea has limited their *Charter* rights.¹¹

Solitary confinement is extremely detrimental to all persons, but the risks are intensified for children. Australian Children's Commissioners and Guardians have summarised the risks as follows:

Children are particularly vulnerable because they are still in crucial stages of development — socially, psychologically, and neurologically. The experience of isolation can interfere with and damage these developmental processes. For children and young people with mental health problems or past experiences of trauma, isolation practices can have severely damaging psychological effects. Where children and young people are at risk of suicide or self-harm, isolation is likely to increase their distress and suicidal ideation and rumination.¹²

This article examines the imposition of solitary confinement on detained children in Victoria to demonstrate the ways in which it breaches the *Charter*, as well as other international human rights law obligations that apply to all states and territories, due to Australia being a signatory to several treaties.¹³ It is a practice that will be under increased scrutiny as Australia operationalises the *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* ('OPCAT').¹⁴ Given international law prohibits the use of solitary confinement of children on the basis that it may constitute 'cruel, inhuman or degrading

¹¹ *Certain Children Dixon J Decision* (n 8) 566 [424].

¹² Australian Children's Commissioners and Guardians, 'Statement on Conditions and Treatment in Youth Justice Detention' (Statement, November 2017) 21. See also Sharon Shalev, 'Solitary Confinement as a Prison Health Issue' in Stefan Enggist, Lars Møller, Gauden Galea and Caroline Udesen (eds), *Prisons and Health* (WHO Regional Office for Europe, 2014) 30; Andrew B Clark, 'Juvenile Solitary Confinement as a Form of Child Abuse' (2017) 45 *The Journal of the American Academy of Psychiatry and the Law* 350, 352.

¹³ *Convention on the Rights of the Child*, opened for signature 22 August 1990, ATS 4 (entered into force 16 January 1991) ('CROC'); *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) ('CAT'); *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'). The *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) is also highly relevant due to the over-representation of people with mental illnesses and cognitive disabilities in adult prisons and juvenile detention, but it is beyond the scope of this article to deal with this Convention.

¹⁴ *Optional Protocol to the Convention against Torture*, opened for signature 18 December 2002, UN Doc A/RES/57/199 (entered into force 22 June 2006) ('OPCAT'). For a detailed analysis of the OPCAT see the Special Issue of *Australian Journal of Human Rights* (2019) 25(1).

treatment',¹⁵ and that ratification of the OPCAT obliges Australia to put in place a system of monitoring to *prevent* torture, cruel, inhuman or degrading treatment or punishment ('TCID'), this article calls for prohibition of its use.¹⁶

Part II of this article outlines the international law governing solitary confinement.¹⁷ Part III briefly outlines the circumstances that led to the Supreme Court of Victoria finding that the *Charter* had been breached in the *Certain Children* cases.¹⁸ Part IV provides evidence from investigatory reports by organisations, including the Victorian Ombudsman and Victorian Commission for Children and Young People, which demonstrates that solitary confinement is over-used in Victoria and is not used in a human rights compliant manner. Finally, the article concludes with human-rights law based justifications for the prohibition of the solitary confinement of children in juvenile detention, both in Victoria and nationally.

II INTERNATIONAL LAW ON SOLITARY CONFINEMENT

Australia has ratified numerous treaties that prohibit TCID and impose a positive duty to treat people deprived of their liberty with humanity and respect for their human dignity. The *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* ('CAT') and *International Covenant on Civil and Political Rights* ('ICCPR') apply to everyone (that is, children and adults), and the *Convention on the Rights of the Child* ('CROC') applies to children (anyone aged under 18)¹⁹ specifically.

The following table outlines the relevant Articles.²⁰

¹⁵ *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, GA Res 45/113, 45th sess, 68th plen mtg, UN Doc A/RES/45/113 (14 December 1990) rule 67.

¹⁶ This is supported by the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. The Committee on the Rights of the Child has also recommended that Australia prohibit solitary confinement, and will be discussed in Part V of this article.

¹⁷ There are a number of labels given to this practice in legislation and places of detention, including 'segregation, isolation, separation, lockdown, Supermax, the hole, the slot' (Deborah Glass, 'Common Sense and Clean Hands: An Ombudsman's View of Justice' (2019) 43(1) *Melbourne University Law Review* 369, 381) but this article will use the term adopted by international human rights law i.e. 'solitary confinement'.

¹⁸ The focus of this article will be on the 2017 judgment.

¹⁹ CROC art 1.

²⁰ This is a very brief overview of the provisions. For a more detailed examination of the interplay between all the relevant treaty provisions, see Juan Ernesto Méndez, *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) 4-7.

Table 1: Treaty Provisions

Prohibition of torture, cruel, inhuman or degrading treatment or punishment	Obligation to treat persons deprived of liberty with humanity and respect
CROC Art 37(a): ‘No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment’.	CROC Art 37(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’.
<p>The CAT requires State Parties to:</p> <ul style="list-style-type: none"> • ‘ensure that all acts of torture are offences under its criminal law’: Art 4 (‘torture’ is defined in Art 1(1)); • ‘take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction’: Art 2(1), and; • ‘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’: Art 16(1). 	ICCPR Art 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’. ²¹
ICCPR Art 7: ‘[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’.	

More detail about how the treaty provisions should be interpreted is provided by the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (known as the ‘Havana Rules’), the *United Nations Standard Minimum Rules for the Treatment of*

²¹ Australia’s solitary confinement of a 16-year-old Indigenous boy was found to have violated Art 10(1) of the ICCPR: Human Rights Committee, *Views: Communication No 1184/2003*, 86th sess, UN Doc CCPR/C/86/D/1184/2003 (17 March 2006) (*Brough v Australia*). For a discussion of how Art 10(1) applies to prisons in Australia more broadly see Anita Mackay, ‘Article 10(1) of the International Covenant on Civil and Political Rights (ICCPR) and Australian prisons’ (2017) 23(3) *Australian Journal of Human Rights* 368.

Prisoners (updated in 2015 and re-named the '*Mandela Rules*'),²² General Comments issued by the Treaty Monitoring Bodies responsible for interpreting each of the Treaties,²³ and reports of Special Rapporteurs whose role is to 'examine, monitor, advise and publicly report on human rights situations'.²⁴

Rule 67 of the *Havana Rules* stipulates that 'disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited' on juveniles and gives solitary confinement as an example of such a measure. Rule 44 of the *Mandela Rules* defines solitary confinement as confinement 'for 22 hours or more a day without meaningful contact' and defines 'prolonged solitary confinement' as 'in excess of 15 consecutive days'. Further, Rule 45 stipulates that solitary confinement 'shall be used only in exceptional cases as a last resort, for as short a time as possible' and requires it to be authorised by 'a competent authority' and subject to 'independent review'.²⁵ Rule 45(2) reiterates the prohibition of its use on children, cross-referencing Rule 67 of the *Havana Rules*.

The Committee on the Rights of the Child has issued a General Comment providing the following details to assist with the interpretation of Article 37 of the *CROC*:

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.²⁶

²² *United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules)*, GA Res 70/175, 70th sess, 80th plen mtg, Agenda Item 106, UN Doc A/RES/70/175 (17 December 2015) ('*Mandela Rules*'). International Rules are known as 'soft law' because they do not go through the same negotiation process and treaties. See also Harmut Hillgenberg, 'A Fresh Look at Soft Law' (1999) 10(3) *European Journal of International Law* 499.

²³ Committee on the Rights of the Child in relation to CROC; Committee against Torture in relation to the CAT and the Human Rights Committee in relation to the ICCPR.

²⁴ Kate Eastman, 'Australia's Engagement with the United Nations' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Lawbook Co, 2013) Need pinpoint as it's a quote.

²⁵ For a discussion of the history that led the United Nations to develop these rules on solitary confinement, see Mandred Nowak, 'Global Perspectives on Solitary Confinement – Practices and Reforms Worldwide' in Jules Lobel and Peter Scharff Smith (eds), *Solitary Confinement. Effects, Practices, and Pathways Toward Reform* (Oxford University Press, 2020). For a discussion about the relevance of the rules to adult imprisonment in Australia, including solitary confinement, see Anita Mackay, 'The Relevance of the United Nations Mandela Rules for Australian Prisons' (2017) 42(4) *Alternative Law Journal* 279.

²⁶ Committee on the Rights of the Child, *General Comment No. 10 (2007) Children's rights in juvenile justice*, 44th sess, CRC/C/GC/10 (25 April 2007) [89].

The Human Rights Committee has issued a General Comment on the interpretation of Article 7 of the ICCPR that clarifies that ‘prolonged solitary confinement’ may constitute TCID.²⁷ Thus, it is clear that the solitary confinement of adults per se is not necessarily TCID, but the duration of confinement is significant.

The Special Rapporteur on TCID has clarified that for children in detention, the ‘threshold’ at which ‘treatment or punishment may be classified as torture or ill-treatment is therefore lower’ and goes on to report that ‘the imposition of solitary confinement, of any duration, on children constitutes cruel, inhuman or degrading treatment or punishment or even torture.’²⁸ This has led the Special Rapporteur to recommend that solitary confinement of children be prohibited entirely — a proposal that will be discussed further in Part V. This article now moves on to discuss how solitary confinement of juveniles in Victoria has been considered by the Supreme Court.

III SUPREME COURT OF VICTORIA’S DECISIONS IN THE *CERTAIN CHILDREN* CASES

The *Charter* has incorporated into Victorian law the dual treaty requirements that people deprived of their liberty be treated with humanity and respect.²⁹ The *Charter* also imposes a requirement to consider the best interests of the child,³⁰ that draws on Articles contained in the ICCPR and the CROC.³¹ The *Certain Children* cases was the first time that the Supreme Court comprehensively considered the manner in which these provisions applied to juvenile detention. The rights were considered in the context of the need to accommodate the children at short notice (due to damage caused to a juvenile detention centre by a riot) in a specific unit (Grevillea) in Barwon prison that was designated as a youth justice precinct by Orders in Council.³² The fundamental issue was whether the establishment of a youth justice centre in a maximum security adult prison was lawful.³³

²⁷ United Nations Human Rights Committee, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 44th sess, UN Doc A/44/40 (10 March 1992) [6].

²⁸ Juan Ernesto Méndez, *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].

²⁹ *Charter* (n 9) s 22(1) and for prohibition against TCID: s 10(b).

³⁰ *Ibid* s 17(2).

³¹ Art 24(1) of the ICCPR and art 3(1) of the CROC: *Certain Children Dixon J Decision* (n 9) 521 [259]–[260].

³² *Certain Children Dixon J Decision* (n 8) 447 [4]–[8].

³³ *Ibid* 446 [2].

The Court found that it was not and ordered the children to be removed from the precinct immediately.³⁴

The Court found that the conditions the children were subjected to (summarised in the quote by Dixon J in Part I) breached two of the rights protected by the *Charter* — the right to be treated with humanity and respect, and the requirement to take into account the best interests of the child. In ruling that Section 10(b) had not been breached, the Court found that the purpose of keeping the children in Grevillea was not inappropriate and that there had been no intention to deliberately or intentionally ‘harm humiliate or debase’ the children.³⁵

Of particular concern to the Court was that the government had less restrictive options available, particularly if more resources were allocated. Dixon J opined:

[T]he limitation that the plaintiffs have suffered on their human rights has been substantial. I am satisfied that the allocation of much greater financial resources was an option that was reasonably available to achieve the purposes of management of safety and security.³⁶

The Court found that the children were subject to a regime that involved keeping them in their cells for 23 hours per day and handcuffed for the hour they were outside their cell.³⁷ Appropriate authorisation of solitary confinement was lacking because it was deemed to only require authorisation (from the Director of Secure Services) if it was longer than 24 hours.³⁸ As the detained children were held in solitary confinement between 21-23 hours, authorisation for its use was not required.³⁹

Further, Individual Behaviour Management Plans (‘IBMP’) were employed for children who were assessed to be a risk to the security or safety of the centre, which also involved solitary confinement for 23 hours per day.⁴⁰ The Principal Commissioner for Children

³⁴ Ibid 529 [588]

³⁵ Ibid 520 [256].

³⁶ Ibid 74 [472].

³⁷ Ibid 551 [355]. A report by the Victorian Ombudsman provides a sample ‘Separation Safety Management Plan’ that details the daily routine of a child in Grevillea who was only allowed out of their cell for one hour per day: Victorian Ombudsman, *Report on Youth Justice Facilities at the Grevillea Unit of Barwon Prison, Malmsbury and Parkville* (2017) 42–45 (Appendix 1).

³⁸ *Certain Children Dixon J Decision* (n 8) 540 [310].

³⁹ Ibid 551 [310](d).

⁴⁰ Ibid 543 [318].

and Young People in Victoria gave evidence for the plaintiffs about her concerns regarding the use of the IBMP and its detrimental impact on the mental health and wellbeing of the children.⁴¹ The Court was also persuaded by the evidence of a psychiatrist that '[c]hildren subjected to sustained periods of isolation in that environment are at risk of developing profound psychological damage'.⁴²

The judgments in the *Certain Children* cases provide a clear indictment of the solitary confinement of children based on extensive evidence of the harmful effects. There can be no doubt that it violates the human rights protected by the *Charter*. The broader context for the Supreme Court's findings is considered in the next Part.

IV THE PRACTICE OF SOLITARY CONFINEMENT IN VICTORIA

The decisions in the *Certain Children* cases would not have been a surprise to anyone familiar with the numerous reports about juvenile detention in Victoria that preceded the judgment. This is because investigatory reports have been raising concerns about the use of solitary confinement in juvenile detention and on young people in adult prisons since 2010. As Boughey observes:

[T]his history indicates that the government had fair warning that detaining young people in a facility designed for high risk adult prisoners was a breach of their human rights, but pursued the strategy anyway, without implementing sufficient measures to minimise the harm to young prisoners.⁴³

The significant reports from before and after the Supreme Court's decisions are:

- Victorian Ombudsman, *Investigation into conditions at the Melbourne Youth Justice Precinct* (2010);
- Victorian Ombudsman, *Investigation into children transferred from the youth justice system to the adult prison system* (2013);
- Victorian Ombudsman, *Report on Youth Justice Facilities at the Grevillea Unit of Barwon Prison, Malmsbury and Parkville* (2017);

⁴¹ Ibid 557 [391], [462].

⁴² Ibid [463].

⁴³ Janina Boughey, 'The Victorian Charter: A Slow Start or Fundamentally Flawed?' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Bloomsbury Publishing, 2019) 208.

- Commission for Children and Young People, *The same four walls: Inquiry into the use of isolation, separation and lockdowns in Victoria youth justice system* (2017);
- Legislative Council Legal and Social Issues Committee (Parliament of Victoria) (hereafter ‘the Committee’), *Inquiry into Youth Justice Centres in Victoria* (2018);
- Jesuit Social Services, *All Alone: Young Adults in the Victorian Justice System* (2018); and
- Victorian Ombudsman, *OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people* (2019).⁴⁴

Detailed examination of the publicly available investigative reports reveals several recurring themes in relation to the use of solitary confinement on children and young people detained in Victoria that violate Australia’s international human rights law obligations as well as provisions in the *Charter*. These are (1) use of solitary confinement not only ‘as a last resort’, (2) prolonged solitary confinement, (3) inadequate record-keeping, and (4) lack of appropriate authorisation.

Before examining these themes, some background is required. Victoria has two youth detention facilities: Parkville Youth Justice Precinct (‘Parkville’) and Malmsbury Youth Justice Precinct (‘Malmsbury’).⁴⁵ Between 2017–2018, 4,933 children in Victoria were in detention for some time during the year.⁴⁶ The examination of the investigatory reports will include treatment of children in both Parkville and Malmsbury, as well as the treatment of young people (defined as ages 18–25) in the Port Phillip Prison (‘PPP’) because the Ombudsman’s 2013 and 2019 investigations and the report by Jesuit Social Services included critique of the treatment of young people in this facility.⁴⁷ Collectively,

⁴⁴ There was also a confidential report into some riots in 2016 (Bessant and Watts (n 7) 106) and a Victorian Parliamentary Committee report refers to a consultant’s report: Merlo Consulting, *Isolation Review Secure Services – DHHS* (2016); see Legislative Council Legal and Social Issues Committee (Parliament of Victoria), *Inquiry into Youth Justice Centres in Victoria* (2018) 113 (‘*The Committee inquiry into Youth Justice in Victoria*’).

⁴⁵ Another facility is being built to house 15–18-year-old males. The Cherry Creek facility is due to open in 2021: Minister for Corrections and Youth Justice (Vic), ‘Building A Safer And More Secure Youth Justice System’ (Media Release, 27 September 2019) <<https://www.premier.vic.gov.au/wp-content/uploads/2019/09/190927-Building-A-Safer-And-More-Secure-Youth-Justice-System.pdf>>.

⁴⁶ Australian Institute of Health and Welfare, *Youth Justice in Australia* (Report, 2019) 16.

⁴⁷ There is also evidence that solitary confinement is highly detrimental for young people: Victorian Ombudsman, *OPCAT in Victoria, A thematic investigation of practices related to solitary confinement of children and young people* (Final Report, 2019) 6, 17–18 (‘*Ombudsman investigation into solitary confinement of children and young people*’). There is also one section of Malmsbury that accommodates young people between the ages of 18 and 21: at 141 [711]. It is important to note that the PPP is not regulated by the *Children, Youth and Families Act 2005* (Vic). Rather, it falls under the *Corrections Act 1986*

the reports paint a picture of practices in Malmsbury, Parkville and PPP that are in breach of Australia's international obligations and the *Charter*.⁴⁸

It is important to be cognisant that improper record-keeping (one of the aforementioned themes) has resulted in the failure to properly measure how long children and young people are in fact placed in solitary confinement.⁴⁹ Therefore, it is likely that the reported statistics of children and young people being confined are significantly lower than the actual number who have been subjected to solitary confinement and that the duration of solitary confinement may be under-estimated.⁵⁰ Despite not having accurate data about the use of solitary confinement on children and young people in Victoria, the investigatory reports clearly demonstrate it is over-used and there are significant mental and physical consequences for children and young people subjected to the practice (as per the findings of the Supreme Court).

A Use of Solitary Confinement is Not Only a Last Resort

The Committee reported that solitary confinement was used 42.4 times per day across youth detention facilities in 2016.⁵¹ As outlined in Part II, the international law position is that children should not be subjected to solitary confinement and, in relation to adults, the *Mandela Rule's* Rule 45 requires solitary confinement only be used 'as a last resort'. The most concerning trend identified in the investigatory reports regarding this practice was the inappropriate use of both solitary confinement and lockdowns.⁵² Facility-wide lockdowns were utilised as a means of collective punishment when one or two persons

(Vic). However, it is beyond the scope of this article to detail the provisions of both Acts, therefore when legislation is discussed, it will focus on the provisions of the *Children, Youth and Families Act 2005 (Vic)*.

⁴⁸ Commission for Children and Young People, *The same four walls: Inquiry into the use of isolation, separation and lockdowns in Victorian youth justice system* (Report, 2017) 58, 73 ('*Four walls report*'); Ombudsman investigation into solitary confinement of children and young people (n 47) 164 (discussing the *Mandela Rules*); Victorian Ombudsman, *Investigation into children transferred from the youth justice system to the adult prison system* (Report, 2013) 4 ('*Ombudsman investigation into transfer of children from youth justice to adult prisons*').

⁴⁹ Ombudsman investigation into solitary confinement of children and young people (n 47) 151 [781].

⁵⁰ *Four walls report* (n 48) 22.

⁵¹ *The Committee inquiry into Youth Justice in Victoria* (n 44) 111; see also *Four walls report* (n 48) 46–47.

⁵² The practice of isolating a child or young person 'in the interests of the security of the centre' under s 488(7) of the *Children, Youth and Families Act 2005 (Vic)* is referred to as a 'lockdown'.

caused an incident.⁵³ The use of solitary confinement on a child or young person as a result of another person's misdemeanour is inconsistent with the 'last resort' condition.

A study of the practice in Malmsbury found that within a 12 month period there were 1,214 incidents of placing children in solitary confinement-like conditions.⁵⁴ Four of those incidents amounted to solitary confinement.⁵⁵ In Malmsbury, the practice was frequently used for behavioural reasons and as a result of lockdowns, which were caused by staff shortages.⁵⁶ The Ombudsman reports that 45% of children and young people 'had been isolated for misbehaviour'⁵⁷ and 90% 'had been isolated at Malmsbury due to a lockdown at the facility'.⁵⁸

Within 12 months, 265 incidents of solitary confinement of young people were recorded in PPP.⁵⁹ Of the young people surveyed by the Ombudsman, 79% reported they had been subjected to solitary confinement at PPP.⁶⁰ PPP's records revealed a concerning use of solitary confinement; it is used on young people as a punitive measure.⁶¹ The punitive use of solitary confinement was also evidenced within Parkville and Malmsbury,⁶² despite the fact that s 487 of the *Children, Youth and Families Act 2005* (Vic) ('CYF Act') explicitly prohibits the use of solitary confinement as a 'punishment'.

The Commission for Children and Young People found that children who were the victims of assault from staff were placed in solitary confinement for the longest average duration in both Parkville and Malmsbury.⁶³ In this situation solitary confinement averaged 10

⁵³ *Ombudsman investigation into solitary confinement of children and young people* (n 47) 157 (815). See also the discussion about lockdowns in PPP by the Ombudsman: at 98.

⁵⁴ *Ibid* 20 [49].

⁵⁵ *Ibid* 245 [1213].

⁵⁶ *Ibid* 20 [51].

⁵⁷ *Ibid* 147 [753].

⁵⁸ *Ibid* 155 [798].

⁵⁹ *Ibid* 87 [427].

⁶⁰ *Ibid* 87 [426].

⁶¹ *Ibid* 21 [64], 89 [443]; Jesuit Social Services, *All Alone: Young Adults in the Victorian Justice System* (Report, 2018) 6 ('*All Alone Report*').

⁶² Parliament of Victoria, Human Rights Law Centre, Submission No 38 to Legal and Social Issues Committee, *Inquiry into Youth Justice Centres in Victoria*, 10 March 2017, 12. This was referred to in the final report by the Committee, who noted their concern: *The Committee inquiry into Youth Justice in Victoria* (n 44) 111–12; see also *Ombudsman investigation of solitary confinement into children and young people* (n 47) 243 [1202]; *Four walls report* (n 48) (the latter citing the perspectives of children who were interviewed by the Commission).

⁶³ *Four walls report* (n 48) 49. Young people who are victims of assault are commonly confined in PPP as well: *Ombudsman investigation of solitary confinement into children and young people* (n 47) 89.

hours, with the Commission observing that '[t]his is concerning, as the child or young person was the victim of the assault'.⁶⁴

It is evident that solitary confinement on children and young people in the examined facilities is not used 'as a last resort'. There is an over-reliance on the practice to overcome any issues and challenges faced within the facilities that are outside the control of the children and young people. The Commission concluded that '[e]xtended and repeated use of isolation reflects a failure of the youth justice system's capacity to effectively understand and address children's behaviours'.⁶⁵

B Use of Prolonged Solitary Confinement

The international law position is that 'prolonged solitary confinement', as defined by Rule 44 of the *Mandela Rules*, constitutes TCID. This emerges as a particular problem in PPP. In 2013, the Victorian Ombudsman reported on three children who had been transferred to PPP and confined for 23 hours per day for months.⁶⁶ At the time the Ombudsman was specific about the *Charter* rights this breached:

I am particularly concerned by the length of time Corrections Victoria held the three children in isolation and its failure to adequately consider the children's best interests. I consider that, in placing these children in isolation for a number of months, Corrections Victoria acted inconsistently with the children's rights under sections 17(2), 22(1) and 23(3) of the *Charter*.⁶⁷

In 2013, the Ombudsman recommended that the *CYF Act* be amended to remove the possibility of children being transferred to an adult prison and that the Department should ensure this did not occur.⁶⁸ This warning was not heeded and a similar situation occurred in late 2016 with the children in the Grevillea unit in Barwon.

The use of prolonged solitary confinement on young people in PPP has also been documented more recently. The Ombudsman's 2019 investigation found that young people were on average separated for 10 days, while 77 persons had been separated for

⁶⁴ *Four walls report* (n 48) 49.

⁶⁵ *Ibid* 64.

⁶⁶ *Ombudsman investigation into transfer of children from youth justice to adult prisons* (n 48) 3–4.

⁶⁷ *Ibid* 37. Section 23(3) relates to children's rights in the criminal justice process.

⁶⁸ *Ibid* 39 (Recommendation 1).

more than 15 days.⁶⁹ Jesuit Social Services give examples of a 19 year old being confined for a year and a half, an 18 year old for 17 months,⁷⁰ and a 25 year old confined for 18 months.⁷¹

It was also recorded that young people kept in an 'Intermediate Regime' were on average held in this regime for 49 days.⁷² The regime in PPP only required those subjected to it to receive a maximum of three hours a day outside of their cell, however, it was noted that in some cases young people were only able to leave their cells for one hour per day.⁷³ Corrections Victoria does not recognise the use of 'Intermediate Regime' as a practice because it does not fall under legislative regulations.⁷⁴ However, this practice constitutes solitary confinement under the *Mandela Rules* which requires that any form of involuntary separation must be appropriately authorised and subject to limitations.

C Inadequate Record-Keeping

Poor record-keeping was raised as a critical point of concern over multiple reports.⁷⁵ It is a breach of the *CYF Act* because Section 488(6) requires a register to be kept whenever isolation is imposed in juvenile detention centres.⁷⁶ It is also inconsistent with Rule 39(2) of the *Mandela Rules* which requires that, for adults, 'a proper record of all disciplinary sanctions imposed' be kept. Failure to record the entire period of solitary confinement has resulted in improper records which significantly impact the ability to have a holistic understanding of the practice.⁷⁷

The Committee expressed frustration with the records they were provided from the Department as follows: '[t]he format of the print outs and the fact that they could not be

⁶⁹ Ibid 91.

⁷⁰ *All Alone Report* (n 61) 24.

⁷¹ Ibid 27. See additional details about this person: at 30.

⁷² An 'Intermediate Regime' is used in Port Phillip to transition persons held in separation to being back with the general prison population. The regime places restrictions on the person, including their ability to leave the cell and contact other imprisoned people.

⁷³ *Ombudsman investigation of solitary confinement into children and young people* (n 47) 94 [457].

⁷⁴ Ibid 108 [539].

⁷⁵ *The Committee inquiry into Youth Justice in Victoria* (n 45) 112; *All Alone Report* (n 61) 6, 20; *Four walls report* (n 48) 46, 48.

⁷⁶ *The Children, Youth and Families Regulations 2017* (Vic) details the information that must be kept in the register: reg 32.

⁷⁷ *Four walls report* (n 48) 16.

searched electronically made it extremely difficult for the Committee to verify whether the correct processes had been followed or identify trends in isolation'.⁷⁸

In Parkville and Malmsbury, there were multiple instances of the isolation time being recorded as zero or in negative minutes.⁷⁹ The staff at Malmsbury would record the period of solitary confinement as ending when the child or young person was escorted out of their room for fresh air or when regular evening lockdowns commenced.⁸⁰ The policy in Malmsbury of not recording time spent 'in a locked room, away from others and separate from the routine of the centre' as isolation, despite this meeting the definition in the *CYF Act*, confirms that the figures for solitary confinement present an under-representation of actual practice.⁸¹

D Lack of Appropriate Authorisation

The authorisation required by Section 488(1) of the *CYF Act* (by the 'officer in charge' of the facility) arguably does not meet the requirement of Rule 45 of the *Mandela Rules* ('authorization by a competent authority').⁸² Of major concern is that in practice, even these lower standards are failing to be met.

The investigatory reports documented a consistent trend of solitary confinement and lockdowns not having the necessary or proper authorisation.⁸³ The Children's Commissioner reported that 73% of solitary confinement instances were not authorised correctly.⁸⁴ The Commission reported that '[t]he requirement for the Director of Secure Services to authorise lockdowns of greater than six hours was routinely not met'.⁸⁵

⁷⁸ *The Committee inquiry into Youth Justice in Victoria* (n 44) 113.

⁷⁹ *Ibid* 47. For example: one instance of solitary confinement was recorded as negative 1,070 minutes.

⁸⁰ *Ombudsman investigation of solitary confinement into children and young people* (n 47) 169 [867], 151 [781].

⁸¹ *Ibid* 151 [781]. See also the discussion in *Four walls report* (n 48) 71.

⁸² There are delegations in place: *Four walls report* (n 48) 52; *Ombudsman investigation of solitary confinement into children and young people* (n 47) 167.

⁸³ *Four walls report* (n 48) 16. A separate review by Merlo Consulting found that '91 per cent of isolations of Koori children and young people in July and August 2016 did not record the appropriate authorisation' as reported in the *Four walls report* (n 48) 56.

⁸⁴ *Four walls report* (n 48) 52.

⁸⁵ *Ibid* 85.

It must be noted that inadequate record-keeping has significantly affected this issue, as across the facilities, the records did not have the authorising officer's details noted.⁸⁶ Inspection of the records by investigatory agencies has revealed several discrepancies, with authorisation either not recorded or completely missing.⁸⁷

Jesuit Social Services recommended that Corrections Victoria implement an independent body to act as the authorising body for the use of solitary confinement in Victoria.⁸⁸ This recommendation would result in greater accountability and transparency, and satisfy the *Mandela Rules'* requirement of an independent body to review the uses of solitary confinement. The implementation of the OPCAT will also increase the scrutiny surrounding solitary confinement.

V A CALL FOR PROHIBITION OF SOLITARY CONFINEMENT OF CHILDREN

As alluded to in Part II, the high risk of solitary confinement of juveniles amounting to TCID has led the United Nations Special Rapporteur on TCID to call for its prohibition. The wording of the Rapporteur's recommendation is as follows: '[w]ith regard to conditions during detention, the Special Rapporteur calls upon all States [...] To prohibit solitary confinement of any duration and for any purpose'.⁸⁹ The Committee on the Rights of the Child has specifically recommended that Australia 'explicitly' prohibit solitary confinement of children in detention.⁹⁰ This article supports these calls for prohibition for the following reasons.

First, the *CYF Act* in Victoria does not incorporate adequate safeguards for the use of solitary confinement on children, and the safeguards that are present are often not complied with. In particular, detailed records are not kept in a register and independent authorisation is not required. This has led the Victorian Ombudsman to recommend that the *CYF Act* be amended to specifically prohibit solitary confinement.⁹¹

⁸⁶ *Ombudsman investigation of solitary confinement into children and young people* (n 48) 106 [533]; *Four walls report* (n 48) 14, 85.

⁸⁷ *Four walls report* (n 48) 52; Merlo Consulting, *Isolations review* (Final Report, 2017) 12–13.

⁸⁸ *All Alone Report* (n 61) 39–40.

⁸⁹ Juan Ernesto Méndez, *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) [86](d).

⁹⁰ United Nations Committee on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia*, UN Doc CRC/C/AUS/CO/5-6 (30 September 2019) 14 [48c].

⁹¹ *Ombudsman investigation of solitary confinement into children and young people* (n 47) 254 (Recommendation 1).

Second, in reliance on the poor data that is available, the investigatory reports have found that solitary confinement is not used 'as a last resort' and prolonged solitary confinement is being imposed on children. It is likely that the poor record-keeping means that this picture is in fact an under-estimate of actual practice.

Third, the Supreme Court found solitary confinement to be a practice central to the finding that the children in the Grevillea unit did not have their best interests or their right to be treated with humanity and respect appropriately protected. The conditions in Grevillea were such that the Court found the establishment of this youth justice precinct unlawful and ordered that children no longer be detained there. This is a serious indictment on the treatment of detained children in Victoria.

Fourth, Australia's new obligations under the OPCAT require the prevention of TCID. While the Supreme Court did not find that the threshold for TCID had been met by practices in the Grevillea unit, international law makes it clear that solitary confinement of children creates a significant risk of TCID. The investigatory reports that have uncovered extensive use of prolonged solitary confinement show this is a very real and imminent risk.⁹² Therefore prohibiting its use is entirely consistent with the preventive aim of the OPCAT.

Scholars who have examined the use of solitary confinement in other Australian jurisdictions have also made this recommendation. Following an examination of the use of solitary confinement in the Northern Territory, Grant, Lulham and Naylor have made a cogent argument that segregating children should be prohibited by all jurisdictions in Australia. They highlight that the American Academy of Child and Adolescent Psychiatry has been officially opposed to the practice since 2012 and that as of 2016, 29 states in the United States of America ('USA') 'prohibit the use of punitive solitary confinement in juvenile correctional facilities by law or practice'.⁹³

⁹² The Ombudsman specifically referred to this as a risk in Malmsbury and PPP: Ibid 19 [41], 20 [53].

⁹³ Grant, Lulham and Naylor (n 3) 127-28. For an international example of the same recommendation, see Jennifer Lutz, Jason Szanyi and Mark Soler, 'Stop Solitary for Kids: The Path Forward to End Solitary Confinement of Children' in American University Washington College of Law, *Protecting Children Against Torture in Detention: Global Solutions for a Global Problem* (Report, 2017).

It is beyond the scope of this article to give a state-by-state overview of the legislation in the USA, given that the criminal law is different in every state.⁹⁴ It is illuminating to examine the protections that have been put in place to apply to federal facilities since 2016 when President Obama banned the practice ‘because of the potential for “devastating, lasting psychological consequences”’.⁹⁵ The *Crimes and Criminal Procedures Code* specifically ‘prohibit[s]’ confining a child for ‘discipline, punishment, retaliation, or any reason other than as a temporary response to a covered juvenile’s behaviour that poses a serious and immediate risk of harm to any individual, including the covered juvenile’.⁹⁶ There is a requirement to explore ‘less restrictive techniques’ first and a list of these is included in § 5043(b)(2)(A)(i), which makes it clear that confinement is a last resort. The Code stipulates maximum periods of confinement where there is ‘immediate risk of harm’.⁹⁷ These periods are three hours where there is a risk to others and 30 minutes where there is a risk posed to the juvenile.⁹⁸ There is also a provision indicating that ‘[t]he use of consecutive periods of room confinement to evade the spirit and purpose of this subsection shall be prohibited’.⁹⁹ Therefore, prolonged solitary confinement would be in breach of these provisions.

This discussion is not to suggest that a legislative provision could (or should) be copied from the USA to Victoria or any other state or territory in Australia. What it does provide is an example of a legislative provision that is better aligned with Australia’s international human-rights law obligations, which may be helpful to policy makers as a point of reference.

⁹⁴ For an overview, see National Conference of State Legislatures, *States that Limit or Prohibit Juvenile Shackling and Solitary Confinement* (Web Page, 29 January 2020) <<https://www.ncsl.org/research/civil-and-criminal-justice/states-that-limit-or-prohibit-juvenile-shackling-and-solitary-confinement635572628.aspx#1>>.

⁹⁵ Clark (n 12) 45, citing the words of former USA President Barack Obama in Barack Obama, ‘Barack Obama: Why we must rethink solitary confinement’, *Washington Post* (online, 25 January 2016) <https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html>.

⁹⁶ *Crimes and Criminal Procedure*, 18 USC § 5043(b)(1) (2008).

⁹⁷ *Ibid.*

⁹⁸ *Ibid* § 5043(b)(2)(B)(ii)(I).

⁹⁹ *Ibid* § 5043(b)(2)(D).

VI CONCLUSION

Children in detention are the most vulnerable members of the community by virtue of being young and the power imbalance between them and their custodians. Their treatment in the Northern Territory was exposed by the *ABC* and a Royal Commission, and their treatment in Victoria has been extensively documented by investigatory reports over the last decade, as well as by evidence before the Supreme Court that the practices breached the *Charter*, in particular circumstances examined in the *Certain Children* cases.

There can be no doubt that Victoria's extensive over-use of solitary confinement on children violates international human rights law and the *Charter*. The risk of it constituting TCID should be eliminated by heeding the call of the Special Rapporteur on TCID and the Committee on the Rights of the Child regarding banning the practice. This is consistent with Australia's recent obligations under the OPCAT to prevent TCID. The risk of TCID is too great for the children subjected to solitary confinement to allow it to continue.

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