

# PROTECTING CHILDREN FROM HARM IN JUVENILE DETENTION

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In ABC's *Four Corners* exposé on the abuse of children at the Don Dale detention centre, interviewee barrister John B Lawrence said:

If I treated my children like that, the authorities would take my children from me quite properly so because I would be behaving cruelly to them.<sup>1</sup>

And, following the ABC's *7:30 Report* showing mistreatment at a Queensland Youth Detention Centre,<sup>2</sup> solicitor Debbie Kilroy tweeted about the 'Child abuse by State'.<sup>3</sup>

When a parent harms their child, a complaint can be made and the State has the power to remove that child from the parent's care. For example, in the Northern Territory ('NT') a child is considered in need of care and protection if, among other things, a parent has caused harm to the child. Harm is any significant detrimental effect to the child's 'physical, psychological or emotional wellbeing [or development]'.<sup>4</sup>

When State agents or institutions harm children the situation is less clear. It is not that systems for monitoring, complaints and reporting in relation to detained children are absent. Rather, as Cunneen states, 'Australia has a relatively comprehensive complaints-based system for children and young people in detention'.<sup>5</sup>

Irrespective, NT children were restrained, and subjected to a lengthy period of solitary confinement and abuse from youth justice officers ('YJOs'). Such abuse is not unique to the NT, with Queensland recently cast in a negative light.<sup>6</sup> This article considers the adequacy of regulation in this space.

First, the events portrayed in the ABC reports are outlined and research is canvassed about the harm that can result from juvenile detention. Then consideration is given to international standards about the use of force, restraints, and isolation for child detainees, followed by an examination of whether the NT and Queensland legislative provisions comply with those obligations. Those jurisdictions are compared to Victoria.

## Australia's Shame

The *Four Corners* report, 'Australia's Shame', which first aired on 25 July 2016, examined the treatment of a number of Indigenous child detainees in the NT.<sup>7</sup> CCTV footage disclosed instances of YJOs' abuse of one particular child ('Child A') from October 2010 to March 2015 and showed him restrained to a chair, wearing a spit hood. The report concentrated largely on an incident on 21 August 2014. That incident involved six

children who had been housed in the Behavioural Management Unit ('the BMU') at Don Dale, in solitary confinement; some by then for as long as 15 days. Reportedly, one child ('Child B') had escaped from his cell and demanded to know when he could leave the BMU. He caused property damage in the exercise yard. After he threw a piece of aluminium through a window, hitting a guard, the officers responded with tear gas; 10 separate bursts of gas, affecting all six boys.

The *7:30 Report* regarding the treatment of Indigenous children in Queensland's Cleveland Youth Detention Centre aired on 18 August 2016.<sup>8</sup> The CCTV images on this occasion show a boy ('Child C') in 2013, who reportedly refused to shower, being pinned down face first by five men and placed in hand and ankle cuffs. His clothes are cut away and he is left lying naked in isolation for more than an hour before being given a gown. On another occasion, in August 2015, a girl ('Child D') reportedly jumped into a pool and initially refused to get out. When she went to exit the pool a guard let an unmuzzled dog off leash to close in on her.

There is little doubt that the children in these stories have suffered harm per the definition outlined in each jurisdiction's respective child protection legislation. Research demonstrates that children who perceive or experience abuse in custody are more likely to re-offend and experience post-traumatic stress disorder, depression and decreased mental health functioning.<sup>9</sup> Harm can result from, among other things, the use of force, restraint and isolation.

There is often overlap in the use and study of these methods and the definitions sometimes differ between studies and regulatory mechanisms. Here the word 'restraint' is restricted to mechanical or instruments of restraint (such as handcuffs or spit hoods). Personal restraint is categorised within use of force. The term 'isolation' is used interchangeably with the phrase 'solitary confinement', and here refers to placing a person in a room alone (usually for a lengthy period).

Apart from the obvious physical injury that can result from the use of force,<sup>10</sup> 'physical abuse during incarceration, whether it is legal or not, contributes to poor social and emotional functioning post-release'.<sup>11</sup> Different levels of physical force and different holds may be more dangerous than others.<sup>12</sup> The force used



## REFERENCES

1. ABC, 'Australia's Shame: The Brutalisation of Children behind Bars', *Four Corners*, 25 July 2016 (John B Lawrence, Barrister).
2. ABC, 'CCTV Shows Alleged Mistreatment at Townsville's Cleveland Youth Detention Centre', *7:30 Report*, 18 August 2016.
3. Debbie Kilroy (@DebKilroy), 'Images of young girl in swimming pool being threatened by guards with an un-muzzled dog Child abuse by State <<https://twitter.com/debkilroy/status/766138107208925184>>.
4. *Care and Protection of Children Act 2007* ('CPA') ss 15, 20(a). In Queensland, harm is 'any detrimental effect of a significant nature on the child's physical, psychological or emotional wellbeing': *Child Protection Act 1999* (Qld).
5. Chris Cunneen, 'Abuse in Youth Detention is not Restricted to the Northern Territory' (28 July 2016) *The Conversation* <<https://theconversation.com/abuse-in-youth-detention-is-not-restricted-to-the-northern-territory-63101>>.
6. ABC, above n 2.
7. ABC, above n 1.
8. ABC, above n 2.
9. Carly B Dierkhising et al, 'Victims Behind Bars' (2014) 20(2) *Psychology, Public Policy and Law* 181.
10. Kate Gooch, 'Who Needs Restraining?' (2015) 37(1) *Journal of Social Welfare and Family Law* 3, 11–12.
11. Dierkhising, above n 9, 187.
12. Andrew Day and Michael Daffern, *Inquiry into Policy and Practice in the Use of Physical Restraint in South Australian Residential Facilities for Children and Young People* (Guardian for Children and Young People, 2009) 10.

to move someone into isolation, and the force used to apply a mechanical restraint, can also be dangerous. Further, the use of restraint may 'compound pre-existing trauma and exacerbate mental shock and suffering'.<sup>13</sup>

Research has found that solitary confinement is 'psychologically painful ... traumatic and harmful, [and] puts many of those who have been subjected to it at risk of long-term emotional and even physical damage'.<sup>14</sup> Shalev has detailed the negative psychological and physiological health effects of solitary confinement, including anxiety, depression, insomnia, loss of appetite, hypersensitivity, cognitive dysfunction, lethargy/fatigue, psychosis, self-mutilation and suicidal ideation.<sup>15</sup> Further, Birkhead's work outlines the significant physical, psychological and developmental harm that children in particular suffer due to isolation,<sup>16</sup> as it is imposed during their formative years.<sup>17</sup> Isolation's impact can intensify where someone has a pre-existing mental health condition,<sup>18</sup> which is particularly concerning given the large percentage of children in custody with such pre-existing conditions.<sup>19</sup>

Despite the harm that the NT and Queensland children suffered, it has taken significant media attention, supported by undisputable pictorial evidence, to elicit any meaningful response. This article considers whether the potential reason for this lapse is due to regulatory inadequacies around the use of force, restraint and isolation.

## International obligations

Australia is a party to the *International Covenant on Civil and Political Rights* ('ICCPR'), the *Convention on the Rights of the Child* ('CROC') and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('CAT'),<sup>20</sup> all of which express rights relevant to children in juvenile detention. Australia is required to take necessary steps to adopt laws or other necessary measures to give effect to the rights in the respective treaties.<sup>21</sup> Australia's international obligations can potentially be enforced by each treaty's respective committee.<sup>22</sup>

The ICCPR, CAT and CROC all prohibit 'torture or other cruel, inhuman or degrading treatment or punishment'.<sup>23</sup> This prohibition can extend to conduct that causes mental or physical suffering, including corporal punishment and prolonged solitary confinement.<sup>24</sup> The Standard Minimum Rules for the Treatment of Prisoners ('the Nelson Mandela Rules') defines solitary confinement as that which confines prisoners for at least 22 hours a day without meaningful human contact and further stipulates that any form of involuntary separation, whether as a disciplinary sanction or for the maintenance of order and security, must be appropriately authorised by law or regulation.<sup>25</sup>

According to CROC, for all actions relating to children,<sup>26</sup> the best interest of the child is paramount.<sup>27</sup> Specifically, a child in detention must be 'treated in a manner consistent with the promotion of the child's sense of dignity and worth, ... which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society'.<sup>28</sup>

The Committee on the Rights of the Child ('the Committee') has promoted the integration of the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* ('the Havana Rules') into national policies.<sup>29</sup> Rule 67 equates corporal punishment and solitary confinement with cruel, inhuman or degrading treatment. The Committee has recommended the prohibition on the use of corporal punishment, including solitary confinement for child offenders.<sup>30</sup> The Committee against Torture has also recommended that children not be held in solitary confinement. 'Solitary confinement, of any duration, on juveniles is cruel, inhuman or degrading treatment.'<sup>31</sup> The Committee also expressed the view that, due to the developmental state of children and their vulnerability, corporal punishment is invariably degrading.<sup>32</sup> In addition the Committee expressed that 'there are other non-physical forms of punishment that are also cruel and degrading ... for example, punishment which belittles, humiliates ... [or] scares ... the child'.<sup>33</sup> The deprivation of liberty experienced by a child detainee compounds their vulnerability,<sup>34</sup> thus meeting the threshold level of severity required of inhuman or degrading treatment. Rule 64 notes that restraint and force should be exceptional and only employed where all other methods of control have failed. Restraint and force may be used to prevent self-injury, injuring others or serious destruction of property.

The international position seems comprehensive. If Australia complied with the ICCPR, CROC, the Havana Rules, the Nelson Mandela Rules, and the CAT it seems less likely that events such as those outlined in Queensland and the NT — that are clearly (i) contrary to the children's best interests, and (ii) undermine the child's chances of reintegration — would eventuate. However, the extent of the protections does not translate domestically because 'international law does not form part of Australian law until it has been enacted in legislation'.<sup>35</sup> Neither CROC, the ICCPR, nor the CAT has been enacted comprehensively into Australian legislation.<sup>36</sup> Further, the Havana and Nelson Mandela Rules are not binding or enforceable, rather they serve as guidelines for stakeholders and policy makers.<sup>37</sup> To determine the scope of protection for children in Australian juvenile detention, it is important to look to the specific domestic legislation.

## Legislative protection

Arguably, the legislation in the Australian jurisdictions considered attempts to comply with the international position. To ensure the best interests of the child and to protect their dignity, states and territories have legislated to promote the acceptable conduct of their centre staff and to prohibit harmful practices in disciplining detainees. The legislative instruments compared here are: the *Youth Justice Act 2005* (NT) ('YJA'); *Youth Justice Regulations 2005* (NT) ('YJR'); *Youth Justice Regulation 2016* (Qld) ('QYJR'); and the *Children, Youth and Families Act 2005* (Vic) ('CYFA').

13. Australian Children's Commissioners and Guardians, *Human Rights Standards in Youth Detention in Australia* (April 2016), 39.

14. Craig Haney and Mona Lynch, 'Regulating Prisons of the Future' (1997) 23 *NYU Review of Law and Social Change* 477, 500.

15. Sharon Shalev, 'Solitary Confinement and Supermax Prisons' (2011) 11 *Journal of Forensic Psychology Practice* 151, 155–6; and Shalev, 'Solitary Confinement as a Prison Health Issue' in Enggist et al (eds), *Prisons and Health* (WHO, 2014) 27, 28.

16. Tamar Birkhead, 'Children in Isolation' [2015] 50 *Wake Forest Law Review* 1, 10–17.

17. Children's Commissioner, *Isolation and Solitary Confinement of Children in the English Youth Justice Secure Estate* (September 2015) 61–3; Shalev (2014) above n 15, 30.

18. See Shalev (2014), above 15, 29.

19. See Devon Indig et al, *2009 NSW Young People in Custody Health Survey: Full Report* (2011) 144–57.

20. ICCPR, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); CROC, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); CAT, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

21. ICCPR art 2(2); CROC art 4; CAT art 2.

22. CROC art 44; CAT art 19; ICCPR art 40; *Optional Protocol to the Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

23. ICCPR art 7; CAT art 16; CROC art 37(a).

24. UN HRC, *CCPR General Comment 20: Article 7 (Prohibition of Torture or other Cruel, Inhuman or Degrading Treatment or Punishment)* (10 March 1992) paras [5]–[6].

25. *UN Standard Minimum Rules for the Treatment of Prisoners* (adopted by General Assembly Resolution 70/175 of 17 December 2015) rr 44, 37(d).

26. CROC art 1.

27. CROC art 3(1).

28. CROC art 40.

29. Committee on the Rights of the Child, *General Comment No 10 in relation to Children's Rights in Juvenile Justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) [4] implementing the *UN Rules for the Protection of Juveniles Deprived of their Liberty* (adopted by General Assembly Resolution 45/113 of 14 December 1990) ('Havana Rules').

30. See eg, Committee on the Rights of the Child, *Consideration of the Reports Submitted by States under Article 44 of the Convention-Concluding Observations: Singapore*, 34th sess, UN Doc CRC/C/15/Add.220 (27 October 2003) [45(d)].

*To determine the scope of protection for children in Australian juvenile detention, it is important to look to the specific domestic legislation.*

*Table: Legislative provisions regarding the use of force, restraint and isolation of detained children*

	Northern Territory	Queensland	Victoria
<b>Use of force</b>	Physical restraint permitted to protect detainee/others: <i>YRJ</i> reg 71 Superintendent may use reasonably necessary force to maintain discipline: <i>YJA</i> s 153(1)-(2) Physical violence, enforced dosing, and compulsion to remain in constrained/ fatiguing position, etc, prohibited as discipline: <i>YJA</i> s 153(3)	Permitted to protect detainee/others/ centre property (employee must have completed physical intervention training; and reasonably believe protection cannot be otherwise achieved): <i>QYJR</i> reg 16(5) Corporal punishment; physical contact; acts involving humiliation, physical/ emotional/ sustained verbal abuse; etc; prohibited as discipline: <i>QYJR</i> reg 16(4)	Permitted to prevent detainee from harming themselves/ anyone else/ damaging property/ for centre security: <i>CYFA</i> s 487(b)(i)&(ii) Corporal punishment; psychological pressure intended to intimidate/ humiliate; physical/emotional abuse; etc; prohibited: <i>CYFA</i> s 487(c)-(f)
<b>Restraint</b>	Permitted to: protect a detainee from self-harm/ to protect another: <i>YJA</i> s 152(1A); escort a detainee: <i>YJA</i> s 155 Not permitted for discipline, unless superintendent opines: an emergency exists/ where it would reduce a risk to good order/ security of centre: <i>YJA</i> s 153(4) Superintendent can use/ authorise use: <i>YJA</i> ss 152; 153 Only Commissioner-approved restraints permitted: <i>YJA</i> ss 151AB; 152; 153	Permitted where staff reasonably believe child is likely to: attempt to escape/ seriously harm themselves/ someone else/ seriously disrupt centre order and security: <i>QYJR</i> reg 19(1)(c) Authorized staff, who have successfully completed physical intervention training, can use: <i>QYJR</i> reg 18(2) If child in centre, can only use where staff reasonably believe no other way of stopping child from behaviour in reg 19(1)(c): <i>QYJR</i> reg 19(1)(d) Only approved restraints permitted: <i>QYJR</i> reg 19(1)	
<b>Isolation</b>	Permitted if superintendent opines necessary: to protect safety of another/ for good order/ security of centre: <i>YJA</i> s 153(5) For not >24 hours, unless Commissioner approval obtained, then max 72 hours: <i>YJA</i> s 153(5)	Permitted (c) for routine security purposes under CEO-issued direction; (d) for protection of detainee/ another/ property; (e) to restore centre order: <i>QYJR</i> reg 21(1) If separated under (d)-(e): if >2 hours (including >2 hours longer than centre's normal overnight confinement hours) approval of centre executive director's approval required; if >12 hours must inform CEO; if >24 hours CEO's approval required: <i>QYJR</i> reg 21(2)	Officer in charge may authorise for a Secretary-approved period if: all other reasonable steps have been taken to prevent child from harming themselves/ others/ from damaging property; and the person's behaviour presents an immediate threat to property/ their/ other persons: <i>CYFA</i> s 488(1)-(3) Officer in charge may isolate in interests of centre's security: <i>CYFA</i> s 488(7) Must not be used as punishment: <i>CYFA</i> s 487(a) Where Secretary approval of period is required, if it is 24 hours or less Secretary can delegate: <i>CYFA</i> s 17(f)

In each jurisdiction's legislation the provisions regarding use of force largely comply with the international position. Physical violence is prohibited as discipline in each jurisdictions' detention centres. The physical abuse (and restraint) to which Child A in the NT and Child C in Queensland were subjected is *prima*

*facie* prohibited. However, where necessary, in each jurisdiction reasonable physical force can be used to protect the detainee or others.<sup>38</sup> As discussed above, these exceptions are recognised internationally. Not recognised though is Victoria's power to use force for centre security.<sup>39</sup> Also, the requirement to only

employ force if other methods have failed is reiterated specifically in Queensland but not in the NT or Victoria.<sup>40</sup> Even a reasonable level of force employed when reasonably necessary may allow force to be used when it is not exceptional.

The NT stipulates conduct that cannot be considered reasonably necessary for discipline. That conduct includes physical violence and ‘enforced dosing with a medicine, drug or other substance’.<sup>41</sup> At least one instance of a YJO’s use of force against Child A was prosecuted as aggravated assault. In that instance, after Child A threatened self-harm the YJO pinned him down to a mattress, his clothes were removed and he was dressed in a non-rip gown. A magistrate found the YJO not guilty. The prosecution appealed this decision; the outcome is reported in *Edwards v Tasker*.<sup>42</sup> The Supreme Court’s Justice Barr found that physical violence had been applied. The Prosecution then argued that physical violence could never be authorised as it was prohibited by YJA s 153(3). However, Justice Barr disagreed with the Prosecution’s reasoning; instead finding that s 153(3) limitations only applied if the use of force was to maintain discipline. In this case he found the YJO’s actions were directed at maintaining order and ensuring ‘the safe custody and protection of all persons’ in the centre, as envisaged in the YJA s 151(3), rather than at maintaining discipline.<sup>43</sup> As the YJO’s conduct was authorised and proportionate, the Court dismissed the appeal.

The General Manager of Don Dale was reported as stating that the YJA did not prohibit the use of tear gas.<sup>44</sup> The prosecution’s reasoning in *Edwards v Tasker* could be applied in relation to the use of tear gas at Don Dale. That is, the limitation on the use of ‘enforced dosing’ (per s 153(3)) could be said to apply to the use of tear gas against the children, including Child B, within the BMU. Acceptance of this view would suggest that the NT legislation complies with the international position that the use of tear gas, particularly in confined spaces, amounts to inhuman and degrading treatment and should be prohibited.<sup>45</sup> However, favouring Justice Barr’s interpretation, where the use of tear gas is justified on protective (administrative) rather than disciplinary grounds, would mean it is not always prohibited in the NT — only if its use is considered excessive.

Restraints are not specifically prohibited in Victoria. Restraints seem to be permitted within the broader concept that allows a reasonable level of physical force in certain circumstances; however, it may be argued in some instances that restraints are prohibited if they fall within the broader prohibition against corporal punishment and physical abuse.<sup>46</sup> Perhaps this is why it has been reported that handcuffs are the only restraints used on children in Victoria.<sup>47</sup>

In the NT and Queensland approved restraints can be authorised to protect the detainee or others (for protection) and to reduce the risk to the centre’s security and good order (on administrative grounds).<sup>48</sup> The restraints used on Child A and Child C have been authorised in their respective jurisdictions.<sup>49</sup> In addition, in Queensland restraints can be used where it is reasonably

likely the detainee will attempt to escape and, in the NT, restraints can be used in times of emergency and during escort.<sup>50</sup> Allowing protective restraint is envisioned in the abovementioned international instruments.

However, the NT and Queensland’s expansion to allow restraint for the purposes of ‘order’, and the potential in each jurisdiction to use restraint to maintain or achieve security in the centres is problematic. In the United Kingdom (‘UK’), in June 2007, the Secure Training Centre (Amendment Rules) were laid before Parliament. Rule 38(1) permitted physical restraint in a Secure Training Centre (a juvenile detention centre) where necessary to prevent: escape; injury to the detainee or others; or damage to property. The Amendment Rules added the words ‘for the purposes of ensuring good order and discipline’, which the Court noted extended the permissible uses of restraint.<sup>51</sup> The Amendment Rules’ validity was considered. Although the Amendment Rules were quashed on different grounds, the Court considered the Amendment Rules’ compliance with article 3 of the *European Convention on Human Rights* (‘ECHR’) prohibiting inhuman or degrading treatment or punishment. Such consideration is made possible in the UK as the *Human Rights Act 1998* (UK) incorporates the ECHR into domestic legislation.<sup>52</sup> While the same exercise is generally not possible in Australia, it is worth noting that the Court was concerned about the discretion the addition afforded when physical restraint should be restricted to instances that are strictly necessary.<sup>53</sup> The same vagueness appears in each jurisdiction considered; there is a lack of clarity about how far security and good order, the administrative purposes of restraint, may extend. The use of restraint in Queensland’s Detention Centre, such as that experienced by Child C following his refusal to shower, potentially illustrates the problem with such wording. It could theoretically be argued that his restraint was necessary for the good order of the Centre.

Provisions that prohibit disciplinary restraint if it causes or is directed towards particular results may also limit the use of restraints. Unlike Queensland and Victoria,<sup>54</sup> the NT does not prohibit emotional abuse or other forms of humiliation. Regulation 70 of the YJR, which states that: ‘(2) In the discipline or control of behaviour of detainees, a practice that is prohibited by the rules of the detention centre must not be used’, could potentially remedy this legislative deficit. However, in 2015 the NT’s detention centre procedures were described as ‘non-existent, outdated and inadequate’.<sup>55</sup> So, while using an unmuzzled dog on Child D seems to fall foul of the Queensland and Victorian provisions prohibiting the use of other forms of humiliation or emotional abuse, there is no corresponding provision in the NT to account for this form of degrading treatment should it occur there, even if clearly directed at inciting fear or anguish in the detainee.<sup>56</sup> This is contrary to the international jurisprudence mentioned above.

Each jurisdiction strictly legislates the use of isolation. It is prohibited for punitive purposes, instead only permitted on protective and administrative grounds and, aligned with the Nelson Mandela Rules, must be

31. UN Human Rights Council, *Interim Report of the Special Rapporteur of the Human Rights Council on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 66th sess, UNGA Doc A/66/268 (5 August 2011) [77].

32. Committee on the Rights of the Child, *General Comment No 8 in relation to the Right of the Child to Protection from Corporal Punishment and other Cruel or Degrading Forms of Punishment*, 42nd sess, UN Doc CRC/C/GC/10 (2 March 2007) [11].

33. *Ibid.*

34. *R(Q) v The Secretary of State for Justice* [2008] EWCA Civ 882, [58]–[59].

35. *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 643–44 (Keane J) citing, *inter alia*, *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 204.

36. Cf. the ACT and Victorian Human Rights Acts, which incorporate much of the ICCPR. However, generally for the ICCPR, CAT and CROC see: *Tomasevic v Travaglini* (2007) 17 VR 100, 113; and *Minister for Immigration and Ethnic Affairs v Teoh* (1994–1995) 183 CLR 273.

37. See Bronwyn Naylor, ‘Protecting the Human Rights of Prisoners in Australia’ in Gerber and Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Lawbook, 2013) 403.

38. YJR reg 71(1); QYJR reg 16(5); CYFA s 487(b)(i).

39. CYFA s 487(b)(ii).

40. QYJR reg 16(5)(b).

41. YJA s 153(3).

42. (2014) 34 NTLR 115.

43. *Edwards v Tasker* (2014) 24 NTLR 115, 126.

44. NT Children’s Commissioner, *Own Initiative Investigation Report Services Provided by the Department of Correctional Services at the Don Dale Youth Detention Centre* (August 2015) 21–2.

45. *Günes v Turkey* (European Court of Human Rights) Chamber, Application No 9829/07, 10 July 2012 [43].

46. CYFA s 487(b)-(f).



## *Isolation's impact can intensify where someone has a pre-existing mental health condition, which is particularly concerning given the large percentage of children in custody with such pre-existing conditions.*

authorised at higher levels.<sup>57</sup> In Queensland and the NT, detainees can only be isolated for enumerated reasons, including, in Queensland, for their own protection or, in both jurisdictions, for the protection of others; or for the security or good order of the detention centre.<sup>58</sup> Victoria's legislation prohibits the use of isolation as punishment. It appears to have the highest threshold for the use of isolation, requiring generally that: the detainee's behaviour present an immediate threat to their own safety or the safety of others or to property; and that all other reasonable steps have been taken to prevent the harm.<sup>59</sup> However, this threshold does not apply to isolation in the interests of security (an administrative ground).<sup>60</sup>

The international sources recognise that isolation of child detainees is problematic and yet it is permitted in each of the jurisdictions examined. The exceptions allowing isolation for 'order' and 'security' (the administrative reasons) may be even more problematic due to the lack of clarity around its use. Regarding Child B and others, the NT Children's Commissioner noted that 'there appears to be an overlap between [isolation] for security reasons, and one for disciplinary reasons'.<sup>61</sup> In Queensland, Amnesty found a 'lack of clear rules around the admission of children into the separation unit ... and insufficient details about why children were held there' and that 'reasons given for separation were broad and strayed from statutory requirements'.<sup>62</sup>

The maximum isolation period stipulated in the NT is 72 hours, with the Commissioner's approval.<sup>63</sup> No maximum is stated in Queensland or Victoria but, for periods greater than 24 hours, it requires high-level approval.<sup>64</sup> International best practice on isolating child detainees requires a maximum period to be stipulated.<sup>65</sup> The NT is the only jurisdiction that stipulates a maximum period of isolation, but it was this provision that was breached in relation to Child B.<sup>66</sup>

Where detainees are at risk of self-harm in the NT, specific provisions require them to be moved to an observation room, furnished with a non-flammable, rip-proof mattress and bedding, and to be clothed in rip-proof material.<sup>67</sup> In the incident involving Child A, this provision was relied upon to justify force and the conduct was found not to be disciplinary. In Queensland too, the conduct to which Child C was subjected was justified on the basis that he had threatened self-harm. Where children are isolated in such instances, the isolation would not be considered punitive. However, allowing exceptions to the otherwise limited use of isolation for such children should not be favoured as a

child's risk of self-harm and suicide is increased from being exposed to such measures.<sup>68</sup>

### Conclusion

While admirable efforts may have been made in Australian legislation to comply with the international obligations, this article has demonstrated that success has been patchy in protecting children in Australian juvenile detention. Sometimes this may be because legislative protections are not followed in practice, but on other occasions Australian legislation is found wanting. Specifically, recent amendments to Queensland's legislation has brought it into line with the requirement that force can only be employed as a last resort, but Victoria and the NT do not have the same requirement. The NT's absence of provisions prohibiting emotional abuse or other forms of humiliation is also contrary to the international position and leaves the door open in that jurisdiction for controversial control measures. Similarly diverging from international best practice, Queensland and Victoria do not impose maximum time limits on the use of solitary confinement. The main problem though appears to be allowing the use of force, restraint and isolation on the questionable 'administrative' basis of maintaining order or security. Although this approach ensures the jurisdictions strictly comply with the international position prohibiting 'punitive' measures, it undermines the spirit of what is trying to be achieved internationally. The State may be able to hide from assertions of inhuman or degrading treatment on the pretext that any force, restraint or isolation is for administrative purposes (permitted by legislation), rather than to discipline or punish (which is prohibited). To use the time limits imposed on isolation as an example, if a child is purportedly isolated for administrative rather than punitive reasons, it may not matter that the time for which they are isolated amounts to solitary confinement, which by its nature is inhuman and degrading. But labelling the confinement as administrative will not limit the harm that isolation can cause to the child. The distress evident on Child A's face, following procedures that arguably cannot be characterised as punitive because they are designed specifically to manage 'at risk' detainees, further illustrates this point. Provisions that technically comply with the letter of international instruments can potentially still result in harm, affording little protection to vulnerable children.

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47. Alyssa Braithwaite, 'Only the Northern Territory Used Restraint Chairs on Children', SBS, 27 July 2016.

48. YJA ss 152(1A), 153(4); QYJR reg 19(1)(c).

49. There is some question over restraint chairs given the NT parliament only passed legislation permitting their approval in June this year. Reports note that use of such restraints has been suspended pending the Royal Commission's investigation into Don Dale: see Braithwaite: above n 47.

50. YJA ss 153(4), 155; QYJR reg 19(1)(c).

51. R(C) v The Secretary of State for Justice [2008] EWCA Civ 882, [7].

52. Human Rights Act 1998 (UK) c 42.

53. R(C) v The Secretary of State for Justice [2008] EWCA Civ 882, [59].

54. QYJR reg 16(4)(c); CYFA s 487(c),(d).

55. Michael Vita, *Review of the Northern Territory Youth Detention System Report* (January 2015) 13.

56. Dog use has since ceased in Queensland: Amnesty International, "'Heads Held High': Keeping Queensland Kids out of Detention, Strong in Culture and Community' (August 2016) 26.

57. NT position appears confused as isolation is permitted in a section entitled 'Discipline'.

58. QYJR reg 21(c)-(e); YJA s 153(5).

59. CYFA s 488(2).

60. CYFA ss 487(a), 488(2) and 488(7).

61. NT Children's Commissioner, above n 44, 40.

62. Amnesty International, above n 56, 27.

63. YJA s 153(5).

64. QYJR reg 21(2)(c); CYFA s 488(3) combined with s 17.

65. Irish Penal Reform Trust, *Detention of Children in Ireland: International Standards and Best Practice* (2009), 69.

66. NT Children's Commissioner, above n 44, 33.

67. YJR reg 42.

68. Human Rights Watch, *Growing Up Locked Down* (October 2012), 61.