SOLITARY CONFINEMENT AND PRISONERS' HUMAN RIGHTS

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Whilst the term 'solitary confinement' does not appear in Australian legislation, prisoners in all states and territories can be placed in isolation for periods of time that exceed United Nations standards. Solitary confinement is an embedded strategy used to manage 'difficult' prisoners, but legal and psychological research indicates that placing a person in solitary confinement, even for a short period of time, can result in serious psychological harm. Most prisoners will be released, and if they are disturbed and distressed, or so institutionalised that they are unable to reintegrate into society, they may pose an increased risk to members of the community. Courts in Canada, New Zealand, and Europe have condemned the use of solitary confinement on human rights grounds, particularly the right to humane treatment when deprived of liberty, the right to life, and the right to be free from cruel, inhuman and degrading treatment. This paper considers how the Human Rights Act 2019 *(Qld) could be used to challenge decisions to place prisoners in solitary confinement in Queensland. It is argued that since there are a number of less restrictive alternatives available, placement in solitary confinement may not be a reasonable or justifiable limitation on prisoners' human rights.*

I INTRODUCTION

Solitary confinement is where a prisoner is locked down in their cell for at least 22 hours a day with very limited or no association with other prisoners.[1] Generally, prisoners living under these conditions have little or no access to natural light or fresh air, limited contact with staff, and reduced privileges, including limitations

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1 *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, GA Res 70/175, UN Doc A/RES/70/175 (8 January 2016, adopted 17 December 2015) r 44 ('*Mandela Rules*'). Note that the *Mandela Rules* are not binding in international law: *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) arts 2(1)(a), 3. See Anita Mackay, 'The Relevance of the United Nations Mandela Rules for Australian Prisons' (2017) 42(4) *Alternative Law Journal* 279.

on their access to televisions, phone calls and visits.[2] Prolonged solitary confinement has been defined as confinement in these conditions for more than 15 days.[3]

The term 'solitary confinement' is not used in Australian corrections legislation, however many Australian prisoners are subjected to solitary confinement conditions. Exact figures are difficult to obtain, but in 2018, Queensland Corrective Services revealed that around 130 prisoners were being held in prolonged separate confinement in Queensland prisons, equating to 1.4% of the Queensland prisoner population.[4] Of course, solitary confinement has been used much more extensively during the COVID-19 pandemic to protect prisoners and staff from infection.[5]

United Nations agencies have concluded that 'solitary confinement should only be used in very exceptional cases, for as short a time as possible and only as a last resort', and that solitary confinement for more than 15 days at a time should not occur.[6] This is based on the premise that it has been 'convincingly documented' that solitary confinement 'may cause serious psychological and sometimes physiological ill effects'.[7] The *Guiding Principles for Corrections in Australia* ('*Guiding Principles*') state that separate confinement should only occur when this is 'deemed necessary following evidence-based assessments' and where 'there is

2 Human Rights Watch, *'I Needed Help, Instead I Was Punished': Abuse and Neglect of Prisoners with Disabilities in Australia* (Report, February 2018) 42–3. Note, however, that solitary confinement has 'many faces': Carl B Clements et al, 'Systemic Issues and Correctional Outcomes: Expanding the Scope of Correctional Psychology' (2007) 34(7) *Criminal Justice and Behavior* 919, 925. The conditions prisoners experience in solitary confinement are so varied that it is difficult to generalise: see Stuart Grassian, 'Psychopathological Effects of Solitary Confinement' (1983) 140(11) *American Journal of Psychiatry* 1450, 1454 ('Psychopathological Effects of Solitary Confinement'); Ivan Zinger, 'The Psychological Effects of 60 Days in Administrative Segregation' (PhD Thesis, Carleton University, December 1998) 11–12.

3 *Mandela Rules*, UN Doc A/RES/70/175 (n 1) r 44. Some studies suggest that lengthier, and indefinite, periods of solitary confinement cause the most harmful effects: see Peter Suedfeld et al, 'Reactions and Attributes of Prisoners in Solitary Confinement' (1982) 9(3) *Criminal Justice and Behavior* 303, 318; Paul Gendreau and James Bonta, 'Solitary Confinement Is Not Cruel and Unusual Punishment: People Sometimes Are!' (1984) 26(4) *Canadian Journal of Criminology* 467. Ten days is their suggested maximum: at 473.

4 Vanessa Krulin and Madelaine van den Berg, 'QLS Uncovers Solitary Confinement Data' (2019) 39(3) *Proctor* 33, 33. The Anti-Discrimination Commission Queensland reported that between 2015–16, 535 women were placed in separate confinement for breaches of discipline and 1,161 were placed on safety orders: Anti-Discrimination Commission Queensland, *Women in Prison 2019: A Human Rights Consultation Report* (Report, 2019) 68–9.

5 Helen Blaber, Tamara Walsh and Lucy Cornwell, 'Prisoner Isolation and COVID-19 in Queensland' (2021) 8(2) *Griffith Journal of Law and Human Dignity* 52; Andreea Lachsz and Monique Hurley, 'Why Practices That Could Be Torture or Cruel, Inhuman and Degrading Treatment Should Never Have Formed Part of the Public Health Response to the COVID-19 Pandemic in Prisons' (2021) 33(1) *Current Issues in Criminal Justice* 54.

6 Symposium, 'The Istanbul Statement on the Use and Effects of Solitary Confinement' (2008) 18(1) *Journal on Rehabilitation of Torture Victims and Prevention of Torture* 63, 66 ('Istanbul Statement'); *Mandela Rules*, UN Doc A/RES/70/175 (n 1) rr 43–4.

7 Istanbul Statement (n 6) 64. See also Juan E Méndez, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc A/68/295 (9 August 2013) 16 [60]–[61] ('*Special Rapporteur on Torture*').

no other reasonable way to manage' the identified risks.[8] The *Guiding Principles* further state that any signs that a prisoner's physical or mental health is being 'injuriously affected' should be 'recognised and considered'.[9]

Numerous studies have concluded that after only a few days, solitary confinement can result in serious psychological harm that may be irreversible.[10] These studies have suggested that the profound sensory and social isolation experienced by prisoners in solitary confinement can itself cause symptoms of psychosis including delusions, hallucinations and paranoia.[11] It is not uncommon for prisoners in solitary confinement to engage in other forms of disordered behaviour including acts of self-harm and obsessive-compulsive behaviours.[12] Some researchers have found that there is an association between placement in solitary confinement and deaths in custody, and it has been reported that even short periods of solitary confinement are associated with post-release mortality.[13]

Some have suggested that the high level of distress observed amongst prisoners in solitary confinement is reflective of the fact that they are more likely to have pre-existing mental illnesses than prisoners in the mainstream prison population.[14] There are high rates of mental illness within the prison population as a whole; the Australian Institute of Health and Welfare reports that 40% of entrants to prison have been told they have a mental health condition at some point during their lives, and 16% of prisoners are dispensed medication for mental illness.[15] Prisoners in solitary confinement may exhibit even higher rates of mental illness.[16] If prisoners are judged to be at risk of suicide, or their illness-related behaviour is too difficult

8 Corrective Services Administrators' Council (Cth), *Guiding Principles for Corrections in Australia: Revised 2018* (Report, 2018) 36 ('*Guiding Principles*').

9 Ibid 18 [3.3.6].

10 Stuart Grassian, 'Psychiatric Effects of Solitary Confinement' (2006) 22 *Washington University Journal of Law and Policy* 325, 332; Brian O Hagan et al, 'History of Solitary Confinement Is Associated with Post-Traumatic Stress Disorder Symptoms among Individuals Recently Released from Prison' (2018) 95(2) *Journal of Urban Health* 141; Terry A Kupers, 'What to Do with the Survivors?: Coping with the Long-Term Effects of Isolated Confinement' (2008) 35(8) *Criminal Justice and Behavior* 1005, 1005–6.

11 Grassian, 'Psychiatric Effects of Solitary Confinement' (n 10) 333–8; *Special Rapporteur on Torture*, UN Doc A/68/295 (n 7) 16 [60].

12 Keramet Reiter et al, 'Psychological Distress in Solitary Confinement: Symptoms, Severity, and Prevalence in the United States, 2017–2018' (2020) 110(Supp No 1) *American Journal of Public Health* 56; Fatos Kaba et al, 'Solitary Confinement and Risk of Self-Harm among Jail Inmates' (2014) 104(3) *American Journal of Public Health* 442, 445.

13 Christopher Wildeman and Lars H Andersen, 'Solitary Confinement Placement and Post-Release Mortality Risk among Formerly Incarcerated Individuals: A Population-Based Study' (2020) 5(2) *Lancet Public Health* 107, 110.

14 Maureen L O'Keefe et al, *One Year Longitudinal Study of the Psychological Effects of Administrative Segregation* (Final Report, 31 October 2010) 52, 78. See also JS Wormith, Marie-Claude Tellier and Paul Gendreau, 'Characteristics of Protective Custody Offenders in a Provincial Correctional Centre' (1988) 30(1) *Canadian Journal of Criminology* 39, 54.

15 Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2018* (Report, 2019) 27.

16 O'Keefe et al (n 14) 78.

to manage in a mainstream setting, they may be placed in solitary confinement for their own protection or the protection of others.[17] Regardless, isolation does not constitute best practice in the treatment of mental health disorders[18] and whilst prisoners may rank towards the bottom of the 'hierarchy of sympath[y]',[19] their psychological wellbeing is important to the community generally. Most prisoners will be released at some time, so efforts must be made to rehabilitate and 'resocialise' them if they and the community are to remain safe.[20]

Courts around the world, and in Australia, have condemned the use of solitary confinement based on human rights considerations.[21] However, there are competing perspectives. Courts have also acknowledged that prison administrators 'do a very difficult job in very difficult circumstances'[22] and that prisoners who are placed in solitary confinement are those who have the highest needs and pose 'the gravest risk to the security of the prison and to the security of the community'.[23] International literature has noted that some prisoners may elect to be placed in solitary confinement in order to escape the stresses that close confinement with other prisoners can create.[24] In particular, prisoners with some forms of psychiatric illness or cognitive impairment may prefer the predictability and relative 'safety' of isolation.[25]

17 In Queensland, prisoners can be placed in solitary confinement as a result of a breach of discipline (by, for example, engaging in violent or destructive behaviour) or because they are subject to a safety order: *Corrective Services Act 2006* (Qld) ss 53, 118 ('*Queensland Corrective Services Act*').

18 Maureen O'Keefe, 'Reflections on Colorado's Administrative Segregation Study' (2017) 278 (May) *National Institute of Justice Journal* 23, 27.

19 Kevin M Dunn, 'Do Australians Care about Human Rights? Awareness, Hierarchies of Sympathy and Universality' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Lawbook, 2013) 515, 521.

20 Kupers (n 10) 1005, 1010; Craig Haney, 'Prison Effects in the Age of Mass Incarceration' (2012) *Prison Journal*: 1–24, 3.

21 See especially *Callanan v Attendee X* [2013] QSC 340, [34], [52] (Applegarth J) ('*Callanan v X*'); *British Columbia Civil Liberties Association v A-G (Canada)* [2018] BCSC 62, [191], [321], [376] (Leask J) (Supreme Court of British Colombia) ('*BCCL v Canada 2018*'), affd [2019] BCCA 228, [154]–[157] (Fitch JA) (Court of Appeal of British Colombia). See also Shaun Gallagher, 'The Cruel and Unusual Phenomenology of Solitary Confinement' (2014) 5 (June) *Frontiers in Psychology* 585:1–8; Joseph Briggs and Russ Scott, 'Prolonged Solitary Confinement (Administrative Segregation) and the Human Rights of a Serving Prisoner' (2022) 29(3) *Journal of Law and Medicine* 904.

22 *Knight v Spadano* (2003) 145 A Crim R 1, 2 [2] (Cummins J) ('*Knight*').

23 Ibid 13 [46] (Cummins J). See also *De Alwis v Minister for Corrective Services* [2013] WASC 275, [41] (Simmonds J) ('*De Alwis*'), quoting *Barreto v McMullan* [2013] WASC 26, [37]–[41] (McKechnie J) ('*Barreto*').

24 Jesenia M Pizarro and Raymund E Narag, 'Supermax Prisons: What We Know, What We Do Not Know, and Where We Are Going' (2008) 88(1) *Prison Journal* 23, 28; Suedfeld et al (n 3) 308.

25 Pamela Valera and Cheryl L Kates-Benman, 'Exploring the Use of Special Housing Units by Men Released from New York Correctional Facilities: A Small Mixed-Methods Study' (2016) 10(6) *American Journal of Men's Health* 466, 470–1.

In Queensland, the *Human Rights Act 2019* (Qld) ('*Queensland Human Rights Act*') has recently been passed and Queensland Corrective Services is a public entity under that *Queensland Human Rights Act*.[26] This means that when making a decision to place a person in solitary confinement, Queensland Corrective Services is required to act in a way that is compatible with human rights, and give proper consideration to relevant human rights.[27] Human rights protected under the Act include the right to life, the right to protection from cruel, inhuman and degrading treatment, and the right to humane treatment when deprived of liberty,[28] and international courts in Europe, New Zealand and Canada have invalidated solitary confinement regimes based on these particular rights.[29] Despite the fact that the *Human Rights Act 2004* (ACT) ('*ACT Human Rights Act*') and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*') have been in place for many years, it was not until 2021 that the first cases examining human rights issues related to solitary confinement in adult prisons emerged.[30]

In order to investigate the extent to which solitary confinement is used in Queensland, the conditions under which segregated prisoners are held, and whether the use of solitary confinement might be found to breach the new *Queensland Human Rights Act*, we undertook textual analysis of client files and focus group interviews with lawyers and advocates who represent and assist prisoners in Queensland. We have reported on the results of that research elsewhere.[31] What we seek to do in this paper is to situate our findings within the existing law and literature on solitary confinement in Australia.

26 *Human Rights Act 2019* (Qld) ss 9, 10(3)(a) ('*Queensland Human Rights Act*').

27 Ibid s 58(1)(b). Although note *Queensland Corrective Services* (n 17) s 5A(2) which states that an officer does not contravene ibid s 58(1) only because they took into account 'the security and good management of corrective services facilities; or the safe custody and welfare of all prisoners'.

28 *Queensland Human Rights Act* (n 26) ss 16, 17, 30.

29 *BCCL v Canada 2018* (n 21); *Taunoa v A-G (NZ)* [2008] 1 NZLR 429 ('*Taunoa*'); *Kudła v Poland* [2000] XI Eur Court HR 197 ('*Kudła*').

30 In Queensland, see *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* (2021) 9 QR 250 ('*Owen-D'Arcy*'). In the Australian Capital Territory ('ACT'), see *Islam v Director-General, Justice and Community Safety Directorate* [2021] ACTSC 33 ('*Islam*'); *Davidson v Director-General, Justice and Community Safety Directorate* (2021) 18 ACTLR 1 ('*Davidson*'). In the context of COVID-19 related restrictions, see also *Donohue v Westin* [2022] VSC 37 ('*Donohue*'). See especially Anita Mackay, 'Recent Court Decisions about the Protection of Human Rights of Imprisoned People' (2022) 28(2–3) *Australian Journal of Human Rights* 435, 436 ('Recent Court Decisions'). As to the lack of jurisprudence related to prisoners' rights, see Julie Debeljak, 'The Rights of Prisoners under the *Victorian Charter*: A Critical Analysis of the Jurisprudence on the Treatment of Prisoners and Conditions of Detention' (2015) 38(4) *University of New South Wales Law Journal* 1332, 1332; Matthew Groves, 'Prisoners and the Victorian Charter' (2010) 34(4) *Criminal Law Journal* 217, 217.

31 Tamara Walsh et al, *Legal Perspectives on Solitary Confinement in Queensland* (Report, 2020).

II SOLITARY CONFINEMENT IN QUEENSLAND

The term 'solitary confinement' is not used in the *Corrective Services Act 2006* (Qld) ('*Queensland Corrective Services Act*'), nor is it used in any of the other Australian corrections Acts.[32] Yet, all corrections Acts allow for a prisoner to be 'segregated' or held 'separately' from other prisoners,[33] and they confer broad discretion upon corrective services to determine when a prisoner should be separated from others, the conditions under which this may occur, and the duration of their placement.[34]

In Queensland, the *Queensland Corrective Services Act* allows for the 'separate confinement' of prisoners, defined as 'the separation of the prisoner from other prisoners',[35] in three sets of circumstances:

1. Breach of discipline,[36] but only after disciplinary proceedings have been held, and only for maximum period of seven days.[37]

2. A safety order, where the chief executive (or a doctor or psychologist) believes there is a risk of the prisoner harming themselves, harming or

32 *Corrections Management Act 2007* (ACT) s 88 (definition of 'segregation') includes 'separate confinement' ('*ACT Corrections Management Act*'); *Crimes (Administration of Sentences) Act 1999* (NSW) s 10 ('segregated custody') ('*NSW Crimes Act*'). However, note the distinction between 'segregated custody' and 'separation of inmates': at s 78A; *Hamzy v Commissioner of Corrective Services (NSW)* (2011) 80 NSWLR 296, 331 [136] (Johnson J). *Correctional Services Act 2014* (NT) s 41 ('separate a prisoner from other prisoners') ('*NT Correctional Services Act*'); *Queensland Corrective Services Act* (n 17) sch 4 (definition of 'separate confinement'); *Correctional Services Act 1982* (SA) s 36 ('separately and apart from all other prisoners') ('*SA Correctional Services Act*'); *Corrections Act 1997* (Tas) ss 61(b) ('separation from other prisoners'), 59(5)(c) ('confine the prisoner … to his or her cell') ('*Tas Corrections Act*'); *Corrections Regulations 2018* (Tas) reg 8 ('separate confinement') ('*Tas Corrections Regulations*'); *Corrections Regulations 2019* (Vic) reg 32 ('separate a prisoner from other prisoners') ('*Vic Corrections Regulations*'); *Prisons Act 1981* (WA) s 43 ('separate confinement') ('*WA Prisons Act*').

33 This language has had the effect of obscuring the true nature of prisoners' 'separation', although the Court in *Fyfe v Bordoni* (1998) 199 LSJS 401 ('*Fyfe*') recognised that '"[s]eparation" comes very close to the old concept of solitary confinement': at [24] (Olsson J).

34 Prisoners may be placed in separate confinement if they are considered a risk to themselves or others, or if this is necessary to ensure 'good order', 'security', or 'discipline' within the facility: *ACT Corrections Management Act* (n 32) ss 90–2; *NSW Crimes Act* (n 32) s 10(1); *NT Correctional Services Act* (n 32) s 41; *Queensland Corrective Services Act* (n 17) ss 53, 121; *Corrective Services Regulation 2017* (Qld) regs 4, 7 ('*Queensland Corrective Services Regulation*'); *SA Correctional Services Act* (n 32) s 36(2). Note that in Tasmania, the *Tas Corrections Act* (n 32) limits periods of separation to 30 days, and confinement in a cell to 48 hours: at ss 59(5)(c), 61(b). But separation may occur 'in accordance with any standing orders': *Tas Corrections Regulations* (n 32) reg 8. *Vic Corrections Regulations* (n 32) reg 32; *WA Prisons Act* (n 32) s 43.

35 *Queensland Corrective Services Act* (n 17) sch 4 (definition of 'separate confinement').

36 *Queensland Corrective Services Regulation* (n 34) reg 5. Examples include 'contravening a lawful direction', 'using abusive, indecent, insulting, obscene, offensive or threatening language', or 'wilfully damaging' property or clothing.

37 *Queensland Corrective Services Act* (n 17) ss 118, 121(2).

being harmed by someone else, or 'the safety order is necessary for the security or good order of the corrective services facility'.[38] A prisoner can be placed on a safety order for a maximum of one month, but consecutive orders can be made.[39]

3. A maximum security order, if the chief executive reasonably believes that: 'there is a high risk of the prisoner escaping, or attempting to escape'; 'there is a high risk of the prisoner killing or seriously injuring other prisoners or other persons'; or, 'generally, the prisoner is a substantial threat to the security or good order of the corrective services facility'.[40] A 'maximum security order must not be for a period longer than 6 months', however unlimited consecutive orders may be made.[41]

The *Corrective Services Regulation 2017* (Qld) ('*Queensland Corrective Services Regulation*') establishes some minimum requirements for prisoners subjected to separate confinement. For example, they must have access to 'reticulated water', and 'a toilet and shower facilities'.[42] They must have the same bedding as other prisoners, and clothing that is appropriate to the conditions.[43] They must also be 'given the opportunity to exercise, in the fresh air, for at least 2 daylight hours a day, unless a doctor or nurse' has advised otherwise.[44] However, there is no entitlement for prisoners to go outdoors and no requirement that they have access to a source of mental stimulation. Indeed, the Queensland Corrective Services' *Custodial Operations Practice Directives* ('*COPD*') indicate that prisoners in separate confinement may be placed in a non-powered cell,[45] which prevents them from accessing a television and other powered devices; sometimes there is no running water in these cells.[46] Further, some of these minimum requirements (such

38 Ibid s 53(1).

39 Ibid ss 53(2), 54. Note that the chief executive cannot make consecutive safety orders in respect of a prisoner unless he/she considers any submission made by the prisoner: at s 54(4)(b).

40 Ibid s 60(3).

41 Ibid s 60(4). Note however that the chief executive cannot make consecutive maximum security orders in respect of a prisoner unless he/she considers any submission made by the prisoner: at s 61(3)(b).

42 *Queensland Corrective Services Regulation* (n 34) reg 4(1)(a). By way of comparison, see *Corrections Act 1986* (Vic) s 47(1) ('*Vic Corrections Act*') which contains a list of '[p]risoners rights'. Even though there is no remedy proscribed in the event that a breach occurs, in *Castles v Secretary to the Department of Justice* (2010) 28 VR 141 ('*Castles*'), Emerton J considered s 47(1)(f) to impose a 'requirement': at 177 [147].

43 *Queensland Corrective Services Regulation* (n 34) regs 4(1)(b)–(c).

44 Ibid reg 4(1)(d).

45 Queensland Corrective Services, *Prisoner Accommodation Management: Maximum Security Unit* (13 December 2019) 16–17; Queensland Corrective Services, *Prisoner Accommodation Management: Detention Unit* (6 December 2019) 3.

46 It is our understanding that, at times, water is turned off in cells, for example where there is a risk that the prisoner may flood their cell. When the water is turned off, the prisoner will only have access to running water if they ask an officer for assistance: Walsh et al (n 31) 17.

as 'the opportunity to exercise, in the fresh air, for at least 2 daylight hours a day')[47] are not always provided.

The *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)* ('*Mandela Rules*') adopted in 2015 state that the use of solitary confinement should be 'subject to independent review, and only pursuant to the authorization by a competent authority',[48] and that prisoners who are subject to solitary confinement should be visited by health care personnel who 'have the authority to review and recommend changes' to the conditions of their confinement on a daily basis.[49] Yet, there is very limited external oversight of the use of solitary confinement in Queensland prisons. Regular health assessments of people on safety orders and maximum security orders are undertaken by medical personnel,[50] however their recommendations are not binding, and they do not have any power to amend or cancel the order.[51] The chief executive is required to 'notify a health practitioner before making a maximum security order' if they know or reasonably believe the 'prisoner has a mental health condition or intellectual disability', however this notification has no legal effect whatsoever.[52] Safety orders must be reviewed regularly by the official visitor, and a prisoner who is subject to a safety order or a maximum security order can apply in writing to the chief executive for a review by the official visitor,[53] but again, 'the chief executive is not bound by the official visitor's recommendation'.[54] Further to this, the official visitor scheme was recently criticised by the Queensland Crime and Corruption Commission for poor performance and for lacking independence and transparency.[55]

47 *Queensland Corrective Services Regulation* (n 34) reg 4(1)(d).

48 *Mandela Rules*, UN Doc A/RES/70/175 (n 1) r 45.1. See also the Council of Europe, *European Prison Rules* (Council of Europe Publishing, 2006) which state that solitary confinement 'shall be imposed as a punishment only in exceptional cases and for a specified period of time, which shall be as short as possible': at r 60.5.

49 *Mandela Rules*, UN Doc A/RES/70/175 (n 1) r 46.3.

50 *Queensland Corrective Services Act* (n 17) ss 55(2)(b), 57, 64.

51 Ibid ss 55(4)–(6), 58(6). See also *Owen-D'Arcy* (n 30) 307 [171] (Martin J).

52 *Queensland Corrective Services Regulation* (n 34) reg 16. See also Queensland Corrective Services, *Sentence Management: Classification and Placement* (6 September 2018).

53 *Queensland Corrective Services Act* (n 17) ss 56(4), 57, 63. Prisoners subject to maximum security orders are limited as to the frequency of applications: at s 63(2). Official visitors can review a maximum security order on their own initiative under certain circumstances: at s 63(6). As to official visitors generally: see at ss 290–2.

54 Ibid ss 56, 63(9)–(10).

55 Crime and Corruption Commission (Qld), *Taskforce Flaxton: An Examination of Corruption Risks and Corruption in Queensland Prisons* (Report, December 2018) 49. Note also that the chief inspector is responsible for coordinating the official visitor scheme and reporting on any incidents he/she investigates, however these reports tend not to be made publicly available. The most recent report of the chief inspector available on the Queensland Corrective Services website is from 2013: 'Healthy Prison Report', Q*ueensland Corrective Services* (Web Page, 18 October 2019) <https://corrections.qld.gov.au/documents/reviews-and-reports/healthy-prison-report>.

III LEGAL PERSPECTIVES ON SOLITARY CONFINEMENT IN AUSTRALIA

This lack of external oversight is particularly problematic considering the limited judicial and academic scrutiny of the use of solitary confinement in Australia. References to solitary confinement and equivalent terminology are rare in Australian case law and literature.[56]

Australian scholars have noted that imprisonment itself is the punishment imposed on prisoners, rather than the conditions within prison, and that when imprisoned, prisoners forfeit only their right to liberty and not those other human rights that can reasonably be afforded them in a carceral context.[57] However, the situation becomes more complex when prisoners commit 'offences' in prison, and when it is not safe for them to be accommodated within the mainstream prison population.[58] Prison administrators suggest that, in these situations, prisoners must necessarily be placed in a more restrictive environment. Some prisoners may request placement in solitary confinement, perhaps because they are at risk of harm from other prisoners, or because they are unable to cope with harsh or violent prison environments.[59]

The implication is that the objectives of their placement in solitary confinement — ensuring the safety and security of individual prisoners and the facility as a whole — outweigh the encroachments on human rights that necessarily result. Solitary confinement is used extensively around the world, almost as a 'standard way of doing business' despite the fact that it has been criticised as a 'primitive [solution]'.[60] Coyle suggests, in the context of significant overcrowding in

56 Since 2021, additional literature has emerged: see especially Briggs and Scott (n 21); Lachsz and Hurley (n 5); Mackay, 'Recent Court Decisions' (n 30).

57 Bronwyn Naylor and Stan Winford, 'Implementing OPCAT through Prison Monitoring: The Relevance of Rehabilitation' (2019) 25(1) *Australian Journal of Human Rights* 113, 113; Bronwyn Naylor, 'Human Rights and Respect in Prisons: The Prisoners' Perspective' (2014) 31 (January) *Law in Context* 84, 84; 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, 368; Debeljak (n 30) 1337; Groves (n 30) 217. See also *Mandela Rules*, UN Doc A/RES/70/175 (n 1) r 5.

58 It is important to note that 'offences' committed in prison are often associated with mental illness: see Kupers (n 10) 1012. Cognitive impairment may also play a role in the use of solitary confinement. For example, an investigation by the Victorian Ombudsman regarding the imprisonment of a woman with a pervasive developmental disorder and borderline intellectual functioning concluded that her 'disability related behaviours' were managed by placement in solitary confinement for a period of 18 months, noting that her case was not isolated: see Victorian Ombudsman, *Investigation into the Imprisonment of a Woman Found Unfit to Stand Trial* (Report, October 2018) 6, 42, 65.

59 Zinger (n 2) 20; Wormith, Tellier and Gendreau (n 14) 54; Ian O'Donnell, *Prisoners, Solitude, and Time* (Oxford University Press, 2014) 70, 74, 84.

60 Paul Gendreau and Ryan M Labrecque, 'The Effects of Administrative Segregation: A Lesson in Knowledge Cumulation' in John Wooldredge and Paula Smith (eds), *The Oxford Handbook of Prisons and Imprisonment* (Oxford University Press, 2018) 341, 350. See also Briggs and Scott (n 21) 905–7.

Australian prisons,[61] that staff may become preoccupied with maintaining security and order at the expense of building relationships and treating prisoners humanely.[62] Previously, courts have expressed a reluctance 'to interfere with what are essentially operational matters within the prison system', and have confined any inquiry to 'whether or not the correct procedures were followed in arriving at the decisions in question'.[63] However, judicial officers have recognised that 'prisoners' rights are important',[64] and that prisoners are not 'beyond the protection of the law'.[65]

The harsh conditions experienced by prisoners in solitary confinement have been judicially noted, and Australian judges have reduced the length of prisoners' sentences in recognition of this.[66] In *Callanan v Attendee X* ('*Callanan v X*'), *Callanan v Attendee Y* ('*Callanan v Y*') and *Callanan v Attendee Z* ('*Callanan v Z*'),[67] Applegarth J noted that considering the 'large body of literature' evidencing the 'harms of solitary confinement', including the risk of enduring psychological damage, a reduced sentence was warranted for the defendants.[68] Importantly, his

61 Queensland prisons often operate above 100% of built capacity: Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (Draft Report, 2019) xviii. See also Queensland Corrective Services, *Annual Report 2020–2021* (Report, 2021) 48.

62 Andrew Coyle, *Humanity in Prison: Questions of Definition and Audit* (International Centre for Prison Studies, 2003) 18–19. See also Naylor (n 57) 85; *Owen-D'Arcy* (n 30) 325 [252] (Martin J).

63 *Abbott v Chief Executive, Department of Corrective Services* [2000] QSC 492, [27]–[28] (Williams J) ('*Abbott*'). See also *Garland v Chief Executive, Department of Corrective Services* [2004] QSC 450, [79] (White J) ('*Garland No 1*'), quoting *A-G (NSW) v Quin* (1990) 170 CLR 1, 35–6 (Brennan J); *McLaren v Rallings* [2015] 1 Qd R 438, 449 [45] (Jackson J) ('*McLaren*'), quoting *McEvoy v Lobban* [1990] 2 Qd R 235, 237 (Macrossan CJ); *De Alwis* (n 23) [41], [43] (Simmonds J), quoting *Barreto* (n 23) [37]–[41] (McKechnie J); *Rich v Secretary, Department of Justice* [2010] VSC 390, [46] (Bell J); *Fyfe* (n 33) [60]–[61] (Olsson J), quoting *Page v South Australia* (1997) 95 A Crim R 25, 27–8 (Bleby J); *Sandery v South Australia* (1987) 48 SASR 500, 513 (Olsson J) ('*Sandery*'). See also Mackay, 'Recent Court Decisions' (n 30) 438.

64 *Knight* (n 22) 2 [1] (Cummins J).

65 *Sandery* (n 63) 513 (Olsson J). See also *Castles* (n 42) 168 [103], 169 [108]–[109] (Emerton J); *Donohue* (n 30) [66] (Niall JA); *Thompson v Minogue* (2021) 67 VR 301, 320 [65]–[67] (Kyrou, McLeish and Niall JJA) ('*Thompson*').

66 *R v Qaumi* [2017] NSWSC 774, [154]–[159], [169], [178], [202], [207], [210], [214] (Hamil J); *R v Binse* [2014] VSC 253, [43]–[44] (Forrest J); *R v Kent* [2009] VSC 375, [32], [41] (Bongiorno JA) ('*Kent*'); *R v Liddy [No 2]* (2002) 84 SASR 231, 256 [91], 259 [106] (Mullighan J). Placement in solitary confinement will not always justify a reduction in sentence, for example where the prisoner is in solitary confinement due to escape attempts: see at 263 [119] (Mullighan J), citing *R v Everett* (1994) 73 A Crim R 550; *Callanan v Attendee Z* [2014] 2 Qd R 11, 16 [25] (Applegarth J) ('*Callanan v Z*'); *Milenkovski v Western Australia* (2014) 46 WAR 324, 338 [79], 342 [106] (Buss JA). See *CCR v The Queen* [2012] VSCA 163 where the Court did not disturb Collins' sentence even though the conditions of his 'significant confinement' did not 'seem justly sustainable over time': at [77] (Hansen JA). More recently, and in the context of COVID-19, see *Scott v The Queen* [2020] NSWCCA 81.

67 *Callanan v X* (n 21); *Callanan v Attendee Y* [2013] QSC 341 ('*Callanan v Y*'); *Callanan v Z* (n 66).

68 *Callanan v X* (n 21) [34], [37]–[39]; *Callanan v Y* (n 67) [34], [37]–[39]; *Callanan v Z* (n 66) 18 [33], 19 [36]–[39].

Honour also noted that the 'purposeful infliction of psychological harm by lengthy solitary confinement would be a cruel and degrading punishment'.[69]

In *Dale v Director of Public Prosecutions (Vic)* ('*Dale*'),[70] the Victorian Supreme Court of Appeal found that the solitary confinement conditions under which the prisoner had been held had 'caused his mental condition to deteriorate'.[71] The Court held that due to the lengthy delay he had already experienced, and the adverse impact these conditions had had on his mental health, Dale should be released on bail pending trial. Importantly, the Court noted:

> As this case starkly illustrates, such conditions can cause significant psychological harm, and can do so quite quickly. Once the risk of such harm is identified, great care should be taken to prevent it eventuating, unless there is a compelling need for such repressive conditions to be maintained.[72]

Coroners have also had reason to comment on solitary confinement in Australian prisons. In particular, coroners have noted the connection between placement in solitary confinement and psychosis. For example, in the *Inquest into the Death of W*, the coroner noted that the deceased's first presentation of psychotic symptoms occurred subsequent to being placed in 'protective custody'.[73] In the *Inquest into the Death of Fenika Junior Tautuliu Fenika* ('*Inquest into the Death of FJTF*'), the coroner observed that Fenika had experienced increased psychotic and depressive symptoms after being subjected to prolonged isolation.[74] The coroner observed that Fenika had experienced extreme social isolation, noting that at one time '[h]e did not see any person, including a correctional services officer' for 'at least 16 hours'.[75] Psychiatrists had said that his increase in mental health symptoms was associated with having 'limited human contact' and that he was 'not being adequately treated'.[76]

Coroners have also commented on the 'deplorable' nature of solitary confinement conditions.[77] In the *Inquest into the Death of Laura Parker* ('*Inquest into the Death of LP*'), the coroner described Laura's solitary confinement cell as 'dreadful', 'uninhabitable' and 'incompatible with hygienic living' because Laura had been

69 *Callanan v X* (n 21) [52]; *Callanan v Y* (n 67) [52]; *Callanan v Z* (n 66) 21 [50]. The Court in *Knight* (n 22) concluded that the Victorian regime did not amount to cruel and unusual punishment: at 13–14 [48] (Cummins J).

70 [2009] VSCA 212 ('*Dale*').

71 Ibid [36] (Maxwell P, Nettle JA and Lasry AJA).

72 Ibid [35] (Maxwell P, Nettle JA and Lasry AJA).

73 *Inquest into the Death of W* (State Coroner's Court of New South Wales, Magistrate Freund, 11 November 2015) 23 [74]–[75], 27 [91] ('*Inquest into the Death of W*').

74 *Inquest into the Death of Fenika Junior Tautuliu Fenika* (State Coroner's Court of New South Wales, Coroner O'Sullivan, 13 July 2018) ('*Inquest into the Death of FJTF*').

75 Ibid 27 [117].

76 Ibid 27 [118]. See also at 28 [121].

77 *Inquest into the Death of W* (n 73) 30 [102].

'distributing urine and faeces within the cell'.[78] The coroner questioned why a mental health referral was not made immediately[79] and said that the 'framework for the humane oversight of prisoners' was 'conspicuously inadequate'.[80]

In some cases, prisoners have had solitary confinement orders overturned on judicial review. For example, in Queensland, some prisoners have successfully argued that procedural fairness requirements have not been complied with in the making of maximum security orders.[81] In *Kidd v Chief Executive, Department of Corrective Services* ('*Kidd*'), Kidd had been accused of being involved in an escape plan and consecutive maximum security orders were made in respect of him on this basis.[82] Kidd denied involvement, and sought review of the order, however the official visitor report went missing, and further information regarding the basis of the allegations was withheld by Queensland Corrective Services to protect the informants.[83] Justice White held that the rules of procedural fairness demanded that Kidd be provided with an opportunity to make submissions in respect of the allegations.[84] Her Honour said that if 'anything more than legislative lip service' was to be paid to the concept of procedural fairness, 'information adequate for a prisoner to respond must be given'.[85] Further, her Honour said that the decision-maker should 'demonstrate that he has directed his mind to the currency of the risks' and 'must explain, without revealing the sources of his information, why that is so'.[86] Since these requirements were not met, White J set aside Kidd's most recent maximum security order.

Similarly, in *McLaren v Rallings* ('*McLaren*'), McLaren had been placed on consecutive maximum security orders in response to behavioural concerns, but had not been informed of the substance of the allegations made against him.[87] Justice Jackson said: '[t]he statutory right of the prisoner to make submissions … is reduced below even mere "lip service", to the depth of a solemn farce' where he is

78 *Inquest into the Death of Laura Parker* (Coroners Court of South Australia, Coroner Schapel, 19 November 2010) 4 [2.5], 14 [4.8] ('*Inquest into the Death of LP*').

79 Ibid 31 [7.9].

80 Ibid 15 [4.8].

81 There is no reported case law in Queensland relating to the placement of prisoners on safety orders. Litigation is difficult from both a practical and administrative law perspective because each decision only lasts for a maximum period of 28 days, and prisoners on safety orders can be accommodated in a range of custodial environments so lawyers may not be aware a safety order is in place.

82 [2001] 2 Qd R 393 ('*Kidd*').

83 Ibid 398 [20], 401 [28] (White J).

84 Ibid 401 [30].

85 Ibid 401 [31].

86 Ibid 402 [31].

87 *McLaren* (n 63) 450 [53] (Jackson J). Note however that the Court in *De Alwis* (n 23) set a higher threshold, one of 'bad faith'. Justice Simmonds said 'the fact that the confinement order may have been made on the basis of incomplete information, or erroneous information, does not of itself make the confinement order reviewable': at [220].

not permitted even to know the 'gist' of the information provided against him.[88] McLaren's most recent maximum security order was invalidated on the basis of this want of procedural fairness.[89]

In the cases of *Abbott v Chief Executive, Department of Corrective Services* ('*Abbott*'), *McQueen v Chief Executive, Department of Corrective Services* ('*McQueen*') and *Garland v Chief Executive, Department of Corrective Services* ('*Garland No 2*'), consecutive maximum security orders had been made.[90] The orders were upheld, but the Court acknowledged that making consecutive orders might improperly become a '"rubber stamp" exercise'.[91] In *Garland No 2*, the Court emphasised that belief on reasonable grounds that the prisoner was a substantial threat to the security and good order of the prison was a jurisdictional fact, and therefore sufficient evidence must exist to support this belief.[92] In *Abbott* and *McQueen*, the Court noted that 'past criminal history' cannot indefinitely 'dominat[e] the decision-making process',[93] rather, it is recent conduct that is of 'critical importance'.[94] The Supreme Court of South Australia came to a similar conclusion in *Fyfe v Bordoni* ('*Fyfe*').[95] In that case, Fyfe had been held in solitary confinement for a continuous period of three years and eight months. He had perpetrated serious violent assaults against other prisoners on a number of occasions, however he had recently been of good behaviour. The conditions of his cell were described by Olsson J as 'spartan', 'claustrophobic' and 'oppressive'.[96] Justice Olsson said that in circumstances where there was 'no suggestion of recent violent behaviour' and where the 'abnormally hard' conditions 'persisted for a very long time', the stage may be reached where 'it could well be said that it is an abuse of power to continue to subject him to [them]'.[97]

Kupers describes solitary confinement as a 'vicious cycle'[98] and this has been acknowledged by the Australian courts. In *Garland No 2*, the Court noted that the prisoner 'cannot be released from maximum security unless he shows that he has a capacity for self-control and voluntary good behaviour. But he cannot demonstrate those characteristics unless he is released from maximum security'.[99]

88 *McLaren* (n 63) 451 [53]. See also at 452 [65].

89 Ibid 453–4 [69]–[71] (Jackson J).

90 *Abbott* (n 63); *McQueen v Chief Executive, Department of Corrective Services* [2002] QSC 421 ('*McQueen*'); *Garland v Chief Executive, Department of Corrective Services* [2006] QCA 568 ('*Garland No 2*').

91 *Abbott* (n 63) [32] (Williams J).

92 *Garland No 2* (n 90) [38], [42] (Chesterman J) (citations omitted).

93 *Abbott* (n 63) [31] (Williams J), quoted in *McQueen* (n 90) [15] (Mullins J).

94 *Abbott* (n 63) [30] (Williams J), quoted in *McQueen* (n 90) [15] (Mullins J).

95 *Fyfe* (n 33).

96 Ibid [21].

97 Ibid [85].

98 Kupers (n 10) 1012.

99 *Garland No 2* (n 90) [47] (Chesterman J).

Medical personnel had expressed the concern that Garland's solitary confinement 'seems now to have reached its useful limits' and 'may leave us with a permanently anti-social member of society'.[100] Similarly in *Fyfe*, the Court noted that the prisoner's continued placement in solitary confinement was precipitating 'periods of intense frustration' and 'could well lead to the development of an adverse psychiatric condition which currently does not exist'.[101]

Yet, in *Fyfe*, the Supreme Court of South Australia also recognised the corresponding 'catch 22' situation that the prison authorities were in:

> On the one hand it clearly has a duty of care to other prisoners, in light of the applicant's past conduct and more recent threats expressed by him. On the other, the applicant's emotional and mental health state seems not likely to improve dramatically unless he is progressively released into a more general prison environment.[102]

IV OUR RESEARCH FINDINGS ON THE USE OF SOLITARY CONFINEMENT IN QUEENSLAND

In practice, the use of solitary confinement is a 'polarizing' issue.[103] On one hand, the legal and psychological literature emphasises the adverse impact that solitary confinement has on prisoners' physical and psychological wellbeing, whilst on the other hand, corrections authorities emphasise the role segregation plays in the 'effective' management of prisons and the maintenance of good order and security.[104] Many researchers have concluded that solitary confinement causes mental illness,[105] but others have said that the adverse effects of solitary confinement have more to do with prisoners' pre-existing psychiatric illnesses, or the manner in which they are treated by corrections staff.[106] There are such significant variations in the conditions experienced by prisoners in solitary confinement across institutions and between jurisdictions, that the results of individual studies may not be generalisable.[107] Local empirical research is

100 *Garland No 1* (n 63) [53] (White J).

101 *Fyfe* (n 33) [83] (Olsson J).

102 Ibid [84] (Olsson J).

103 Gendreau and Labrecque (n 60) 340. See also Suedfeld et al (n 3) 303.

104 See generally Richard Vince, 'Segregation: Creating a New Norm' (2018) 236 (March) *Prison Service Journal* 17; Jody L Sundt, Thomas C Castellano and Chad S Briggs, 'The Sociopolitical Context of Prison Violence and Its Control: A Case Study of Supermax and Its Effects in Illinois' (2008) 88(1) *Prison Journal* 94.

105 See especially Sharon Shalev, *A Sourcebook on Solitary Confinement* (Report, October 2008) 15–17 ('*A Sourcebook on Confinement*'); Kupers (n 10); Grassian, 'Psychopathological Effects of Solitary Confinement' (n 2); Grassian, 'Psychiatric Effects of Solitary Confinement' (n 10) 332.

106 See especially O'Keefe et al (n 14); Zinger (n 2).

107 For example, factors such as the period of confinement and the types of programs on offer may influence the results: Zinger (n 2) 20; Clements et al (n 2) 925–6; Suedfeld et al (n 3) 305–6; O'Keefe et al (n 14) ix.

extremely important if we are to determine whether reasonable alternatives exist and what form they might take.

Unfortunately, there are significant barriers to undertaking research in correctional contexts. Prisoners may be unwilling to speak freely because they are fearful of the consequences, and they may not report psychological distress in case they are placed in a more restrictive environment for their own protection.[108] In the Queensland context, these challenges are compounded by s 132 of the *Queensland Corrective Services Act* which makes it an offence for researchers or journalists to interview or obtain statements from prisoners without the chief executive's written approval.[109] There is limited case law on how this provision should be interpreted and applied, but it has been enforced against journalists, and requests for approval have been denied by Queensland Corrective Services in the past.[110] Therefore, contemporaneous accounts of Queensland prisoners' lived experiences are difficult to obtain lawfully.

For our empirical research project, we decided not to interview prisoners.[111] As a result of s 132, we would not have been able to interview prisoners about their experiences in solitary confinement without requesting and obtaining approval from Queensland Corrective Services. This would have meant that the identities of the prisoners we interviewed were known to Queensland Corrective Services, and we were concerned that this would compromise their confidentiality, and potentially their safety if their comments could be connected with them. We were also cognisant of other ethical concerns associated with interviewing vulnerable people in closed environments, including difficulties with obtaining informed consent and maintaining prisoners' privacy.[112]

Instead, we relied on textual analysis of client files of a community legal service that provides assistance and advice to prisoners in Queensland, and focus group interviews with lawyers and advocates who work with prisoners in solitary

108 Stuart Grassian and Terry Kupers, 'The Colorado Study vs the Reality of Supermax Confinement' (2011) 13(1) *Correctional Mental Health Report* 1.

109 See also *NSW Crimes Act* (n 32) s 267; *NT Correctional Services Act* (n 32) ss 97, 98; *SA Correctional Services Act* s 51(1)(a); *Tas Corrections Act* (n 32) ss 12, 18; *Vic Corrections Act* (n 42) ss 32(1)(b), 39; *WA Prisons Act* (n 32) ss 52(1)(b), 65, 66. Compare this with *ACT Corrections Management Act* (n 32) s 46(1) which is protective of prisoners having 'adequate opportunit[y]' to have contact with 'other people'.

110 See *Wotton v Queensland* (2012) 246 CLR 1, 25–7 [61]–[66] (Heydon J) ('*Wotton*'); *Tonkin v Queensland Parole Board* [2016] 2 Qd R 465, 474 [35], 479 [57], 480–1 [65]–[69] (Peter Lyons J) ('*Tonkin*'); *Renwick v Bell* [2002] 2 Qd R 326; *Renwick v Bell* [2001] QDC 006. See also Tamara Walsh, 'Suffering in Silence: Prohibitions on Interviewing Prisoners in Australia, the US and the UK' (2007) 33(1) *Monash University Law Review* 72.

111 See also Walsh et al (n 31) 44.

112 National Health and Medical Research Council, *National Statement on Ethical Conduct in Human Research 2007 (Updated 2018)* (Statement, 2018) 13–14, 68, 74, 75. See also Zoltán L Apa et al, 'Challenges and Strategies for Research in Prisons' (2012) 29(5) *Public Health Nursing* 467, 471; David J Moser et al, 'Coercion and Informed Consent in Research Involving Prisoners' (2004) 45(1) *Comprehensive Psychiatry* 1, 2.

confinement in Queensland.[113] All files opened by the community legal service concerning prisoners in solitary confinement between 2016–19 were included in the analysis, regardless of the legal merits of their matter.[114] The files included a wide array of documents authored by medical practitioners, corrective services officers and lawyers, so a range of professional views was represented.[115] Gendreau and Labrecque criticise corrections research that relies on 'narrative reviews'[116] and it might be argued that the lawyers and advocates who participated in the focus groups had an interest in presenting a bleak picture of their clients' circumstances.[117] However, their observations and reflections are a relevant and valuable source of information, particularly in view of the barriers to conducting research in this context. Lawyers and advocates work directly with prisoners over an extended period of time (often before, during and after their placement in solitary confinement), they observe the institutional environments in which prisoners are housed, and they are bound by ethical rules related to honesty and integrity.[118]

We analysed 30 client files and interviewed 18 lawyers and advocates.[119] Based on the file analysis and the interviews, we found that most prisoners in solitary confinement had been diagnosed with a mental illness, and the vast majority had experienced a deterioration in their mental health since they had been placed in solitary confinement.[120] Our research suggested that the average period of time that prisoners were placed in solitary confinement was 18 months, which is significantly longer than the maximum period of 15 days prescribed by the United Nations.[121] Indeed, we found that some prisoners had been held in solitary confinement for many years.[122]

113 Walsh et al (n 31) 44.

114 Including all files and all documents, regardless of legal merit, ensured there was no incentive or opportunity for the legal service to present any particular perspective on solitary confinement. Data extraction and deidentification was conducted by the legal service, and data analysis was undertaken by the academic researcher. Splitting these functions protected prisoners' confidentiality and minimised the risk and perception of bias in the presentation of the results. Note that any material that could be considered a 'statement from a prisoner' was omitted. See also ibid 52–3.

115 Glenn A Bowen, 'Document Analysis as a Qualitative Research Method' (2009) 9(2) *Qualitative Research Journal* 27.

116 Gendreau and Labrecque (n 60) 342.

117 Indeed, they observe in ibid that if litigation is on foot, research with prisoners may be 'bias[ed]' because the prisoner may have 'much to gain by responding negatively to the interviewers' questions': at 348.

118 Walsh et al (n 31) 52. As to the importance of observing prisoners over time, see Suedfeld et al (n 3) 312.

119 Walsh et al (n 31) 44, 52.

120 Ibid 54.

121 Ibid 55. See above n 6 and accompanying text. This is also significantly longer than the period of time prisoners in the Colorado Study spent in solitary confinement: see O'Keefe et al (n 14) 24.

122 Walsh et al (n 31) 55.

Our analyses indicated that prisoners in solitary confinement engage in a wide range of 'maladaptive' behaviours including 'smearing faeces on the wall', talking to themselves, and smashing themselves against walls and doors.[123] Smearing faeces, or 'bronzing', has been recorded in the case law as well. In *Inquest into the Death of LP*, Laura was described as 'distributing urine and faeces within the cell such that the cell became uninhabitable'.[124] In the New Zealand case of *Toia v Prison Manager, Auckland Prison* ('*Toia*'), the prisoner engaged in the 'practice of dumping his excrement outside his cell'.[125] Medical documents in the files we analysed explained these behaviours as a 'coping strategy' to assert 'control over [their] environment' and 'manage social isolation'.[126]

When prisoners experience a deterioration in their mental health due to their placement in solitary confinement, they are caught in a 'catch 22' situation. They may be 'placed in solitary confinement because they are considered a risk to those around them', yet 'solitary confinement actually serves to increase the risk they pose' to others.[127] In our research, we found that prisoners may become so institutionalised as a result of their placement in solitary confinement that they do not want to leave — they may be reluctant to 'come out of their cell [at all], even for exercise'.[128] Solitary confinement renders prisoners less able to cope in the 'real world' or even in the mainstream prison as they become either increasingly angry and unstable, or too 'comfortable'.[129] Maladaptive coping strategies can result in prisoners being charged with more in-prison offences and solitary confinement becomes a 'self-fulfilling prophecy'.[130] Placement in solitary confinement also reduces prisoners' chances of receiving parole because they are unable to demonstrate that they do not pose a risk to others. Whilst some prisoners may find the experience of isolation to be 'restorative' or 'safe',[131] they necessarily pose an increased risk to members of the public upon their release. They quickly return to custody, sometimes deliberately, and often on charges they have not had before, particularly sex offences and drug offences.[132]

Since there is such limited oversight of the conditions in prisons generally, and solitary confinement cells specifically, this situation continues by default without

123 Ibid 57.

124 *Inquest into the Death of LP* (n 78) 4 [2.5].

125 [2015] NZCA 624, [15] (French J for the Court) ('*Toia*').

126 Walsh et al (n 31) 57–8, 60.

127 Ibid 49 (emphasis omitted). See also Kupers (n 10) 1012.

128 Walsh et al (n 31) 58.

129 As to prisoners' 'habituation' to solitary confinement, see O'Donnell (n 59) 70, citing United Kingdom, *Royal Commission on Capital Punishment: 1949–1953* (Cmd 8932, 1953) 484. See also Suedfeld et al (n 3) who found that prisoners exiting solitary confinement were more antisocial and hostile: at 334.

130 Walsh et al (n 31) 49. See also Kupers (n 10) 1012.

131 O'Donnell (n 59) 84; Valera and Kates-Benman (n 25) 470.

132 Walsh et al (n 31) 50.

any effective external intervention. Australian scholars have expressed optimism that Australia's ratification of the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('*OPCAT*') could make a positive difference to prison policy and practice once it is implemented.[133] Under *OPCAT*, regular monitoring of closed environments by independent bodies will be required.[134] The Australian government has indicated that these monitoring activities will be conducted by existing bodies, including ombudsmen and inspectorates.[135] Implementation strategies are still being devised[136] so any benefits to prisoners, in terms of increasing accountability and transparency of prison conditions, are yet to be realised. However, it should be noted that '[s]eclusion and restraint remain overused in [countries like] New Zealand' that have had *OPCAT* mechanisms in place for some years.[137] Focus group participants in our study doubted that *OPCAT* would result in substantial reform, but they acknowledged the potential for human rights litigation to provide additional options for redress.

V HUMAN RIGHTS AND SOLITARY CONFINEMENT IN AUSTRALIA

The *Queensland Human Rights Act* came into effect in 2020. It was the third Act of its kind to be passed in Australia, following the *ACT Human Rights Act* and the *Victorian Charter*. Each of these Acts protect similar rights[138] including those that pertain to prisoners such as the right to life, liberty and security of person, the right

133 *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 18 December 2002, 2375 UNTS 237 (entered into force 22 June 2006) ('*OPCAT*'). Some states and territories have introduced implementation legislation: see *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018* (NT); Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022 (Qld); *Monitoring of Places of Detention by the United Nations Subcommittee on Prevention of Torture (OPCAT) Act 2022* (Vic). See, eg, Naylor and Winford (n 57); Naylor (n 57) 121; Rebecca Minty, 'Involving Civil Society in Preventing Ill Treatment in Detention: Maximising OPCAT's Opportunity for Australia' (2019) 25(1) *Australian Journal of Human Rights* 91; Bronwyn Naylor, Julie Debeljak and Anita Mackay, 'A Strategic Framework for Implementing Human Rights in Closed Environments' (2015) 41(1) *Monash University Law Review* 218, 257–8.

134 *OPCAT* (n 133) arts 17–23. See also Australian Human Rights Commission, *Road Map to OPCAT Compliance* (Report, 17 October 2022) ('*OPCAT Compliance Report*').

135 See also Australian Human Rights Commission, *Implementing OPCAT in Australia* (Report, 2020) 28–31.

136 *OPCAT Compliance Report* (n 134).

137 Michael White, 'The Role and Scope of OPCAT in Protecting Those Deprived of Liberty: A Critical Analysis of the New Zealand Experience' (2019) 25(1) *Australian Journal of Human Rights* 44, 58.

138 With some exceptions, for example: the cultural rights provisions differ, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*') does not include a right to education, and the *Victorian Charter* (n 138) and *Human Rights Act 2004* (ACT) ('*ACT Human Rights Act*') do not include a right to health services.

to humane treatment when deprived of liberty, and the right to be free from cruel, inhuman and degrading treatment.[139]

Under the *Queensland Human Rights Act*, public entities (including corrective services officers) act unlawfully if they 'act or make a decision in a way that is not compatible with human rights', 'or in making a decision, fail to give proper consideration to a [relevant] human right'.[140] Unlike Victoria and the Australian Capital Territory ('ACT'), in Queensland, if a person believes their human rights have been breached, they can apply to the Queensland Human Rights Commissioner to have their matter dealt with by conciliation.[141] A person may only seek relief or a remedy from a court if another cause of action, separate to the human rights argument, is available to them.[142] An application for judicial review provides an example of such a cause of action, which is relevant in this context because most litigation concerning prisoners' rights involves a judicial review application.

Limitations on human rights are only permitted where they are 'reasonable' and 'can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'.[143] Importantly, the *Queensland Corrective Services Act* states that a corrective services officer does not contravene the public entity provision of the *Queensland Human Rights Act* 'only because [their] consideration takes into account — (a) the security and good management of corrective services facilities; or (b) the safe custody and welfare of all prisoners'.[144] The effect of this provision, including the extent to which it limits the proportionality analysis required under the *Queensland Human Rights Act*, is yet to be tested and is difficult to predict, however it clearly does not exempt corrective services officers from human rights obligations entirely.[145] Regardless, the *Queensland Human Rights Act* requires that all statutory provisions, including those in the *Queensland Corrective Services Act* and the *Queensland Corrective Services Regulation*, be interpreted in a way that is compatible with human rights.[146]

139 *Queensland Human Rights Act* (n 26) ss 16, 17, 30; *Victorian Charter* (n 138) ss 10, 21, 22; *ACT Human Rights Act* (n 138) ss 10, 18, 19.

140 *Queensland Human Rights Act* (n 26) s 58(1).

141 Ibid s 77.

142 Ibid s 59(1). This is also the case in Victoria: *Victorian Charter* (n 138) s 39(1). However, in the ACT, human rights is a standalone cause of action: *ACT Human Rights Act* (n 138) s 40C.

143 *Queensland Human Rights Act* (n 26) s 13(1).

144 *Queensland Corrective Services Act* (n 17) s 5A(2), as inserted by *Queensland Human Rights Act* (n 26) s 126.

145 *Owen-D'Arcy* (n 30) 300 [141] (Martin J), quoting *Minogue v Thompson* [2021] VSC 56, [53] (Richards J). Had the Queensland government intended to exempt corrective services officers from the *Queensland Human Rights Act* (n 26), they could have done so under s 9 (definition of 'public entity'). Note, however, that Chen believes s 5A might 'exempt segregation or placement of prisoners' from the *Queensland Human Rights Act* (n 26): see Bruce Chen 'The *Human Rights Act 2019* (Qld): Some Perspectives from Victoria' (2020) 45(1) *Alternative Law Journal* 4, 9.

146 *Queensland Human Rights Act* (n 26) s 48(1).

When 'deciding whether a limit on a human right is reasonable and justifiable', relevant factors include 'the relationship between the limitation [of the right] and its purpose', 'including whether the limitation helps to achieve the purpose' and 'whether there are any less restrictive and reasonably available ways to achieve the purpose'.[147] Certainly, protection of prisoners and staff, and maintaining security and good order of a corrective services facility, will be considered legitimate aims.[148] The question is whether the decision to keep someone in solitary confinement is 'reasonable and justifiable' taking into account their particular circumstances including the impact that isolation is having on their physical and mental health.

The potential for human rights litigation to bring about reform in corrections is only just beginning to be realised in Australia. Overall, there have been few Australian human rights cases concerning prisoners' rights,[149] yet a handful of cases since 2021 have addressed the issue of solitary confinement in adult prisons.[150] They are: *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* ('*Owen-D'Arcy*') (in Queensland); *Islam v Director-General, Justice and Community Safety Directorate* ('*Islam*') and *Davidson v Director-General, Justice and Community Safety Directorate* ('*Davidson*') (in the ACT).

A *The Queensland Supreme Court Case of* Owen-D'Arcy

In the recent case of *Owen-D'Arcy*, the Supreme Court of Queensland found a 'no association order' to be unlawful because the decision-maker failed to give proper consideration to the prisoner's human rights. Owen-D'Arcy was serving a life sentence for murder and had committed other offences whist in prison, including the attempted murder of a corrective services officer. He had been subject to consecutive maximum security orders for over seven years. As part of the maximum security orders issued in respect of him, 'no association orders' had also been made which meant Owen-D'Arcy was not permitted to have any contact with other prisoners. He challenged the most recent maximum security order and the related no association decision, seeking review under the *Judicial Review Act 1992*

147 Ibid ss 13(2)(c)–(d).

148 This has been confirmed in other corrections matters: see *Tonkin* (n 110) 477–8 [51] (Peter Lyons J); *Wotton* (n 110) 32–3 [85] (Kiefel J).

149 See generally Mackay, 'Recent Court Decisions' (n 30); Debeljak (n 30). Notable examples of human rights litigation pertaining to prisoners are *Castles* (n 42) (where preventing a women from accessing IVF services whilst incarcerated in a minimum security facility breached her right to humane treatment), *Eastman v Chief Executive Officer of the Department of Justice and Community Safety* (2010) 4 ACTLR 161 ('*Eastman*') (where it was held that opportunities for work form part of the right to humane treatment), and *Thompson* (n 65) (where strip searching prisoners prior to random urine testing was incompatible with the right to privacy and the right to dignity).

150 *Owen-D'Arcy* (n 30); *Islam* (n 30); *Davidson* (n 30). Note that two additional cases, *Certain Children v Minister for Families and Children [No 2]* (2017) 52 VR 441 ('*Certain Children*') and Human Rights Committee, *Views: Communication No 1184/2003*, 86th sess, UN Doc CCPR/C/86/D/1184/2003 (17 March 2006) ('*Brough v Australia*') concerned the solitary confinement of young people in detention.

(Qld). In the alternative, he argued that his human rights had been breached under the *Queensland Human Rights Act*.

In relation to the judicial review application, Martin J found no breach of the rules of natural justice on the basis that the decision-maker, Ms Newman (an Executive Director within the Department of Corrective Services), considered all relevant submissions when making the decisions.[151] His Honour also found that there was no *Wednesbury* unreasonableness because there was evidence and other material available that was consistent with her conclusion that Owen-D'Arcy posed a risk of harm to others.[152] However, Martin J did conclude that Ms Newman failed to take a relevant consideration into account, namely the prisoner's human rights, when making the no association order.[153] Ms Newman said in her statement of reasons that she had 'considered the impact of not permitting contact associations within the MSU [maximum security unit] on prisoner Owen-D'Arcy's human rights, particularly the right to peaceful assembly and freedom of association'.[154] However, Martin J found that such consideration was 'superficial at best',[155] noting that several other relevant human rights, such as the right to protection from cruel, inhuman or degrading treatment and the right to humane treatment when deprived of liberty, were not considered.[156] The Court concluded that Ms Newman failed to identify 'the human rights that may be affected by the decision' and thereby failed to take into account a relevant consideration.[157]

Regarding the application of the *Queensland Human Rights Act*, Martin J found that Ms Newman did not act compatibly with, and failed to give proper consideration to, Owen-D'Arcy's right to humane treatment when deprived of liberty when making the no association order.[158] However, Martin J did not find a breach of Owen-D'Arcy's right to liberty and security of person because when placing him in effective solitary confinement, Ms Newman was acting 'in accordance with the law'.[159] Furthermore, Martin J did not find that Owen-D'Arcy's right to protection from cruel, inhuman or degrading treatment had been

151 *Owen-D'Arcy* (n 30) 277 [50].

152 Ibid 280–1 [58], 282 [63]. See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 229–30 (Lord Greene MR).

153 Ibid 285 [79].

154 Ibid 284–5 [78] (Martin J).

155 Ibid 285 [80].

156 Ibid 285 [79]–[80].

157 Ibid 285 [79] (Martin J), quoting *Queensland Human Rights Act* (n 26) s 58. See ibid 285 [81] (Martin J).

158 Ibid 327–8 [261]–[264].

159 Ibid 317 [218]. The Court also rejected arguments related to the idea of 'residual liberty', holding that it was inappropriate, and not the role of a court, to 'engage in an assessment of various levels of imprisonment and determine which is most appropriate for a particular prisoner': at 322 [234] (Martin J).

breached because insufficient evidence had been led to establish that his confinement resulted in 'bodily injury of physical or mental suffering'.[160]

B *The ACT Supreme Court Cases of* Islam *and* Davidson

The case of *Islam* concerned a prisoner who was placed in solitary confinement on seven occasions as a disciplinary measure because he repeatedly refused to clean up his cell. Each period of solitary confinement lasted a few days, and the total number of days spent in solitary confinement was 30 days during a one-year period. The ACT Supreme Court found that the statutory process for disciplining prisoners (as outlined in the *Corrections Management Act 2007* (ACT) ('*ACT Corrections Management Act*')) had not been complied with; in particular, Islam had not been provided with a 'written notice of the commencement of [an] internal inquiry' into the alleged disciplinary breaches, an opportunity to be heard by an independent decision-maker, or a written outcome of the decision with reasons.[161] Associate Justice McWilliam concluded that this amounted to a breach of the rules of procedural fairness.[162] His Honour further found that by not complying with the statutory process, the Director-General breached Islam's right to a fair trial.[163] Associate Justice McWilliam emphasised that since Islam was 'in a position of vulnerability' due to his incarceration, and lacked access to legal advice and information, his 'opportunity to receive a procedurally fair hearing very much depended on proper compliance with the statutory scheme'.[164]

Islam also argued that his right not to be treated or punished in a cruel, inhuman or degrading way had been breached, however the Court concluded that the conduct did not meet the 'threshold of severity' required to constitute a breach.[165] Associate Justice McWilliam noted that whilst his solitary confinement was unlawful, it was only for a short period of time, the intention was not to 'humiliate or debase' him, and there was no evidence of 'any specific mental or physical effect on the prisoner'.[166]

In contrast, in the case of *Davidson*, evidence was led to establish the deleterious effect that solitary confinement had on the prisoner's mental health. Davidson explained, by way of affidavit and oral evidence, that his solitary confinement was 'physically hard and mentally hard' and that he had contemplated (and indeed had

160 Ibid 310–11 [190]–[191], discussing *Queensland Human Rights Act* (n 26) s 17(b).

161 *Islam* (n 30) [64]–[65] (McWilliam AsJ).

162 Ibid [70].

163 *Islam* (n 30) [119], discussing *ACT Human Rights Act* (n 138) s 21.

164 *Islam* (n 30) [112].

165 Ibid [99] (McWilliam AsJ), discussing *ACT Human Rights Act* (n 138) s 10(1)(b).

166 *Islam* (n 30) [99].

attempted) suicide and self-harm.[167] The ACT Supreme Court held that the small courtyard to which Davidson had periodic access, did not allow him access to the open air and was 'not suitable for or equipped for recreation and exercise' as required by the *ACT Corrections Management Act*.[168] Since open air and exercise are 'basic entitlements', the decision to limit the prisoner's access to them represented 'a failure by the defendant to protect the plaintiff, as a person deprived of liberty and therefore vulnerable, from conduct which lacks humanity'.[169] Justice Loukas-Karlsson concluded that the limit on the prisoner's right to humane treatment 'was not a necessary consequence of deprivation of liberty' and should have been addressed with appropriate resources.[170] Further to this, her Honour concluded that there was no consideration of Davidson's right to humane treatment, 'let alone "proper consideration"' of it.[171]

VI INTERNATIONAL HUMAN RIGHTS LAW ON SOLITARY CONFINEMENT

The *Queensland Human Rights Act* states that international law and the judgments of international courts may be considered in interpreting a statutory provision,[172] so the manner in which the human rights complaints of prisoners subjected to solitary confinement are dealt with by courts in other jurisdictions is worthy of analysis.

A *Rights to Life, Liberty and Security of Person*

In *British Columbia Civil Liberties Association v Attorney-General (Canada)* ('*BCCL v Canada 2018*'), the Supreme Court of British Columbia found that laws authorising administrative segregation (where prisoners were held in solitary confinement for their own safety or the safety of others) breached the right to life, liberty and security of person.[173] In that case, two non-profit organisations complained that certain provisions of the *Corrections and Conditional Release Act*

167 *Davidson* (n 30) 16 [52], 18 [62] (Loukas-Karlsson J). See also at 16 [48], 18–19 [68]–[69] (Loukas-Karlsson J).

168 Ibid 52 [250] (Loukas-Karlsson J). Note that when determining the meaning of 'open air' and 'suitable to exercise in', Loukas-Karlsson J had regard to international materials, including the *Mandela Rules*, UN Doc A/RES/70/175 (n 1): ibid 51–2 [243]–[247].

169 *Davidson* (n 30) 80–1 [404] (Loukas-Karlsson J), discussing *ACT Human Rights Act* (n 138) s 19(1).

170 *Davidson* (n 30) 79 [397], 81 [408].

171 Ibid 82–3 [414], quoting *ACT Human Rights Act* (n 138) s 40B(1)(b).

172 *Queensland Human Rights Act* (n 26) s 48(3). See also *ACT Human Rights Act* (n 138) s 31(1); *Victorian Charter* (n 138) s 32(2).

173 *BCCL v Canada 2018* (n 21).

('*Corrections and Conditional Release*')[174] contravened the *Canadian Charter of Rights and Freedoms*.[175]

The Court held that the right to life was engaged because prisoners in solitary confinement were at a higher risk of suicide than other prisoners, and because being placed in solitary confinement put prisoners at increased risk of self-harm.[176] The Court held that the right to security of person was also engaged because of the 'significant risk of serious psychological harm' that solitary confinement created,[177] as well as the risk of physical harm for those who are older, have chronic health conditions or have disabilities.[178] The Court accepted evidence that even after a brief period of solitary confinement, individuals experienced 'delirium, psychosis, major depression, hallucinations, paranoia, aggression, rage, loss of appetite, self-harm, suicidal behaviour, and disruption of sleep patterns',[179] particularly where there was a lack of human contact,[180] and the placement was indefinite.[181]

Whilst the Court agreed that 'maintain[ing] the security of the penitentiary and the safety of the people within it' was a legitimate objective,[182] it held that the provisions were overbroad for two reasons:[183] first, because they had the effect of undermining institutional security rather than promoting it; and secondly, because 'some lesser form of restriction would achieve the objective of the provisions'.[184] The Court specified some less restrictive ways of addressing the needs of 'dangerous and difficult inmates', such as imposing 'strict time limits' on the use of solitary confinement, establishing mental health treatment units and transition units, and creating more opportunities for mental stimulation.[185] Further, the Court criticised the degree of mental health monitoring,[186] and the internal review

174 *Corrections and Conditional Release Act*, SC 1992, c 20, ss 31–3, 37 ('*Corrections and Conditional Release*').

175 See especially *Canada Act 1982* (UK) c 11, sch B pt I, ss 7, 9, 10, 12, 15 ('*Canadian Charter of Rights and Freedoms*'); *BCCL v Canada 2018* (n 21) [2] (Leask J).

176 *BCCL v Canada 2018* (n 21) [264]–[265], [274] (Leask J).

177 Ibid [275]–[276] (Leask J).

178 Ibid [307]–[310] (Leask J).

179 Ibid [160] (Leask J). See also at [170]–[171], [187] (Leask J).

180 Ibid [138]–[139] (Leask J).

181 Ibid [154]–[155] (Leask J).

182 Ibid [319] (Leask J), discussing *Corrections and Conditional Release* (n 174) s 31(1). See also *Corporation of the Canadian Civil Liberties Association v The Queen* [2017] ONSC 7491, [159]–[160] (Marrocco AsCJ) (Ontario Superior Court of Justice); *Shahid v Scottish Ministers* [2016] AC 429, 460–1 [85] (Lord Reed JSC) ('*Shahid*').

183 *BCCL v Canada 2018* (n 21) [326]–[327], [558] (Leask J).

184 Ibid [326] (Leask J). See also at [553], [558] (Leask J).

185 Ibid [556], [567] (Leask J). See also at [558]–[570], [585], [588] (Leask J).

186 Ibid [285] (Leask J).

process, finding that '[a]n independent adjudicator is best placed to ensure that robust inquiry occurs'.[187]

Notably, in the Queensland case of *Owen-D'Arcy*, the prisoners' right to life was not expressly considered and the Court found that the right to liberty and security of person was not engaged. In rejecting the concept of prisoners retaining 'residual liberty', Martin J concluded that Owen-D'Arcy was at all times lawfully restrained and that it was not appropriate for the Court to consider whether his placement in solitary confinement constituted an appropriate level of imprisonment.[188] Justice Martin took the view that such an inquiry would mean that the Court was 'exercising a substitutionary and not a supervisory power'.[189] In reaching this conclusion, his Honour referenced the decision of *Bennett v Superintendent, Rimutaka Prison*,[190] where the New Zealand Court of Appeal considered that judicial review was the appropriate avenue to advance arguments regarding the lawfulness of conditions of detention.[191]

B *Right to Be Free from Torture and Cruel, Inhuman or Degrading Treatment*

The Court in *Taunoa v Attorney-General (NZ)* ('*Taunoa*') held that the threshold for 'cruelty' was higher than inhumane treatment, and required an additional 'level of harshness'.[192] According to courts in Canada and New Zealand, treatment that is cruel is that which 'shocks community conscience';[193] that is, it must be 'so disproportionate to the extent that [the community] "would find the punishment abhorrent or intolerable"'.[194]

The European Court of Human Rights has defined 'degrading' treatment as that which arouses 'feelings of fear, anguish and inferiority capable of humiliating and

187 Ibid [391] (Leask J). See also at [410] (Leask J).

188 *Owen-D'Arcy* (n 30) 322 [234].

189 Ibid, citing *PJB v Melbourne Health* (2011) 39 VR 373.

190 [2002] 1 NZLR 616.

191 *Owen-D'Arcy* (n 30) 322 [234]. Note, however, that in *Islam* (n 30), when discussing the prisoner's right to a fair trial, McWilliam AsJ observed: '[t]he further deprivation of liberty of a person already confined is a serious matter': at [114].

192 *Taunoa* (n 29) 548–9 [362] (McGrath J).

193 *A-G (NZ) v Taunoa* [2006] 2 NZLR 457, 503 [225] (Anderson P, Glazebrook, Hammond, Young and O'Regan JJ); *Munoz v Director of the Edmonton Remand Centre* (2004) 369 AR 35, 50–1 [78] (Nation J) (Court of Queen's Bench of Alberta). See also *R v Smith* [1987] 1 SCR 1045, 1109 (Wilson J) ('*Smith*'). See especially *Smith* (n 193) 1068 (Lamer J), quoting Walter S Tarnopolsky, 'Just Deserts or Cruel and Unusual Treatment or Punishment? Where Do We Look for Guidance?' (1978) 10(1) *Ottawa Law Review* 1, 33.

194 *R v Ferguson* [2008] 1 SCR 96, 105–6 [14] (McLachlin CJ for the Court), quoting *R v Wiles* [2005] 3 SCR 895, 898 [4] (Charron J for the Court). See also *Smith* (n 193) 1098 (McIntyre J); *R v Boudreault* [2018] 3 SCR 599, 624–5 [45] (Martin J), quoting *R v Lloyd* [2016] 1 SCR 130, 149 [24] (McLachlin CJ for Abella, Cromwell, Moldaver, Karakatsanis and Côté JJ).

debasing' the person.[195] Whilst courts around the world have said that solitary confinement alone will not constitute a breach of the right to be free from cruel, inhuman and degrading treatment,[196] solitary confinement may amount to inhuman or degrading treatment or punishment if it meets a 'minimum threshold of severity'.[197] The European Court of Human Rights has concluded that, when assessing whether this threshold of severity has been met, all the circumstances of the case should be considered, including the 'duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim', as well as the extent of the victim's vulnerability.[198] The European Court of Human Rights has held that the extreme of 'complete sensory isolation coupled with total social isolation' meets this threshold.[199]

The conditions under which Owen-D'Arcy was held would appear to meet the threshold of severity as defined by the European Court of Human Rights. Owen-D'Arcy explained in his affidavit that he had spent seven years in a cell with little natural light, and no contact with anyone 'without the presence of a physical barrier'.[200] For any movement outside of the cell he was required to wear handcuffs secured to a body belt placed around his torso and 'leg irons placed around both ankles'.[201] He was permitted one three-minute shower and only six toilet flushes each day meaning that 'excrement can be left in the toilet for any number of hours'.[202] Yet, Martin J concluded that the right not to be treated in a cruel, inhuman or degrading way was not engaged in this case.[203] His Honour found that there was insufficient evidence that 'bodily injury or physical or mental suffering'

195 *Kudła* (n 29) 223 [92]. Note that the *European Convention on Human Rights* does not include a right to humane treatment when deprived of liberty: *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

196 *Vogel v A-G (NZ)* [2013] NZCA 545, [66] (Cooper J) ('*Vogel*'); *Ramirez Sanchez v France* (2007) 45 EHRR 49, 1149 [146]. See also *Shahid* (n 182) 449 [37] (Lord Reed JSC); *Lorsé v Netherlands* (2003) 37 EHRR 3, 131–2 [77]; *Islam* (n 30) [95]–[97] (McWilliam AsJ), quoted in *Davidson* (n 30) 50 [225] (Loukas-Karlsson J).

197 *Enea v Italy* (2010) 51 EHRR 3, 123 [64] ('*Enea*').

198 *Ireland v United Kingdom* (1978) 25 Eur Court HR (ser A) 65 [162]. See also *Nicolae Virgiliu Tănase v Romania* (European Court of Human Rights, Grand Chamber, Application No 41720/13, 25 June 2019) [121], cited in *Islam* (n 30) [90] (McWilliam AsJ).

199 *Mathew v Netherlands* (European Court of Human Rights, Third Section, Application No 24919/03, 29 September 2005) [199]. See also *McFeeley v United Kingdom* (1981) 3 EHRR 161, 197 [49]. A court will consider the length of time the person has been held under solitary confinement conditions, the conditions themselves, and the impact they have had on the prisoner's health and well-being: see *Enea* (n 197) 123 [64]; *Kudła* (n 29) 223 [92]; *Keenan v United Kingdom* [2001] III Eur Court HR 93, 135 [115]; *Farbtuhs v Latvia* (European Court of Human Rights, First Section, Application No 4672/02, 2 December 2004) [53].

200 *Owen-D'Arcy* (n 30) 302–3 [151] (Martin J).

201 Ibid.

202 Ibid.

203 Ibid 311 [192].

had been caused to Owen-D'Arcy as a result of the conditions under which he was held.[204] Although reference was made to decisions of other courts as to the impacts of solitary confinement on prisoners' mental and physical health, and expert evidence from other cases was summarised, Martin J found that 'the view of another judge about evidence given in another court is not evidence in this proceeding' and that 'appropriate expert evidence should have been adduced'.[205]

C *Right to Humane Treatment When Deprived of Liberty*

In distinguishing the right to humane treatment when deprived of liberty from the right to be free from cruel, inhuman and degrading treatment, Blanchard J said in *Taunoa* that the right to humane treatment prohibits 'conduct which lacks humanity, but falls short of being cruel; which demeans the person, but not to an extent which is degrading; or which is clearly excessive in the circumstances, but not grossly so'.[206]

In *Taunoa*, the Supreme Court of New Zealand found that solitary confinement breached prisoners' right to humane treatment when deprived of liberty.[207] The Court held that this right imposed a requirement that prisoners not be treated 'as if they are less than human',[208] for example by depriving them of 'basic human needs, including personal dignity and physical and mental integrity'.[209] This was true regardless of whether or not the prisoner was 'the most difficult and the most intransigent' of prisoners.[210]

Drawing on jurisprudence from the European Court of Human Rights, Blanchard J found that in order to avoid a breach of this right:

> [T]he State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention, and that, given the practical demands of imprisonment, his health and wellbeing are adequately secured …[211]

204 Ibid 310–11 [190]–[191].

205 Ibid 305 [160]–[161].

206 *Taunoa* (n 29) 501–2 [177] (McGrath J agreeing at 544 [339]). See also *Toia* (n 125) [28] (French J for the Court).

207 *Taunoa* (n 29) 485–6 [121]–[122], 509–10 [211]–[212] (Blanchard J); *New Zealand Bill of Rights Act 1990* (NZ) s 23(5).

208 *Taunoa* (n 29) 471–2 [80] (Elias CJ).

209 Ibid.

210 Ibid 511 [216] (Blanchard J). See also at 547–8 [358] (McGrath J).

211 Ibid 496 [156], quoting *Kudła* (n 29) 224 [94]. Blanchard J said that inhumane treatment is treatment that is not 'outrageous' but still considered 'unacceptable in our society': ibid 500 [170]. This was affirmed in *Toia* (n 125) [28] (French J for the Court).

Factors to be taken into account in this analysis were stated to include the size of the cell, lack of natural light, insufficient medical care, lack of social contact, lack of recreation and lack of exercise, as well as the length of time the prisoner was subject to these conditions.[212] In *Toia*, the New Zealand Court of Appeal considered these factors, and held that a short stay in solitary confinement which did not cause harm would not breach the right, however the Court noted that it would be a 'clear breach' of the right if a prisoner were 'forced to vegetate'.[213]

The right to humane treatment has been considered by the Supreme Courts of Victoria and the ACT.[214] For example, in *Castles v Secretary to the Department of Justice* ('*Castles*'), a breach of this right was found when a female prisoner was prevented from accessing IVF services.[215] Consistently with the approach of the Supreme Court of New Zealand, Emerton J said that 'the starting point should be that prisoners not be subjected to hardship or constraint other than the hardship or constraint that results from the deprivation of liberty'.[216] The Court outlined a similar list of relevant considerations to those listed in *Taunoa* and concluded that the right 'requires the provision of facilities, goods, services and conditions necessary for the realisation of the standard of health enjoyed by other members of the community'.[217]

Further, in *Certain Children v Minister for Families and Children [No 2]* ('*Certain Children*'), the Supreme Court of Victoria held that the detained children's right to humane treatment when deprived of liberty was breached because the 'defendants were imposing hardship or constraint that was beyond the necessary consequence of the deprivation of liberty'.[218] The Court considered the 'combined effects' of isolation, handcuffing, lack of natural light and fresh air, the noise, the lack of privacy, lack of mental stimulation, the lack of time outdoors and the confined outdoor space, as well as the young age of the prisoners in coming to its conclusion.[219]

Further to this, in the ACT case of *Eastman v Chief Executive Officer of the Department of Justice and Community Safety* ('*Eastman*'), Refshauge J was of the view that the right required 'rehabilitative measures to be put in place' and

212 *Taunoa* (n 29) 496 [157], 504–6 [190]–[196], 511–2 [218] (Blanchard J, McGrath J agreeing at 547 [353], 547 [355], 548–9 [362]).

213 *Toia* (n 125) [49] (French J for the Court).

214 *Victorian Charter* (n 138) s 22(1). The right is also protected in the *ACT Human Rights Act* (n 138) s 19(1).

215 *Castles* (n 42).

216 Ibid 169 [108]. This is consistent with the approach of the European Court of Human Rights: see *Kudla* (n 29) 224 [94].

217 *Castles* (n 42) 173 [127] (Emerton J).

218 *Certain Children* (n 150) 519 [247] (John Dixon J). See especially at 530 [290], 572 [444] (John Dixon J). See also *Brough v Australia* (n 150), however it is beyond the scope of this paper to discuss the use of solitary confinement in youth detention centres.

219 *Certain Children* (n 150) 566 [424] (John Dixon J).

imported 'an obligation to provide access to appropriate and timely medical treatment'.[220] The provision of adequate medical assistance was also discussed in *R v Kent* ('*Kent*'), where the Victorian Supreme Court said that 'plac[ing] people in a custodial environment which is able to be foreseen as likely to result in their suffering a major psychiatric illness can hardly be said to be treating them with humanity'.[221]

In *Owen-D'Arcy*, the Queensland Supreme Court applied similar reasoning when finding that the decisions to issue a maximum security order and no association order were not compatible with human rights. Justice Martin held that the decision-maker did not give sufficient weight to the total duration of the orders, which had been made consecutively over a period of eight years.[222] His Honour said that the 'total effect of the extension' should have been considered and that '[t]o do otherwise merely pays lip service to the necessary consideration of the effect on the applicant of the Decisions'.[223] Further, Martin J found that the decision-maker did not provide any basis for her stated belief that there were no less restrictive and reasonably available ways to manage the prisoner's risk of violence.[224]

D *Less Restrictive Alternatives*

The European Court of Human Rights has affirmed a report by the Council of Europe stating that the longer a person remains in solitary confinement, 'the stronger must be the reason for it and the more must be done to ensure that it achieves its purpose'.[225] However, it must be acknowledged (as noted above) that the longer a person is held in solitary confinement, the more difficult it will be to release them safely.[226] This presents a profound challenge to corrective services, however it does not necessarily follow that placement in solitary confinement is 'reasonable' or 'demonstrably justified'.[227]

The claim that solitary confinement is a reasonable and justifiable response to safety and security concerns is legally difficult to sustain for two reasons. First, the practical effect of placing a person in solitary confinement — where this results in

220 *Eastman* (n 149) 183 [99]. Note also that the European Court of Human Rights has held that it would be 'incompatible with human dignity' to deprive someone of liberty without giving them 'a real opportunity to rehabilitate themselves': *Murray v Netherlands* (2017) 64 EHRR 3, 170–1 [101]–[103].

221 *Kent* (n 66) [32] (Bongiorno JA). See also *Vogel* (n 196) [72] (Cooper J).

222 *Owen-D'Arcy* (n 30) 325 [253].

223 Ibid.

224 Ibid 325 [250].

225 *Razvyazkin v Russia* (European Court of Human Rights, First Section, Application No 13579/09, 3 July 2012) [89], quoting Council of Europe, *21st General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)* (Report, 1 August 2010 – 31 July 2011) 40 [55]. This was quoted in ibid 326 [254] (Martin J).

226 Kupers (n 10) 1012.

227 This was noted in *Owen-D'Arcy* (n 30) 325 [250] (Martin J).

sustained periods of social and sensory isolation — is not to secure the safety of the prisoner, or that of other prisoners, staff or the community; that is, the limitation does not achieve its purpose.[228] Courts themselves have recognised that placing a prisoner in solitary confinement can 'leave us with a permanently antisocial member of society' who poses a significant safety risk to those around them.[229]

Secondly, there are myriad 'less restrictive and reasonably available ways'[230] to achieve that purpose which do not involve detaining someone under such 'spartan' conditions.[231] Secure mental health facilities that offer a 'therapeutic community' are much more successful in treating and managing prisoners' psychiatric illnesses, and this was observed by our participants.[232] Units that provide treatment in secure environments to prisoners with serious mental health issues have been established in England, Northern Ireland and the United States of America ('US'); they have a high ratio of specialty staff to prisoners, and provide a range of therapeutic activities including psychotherapy, group work, art therapy, education and work.[233] Prisoners have long periods of time out of their cell during the day, and there is a high level of interaction between prisoners and staff, and amongst prisoners themselves.[234] These units report lower rates of self-harm, fewer instances of violence, and many claim to be cost-neutral, requiring only a reallocation of existing resources.[235]

228 *Queensland Human Rights Act* (n 26) s 13(2)(c).

229 *Garland No 1* (n 63) [53] (White J). See *Fyfe* (n 33) [21] (Olsson J); *BCCL v Canada 2018* (n 21) [160], [164] (Leask J). See also Kupers (n 10) 1015; Naylor (n 57) 105.

230 *Queensland Human Rights Act* (n 26) s 13(2)(d).

231 *Fyfe* (n 33) [20] (Olsson J).

232 Walsh et al (n 31) 49–51; Kupers (n 10) 1007; *Inquest into the Death of LP* (n 78). This was observed by researchers involved in the Colorado Study: see O'Keefe (n 14) 27.

233 In England, see HM Chief Inspector of Prisons, *Report on an Unannounced Inspection of HMP Grendon* (Report, 8–18 May 2017) 5. In Northern Ireland, see Yvette Giblin et al, 'Reducing the Use of Seclusion for Mental Disorder in a Prison: Implementing a High Support Unit in a Prison Using Participant Action Research' (2012) 6(1) *International Journal of Mental Health Systems* 2:1–8. In the US, see New York City Department of Correction, *Efforts to Reform Punitive Segregation and Create Therapeutic Alternatives to Address Persistent Violence by Individuals in NYC Department of Correction Custody* (Report, 27 June 2017) 1–2 ('*Efforts to Reform Punitive Segregation and Create Therapeutic Alternatives*'); Rick Raemisch and Kellie Wasko, Colorado Department of Corrections, *Open the Door: Segregation Reforms in Colorado* (Report, 2015) 5 <http://safealternativestosegregation.vera.org/resource/open-the-door-segregation-reforms-in-colorado/>; The Association of State Correctional Administrators and The Liman Center for Public Interest Law, Yale Law School, *Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-in-Cell* (Report, October 2018) 90, 145 ('*Reforming Restrictive Housing*'); David Cloud, Jacob Kang-Brown and Elena Vanko, Vera Institute of Justice, *The Safe Alternatives to Segregation Initiative: Findings and Recommendations for the Nebraska Department of Correctional Services* (Report, 1 November 2016) 58.

234 See Sarah Glowa-Kollisch et al, 'From Punishment to Treatment: The "Clinical Alternative to Punitive Segregation" (CAPS) Program in New York City Jails' (2016) 13(2) *International Journal of Environmental Research and Public Health* 182:1–10, 3; Raemisch and Wasko (n 233).

235 Giblin et al (n 233) 5; Michael Brookes, 'Introduction to the Special Issue on "Fifty Years of HMP Grendon"' (2010) 49(5) *Howard Journal of Criminal Justice* 425; *Efforts to Reform Punitive Segregation and Create Therapeutic Alternatives* (n 233) 6–7.

The profound harm that prolonged solitary confinement causes to prisoners could be avoided by limiting the amount of time prisoners are lawfully able to spend in solitary confinement conditions. Following the decision of the Court in *BCCL v Canada 2018*, the Canadian Parliament replaced segregation units with a new regime of 'Structured Intervention Units' ('SIUs').[236] Prisoners within these units are supposed to receive 'structured interventions … and programming' tailored to address their risks and needs and allow for 'meaningful human contact'.[237] The Senate recommended a legal maximum of 48 hours, however the House of Commons ultimately imposed a 15-day limit within each 30-day period.[238] Prisoners must receive a mental health assessment within 24 hours of their placement in an SIU and must be visited daily by medical personnel who can recommend changes to prisoners' conditions.[239]

Other jurisdictions around the world have placed strict time limits on solitary confinement placements, for example, a maximum of 15 days applies in Colorado,[240] 20 days in Washington,[241] and 30 days in New Mexico.[242] Similar limits apply in European countries: 10 days in Finland,[243] four weeks in

236 *An Act to Amend the Corrections and Conditional Release Act and Another Act*, SC 2019, c 27.

237 Explanatory Note, Bill C-83: An Act to Amend the Corrections and Conditional Release Act and Another Act (C); *Corrections and Conditional Release* (n 174) ss 32(1), 36(1).

238 Canada, *Parliamentary Debates*, Senate, 2 May 2019, 7955–67. See generally Kim Pate, 'Corrections Bill Lacks Key Provisions on Judicial Oversight', *Policy Options* (online, 10 May 2019) <https://policyoptions.irpp.org/magazines/may-2019/corrections-bill-lacks-key-provisions-judicial-oversight/>.

239 *Corrections and Conditional Release* (n 174) s 37.1(2). Also, prisoners exhibiting 'red flags' such as refusal to interact or self-harming must be immediately referred for treatment: at s 37.11.

240 *Reforming Restrictive Housing* (n 233) 67.

241 Alexa T Steinbuch, 'The Movement Away from Solitary Confinement in the United States' (2014) 40(2) *New England Journal on Criminal and Civil Confinement* 499, 527, citing Tracy Hresko, 'In the Cellars of the Hollow Men: Use of Solitary Confinement in US Prisons and Its Implications under International Laws against Torture' (2006) 18(1) *Pace International Law Review* 1, 13–14.

242 US Department of Justice, *Report and Recommendations Concerning the Use of Restrictive Housing* (Final Report, January 2016) 76 ('*Restrictive Housing Report*').

243 *Vankeuslaki* [Imprisonment Act] (Finland) 23 September 2005, pt V ch 15 s 4 [tr Ministry of Justice]. Some have claimed that there is also a two-week limit in Norway. Note, however that after two weeks, a decision can be made at regional level to extend the prisoner's period of exclusion: see *Straffegjennomføringsloven* [The Execution of Sentences Act] (Denmark) 1 March 2002, s 37 [tr Norwegian Correctional Service]. See further Dignity, 'Solitary Confinement as a Disciplinary Sanction: Focus on Denmark' (Discussion Paper, 3 April 2017) 13 ('*Solitary Confinement Denmark*'); Sharon Shalev, 'Solitary Confinement: The View from Europe' (2015) 4(1) *Canadian Journal of Human* Rights 143, 155 ('Solitary Confinement').

Germany[244] and Denmark,[245] and 60 days in Ireland.[246] Further to this, the Colorado Department of Corrections has abolished indeterminate solitary confinement orders, and introduced a policy preventing inmates from being housed in solitary confinement or maximum security units at the end of their sentence.[247]

For prisoners who have spent prolonged periods in solitary confinement, 'step-down programs' have proven successful because they support prisoners to exit solitary confinement gradually, by allowing them to earn privileges, out of cell time and association over an extended period of time.[248] The Queensland Corrective Services *COPD* creates the policy infrastructure for a staged approach to reintegration, however in practice, prisoners do not end up progressing through all of the stages.

Many of the human rights concerns associated with solitary confinement could be addressed immediately, simply by providing prisoners with adequate mental stimulation and activity.[249] Prisoners should have increased access to television and books and other in-cell activities such as puzzles and activity packs,[250] in-cell employment opportunities and distance education.[251] MP3 players have been provided to prisoners in some US facilities for music, podcasts, audiobooks and audio-programs.[252] Mindfulness classes, physical education classes and exercise

244 Ram Subramanian and Alison Shames, Vera Institute of Justice, *Sentencing and Prison Practices in Germany and the Netherlands: Implications for the United States* (Report, October 2013) 13, citing *Strafvollzugsgesetz* [Prison Act] (Germany) 16 March 1976, s 103(1) [tr Language Service of the Federal Ministry of Justice and Consumer Protection].

245 *Solitary Confinement Denmark* (n 243) 1, citing *Straffuldbyrdelsesloven* [Sentence Enforcement Act] (Denmark) 13 December 2017, s 70.

246 Shalev, 'Solitary Confinement' (n 243) 155.

247 *Restrictive Housing Report* (n 242) 75; Raemisch and Wasko (n 233) 3.

248 The importance of providing incentives should not be underestimated: see *Restrictive Housing Report* (n 242) 41; Terry A Kupers et al, 'Beyond Supermax Administrative Segregation: Mississippi's Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs' (2009) 36(10) *Criminal Justice and Behavior* 1037, 1042–3; Raemisch and Wasko (n 233) 4; Steinbuch (n 241) 527–8.

249 Raemisch and Wasko (n 233) 3; Suedfeld et al (n 3) 311.

250 Shalev, *A Sourcebook on Confinement* (n 105) 44–5; Zachary Heiden, American Civil Liberties Union of Maine, *Change is Possible: A Case Study of Solitary Confinement Reform in Maine* (Report, March 2013) 13; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Report to the Norwegian Government on the Visit to Norway Carried Out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 28 May to 5 June 2018* (Report, 17 January 2019) 36 [79] ('*Report to the Norwegian Government*'); Sharon Shalev, New Zealand Human Rights Commission, *Thinking Outside the Box? A Review of Seclusion and Restraint Practices in New Zealand* (Report, April 2017) 50, 52–3.

251 HM Chief Inspector of Prisons (n 233) 40 [3.27]–[3.30]; *Report to the Norwegian Government* (n 250) 36 [79].

252 John Evon and Francis Olive, 'The Utilization of MP3 Players in Correctional Segregation Units' (2012–13) 74(6) *Corrections Today* 53, 53. The units have a one-piece headset with no cord: at 54.

routines have been introduced in some units,[253] in fact, some prisons in the United Kingdom ('UK') employ physical education teachers to devise individualised exercise plans for prisoners.[254] One prison in the Netherlands provides a 'running strip' for prisoners, as well as gym equipment, and segregated prisoners are allowed to exercise in small groups.[255]

'De-escalation' and 'calm down' rooms have been introduced as an alternative response to potentially violent incidents.[256] These rooms remove the prisoner from his or her environment for a brief period and aim to distract and restore them through the use of calm music and other diversionary activities, thus preventing the use of prolonged solitary confinement.[257] Nadkarni et al developed an innovative indoor solution, the 'Blue Room', where videos of natural landscapes including beaches, space, forests and underwater scenes can be viewed by prisoners for a period of time each day.[258] Nadkarni et al reports that 80% of prisoners in her study said access to the Blue Room made their experience in solitary confinement 'easier', and there was a 26% reduction in violent offences within the unit.[259]

Another interesting finding of international studies is that the manner in which corrective services officers treat prisoners in solitary confinement can influence prisoners' capacity to cope with the conditions. If officers treat prisoners humanely, with dignity and respect and concern for their wellbeing, negative effects are less likely to be observed.[260] Participants in our research also noted the importance of treating prisoners with respect, and emphasised the significance of simple courtesies, such as calling a prisoner by their first name.

Independent oversight of solitary confinement decisions and conditions could also be increased. The new Canadian legislation requires an independent decision-maker to review a prisoner's placement in solitary confinement within seven working days, and this independent decision-maker has the power to direct that the prisoner be removed from solitary confinement.[261] There is also a requirement that an institutional head visit the prisoner before making a decision on whether or not

253 *Reforming Restrictive Housing* (n 233) 72–3.

254 HM Chief Inspector of Prisons (n 233) 42 [3.40]–[3.43].

255 See Shalev, *A Sourcebook on Confinement* (n 105) 44, quoting *Report to the Norwegian Government* (n 250) 31 [63].

256 Raemisch and Wasko (n 233) 8; *Reforming Restrictive Housing* (n 233) 70.

257 Raemisch and Wasko (n 233) 6.

258 Nalini M Nadkarni et al, 'Impacts of Nature Imagery on People in Severely Nature-Deprived Environments' (2017) 15(7) *Frontiers in Ecology and the Environment* 395, 398–400.

259 Ibid.

260 Gendreau and Labrecque (n 60) 350, citing Gendreau and Bonta (n 3) and Michael Jackson, 'The Psychological Effects of Administrative Segregation' (2001) 43(1) *Canadian Journal of Criminology* 109; Gendreau and Bonta (n 3) 474, citing Michael Jackson, *Prisoners of Isolation: Solitary Confinement in Canada* (University of Toronto Press, 1983); Suedfeld et al (n 3) 334.

261 *Corrections and Conditional Release* (n 174) ss 37.76, 37.83(3).

to alter a distressed prisoner's conditions of confinement.[262] As noted above, some scholars have argued that *OPCAT* has the potential to prevent ill-treatment through increased external scrutiny by monitoring organisations and community visitors.[263] Yet, prison inspectors' and official visitors' capacity to provide effective independent oversight has proved limited to date. Past experience suggests that it is not enough just to expose human rights breaches,[264] and since existing monitoring mechanisms have been subject to criticism, one wonders what difference *OPCAT* can reasonably make.[265]

VII CONCLUSION

Prison authorities face complex decisions when considering the risks associated with reintegrating prisoners who have become adapted to complete isolation within a highly regulated and controlled environment and, as Groves has noted, these 'many competing demands … remain unchanged in the new era of human rights'.[266] Nevertheless, international experience shows there are alternative ways of managing prisoners, without placing them in solitary confinement, that are cost effective, and reintegration strategies can be implemented even for those who have been isolated for years. Many of the alternatives to solitary confinement that have been implemented in other jurisdictions have proved to be cost-neutral,[267] so resource limitations need not pose a substantial barrier to reform.[268]

As White has said based on the New Zealand experience, placing people in solitary confinement will 'continue to be justified as necessary' by prison authorities

262 Ibid ss 37.2, 37.3.

263 See above n 133 and accompanying text.

264 Note the scepticism expressed by prisoners in Naylor's study regarding the effectiveness of prison visitors, inspectors, and ombudsmen: Naylor (n 57) 118–20. Hardwick and Murray doubt that sporadic visits can bring about systemic change, based on the UK experience: Nick Hardwick and Rachel Murray, 'Regularity of OPCAT visits by NPMs in Europe' (2019) 25(1) *Australian Journal of Human Rights* 66, 70, 73, 85. And note the limitations that lack of funding can cause for comprehensive monitoring, as expressed by White (n 137), based on the New Zealand experience: at 56–7, citing Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading or Punishment to New Zealand*, UN Doc CAT/OP/NZL/1 (28 July 2014).

265 Particularly since the National Preventative Mechanism bodies that have been designated in Australia are existing agencies and organisations: see *OPCAT Compliance Report* (n 134) 15–29. See also Committee Against Torture, *Concluding Observations on the Sixth Periodic Report of Australia*, UN Doc CAT/C/AUS/CO/6 (5 December 2022) 13 [41]–[42].

266 Groves (n 30) 220.

267 See, eg, the High Support Unit in Northern Ireland: Giblin et al (n 233) 5; the 'CAPS' unit in New York City: Glowa-Kollisch et al (n 234) 8–9. See Steinbuch (n 241) 525–6.

268 Resource implications are relevant to a proportionality assessment: *Queensland Human Rights Act* (n 26) s 13(1). However, courts have not been sympathetic to such arguments: see *Certain Children* (n 150) 581 [475] (John Dixon J); *Muršić v Croatia* (2017) 65 EHRR 1, 47 [101]; *Poltoratskiy v Ukraine* [2003] V Eur Court HR 89, 126 [148].

'[u]nless a more humane option [to seclusion] is suggested'.[269] Certainly, it is important that lawyers acknowledge and seek to understand the unique challenges that mentally unwell and 'difficult' prisoners pose to practitioners and managers who work in prisons. However, the universal standard that human rights instruments impose should not be ignored by adopting a deferential approach to managerial decisions of prison administrators that result in severe restrictions on basic human entitlements. As the recent cases of *Owen-D'Arcy*, *Islam* and *Davidson* demonstrate, scrutiny of these decisions allows shortcomings to be examined and may provide an impetus to develop alternative, more effective means by which to address the complex situations that arise in prisons.[270]

Despite the work of various monitoring bodies charged with overseeing, inspecting and reporting on prison conditions and prisoner well-being, many of the 'barbarisms of earlier times' remain.[271] Prisoners in isolation in Queensland experience sensory and social deprivation to such an extent that the threshold for cruel and inhumane treatment may be met.

Naylor, Debeljak and MacKay argue that three interrelated 'pillars' must be in place if prisoners' human rights are to be protected: a human rights regulatory framework, preventive monitoring mechanism and human rights cultural change.[272] We suggest that the most effective ingredient in the context of solitary confinement is likely to be the introduction of hard legal limits on the amount of time a person can spend in solitary confinement, and judicial oversight of solitary confinement placements. Relying on broad-based community education campaigns to promote a human rights culture is an important long-term goal,[273] but this will not address the complexities associated with prisoner management, particularly amongst an unsympathetic public, and it will not improve the conditions under which prisoners in solitary confinement live now. Both legal and moral imperatives require the urgent implementation of less restrictive alternatives that recognise individuals' inherent dignity, whilst preserving the security of prisons, bearing in mind that this will also best ensure the safety of the community. Additional research is required regarding the views of corrections practitioners on these issues, and the extent to which the legal perspectives we offer here can inform managerial practices.

269 White (n 137) 59.

270 Clements et al (n 2) 927.

271 *Sandery* (n 63) 509 (Olsson J).

272 Naylor, Debeljak and MacKay (n 133) 224, 248, 260.

273 Ibid 264.