

Solitary Confinement, Torture and Children: Applicable minimum standards

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Overview

In March 2021, the Scottish Parliament unanimously adopted the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill. Once the Bill receives Royal Assent, the incorporated articles of the UN Convention on the Rights of the Child (UNCRC) will be enforceable in Scots law.¹ Among the many provisions outlined in the UNCRC is the prohibition against torture. A host of other Scottish, UK and international laws also prohibit torture. In its most recent report to the Committee on the Rights of the Child (CRC), the UK government reported that ‘In Scotland and [Northern Ireland], no children are kept in solitary confinement.’² Nonetheless, certain detention practices in Scotland may breach the minimum threshold for a finding of torture or cruel, inhuman or degrading treatment (CIDT) due to the heightened protections due children in the context of detention on the Scottish prison estate.

This brief sets out the basis upon which the detention of children in Scotland could amount to torture or CIDT in breach of a range of legal obligations owed to children. It begins with a concise introduction to the range of laws prohibiting torture that are applicable in Scotland. Next, it considers the use of solitary confinement and at what point this extreme detention practice breaches the threshold of prohibited conduct. Finally, the specific question of children in detention on the Scottish prison estate in youth offender institutes (YOIs) is examined in light of a recent survey raising red flags in relation to the number of hours detained children are isolated in their cells each day.

The Legal Prohibition against Torture or CIDT and Solitary Confinement

The prohibition against torture and inhuman or degrading treatment found in Article 3 of the European Convention on Human Rights (ECHR) was incorporated into UK law through the Human Rights Act 1998. The UK’s international legal obligation to prohibit torture and CIDT is also repeated in the following international treaties:

- UN Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment (UNCAT);³
- International Covenant on Civil and Political Rights (ICCPR), Article 7;⁴

¹ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC), <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

² UK Response to the UN Committee’s List of Issues on the Rights of the Child, UN Doc CRC/C/GBR/6-7 (16 June 2022), para 305, at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGBR%2f6-7&Lang=en.

³ Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (UNCAT), at <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>.

⁴ International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

- Convention on the Rights of Persons with Disabilities;
- Convention on the Rights of the Child, Article 37;
- and a wide range of other international resolutions and declarations, including those agreed through the UN and the Council of Europe.⁵

The repetition of the prohibition supports the universal recognition of the this norm as one of customary international law binding on all countries regardless treaty participation.⁶ The Scotland Act 1998 requires the Scottish Government to implement the UK's international obligations, including the UNCAT and other treaties prohibiting torture.⁷ In addition to the Human Rights Act, the Criminal Justice Act 1988 also criminalises torture (s134).

Since 1988, when the UNCAT took effect in the UK, the Committee against Torture (CAT) has monitored the UK and all states that signed up to the treaty in order to ensure that torture in all its forms is eradicated. The UK submits periodic reports for review by the CAT as one way of establishing its compliance with the UNCAT. Various Scottish agencies and organisation contribute to the review process as part of holding the Scottish Government to account in the exercise of its devolved governance responsibilities.

Defining torture and CIDT

The UNCAT offers the most comprehensive definition of torture but recognizes that states may have more expansive definitions of torture.

UNCAT Article 1

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Similarly, the UNCAT prohibits cruel, inhuman or degrading treatment, also referred to as CIDT, that does not rise to the level of treatment amounting to torture.

⁵ For example, Universal Declaration of Human Rights, UNGA Res. 217A, UN Doc A/810, 10 December 1948; Resolution on the adoption of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1985); Resolution adopting the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2002);

⁶ Steven Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law' (2015) 15 *Human Rights Law Review* 101, 108; David Weissbrodt and Cheryl Heilman, 'Defining Torture and Cruel, Inhuman, and Degrading Treatment' (2011) 29 *Law & Inequity* 343, 348.

⁷ Scotland Act 1998, Schedule 5, s. 7(2)(a).

UNCAT Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.
2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

In addition to the UNCAT, multiple soft laws or guidelines have been adopted at the international level to reinforce the prohibition against torture and CIDT in various settings. Of particular relevance here are the UN Standard Minimum Rules for the Treatment of Prisoners⁸ (Nelson Mandela Rules) and the UN Rules for the Protection of Juveniles Deprived of their Liberty (Beijing Rules).⁹ Both of these documents consider the relationship between conditions of confinement and the prohibition against torture and CIDT and both offer guidance on the use of solitary confinement as an extreme form of detention.

What amounts to 'solitary confinement'?

None of the international legal instruments relating to human rights requires an absolute ban on the use of solitary confinement for adults detained incident to a judicial sentence. However, this controversial form of detention is the focus of a great deal of mental health and human rights commentary. The evolving interpretations of each of the international treaty prohibitions against torture and CIDT call for a very careful assessment of the circumstances of such extreme detention conditions as they can lead to the breach of a range of other human rights, including the right to be free from arbitrary detention. As such, there is no universally agreed, binding legal definition of solitary confinement; however, there are a number of threshold considerations set out in international standards and soft laws.

The Istanbul Statement on the Use and Effects of Solitary Confinement details that 'Solitary confinement is the physical isolation of individuals who are confined to their cells for twenty-two to twenty-four hours a day.'¹⁰ Similarly, Rule 43(1)(b) of the UN Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) defines solitary confinement as '22 hours or

⁸ UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), UNGA Resolution 70/175 of 17 December 2015, UN Doc A/RES/70/175, 8 January 2016. For an overview, see discussion in Kasey McCall-Smith, Introductory Note to the United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)' (2016) 55 *International Legal Materials* 1180.

⁹ UN Rules for the Protection of Juveniles Deprived of their Liberty, UNGA Resolution 45/113, 14 December 1990, <https://www.un.org/ruleoflaw/files/TH007.PDF>.

¹⁰ Istanbul Statement on the Use and Effects of Solitary Confinement adopted on 9 December 2007 at the International Psychological Trauma symposium, Istanbul, UNGA, Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/63/175, 28 July 2008, Annex (Istanbul Statement on Solitary Confinement).

more a day without meaningful human contact'.¹¹ On a policy level, the UK appears to have adopted the same definition:

*Solitary confinement is the physical isolation of individuals who are confined to their cells for 22 or more hours a day. Where this lasts for a period in excess of 15 consecutive days it is known as prolonged solitary confinement. In many jurisdictions prisoners are allowed out of their cells for one hour of solitary exercise. Meaningful contact with other people is typically reduced to a minimum. The reduction in stimuli is not only quantitative but also qualitative. The available stimuli and the occasional social contacts are seldom freely chosen, are generally monotonous, and are often not empathetic.*¹²

The extensive use of prolonged solitary confinement – over 14 days – in the UK was a point of concern for the Subcommittee on the Prevention of Torture in its May 2021 report on its 2019 visit to the UK.¹³ Prolonged solitary confinement tends to demand a more critical examination in order to prevent torture or CIDT.

Reflecting on the various international resources addressing solitary confinement it is clear that an evaluation of what constitutes solitary confinement demands both a consideration of (1) the duration of *time* spent in isolation and (2) what equates to *meaningful* social contact. From the international perspective, failure to ensure two hours or more outside a single-occupancy cell or room in a 24-hour period is the consistent time-determinant threshold for solitary confinement. Duration of the confinement is simply one of the factors to consider.¹⁴ This does not mean that the detained individual will have no other human contact during the 22-hour period. The contact must be 'meaningful' in order to prevent the detention conditions being viewed as solitary confinement. In this sense, 'meaningful' is not defined consistently, but the term has been interpreted as requiring social stimulation greater than mere contact with another human being.¹⁵ The findings of an expert meeting examining challenges to interpretation and implementation of the Nelson Mandela Rules explain that

[Meaningful] has been used to describe the amount and quality of social interaction and psychological stimulation which human beings require for their mental health and well-being. Such interaction requires the human contact to be face to face and direct (without physical barriers) and more than fleeting or incidental, enabling empathetic interpersonal communication. Contact must not be limited to those interactions

¹¹ UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), UNGA Resolution 70/175 of 17 December 2015, UN Doc A/RES/70/175, 8 January 2016, See discussion in Kasey McCall-Smith, Introductory Note to the United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)' (2016) 55 *International Legal Materials* 1180, 1181.

¹² UK National Preventative Mechanism, Sixth Annual Report to Parliament (2015), 21.

¹³ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report of the Subcommittee on its Visit to the United Kingdom of Great Britain and Northern Ireland undertaken from 9 to 18 September 2019, UN Doc CAT/OP/GBR/ROSP/1, 31 May 2021, para 86.

¹⁴ *Peñaranda Soto v Malta* (Application No 16680/14) (unreported) 19 December 2017, para 75; *AT v Estonia* (Application No 70465/14) (unreported) 13 November 2018, para 72. Both cases cited in *R (on the application of AB) v Secretary of State for Justice* [2021] UKSC 28, para 44.

¹⁵ See, for example, CAT, Observations of the Committee against Torture on the revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners, UN Doc CAT/C/51/4, 16 December 2013, para 34.

*determined by prison routines, the course of (criminal) investigations or medical necessity. ... The experts stressed that the provision needs to be interpreted in good faith and conscious of its intent and purpose. They emphasised that, therefore, it does not constitute 'meaningful human contact' if prison staff deliver a food tray, mail or medication to the cell door or if prisoners are able to shout at each other through cell walls or vents. In order for the rationale of the Rule to be met, the contact needs to provide the stimuli necessary for human well-being, which implies an empathetic exchange and sustained, social interaction. Meaningful human contact is direct rather than mediated, continuous rather than abrupt, and must involve genuine dialogue. It could be provided by prison or external staff, individual prisoners, family, friends or others – or by a combination of these.*¹⁶

The absence of social and or psychological engagement is considered one of the most harmful features of solitary confinement.¹⁷ 'Solitary confinement harms prisoners who are not previously mentally ill and tends to worsen the mental health of those who are.'¹⁸

When does solitary confinement rise to the level of prohibited treatment?

While international interpretations of the prohibition of torture or CIDT firmly include instances of prolonged solitary confinement – stretches of solitary exceeding 14 days – regional courts have been less willing to make such determinations without aggravating circumstances. The ECtHR makes clear that ECHR Article 3 does not automatically 'amount to inhuman treatment or degrading punishment.'¹⁹ In short, each case must engage in an assessment of circumstances relevant to a determination of torture or CIDT. The first consideration is who is inflicting the particular treatment on an individual? To engage the prohibition against torture or CIDT, the treatment must have been at the hand of an individual who is acting on behalf or with the acquiescence of the state, e.g. prison staff. Therefore, any person detained in the state justice system is assumed to be the responsibility of the state.

In line with the standard assessment of whether a state action (or inaction) meets the threshold for breaching the prohibition against torture or CIDT, there are three primary factors to consider – the severity of the action, the intention and the purpose. In determining whether the state's use of solitary confinement rises to the level of torture or CIDT, each of these factors must be considered on a case-by-case basis. Therefore, the following overview offers some of the key judicial opinions to contextualise the point at which solitary confinement breaches the prohibition against torture and CIDT when examining challenges to confinement conditions brought by *adult* detainees.

Severity

¹⁶ Penal Reform International/Human Rights Centre, University of Essex, *Initial Guidance on the Interpretation and Implementation of the UN Nelson Mandela Rules*, Essex paper 3 (2017), 88-89, at <https://cdn.penalreform.org/wp-content/uploads/2016/10/Essex-3-paper.pdf>.

¹⁷ Istanbul Statement on Solitary Confinement, 2.

¹⁸ Istanbul Statement on Solitary Confinement, 1.

¹⁹ *Van der Ven v Netherlands* (2004) 38 EHRR 46, para 51.

Though the severity of the pain or suffering was the primary determinate of whether an act or failure to act was classed as torture or CIDT, the distinction has largely been discarded by the ECtHR as well as the CAT.²⁰ What equates to severe pain or suffering is an assessment that sits along a spectrum in relation to the alleged victim, the action and the two remaining elements.²¹ Furthermore, as both torture and CIDT are prohibited, any action along the spectrum is a human rights breach from an international perspective. The distinction may be relevant in a national criminal context, for example, for the purposes of a defendant's sentencing.

Intention

Is the act or inaction intended to cause physical or mental pain or suffering. Notably, the ICCPR does not require the element of 'intent'. In the context of solitary confinement, the question is was the deprivation of social and psychological contact or stimulus carried out in order to cause pain or suffering. It is unclear from the case law where pure negligence, or failing to take a detainee out of their cell for exercise, would support a finding of torture. An alternative, lesser degree of prohibited treatment characterised as CIDT would no doubt align more closely with existing ECtHR jurisprudence.

Purpose

Is the action or inaction carried out for the purpose of gaining information, disciplining the person, intimidating the person or for any reason based on discrimination.

Despite the tendency to apply this formulaic approach to assessments of torture or CIDT in the early days of the European and international human rights systems, contemporary legal analysis does not demand that each element meet a certain threshold but, instead, considers the cumulative effects of factors – a totality of the circumstances, fact-sensitive or cumulative approach.²² As noted in *Ahmad v United Kingdom*, and acknowledged in the July 2021 UK Supreme Court decision in *R (on the application of AB) v Secretary of State for Justice*, '[t]here no "bright line" rule, at least in the adult context, that solitary confinement lasting more than a specific period of time automatically breaches article 3.'²³

The cumulative approach applied to situations of solitary confinement of adults is, therefore, unsettled in terms of outcomes. However, the impact of deliberate or apathetic isolation or solitary confinement of adults in the justice system can lead to grave results.

Medical research confirms that the denial of meaningful human contact can cause 'isolation syndrome', the symptoms of which include anxiety, depression, anger,

²⁰ *Mammadov v Azerbaijan*, no. 34445/04 [68] 11 January 2007; *Süheyla Aydın v Turkey*, No. 25660/94 [195] 24 May 2005.

²¹ See Nigel Rodley and Matt Pollard, 'What Constitutes Torture and Other Ill-treatment?' in Nigel Rodley and Matt Pollard, *The Treatment of Prisoners under International Law*, 3d ed. (OUP 2015), cf Manfred Nowak, 'What Practices Constitute Torture: US and UN Standards' (2006) 28 *Human Rights Quarterly* 809

²² *Ramirez-Sanchez v France* (2006) 45 EHRR 49, para 118. See discussion in Nigel Rodley and Matt Pollard, 'What Constitutes Torture and Other Ill-treatment?' in Nigel Rodley and Matt Pollard, *The Treatment of Prisoners under International Law*, 3d ed. (OUP 2015), 92-95

²³ *Ahmad v United Kingdom* (2012) 56 EHRR 1, para 210, cited in *R (on the application of AB) v Secretary of State for Justice* [2021] UKSC 28, para 26.

*cognitive disturbances, perceptual distortions, paranoia, psychosis, self-harm and suicide, and can destroy a person's personality.*²⁴

Preventing torture and CIDT demands guarding against the combination of sensory and social isolation.

The ECtHR tends to examine the persistence of complete sensory isolation combined with total social isolation when assessing whether solitary confinement conditions rise to the level of torture or CIDT.²⁵ Most of the case law interpreting the prohibition against torture or CIDT in the context of solitary confinement relates to individuals in conflict with the law. Despite the normative view presented in the Nelson Mandela rules, the ECtHR has been hesitant to rule solitary confinement breaches Article 3 where there have been regular contacts with detention facility personnel, including guards or medical staff.²⁶ In direct contradiction to the views of most experts on mental health, detention and human rights, the ECtHR jurisprudence accepts shouting through ventilation systems as 'meaningful' enough to prevent a breach of Article 3.²⁷ Furthermore, the Court has been reluctant to declare a breach of Article 3 where the detained individual has access to different forms of media or 'in-cell stimulation'.²⁸ In the 2004 Van der Ven case the ECtHR set out its assessment standard for determining when solitary confinement might rise to a breach of Article 3:

*In assessing whether such a measure may fall within the ambit of article 3 in a given case, regard must be had to the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned.*²⁹

In short, the ECtHR is thus far unwilling to find a breach of the ECHR Article 3 prohibition against torture or CIDT in relation to extended periods of solitary confinement for adults without additional aggravating factors. It is notable, too, that the claimants in many of the solitary confinement cases were considered dangerous due to their links to organized crime and or terrorism.³⁰

At present, at least in the ECHR system, courts have been unwilling to find solitary confinement of adults a specific breach of the prohibition against torture or CIDT without further aggravating treatment or conditions of detention. The situation of children in solitary confinement opens up a space to consider how the threshold for adults must be lowered when applying the cumulative approach in light of the application of children's human rights.

Detention of Children in Scotland's Justice System

²⁴ Penal Reform International/Human Rights Centre, University of Essex, *Initial Guidance on the Interpretation and Implementation of the UN Nelson Mandela Rules*, Essex paper 3 (2017), 86, at <https://cdn.penalreform.org/wp-content/uploads/2016/10/Essex-3-paper.pdf>.

²⁵ *Ilaşcu v Moldova* (2005) 40 EHRR 46, para 432; *Babar-Ahmad* (n37) § 206; *Ramirez-Sanchez v France*, paras 135-36; *Öcalan v Turkey* (2005) 41 EHRR 45, para 191; *Van der Ven v Netherlands* (2004) 38 EHRR 46, para 51.

²⁶ For example, *Öcalan v Turkey* (2005) 41 EHRR 45, paras 194-196; *Ramirez-Sanchez v France*, paras 105-06 and 135.

²⁷ *Ahmad v United Kingdom*, para 222.

²⁸ *Ibid.*

²⁹ *Van der Ven v Netherlands* (2004) 38 EHRR 46, para 51

³⁰ For example, *Öcalan v Turkey*; *Ramirez Sanchez v. France*.

Since the initial development of the international human rights system, the need for ‘special care and assistance’ for children has been repeatedly recognised.³¹ For this reason, UNCRC Article 37 outlines the prohibition against torture and CIDT in the specific context of children as a way of reinforcing the prohibitions in instruments predating the Convention.

UNCRC Article 37

States Parties shall ensure that:

- (a) *No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.* Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- (b) *No child shall be deprived of his or her liberty unlawfully or arbitrarily.* The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and *in a manner which takes into account the needs of persons of his or her age.* In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
- (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action. (emphasis added)

While the UNCRC provisions are less comprehensive than the UNCAT, they are generally interpreted to align with the UNCAT and take into account the four guiding principles of the UNCRC – non-discrimination (Article 2), the best interests of the child (Article 3), the right to life, survival and development (Article 6) and the child’s right to be heard (Article 12). UK case law recognises the need to ensure that children are treated with respect and that their interests are balanced against those of the community with the child’s interests always being the primary concern.³² UNCRC Article 37 should be the starting point for consideration of torture or CIDT in relation to children and particularly those children subject to detention.

Despite the numerous measures of implementation of the UNCRC in Scotland, examining solitary confinement demands reading the UNCAT in concert with the UNCRC in order to ensure the appropriate threshold when examining what constitutes torture or CIDT in relation to children. In this context and in line with UNCRC Article 1 and the UNCRC (Incorporation) (Scotland) Bill, ‘children’ are recognised as all individuals under age 18. However, until the Bill

³¹ Universal Declaration on Human Rights, preamble.

³² *R (Howard League for Penal Reform) v Secretary of State for the Home Department* [2002] EWHC 2497 (Admin); [2003] 1 FLR 484, cited in *R (on the application of AB) v Secretary of State for Justice*, para 26(6)

takes effect and existing laws are adjusted to coordinate with the UNCRC, gaps will continue in human rights protections for children in the Scottish criminal justice system. The tendency for 16 and 17-year-olds to be prosecuted through the traditional court system rather than handled through the Children's Panel system is a concern if Scotland is to fully implement the UNCRC. As it currently stands, the Criminal Procedure (Scotland) Act 1995 (s207(3)) and the Children (Scotland) Act 1995, for example, breach the UNCRC by excluding 16 and 17-year-olds from the status of 'children', which enables the application of adult criminal justice processes and can result in them being detained in a YOI. While there is a presumption against short periods of imprisonment³³ and generally against custodial sentences for children, including 16 and 17-year-olds, judges may opt to explain why remand or a post-conviction sentence is necessary.³⁴

Particularly worrying is the number of children detained on remand in Scotland, which means they have not yet had their case heard in court or been convicted of a criminal offense.³⁵ In line with UNCRC Article 37, the ECtHR has consistently considered the international view that detention of children prior to a conviction is a measure of last resort and, when necessary, should be used only for the shortest duration possible.³⁶ In December 2020, 72% of children referred to the courts in Scotland were held on remand in a young offenders institution (YOI).³⁷ The high percentage of children held on remand does not align with the presumption against pre-trial detention elaborated in Scots law, ECtHR judgments or international guidance.³⁸

Children, detention and solitary confinement

In the 2019 UN Global Study on Children Deprived of Liberty, Manfred Nowak, the UN Independent Expert on Children Deprived of Liberty and former UN Special Rapporteur on Torture and Cruel, Inhuman or Degrading Treatment, firmly concluded that '[d]epriving children of liberty is depriving them of their childhood.'³⁹ In over 600 pages, the report charts the ways in which the human rights of children in detention are breached, repeatedly, through direct action or neglect by the states that detain children in various settings, including as a result of a child coming into conflict with the law. The primary aim of the international standards relating to children in conflict with the law is to ensure that legal systems take account of the evolving and variable levels of emotional, mental and intellectual maturity and

³³ Criminal Justice and Licensing (Scotland) Act 2010, s17.

³⁴ Criminal Procedure (Scotland) Act 1995, s207(3).

³⁵ UK Government, 'Being Charged with a Crime: Remand', <https://www.gov.uk/charged-crime/remand#:~:text=If%20the%20court%20decides%20to,hearing%20at%20a%20magistrates'%20court.&text=the%20police%20think%20you%20may,not%20stuck%20to%20the%20terms>.

³⁶ *Korneykova v Ukraine*, App No. 39884/05, 19 January 2012, paras 25-27 and 44; *Nart v. Turkey*, App No. 20817/04, 6 May 2008, paras 31 and 33; *Selçuk v. Turkey*, App No. 21768/02, 10 January 2006, paras 35-36.

³⁷ Claire Lightowler and Bruce Adamson, "'Not cut out for prison': Depriving children of their childhood, Blog, Children and Young People's Centre for Justice', <https://www.cycj.org.uk/not-cut-out-for-prison-depriving-children-of-their-childhood/>

³⁸ Beijing Rules, rule 13.

³⁹ Manfred Nowak, Report of the Independent Expert leading the United Nations global study on children deprived of liberty, Summary, UN Doc A/74/136 (11 July 2019), para 3.

development.⁴⁰ This aim reflects the UNCRC Article 5 recognition that each child is unique, and their evolving capacity will not necessarily conform to a singular ‘age and stage’ measure.

While Scotland does not employ ‘solitary confinement’ to children in YOIs as a matter of policy, in practice a combination of factors result in conditions equivalent to solitary confinement. The recent results of a Pre-Inspection Survey conducted in the context of the Year of Childhood revealed certain troubling dimensions of the detention situation for children in prison custody in Scotland.⁴¹ The Survey ran as a pilot and prelude to a survey planned for adults detained in the wider prison estate. While there are many issues that must be monitored in the context of detaining children, a key finding of the survey was that the majority of the respondents were restricted to their single occupancy cells more than 22 hours per day. The relevant parts of the survey detailed that...

Respondents typically (66.7%) spent *less than two hours out of their cell or room per day*, although the proportion spending *less than one hour out of their cell* increased from 11.1% on a weekday, to a third (33.3%) at the weekend (see Table 2). Within that short time frame children commented that showers and telephone calls had to be completed, leaving very little time for other positive activities or interactions. Staff observed that due to changes in shift patterns and staff absences arising from COVID-19, there was not enough staffing capacity to allow children out for longer.⁴²

Most respondents (10, or 83.3%) did not have enough to do to keep themselves busy, with only two (16.7%) stating that they did. This was one of the children’s biggest concerns, with children feeling that being restricted to their cells for long periods had a detrimental effect on their health and wellbeing. Of those respondents who chose to answer the question, almost half (5, or 45.5%) were not able to have a private conversation with family, and one child described feeling angry that staff listened in to conversations.⁴³

In light of the Survey revelations and the close connections between certain conditions of confinement and breaches to a range of human rights it is necessary to reflect on the minimum standards for detained children, including when detention conditions equate to solitary confinement. In clarifying the baseline for detention of adults above, the following focuses on the need to apply heightened levels of scrutiny in the context of children.

In terms of the duration of the time in their cells, 22 hours or more equates to the minimum threshold considered for detention to be classified as ‘solitary confinement’. The Subcommittee on Prevention of Torture previously flagged the duration that children in UK

⁴⁰ For example, UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), UNGA Resolution 40/33, 29 November 1985, para 4.1, at <https://www.ohchr.org/documents/professionalinterest/beijingrules.pdf>.

⁴¹ Her Majesty’s Inspectorate of Prisons Service (HMIPS) in partnership with the Children and Young People Commissioner for Scotland (CYPCS) and the Children’s and Young People’s Centre for Justice (CYCJ), Year of Childhood: Pre-Inspection Survey 2021, <https://www.cycj.org.uk/wp-content/uploads/2021/10/HMIPS-Year-of-Childhood-Survey.pdf>.

⁴² Pre-Inspection Survey 2021, 4.

⁴³ Pre-Inspection Survey 2021, p. 5 (emphasis added).

YOIs spent in their cells as problematic, though specifically in relation to an English YOI.⁴⁴ In an adult scenario, the next consideration would be whether there is sufficient ‘meaningful’ contact. To prevent conditions from infringing on a child’s right to be free from torture or CIDT, more stringent standards must be applied in a determination of ‘meaningful’ contact that will ensure none of the child’s rights are breached. Arguably, the time threshold alone should trigger alarm bells in the Scottish criminal justice system due to widely recognised views against detaining children in conditions equating to solitary confinement. Assessing meaningful contact in line with each detained child’s particular circumstances must be clearly documented and constantly monitored.

The following international instruments, reports and guidance mutually reinforce the prohibition on the use of solitary confinement of children:

- General Comment No 10 on Children’s Rights in Juvenile Justice;
- General Comment No 24 on children’s rights in the child justice system;⁴⁵
- UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules);⁴⁶
- Nelson Mandela Rules;⁴⁷
- Reports of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment to the UK;⁴⁸
- Istanbul Statement on the Use and Effects of Solitary Confinement.⁴⁹

Solitary confinement of children as a form of discipline is strictly prohibited by the UN Rules for the Protection of Juveniles Deprived of their Liberty.⁵⁰ For over a decade, the UN and other experts have called for states to abolish the use of solitary confinement for children because it ‘can amount to torture or cruel, inhuman or degrading treatment.’⁵¹ The logical follow-on to these prohibitions on the use of solitary confinement for children as a form of discipline is that children should not experience solitary confinement as a result of apathetic or negligent detention practices. ‘Lack of staffing’ cannot absolve YOI of the duty to protect children, including those in conflict with the law, whether on remand or serving a sentence.⁵² At the

⁴⁴ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report of the Subcommittee on its Visit to the United Kingdom, paras 97-99.

⁴⁵ CRC, General Comment No. 24 on children’s rights in the child justice system, UN Doc CRC/C/GC/24, 18 September 2019, para 95(h). See also, Committee on the Rights of the Child (CRC), Concluding Observations on Denmark, UN Doc CRC/C/15/Add.273, 30 September 2005, para 58(a);

⁴⁶ UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), rule 27.

⁴⁷ Nelson Mandela Rules, rule 45(2).

⁴⁸ Report of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment of 19 August 2017 on its visit to the UK, CPT/Inf (2017) 9, para 98, reinforcing adherence with the Nelson Mandela Rules; Report of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment of 30 April 2020 on its visit to the UK, CPT/Inf (2020) 18, paras 129, 145-46, 152.

⁴⁹ Istanbul Statement on Solitary Confinement.

⁵⁰ UN Rules for the Protection of Juveniles Deprived of their Liberty, UNGA Resolution 45/113, 14 December 1990, para 67, <https://www.un.org/ruleoflaw/files/TH007.PDF>.

⁵¹ See discussion in Mikah Owen and Jeffrey Goldhagen, ‘Children and Solitary Confinement: A Call to Action’ (May 2016) 137:5 *Pediatrics* at <https://doi.org/10.1542/peds.2015-4180>.

⁵² Report of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment of 30 April 2020 on its visit to the UK, CPT/Inf (2020) 18, 8.

very least, the Survey findings strengthen the argument against detaining children in prison settings.

The ECtHR has not reviewed a case involving a child held in solitary confinement.⁵³ The UK Supreme Court, on the other hand, published its decision in the *R (on the application of AB) v Secretary of State for Justice* in summer 2021.⁵⁴ The case involved whether the exclusion of a 15-year-old at an English YOI for 55 days was solitary confinement in breach of ECHR Article 3. At the lower level, there was a finding that the detention conditions breached ECHR Article 8 (right to private life) but not Article 3. The two questions before the Supreme Court were: (1) whether the solitary confinement of persons under 18 years of age is inherently inhuman and degrading, contrary to ECHR Article 3, in other words strictly prohibited; and (2) if the first question is answered in the negative, is there is a single and universal test of the compatibility of the use of solitary confinement of children with ECHR Article 3, in other words, do “exceptional” circumstances exist in which such treatment is “strictly necessary”?⁵⁵ The Court ruled that UK and ECtHR interpretation of Article 3 did not prevent the use of solitary confinement on under-18s. The Court refused to acknowledge a universal test assessing the exceptional use of solitary confinement.

The reasoning offered by the Supreme Court decidedly steps away from the general tenor toward using the UNCRC and CRC jurisprudence as interpretive tools when analysing ECHR rights in the context of children. Lord Reed, in fact, went to great extremes to set out why the copious amounts of international opinion against using solitary confinement were not binding on the UK when interpreting the prohibition against torture and CIDT under the ECHR.⁵⁶ In short, his determination was that international opinions could not be followed where they were not part of UK law. The case presents a prime example of why it is necessary to incorporate the UNCRC, which would squarely permit courts to rely on the UNCRC when examining legal issues for all under-18s.

Conclusion

Solitary confinement of children is recognised both as an amplifier of trauma in judicial detention and as a source of trauma in and of itself.⁵⁷ The CRC and the CAT have highlighted the UK need to prohibit solitary confinement of children.⁵⁸

⁵³ The most concise discussion of relevant ECHR case law is found in *R (on the application of AB) v Secretary of State for Justice* [2021] UKSC 28, paras 46-49.

⁵⁴ *R (on the application of AB) v Secretary of State for Justice* [2021] UKSC 28

⁵⁵ *Ibid*, 1

⁵⁶ *Ibid*, esp. paras 60-67.

⁵⁷ UN Global Study on Children Deprived of Liberty (2019), 121,

⁵⁸ CRC, Concluding observations on the ...; CAT, Concluding observations on the sixth periodic report of the UK, UN Doc CAT/C/GBR/CO/6 (7 June 2019), para 23.

*For children, segregation has been found to be particularly traumatic, and the imposition of solitary confinement on children, of any duration, has been considered to constitute cruel, inhuman or degrading treatment or punishment or even torture.*⁵⁹

A range of experts have offered extensive guidance on how to facilitate alternatives to solitary confinement in the instances it is employed for protective reasons. To guard against the harmful effects of detention on children, detention facility personnel must increase the opportunity for meaningful contact in any detention circumstances so as to avoid detention equating to solitary confinement.⁶⁰

As Scotland progresses toward implementation of the UNCRC Bill the issue of solitary confinement and children must be addressed once and for all. It cannot continue to be ignored as appears to be the case with the most recent report to the CRC.⁶¹ As a matter of course, children should not be detained in the prison system. Where they are, stringent standards of treatment, conditions of detention and rehabilitation must be observed in order to give full effect to all of the human rights to which each child is entitled.

⁵⁹ Penal Reform International/Human Rights Centre, University of Essex, *Initial Guidance on the Interpretation and Implementation of the UN Nelson Mandela Rules*, Essex paper 3 (2017), 89 (footnotes omitted), at <https://cdn.penalreform.org/wp-content/uploads/2016/10/Essex-3-paper.pdf>.

⁶⁰ *Mathew v. Netherlands*, Application No. 24919/03, para 202.

⁶¹ UK Response to the UN Committee's List of Issues on the Rights of the Child, UN Doc CRC/C/GBR/6-7 (16 June 2022), para 305.