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By Email - corporate@oics.wa.gov.au

Dear Neil

### **Prohibition on solitary confinement and strict regulation of isolation and seclusion**

We welcome the Western Australian Government's calls to investigate allegations of the solitary confinement of children in Banksia Hill Detention Centre.

We write to assist your investigation by providing you with a briefing document outlining the need for Western Australia to make two important legislative changes to protect the human rights of children in detention:

1. An absolute prohibition on the use of solitary confinement on children in detention; and
2. The regulation of practices that can result in the forced isolation or seclusion of a child.

### **How solitary confinement has been used in Western Australia**

Western Australia is the only jurisdiction that expressly permits confinement to be used as punishment.<sup>1</sup> The legislation authorises the isolation or 'confinement' of a detainee in response to a detention offence or in order to maintain good governance, order or security in a detention centre.<sup>2</sup>

There is little guidance in the legislation to regulate the circumstances in which a child or young person may be isolated or confined and as such enables routine use as a behaviour management strategy.<sup>3</sup> We note that you have previously warned that this overreliance on isolation or separation does little to ensure long-term behaviour management, is likely to promote further problems and conflicts with any concept of trauma-informed care.<sup>4</sup>

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<sup>1</sup> Australian Children's Commissioners and Guardians, 'Human rights standards in youth detention facilities in Australia: the use of restraints, disciplinary regimes and other specified practices', April 2016, pp 64.

<sup>2</sup> Young Offenders Regulations 1995 (WA), reg 74 and Young Offenders Act 1994 (WA), s 196(2)(e).

<sup>3</sup> Office of the Inspector of Custodial Services, Behaviour management practices at Banksia Hill Detention Centre, (June 2017), 33.

<sup>4</sup> Ibid.

## What is solitary confinement?

Solitary confinement is the isolation of detainees for 22 hours or more a day without any meaningful human contact.<sup>5</sup> It involves the involuntary placement of a child in a room (often with limited ventilation and natural light) from which they are unable to leave, denying the child meaningful contact with peers, therapeutic professionals or family.

Across Australia multiple terms are used to describe certain detention practices that can amount to solitary confinement in given situations, including: isolation, segregation, seclusion and separation.<sup>6</sup> The use of these different terms and the lack of consistency in the governing legislation and/or policies across states and territories has resulted in a broadening of circumstances in which a child may be isolated in a room or cell without meaningful human contact.

## Why solitary confinement should be prohibited

International human rights law strictly prohibits the use of solitary confinement on children as evidence shows that this practice can have severe, long-term and irreversible effects on a child's health and wellbeing.<sup>7</sup>

In other words, solitary confinement should be prohibited because of the risk posed to the emotional, psychological and physical health and wellbeing of children.<sup>8</sup> Proven negative health effects include insomnia, confusion, compounded trauma, hallucinations and psychosis.<sup>9</sup> Children are particularly vulnerable because they are undergoing crucial stages of development- socially, psychologically and neurologically and these developmental processes can be interrupted or damaged as a result of isolation.<sup>10</sup> Additionally, most children in youth detention have a history of trauma or disadvantage. Approximately two thirds are victims of childhood abuse, trauma or neglect and may have a disability or mental health issue, which are exacerbated by being placed in solitary confinement.<sup>11</sup> Where children are at risk of suicide or self-harm, isolation is likely to increase their distress and suicidal ideation and rumination.<sup>12</sup>

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<sup>5</sup> United Nations Standard Minimum Rules for the Treatment of Prisoners ('*Mandela Rules*') UN Doc E/CN.15/2015/L.6/Rev.1, rule 44.

<sup>6</sup> Australian Children's Commissioners and Guardians, Human rights standards in youth detention facilities in *Australia: the use of restraint, disciplinary regimes and other specified practices* (April 2016), 60.

<sup>7</sup> United Nations Standard Minimum Rules for the Treatment of Prisoners ('*Mandela Rules*') UN Doc E/CN.15/2015/L.6/Rev, Rule 45(2) and Havana Rules, para 67. See also Committee on the Rights of the Child, *General comment no. 10*, UN Doc CRC/C/GC/10 (25 April 2007); Juan E. Mendez, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment', UN Doc A/HRC/28/68 (5 March 2015), para 86(f).

<sup>8</sup> Committee on the Rights of the Child, *General comment no. 10*, UN Doc CRC/C/GC/10 (25 April 2007). See also CRC/C/15/Add.151, para. 41; CRC/C/15/Add.220, para. 45 (d); and CRC/C/15/Add.232, para. 36 (a).

<sup>9</sup> 'The Istanbul Statement on the use and effects of solitary confinement' (9 December 2007) *International Psychological Trauma Symposium, Istanbul*.

<sup>10</sup> Australian Children's Commissioners and Guardians, Statement on conditions and treatment in youth justice detention (November 2017), 20.

<sup>11</sup> Commission for Children and Young People, *The same four walls: inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system* (Melbourne: Commission for Children and Young People, 2017), 6; The Royal Commission has confirmed that 'many children and young people enter detention with serious cognitive disabilities, mental illness, addiction to nicotine, alcohol and other drugs as well as physical deficits such as poor hearing and sight, and, in some cases, also functional illiteracy.' Royal Commission into the Protection and Detention of Children in the Northern Territory, Interim Report, (31 March 2017), 38.

<sup>12</sup> Australian Children's Commissioners and Guardians, Statement on conditions and treatment in youth justice detention (November 2017), 20.

Because of the harm caused by solitary confinement, the Australian Children's Commissioners and Guardians stated in 2016 that 'solitary confinement constitutes cruel, inhuman or degrading treatment' and therefore affirmed that 'children should never be subjected to solitary confinement'.<sup>13</sup>

Evidence shows that Aboriginal and Torres Strait Islander children are at increased risk of harm when subject to solitary confinement due to their deep need for connection to family, kin and culture.<sup>14</sup> We note that you have previously said that 'Aboriginal prisoners separated from family and kin suffer emotional and spiritual distress beyond that imposed upon non-Aboriginal prisoners'.<sup>15</sup> This echoes the Royal Commission into Aboriginal Deaths in Custody finding that 'it is undesirable in the highest degree that an Aboriginal prisoner should be placed in segregation or isolated detention'.<sup>16</sup>

Accordingly, the importance of prohibiting solitary confinement is particularly pronounced in Western Australia given the exceptionally high number of Aboriginal and Torres Strait Islander children in the youth detention system.

### **Recent Australian research**

#### *1. Victoria*

The Victorian Children's Commissioner recently undertook an inquiry into the use of isolation, separation and lockdown practices in Victorian youth justice facilities.<sup>17</sup> The Commission looked at isolation as part of a 'separation plan' to address behaviour or vulnerability; isolation to prevent harm to a child, others or property; and isolation through cell confinement due to staff shortages. It found that no matter what the purpose or intention behind the isolation, 'the result was usually the same: children and young people enclosed alone between four walls with limited access to fresh air, human interaction, stimulation, psychological support and, in some circumstances, basic sanitation'.<sup>18</sup> The Commission went on to make over 20 recommendations including legislative and policy reforms, improvements to staff training and practices, increased transparency, reporting and regular reviews of practices to specifically clarify the purpose of isolation and to confine the circumstances under which a young person can be isolated.<sup>19</sup>

#### *2. The Northern Territory*

The Northern Territory's laws and policies permitting isolation were also reviewed as part of the inquiry by the Royal Commission into the Protection and Detention of Children in the Northern Territory. The Commission found that the laws in place were often inappropriately and unlawfully used as punishment and as a behavioural management tool. The Commission found that unlawful and inappropriate isolation practices were allowed to occur 'due to careless management, poorly drafted

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<sup>13</sup> Australian Children's Commissioners and Guardians, 'Human rights standards in youth detention facilities in Australia: the use of restraints, disciplinary regimes and other specified practices', April 2016, pp 63.

<sup>14</sup> E Grant, L Lulham and B Naylor, 'The use of segregation for children in Australian youth detention systems: An argument for prohibition', *Advancing Corrections*, 2017, pp 117-136. Available at: [https://digital.library.adelaide.edu.au/dspace/bitstream/2440/105842/3/hdl\\_105842.pdf](https://digital.library.adelaide.edu.au/dspace/bitstream/2440/105842/3/hdl_105842.pdf)

<sup>15</sup> Office of the Inspector of Custodial Services (WA) 2008.

<sup>16</sup> Commonwealth of Australia 1991: 334.

<sup>17</sup> Commission for Children and Young People, *The same four walls: inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system* (Melbourne: Commission for Children and Young People, 2017), 5.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*, 18-19.

directives that were not at all appropriate for youth detention, badly trained and inexperienced staff, inadequate facilities and a punitive approach to managing children and young people...Broadly worded legislation also enabled unjustified isolation to occur.'<sup>20</sup>

The Commission went on to recommend legislative and policy reforms to prohibit the isolation of a child for behaviour management or punishment and to prohibit extendable periods of isolation beyond 24 hours, to clearly define the circumstances in which a child could be isolated and to provide stronger protections and safeguards.<sup>21</sup> These recommendations are consistent with human rights standards and international law that strictly prohibit 'solitary confinement' and any other punishment that may compromise the physical or mental health of a child or young person.

### **How solitary confinement should be prohibited in law**

Western Australia's youth justice legislation, policies and internal guidelines should be amended to strictly prohibit the use of solitary confinement and to clearly define the circumstances for legitimate separation or 'confinement'.

There will be situations in detention when it is necessary to separate a child to prevent an imminent and serious threat to the child or others or for legitimate health reasons and only when all other means have been exhausted provided it does not place restrictions on a child's access to education, physical activity or family contact.<sup>22</sup> Accordingly, in addition to the prohibition on solitary confinement, the legislation and internal policies and guidelines applicable to youth detention facilities should be amended to provide definitional clarity and strict safeguards to confine the circumstances in which separation can occur. Safeguards should, for example, include:

- clear preconditions for the use of separation, including that it can never be used for punishment and can only be used as an absolute last resort when all other measures to address a child's behaviour or risk (including de-escalation strategies) have been exhausted;<sup>23</sup>
- a requirement that the individual circumstances of the affected child be taken into account and an assessment be conducted of the likely impact a period of separation will have on a child's physical and mental health;<sup>24</sup>
- non-extendable timeframes for how long a child can be separated and regular review to ensure it does not extend longer than required;<sup>25</sup>

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<sup>20</sup> Children's Commissioner NT, Don Dale Youth Detention Report to Minister, September 2015; Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, above n 22, 332.

<sup>21</sup> Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, Findings and Recommendations (November 2017), Recommendation 14.1.

<sup>22</sup> Australian Children's Commissioners and Guardians, Human rights standards in youth detention facilities in *Australia: the use of restraint, disciplinary regimes and other specified practices* (April 2016), 63; Australian Children's Commissioners and Guardians, Statement on conditions and treatment in youth justice detention (November 2017), 20.

<sup>23</sup> Commission for Children and Young People, *The same four walls: inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system* (Melbourne: Commission for Children and Young People, 2017), recommendations 2 and 16; Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, Findings and Recommendations (November 2017), Recommendation 14.1.

<sup>24</sup> Australian Children's Commissioners and Guardians, Human rights standards in youth detention facilities in *Australia: the use of restraint, disciplinary regimes and other specified practices* (April 2016), 63.

<sup>25</sup> Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, Findings and Recommendations (November 2017), Recommendation 14.1.

- a requirement that a separated child still be provided with access to family, lawyers, therapeutic professionals, teachers and appropriate peers, access to education including educational material, access to outdoor exercise or recreation at regular time intervals, and access to appropriate recreational material including reading material.<sup>26</sup>
- a requirement that a separated child be seen by a health professional prior to their separation, or within a reasonable timeframe after separation;<sup>27</sup> and
- a requirement that precise and transparent records and data be maintained and regularly published about the number of children separated and the circumstances surrounding their separation.<sup>28</sup>

### **How solitary confinement should be prohibited in practice**

Beyond legislative reform, cultural and institutional change is critical for achieving a safe, human rights compliant and therapeutic youth detention environment.

Ensuring separation practices are only used in appropriate circumstances and as a last resort will require significant organisational, philosophical and cultural change flowing through ministerial, executive and departmental levels. Experience from the United States shows that this will require:

- the adoption of a mission statement and philosophy that reflects rehabilitative goals;
- the development of internal policies and procedures for the appropriate use and monitoring of separation;
- the collection of data to manage, monitor and hold institutions to account for the use of separation;
- the development and implementation of alternative behaviour management options and responses; and
- a commitment to training and development of staff with respect to mission, values, standards, goals, policies and procedures.<sup>29</sup>

### **Conclusion**

A prohibition on solitary confinement will not undermine the safe operation of youth detention facilities. Rather, the limited practice of separation should be both clearly defined and restricted, and a therapeutic culture embedded in the facility.

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<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Australian Children's Commissioners and Guardians, *Human rights standards in youth detention facilities in Australia: the use of restraint, disciplinary regimes and other specified practices* (April 2016), 63; Commission for Children and Young People, *The same four walls: inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system* (Melbourne: Commission for Children and Young People, 2017), recommendations 20 and 21; and further see Committee on the Rights of the Child, *Concluding observations of the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland*, UN Doc CRC/C/GBR/CO/5 (12 July 2016).

<sup>29</sup> Council of Juvenile Correctional Administrators, 'Council of Juvenile Correctional Administrators Toolkit: Reducing the Use of Isolation', (March 2015), pp 6.

Failing to clearly prohibit solitary confinement will mean that children in Western Australia remain at risk of abuses that can amount to torture, cruel or inhuman treatment and practices that may compromise their physical or mental health and wellbeing.

We will be in Western Australia around 19 April and would be pleased to meet with you to discuss these issues further.

If you require any further information, please do not hesitate to contact me or my colleague Shahleena Musk at [shahleena.musk@hrlc.org.au](mailto:shahleena.musk@hrlc.org.au).

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ruth Barson', with a stylized flourish at the end.

Ruth Barson

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