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Elizabeth Grant, Rohan Lulham and Bronwyn Naylor

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## THE USE OF SEGREGATION FOR CHILDREN IN AUSTRALIAN YOUTH DETENTION SYSTEMS: AN ARGUMENT FOR PROHIBITION

Dr. Elizabeth Grant<sup>1</sup>, Dr. Rohan Lulham<sup>2</sup> and Professor Bronwyn Naylor<sup>3</sup>

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### Abstract

In 2016, the Australia Federal Government called a formal public inquiry under the arrangement of a Royal Commission to investigate the care and custody arrangements of children under detention orders in the Northern Territory. The NT youth detention system has been shown to be over-reliant on segregation as a behavior management tool which has likely resulted in the abuse of children in their care. This paper examines literature on the use of segregation to explain the progressively degenerating behavior of the children in custody and the likely negative physical and psychological impacts to the children involved. The paper calls for the prohibition of segregation of children arguing that a paradigm shift in the youth detention system to a model employing non-institutional care with trauma informed practice needs to be made.

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1 Dr Elizabeth Grant, Senior Research Fellow, Office of the Deputy Vice Chancellor and Vice President (Academic) The University of Adelaide Email [elizabeth.grant@adelaide.edu.au](mailto:elizabeth.grant@adelaide.edu.au)

2 Dr Rohan Lulham, Research Fellow, Designing Out Crime Research Centre, University of Technology Sydney, Email: [Rohan.Lulham@uts.edu.au](mailto:Rohan.Lulham@uts.edu.au)

3 Professor Bronwyn Naylor, Professor of Law, Graduate School of Business and Law, RMIT. Email: [bronwyn.naylor@rmit.edu.au](mailto:bronwyn.naylor@rmit.edu.au)

## Introduction

In July 2016, the Australian Broadcasting Commission aired an episode of the investigative journalism program, 'Four Corners', entitled 'Australia's Shame' (ABC 2016). The program centred on the treatment of children in the Northern Territory's<sup>1</sup> youth detention system. It outlined a system plagued by regular failure and institutionalized cruelty. Among the footage were stark images of a boy shackled to a chair, his head covered in a spit hood and children being held in segregation for extended periods with no access to natural light, ventilation or running water and subsequently being tear-gassed. The following day, the Australian Prime Minister, Malcolm Turnbull made a decision to call a Royal Commission into the detention of children in the Northern Territory (Prime Minister of Australia 2016).



Figure 1: Child shackled to a chair wearing a 'spit hood' at the Don Dale Youth Detention Centre, Berrimah, Northern Territory. Photograph: Australian Broadcasting Commission (2016).

The Northern Territory Youth Detention System has been subjected to a number of investigations regarding critical incidents in their system and their treatment of children. The Department of Correctional Services commenced a review of the system following a number of such incidents. The subsequent *Review of the Northern Territory Youth Detention System Report* (Vita 2015) found that the Northern Territory youth detainee population had risen steadily with 97% of the youth detainees being Aboriginal<sup>2</sup> youths, and predominantly aged between 15 and 16 years. It also identified an increasing number of children aged under 15 years being placed in detention and a number of significant critical incidents occurring since 2009.

In 2015, the Northern Territory Children's Commissioner launched an investigation into the conditions of confinement of children in the Northern Territory. The Commissioner responded to complaints of

- 1 Australian has nine separate State and Territory agencies responsible for the care and safe custody of children sentenced by the courts. The Northern Territory (NT) is a federal Australian territory in the central and central northern regions of Australia encompassing approximately 1,349,129 square kilometres (520,902 sq mi). The Northern Territory had a population of 244,000 in 2016.
- 2 The terms 'Aboriginal' and 'Indigenous' are used inclusively in this paper to refer to Australian Aboriginal and Torres Strait Islander peoples.

Years	2010	2011	2012	2013	2014
Daily average young people in detention	29	39	39	50	48

Table 1: Daily average number of children aged 10–17 years in detention, Northern Territory (adapted from Australian Government Productivity Commission 2016).

‘inhumane’ conditions where “...young persons were being held in solitary confinement in cramped and darkened cells, for up to 23 hours a day ...[and] concerns about the long term impact this could have on the ...young persons’ psychological and physical wellbeing” (Children’s Commissioner 2015: 3). While the Children’s Commissioner was highly critical of the actions of Correctional Services and highlighted the negative impacts of segregation, the report fell short of calling for a prohibition on the use of segregation for children in detention.

Given that the Northern Territory Youth Detention System is experiencing high levels of critical incidents and alleged abuses, particularly in the use of segregation, a discussion of segregation and its impacts forms an important starting point in understanding ‘best practice’ principles in dealing with children in criminal justice systems<sup>3</sup>. To understand the behaviors of the children in custodial settings, it is useful to review the literature on the responses of young people to imprisonment. The theory in this area comes from the multidisciplinary field of environmental psychology, which examines the relationship between the environment and its inhabitants. Using theoretical models can assist in the understanding of environments that enhance reasonable behavior and may predict the likely outcomes when these conditions are not met.

**Responses to imprisonment**

The *Review of the Northern Territory Youth Detention System Report*, stated YDCs [Youth Detention Centres] in the NT have been required to respond to higher numbers of detainees especially those exhibiting complex and violent behaviors. During the past two years in particular, there have been major incidents where difficult and disruptive detainees have compromised the safety and security of the centres – putting staff, other young people and the community at risk (Vita 2015: 10).

The Australian Productivity Commission’s report on Youth Justice Services (2015) illuminates the extent of behaviors of concern being exhibited by children held in detention in the Northern Territory. In the 2013-14 period, half of the escapes<sup>4</sup> by youth detainees across Australia occurred in the Northern Territory and in the following year that number increased threefold (see table 1). During the 2013-14 period, the Northern Territory recorded the highest rate of children self-harming or attempting suicide in custody (not requiring hospitalisation), a rate of 7.2 per 10 000-custody nights

3 This article deals with the detention of children in youth detention or justice centres. A youth justice centre is defined by the Australian Productivity Commission as “[a] place administered and operated by a youth justice department, where young people are detained while under the supervision of the relevant youth justice department on a remand or sentenced detention episode” (2015: 16.36). This article does not extend to the issues of children detained in police custody.

4 An escape from a youth justice detention centre is defined as a breach of a secure perimeter or defined boundary of a youth justice detention centre by a young person under the supervision of the centre (ibid 2016: 16.23).

for Indigenous children and a (extraordinary) rate of 45.2 for non-Indigenous children (see table 2). Nationwide, the Northern Territory had the highest rate and number of children in custody self-harming or attempting suicide that did not require hospitalization<sup>5</sup>.

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	AUS
Daily average young people in detention in 2015	314	146	168	150	43	10	10	44	885
Number of Escapes 2013-2014	-	1	-	-	-	3	-	4	8
Number of Escapes 2014-2015	-	2	-	-	-	-	-	12	14
<b>Total</b>	<b>0</b>	<b>3</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>3</b>		<b>16</b>	<b>22</b>

Table 2: Escapes from youth justice detention centres 2013-15 (adapted from Australian Productivity Commission 2015; 16: 16.24)

Rate per 10 000 custody nights	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Aboriginal and Torres Strait Islander Children	1.7	0	1.6	na	4.1	0	10.3	7.2
Non-Indigenous Children	0.9	0.9	1.3	na	1.8	0	5.1	45.2
<b>Total</b>	<b>1.2</b> <b>(14)</b>	<b>0.8</b> <b>(4)</b>	<b>1.5</b> <b>(10)</b>	<b>na</b>	<b>2.9</b> <b>(6)</b>	<b>0</b>	<b>6.8</b> <b>(4)</b>	<b>8.9</b> <b>(15)</b>

Table 3: Rate per 10 000 custody nights (total number of detainees) who self-harmed or attempted suicide in custody not requiring hospitalization 2013-14 (adapted from Australian Productivity Commission 2015: 16.31).

Applying the theory of responses to imprisonment to understand the behavior of youth detainees in the reported conditions of incarceration in Youth Detention Centres in the Northern Territory, it becomes apparent that actions of the detainees may have been predictable. It is somewhat surprising that desperate behaviors did not occur more frequently.

<sup>5</sup> Types of self-inflicted incidents that constitute self-harm include poisoning by drugs, alcohol, gases and vapours, hanging, strangulation, suffocation, drowning or submersion in water, burning, cutting, jumping from a high place, jumping or lying in front of a moving object and electrocution (ibid 2016: 16.29).

The impacts of imprisonment on the individual have been well documented. The unique environmental experiences of prison may evoke extreme and complex responses with individuals responding to the loss of liberty, autonomy, goods, services, heterosexual relationships and personal security (Sykes 1958) with a range of emotions and behaviors (Zamble and Porporino 1990; Zamble 1992). Individual responses to prison environments vary. Taylor and Cohen's studies of long-term maximum-security prisoners identified five types of behaviors occurring in response to the prison environment, defined as self-protecting, campaigning, escaping, striking, and confronting behaviors (Taylor and Cohen 1972).

The researchers termed these 'resistance behaviors' noting that the behaviors were not exclusive or sequential and could occur as individual or group actions. For example, a prisoner could individually campaign whilst being involved in a collective action to escape. Self-protecting behaviors were noted to include behaviors such as situational withdrawal (e.g. retreating to sleep, reverting to the foetal position). Campaigning behaviors included actions such as seeking moves to alternative accommodation or appealing sentences, attempting negotiation, setting up grievance committees, and submitting personal grievances and appeals. Escaping behaviors included attempting to physically escape, self-harming behaviors or suicide, or retreating to 'safe' areas of the prison or isolating oneself. Striking behaviors included refusal to adhere to situational demands, and confrontational behaviors included taking part in riots, disturbances, hostage taking, and suicide (Taylor and Cohen 1981). A diverse range of emotions and behaviors therefore arises in response to custodial environments.

Researchers view these resistance behaviors as a continuum of behaviors rather than singular acts. The people-environment interaction is dependent on a complex interplay of factors as the prisoner attempts to regain control of their environment. The consequences of resistance behaviors in the custodial environment can be life threatening, costly and politically sensitive. Poor or inappropriate accommodation has been identified as a catalyst for critical incidents, riots and disturbances in prisons (Toch 1992), and may lead to individual self-harming or suicidal or other non-compliant behaviors among prisoners (Reser 1989) contributing to a variety of other poor outcomes for prison communities and prisoners (including diminishing mental health) (Krauth and Clem 1987).

Providing a 'normalized' custodial environment which fits the environmental and cultural needs of the user group is paramount in reducing the impact of the prison environment on the individual<sup>6</sup>. The designed environment should mirror and promote activities and routines which may occur in the outside society. Levels of security in prison environments should be proportional to the 'risk' a person presents to society and provide the prisoner with the highest achievable level of personal control over their environment.

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6 *Understandings of what constitutes a 'best practice' juvenile detention centres are limited. As Grant notes "...it is evident that the intricacies of designing custodial environments for young offenders are not fully understood" (2013:54). The Northern Territory juvenile prison population consists predominantly of Aboriginal young people from a range of urban, rural and remote settings with diverse environmental and cultural needs. While research has been completed to provide design guidelines for the design of custodial environments for Aboriginal adult prisoners (see, Grant 2016: 42), little is known about 'best practice' for Aboriginal children. Research indicates that it is preferable for children to be housed in non-institutional environments and there are likely to be negative impacts for children placed in institutional environments (for example, see, Quinton et al 1984; 1984; Hodges and Tizard 1989; Rutter et al. 1990).*

In contrast to such approaches, the Northern Territory has not developed detention centres to fit the specific needs of its user group of children. As documented in the ABC television program (ABC 2016), staff saw the need to routinely resort to segregating their young charges (and, at times use mechanical restraints, weapons, dogs and chemical agents) to 'control' their behavior<sup>7</sup>. Vita (2015) stated that there was an 'overreliance' on segregation implying officers used segregation as their principle behavioral management tool. This can be seen to be counterproductive to the aims of behavioral management<sup>8</sup>. The management of youth detainees in the NT progressively degenerated with potentially damaging impacts to the children involved. This is a matter of grave concern.



Figure 2: Child lying in foetal position in a segregation cell at the Don Dale Youth Detention Centre, Berrimah, Northern Territory. Photograph: Australian Broadcasting Commission (2016).

### What is segregation?

Segregation is the practice of holding people in solitary confinement, generally isolated from human contact (apart from prison staff). In some instances, segregation is employed as a form of punishment, beyond the mere incarceration of a prisoner, usually for violations of the institution's regulations. Segregation is also commonly used in Australia where a prisoner is being investigated for infractions or at 'high risk' and 'unable to be housed' in the mainstream population of an institution for a variety

- 7 In response to critical incidents (the display of resistance behaviours by the detainees), children were moved three times. "The Don Dale YDC, commissioned in 1991, was closed in September 2014, in response to a series of serious incidents at that centre" (Vita 2015: 8) and the children moved to an interim unit within adult Darwin Correctional Centre (Doug Owston Correctional Centre). Then "...due to a series of serious incidents ...culminating in extensive malicious damage and attempted escape, detainees were moved to the former Berrimah Correctional Centre on 23 December 2014." (Vita 2015: 8). The facility was renamed the Don Dale Youth Detention Centre.
- 8 There is also evidence that the mere presence of segregation cells in detention centres sends an incorrect message about the nature of youth detention to staff. (Committee on the Judiciary United States Senate 2012). Staff who have the capacity to use segregation as a behaviour management 'tool' and may choose to use this regularly do so instead of developing those human relationship skills that will fit them for dealing with their charges. Cohen noted that "segregation is an easy response and requires no thinking or planning; no work at changing offenders' behaviors. For some officers, it is an ideal assignment: no real interaction with inmates, nothing but control is on the daily menu" (Committee on the Judiciary United States Senate 2012: 308).

of reasons. Where prison systems are overcrowded, prisoners on transfer (i.e. prisoners being transferred between prisons for court appearances, medical appointments, etc.) are commonly housed in segregation in the short term due to bed shortages in other types of accommodation (Bilby, 2015). However, people deemed 'at risk' of suicide or self-harming are routinely held in segregation. Most prisons and detention centres have segregation units. These are generally separate from other housing units and are fitted with maximum security features. Within such units there are likely to be several types of cells. The majority of cells in segregation units have minimal facilities, limited to a toilet/basin, concrete bed base and mattress. Prisoners often spend most of the day locked up with little meaningful activity or human interactions. Exercise usually takes place alone in an exercise room or a fenced or walled run (Birkhead, 2015).

A different form of segregation involves what are referred to as 'assessment cells',<sup>9</sup> which are used to house inmates who are 'at risk' of self-harm. In Australian prisons and detention centres, these cells are again located within segregation units and generally are fitted with CCTV for observing the prisoner from a separate place. Fittings in such cells are limited; in some locations, the cell only contains a drain and the prisoner is "...stripped of all clothing and possessions in an effort to reduce the chances of harmful behavior" (McArthur et al. 1999:3). The most extreme regime involves the prisoner being stripped of all clothing and given a smock and bedding made of tear-proof material and being observed continuously (generally via CCTV and/or an officer placed outside the cell). Another form of segregation occurs within the increasing number of super-max units and super-max prisons around Australia (Grant and Jewkes 2015). Such units and prisons, built to house the most dangerous prisoners and those charged with terrorist offences, have been commonly criticized for their lack of natural light and airflow, isolation, deprivation of association, harsh environments, and regimes (see, for example, New South Wales Ombudsman 2008; Wacquant et al. 2013).

### **The evolution of segregation cells and units in Australia**

Major prison reform and the rebuilding of the Australian penal estate occurred across Australia in the 1970s and 80s following the critical report of the Nagle Royal Commission. Separate units which segregated recalcitrant prisoners for the good order of the institution and their own protection were developed.

The development of a separate observation cell with minimal fittings for 'at risk' prisoners occurred upon the release of interim findings of RCIADIC (Commonwealth of Australia 1988). The interim report suggested:

A task force should be established among the Police Departments, in consultation with the Australian Institute of Criminology, to establish a standard and program for the upgrading of police cells to a level where the opportunity for death by suicide is substantially reduced by appropriate cell design and equipment (Commonwealth of Australia 1988:40-41).

While the recommendations were focused on police stations and watch houses, correctional administrations around Australia raced to install observation cells. Typically, the fit outs varied from

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<sup>9</sup> The terminology for such cells varies. Camilleri et al. (1999) use the term 'strip cells' with other sources using a variety of names including 'isolation cells' (Australian Law Reform Commission 1997), 'Muirhead cells', 'segregation cells', 'wet cells' (Victorian Correctional Services Taskforce 1999), 'segregation or isolated detention' (Commonwealth of Australia 1991) and 'observation cells' (Commonwealth of Australia 1991).



padded sensory deprivation chambers to cells where all hanging points had been removed leaving an environment with little more than a drainage point.

By the time of the release of the final report of RCIADIC, there was condemnation of the use of observation cells. However, despite extensive evidence indicating that segregation cells are detrimental to the health of prisoners (see below), segregation continues to be used as a 'suicide prevention' strategy and behavioral management tool in Australian custodial settings.

### **The impact of segregation on the individual**

A number of scholars have used the theoretical understandings of stress reactions to propose that being imprisoned in segregation undermines personal coping mechanisms. Studies on sensory deprivation and social isolation have found that extreme anxiety and heightened suggestibility occurs in individuals, even after short periods in isolation (Suedfeld 1974; Suedfeld 1980; Fisher 1994). Further symptoms include hypersensitivity to external stimuli, hallucinations, panic attacks, cognitive deficits, obsessive thinking, paranoia, and a litany of other physical and psychological problems (Grassian 2006). Psychological assessments of prisoners in solitary confinement have indicated high rates of anxiety, nervousness, obsessive rumination, anger, violent fantasies, nightmares, trouble sleeping, as well as dizziness, unduly perspiring hands and heart palpitations attributable to being placed in segregation (Shalev 2008).

Although psychological effects are most common, and most significant, physiological effects are nevertheless commonly reported. Some of these may be physical manifestations of psychological stress, but the lack of access to fresh air and sunlight and long periods of inactivity are likely also to have physical consequences. Grassian and Friedman (1986) list problems such as gastro-intestinal, cardiovascular and genito-urinary problems, migraine headaches and profound fatigue. Shalev notes that other signs and symptoms recorded by the some of the studies reviewed include, "heart palpitations (awareness of strong and/or rapid heartbeat while at rest), diaphoresis (sudden excessive sweating), insomnia, back and other joint pains, deterioration of eyesight, poor appetite, weight loss and sometimes diarrhoea, lethargy, weakness, tremulousness (shaking), feeling cold and aggravation of pre-existing medical problems" (2008: 15).

Segregation is therefore fundamentally damaging, whatever its purpose. Unsurprisingly, the use of segregation for people displaying 'at-risk' behaviors has been universally condemned (Reser 1989; Howard League for Penal Reform 1991; Commonwealth of Australia 1991; Hayes 1995; Eylandt et al. 1997; Dear et al. 1998; Camilleri et al. 1999; Dear 1999; Howells et al. 1999; Cohen 2011). Prisoners housed in segregation are compelled to ruminate on events that they are unable to deal with due to their situation, thus increasing their distress and increasing the risk of suicide and self-harm. The literature notes that the majority of prison suicides occur whilst the prisoner is alone, most commonly when the person is in isolation or segregation (Hayes 1983; Home Office 1984; 1990; Scott-Denoon 1997). This indicates that a potentially suicidal prisoner should not be removed from the general population in the first place (Victorian Correctional Services Taskforce 1999; Cohen 2011). Howells et al further point out that in an 'integrated punishment environment', prisoners regarded as 'at risk' may be confused and unclear as to whether they are being treated or punished when they are placed in an observation cell. The environment itself may be hostile, often housing prisoners who are 'acting out' with officers consequently being required to exert physical control. The presence of groups of

prisoners undergoing punishment results in an atmosphere that is punitive and coercive rather than therapeutic. Observation, for the 'at risk' person, is an isolating experience that is likely to exacerbate the level of distress and suicidal rumination (Howells et al. 1999:161).

The psychological and physiological issues in segregation are amplified for Aboriginal prisoners due to specific cultural needs. Family and kin is the core of Aboriginal life and often the only constant in the lives of Aboriginal people (Berndt and Berndt 1992: 412). Aboriginal prisoners separated from family and kin suffer emotional and spiritual distress beyond that imposed upon non-Aboriginal prisoners (Office of the Inspector of Custodial Services (WA) 2008; Grant 2014). Given this, RCIADIC suggested "...that it is undesirable in the highest degree that an Aboriginal prisoner should be placed in segregation or isolated detention" (Commonwealth of Australia 1991: 334). It was noted "that attempts to reduce opportunities for suicide [i.e. housing an Aboriginal prisoner in segregation to reduce the risk of self-harming] may increase alienation and disorientation and thus increase the probability that detainees may engage in self-destructive behavior" (Reser 1989: vi).

The issues in using segregation on Aboriginal people are compounded when consideration is given to the number of Aboriginal prisoners living with physical and psychosocial disability. Levels of disability in the Indigenous population are underreported and there are many reasons why Aboriginal people do not identify as having a disability. At the same time, it is known that Indigenous people with profound or severe physical, intellectual and cognitive disabilities are being imprisoned at alarming rates (Baldry et al. 2012; MacGillivray et al. 2014; Grant 2016: 24).

There are also specific concerns regarding the use of segregation for juveniles – experts agree that the harms already identified may be more pronounced. Solitary confinement "...has a distinct and particularly profound impact on young people, often doing serious damage to their development and psychological and physical well-being. Because of the special vulnerability and needs of adolescents, solitary confinement can be a particularly cruel and harmful practice when applied to them" (Human Rights Watch and the American Civil Liberties Union 2012: 22). While there are no studies that "look specifically at the effects of prolonged solitary confinement on adolescents, many experts on child and adolescent psychology [contend that solitary confinement] can cause or exacerbate mental disabilities or other serious mental health problems" (*ibid* 2016: 24).

One can expect therefore that the cumulative harm to young offenders of the use of segregation, especially to Aboriginal children who may be demonstrating self-harming and other extreme behaviors, can be life-threatening.

### **Human Rights Legislation and the use of segregation for children**

The solitary confinement of children has been found to breach international and domestic human rights laws. Key rights include protection from 'torture and cruel, inhuman or degrading treatment' under the International Covenant on Civil and Political Rights (ICCPR) (article 7) and the Convention against Torture, and equivalent documents, the right to humane treatment while detained (ICCPR article 10) and the protection of the rights of the child under the UN Convention on the Rights of the Child (CRoC) and equivalent local instruments. The prohibition on torture and cruel, inhumane or degrading treatment is one of the few 'absolute' (that is, non-derogable) international human rights standards.

The UN position is that, in light of the requirements of the CRoC, and of the UN Rules for the Protection of Juveniles Deprived of their Liberty (the 'Havana Rules'), the vulnerability of children and the recognized harm caused by solitary confinement means that 'the imposition of solitary confinement, of any duration, on juveniles is cruel, inhuman or degrading treatment' and should be prohibited (United Nations 2011: 77, 86; 2015: 44, 86).

In the Australian context, the UN Human Rights Committee found a violation of the right to humane treatment (ICCPR art 10) and of the rights of the child (ICCPR art 24(1)) where a 16 year old Aboriginal boy with an intellectual disability was held in a New South Wales adult prison in isolation, under 24 hour lighting, with little clothing despite low temperatures (*Brough v Australia*).

The Committee observed:

In the circumstances, the author's extended confinement to an isolated cell without any possibility of communication, combined with his exposure to artificial light for prolonged periods and the removal of his clothes and blanket, was not commensurate with his status as a juvenile person in a particularly vulnerable position because of his disability and his status as an Aboriginal [person]. ([9.4])

In Victoria, in 2013, the Ombudsman, exercising powers which include investigating the compatibility of administrative actions with the Victorian *Charter of Human Rights and Responsibilities Act 2006* (the Charter), which parallels the ICCPR, carried out a review of the transfer of a number of children from youth detention to an adult prison. The children, some of whom were of Aboriginal descent, had been held in solitary confinement in the adult prison for a number of months. They were locked in their single cells for 23 hours per day, and had one hour a day for exercise, on their own and in handcuffs, with no access to education or programs (Ombudsman 2013: 12). The Ombudsman concluded that Corrections Victoria had breached Charter rights including the right to protection of families and children (Charter s.17), the right to humane treatment when deprived of liberty (Charter s.22) and the rights of children in the criminal process (Charter s.23).

The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) had conducted a review of Corrections Victoria's policies on this topic and had advised that the solitary confinement of children was likely to be considered degrading treatment and that '[a]s a principle, solitary confinement should never be used for prisoners under 18 years' (cited in Ombudsman 2013: 27).<sup>10</sup>

More recently, the Victorian Supreme Court (upheld on appeal 28 December 2016) has found that the transfer of several children to a facility previously used for high security adult prisoners, and their detention there in circumstances which included "very long periods of solitary and prolonged confinement", was unlawful. The Supreme Court also concluded that the Government's actions breached the right not to be treated in a 'cruel, inhuman or degrading way' (Charter s.10(b)), the right to treatment in the 'best interests' of the child (Charter s.17(2)) and the right to be treated with humanity and respect (Charter s.22(1)) (*Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children and Others* [2016] VSC 796).

<sup>10</sup> Both the VEOHRC recommendation and the Ombudsman's draft findings were subsequently rejected by Corrections Victoria (Ombudsman 2013: 27).

The Inter-American Court of Human Rights has also held that solitary confinement can amount to 'cruel, inhuman and degrading treatment', and can result in suffering to an extent that the treatment may constitute torture (see case law summarized at UN 2011 A/66/268 [37] and [38]).

### **Banning the use of segregation for children**

Given the overwhelming evidence of the potential harms of segregation, and the strong human rights findings, some countries have revised their use of penal segregation, especially in regard to juveniles. The United States began to reconsider the human rights, fiscal, and public safety implications of the use of penal segregation post 2012 (see, for example, Committee on the Judiciary United States Senate 2012). In a submission to the Senate Committee, Professor Emeritus of Yale Law School, Fred Cohen noted that:

...the contemporary use of penal isolation is one of the most psychologically damaging, penologically unnecessary, and needlessly expensive correctional measures currently in use. Whether analyzed from a human rights or an empirical perspective, our current practices with penal isolation are properly subject to condemnation and candidates for early reform (Committee on the Judiciary United States Senate 2012: 308).

In 2012, the American Academy of Child and Adolescent Psychiatry released a policy statement opposing the use of solitary confinement in correctional facilities for juveniles, stating:

The potential psychiatric consequences of prolonged solitary confinement are well recognized and include depression, anxiety and psychosis. Due to their developmental vulnerability, juvenile offenders are at particular risk of such adverse reactions. Furthermore, the majority of suicides in juvenile correctional facilities occur when the individual is isolated or in solitary confinement (Juvenile Justice Reform Committee, American Academy of Child and Adolescent Psychiatry 2012).

The Academy called for an evaluation by a mental health professional of any child or youth confined for more than 24 hours. In 2013, the United Nations Special Rapporteur on Torture, stated that the effect that a prolonged period in isolation can have on a child's mental health is so severe that countries should implement "an absolute ban" on solitary confinement and seclusion of any duration for children as well as people with psychosocial disabilities. Similarly, in 2014, the American Medical Association approved a resolution saying solitary confinement is detrimental to adolescent health and should be prohibited, except for extraordinary circumstances, such as those that involve protection of the juvenile, staff, or other detainees (Moran 2014).

In 2015, then President Obama announced a review of 'the overuse of solitary confinement across American prisons' (US Department of Justice 2016: 1) and bipartisan legislation was introduced into Congress to ban punitive solitary confinement for juveniles in federal custody (Kraner et al. 2016: 3). A year later, the US Justice Department released its Final Report and Recommendations concerning the use of Restrictive Housing. The report outlines principles to reduce the use of segregation, in particular reforms for special needs groups (including people with a serious mental illness and juveniles), which include reforms to prevent disruptive behavior, development of specialized housing units, and stricter rules for use of restrictive placements:

## Prevention

These reforms are designed to prevent the type of disruptive behavior that often results in segregation. The policies make it easier for correctional staff to identify inmates who are prone to violence, victimization, and/or mental health issues, facilitating early intervention. Among other things, these policies include behavioral and contingency management tools, as well as risk assessment programs.

## Specialized, or 'mission-specific' housing units

These reforms involve the creation of specialized housing units for those inmates who require removal from the general population, but typically do not require the type of restrictions typically found in a 'traditional' segregation unit. These mission-specific programs include units for inmates with serious mental illness and those requiring protective custody.

## Stricter rules for placement and length of stay

These reforms limit when, why, and for how long an inmate can be placed in restrictive housing, especially in cases involving disciplinary or preventative segregation. Some jurisdictions have narrowed the list of offenses that are punishable by restrictive housing. Some have also imposed limits on the amount of time inmates can be held in restrictive housing, which can apply to specific categories of inmates (e.g., juveniles and inmates with serious mental illness), or to certain types of segregation (such as maximum penalties for disciplinary violations). Some jurisdictions have effectively eliminated restrictive housing for certain populations, such as juveniles (US Department of Justice 2016: 72-73).

Kraner et al. (2016) reviewed correctional practice across the US and reported that 29 jurisdictions prohibit the use of punitive solitary confinement in juvenile correctional facilities by law or practice due to growing understanding of the ill-effects and overuse of segregation.

Despite the overwhelming evidence to the contrary, the majority of Australian jurisdictions<sup>11</sup> still allow the segregation of children in detention. Indeed, the Australian Children's Commissioners and Guardians reported that "[s]egregation can be used as a legitimate behavior management tool or an emergency safety measure provided it does not place restrictions on a child's access to education, physical activity or family contact" (2016: 63). Given the very nature of solitary confinement, including 22 and 23 hour lockdowns and the placement of people in segregation cells, which are generally located well away from visitation, association and program areas, it is surely wishful thinking or utterly unrealistic to propose that segregation can be combined with rehabilitative programs and substantial family contact.

## Ceasing the use of segregation in practice

This paper makes the clear argument for banning the use of segregation for children in detention in Australia. In discussing the Northern Territory Youth Detention System, we have demonstrated that segregation is profoundly harmful to young people. Relying on segregation as a behavior

<sup>11</sup> Note recent legislative changes to the Youth Justice Administration Act (South Australia) (2016), have prohibited children under 12 years being held in segregation (see Sect. 28).

management tool brutalizes the role of custodial officers and case workers.<sup>12</sup> Studies show that staff placed in such situations apply authoritarian measures and may resort to psychological or physical torture resulting in serious systemic dysfunction across an institution. In short, the use of segregation is counterproductive for all parties. Organisational, philosophical and cultural changes are however required for agencies to move beyond the use of segregation as a practice under any circumstance. Rademacher (2016) describes the North American experience in Ohio, suggesting it as a statutory model for eliminating juvenile solitary confinement in other jurisdictions.

The most commonly cited 'best practice' guidelines for stopping the use of segregation in juvenile detention originate from the United States Council of Juvenile Correctional Administrators. They outline five components of 'best practice' to reduce the use of segregation. These are:

1. Adopt a mission statement and philosophy that reflects rehabilitative goals;
2. Develop policies and procedures for use and monitoring of isolation;
3. Identify data to manage, monitor and be accountable for use of isolation;
4. Develop alternative behavior management options and responses; and,
5. Train and develop staff in agency mission, values, standards, goals, policies and procedures (Chinn 2015).

There are additional guidelines and literature relevant to ceasing the use of segregation within other closed institutions (i.e. mental health, disability and adult corrections). Particularly relevant in the mental health literature is the emphasis on adopting a trauma informed interpersonal and organisational approach to eliminating the use of segregation and restrictive practices in managing difficult situations. A trauma informed approach employs principles of physical and emotional safety, collaboration, trustworthiness, choice and control, and skill building with the aim of empowering the client to resolve previous traumatic experiences (see, for example, Hodas 2006). A trauma informed approach to youth detention would seek to eliminate the feelings of fear, distress, helplessness or humiliation typically felt by youth detainees that may be re-traumatising (Robins et al. 2005) and may produce the types of behavior which lead to the use of segregation. In so doing, a trauma informed approach would endeavour to reduce and prevent many of the actual behaviors that currently lead to the use of segregation.

In mental health contexts, a trauma informed approach is identified as fundamental to reducing and ultimately eliminating the use of segregation. Its value lies in the prevention, management and recovery of individuals experiencing negative consequences related to past trauma. For children, trauma leads to difficulties in controlling emotions, forming relationships, showing empathy towards others, concentration and learning (Anderson 2012). While there is some advocacy for trauma informed care generally in juvenile detention, and particularly with Indigenous peoples (Healing Foundation 2013), it is rarely explicitly addressed towards eliminating the use of segregation. Considering juveniles in detention are potentially the most traumatized individuals in our society, and that detention is traumatizing in itself, it needs urgent investigation.

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12 *For discussions of how prison environments can define the role and behaviour of staff see literature on the Stanford Prison Experiment (for example, see, Haney et al. 1973; Zimbardo 2007).*

## Conclusion

In conclusion, we make three broad recommendations for juvenile justice systems. While our analysis has focused on the Northern Territory system, we suggest that the issues and related recommendations discussed are relevant to many jurisdictions nationally and internationally.

### 1. Make trauma-informed screening, assessment and care the standard in juvenile justice services

Children who enter juvenile justice systems are likely to have highly complex unmet social, emotional, cultural and physical needs. A great number of children will have experienced emotional, sexual and physical abuse. Many will have been living chaotic lifestyles and present with a complexity of issues (for example, some will be parents, a primary caregiver for another and/or have alcohol/substance use issues). In the Northern Territory justice system, while the rates of children living with a disability or significant trauma are generally unknown, research from other Australian jurisdictions (Indig et al. 2010) indicates it is likely that more than half will have a disability and/or significant trauma history. Given the also high prevalence of unreported disability and trauma among the wider Aboriginal population, it can be conjectured that the majority of children in the juvenile justice system are living with significant issues that if left untreated will be major impediments to their future development.

Accordingly, we must abandon juvenile justice correctional practices that traumatize children and further reduce their opportunities to become productive members of society. Trauma-informed screening, assessment and care should become the standard across all juvenile justice services. In doing this, juvenile justice services must be delivered that are appropriate and responsive to each child's ethno cultural background and based on an assessment of each violence-exposed child's individual needs. In particular, the special circumstances and needs of girls and LGBTQ (lesbian/gay/bisexual/transsexual/questioning) youth needed to be addressed (Ford 2016). Young people who exhibit 'at risk' behaviors should be treated in a rehabilitative setting such as a hospital or mental health facility.

### 2. Create alternatives to detention based orders for young people

In the Northern Territory, the rate of detention (180.4 per 100 000 of young people aged 10-17 years) is four times the rate of NSW and up to 20 times the rate in Victoria. Similar disparities exist internationally for example in 2013 estimated rates per 100, 000 in Australia, Canada, UK and United States were 34, 80, 29 and 157 respectively (Australian Institute of Health and Welfare 2014). Given the extraordinarily high rate of detention based orders issued in the Northern Territory, the overwhelming evidence that custodial sentences are not in the best interests of society or offenders, and the evidence outlined above about the risks of using segregation, it is suggested that there is an essential need for reform.

Thus there is a need to examine and introduce alternatives to detention based orders for young people with adequate associated resourcing. Tolfree (2003) and other research provides compelling evidence that institutionalized forms of care have "...serious and negative impacts on children's development and on children's rights' (2003:5). Home based care with children within a family setting is almost always preferable to institutional care. For some children, unable to stay in the family setting, community based care may provide an alternative. Within this model, a range of approaches can be designed to enable children either to remain with their own (or extended) families to prevent the need for separation, or to be placed with an alternative family, if possible within their own community.

Other alternative care approaches could include options such as small group homes, drug and alcohol residential units, youth rehabilitation camps (as per recommendation of the Northern Territory Government 2010 and the Coroner of South Australia 2005: 10.18). Any such systems must have regular mandated checks and reporting mechanisms to preserve the child's human rights and prevent abuse.

### 3. Remove segregation as a behavior management option in juvenile detention

In the small number of cases where detention is nonetheless required, the use of segregation must be re-evaluated and removed as an option, with alternative approaches developed for those scenarios previously regarded as requiring segregation.

First, consideration must be given to the design and location of facilities. Given that little is known about designing custodial environments for young offenders, and more particularly about the diverse environmental and cultural needs of young Aboriginal people, it is vital that evidence-based research is conducted into the type and design of humane and safe custodial environments appropriate for Aboriginal children. Aboriginal people have specific needs in this regard such as needing to stay connected to country and family and kin (Grant 2016) which are currently unmet. Children in the Northern Territory Youth Detention System are currently routinely housed in facilities over 1,000 kilometres (621 miles) away from their families and country. Children are often transported from remote communities where English is not the first language. The potential for damage to the child is immeasurable. It is likely that the same issues may arise internationally as Indigenous peoples around the world are highly overrepresented in prison systems (Grant 2016).

Second, trauma-informed practice should be established as part of alternative behavior management options to pre-empt behaviors which otherwise may lead to the use of segregation. Staff will need to be recruited and trained in the use of trauma informed screening, assessment and care approaches. A trauma-informed approach needs to be central to practices of the organisation, its staff practices and the physical design of the facility where young people under their care are housed.

The overuse of detention as a sanction for juveniles, the use of segregation as a behavior management practice and the prevalence of traumatic histories among the young people is a feature of too many juvenile justice systems across Australia and internationally. The situation in the Northern Territory juvenile detention system is not an isolated case study. Systems that allow vulnerable children to be imprisoned, segregated and abused need urgent radical rethinking and reform.

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### **About the Authors**

Dr. Elizabeth Grant is an architectural anthropologist and Senior Research Fellow in the Office of the Deputy Vice Chancellor and Vice President (Academic) at the University of Adelaide with a distinguished record in the field of Indigenous architecture with specialist expertise in the safe and humane design of custodial environments for Indigenous prisoners. Elizabeth is a Churchill Fellow and the recipient of 2015 ICPA Excellence in Research Award.

Dr Rohan Lulham is a psychologist and Research Fellow at the Designing Out Crime Research Centre at the University of Technology Sydney. His research covers the areas of design, environmental psychology and criminology with particular research interests in affect and design and correctional design practice.

Bronwyn Naylor is a Professor of Law at RMIT University in the Graduate School of Business and Law. She has degrees in Law from Monash University, and in Criminology from Cambridge University, where she received her PhD in Criminology. Bronwyn teaches and researches in criminal law, human rights, criminal justice, prisons and punishment, and law and gender.