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Solitary Confinement, Torture and Children: Applicable minimum standards

Briefing Note

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Overview

In March 2021, the Scottish Parliament unanimously adopted the UN Convention on the Rights of the Child (Incorporation) (Scotland) Bill. Once the Bill receives Royal Assent, the 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, which is also replicated in Article 3 of the European Convention on Human Rights (ECHR) as incorporated into UK law through the Human Rights Act 1998. A host of other Scottish, UK and international laws also prohibit torture. Specifically, the UK is party to the UN Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment (UNCAT) and, under the Scotland Act 1998, Scotland is responsible for implementing its provisions prohibiting torture or cruel, inhuman or degrading treatment (CIDT).² Nonetheless, certain detention practices in Scotland may breach the minimum threshold for a finding of torture or CIDT due to the heightened protections due children. This brief addresses the detention of children in Scottish youth offender institutes (YOIs) and how it may amount torture or CIDT in breach of a range of legal obligations owed to children.

Children, detention and solitary confinement in Scotland

The high number of children detained on remand in Scotland is worrying.³ In line with UNCRC Article 37, the European Court of Human Rights (ECtHR) has consistently outlined 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.⁴ In December 2020, 72% of children referred to the courts in Scotland were held on remand in a YOI.⁵ 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.⁶

While Scotland does not employ 'solitary confinement' of 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 (YoC Survey) revealed troubling dimensions of the detention situation for children in prison custody in Scotland.⁷ A key finding was that the majority of the respondents were restricted to their single occupancy cells more than 22 hours per day.⁸ The Istanbul Statement on 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.'⁹ Similarly, Rule 43(1)(b) of the UN Mandela Rules defines solitary confinement as '22 hours or more a day without meaningful human contact'.¹⁰ The YoC Survey reveals that in terms of duration of isolation, Scottish YOIs are holding children in 'solitary confinement'.

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

Contemporary legal analysis utilises a totality of the circumstances, fact-sensitive or cumulative approach to determine the point at which solitary confinement breaches the

prohibition against torture or CIDT.¹¹ In short, '[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 [ECHR] article 3.'¹² While the cumulative approach applied to the solitary confinement of adults is unsettled in terms of outcomes, the situation is not the same for children. Since the initial development of the international human rights system, the need for 'special care and assistance' for children has been repeatedly recognised.¹³ For this reason, UNCRC Article 37(c) provides that '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.*'

Children's rights experts, international instruments, reports and guidance mutually reinforce the prohibition against solitary confinement of children.¹⁴ For over a decade, the UN and other experts have called for states to abolish the use of solitary confinement as a form of discipline for children because it can amount to torture or cruel, inhuman or degrading treatment.¹⁵ 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 YOIs of the duty to protect children, including those in conflict with the law, whether on remand or serving a sentence.¹⁶ The YoC Survey findings strengthen arguments against detaining children in prison settings.

The ECtHR has not reviewed a case involving a child held in solitary confinement.¹⁷ A recent UK Supreme Court case 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.¹⁸ 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.

Key Findings

- The recent YoC Survey reveals that children are being held in solitary confinement as defined by international standards recognised by the UK.
- Solitary confinement of children is prohibited and recognised both as an amplifier of trauma in judicial detention and as a source of trauma in and of itself.¹⁹
- The Committee on the Rights of the Child and the Committee against Torture have highlighted that the UK needs to prohibit solitary confinement of children.
- Even where the UK Supreme Court has been unwilling to recognise solitary confinement of children in England as a breach of the prohibition against torture or CIDT, enactment of the UNCRC Incorporation (Scotland) Bill will require that children are never held in solitary confinement in Scotland in line with international standards.

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- 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 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>.
- ³ 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>.
- ⁴ *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.
- ⁵ 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/>.
- ⁶ Beijing Rules, rule 13.
- ⁷ 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>.
- ⁸ *ibid*, p. 5 (emphasis added).
- ⁹ 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).
- ¹⁰ 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. On a policy level, the UK appears to have adopted this definition, see UK National Preventative Mechanism, 6th Annual Report to Parliament (2015), 21.
- ¹¹ *Ramirez-Sanchez v France* (2006) 45 EHRR 49, para 118.
- ¹² *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.
- ¹³ Universal Declaration on Human Rights, preamble.
- ¹⁴ 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); UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), rule 27; 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; 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>; Istanbul Statement on Solitary Confinement.
- ¹⁵ 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>.
- ¹⁶ 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.
- ¹⁷ A concise discussion of relevant ECHR case law can be found in *R (on the application of AB) v Secretary of State for Justice* [2021] UKSC 28, paras 46 et seq.
- ¹⁸ *R (on the application of AB) v Secretary of State for Justice* [2021] UKSC 28, esp. paras 60-67.
- ¹⁹ UN Global Study on Children Deprived of Liberty (2019), 121; 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>.