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REPORT ON SOLITARY CONFINEMENT

"I am a human being"

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1. Purpose of the report

The purpose of this report is to outline the concept and consequences of solitary confinement and to consider whether it is practised in South African correctional facilities and, if so, what should be done about it. In particular, the report investigates whether it occurs in C-Max and Super-Maximum correctional centres, Ebongweni Super-Maximum Correctional Centre (Ebongweni), Kgosi Mampuru II C-Max Correctional Centre (C-Max) and Mangaung Public-Private Partnership Correctional Centre (Mangaung PPP).

2. Historical context

2.1 Origins of solitary confinement

The practice of solitary confinement is understood to originate in the Middle Ages in the mechanism of *murus strictus* or "close confinement".[1] In modern times, the notion that an offender can be rehabilitated through the use of isolation originated at Cherry Hill Prison in the United States (US) during the 1820s.[2] Other countries were inspired by this approach and imported the model in the mid- and late-1800s. However, back at Cherry Hill Prison, the deterioration of prisoners' health became pronounced. It was apparent that this form of isolation caused health problems – especially severe psychological effects on mental health. As a result, the 'rehabilitation through isolation' mantra was challenged. Many countries abandoned the strategy of large-scale solitary confinement. In 1930, during a penitentiary congress in Prague, international resolutions were drawn up to condemn aspects of solitary confinement.[3] Almost a century later, the international community's condemnation persists.[4]

[1] Scharff Smith "The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature" (2006) 34 (441) *Crime and Justice: A Review of the Literature* at fn 1.

[2] This was known as the "Pennsylvania Model, which was based on the idea that prisoners ought to be alone in their cells in order to reflect on their transgressions and return to society 'morally cleansed'". See further Special Rapporteur of the Human Rights Council on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment Report penned by Manfred Nowak dated 28 July 2008 A/63/175 (2008 Special Rapporteur Report) at para 81.

[3] Scharff Smith above n 1 at 467.

[4] In 1990, the General Assembly adopted resolution 45/111, the Basic Principles for the Treatment of Prisoners. Principle 7 states that efforts to abolish solitary confinement as a punishment, or to restrict its use, should be undertaken and encouraged. In the same year, the General Assembly adopted resolution 45/113, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty. In paragraph 67 the Assembly asserted that: "All disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including ... solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned". In 1992, General Comment No 20 of the Human Rights Committee stated at para 6 that the use of prolonged

Why, after solitary confinement's abandonment in the 1900s, did the practice make a comeback? Researchers suggest that, despite the considerable evidence against solitary confinement, it was employed by the US as part of the "tough on crime" policies in the 1980s and 1990s.[5]

Countries around the world and especially the US are (again) considering reforming and abolishing solitary confinement. The US Supreme Court itself has critically underscored the "human toll wrought by extended terms of isolation long has been understood" and solitary confinement brings prisoners "to the edge of madness, or perhaps to madness itself".[6]

2.2 Solitary confinement in South Africa – from apartheid to democracy

The practice of solitary confinement has a particularly grim history in South Africa. During apartheid, prisons were key sites for the enforcement of harsh practices. Prisons institutionalised racial discrimination, political oppression and torture.[7]

From 1965, as opposition to apartheid intensified, solitary confinement in detention and incarceration was regularly employed.[8] It has been noted that "[p]hysical and emotional torture, including extended periods of solitary confinement was routine and severe."[9] The courts' jurisdiction to intervene was ousted and the public was barred the full picture of what was happening in detention and incarceration.[10]

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solitary confinement may amount to a breach of article 7 of the International Covenant on Civil and Political Rights. The Committee on the Rights of the Child, in its General Comment No. 10 (2007) at para 89, underscored that "disciplinary measures in violation of article 37 [of the Convention on the Rights of the Child] must be strictly forbidden, including . . . closed or solitary confinement, or any other punishment that may compromise the physical or mental health or well-being of the child concerned". Moreover, the Committee has urged States parties to prohibit and abolish the use of solitary confinement against children. More recently, in February 2020 the Special Rapporteur openly criticised the United States for its prolonged solitary confinement practices, which amounts to a form of psychological torture.

[5] Wykstra in Vox "The Case against Solitary Confinement" (17 April 2019) available at https://www.vox.com/future-perfect/2019/4/17/18305109/solitary-confinement-prison-criminal-justice- (accessed on 2 September 2021).

[6] See Justice Kennedy's separate concurring opinion in *Davis v Ayala* 576 U.S. 257 (2015).

[7] See Dissel and Ellis "Reform and Stasis: Transformation in South African Prisons" (2002) *Critique Internationale* 139.

[8] Foster et al *Detention and Torture in South Africa* (James Currey Ltd, 1987) note at 24 that: "Detention under solitary confinement first became a permanent feature of South African law during 1965." The 180-day detention law under 215 *bis* of the Criminal Procedure Act of 1955 permitted that "the period of possible unbroken solitary confinement was doubled [compared to the 90-day law], it broadened the net to include potential witnesses, and it was permanent measure."

[9] Baldwin-Ragaven et al *An Ambulance of the Wrong Colour: Health Professionals, Human Rights and Ethics in South Africa* (University of Cape Town Press, 1999) at 72.

[10] Foster above n 8 at 25.

For these reasons, the Commission of Inquiry into Alleged Incidents of Corruption, Maladministration, Violence or Intimidation in the Department of Correctional Services (Jali Commission) concluded that:

> "**Solitary Confinement is a product of our past and should not be resorted to as a norm by prison officials in the new democratic order**."[11]

Yet what prompted solitary confinement (and the design of C-Max and Ebongweni centres) in our democracy?

During the first decade of democracy, crime increased – the so-called "post-apartheid crime wave"[12] – as did fear of crime.[13] Public pressure demanded action – and "tough on crime" policies offered the political leadership a quick response.[14] With the abolition of the death penalty,[15] coupled with mandatory minimum sentences, life imprisonment became widely-applied. During the same period, there was unrest in prisons. According to the Department of Correctional Services (DCS),[16] in 1996, violence in and escapes from prisons "reached an all-time high", "several inmates and correctional officials died in widespread unrest in prisons" and "the types of offenders in correctional institutions were becoming more violent".[17] In light of all of this, DCS claims that it was "forced to revisit their policies, structures and management in order to protect communities against hardened criminals".[18]

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[11] Department of Correctional Services, *Jali Commission of Inquiry into Alleged Incidents of Corruption, Maladministration, Violence or Intimidation in the Department of Correctional Services* (2005) (Jali Commission) at 336.

[12] In fact, realistic comparative statistics to determine whether crime had actually increased are hard to come by. This is compounded by the fact that before democracy 'South Africa' excluded almost 10 million people in the supposedly 'independent' Bantustan homelands. In addition, statistics for pre-1994 'South Africa' related to a very different population. There is some indication, however, that, as civil dissent against apartheid grew, crime from the mid-1980s steeply rose.

[13] According to the SAPS, during 1994–2004, crime in fact increased by an alarming 30 per cent. See de Kock, Kriegler and Shaw "A Citizen's Guide to SAPS Crime Statistics: 1994–2015" UCT *Centre of Criminology* (September 2015) at 9.

[14] The Minister of Safety and Security in 1999, Mr Steve Tshwete announced that:

> "[T]he criminals have obviously declared war against the South African public. . . . [W]e are ready more than ever before, not just to send the message to the criminals out there about our intention, but more importantly to make them feel that the tyd vir speletjies is nou verby."

Remarks at a Parliamentary Briefing, 28 June 1999, quoted in Ballard and Subramanian "Lessons from the Past: Remand Detention and Pre-trial Services' (2013) 44 *SA Crime Quarterly* 15 at 17-18.

[15] See *S v Makwanyane* 1995 (3) SA 391 (CC).

[16] Media Briefing at Pretoria 22 September 1997 and Introduction to Kgosi Mampuru II C-Max Internal Manual.

[17] Id.

[18] Id.

A jurisdiction media briefing on 22 September 1997[19] reveals how solitary confinement was considered a solution:

> "For the first time in our history we will be in a position *to completely isolate those prisoners in our system* who are causing severe problems and who are also constantly posing a threat to the community at large, either because of the severity of their behavioural disorders or due to the hideousness of their crimes . . . C-Max concept is a forerunner for the super maximum prisoners (SPM) . . . and the C-Max is therefore in a sense an institutional research project with a view to develop fully fledged Super Maximum Prisons . . . [DCS] is proud to have made another major contribution towards our *country's war on crime*".

Originally, the Correctional Services Act 111 of 1998 (CSA) permitted solitary confinement.[20] But it was expressly excised from the legislation in 2008. Replacing it was a lighter form of isolation – called segregation.[21] The statutory change means that practices amounting to solitary confinement are not permitted.

But is solitary confinement is in fact taking place under the veneer of segregation? As the Jali Commission astutely noted "[DCS] seemed to be under the impression that the mere re-naming of the confinement removed all harm that results from this form of detention."[22] Employing solitary confinement in C-Max and (soon to be) Ebongweni was highly criticised by the Jali Commission.

3. What is solitary confinement?

While there is no universal definition of what constitutes solitary confinement, the Istanbul Statement on the Use and Effects of Solitary Confinement defines it as follows:[23]

> "[T]he physical isolation of individuals who are confined to their cells for twenty-two to twenty-four hours a day. In many jurisdictions prisoners are allowed out of their cells for one hour of solitary exercise. Meaningful contact with other people is typically

[19] At this time, the Minister of Correctional Services was Dr Sipho Mzimela and the Commissioner was Dr Khulekani Sithole.

[20] Section 25 of the CSA as enacted in 1998.

[21] The Jali Commission above n 11 noted the following at 337:

> "Although the 1959 and 1998 Correctional Services Acts expressly permit the detention of inmates in isolation cells, it is clear, when the locality and size of such cells is examined, and the procedures followed and the reasons given by the officers when they detain prisoners in 'segregation' that the practice is ultimately nothing more than solitary detention."

[22] Jali Commission above n 11 at 340.

[23] Adopted on 9 December 2007 at the International Psychological Trauma Symposium, Istanbul.

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."

In addition, the Mandela Rules, through Rule 44, provide further content:

> "For the purpose of these rules, solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days."[24]

Rule 45 further provides that:

> "1. Solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority. It shall not be imposed by virtue of a prisoner's sentence.
>
> 2. The imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures. The prohibition of the use of solitary confinement and similar measures in cases involving women and children, as referred to in other United Nations standards and norms in crime prevention and criminal justice, 28 continues to apply."

There are various sub-forms:

- First, disciplinary confinement covers any instance in which prisoners are placed into solitary confinement for punitive reasons or purposes.
- Second, non-disciplinary confinement consists of solitary confinement imposed for purposes other than discipline.[25]

The Vera Institute unpacks the various types of segregation that may constitute solitary confinement:

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[24] This definition has been echoed by the Special Rapporteur of the Human Rights Council on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment Report penned by Juan E Méndez dated 5 August 2011 A/66/268 (2011 Special Rapporteur Report) at para 79 as he "defines prolonged solitary confinement as any period of solitary confinement is excess of 15 days".

[25] Fuller "Torture as a Management Practice: The Convention Against Torture and Non-Disciplinary Solitary Confinement" (2018) 19 (1) *Chicago Journal of International Law* at 106. Fuller id notes that: "The term accurately encompasses all types of solitary confinement that are for non-punitive purposes, as opposed to terms such as 'administrative segregation,' which fail to include other forms of the practice because, for example, administrative segregation excludes pre-trial solitary confinement and protective custody in some prison systems."

- Disciplinary or punitive segregation: used to punish incarcerated people for violating facility rules.
- Administrative segregation: used to remove incarcerated people from the general prison or jail population who are thought to pose a risk to facility safety or security.
- Protective custody: a form of administrative segregation that is used to remove incarcerated people from a facility's general population who are thought be at risk of harm or abuse, such as incarcerated people who are mentally ill, intellectually disabled, gay, transgender, or former law enforcement officers. This status is often conferred involuntarily.
- Temporary confinement: segregated housing is used when a reported incident is being investigated or related paperwork is being completed, or when no beds are available for transfers.[26]

4. Legal frameworks

4.1 South African law

As a point of departure, the Bill of Rights (Chapter Two of the Constitution) contains an array of justiciable rights. The following are of particular relevance:

Section 10 "Human Dignity" provides that:

> "Everyone has inherent dignity and the right to have their dignity respected and protected."

Section 12(1) "Freedom and security of the person" states that:

> "(1) Everyone has the right to freedom and security of the person, which includes the right —
>
> (a) not to be deprived of freedom arbitrarily or without just cause;
>
> (b) not to be detained without trial;
>
> (c) to be free from all forms of violence from either public or private sources;
>
> (d) *not to be tortured in any way*; and
>
> (e) *not to be treated or punished in a cruel, inhuman or degrading way*.

[26] See Shames et al (May 2015) report titled "Solitary Confinement: Common Misconceptions and Emerging Safe Alternatives" at 4 available at https://www.vera.org/downloads/publications/solitary-confinement-misconceptions-safe-alternatives-report_1.pdf (accessed on 2 September 2021).

(2) Everyone has the right to bodily and psychological integrity, which includes the right—

(a) to make decisions concerning reproduction;

(b) to security in and control over their body; and

(c) not to be subjected to medical or scientific experiments without their informed consent."

Section 35(2)(e) "Arrested, detained and accused persons" includes:

"Everyone who is detained, including every sentenced prisoner, has the right—

to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment".

The rights entrenched in the Bill of Rights may be limited in terms of section 36 "Limitation of rights":

"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

The CSA regulates in detail inmates' treatment and conditions of detention and incarceration. Section 30, titled "Segregation" permits only segregations – not solitary confinement – in defined circumstances:

"(1) Segregation of an inmate for a period of time, which may be for part of or the whole day and which may include detention in a single cell, other than normal accommodation in a single cell as contemplated in section 7 (2) *(e)*, is permissible:
(a) upon the written request of an inmate;

(b) to give effect to the penalty of the restriction of the amenities imposed in terms of section 24 (3) *(c)*, (5) *(c)* or (5) *(d)* to the extent necessary to achieve this objective;

(c) if such detention is prescribed by the correctional medical practitioner on medical grounds;

(d) when an inmate displays violence or is threatened with violence;

(e) if an inmate has been recaptured after escape and there is a reasonable suspicion that such inmate will again escape or attempt to escape; and

(f) if at the request of the South African Police Service, the Head of the Correctional Centre considers that it is in the interests of the administration of justice.

(2) *(a)* An inmate who is segregated in terms of subsection (1) *(b)* to *(f)*-

(i) must be visited by a correctional official at least once every four hours and by the Head of the Correctional Centre at least once a day; and

(ii) must have his or her health assessed by a registered nurse, psychologist or a correctional medical practitioner at least once a day.

(b) Segregation must be discontinued if the registered nurse, psychologist or correctional medical practitioner determines that it poses a threat to the health of the inmate.

(3) A request for segregation in terms of subsection (1) *(a)* may be withdrawn at any time.

(4) Segregation in terms of subsection (1) *(c)* to *(f)* may only be enforced for the minimum period that is necessary and this period may not, subject to the provisions of subsection (5), *exceed seven days*.

(5) If the Head of the Correctional Centre believes that it is necessary to extend the period of segregation in terms of subsection (1) (c) to (f) and if the correctional medical practitioner or psychologist certifies that such an extension would not be harmful to the health of the inmate, he or she may, with the permission of the National Commissioner, extend the period of segregation for a period *not exceeding 30 days*.

(6) All instances of segregation and extended segregation must be reported immediately by the Head of the Correctional Centre to the National Commissioner and to the Inspecting Judge.

(7) An inmate who is subjected to segregation may refer the matter to the Inspecting Judge who must decide thereon within 72 hours after receipt thereof.

(8) Segregation must be for the minimum period, and place the minimum restrictions on the inmate, compatible with the purpose for which the inmate is being segregated.

(9) Except in so far as it may be necessary in terms of subsection (1) *(b)* segregation *may never be ordered as a form of punishment or disciplinary measure*."

In the context of C-Max and Ebongweni, other sections of the CSA are pertinent: Section 4 "Approach to safe custody" provides:

"(1) Every inmate is required to accept the authority and to obey the lawful instructions of the National Commissioner and correctional officials of the Department and custody officials.

(2) *(a)* The Department must take such steps as are necessary to ensure the safe custody of every inmate and to maintain security and good order in every correctional centre.

(b) The duties and restrictions imposed on inmates to ensure safe custody by maintaining security and good order must be applied in a manner that conforms with their purpose and which does not affect the inmate to a greater degree or for a longer period than necessary.

(c) The minimum rights of inmates entrenched in this Act must not be violated or restricted for disciplinary or any other purpose, but the National Commissioner may restrict, suspend or revise amenities for inmates of different categories."

Section 5 "Establishment of correctional centres" authorises the Minister to establish and review the establishment of correctional centres and remand detention facilities for—

"1(a) the detention and treatment of inmates;

(b) particular purposes in relation to inmates; or

(c) particular categories of inmates"

Relevant parts of section 7, "Accommodation", include:

"(1) Inmates must be held in cells which meet the requirements prescribed by regulation in respect of floor space, cubic capacity, lighting, ventilation, sanitary installations and general health conditions. These requirements must be adequate for detention under conditions of human dignity."

"2(d) The National Commissioner may detain inmates of specific age, health or security risk categories separately.

"2(e) The National Commissioner may accommodate inmates in single or communal cells depending on the availability of accommodation."

Section 29 "Security Classification" states that:

> "Security classification is determined by the extent to which the inmate presents a security risk and so as to determine the correctional centre or part of a correctional centre in which he or she is to be detained."

The CSA empowers the National Commissioner to make institutional orders or B Orders. JICS was informed that Correctional Services B Order 1 has apparently been amended to suit Ebongweni correctional centres and each centre has a correctional facility policy document. We say "apparently" because it has not been provided to us.

Furthermore, in line with the United Nations (UN) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Prevention of Combating of Torture of Persons Act 13 of 2013 (Torture Act) was made fully enforceable domestically.

4.2 International law

International law is pertinent. First, when interpreting the Bill of Rights one "must consider international law".[27] Second, international agreements in the form of treaties and conventions that South Africa has signed or ratified are binding on the Republic in the international sphere and once it is domesticated (enacted into law by national legislation) it is binding on the Republic in the domestic sphere.[28] Furthermore, customary international law "is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."[29] Finally, "[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."[30]

International instruments that govern human rights include the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). The UDHR and ICCPR prohibit torture or cruel, inhuman or degrading treatment or punishment. In addition, South Africa is party to the African Charter on Human and Peoples' Rights (Banjul Charter), which also prohibits torture, cruel,

[27] Section 39(1)(b) of the Constitution.
[28] Section 231 of the Constitution.
[29] Section 232 of the Constitution.
[30] Section 233 of the Constitution.

inhuman or degrading treatment or punishment.[31] All of these instruments also enshrine the right to human dignity.[32]

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment[33] is the leading international law instrument on torture. Article 1 defines "torture":

> "[T]he 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."

The UN Standard Minimum Rules for the Treatment of Prisoners (also known as the Mandela Rules) is a compendium of international standards. Although it is "soft law" (not directly enforceable), is it widely embraced by the international community. The Mandela Rules expand upon torture and other acts in detention and incarceration.

Rule 1 provides that:

> "All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. *No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification*. The safety and security of prisoners, staff, service providers and visitors shall be ensured at all times."

Rule 37 states that:

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[31] Article 5 of the Banjul Charter states: "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

[32] Article 1 of the UDHR states "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." Article 10(1) of the ICCPR states that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

[33] See further the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

"The following shall always be *subject to authorization by law* or by the regulation of the competent administrative authority:

(a) Conduct constituting a disciplinary offence;

(b) The types and duration of sanctions that may be imposed;

(c) The authority competent to impose such sanctions;

(d) Any form of *involuntary separation from the general prison population, such as solitary confinement*, isolation, segregation, special care units or restricted housing, whether as a disciplinary sanction or for the maintenance of order and security, including promulgating policies and procedures governing the use and review of, admission to and release from any form of involuntary separation."

Rule 39 provides the following:

"1. No prisoner shall be sanctioned except in accordance with the terms of the law or regulation referred to in rule 37 and the principles of fairness and due process. A prisoner shall never be sanctioned twice for the same act or offence.

2. Prison administrations shall ensure proportionality between a disciplinary sanction and the offence for which it is established, and shall keep a proper record of all disciplinary sanctions imposed.

3. Before imposing disciplinary sanctions, prison administrations shall consider whether and how a prisoner's mental illness or developmental disability may have contributed to his or her conduct and the commission of the offence or act underlying the disciplinary charge. Prison administrations shall not sanction any conduct of a prisoner that is considered to be the direct result of his or her mental illness or intellectual disability."

Critically, Rule 43 provides this on indefinite and prolonged solitary confinement:

"*In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment*. The following practices, *in particular, shall be prohibited*:

(a) *Indefinite solitary confinement*;

(b) *Prolonged solitary confinement*".

5. The evil consequences of solitary confinement

The Special Rapporteur found that solitary confinement can cause psychological torture, which ranges from progressively severe forms of anxiety, stress and depression to cognitive impairment and suicidal tendencies.[34]

South African case law has also considered solitary confinement as an extreme form of punishment. Hoexter JA remarked that "[i]t cannot be gainsaid that any enforced and prolonged isolation of the individual is punishment. It is a form of torment without physical violence. This fact has been recognised since the beginning of time."[35]

The Vera Institute[36] recently noted three-fold health consequences of solitary confinement. First, it has been proven that solitary confinement can lead to serious and lasting psychological damage, which includes: anxiety; anger; depression; insomnia; psychosis; post-traumatic stress disorder; and others.[37] Linked to this, solitary confinement not only causes mental illness, but it can exacerbate pre-existing mental illness[38] and it is also associated with the increased risk of self-harm and suicide.[39] Studies also found that the longer one is in solitary confinement, the worse the psychological impact. For these reasons, the impact of solitary confinement on mental health has been described as "lethal".[40]

Second, there is a neurological impact. Some research found that social isolation and sensory deprivation can lead to changes in electrical activity in the brain, which can lead to slowed brain activity and poor intellectual performances.[41] Third, solitary

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[34] Special Rapporteur of the Human Rights Council on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment Report penned by Nils Melzer dated 20 March 2020 A/HRC/43/49 (2020 Special Rapporteur Report) at 57-9.

[35] *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) at 35.

[36] James and Vanko from the Vera Institute "The Impacts of Solitary Confinement" Evidence Brief (April 2021) available at https://www.vera.org/downloads/publications/the-impacts-of-solitary-confinement.pdf (accessed 12 September 2021).

[37] Id. "More than 150 years of research in psychiatry, psychology, criminology, anthropology and epidemiology has documented the detrimental effects of solitary confinement on mental health and well being."

[38] Id. "Symptoms or behaviours associated with mental illness are often perceived as "behavioural issues" to be met with disciplinary action, resulting in those in need of the most care being placed in solitary, which may contribute to their decompensation."

[39] Id.

The Jali Commission above n 11 found at 351 "The Commission heard evidence from man prisoners who went so fat as to say that the impact of such detention led to the suicide of some of their fellow inmates."

[40] Herring from Prison Policy Initiative "The research is clear: Solitary confinement causes long-lasting harm" (8 December 2020) available at https://www.prisonpolicy.org/blog/2020/12/08/solitary_symposium/ (accessed on 12 September 2021).

[41] James and Vanko above n 35 at footnote 15 and Herring above n 39: "In fact, the part of the brain that plays a major role in memory has been shown to physically shrink after long periods without human interaction. And since humans are naturally social beings, depriving people of the ability to

confinement has a physiological impact. Research shows that people placed in solitary confinement "can develop serious, long-lasting health problems, which may increase their risk for further health complications in the future and even premature death."[42] These include: hypertension; heart attacks; strokes; deterioration of eyesight.

Broader consequences also are at play. Solitary confinement does not affect only the inmates who experience it, but it also the correctional officials who work in solitary confinement units. Generally, it has been found that working in the corrections environment takes a toll on the mental health and wellbeing of correctional officials.[43] This is particularly so for correctional officials in solitary confinement units.[44] Furthermore, it impacts the families (especially children), loved ones and communities of the inmates placed in solitary confinement, who have less contact with the outside world, meaning fewer phone calls and less access to visitors (and contact visits). Finally, solitary confinement units are expensive to run.

JICS's reports on the three correctional centres are resonant with these harmful consequences.

The reports underscore the mental and physical health of inmates, which is not being closely monitored, as well as the impact of solitary confinement on the entire prisons system.

For example, at Ebongweni, the 2019 Report found that all the inmates in Phase One were on anti-depressants (although the feedback report denied this, claiming only 29 on anti-depressants).

The 2021 Report noted that inmates are locked up, alone in a cell, 2m by 2.5m, for 23 hours a day. Food is given through a thin post-box sliver in the door. There is a single daily hour of exercise in an isolated exercise cage.

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socialize can cause 'social pai'".

[42] James and Vanko above n 35.

[43] James and Vanko above n 35.

[44] James and Vanko above n 35. "Vera's experience in the field suggests that working in solitary is especially taxing. There are frequent reports of staff being reluctant to work in solitary confinement, sometimes even quitting on the spot after being assigned to those units. Corrections staff often report experiencing significantly lower stress levels and increased feelings of safety after leaving solitary to work in less restrictive units, or when working in solitary units that have implemented substantial reforms."

When JICS interviewed inmates in Phase One and Phase Two, the inmates peeped through the sliver door, kneeling down and looking up.

This affected the dignity not only of the inmates, but of the JICS officials engaging with them.

Inmates complained plausibly that they lost count of the days and nights. An inmate at Kgosi Mampuru II C-Max who had previously spent time at Ebongweni frantically complained about his mental state, wellbeing and general sense of humanity and dignity. He said it is as if "I have committed the worst crime in the entire world" and we must not forget that "I am a human being".

6. Is solitary confinement a form of torture?

"Torture" refers to "one of the worst possible human rights violations and abuses human beings can inflict upon each other" and it "holds a special position in international law: it is absolutely prohibited and this prohibition is non-derogable".[45]

To meet the threshold of "torture" in the Torture Convention, the following definitional elements must be met: (i) an act inflicting severe pain or suffering, whether physical or mental; (ii) the element of intent; (iii) the specific purpose; (iv) the involvement of a state official, at least by acquiescence. Section three of the Torture Act largely echoes this definition and outlines specific purposes to include: (i) to obtain information or a confession; (ii) to punish for an act a person has committed or is suspected of having committed or is planning to commit; and (iii) to intimidate or coerce another person to do something or refrain from doing something.

Purely on definitions, if DCS is intentionally isolating inmates and it causes severe mental or physical suffering and it is done to punish or coerce or intimidate inmates, it may constitute a form of torture. Even if the purpose does not meet the threshold of torture, it will nevertheless constitute cruel and inhuman treatment.

The Jali Commission found that "[i]t is commonly accepted that solitary confinement is one of the worst forms of torture that can be imposed on another human being."[46]

[45] Special Rapporteur of the Human Rights Council on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment Report penned by Manfred Nowak (9 February 2010) A/HRC/13/39 (Special Rapporteur 2010 Report) at 43.
[46] Jali Commission above n 11 at 334.

And noted further that the "mental anguish and torture of being in solitary confinement, together with the comparative studies, should leave no one in any doubt as to the long-term effects of this form of punishment on prisoners."[47]

The general international law position seems to be that solitary confinement is permissible only in limited, exceptional circumstances with rigorous safeguards in place. Whether it constitutes a form of torture or inhuman and degrading treatment or punishment[48] should be considered on the circumstances of each case. For example, in March 2020, the Special Rapporteur of the Human Rights Council on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Special Rapporteur) submitted a report dedicated to psychological torture. This stated:

> "The assessment of whether solitary confinement amounts to torture and other cruel, inhuman or degrading treatment or punishment *should take into consideration all relevant circumstances on a case-by-case basis*. These circumstances include the purpose of the application of solitary confinement, the conditions, length and effects of the treatment and, of course, the subjective conditions of each victim that make him or her more or less vulnerable to those effects."

However, the position is much clearer when it comes to prolonged or indefinite solitary confinement. These forms are categorically considered a form of torture and are thus prohibited. On this score, the Special Rapporteur emphasised the prohibition on prolonged solitary confinement.

> "Under international law, solitary confinement may be imposed only in exceptional circumstances, and '*prolonged' solitary confinement, in excess of 15 consecutive days, is regarded as a form of torture or ill-treatment*. The same applies to frequently renewed measures which, in conjunction, amount to prolonged solitary confinement."[49]

The Special Rapporteur also found that "lawful sanctions" in the definition of torture cannot include "any sanctions or measures prohibited by relevant international instruments or national legislation, such as prolonged or indefinite solitary

[47] Jali Commission above n 11 at 336.

[48] The Jali Commission above n 11 observed at 351:

> "The effect of segregated confinement on inmates is *clearly very harsh and in most instances constitutes inhumane and cruel punishment*. Clearly our system of justice gives the judiciary the power to punish persons convicted of a crime in a court of law by imposing sentences, but the one thing that the judiciary never intended doing when imposing such sentences was to allow the authorities to drive people insane through solitary confinement."

[49] 2020 Special Rapporteur Report above n 33 at 57.

confinement."[50] It is also worth reiterating that Rule 43 of the Mandela Rules expressly prohibits indefinite and prolonged solitary confinement. In light of this, the Special Rapporteur has called on States to abolish solitary confinement and prolonged solitary confinement.[51]

7. Is solitary confinement and prolonged solitary confinement practised in South African correctional centres?

7.1 Findings

Only at a first blush can one consider it controversial whether solitary confinement is practised behind the bars of South African correctional centres, in particular C-Max and Ebongweni. JICS has nevertheless, in pursuit of a rigorous answer, conducted three careful thematic inspections and produced reports.
All of these found that the common features of solitary confinement were present – inmates alone in a small cell for 23 hours a day without stimulation or human contact.

This question was in fact answered by the Jali Commission, nearly two decades ago. It described C-Max and Ebongweni prisons as "merely institutions of solitary confinement".[52]

DCS itself concedes this. Following JICS's 2019 Report on Ebongweni, DCS (belatedly) responded on 31 August 2021 (though its document was dated 19 February 2021). The Feedback Report stated:

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[50] Id at para 82(f). Also, in the report A/HRC/42/26 (22 February- 19 March 2021) the Special Rapporteur stated at para 13:

> "Some States have tried to justify torture or ill-treatment based on the treaty exception of "lawful sanctions". Any such "lawful sanctions" should, however, be interpreted in terms of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) and the general principle of international law, expressed in the Vienna Convention on the Law of Treaties, that a State "may not invoke the provisions of its internal law as justification for its failure to perform a treaty". In this regard, the Special Rapporteur and previous mandate holders have established that certain practices, including prolonged solitary confinement and corporal punishment, could not be considered lawful sanctions (see A/66/268 and A/HRC/13/39/Add.5)."

[51] UN News "Solitary confinement should be banned in most cases, UN experts says" (18 October 2011) available at https://news.un.org/en/story/2011/10/392012-solitary-confinement-should-be-banned-most-cases-un-expert-says (accessed 2 September 2021).

[52] Jali Commisison above n 11 at 351.

> "The facility is designed in such a way that inmates [are] ***incarcerated in solitary confinement for twenty three hours and given one hour exercise***, which is in accordance with the Standard Operating Procedures of the facility. It is anticipated that the concerns raised by JICS in respect of solitary confinement, will be considered in the aforementioned draft policy."[53]

DCS here rightly concedes that solitary confinement is taking place at Ebongweni. Similar logic and reasoning applies to C-Max.

JICS concludes: solitary confinement is taking place.

What about prolonged solitary confinement? As mentioned, this refers to solitary confinement in excess of 15 days. JICS's **reports and findings show without doubt that prolonged solitary confinement is taking place**.

Given the way in which the three-phased behaviour modification programs work; the single cell structures; minimal exercise; meal routines and harsh daily regimes, inmates are in Phase One for at least six months.
Alarmingly, JICS established that some inmates spend more than six months in Phase One. Even the Feedback Report from DCS concedes this:

> "As of 18 February 2021 there are 363 offenders incarcerated in Phase One *for a period longer than six months*".

The Feedback Report further acknowledges that Inmate TSM[54] had spent nine years in Phase One. And Inmate GT[55] had spent four and a half years in Phase One. Although the Feedback Report claims that these inmates will be transferred, JICS is yet to receive confirmation.

If these two inmates remain in this position, there can be little doubt there are others.

JICS therefore finds that prolonged solitary confinement, clearly exceeding the 15-day limit, is taking place, for months (and even years).

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[53] However, DCS also states that "however the current functioning of Ebongweni is prescribed by the draft C Max Policy". It is critical to note that no policy may supersede the CSA, the Constitution and international law.
[54] Prison number [redacted], sentenced to one hundred and eleven years imprisonment.
[55] Prison number [redacted].

First, prolonged solitary confinement is not authorised or permitted by section 30 of the CSA. The provision permits segregations only for a "minimum period as is necessary" and the HCC may (if they believe it is necessary) extend the period of segregation for a period not exceeding 30 days with the permission of the National Commissioner (and with approval from health professionals).[56]

Second, section 30(9) provides that segregations "may never be ordered as a form of punishment or disciplinary measure".

Yet, on both policy and practice, JICS finds that solitary confinement is being used as a form of punishment or discipline. The reports established that the criteria for transfer and admissions to C-Max and Ebongweni are punitive.

In addition, the Feedback Report states that some inmates are accommodated at Ebongweni "because security reasons based on the *crimes committed* and the *length of their sentence*." In the case of Inmate TSM, it is due to his history of escapes, but why so long in Phase One? At least ensure he is transferred to Phase Three? And Inmate GT's confinement is "due to various security reasons as well as a criminologist report advising DCS to incarcerate him at Ebongweni".

How can it be appropriate that a criminologist advise that an inmate spend his sentence in solitary confinement?

In sharp contradistinction to these inmates, other inmates are accommodated at Ebongweni – and thus in solitary confinement – because they were found to be in possession of a cell phone or drugs or other petty disciplinary transgressions.

Prolonged solitary confinement constitutes a form of torture. It is contrary to the Torture Act, section 12(1)(d) of the Constitution, the CAT, ICCPR and UDHR and thus violates both domestic and international law.

[56] See section 30(4) and section 30(5) of the CSA.

The common response from DCS officials is that it is (implicitly) authorised by internal policies of the centres. This cannot be so. All DCS policies are subject to the CSA. And all laws, including policies, B-orders, manuals, are subject to the Constitution.

7.2 Brief limitations analysis

Can solitary confinement and prolonged solitary confinement be considered a reasonable and justifiable limitation of the inmates' rights? This is where proportionality comes into play.[57] The Jali Commission questioned whether such institutions could be "defended on any constitutional basis."[58] The Commission showed how incarcerating inmates in this way cannot be justified under the Constitution, CSA, Regulations and Departmental policies.[59]

The right to freedom and security of the person is the bedrock of our democracy. In particular, the right not to be tortured or to be subjected to cruel, inhuman or degrading treatment are non-derogable rights. In *Makwanyane*, Chaskalson P noted that "It is difficult to conceive of any circumstances in which torture, which is specifically prohibited under section 11(2), could ever be justified."[60]

First, DCS states that the purpose of these centres is "security reasons" – in other words, to accommodate the most violent and hardened inmates.[61] However, this cannot erase the other objectives the CSA sets for DCS, namely to accommodate "all inmates under conditions of human dignity" and to provide "services and programmes aimed at correcting the offending behaviour of sentenced offenders in order to rehabilitate them."[62]

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[57] *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services* 2021 (1) SACR 387 (CC) at para 91.
[58] Jali Commission above n 11 at 351-2.
[59] Jali Commission above n 11 at 352 under the heading titled "Humanity vis-à-vis Super-Maximum Prisons".
[60] *Makwanyane* above n 15 at para 97.
[61] Although, the reports on the centres revealed that some inmates are transferred to these centres simply because of the length of their sentence or for some other petty offences (like cellphones and drugs).
[62] See section 1 of the CSA. See further White Paper on Corrections (2005) available at https://acjr.org.za/resource-centre/White%20Paper%20on%20Corrections%20in%20South%20Africa.pdf (accessed 26 February 2021).

Next, the severity of solitary confinement and prolonged solitary confinement strikes at the core of the right to freedom from torture or subject to cruel, inhuman or degrading treatment or punishment.[63]

Further, it is not at all clear that there is at least a rational connection between the objectives (security, corrections ad rehabilitation) and the means chosen (solitary confinement) to achieve these objectives. The Special Rapporteur found that solitary confinement undermines "one of the essential aims of the penitentiary system, which is to rehabilitate offenders and facilitate their reintegration into society".[64]

On this approach, solitary confinement, corrections and rehabilitation are mutually exclusive.

In addition, the Jali Commission doubted that solitary confinement is effective. It urged that serious consideration be given to whether "Super-Max prisons serve a purpose and whether such prisons assist in the efforts to rehabilitate prisoners and correct their behaviour"[65] and that "[n]o scientific studies nor persuasive evidence have been put before the Commission that justify the establishment of institutions like C-Max or the retention of such detention conditions in our prison system".[66]

To this day, there is a dearth of evidence that solitary confinement is rationally related to security purposes and to modifying violent behaviour.

The Vera Institute found that there is little evidence to suggest that the use of solitary confinement makes prisons and communities safer. They note that "[m]ost studies examining the effects of solitary find that its use *does not decrease* instances of misconduct or violence – including assaults on corrections staff or other incarcerated people – and therefore does not improve prison and jail safety" and "[s]tudies indicate that the use of solitary confinement *does not decrease* rates or recidivism . . . research suggests that time spent in solitary may actually increase people's likelihood of post-release offending, especially violent re-offending" and "people released *directly* from solitary into the community have significantly greater recidivism rates."[67]

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[63] *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC) at para 59.
[64] 2011 Special Rapporteur Report above n 23 at para 79.
[65] Jali Commission above n 11 at 351.
[66] Id at 354.
[67] James and Vanko above n 35.

Furthermore, JICS's reports found there is no monitoring or evaluation on whether the behaviour modification programs at Ebongweni and Kgosi Mampuru II C-Max are effective in changing behaviour.

If anything, DCS concedes that some inmates return or spend longer periods of time in the various phases.

In sum, it is doubtful that solitary confinement fulfils its purported objectives. These concerns were echoed at the International Symposium on Solitary Confinement. There, researchers and formerly incarcerated persons stated that "any positive benefits correctional institutions gain by using solitary confinement are outweighed by the severe and often permanent damages caused by prolonged isolation."[68]

Finally, are there less restrictive means? The answer is: there are other methods, techniques and strategies for DCS to craft to deal with violent and recalcitrant inmates. For example, on many JICS inspections, CCTV cameras do not seem to be working. Ensuring CCTV cameras are working will reduce the number of escapes.

Other simple yet effective measures that DCS could consider include disciplining inmates transferred for petty offences (possession of cell phones and drugs) in other less brutal ways.
And inmates serving life sentences (especially when they have not proven to be violent during their incarceration) can be accommodated at other centres that offer rehabilitation and education programs.

It follows that, constitutionally, solitary confinement and especially prolonged solitary confinement, as practised in C-Max and Ebongweni, are *not* a reasonable and justifiable measure.

8. The way forward

Reforming the current state of centres that are designed to implement solitary confinement and urgent abolition of the entire practice must be considered.

[68] Herring above n 39.

In addition to all the recommendations in the reports, there are eight guiding and practicable principles that have been distilled by experts. These DCS ought to consider.[69] These can also be implemented as interim measures while DCS reviews its policies.

1. **Inmates should never be subject to long-term solitary confinement when it is not truly necessary for safety and security** – this speaks to the problematic admissions criteria and transfers taking place. These inmates housed at C-Max or Ebongweni ought not to be in solitary confinement:
   (i) those transferred simply because of the length of their sentences; (ii) those transferred for minor misconduct (cell phones, drugs and other misconduct); and (iii) inmates dumped in these centres as part of mass transfers.
   DCS must conduct an audit of all transfers and share it with JICS.
2. **Solitary confinement should be used for the least time possible** – this report reveals the harsh consequences of solitary confinement plus the findings that numerous inmates in C-Max and Ebongweni are in prolonged solitary confinement. Section 30 of the CSA outlines the time frames and safeguards for lawful segregations. These must be followed and observed.
3. **Inmates who are particularly vulnerable to serious medical and mental health injury should not be confined in solitary confinement for more than an emergency period** – while international law already protects certain vulnerable groups from solitary confinement (children, pregnant women and persons with mental health issues), the difficulty is that solitary confinement itself can trigger and/or exacerbate mental health issues. From the outset, if inmates have or display mental health issues, they should not be placed in solitary confinement.
4. **Out-of-cell time is critical** – while C-Max and Ebongweni may be constructed to ensure single cell accommodation, there are ways to increase out of cell time without posing a threat to security. These include: (i) extra time to exercise; (ii) rehabilitation and education programs; (iii) meals to be eaten outside of the cells; and (iv) non-contact visits to be longer than one hour and contact visits for inmates in Phase Three.

[69] Fettig and Schlanger "Eight Principles for Reforming Solitary Confinement" (6 October 2015) available at https://prospect.org/justice/eight-principles-reforming-solitary-confinement/ (accessed on 2 September 2021).

5. **Solitary confinement should not include sensory deprivation or complete social isolation** – inmates are kept in single cells for safety and security – they should not be subjected to further punishment. Inmates should have access to television, radios, books, calendars, clocks, natural light. They should be encouraged to make phone calls and write letters and to stay in touch with the outside world.
6. **When inmates are placed in solitary confinement, they should be closely monitored by correctional and health staff** – since solitary confinement causes and perpetuates health problems, there ought to be more frequent and in depth medical, physical and mental health checks by health professionals.
7. **Inmates should be given realistic incentives and support to follow facility rules** – there must be a proper orientation program outlining the various phases and how inmates are promoted to each phase. In addition, clear guidance must be given for inmates to gain access to privileges based on their behaviour and to not be disproportionality punished for misconduct (for example, to be kept in Phase One indefinitely).
8. **Empower independent oversight** – JICS must be empowered to access information from all C-Max and Ebongweni centres. JICS should not be impeded from access to internal policies, transfer memorandum and other important documents. Transfer audits should occur on a regular basis. Reviewing the decisions of Heads of Centres, Regional Commissioners and the National Commissioner must be a realistic option for inmates.

9. Conclusion

Solitary confinement and prolonged solitary confinement are practised in South African correctional centres, in particular C-Max and Ebongweni. Under democracy, hHundreds and even thousands of inmates have been subjected to these practices. Solitary confinement (on a case by case basis) and prolonged solitary confinement are acts of torture. This is contrary to the Constitution, the CSA, Torture Act and international law. DCS must reform the current state of C-Max and Ebongweni.

Solitary confinement went from a harsh method during apartheid to a desperate last resort in the peak of the post-apartheid crime wave. It is now a common practice. The “worst of the worst” has become a norm – without making us safer.

In 2005, the Jali Commission found that there was a culture of impunity in DCS; segregations were ordered as forms of punishment; there was no indication that prisoners were sent there through a fair process; and there was abuse of segregated isolated detention.[70] These findings sadly resonate with what JICS now finds.

The public deserves to know what is being done in their name, to fellow members of their communities and with taxpayer money. JICS will continue to uncover and speak out on solitary confinement in South African correctional centres. JICS hopes that DCS can meaningfully and constructively engage on this serious issue.

[70] See Jali Commission above n 11 at 349 and 351.