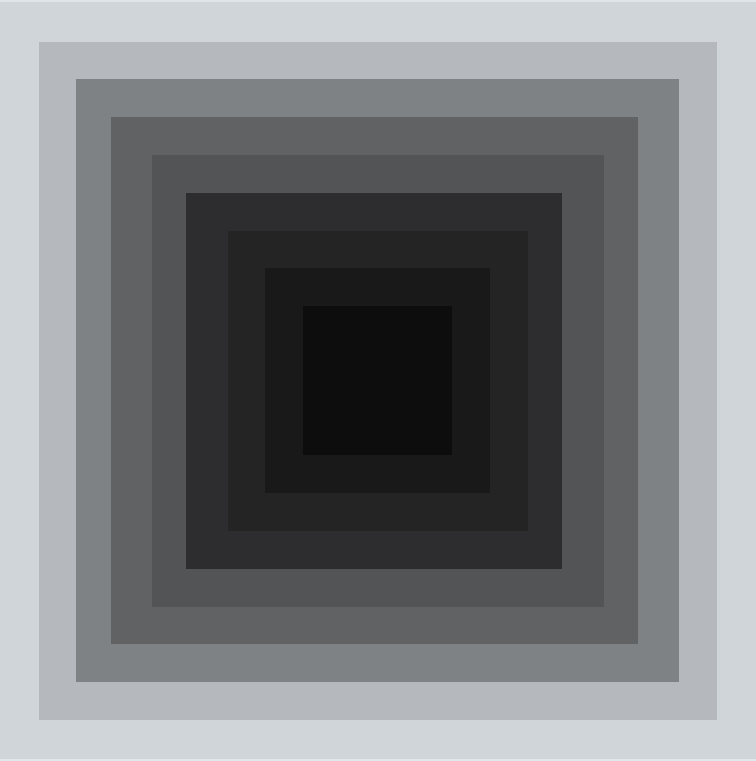
# Solitary Confinement as a Disciplinary Sanction

Focus on Denmark

**Discussion Paper**



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# Introduction

The use of solitary confinement, defined by the *Mandela Rules* as 'the confinement of prisoners for 22 hours or more a day without meaningful human contact',[1] has been the subject of much local and international concern, and the extents of its use and severe health consequences are widely documented and debated around the world.[2]

International legal standards have long prohibited forms of solitary confinement amounting to torture or cruel, inhuman or degrading punishment.[3] Further protection and regulation are provided by universal soft-law standards, primarily the *Mandela Rules*, that were adopted unanimously by the UN General Assembly in 2015, and regional soft-law standards such as the *European Prison Rules* (EPR), as well as by the long-standing practice of human rights monitoring bodies, including the UN Committee against Torture (CAT), the UN Subcommittee on Prevention of Torture (SPT), Council of Europe's Committee for the Prevention of Torture (CPT), and by the jurisprudence of various courts.

The use of solitary confinement *as a disciplinary measure*, which is the topic of this conference in Copenhagen, has also attracted attention for decades. More than 25 years ago, the United Nations recognised that efforts targeting the abolition of solitary confinement as a punishment should be undertaken and encouraged.[4] Yet, this punitive measure continues to be used in numerous countries, causing severe health implications for many inmates, at times in violation of the international normative framework.

Danish prison authorities use such measures primarily on the grounds of necessity and a lack of alternatives and recently due to political directives to increase the use of disciplinary sanctions in general.[5] Therefore, in Denmark, the use of solitary confinement as a disciplinary measure (*strafcelle*) pursuant to the *Sentence Enforcement Act* (in Danish: *Straffuldbyrdelsesloven*) – for both pre-trial detainees[6] and convicted prisoners – is still high (except for children). In total, its use has more than doubled since 2001[7] and, during the last ten years, the numbers have fluctuated between 2430 (2008) and 3044 (2011). From 2015 to 2016, there has been an increase of more than 400 from 2579 in 2015 to an estimated 2995 in 2016, with half relating to long-term duration of 15 or more days.[8] This is due to the recent tougher regulation of unlawful possession (and use) of mobile phones.[9]

The law continues to permit prolonged solitary confinement of up to four weeks for both adults and children,[10] for both pre-trial detainees and those convicted in contravention of international standards, which prohibit solitary confinement of children and sets the upper limit at two weeks for adults. Denmark's use of the *strafcelle* has long attracted the ire of the international community, and, as recently as 2016, the CAT explicitly recommended that Denmark abolish the use of solitary confinement of minors and its use as a disciplinary measure. The HRC called Denmark to align its practice with international standards.[11]

**This paper provides the background for the discussions pertaining to the four panels:**

- **Panel 1:** What are the international legal standards regarding solitary confinement as a disciplinary measure?
- **Panel 2:** What are the health consequences of solitary confinement?
- **Panel 3:** How is solitary confinement used as a disciplinary measure *(strafcelle)* in Denmark and what are the areas of concern?
- **Panel 4:** What are the international experiences using alternatives and reducing the use of solitary confinement?

## Key Questions for the Four Panels:

**What are the international legal standards regarding solitary confinement as a disciplinary measure?**

- How is solitary confinement defined under international law?
- How is solitary confinement as a disciplinary measure regulated by international law?
- When does solitary confinement amount to ill-treatment or torture?
- What has been the impact of the *Mandela Rules* on the practice of solitary confinement?
- How does the European system regulate the use of solitary confinement?
- How is solitary confinement as a disciplinary measure viewed by the SPT and CPT?

**What are the health consequences of solitary confinement?**

- What are the health consequences of solitary confinement?
- Could effects be visible after only a few days?
- How to better understand health consequences of punitive isolation?
- How is such knowledge factored into the imposition of solitary confinement regimes?
- How is the health of those in solitary confinement monitored?
- What is the role of health professionals?

**How is solitary confinement used as a disciplinary measure *(strafcelle)* in Denmark and what are areas of concern?**

- How does Denmark currently use solitary confinement as a disciplinary measure?
- How is this measure used in relation to the regulation of mobile phones in prisons?
- What are the durations involved?
- How does the Danish NPM monitor solitary confinement as a disciplinary measure?
- How can inmates complain about these measures?

**What are the international experiences using alternatives and reducing the use of solitary confinement as a disciplinary measure?**

- What are the primary areas in which improvements can be realised?
- What are lessons to be learned from international experiences in reform?
- What are the factors impeding reform on solitary confinement particularly as a disciplinary measure?
- How can reform engage with the concerns of prison staff?
- What are the cost-related arguments advanced against reform?

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# Panel 1: What are the international legal standards?

**Definition of Solitary Confinement**

Solitary confinement is now defined under international law for the first time as the:

> confinement of prisoners for 22 hours or more a day without meaningful human contact.

This 22/24 definition is now a universal yardstick that will cover various forms of solitary confinement, including its use for disciplinary purposes. Guidance as to the definition of 'meaningful human contact' can be found in Essex Paper 3 and the Istanbul Statement on Solitary Confinement12.

**Mandela Rules, Rule 44:** 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.

The *Mandela Rules* also define **prolonged** solitary confinement as being 'solitary confinement for a time period in excess of 15 consecutive days'.

**Regulation of Solitary Confinement as a Disciplinary Measure**

***Prohibition as Torture or Cruel, Inhuman or Degrading Punishment***

No *binding* instrument of international law *directly* prohibits the use of solitary confinement. However, solitary confinement as amounting to cruel, inhuman or degrading punishment, and to torture, has long been prohibited by the UN *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, International Covenant on Civil and Political Rights (ICCPR)* and the *European Convention on Human Rights*. This is now repeated in rule 43 (1) of the *Mandela Rules*. Moreover, the *ICCPR* stipulates that 'all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person' (Article 10(1)).

In assessing whether a specific detention regime or case is a violation of these provisions, the Committee against Torture (CAT), the Human Rights Committee (HRC) and the European Court of Human Rights (ECHR) approach the matter in a broadly similar manner by focusing on several factors, such as legality, justification, proportionality, duration, degree, conditions, impact, monitoring and whether procedural safeguards have been observed.

***Prohibition of Prolonged Period of Confinement***

Given the risk of irreparable harm arising after two weeks, isolation beyond this mark is prohibited by rule 43 (1)(b) of the *Mandela Rules*. This should be viewed as 'a clear point of departure from which solitary confinement no longer constitutes a legitimate tool for State use regardless of the circumstances',[13] as stated by the former UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Thus, indefinite and prolonged solitary confinement are prohibited. This prohibition should also be applied to 'frequently renewed measures that amount to prolonged solitary confinement'.[14] It is CPT practice to require an interruption of several days between such periods.[15]

***Prohibition of Isolation of Vulnerable Groups***

Rule 45 (2) of the *Mandela Rules* makes it clear that solitary confinement should be abolished for the following persons deprived of their liberty:

- children;
- women (who are pregnant, with infants or breastfeeding); and,
- prisoners with mental or physical disabilities 'when their conditions would be exacerbated by such measures'.

The first two prohibitions are simply incorporations of standards already enshrined in the *Havana Rules*[16] and *Bangkok Rules*[17] respectively. Specifically with respect to **children**, the Committee for the Rights of the Child (CRC) has consistently recommended that solitary confinement of children be abolished.[18]

Rule 45 (2) of the *Mandela Rules* prohibits confinement of prisoners with **mental or physical disabilities** 'when their conditions would be exacerbated by such measures'. Relatedly, rule 39 (3) of the *Mandela Rules* requires prison staff to consider the degree to which the prisoner's disability has influenced their behavior. If it is deemed to be a direct result of the disability, then no sanction shall be imposed.

The CAT has already formed the view in its practice that any solitary confinement for disciplinary purposes for these three groups should be abolished.[19]

**Mandela Rules, Rule 45 (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 (fn: r 67 of Havana Rules and r 22 of Bangkok Rules) continues to apply.

***Exceptional Use as a Last Resort for as Short a Time as Possible***

The *Mandela Rules* and the ECHR's jurisprudence[20] confirm that solitary confinement is 'one of the most serious measures which can be imposed [within a prison, and that, accordingly] authorities are under an obligation to assess all relevant factors in an inmate's case before placing him in solitary confinement'.[21]

The rule arising from this recognition is, therefore, that solitary confinement be used only in exceptional cases as a last resort, for as short a time as possible in rule 45 (1) of the *Mandela Rules* and rule 60.5 of the *EPR*.

**Mandela Rules, Rule 45 (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.

Even a disciplinary sanction of short duration should be assessed against all relevant factors, including the principle of necessity, proportionality and non-discrimination. Most recently, the SPT drew attention to the plight of LGBT prisoners in discriminatory isolation observing that they were 'not only likely to serve their sentences in isolation, but also more likely to serve longer time.' [22]

***Strict Regulation of Disciplinary Measures***

The *ICCPR* clearly stipulates that 'the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation' (Article 10 (3)).

**The Mandela Rules, from rules 36 to 46, require that:**

- **Rule 36:** Discipline and order to be maintained with no more restriction than necessary;
- **Rule 37:** Disciplinary measures, including isolation, shall always be authorized by law;
- **Rule 38:** Alternative dispute resolution mechanisms to be used in preventing and resolving conflicts as much as possible;

- **Rule 39 (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;
- **Rule 39 (1):** A prisoner shall never be sanctioned twice for the same act or offence;
- **Rule 39 (2):** Prison administrations shall ensure proportionality between a disciplinary sanction and the offence for which it is established; and,
- **Rule 39 (2):** Prison administrations shall keep a proper record of all disciplinary sanctions imposed.

Moreover, inmates are entitled to specific procedural rights before disciplinary sanctions can be imposed including the rights mentioned in rule 41 of the *Mandela Rules* as well as:

- **Rules 24-35:** access to and adequate provision of medical attention and right to visit by a doctor daily; and,
- **Rule 43 (3):** right to family visits.

**Mandela Rules, Rule 41:**

1. Any allegation of a disciplinary offence by a prisoner shall be reported promptly to the competent authority, which shall investigate it without undue delay.
2. Prisoners shall be informed, without delay and in a language that they understand, of the nature of the accusations against them and shall be given adequate time and facilities for the preparation of their defence.
3. Prisoners shall be allowed to defend themselves in person, or through legal assistance when the interests of justice so require, particularly in cases involving serious disciplinary charges. If the prisoners do not understand or speak the language used at a disciplinary hearing, they shall be assisted by a competent interpreter free of charge.
4. Prisoners shall have an opportunity to seek judicial review of disciplinary sanctions imposed against them.

Part IV of the *EPR* mirrors this regulatory framework regarding the use of solitary confinement as a disciplinary measure.

***Practice of the European Committee for the Prevention of Torture (CPT)***

The CPT has worked consistently towards the minimisation of solitary confinement because of the 'mental, somatic and social damage' it can inflict and also because 'given the opportunity it can provide for the deliberate infliction of ill-treatment'[23]. Its reports and standards have been especially influential.[24] Particular attention has also been paid to the justifications, duration, detention conditions, impact, and procedural rights.[25] This is summarised in its PLANN (proportionality, legality, accountability, necessity, non-discrimination) mnemonic.

**CPT requires that legal regulation needs to be clear and precise in terms of the:[26]**

- Circumstances in which each form of solitary confinement can be imposed;
- Imposition of solitary confinement as a disciplinary sanction should be a measure of last resort, for as short a time as possible;
- Authority/public officials who may impose the measure;
- Procedures to be followed when imposing it;
- Requirement to give the prisoner the fullest possible reasons for the decision;
- Right of the prisoner affected to make representations as part of the procedure;
- Procedure and frequency of independent reviews of the decision; and,
- Procedure for appealing the decision.

# Panel 2: What are the health consequences of solitary confinement?

**Health Impacts of Solitary Confinement**

Health studies extensively document, as noted by Peter Scharff Smith and others, the deleterious health impacts of solitary confinement that relate to physical, mental and social consequences.[27]

The degree of harm inflicted on a specific inmate is, according to Shalev, dictated by a number of factors, including:

- individual factors – such as personal background and pre-existing health problems;
- environmental factors – i.e. physical conditions and provisions;
- contextual factors, including:
    - the specific regime – such as time out of cell, degree of human contact etc.;
    - the context of the isolation – such as punishment, own protection, voluntary/non-voluntary, political/criminal; and,
    - its duration.[28]

Despite variations in individual, environmental and contextual factors, there is consistency in findings on the health effects of solitary confinement.

Moreover, solitary confinement need not be prolonged (more than 15 days) for any suffering to be inflicted, as noted by Shalev and others. By way of example, according to Koch's research on Danish pre-trial detainees in isolation, 'acute isolation syndrome' entailing 'problems of concentration, restlessness, failure of memory, sleeping problems and impaired sense of time an ability to follow the rhythm of day and night' became evident after a few days in isolation. This was observed to develop into 'chronic isolation syndrome' within weeks.[29]

Thus, it is a widely-held view that effects 'can occur after only a few days [and] rise with each additional day spent in such conditions'.[30]

***Mental Impact***

Reported effects with regards to negative impacts on mental health and wellbeing include adjustment disorders and symptoms of anxiety, depression and stress.[31] Studies have found that solitary confinement increased the risk of hospitalization to prison hospital for psychiatric reasons, and that mental health condition improved when prisoners were moved from solitary confinement to non-solitary confinement, indicating that solitary confinement imposes harmful conditions that could have been avoided by abolishing solitary confinement.

More studies show that previously isolated prisoners have a higher risk of trying to commit suicide than others.[32] Relatedly, surveying recent studies, Scharff Smith and Jacobsen conclude that the rate of mental illness has generally increased in Danish prisons.[33] One study cited relates to Vestre Fængsel, where in 2013 Kriminalforsorgen diagnosed 8% of remand prisoners with insanity and 83% with psychiatric disorders.[34]

***Social Impact***

With the deprivation of basic human needs such as social contact, belongingness (including visitation rights, meaningful interaction with other inmates), environmental stimulation (including institutional programming, physical exercise and recreation), individuals can become socially debilitated.

Koch, for instance, has documented the difficulties some Danish prisoners had, due to the anxiety as caused by their isolation, in being around other people upon their release from prison. Haney attributes this, particularly those subjected to prolonged isolation, to the damage and distortion caused to an individual's social identity and sense of self, which, 'for some, destroy their ability to function normally in free society' and the 'atrophy of important skills and capacities'.[36]

Prison health concerns should be situated within the domain of public health. The World Health Organisation has stated that 'good prison health is essential to good public health'.[37]

Needless to say, this is because what happens in prison does not stay in prison; prisoners are not released from health and behavioural issues as they are released from terms of incarceration. This connection is also made in the *EPR*. Such links clearly include, but also reach beyond, the harms inflicted by solitary confinement.[38]

**Factoring Health into Decisions about Disciplinary Sanctions**

The prevalent use of solitary confinement as a disciplinary measure in some countries points us to questioning the extent to which health considerations feature in decision-making processes. Perhaps, the widespread institutionalisation of the practice itself has come to represent its own justification.[39] Reportedly, such thinking renders it easier for an inmate to be put into solitary confinement if that inmate is a gang member or classified as dangerous based on having been subjected to it previously.[40]

**Mandela Rules, Rule 39 (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 commitment 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.

Further to this, the mid to longer-term impacts need to be canvassed before solitary confinement is deemed to be fitting. Accepting its harmful effects on the psyche of its subjects, solitary confinement can predictably also exacerbate recalcitrance and retribution, already a feature in many a prison. This would conceivably resonate more so in circumstances where the decision-making process remains opaque: with little or no communication or review rights afforded to the prisoner.

In their study on the United States, Reiter and Blair illustrate 'the perverse symbiosis of solitary confinement and mental illness', entailing a 'vicious cycle' as mental illness causes misbehaviour that is used to justify solitary confinement, which then causes further deterioration in behaviour and the underlying conditions attracting further discipline.[41] Beyond reasons pertaining to the deinstitutionalisation of inpatient psychiatric care, the failure of prison health professionals to sufficiently 'track individuals or patterns of behaviour' is put forward as facilitating this, since 'without documentation of outcomes, the system is permitted to perpetuate itself'.[42] Challenges in disassociating mental illness from criminality is not exclusive to the United States.

**Monitoring of Disciplinary Sanctions by Health Professionals**

Monitoring by a qualified health professional of the health of inmates in solitary confinement as a punishment is also paramount. Not all prisoners react to the same conditions in the same way, especially if an inmate has pre-existing, or a predisposition to, mental health issues.

The *EPR* require that prisoners in solitary confinement to be monitored daily by a medical practitioner, who is then to report to the prison director if the prisoner's health is being put seriously at risk (Rules 43.2 and 43.3).[43]

The *Mandela Rules* similarly impose strict requirements about monitoring by health professionals and underline that the health professionals should advise the staff 'if necessary to terminate or alter them [these measures] for physical or mental health reasons' (Rule 46(2)).

Health professionals, primarily driven by the ethos of preserving health, are very much faced with a difficult ethical quandary when working in a system which has punishment, dimensions of which can constitute ill-treatment, at its heart. Conflicted loyalties, between the inmate/patient and the institution, conceivably arise where it is incumbent on the health professional to report any such ill-treatment but who must also continue to work with the responsible staff. In one Danish study, it was shown that prison counsellors administering prison-based drug treatment were themselves adapting to and recommending the use of isolation as a means of detoxification.[44] In a Norwegian ethnographical study, Marte Rua noted that attitude towards prison and knowledge about solitary confinement varied among prison doctors. Even so, with a few historical exceptions, prison doctors avoid conflict when prisoners are affected from isolation, due to lack of institutional awareness and measures to handle conflicts between health and security interests.[45]

**Mandela Rules, Rule 46:**

1. Health-care personnel shall not have any role in the imposition of disciplinary sanctions or other restrictive measures. They shall, however, pay particular attention to the health of prisoners held under any form of involuntary separation, including by visiting such prisoners on a daily basis and providing prompt medical assistance and treatment at the request of such prisoners or prison staff.

2. Health-care personnel shall report to the director, without delay, any adverse effect of disciplinary sanctions or other restrictive measures on the physical or mental health of a prisoner subjected to such sanctions or measures and shall advise the director if they consider it necessary to terminate or alter them for physical or mental health reasons.

3. Health-care personnel shall have the authority to review and recommend changes to the involuntary separation of a prisoner in order to ensure that such separation does not exacerbate the medical condition or mental or physical disability of the prisoner.

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## Panel 3: How is solitary confinement used as a disciplinary measure (*strafcelle*) in Denmark and what are the areas of concern?

*Regulation*

In Denmark, the following four types of isolation are regulated by the Sentence Enforcement Act:

1. Exclusion from association, cf. the *Sentence Enforcement Act* § 63
2. Voluntary exclusion from association, cf. the *Sentence Enforcement Act* § 33
3. Isolation in a security cell *(sikringscelle)*, possibly under forced physical restraint, cf. the *Sentence Enforcement Act* § 66
4. Isolation as a disciplinary sanction *(strafcelle)*, cf. the *Sentence Enforcement Act* § 68.

Exclusion from association is a preventive measure that cannot be used as a sanction for previous (mis)behaviour. This measure is applied to prevent future violent behaviour, criminal activity, escape, etc. In contrast, the use of solitary confinement as a disciplinary measure is a punishment that does not directly aim at preventing certain behaviour.

Pursuant to § 67 of the law, an inmate *shall* receive a disciplinary measure in certain situations, including for the reasons mentioned in Table 3. In June 2016, the wording of this paragraph was amended from discretionary decision about imposing a disciplinary measure ('could' be imposed) to a compulsory measure ('shall' be imposed) leaving the prison administration without any discretion but to impose it as a standard operational procedure.[46]

The punishment cell is the most severe disciplinary measure available in Danish prisons, with lesser restrictive methods including warnings and fines (Sentence Enforcement Act § 68). Pursuant to § 68 (2) of the Sentence Enforcement Act, this can only be used as a disciplinary measure in specific situations as listed in Table 3. Obviously, some of these infractions would also be punished in accordance to the Danish Criminal Code. By way of example, the unlawful use and possession of mobile phones in closed prisons and remand prisons is criminalised in § 124 (4) in the *Danish Criminal Code*.[47] This might raise the question of double punishment as highlighted by the Danish Institute of Human Rights in its recent comments to the legislative changes to the use of mobile phones.[48]

*Decision Process*

Pursuant to § 70 (1) of the Sentence Enforcement Act, the prison staff have to take into account the nature and extent of the violation in order to determine the duration of the *strafcelle* that can last for a maximum of four weeks. In doing so, the prison staff conduct a specific assessment as bound by the principle of proportionality.

Pursuant to the powers conferred to the Minister of Justice under § 70 (3) of the Act, the Minister has adopted a regulation regarding the punishment cell *(Disciplinærstrafbekendtgørelsen)*.[49] This, in detail, describes the use, administration and complaint procedure, and the inmate is entitled to, inter alia, a justification, information and the right to express his/her opinion. In addition, the Minister of Justice has published a guidance ('Vejledning om behandlingen af sager om disciplinærstraf, konfiskation og modregning af erstatningsbeløb (disciplinærstrafvejledningen)')[50] which includes information on how to decide on using the disciplinary cell, legal obligations and safeguards for the prisoner.

*Practice*

In daily practice, when prisoners violate internal prison rules, disciplinary measures are used in accordance with a *form of normal reactions* (a type of sentencing matrix). This form is developed centrally by Danish Prison and Probation Service and as a way of guiding the institutions and applies to uniform prison facilities, i.e. some for closed prisons and others for open prisons. As pointed out by experts, this practice can be useful to secure a consistent use of disciplinary measures such as solitary confinement. However, it can also be a pitfall as the form sometimes is used uncritically, as an answer book of sorts. This unduly eliminates the need for the specific assessment and the proportionality test, informed by the circumstances particular to the situation, by the appropriate prison staff.[51]

This punishment is served in a special unit of the prison, a prisoner's regular cell or in a remand institution *(arresthus)*. Some prisons have separate sections for the punishment cell. Their physical conditions vary between the different institutions (in size, state of repair, condition, lighting etc.).

As shown in table 3, in 2015, the most commonly used justification for the use of disciplinary cell was the improper disposal of objects and money, constituting 44,9 % of all placements.

**Table 3, Justifications (%) for the disciplinary cell in 2015**

| | |
|---|---|
| Refused to give urine sample | 4,8 |
| Occupation refusal | 1,3 |
| Smuggling / possession / consumption of alcohol or drugs | 8,1 |
| Failed to follow staff instructions | 5,5 |
| Escape attempts | 1,2 |
| Improper disposal of objects and money | 44,9 |
| Avoidance / absence from leave | 0,5 |
| Other misuse of leave | 1,6 |
| Other criminal offences | 17,7 |
| Violation of rules set by the institution leader | 14,4 |
| **Total %** | **100** |

The use of the punishment cell remains highly prevalent. In fact, its use pursuant to the *Sentence Enforcement Act* has virtually doubled from 2001 to 2016, as mentioned. The vast majority of cases relate to men (2918 out of the estimated 2995 cases in 2016). Moreover, the mentioned legislative amendment regarding unlawful use of mobile phones has entailed a significant increase in the use of longer punishment in excess of 15 days. In 2016, there were 222 long-term placements (in excess of 15 days) whereas in 2015 there were seven. Some 219 of the 222 were due to unlawful possession of mobile phones. This is due the recent tripling of punishments in closed prisons from five to 15 days, and also applies to pre-trial detainees.

There is, unfortunately, no general statistics regarding the duration of any isolation, except for the unlawful possession of mobile phones.

*Complaints*

Decisions on the use of the *strafcelle* made by local institutions can be appealed to Direktoratet for Kriminalforsorgen, whose decisions are final and cannot be brought before another administrative authority. An appeal to Kriminalforsorgen has no suspensory effect, unless it so decides. Decisions regarding disciplinary cells entailing a duration of more than seven days can be appealed to the court system (*Straffuldbyrdelsesloven* § 112 (3)). Other decisions can be brought to the judicial system under § 63 of the Danish Constitution.

Only a very small number of decisions are appealed first to Direktoratet and then before the judicial system. We are aware of three decisions from 2013 and in one of these the court overturned the administrative decision about the punishment cell.[52]

*Independent Oversight*

In 2012, the Parliamentary Ombudsman (Danish: Folketingets Ombudsmand), in cooperation with DIGNITY and the Danish Institute for Human Rights, began to conduct inspections of institutions where people who are deprived of their liberty as Denmark's National Preventive Mechanism (NPM) under the Optional Protocol to the Convention Against Torture (OPCAT). Recognising the particular concerns arising from the use of solitary confinement, the Ombudsman has long paid special attention to those in strafcelle and other forms of isolation when conducting its visits.[53] As the visit reports are not made public, it is not possible to ascertain the NPM's findings regarding the use of disciplinary measures.

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# Panel 4: What are the international experiences using alternatives and reducing the use of solitary confinement?

**Introduction**

Discipline within conventional prison settings centres on retribution and deterrence, deeming rehabilitation a secondary consideration, if at all. Environments which are oppressive and violent should call us to question the degree to which prisoners should be expected to adhere to prison discipline.[54] The primacy of security concerns also mean that expectations of reform need to be approached with some caution. Given that studies have found the measure at hand not to deter, the rationale of security and prison discipline must be critically evaluated.

***Legislative Change:*** is the most direct and effective avenue. Like Norway and Sweden, the most meaningful and concrete reform would be to abolish the measure outright in domestic legislation.

Favourable Regulation: Entry, Conditions and Exit: Other means of progressive reform of the use of solitary confinement as a disciplinary measure would be to restrict entry criteria, improve conditions of confinement, and strengthen review mechanisms.

***Prison Culture:*** A range of stakeholders, primarily prison administrators and guards, must also be factored in to the equation. Legitimate considerations of prison security and order would expectedly feature prominently in the mind of a decision maker. Legal or theoretical knowledge is no substitute for operational expertise of a prison's dynamics. It is important that they are given their due weight. Gauging the need for training on improving prisoner-prison staff relationships and practical implications of international law standards are key. These prescriptions are seemingly derived from the concept of 'dynamic security', a proactive approach which values positive prisoner-staff relationships to better enable staff to anticipate and address security threats early on.[55] Both the *EPR* (rule 51) and the *Mandela Rules* (rule 76) incorporate dynamic security into their respective understandings of prisoner management.

Prison officer culture is, by one account, 'central to the reproduction of the prison as a place of punishment and pain'.[56] Accordingly, it must be incorporated into any discussion on penal reform. That is to say, deep-seated cultural impediments may also encumber any change in procedure. One must be mindful, however, that prison authorities also act on political directives or other less formal cues such as the emanating rhetoric on law and order. Crewe, Bennett and Wahidin argue that there is an explanatory deficiency in how and why cultures differ between institutions or, 'the dynamics by which they are sustained'.[57] Leibling argues that prison staff culture cannot said to be homogenous, observing that prison staff operate on suspicion and machismo on the one hand and diplomacy, decisiveness and flexibility on the other.[58]

***Deterrence:*** Effectiveness of the disciplinary isolation is another aspect of the critique here. Even with other factors controlled, a recent study of male inmates in Oregon concluded that 'disciplinary segregation [double-celled isolation] was not a significant predictor of subsequent institutional misconduct'.[59] Lucas and Jones provide an overview of a number of similar studies that have reached similar conclusions with respect to various uses of solitary confinement.

***Cost–Related Arguments:*** Some have argued that it is cheaper to use solitary confinement than other less-restrictive means. However, when calculated, financial costs associated with relying on solitary confinement, which engages comparatively more prison resources to perform the same functions such as monitoring, delivering basic needs such as food, hygiene and recreation, undermine such reasoning. Moreover, as a secondary argument, according to Bennion, as cost efficiency arguments do not override the provision of other basic human needs like food, neither should they override another such need namely meaningful human contact.[60]

**Reform of Pre-trial Solitary Confinement in Denmark**

Historically, Denmark's use of solitary confinement during criminal investigations, pursuant to the *Administration of Justice Act* (Danish: *Retsplejeloven*), was excessive in number and duration. Smith and Koch point out that until the late 1970s more than 40% of all pre-trial detainees were placed in such solitary confinement.[61] As a consequence of extensive research and documentation, as well as pressure from organisations, individual experts and groups, and international committees, this practice was challenged and since improved.

The reform began in late 1982 with a parliamentary discussion. The Ministry of Justice requested, on two occasions, the opinion of the Criminal Justice Committee (Strafferetsplejeudvalget). The Committee then conducted an extensive comprehensive psychiatric and psychological study to inform this legislative process.[62] This lead to the Copenhagen Study on Solitary Confinement (Danish: *Isolationsundersøgelsen*), published in two phases being in 1994 and 1997, which was instrumental in documenting the health consequences of isolation. Danish psychiatrists Andersen, Sestoft and Lillebæk, inter alia, related the use of pre-trial solitary confinement to negative psychiatric effects, such as significantly higher incidence of psychiatric morbidity and higher likelihood of being admitted to the prison hospital for a psychiatric reason.[63] The authors, therefore, recommended that pre-trial solitary confinement be abolished.

Subsequently, a number of legislative changes focusing on better complaint and oversight mechanisms and decreased time limits were introduced.[64] The latest changes happened in 2006 following a major public debate[65] resulting in the introduction of the current time limits of maximum eight weeks.[66] Moreover, an oversight mechanism, which was introduced in the form of mandatory yearly reporting to the Ministry of Justice by the Director of Public Prosecution, entailed improved transparency and documentation.[67] This coupled with broader change in public and policy mentality incrementally reduced the use of pre-trial solitary confinement.

In 2001, 9,5% of all pre-trial detainees were held in isolation and, in 2015, this number dropped to only 0,7% of overall (being a total of 32 placements). This is a drop of more than 94% from 2001.

The average duration of solitary confinement in 2015 was 19 days.[68] In 2014, three prisoners were placed in isolation between 15 and 28 days, one prisoner was placed in isolation between 29 and 42 days and six were placed between 43 and 56 days. Altogether 10 prisoners were placed in prolonged solitary confinement.[69] The CAT and HRC, assessing this as prolonged and in breach of international standards, strongly recommended that time limits be further decreased.[70]

The main arguments in affecting these changes, as just outlined, were based on raising awareness of the harm inflicted by solitary confinement, the strengthening of judicial review mechanisms coupled with the imperative that it needed to be seen and used as a method of last resort. This development should be seen as an illustration of how rigid conceptions of necessity can be challenged and, ultimately, dismantled.

**International Experiences in Reforms and Alternatives**

There are significant challenges in comparing the use of solitary confinement across different jurisdictions. Prison conditions, degrees of isolation, terminology and regulatory frameworks are not standardised. With that in mind, reforms in jurisdictions comparable to Denmark show that more innovative and effective alternatives to solitary confinement, though not without their own shortcomings, exist. Focal points are found in Norway, Sweden, the UK, and the US. Despite the existence of strong historical work tracing the relevant developments, there is no comprehensive comparative research available on reforms and alternatives.

***Norway:*** where complete solitary punishment as a disciplinary measure was abolished with the enactment of the Execution of Sentences Act in 2001, is of some instruction here. The reform was also a product of domestic and international pressure. Exceptions in the regulatory framework are made for short-term punitive use entailing partial isolation for up to 24 hours.[71] Partial or complete preventive solitary confinement (i.e. exclusion) can still be used if necessary to 'maintain peace, order and security', and to prevent negatively influencing prison environment, criminal acts or material damage.[72] Human rights advocates have argued that the increased use of preventive

solitary confinement coupled with its vague and discretionary nature in Norway indicates a development of a practice where prevention is being used to circumvent the limitations on disciplinary measures.[73]

***Sweden:*** abolished the solitary confinement as a disciplinary measure in 1975.[74] The reforms were driven by the recognition of the harms resulting from isolation. Notably, the Parliamentary Committee tasked with the investigation also considered and dismissed the claims that the measure was indispensable as a last resort. [75] Furthermore, the Parliamentary Committee pointed out that prisons as a matter of course significantly isolate prisoners and that further isolation, when prolonged, would raise difficulties for the isolated prisoner, as a result of denial of prison programs such as job training, in re-adjusting back to society.[76] The CPT noted that although solitary confinement was purportedly used on administrative grounds as found under the relevant law, it was perceived by some interviewed inmates as punitive.[77]

***United Kingdom:*** has sought reforms in limiting its use of solitary confinement. Particularly In the last couple of years, its NPM has paid close attention to its causes and prevalence. This process has culminated in the development of new guidelines released in January 2017 where the UK NPM, amongst other things, requires: that evidence of the consideration of alternatives be provided by decision-makers; that isolation not occur due to a shortage of staff or facility design; that decisions should be authorised and recorded by senior staff; that basic amenities and routines should be provided and not be denied as a matter of policy; and that staff should play a positive and meaningful role with prisoners.[78]

**Grendon:** Pitted against the supermax, HMP Grendon in England represents a system of incarceration comprehensively informed by a psycho-therapeutic approach. As the only therapeutic community prison in England, it has successfully abolished isolation within its confines, only resorting to transferring its inmates to isolation cells in nearby prisons on the rare occasion.[79] It is all the more impressive as its prisoner population is comparable to that of a supermax, with a vast majority serving indeterminate sentences, with a history, prior to being transferred to Grendon, of 'significantly higher level of formal disciplinary punishments for disciplinary infractions'.[80] Composed of five distinct communities, each has its 'dedicated staff group including prison officers, a therapy manager who has psychotherapeutic training, a psychologist and facilitators with a range of professional and clinical backgrounds.'[81] Instances of poor behaviour are effectively addressed by the prisoner group. Significant outcomes have been documented 'including reduced levels of violence and self-harm, improved psychological well-being and improved quality of life for prisoners and staff'.[82]

***United States of America:*** Although the scale of solitary confinement remains a strong feature of the American penitentiary landscape, successful reforms have been realised in some states.[83] Standards and alternatives have been developed and advocated for by non-governmental organisations as well as governmental agencies.[84]

**Colorado:** has reduced its administratively segregated population from 7.7% of its overall population in 2011 to 1.1% in 2014 through developing specific facilities for the treatment of inmates with mental illnesses. It has also prohibited the isolation of women and children.[85]

**Maine:** According to the American Civil Liberties Union, the reforms there have been significant with: 'the number of prisoners in solitary confinement has been cut in half; the duration of stays in Maine's solitary units is generally now measured in days rather than weeks or months; and the treatment of prisoners in these units includes substantially more meaningful human interaction and more opportunity for rehabilitation.'[86] In terms of disciplinary solitary confinement, its imposition was limited to cases involving an 'extremely serious offence such as a fight involving weapons' where either of the following was present: '1) the prisoner constitutes an escape risk in less restrictive status; 2) the prisoner poses a threat to the safety of others in less restrictive status; 3) the prisoner poses a threat to his/her own safety in less restrictive status; or 4) there may be a threat to the prisoner's safety in a less restrictive status.' Alternatives were broadened to include: 'confining the prisoner to his own cell; limiting contact visits; restricting the visitors allowed to immediate family; loss of work opportunities'.

**New York:** Proposed changes to primarily reduce, through less restrictive means, the state's overreliance on extreme forms of solitary confinement were instigated by litigation. The draft bill Humane Alternatives to Long-

Term (HALT) Solitary Confinement Act proposes to ensure that those separated from the general population be placed in 'a rehabilitative and therapeutic unit aimed at providing additional programs, therapy, and support to address underlying needs and causes of behavior, with 6 hours per day of out-of-cell programming plus one hour of out-of-cell recreation' and that 'no person may be held in isolated confinement more than 15 consecutive days nor 20 days total in any 60 day period. At these limits, a person must be released or diverted to the alternative [unit] with more out-of-cell time, programs, and therapy.'[87]

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