

A NZCPL LECTURE

TONY ELLIS
PRESIDENT OF THE NZ COUNCIL FOR CIVIL LIBERTIES ^a

SOLITARY CONFINEMENT IN NZ: FINDINGS OF THE HIGH COURT AND THE UN COMMITTEE AGAINST TORTURE

1. In 2002, Mr Taunoa and 9 others originally sought to sue the Attorney-General and the Department of Corrections, Prison Medical officers and others in respect of the Behaviour Management Regime ("BMR") in Auckland Prison's "D" block, and for various solitary confinements in other prisons.
2. When the pleadings were finally settled, one plaintiff withdrew because of complications, and the Prison Medical Officers were not sued because of practical difficulties. There were an estimated 68 Medical Officers, and each would have been entitled to separate representation.
3. Whilst the case was filed in 2002 it did not come to trial until Oct and November 2003 and Feb/March 2004. Some 8 weeks were devoted to the hearing about 7 weeks for evidence, and 1 week for submissions.
4. Following the liability victory in April 2004¹, a compensation hearing was held in August 2004. That resulted in \$130,000 compensation, and \$358,000 costs and disbursements. Taunoa \$55,000, Robinson \$40,000, Tofts \$25,000, Kidman \$8,000, and Gunbie \$2,000.
5. The case was complex legally and factually, and understandable there was no precedent. Its nearest NZ equivalent was the Mangaroa settlement where the 4 prisoners beaten received nearer \$300,000.
6. Compensation was paid out to 4 inmates for various psychological abuse, beatings, and denial of medical treatment in 2000, as a result of a settlement.

¹ Taunoa v Attorney-General 7 HRNZ 379, also available at www.act.org.nz/compensation.

The compensation judgment is not yet reported but is available at www.scoop.co.nz/mason/stories/PO0409/S00039.htm

^a The opinions expressed here are those of the author and do not necessarily reflect the positions of Victoria University Law School.

How did the case come about?

7. Mr Bennett not one of these clients, but a leading client of mine in another case the Taito proceedings (successfully challenging the Court of Appeal's criminal procedures), was transferred from Rimutaka to Auckland Prison.
8. s7(1)(A) and (C) of the Penal Institutions Act provide that the Superintendent can restrict association for a maximum of 14 days and these can be extended to 3 months with head office approval. A judicial imposition of cellular confinement is to a maximum of 15 days and cannot be imposed cumulatively².
9. I had sought a habeas corpus for him without success, however the a bench of five judges of the Court of Appeal did decide that in that case that the Security classification system was unlawful. See **Bennett v. Superintendent, Rimutaka Prison (No 2); Karaitiana v. Superintendent, Wellington Prison.**³ K was placed in an isolation cell in non-voluntary segregation under the s 7(1A) direction ground because of reports indicating personal drug use and stand-over tactics against other inmates. K was released from confinement within 14 days as required by s 7(1C). No authorisation for the direction to remain in force had been received. A few days after the expiry of the 14 day period a further direction for his confinement emanated from a delegate of the Secretary for Justice and K was returned to cell confinement. It was intended that this would continue for some 10 weeks. The Court of Appeal noted that only the prison Superintendent had the power to initiate confinement, the Secretary's powers were limited to the authorisation of the continuance of the direction for confinement. No direction was operative, the further segregation of K was not in accordance with s 7 and was unlawful. The Court indicated that had there been an application by K for judicial review, instead of habeas corpus, relief would have been granted (the Superintendent of Wellington Prison acted on oral advice from the Court on the day of the hearing and K was immediately released from segregation).
10. That case is clearly distinguishable as the main argument was the scope of the Writ of Habeas Corpus, the solitary imposed being relatively short, and no argument was advanced along the lines of Taunoa as to whether long term use of solitary is torture.
11. What that case alerted me to, was that we had a system of solitary operating in this country. It was however disguised.

² s33(3) Penal Institutions Act 1954

³ [2002] NZAR 70 (CA) this commentary has been taken from Halls Laws of Sentencing, LexisNexis, Wellington, 2003.

Disguised terms

12. Livingstone and Owen, the authors of *Prison Law*⁴ state:
- the former (England & Wales) Chief Inspector of Prisons, Sir James Hennessy, commented in his 1985 special report on the use of **segregation** that it “*can entail living under an impoverished and monotonous regime which may even be psychologically harmful*”. Though the Home Office prefers the term “**segregation**”, the description “**solitary confinement**” more accurately describes the reality of what is involved.
13. The term “segregation” appears in the Corrections Act 2004.⁵ It is worthwhile to note at this early stage that all Taunua litigants were segregated, whether in **BMR** or more traditional solitary conditions in other prisons, for “*administrative*” reasons. They were detained for the good order and discipline of the prison, not for any disciplinary reason, nor by order of a judicial officer. None have had a judicial or even quasi-judicial hearing where they have been heard, nor was there any right of internal appeal or review.
14. Bennett used the word “capital cells” retained from the capital punishment days, none of these terms segregation, administrative segregation, or capital cells really meant anything to me.
15. However, on giving it some thought and research the penny dropped. Mr Robinson (the second plaintiff) for example whilst being on BMR for a year, recalled after the statement of claim was lodged that he had been in admin seg, or solitary for 3 years prior to that.
16. The UN Human Rights Committee⁶ noted in 2000 in respect of Denmark:
12. ... *The Committee is of the view that solitary confinement is a harsh penalty with serious psychological consequences and is justifiable only in case of urgent need; the use of solitary confinement other than in exceptional circumstances and for limited periods is inconsistent with article 10, paragraph 1, of the Covenant.*
- Denmark should reconsider the practice of solitary confinement and ensure that it is used only in cases of urgent**

⁴ Livingstone and Owen, *Prison Law*, 2nd edn (OUP, 1999) paragraph 10.07, repeated in more or less identical terms in Livingstone, Owen and MacDonald, *Prison Law*, 3rd edn (OUP, 2003) also at para 10.07; and see *A Review of the Segregation of Prisoners Under Rule 43*, Report by HM Chief Inspector of Prisons (London, 1985) (Hennessy Report) paragraph 2.29.

⁵ S 57 and see discussion below on the Act.

⁶ Concluding Observations of the Human Rights Committee, Denmark, 31 October 2000. CCPR/CO/70/DNK.

necessity.

(Bold in original).

17. I was aware of this and also very conscious that to seriously challenge this regime I needed to spend considerable time researching the issue. I took a year's sabbatical enrolled for a M Phil at the University of Essex and my thesis was entitled: PSYCHOLOGICAL TORTURE BY THE MISUSE OF LONG TERM SOLITARY CONFINEMENT IN NEW ZEALAND PRISONS AND THE DENIAL OF HABEAS CORPUS: AN INTERNATIONAL AND COMPARATIVE PERSPECTIVE.

What Conditions were the prisoners held in?

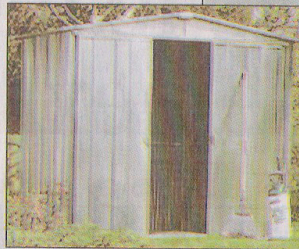
18. Firstly lets consider Solitary for those prisoners not on BMR ie not at Auckland prison. These prisoners are kept in solitary in a cell with yard attached. They are alone all day and night for months if not years on end.
19. The BMR was generally considered to be where the worse prisoners were sent. Most if not all would have however have spent months in solitary before being consigned to BMR.
20. The Sunday Star Times graphically portrayed the cell by comparison with a garden shed See photo 1. The Dominion Post also had a photograph from one we supplied see photo 2.

Solitary – New Zealand style

THE AVERAGE Kiwi kitset garden shed is about the same size as the behaviour management regime cell occupied by convicted killer Christopher Taunoa for up to 23 hours a day for about two years.

This illustration shows the human scale of the 3m by 1.8m cells at Paremoremo Prison outside Auckland. Each cell (shown to scale below with garden shed outline in red dashes) contained a bed, toilet, hand basin and a table and seat.

The cell occupied by Taunoa was closed on three sides, with an open grill on the fourth. Taunoa's lawyer told the High Court windows on the opposite side of a 3m-wide corridor opposite the cell were closed in summer and left open in winter.



AVERAGE GARDEN SHED:
2.2m x 2.2m
(7.3ft x 7.3ft)

CELL: 3m x 1.8m
(10ft x 6ft)

Average NZ male:
1.85m (6ft)



WHAT THE PRISONERS CLAIMED:

- 22 to 23 hours a day in a 3m by 1.8m cell
- exercise cells the same size
- no privacy
- inadequate fresh air
- no access to outside air for weeks
- nearby windows deliberately misused
- no personal clothing or bedding
- denied weekly changes of clothes and bedding



Bare necessities: A behaviour management regime cell. Lawyer Tony Ellis believes the regime is inherently unlawful. Picture: MARTIN KAY

PHASE	1	2	3	4
DURATION	14 days	Min = 6 weeks	Min = 2 months	Min = 2 months
Unlock hours per day	1 hour	1 hour	2 hours	2 hours
Association	No association	1 other	3 others	5 others
Movements	Restricted 3 (staff) – 1 (inmate)	Restricted 3 (staff) - 1	3-1	3-1
Meals	In cell	In cell	In cell	In cell
Visits	30 min booth per week	30 min booth per week	30 min booth per week	30 min booth per week
Personal Kits	No, except own shoes	No, except own shoes	No, except own shoes	No, except own shoes
Hobbies	None	None	None	As approved by UM/PCO
Cultural Activities	No	Individual visits only	Individual visits only	Individual visits only
Toiletries	Issued on request. Not retained	Retain in cell except razor	Retain in cell except razor	Retain in cell
Phones	2x10 min per week pre-arranged	2x10 min per week pre-arranged	2x15 min per week pre-arranged	Daily access to phones at discretion of staff
Smoking	No	No	No	No
P119 Purchases	As approved	As approved	As approved	As approved
TV	No	No	No	Yes
Stereo	No	No	Walkman	Walkman
PROGRAMMES				
Chapel	No, but individual visit is OK	No, but individual visit is OK	No, but individual visit is OK	No, but individual visit is OK
Education	No	Approved distance education	Approved distance education	Approved distance education
Core Programmes	No	No	No	No

Library	Books brought to cell	Books brought to cell	Books brought to cell	Books brought to cell
PARS (Prisoner Assistance Rehabilitation Service), Kaumatuas etc	As approved by UM (Unit Manager)/PCO (Principal Corrections Officer)	As approved by UM/PCO	As approved by UM/PCO	As approved by UM/PCO
Employment	Limited cleaning	Limited cleaning	Limited cleaning	Any available
Recreation	No	Yards 2x per week x1 hour	Yards 2x per week x2 hours	Yards 2x per week x2 hours
TARGETED BEHAVIOUR	1	2	3	4
	As per the unit's list of targeted behaviour	As per the unit's list of targeted behaviour	As per the unit's list of targeted behaviour	As per the unit's list of targeted behaviour

21. A least that was the theory. This table is the official scheme. Reality was different.
22. As can be seen from the judgment Mr Taunoa for example whilst supposedly being given an hour's outside exercise a day, actually had 17 days in 2 years, where he got his outside exercise.
23. The minimum in BMR until the Ombudsman's report was 9 months, then reduced to six months in Nov 2002 or thereabouts, many got more, it was snakes and ladders form one phase to the next and back.

What did the High Court find—BMR

24. The judgment of Justice Young can be best summarised by reading paragraphs 276-278 which are set out below:

[276] I am satisfied that in considering BMR overall it was in breach of s23(5) New Zealand Bill of Rights Act. Corrections failed to treat prisoners on BMR with humanity and failed to treat them

with the inherent dignity due every person. The degree of “mistreatment” varies from applicant to applicant. I consider the position with respect to each individual inmate at the end of this general section. However, I highlight the combination of factors which have convinced me. By themselves none may be sufficient, collectively they overcome the threshold of serious failure the New Zealand Bill of Rights Act is concerned with.

- (i) Some inmates were segregated for lengthy periods unlawfully. This failure was not simply a technical failure. Inmates on BMR were segregated for administrative purposes not arising from misconduct complaints. Inmates have protection of due process before they are charged with disciplinary offences. Where inmates are segregated for administrative reasons they cannot challenge why they are segregated. The protection for them is in the regime of review (s7(1)B and C) which if working should ensure no inmate is segregated for longer than can be justified by law.
- (ii) Inmates segregated (in isolation) for administrative reasons, beyond the fact of isolation should lose no “entitlements”. This fits logically with the proposition that isolation as administrative segregation is not punishment. Admission to the isolation cell for inmates on BMR did not occur after a hearing and a decision able to be challenged. Thus without a “misconduct” hearing, there should be no reduction in conditions, i.e. no punishment. In this case administratively segregated inmates on BMR did suffer “loss” of entitlements unlawfully.
- (ii) Breaches 1 and 2 are serious failures. The result of these failures were that inmates were deprived of a number of conditions and protections they would normally have been entitled to.
- (iii) Inmates’ conditions in a number of aspects were below those provided for in the Penal Institutions Regulations and the Penal Institutions Act. Some examples are inmates’ cell hygiene which fell below the standard anticipated by the Regulations; for example, some inadequate changes of clothes and bedding, and inadequate facilities for cell cleaning. There was inadequate monitoring of inmates’ mental health. There was no adequate check at entry on to the programme of the inmates’ mental health, nor were there adequate regular checks during the programme unless complaint was made. Exercise conditions were inadequate. Outside exercise was infrequent and no facilities for exercise were provided beyond the small room. Natural light in the cells was modest below standards for

housing. Strip searches were conducted in breach of the Act when they were “routine”. They typically lacked privacy and preservation of dignity. “Strips” after C&R also breached preservation of dignity requirements. Inmates were faced with contradictory, inadequate and confusing information about BMR which was unevenly distributed to them. One of the few checks on the regime, Superintendent or nominee visits to inmates, did not occur as it should have. The BMR programme itself ignored Corrections’ own psychiatric staff’s expressions of concern about its conflict with good behaviour management or modification, it ignored warnings about possible damage to inmates’ mental health, or at least it failed to take measure to monitor inmate mental health and it ignored international best practice for such regimes. A few rules could be seen as pointlessly punitive; for example, the refusal to supply individual inmate laundry bags and the control over toilet paper.

- [277] This combination of circumstances convinces me that inmates on BMR were not treated with the humanity, and with respect to the inherent dignity that they were entitled to as human beings. While inmates may not have been treated deliberately cruelly, this was collectively treatment that fell well below standards that befits a human being including one who is in prison and who has behaved badly in prison. Unlawful and difficult behaviour by prisoners can never justify unlawful conduct by their jailers.
- [278] In reaching these conclusions I acknowledge considerable generalisations have been made. I acknowledge that not all BMR applicant inmates all the time suffered all of the problems described. And I have dismissed a number of inmates’ complaints as exaggerated or untrue. However, most of the breaches identified applied to most of the applicant inmates most of the time. Clearly Mr Taunoa and Mr Robinson were most affected because they were subjected to BMR for the longest periods.

Solitary rather than BMR

25. None of the 4 plaintiffs would were not on BMR succeeded apart from one aspect of one. That major challenge currently failed. Why?

26. His Honour Justice Young said at:

[266]The applicants' case seemed to be that in any event segregation or solitary confinement of prisoners is by itself torture. I reject that submission, indeed the proposition itself does not seem helpful. It is simply impossible to say in a general sense what is or is not solitary confinement. No definition in law exists. Rather than anguish about the definition of solitary confinement, it is far better in my view to concentrate on the particular facts of the case and analyse how these facts fit with the definition of torture. The answer, therefore, to the proposition that solitary confinement per se is torture is that it depends on the facts established; in some cases it might be, in others it will not be. I consider this aspect further in paragraph ...

27. His Honour was obviously unimpressed with comments by Rodley:⁷

It is obvious, however, that a juridical definition cannot depend upon a catalogue of horrific practices; for it to do so would simply provide a challenge to the ingenuity of the torturers.

28. Or by Cory J., dissenting partly, in **Winters v. Legal Services Society**⁸ (but not on this point) noted that in **McCann v. Canada**:⁹

53. It was observed that the substantial and deleterious effects of solitary confinement are well documented and have long been known. At p.9 of Shubley, [R. v. Shubley (1990), 52 CCC (3d) 481], I

⁷ See Nigel S. Rodley, "The Definition(s) of Torture in International Law" in *Current Legal Problems* 2002, Vol. 55 (OUP, 2003)

⁸ 177 DLR (4th) 94 (1999).

⁹ (1975) 29 CCC (2d) 337.

wrote:

Prisons within prisons have been known to man as long as prisons have existed. As soon as castles had dungeons there were special locations within those dungeons for torture and for solitary confinement. The grievous effects of solitary confinement have been almost instinctively appreciated since imprisonment was devised as a means of punishment. *Prisons within prisons* exist today, exemplified by solitary confinement.

[Emphasis added by Cory J.]

- 29. We shall see what the Court of Appeal has to say.
- 30. Clearly the UN Committee Against Torture had no problem with recognising solitary confinement, when it saw the Taunua judgment.

UN Committee Against Torture—May 2004¹⁰

- 31. The report is available on the Web¹¹. The following points are of note.

C. Subjects of Concern

The Committee expresses concern about:

(d) Cases of over-prolonged non voluntary segregation (solitary confinement), as the prolonged and strict conditions of such a detention may amount, in certain circumstances, to acts prohibited by article 16 of the Convention;

(f) The findings of the Ombudsman regarding investigations of alleged staff assaults on inmates, in particular regarding the reluctance to confront such allegations promptly, and the quality, impartiality, and credibility of investigations.

D. Recommendations

¹⁰ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987, created the Committee see Article 17.

¹¹ www.humanrights.co.nz/documents/CATCteeReportMay04.doc

7. The Committee recommends that the State party:

(d) Reduce the time and improve the conditions of non-voluntary segregation (solitary confinement) that can be imposed on asylum seekers, prisoners and other detainees;

(g) Carry out an inquiry into the events that led to the decision of the High Court in the Taunoa and al. case;

(h) Inform the Committee about the results of the action taken in response to the concern expressed by the Ombudsman regarding investigations of staff assaults on inmates.

9. The Committee recommends that the State party disseminate widely the Committee's conclusions and recommendations, in appropriate languages, through official websites, the media and non-governmental organizations.

10. The Committee requests the State party to provide, within one year, information on its response to the Committee's recommendations contained in paragraphs 7 b), c), d) and h) above.

32. The Comments from the Committee arose from the 3rd periodic report from the Government in respect of its compliance with the Convention Against Torture. The Government's assertion that during the period of the report that there had been no allegations of torture, was not only completely untrue but also provided the impetus to provide an alternative report to the Committee, which the NZCCL did.

33. The result of that you can see. This was particularly important given the Government sent 8 officials to defend their position including the General Manager Public Prisons and we had a 1/3rd share at best of a volunteer.

Legislative Change

34. There are of course more ways of changing the law than winning a High Court case. Whilst Justice Young was not minded to find lengthy periods of solitary unlawful, by firm lobbying on the Corrections Bill 2002 a major change was implemented improving human rights.
35. Much of this is because the Greens took a very firm and principled position. I had put in the most extensive submission on any legislation I have to date—some 44 pages. From the report back of the Select Committee it was clear the political parties were deadlocked and the Bill would not be passed, it did eventually pass only with the Greens support..
36. However, as part of that support major changes were made to the solitary regime.
37. Section 7(1A) of the Penal Institutions Act 1954 reads:
- [(1A) Without limiting the generality of subsection (1) of this section, if a Superintendent is satisfied that—
- (a) The safety of an inmate or of any other person, or the security of the institution, would otherwise be endangered; or
- (b) Directions to be given under this subsection are in the interests of an inmate and the inmate consents to or requests the giving of the directions; or
- (c) Failure to give the directions would be seriously prejudicial to the good order and discipline of the institution,—
- he may in the discharge of his responsibility for the general administration of the institution give directions that the opportunity of the inmate to associate with other inmates be restricted or denied for a period.
38. Whereas the Corrections Act 2004 (In force early 2005) requires a Visiting Justice to approve segregation beyond three months. This was a significant victory. The relevant section reads:
58. Segregation for purpose of security, good order, or safety
- (1) The prison manager may direct that the opportunity of a prisoner to associate with other prisoners be restricted or denied if, in the opinion of the manager,—

(a) the security or good order of the prison would otherwise be endangered or prejudiced; or

(b) the safety of another prisoner or another person would otherwise be endangered.

(2) If a direction is given under subsection (1),—

(a) the prisoner concerned must promptly be given the reasons in writing for the direction and any subsequent direction under subsection (3)(c):

(b) the chief executive must promptly be informed of the direction and the reasons for it.

(3) A direction under subsection (1)—

(a) must be revoked by the prison manager if there ceases to be any justification, under subsection (1), for continuing to restrict or deny the opportunity of the prisoner to associate with other prisoners:

(b) may be revoked at any time by the chief executive or a Visiting Justice:

(c) expires after 14 days unless, before it expires, the chief executive directs that it continue in force:

(d) if it continues in force because of a direction under paragraph (c), must—

(i) be reviewed by the chief executive at intervals of not more than 1 month:

(ii) expire after 3 months unless a Visiting Justice directs that it continue in force:

(e) if it continues in force because of a direction under paragraph (d)(ii), must be reviewed by a Visiting Justice at intervals of not more than 3 months.

Compare: 1954 No 51 s7(1A)-(1C)

Status Compendium

39. In Summary

A: Following the High Court judgment the BMR programme was shut down;

B: The UN Committee Against Torture expresses its concerns and called for improvements;

C: The Corrections Act 2004 brings about significant Human Rights improvements;

D: The Taunua 5 received compensation.

As important as these victories are more need to be done. The Court of Appeal is the next venue and I hope to achieve further progress there.

Tony Ellis

7 October 2004

Wellington