Sekretariatet

ADVOKAT SAMFUNDET

Justitsministeriet
Slotsholmsgade 10
1216 København K

jm@jm.dk + cmg@jm.dk

KRONPRINSESSEGADE 28
1306 KØBENHAVN K
TLF 33 96 97 98

DATO 10 september 2018
SAGSNR 2018 - 2024
ID NR 544632

Høring over udkast til forslag til lov om ændring af lov om fuldbyrdelse af straf mv., retsplejeloven, straffeloven og lov om folkeskolen (Forhold for indsatte i kriminalforsorgens institutioner, varetægtssurrogat mv.)

Justitsministeriet har ved e-mail af 13. august 2018 anmodet om Advokatrådets bemærkninger til ovennævnte lovforslag.

Advokatrådet finder, at lovforslaget generelt medfører en væsentlig forringelse af retssikkerheden for de indsatte og personer, som er tilknyttet de indsatte.

Det er Advokatrådets opfattelse, at den øgede overvågning med indsattes kommunikation og muligheden for at indsamle, behandle og videregive oplysninger til andre myndigheder er et vidtgående indgreb over for indsatte eller personer, som indsatte har kontakt til.

Advokatrådet finder det særligt betænkeligt, at det som grundlag for så vidtgående indgreb vil være tilstrækkeligt for kriminalforsorgen at henvise til brede og vage begrundelser som "ordens- eller sikkerhedsmæssige hensyn" eller "hensyn til bekæmpelse og forebyggelse af kriminalitet".

Advokatrådet noterer sig i den forbindelse, at der ikke stilles krav om, at kriminalforsorgen i de enkelte tilfælde konkret skal godtgøre, at indgrebet er påkrævet af ordens- eller sikkerhedsmæssige hensyn mv.

Lovforslaget åbner endvidere op for, at kriminalforsorgen uden retskendelse kan gøre sig bekendt med indholdet af elektroniske effekter, som en indsat har i sin besiddelse, eller som i øvrigt forefindes i kriminalforsorgens institutioner, og som indsatte efter lovgivningen ikke må besidde. Endvidere følger det af lovforslaget, at dette indgreb kan foretages uden nogen form for begrundelse.

Det er Advokatrådets opfattelse, at indgreb i kommunikationsmidler kun bør foretages efter indhentelse af en retskendelse i overensstemmelse med de hidtidige regler. Kriminalforsorgens adgang til indholdet af elektroniske effekter – uden nogen

form for begrundelse – strider imod almindelige principper i en retsstat, også selv om der er tale om personer, der er indsat i kriminalforsorgens institutioner.

Endvidere er det efter Advokatrådets opfattelse bemærkelsesværdigt, at der ikke i lovforslaget er anført en egentlig begrundelse for, at det er nødvendigt at fravige kravet om retskendelse.

Advokatrådet skal derfor opfordre Justitsministeriet til at genovervejen hensigtsmæssigheden og sagligheden af denne bestemmelse.

Med venlig hilsen

Torben Jensen

Børnerådet

Justitsministeriet
Straffuldbyrdelseskontoret
Slotsholmsgade 10
1216 København K

10.09.2018
J.nr. 3.7.27/JR

Børnerådets kommentar til Lov om ændring af lov om fuldbyrdelse af straf m.v., retsplejeloven, straffeloven og lov om folkeskolen

Indledende vil Børnerådet gerne understrege, at unge under 18 år slet ikke skal anbringes i varetægt på kriminalforsorgens institutioner over længere tid. Ifølge Børnekonventions artikel 37 skal frihedsberøvelse af unge under 18 år altid ske under hensyntagen til barnets aldersmæssige behov, og frihedsberøvelse skal ske for det kortest mulige passende tidsrum og med ret til hurtig afgørelse af sagen. Unge under 18 år, skal hurtigst muligt overføres til varetægtssurrogat på en sikret institution, hvor muligheden for at tage hånd om de unge er bedre end i arresthusene.

Brugen af strafcelle har været i kraftig stigning over de seneste år. Børnerådet hilser derfor forslaget om begrænsning af brugen af strafcelle overfor mindreårige velkommen. Herunder bemærker vi særligt, at strafcelle som udgangspunkt højst skal ikendes for et tidsrum af 3 dage, og kun undtagelsesvist op til 7 dage. Vi mener, at denne begrænsning af strafcelle også skal gælde i sager om vold mod personalet, idet isolation alene har karakter af straf og ikke forebygger nye voldstilfælde. I stedet bør udadreagerende adfærd blandt mindreårige i kriminalforsorgens institutioner, følges op med konfliktforebyggende indsatser, med større chancer for at forebygge nye tilfælde af vold – både indenfor og udenfor murene.

Forslaget om en begrænsning af brugen af strafcelle, sker efter anbefaling fra både Folketingets Ombudsmand og Europarådets Torturkomité, som har udtrykt bekymring

over brugen af isolation som disciplinærstraf, særligt i forhold til unge under 18 år. Bekymringerne går på de fysiske og/eller psykiske skadevirkninger som isolationsanbringelser kan har. I forlængelse heraf ser Børnerådet helst, at den isolationslignende sanktion som strafcelle er, helt afskaffes for unge under 18 år. I den udstrækning strafcelle alligevel anvendes til unge under 18 år, anbefaler Børnerådet, at den unge dagligt deltager i såkaldt begrænsede fællesskaber med andre, gennem daglig beskæftigelse på institutionen, medmindre konkrete forhold taler imod.

Børnerådet ser generelt positivt på, at der i ændringsforslaget er fokus på at sikre mindreåriges ret til undervisning. I det omfang kriminalforsorgen i praksis har udfordringer med at tilbyde relevante undervisningsforløb, som fuldt ud opfylder folkeskolelovens krav til fagudbud, timetal mv. er vi tilfredse med indførelsen af regler, som betyder, at kriminalforsorgen som minimum skal tilbyde undervisning, der samlet set står mål med undervisningen i folkeskolen. Vi ser gerne en præcisering af, hvordan det sikres, at undervisningen tager udgangspunkt i den unges individuelle behov og potentialer, så den unge opnår størst mulig skolefaglig udvikling.
Det er ligeledes positivt, at kriminalforsorgen, i tilknytning til undervisningsopgaven, skal påse, at der foreligger en uddannelsesplan for 15-17-årige, der afslutter folkeskolens 9. klasses afgangsprøver, og gerne som del af en generel handlingsplan, idet dette sikrer et fokus på at styrke den unges muligheder efter afsoning.

I forhold til lovforslagets øvrige indhold vedrørende øget overvågning og registrering af indsattes kommunikation med andre indsatte og besøgende samt etablering af en ny efterretningsenhed i kriminalforsorgen, anbefaler Børnerådet, at der oprettes et eksternt kontrolorgan som skal sikre overholdelse af Den Europæiske Menneskerettighedskonventions (EMRK) artikel 8, stk. 1. samt Børnekonventions artikel 16. Ifølge disse artikler har enhver ret til respekt for sit privatliv og familieliv, sit hjem og sin korrespondance. Dette gælder også unge under 18 år, som er indsat i sikrede institutioner og arresthuse/fængsler. Formålet med oprettelsen af et eksternt kontrolorgan er, at

Hovedgaden 12, 1. • 7190 Billund • Tlf. 3378 33 00 • brd@brd.dk • www.brd.dk • EAN: 5798000985827 • CVR: 25966376

sikre løbende tilsyn med, at indgreb i udøvelsen af denne ret alene sker i overensstemmelse med loven og reelt er nødvendig af hensyn til den nationale sikkerhed, for at forebygge uro eller forbrydelse.

Med venlig hilsen

Per Larsen
Formand for Børnerådet

Lisbeth Sjørup
Sekretariatschef

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Signe Hovmøller Ellemose

Fra: Rina Raun Borg <RRB@da.dk>
Sendt: 15. august 2018 08:40
Til: Justitsministeriet; Camilla Marta Giordano
Emne: Høring - Lov om ændring af lov om fuldbyrdelse af straf m.v. (j. nr. 2018-0090-0415)

Til rette vedkommende

Høring om Lov om ændring af lov om fuldbyrdelse af straf m.v. (j. nr. 2018-0090-0415) falder uden for DA's område.

Med venlig hilsen

Rina Raun Borg
Administrativ koordinator, barselsvikar

DANSK ARBEJDSGIVERFORENING
Vester Voldgade 113
DK-1790 København V
Direkte +45 33 38 92 97
Mobil +45 29 20 02 97
E-mail rrb@da.dk
Web **www.da.dk**

Fra: Justitsministeriet <jm@jm.dk>
Sendt: 13. august 2018 10:22
Emne: Høring - Lov om ændring af lov om fuldbyrdelse af straf m.v. (j. nr. 2018-0090-0415)

Se venligst vedhæftede filer

Med venlig hilsen

JUSTITS
IT og Service
Slotsholmsgade 10
1216 København K
Tlf.: 7226 8400
www.justitsministeriet.dk
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danske ERHVERVSSKOLER OG -GYMNASIER

Justitsministeriet
Slotsholmsgade 10
1216 København K

Den 3. september 2018

Vedrørende sagsnr.: 2018-0090-0415

Høring over udkast til forslag til lov om ændring af lov om fuldbyrdelse af straf m.v., retsplejeloven, straffeloven og lov om folkeskolen (Forhold for indsatte i kriminalforsorgens institutioner, varetægtssurrogat m.v.)

Danske Erhvervsskoler og -Gymnasier har ingen bemærkninger til ovenstående høring.

På vegne af Danske Erhvervsskoler og -Gymnasier

Camilla Kjær Mårtonsson
Overassistent

Danske Handicaporganisationer

Blekinge Boulevard 2
2630 Taastrup, Danmark
Tlf.: +45 3675 1777
Fax: +45 3675 1403
dh@handicap.dk
www.handicap.dk

Til Justitsministeriet
E-mail: jm@jm.dk og cmg@jm.dk

Taastrup, den 07. september 2018
Sag 16-2018-00668 – Dok. 385016/mmh_dh

Danske Handicaporganisationers (DH) høringssvar til lovforslag om fuldbyrdelse af straf

DH takker for muligheden for at komme med bemærkninger til lovforslag om fuldbyrdelse af straf. DH har følgende bemærkninger:

Transport af arrestanter med psykisk sygdom eller vidtgående psykisk handicap
Det fremgår af lovforslaget, at kriminalforsorgen skal overtage en væsentlig del af politiets opgaver med transport af bl.a. arrestanter, herunder unge og psykisk syge, samt domfældte, der er anbragt i hospital for sindslidende eller i institutioner inden for det sociale område, herunder institutioner for personer med vidtgående psykiske handicap.

DH finder, at lovforslaget alene fokuserer på anvendelsen af magt i forbindelse med transport af bl.a. personer med en sindslidelse eller vidtgående psykisk handicap.

DH savner, at der kommer fokus på, at kriminalforsorgens personale, skal have viden om mennesker med en sindslidelse eller psykisk handicap. Det er afgørende for at kunne løse opgaven så skånsomt som muligt og reelt kunne leve op til proportionalitets- og skånsomhedsprincippet.

DH anbefaler, at det i forbindelse med opgaveflytningen af transport af visse personer fra politiet til kriminalforsorgen sikres, at de pågældende medarbejdere får den nødvendige uddannelse til opgaven. Fx uddannede i teknikker til skånsom fysisk fastholdelse, proportionsbetragtninger osv.

For uddybning kontakt venligst chefkonsulent Maria Holsaae, tlf.nr. 24 45 15 57 eller e-mail: mmh@handicap.dk

Med venlig hilsen

Thorkild Olesen
formand

B-SOSU

Danske SOSU·skoler

Justitsministeriet
Straffuldbyrdelseskontoret
Slotsholmsgade 10
1216 København K

København, den 10. september 2018

Fælles høringssvar til høring over udkast til forslag til lov om ændring af lov om fuldbyrdelse af straf m.v., retsplejeloven, straffeloven og lov om folkeskolen (forhold for indsatte i kriminalforsorgens institutioner, varetægtssurrogat m.v.)

Danske SOSU-skoler og Bestyrelsesforeningen for Social-og sundhedsskoler kvitterer hermed for invitationen til at afgive høringssvar til Justitsministeriet i høring over ovenfor nævnte udkast til lov om ændring af lov om ændring af lov om fuldbyrdelse af straf m.v., retsplejeloven, straffeloven og lov om folkeskolen (forhold for indsatte i kriminalforsorgens institutioner, varetægtssurrogat m.v.).

Foreningerne har ingen bemærkninger til det fremsendte forslag.

Med venlig hilsen
På foreningernes vegne
e.b.

Michael Kümmel
chefkonsulent

Danske SOSU-skoler og B-SOSU
Ny Vestergade 17, 2. sal, 1471 København K
tlf. 42 41 35 01, e-mail: lederforeningen@sosu.dk, b-sosu@sosu.dk

DATATILSYNET

Justitsministeriet

Sendt til jm@jm.dk og cmg@jm.dk

05-09-2018

Datatilsynet
Borgergade 28, 5
1300 København K

CVR-nr. 11-88-37-29

Telefon 3319 3200
Fax 3319 3218

E-mail dt@datatilsynet.dk
www datatilsynet.dk

J.nr. 2018-11-0087
Dok.nr.
Sagsbehandler
Amanda Lærke Vad

Høring over udkast til forslag til lov om ændring af lov om fuldbyrdelse af straf m.v., retsplejeloven, straffeloven og lov om folkeskolen (Forhold for indsatte i kriminalforsorgens institutioner, varetægtssurrogat m.v.)

Ved e-mail af 13. august 2018 har Justitsministeriet anmodet om Datatilsynets eventuelle bemærkninger til ovennævnte udkast til lovforslag.

Vedrørende indsættelsen af en ny bestemmelse i straffuldbyrdelseslovens § 66 b, stk. 1, har Datatilsynet noteret sig det oplyste om, at Kriminalforsorgens behandling af personoplysninger om indsatte som led i den foreslåede ordning vil skulle ske inden for rammerne af retshåndhævelsesloven, herunder §§ 9 og 10, samt at bestemmelsen – efter Justitsministeriets vurdering – kan vedtages inden for rammerne af retshåndhævelsesdirektivets artikel 8 og 10.

Indsættelsen af den forslåede bestemmelse giver i øvrigt ikke umiddelbart Datatilsynet anledning til bemærkninger.

Vedrørende indsættelsen af en ny bestemmelse som retsplejelovens § 776 a, har Datatilsynet forstået det sådan, at den foreslåede ordning vil give kriminalforsorgen mulighed for at fotografere og optage fingeraftryk af samtlige varetægtsarrestanter med henblik på senere identifikation, uanset grundlaget for varetægtsfængslingen eller risikoen for, at den pågældende vil unddrage sig varetægtsfængslingen.

Datatilsynet skal i den forbindelse opfordre til, at Justitsministeriet i bemærkningerne til lovforslaget beskriver forholdet til retshåndhævelsesloven, herunder om den foreslåede ordning opfylder princippet om dataminimering og reglerne om behandlingshjemmel.

Datatilsynet bemærker i den forbindelse, at biometriske data, herunder fingeraftryk, udgør en følsom personoplysning.

Med venlig hilsen

Amanda Lærke Vad

Signe Hovmøller Ellemose

Fra:	Mikael Sjöberg <MikaelSjoeberg@OestreLandsret.dk>
Sendt:	25. september 2018 13:04
Til:	Justitsministeriet
Cc:	Camilla Marta Giordano
Emne:	Høring 2018-0090-0415

Justitsministeriet
Straffuldbyrdelseskontoret

Justitsministeriet har ved brev af 13. august 2019 anmodet blandt andet Dommerforeningen om eventuelle bemærkninger til udkast til lov om ændring af lov om fuldbyrdelse af straf m.v., retsplejeloven, straffeloven og lov om folkeskolen (Forhold for indsatte i kriminalforsorgens institutioner, varetægtssurrogat m .v.)

Lovudkastet har været behandlet på et bestyrelsesmøde i Dommerforeningen.

Med forslaget stilles der ikke mere krav til, at kriminalforsorgen indhenter en retskendelse for at undersøge indholdet af elektroniske effekter. Forslaget åbner hermed op for, at der kan foretages indgreb, som i andre sammenhænge kræver retskendelse. Der ses ikke fremført eksempler på, at en forud indhentet - eller efter omstændighederne en efterfølgende indhentet - tilladelse til at foretage et sådan indgreb har besværliggjort kriminalforsorgens retshåndhævelser i fængslerne, og Dommerforeningen skal derfor henstille, at netop denne del af lovforslaget overvejes på ny.

I øvrigt giver lovudkastet ikke anledning til bemærkninger.

Med venlig hilsen

Mikael Sjöberg

Mikael Sjöberg
landsdommer/Formand for Den Danske Dommerforening
Direkte: + 45 99 68 65 01/ 21 66 18 49

DEN DANSKE DOMMERFORENING

Justitsministeriet
Att.: Pernille Bjørnholk, chefkonsulent
Høringssvaret et fremsendt pr. e-mail
til: jm@jm.dk, pbj@jm.dk, cmg@jm.dk

DIGNITY
DANSK
INSTITUT
MOD TORTUR

København, den 10. september 2018

Vedr.: Høringssvar vedrørende udkast til forslag til lov om ændring af lov om fuldbyrdelse af straf m.v., retsplejeloven, straffeloven og lov om folkeskolen (Forhold for indsatte i kriminalforsorgens institutioner, varetægtssurrogat m.v.)

DIGNITY – Dansk Institut mod Tortur (DIGNITY) ønsker hermed at takke Justitsministeriet for jeres anmodning af d. 13. august 2018 om en udtalelse om ovennævnte lovforslag. DIGNITYs bemærkninger er begrænset til den del af lovforslaget, som vedrører spørgsmålet om brugen af strafcelle overfor mindreårige i danske fængsler og arresthuse, dvs. anbringelse i isolation som en sanktion for overtrædelse af en række ordensforseelser, jf. straffuldbyrdelsesloven § 67-72.

DIGNITY er medlem af den danske nationale forebyggende mekanisme under OPCAT, som er forankret hos Folketingets Ombudsmand, og som løbende besøger danske fængsler med henblik på at styrke beskyttelsen mod og forebyggelsen af tortur, umenneskelig og nedværdigende behandling.

DIGNITY har i mange år sat fokus på den høje anvendelse af isolationsfængsling i Danmark. Som kulmination på adskillige års forskning og praksis og i lyset af den internationale retsudvikling afholdt vi i april 2017 en international konference om brugen af strafcelle i Danmark og internationalt. Ved konferencen deltog 100 nationale og internationale eksperter, bl.a. repræsentanter fra FN og Europarådets komité til Forebyggelse af Tortur, Justitsministeriet, Kriminalforsorgen, Fængselsforbundet i Danmark, fængselsdirektører fra vores nabolande, Ombudsmanden, Institut For Menneskerettigheder, forskere, læger, psykologer m.fl.

Vedhæfter finder I konklusionerne fra konferencen (bilag 1) og notat til Folketingets Retsudvalg, udarbejdet forud for vores foretræde for udvalget i april 2017 (bilag 2).

DIGNITY
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CVR nr. 69735118
P nr. 1002304764
EAN 5790000278114
LOK nr. 5790001376147

Danske Bank Nr.
4183-4310821209

Det er et fornuftigt synspunkt at revurdere praksis og lovgivning vedrørende isolation af mindreårige, og DIGNITY ser således positivt på Justitsministeriets og Kriminalforsorgens initiativ til i første omgang at fokusere på anvendelse af strafcelle. Må vi dog opfordre ministeriet til at overveje i fremtiden at inddrage eksperter og civilsamfundsorganisationer på et tidligere stadie i sådanne processer, således at eksisterende viden og erfaring om fængselsforhold og voldsforebyggelse om muligt kan inddrages allerede i lovforslaget som sendes i høring?

Må vi i denne anledning endvidere opfordre Justitsministeriet og Kriminalforsorgen til snarest at sætte fokus på de andre former for isolation, som anvendes overfor mindreårige i danske fængsler, og som ikke er berørt af nærværende lovforslag, herunder udelukkelser fra fællesskab og anbringelse i sikringscelle (jf. straffuldbyrdelsesloven) og isolation besluttet af Retten (jf. retsplejeloven)?

1: Baggrund

Dansk lovgivning og praksis vedrørende anvendelse af strafcelle

Det er det klare udgangspunkt, at mindreårige (unge mellem 15 – 17 år), der er dømt for en lovovertrædelse, ikke skal anbringes til afsoning i fængslerne, men derimod i familiepleje eller i institutioner uden for Kriminalforsorgen.[1] På trods af en stødt faldende ungdomskriminalitet placeres et højt antal mindreårige stadig i danske fængsler. I 2016 sad der i gennemsnit 11 mindreårige i fængsel hver dag, hvoraf gennemsnitligt ca. 9 var under afsoning og ca. 2 var i varetægt.[2]

Anbringelsen i isolation (strafcelle) er den alvorligste sanktion, der gennemføres overfor indsatte, som bryder en række ordensforseelser, og som kan vare i op til 4 uger ad gangen, jf. straffuldbyrdelsesloven § 70.

Mindreårige bliver i mindre grad straffet med isolation, og statistik viser et fald fra 25 sager i 2014 (18 sager af 1-5 dages varighed og 7 sager af 6-10 dages varighed) til 15 i 2015 (12 sager af 1-5 dages varighed og 3 sager af 6-10 dages varighed). De fleste af sagerne vedrørte strafafsonere (19 af sagerne fra 2014 og 13 fra 2015).[3]

Internationale juridiske regler

De internationale regler fastslår, at isolation generelt (dvs. ikke alene i form af strafcelle) bør afskaffes overfor mindreårige, jf. FN Standard Minimum Regler for

[1] Straffuldbyrdelsesloven § 78, stk. 2 og 4.
[2] Kriminalforsorgens årlige statistik 2016, tabel 3.3 gennemsnitlige belægning af unge under 18 år.
[3] Brev fra Kriminalforsorgen til DIGNITY af 26. august 2016.

Indsatte (Mandela Rules),[4] idet mindreårige er en sårbar gruppe for hvem isolation vil indebære en risiko for overtrædelse af forbuddet mod umenneskelig og nedværdigende behandling, jf. EMRK artikel 3 og FNs Torturkonvention artikel 16. Stater, som har ratificeret FNs Torturkonvention, har en klar forpligtelse til at indrette lovgivningen og praksis med henblik på at forebygge umenneskelig og nedværdigende behandling, jf. Artikel 16 i Torturkonventionen. Der henvises endvidere til Europarådets anbefalinger vedrørende mindreårige:

> Solitary confinement in a punishment cell shall not be imposed on juveniles.[5]

Mandela Rules understreger i samme ånd, at disciplinære foranstaltninger aldrig må indebære en risiko for umenneskelig og nedværdigende behandling.[6] Der henvises endvidere til 1990 FN Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules), rule 67:

> All disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned.

FNs Børnekomite henviser ofte til forbuddet mod isolation anvendt som disciplinær foranstaltning og bredere til "any other punishment that may compromise the physical or mental health of the juvenile concerned", jf. General Comment No. 10 (2007), para 89.

FNs direkte anbefalinger til Danmark

Der er også en klar tendens blandt internationale menneskerettighedsorganer til at anbefale lande hurtigst muligt at afskaffe isolation overfor mindreårige, hvilket blandt andet kom til udtryk i de seneste anbefalinger til Danmark fra FNs Torturkomité, som i december 2015 anså afskaffelse af isolationsfængsling overfor mindreårige som et af de såkaldte follow-up issues, der krævede handling fra danske myndigheder indenfor et år.[7] Der henvises endvidere til anbefalingerne fra FNs Menneskerettighedskomité fra 2016.[8]

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[4] Para 45(2): "... 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, continues to apply".

[5] Recommendation CM/Rec(2008)11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures, para 95(3).

[6] Rule 43: "In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment."

[7] CAT/C/DNK/CO/6-7 af 4. februar 2015, para 33(4).

[8] CCPR/C/DNK/6 af 15. august 2016, para 24.

Sundhedsfaglige konklusioner

Isolation har ofte alvorlige negative sundhedsmæssige konsekvenser. Der er dokumentation for, at isolation kan medføre angst, depressioner og en øget risiko for selvskade og selvmord. Skadevirkninger kan opstå allerede efter kun et par dage og stige for hver dag i isolation. Forskningen har vist, at indsatte efter isolation kan have alvorlige fysiske, psykiske og sociale problemer, og at reintegration i samfundet efter fængselsophold bliver mere vanskelig.

Børn anses for at være en særlig sårbar gruppe overfor hvem isolation og straf i fængsel kan have særlige alvorlige skadevirkninger. Sundhedsfaglige eksperter anbefaler således entydigt, at af hensyn til barnets tarv og trivsel bør isolation ikke anvendes i fængsler. [9]

2: Manglende stillingtagen til internationale normer og anbefalinger vedrørende forebyggelse af umenneskelig og nedværdigende behandling

Lovbemærkninger (afsnit 2.6 Begrænsning af brugen af strafcelle over for mindreårige) indeholder en henvisning til Europarådets Torturkomité og dens bekymring over brugen af isolation som disciplinærstraf i Danmark, særligt i forhold til unge under 18 år.

Lovbemærkninger indeholder dog ikke en juridisk vurdering af de internationale normer på området (se ovenfor) og en stillingtagen til, om den foreslåede lov- og praksisændring harmonerer med Danmarks internationale forpligtelser til at forebygge umenneskelig og nedværdigende behandling og til at afskaffe anvendelse af isolation som en disciplinær foranstaltning overfor børn. Lovbemærkningerne mangler endvidere en stillingtagen til FNs anbefalinger til Danmark om at rette op på lovgivning og praksis på området.

DIGNITY anbefaler, at lovforslaget, når det fremsættes i Folketinget, indeholder Justitsministeriets juridisk vurdering af de menneskeretlige aspekter af lovforslaget, herunder forbuddet mod umenneskelige og nedværdigende behandling, og en stillingtagen til FNs anbefalinger på området.

[9] Der henvises til DIGNITYs 2017 konference og litteratur nævnt i konferencerapporten, samt til senere udgivelser, herunder Royal College of Paediatrics and Child Health (RCPCH), Royal College of Psychiatrists and British Medical Association (BMA) Joint position statement on solitary confinement of children and young people (2018).

3: Anvendelse af strafcelle overfor mindreårige vil fortsat være lovligt

Som nævnt i lovbemærkningerne fastholder Justitsministeriets sin tidligere opfattelse, at anvendelse af strafcelle som disciplinærstraf er et nødvendigt redskab til at sikre orden og sikkerhed i kriminalforsorgens institutioner (afsnit 2.6.2).

Lovforslaget indeholder således ikke en afskaffelse af strafcelle i Danmark, og strafcelle vil fortsat kunne anvendes uden mulighed for deltagelse i beskæftigelse m.v. i institutionen og uden mulighed for fællesskab med andre, hvis konkrete grunde taler for ikke at anvende den nye hovedregel om mulighed for beskæftigelse, jf. ny § 70, stk. 2 i straffuldbyrdelsesloven. Hvis sagen angår vold mod personalet, vil loven tillade sådan brug af strafcelle op til 4 uger.

DIGNITY er klar over, at under anvendelse af strafcelle har fængselspersonalet opmærksomhed på den unge, og der kan flere gange være kontakt mellem personalet og den unge. Vi er dog meget kritiske overfor den lovgivningsmæssige mulighed for at anvende strafcelle uden fællesskab med andre i helt op til 4 uger og er af den opfattelse, at dette kan indebære en risiko for umenneskelig og nedværdigende behandling af de mindreårige.

På linje med Det Danske Institut for Menneskerettigheder og en række danske NGO'er[10], holder DIGNITY af ovennævnte grunde fast i vores anbefaling om, at anvendelsen af strafcelle over for mindreårige bør afskaffes – og ikke alene begrænses som foreslået i dette lovforslag.

4: Alternativer til anvendelse af strafcelle

Lovforslag bygger på arbejdsgruppens vurdering, at der forekommer tilfælde, hvor det er tvingende nødvendigt at anvende strafcelle over for indsatte under 18 år, og at det ikke er muligt at anvise alternative reaktioner, der er egnede eller bedre midler til adfærdsregulering end strafcelle.

DIGNITY ønsker at understrege, at det er vores erfaring, at i sager, hvor unge indsatte slår personalet eller bruger anden form for vold, er det ofte udtryk for, at noget er gået galt i kommunikationen/relationen mellem den unge og personalet. Der findes alternativer til strafcelle, og en metode til at forebygge vold mod personalet er at flytte den unge til en anden afdeling i fængslet eller til mindre enheder med et andet fællesskab.

[10] Se fælles NGO skyggerapport til FNs Torturkomite, FNs Menneskerettighedskomite og Børnekomite.

DIGNITY opfordrer ministeriet til i lovforslaget at tage stilling til alternative adfærdsregulerende tiltag, som anvendes i andre lande, og redegøre for, hvorfor sådanne alternative reaktioner ikke skal anvendes i danske fængsler.

5: Regulering af brug af strafcelle

Ifølge lovforslaget skal udgangspunktet fremadrettet være, at unge under 18 år under udståelse af strafcelle kan deltage i beskæftigelse i institutionen, medmindre konkrete grunde taler herimod. Dette kan omfatte deltagelse i arbejde, uddannelse og andre godkendte aktiviteter, herunder behandlingsforløb. Ordningen vil således indebære, at den unge har mulighed for samvær med andre indsatte under disse aktiviteter, men ved afslutning af disse må tilbage i sin celle for at fortsætte strafcelleperioden.

Det er positivt, at den tidligere undtagelse om mulighed for beskæftigelse nu gøres til hovedreglen, således at de unge har mulighed for at opretholde en vis daglig rytme. DIGNITY efterlyser dog en redegørelse for kriterierne for personalets skøn om, hvem som får mulighed for at deltage i beskæftigelse, og for de omstændigheder som kan føre til nægtelse af fællesskab med andre. Det er vigtigt at sikre, at sådanne skøn ikke indeholder en ulovlig forskelsbehandling, og at der er klarhed om kriterierne anvendt i praksis.

Det er vigtigt, at fængselspersonalet under anvendelse af strafcelle fortsat har opmærksomhed på den unge og er opmærksom på vigtigheden af meningsfuld menneskelig kontakt, og hvad det indebærer.[11]

DIGNITY ønsker endvidere at påpege de relevante internationale normer, herunder vedrørende krav om dagligt sundhedsfagligt tilsyn[12] og ret til besøg af familie. [13]

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[11] Der henvises til Essex Paper 3 vedrørende fortolkning af Mandela Rules, herunder begrebet "meaningful human contact": "the contact needs to provide the stimuli necessary for human well-being, which implies an empathetic exchange and sustained, social interaction. Meaningful human contact is direct rather than mediated, continuous rather than abrupt, and must involve genuine dialogue". Se https://www.penalreform.org/resource/guidance-on-implementation-the-nelson-mandela-rules/

[12] Mandela Rules 46: "...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". Recommendation CM/Rec(2008)11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures, para 95.5. (A medical practitioner shall be informed of such segregation and given access to the juvenile concerned.

[13] Recommendation CM/Rec(2008)11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures, para 95. 6 (Disciplinary punishment shall not include a restriction on family contacts or visits unless the disciplinary offence relates to such contacts or visits)

6: 4-uger max. grænse for strafcelle i sager om vold mod personalet

DIGNITY er meget kritisk overfor, at Justitsministeriet fastholder en lovgivningsmæssig øvre tidsgrænse på 4 uger i sager om vold mod personalet. Ifølge lovforslaget er begrundelsen, at der er behov for, at Kriminalforsorgen kan reagere med særligt klare og mærkbare reaktioner i sager om vold mod kriminalforsorgens personale, bl.a. af hensyn til personalets sikkerhed og trivsel (afsnit 2.6.2).

Til trods for den internationale retsudvikling og FNs direkte anbefalinger til Danmark vil den danske straffuldbyrdelseslov således fortsat i fremtiden tillade isolation af mindreårige uden mulighed for fællesskab med andre indsatte (dvs. når de konkrete omstændigheder ikke taler for anvendelse af ovennævnte hovedregel om beskæftigelsesaktiviteter) i op til 4 uger. Efter vores opfattelse er denne ordning ikke i overensstemmelse med de internationale anbefalinger på området, jf. ovenfor, og internationale tendenser går i den modsatte retning med brug af alternative reaktioner til adfærdsregulering.

DIGNITY anbefaler:

- **At lovgivningen ændres i lyset af de alvorlige sundhedsmæssige skadevirkninger af isolation og de stærke internationale standarder og anbefalinger, således at strafcelle afskaffes i forhold til mindreårige.**

Hvis lovforslaget fastholdes i sin nuværende form, anbefaler DIGNITY:

- At Justitsministeriet i lovforslaget redegør for jeres stillingtagen til de internationale anbefalinger og juridiske normer på området.
- At Justitsministeriet i lovforslaget redegør for mulige alternative reaktioner på adfærdsproblemer og for hvorfor disse ikke kan anvendes fremfor strafcelle.
- At Justitsministeriet og Kriminalforsorgen, hvis lovforslaget gennemføres i sin nuværende form, iværksætter en nærmere kortlægning eller undersøgelse af sager, hvor strafcelle blev anvendt overfor mindreårige. Undersøgelsen skal give bud på alternative løsninger på de bagvedliggende adfærdsproblemer.

Vi står naturligvis til rådighed, såfremt I måtte ønske yderligere oplysninger.

DIGNITY
DANSK
INSTITUT
MOD TORTUR

Med venlig hilsen

Elna Søndergaard
Seniorjuridisk rådgiver

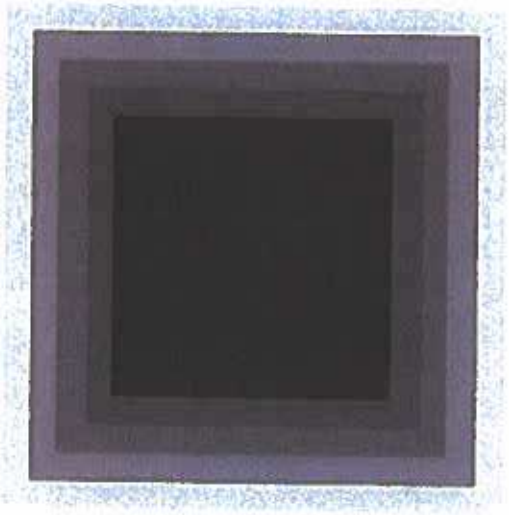
Bilag 1 Konferencerapport 2017

Bilag 2 Skriftligt indlæg til foretræde for Folketingets Retsudvalg

Solitary Confinement as a Disciplinary Sanction

Focus on Denmark

Conference Report



International Conference
3 April 2017
Copenhagen, Denmark

DIGNITY
DANISH
INSTITUTE
AGAINST TORTURE

Table of Contents

1. Executive Summary

International Legal Standards (Panel 1)

- The *Nelson Mandela Rules* now, for the first time, provide a universal definition of solitary confinement as entailing 'the confinement of prisoners for 22 hours or more a day without meaningful human contact'.[1] Given the risk of irreparable health harms that may arise after two weeks, solitary confinement beyond the two-week mark is now defined as *prolonged* and, as such, prohibited by rule 43 (1)(b).
- Representatives of the CPT and SPT recommended that States consider abolishing solitary confinement as a disciplinary sanction and instead apply alternative and less intrusive forms of disciplinary sanctions, such as curbing access to television and other privileges.

Health Consequences (Panel 2)

- The conference concluded that a multitude of mental harms on isolated prisoners had been strongly documented, such as higher rates of depression, stress, psychiatric morbidity and even suicide. The conference also drew attention to the notable social damage inflicted by isolation primarily in terms of the deterioration of social skills and functionality, recommending viewing such harms as also impacting prisoners' post-prison life. Considering the clarity of the research, health professionals present advocated the abolition of solitary confinement.
- Systematised dual loyalty training and support must be developed and provided to health care professionals working in detention settings as well as to prison administrators, ensuring that conflicts are readily identified and avoided.

Reforming Danish Solitary Confinement (Panel 3)

- Better monitoring, through data-collection and analysis and NPM involvement, was accepted as a significant need. Identifying the particular dynamics who, when, and why prisoners are being isolated was seen to be central to getting a better picture.
- Despite the difficulties with the political climate, room for collaboration existed in interactions as NPM members, talking with the Danish Prison and Probation Service and the government. Relatedly, exposing and encouraging prison authorities to consider proven alternatives emerged as a potential avenue for change.

Reforms and Alternatives (Panel 4)

- Pointing to Norway and Sweden, where arguments of necessity were overcome, it was noted that an outright abolition of punitive solitary confinement has been successfully demonstrated as the most direct and meaningful action to realise adherence to international obligations. Relatedly, complaint and independent oversight mechanisms were observed as needing to be strengthened. It is important to strengthen the capacity of NPMs to monitor and report on solitary confinement.
- Notably, prison administration stated solitary confinement did not make prisons safer. The fourth panel unanimously advocated that a focus on improving positive prisoner and prison staff relations was imperative. The importance of activities was also highlighted through the presented case-studies in Norway and the UK. The panel questioned the effectiveness of punitive solitary confinement as a deterrent.

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[1] *UN Standard Minimum Rules for the Treatment of Prisoners ('Nelson Mandela Rules')* (A/RES/70/175, 8 January 2016), rule 44.

2. Introduction

Background and Purpose

The use of solitary confinement *as a disciplinary sanction* has attracted attention for decades, with the extents of its use and severe health consequences widely documented and debated around the world.[2] 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.[3] Yet, this punitive measure continues to be used in numerous countries, causing severe health implications and other rights violations for many inmates, at times in violation of international human rights standards.

As in several other countries, Danish prison authorities have long used such measures on the official grounds of 'necessity and a lack of alternatives'.[4] Recently, this punitive approach was further cemented with the adoption of political directives imposing automatic resort to disciplinary sanctions in general and solitary confinement in particular. As a result, the use of solitary confinement as a disciplinary measure, namely the punishment cell (in Danish: *strafcelle*), has increased drastically both in numbers and length.

With the development of international legal standards as found in the *United Nations Standard Minimum Rules on the Treatment of Prisoners* (*SMR* or *Nelson Mandela Rules*), adopted by the UN General Assembly in 2015, which for the first time universally define solitary confinement as well as set clear prohibitions, it has become incumbent on governments to act accordingly.[5] That said, understanding the medical knowledge with respect to harms inflicted by solitary confinement and the existence of effective reforms in terms of abolition, as affected in Sweden and Norway, and alternatives such as warnings or prolonged sentences remain of crucial importance for lasting reform. These, accordingly, now represent the centrepieces of discussion regarding solitary confinement.

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[2] See DIGNITY, 'The Use of Solitary Confinement as a Disciplinary Measure: Literature available in DIGNITY's Library & Documentation Centre', March 2017. See United Nations, Report of the SRT (A/66/268, 5 August 2011); Weil, Gotshal & Manges LLP, Cyrus R. Vance Center for International Justice, and Anti-Torture Initiative, Center for Human Rights & Humanitarian Law at American University Washington College of Law, 'Seeing into Solitary: A Review of the Laws and Policies of Certain Nations Regarding Solitary Confinement Detainees' (United Nations Special Rapporteur on Torture: October 2016); CPT, 21st General Report, CPT/Inf (2011) 28, para. 53; OEA/Ser.L/V/II. Doc. 64 (31 December 2011), p. 143; Smith, Peter Scharff, 'The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature' (2006) 34 *Crime and Justice* 441, pp. 444-450, Shalev, Sharon, *A Sourcebook on Solitary Confinement* (London: Mannheim Centre for Criminology, LSE: 2008; Birckhead, Tamar, 'Children in Isolation: The Solitary Confinement of Youth' (2015) 50 *Wake Forest Law Review* 1; United Kingdom National Preventive Mechanism, 'Guidance: Isolation in Detention', January 2017.

[3] Principle 7 of the *UN Basic Principles for the Treatment of Prisoners* (A/RES/45/111, 28 March 1991).

[4] Government of Denmark, Sixth Report to HRC (CCPR/C/DNK/6, 10 November 2015), para. 131: 'The Government is of the opinion that it is necessary to have the possibility to resort to solitary confinement, also for minors.'

[5] U.N. Doc A/RES/70/175, General Assembly resolution 70/175, annex, adopted on 17 December 2015. In tribute to the late anti-apartheid fighter, long-term prisoner and former President of South Africa, Nelson Mandela, the standards received the additional name of 'the Nelson Mandela Rules'.

Upon this background, DIGNITY – the Danish Institute Against Torture hosted an international, interdisciplinary conference in Copenhagen on solitary confinement as a disciplinary punishment on 3 April 2017. The overall purpose of the conference was to bring together a body of expert knowledge from different fields of professional expertise and diverse jurisdictions across Europe in order to map and debate current practices of solitary confinement and its effects, and to search for a common agenda for the future. To this end, the conference gathered legal, medical and prison administration perspectives on the excessive use of solitary confinement as a disciplinary measure, notably:

- Prison directors and officials with experience in applying solitary confinement as a disciplinary sanction and in reforming the use of punitive measures;
- Scholars engaged in researching the medical, psychological and social effects of solitary confinement on the individuals as well as its broader societal effects; and,
- National and international bodies mandated to monitor the treatment of persons deprived of their liberty, notably:

    - UN Subcommittee on Prevention of Torture (SPT);
    - European Committee for the Prevention of Torture (CPT); and,
    - National Preventive Mechanisms (NPMs).

DIGNITY also aimed at bringing the conference deliberations into the Danish context, *inter alia*, by relaying the recommendations and conclusions to the Danish Parliament's Legal Affairs Committee (*Folketingets Retsudvalg*) and the Prison and Probation Service (*Kriminalforsorgen*) in order to promote and support much needed national reforms.

Please note that full-length video recordings of the conference are available here: https://www.youtube.com/user/DignityInstitute/playlists

Opening by the Director-General

The conference was convened by Dr Karin Verland, DIGNITY's Director-General and member of Danish NPM. Acknowledging and welcoming the local and international experts in attendance, Dr Verland relayed her own experiences as a medical doctor working as an independent prison monitor having met scores of prisoners in solitary confinement across different prisons.

She echoed the widely-documented harms associated with such disciplinary regimes as they pose a real restraint and threat to human dignity. The political push, in spite of this knowledge-base, for harsher disciplinary measures represents the main reason for the recent increase in the use of punishment cells. Observing that imprisonment was punishment enough, Dr Verland pointed out that any further punishment of prisoners was not only unnecessary, but also counter-productive to one of the two declared aims of imprisonment, namely re-socialisation.

DIGNITY's decision to place emphasis on punitive solitary confinement, Dr Verland explained, was due to its organisational DNA to 'work towards establishing a good prison culture with a protection of human rights standards'. Encouraging a healthy dialogue with prison authorities, she added that 'good prison management is crucial to meet the challenge of re-socialising inmates and preparing them for life after prison'.

Dr Verland also drew attention to the importance of reflecting on and exchanging knowledge and experience in affecting reform in the face of challenging questions. Drawing parallels to the research-oriented reform of the Danish pre-trial detention regime, which has led to significant reductions of use of solitary confinement of pre-trial detainees,[6] Dr Verland called upon the conference to make strong recommendations to be 'the spark that will lead to a similar change of attitude' and inspire not only the Danish debate but the discussion worldwide regarding the use of punitive solitary confinement.

[6] Historically, Denmark's use of solitary confinement during criminal investigation pursuant to the *Administration of Justice Act*, (Danish: *Retsplejeloven*) has been 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. A number of legislative changes over many decades, which centred around better complaint and oversight mechanisms, decreased time limits and a 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. See further: Smith, Peter Scharff og Koch, Ida, 'Isolation – et fængsel i fængslet, i Kriminalistiske pejlinger' (2015) i af Britta Kyvsgaard (red.), Jørn Vestergaard (red.), Lars Holmberg (red.) og Thomas Elholm (red.), *Kriminalistiske pejlinger - Festskrift til Flemming Balvig* (DJØF: 2015), s. 312.

3. International Legal Standards (Panel 1)

An Overview of Discussion Points

No *binding* instrument of international law *directly* prohibits the use of solitary confinement. However, solitary confinement as amounting to cruel, inhuman or degrading treatment or punishment, and in extreme cases to torture, has long been *implicitly* prohibited by the UN *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, the *International Covenant on Civil and Political Rights* and the *European Convention on Human Rights*, and the accompanying body of jurisprudence as exuding from their respective interpretative mechanisms.

Gauging the definition and the extent of solitary confinement amounting to a violation, however, has remained elusive and controversial. That is, until the *UN Standard Minimum Rules on the Treatment of Prisoners* (*SMR*, now and hereafter '*Nelson Mandela Rules*') were revised to ensure that they reflect the progressive development of human rights and criminal justice as well as recent advances in penitentiary sciences and practices. A crucial aim was to regulate and restrict the practice of solitary confinement, both as a disciplinary measure and more generally.

The impact of the *Nelson Mandela Rules* on the existing regulatory framework and practice is emerging and multi-faceted in terms of defining, monitoring, restricting and prohibiting its use. Clarifying such dimensions, ambiguities and practicability relating to relevant international provisions can be key for national systems to better understand and, in turn, to ensure that they are properly adhered to. To that end, clearly understanding the reasoning, both legal and medical, underpinning the related safeguards and prohibitions is central to optimal implementation.

Chaired by Therese Rytter, Director of the Legal Department, DIGNITY and Member of the European Committee for the Prevention of Torture (CPT), the panel was composed of:

- Sir Malcolm Evans, Chair of the UN Subcommittee on Prevention of Torture (SPT) and Professor of Public International Law at the University of Bristol, United Kingdom;
- James McManus, Member of the European Committee for the Prevention of Torture (CPT) and former Professor of Criminal Justice at Glasgow Caledonian University; and,
- Stephanie Selg, Advisor on Torture Prevention at the Office of Democratic Institutions and Human Rights (ODIHR) of the OSCE.

Participants heard presentations from the three panel members oriented around their institutional experiences with respect to the regulation and practices of solitary confinement internationally.

Main Points of Discussion

Clear Universal Definitions

The *Nelson Mandela Rules* now, for the first time, provide a universal definition of solitary confinement as entailing 'the confinement of prisoners for 22 hours or more a day without meaningful human contact'.[7] Importantly, an elaboration of what constitutes 'meaningful human contact' is found in the *Istanbul Statement on Solitary Confinement* as well as *Essex*

[7] *UN Standard Minimum Rules for the Treatment of Prisoners* ('*Nelson Mandela Rules*') (A/RES/70/175, 8 January 2016), rule 44.

Paper 3: Initial guidance on the interpretation and implementation of the Nelson Mandela Rules, a commentary based on the deliberations of the meeting of experts, informally called the Essex Group which was tasked with expert input to the revision process.

Given the risk of irreparable health harms that may arise after two weeks, solitary confinement beyond the two-week mark is now defined as *prolonged* and, as such, prohibited by rule 43 (1)(b) of the *Nelson Mandela Rules*. Significantly, this is to be interpreted to include indefinite periods and to 'frequently renewed measures that amount to prolonged solitary confinement'.[8] In this respect, the CPT has advocated that several days interrupt any two or more periods of solitary confinement.[9]

Urgency of Prohibitions

While physical disciplinary sanctions (such as beatings) are prohibited in most jurisdictions, there is an outstanding need to better recognise the increased use of non-physical methods taking their place (such as solitary confinement), and their ensuing harms. With this growing universal recognition (as demonstrated in he work of the CPT and SPT and the prominence in the *Nelson Mandela Rules*), the consensus was observed as going beyond merely observing the minimums set out in the *Nelson Mandela Rules* and to instead abolish the practice altogether. In fact, it was seen, notably by the CPT and SPT, as necessary to place solitary confinement in the long line of now illegitimate punitive tools, such as floggings and restraints.

Tied to this, based on its psychological harms and its ineffectiveness as a deterrent, the need to abolish the use of solitary confinement as a punishment under article 3 of the *European Convention on Human Rights* is considered to be long overdue. To impose it for weeks and months on end as a sanction for a breach of internal prison rules clearly fails the tests of necessity and proportionality. This type of misuse was further accentuated given the existence of effective alternatives, such as curbing access to television and other privileges. In fact, the representatives of the CPT and SPT recommended that States consider abolishing solitary confinement as a disciplinary sanction and instead apply alternative and less intrusive forms of disciplinary sanctions.

Referring to the international legal standards, strong calls were also made for the immediate prohibition of its use on groups for whom harm was clearly amplified and unjustified. Namely, rule 45 (2) of the *Nelson Mandela Rules* now made 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);[10] and, prisoners with mental or physical disabilities 'when their conditions would be exacerbated by such measures'.

Strong Procedural Safeguards

Narrowing the scope of legitimate uses of solitary confinement as well as all disciplinary measures, the *Nelson Mandela Rules* represent new and improved standards for the international community. The significant incorporations in the *Rules* of the following were outlined: the prohibition of torture and ill-treatment, the principle of necessity, the mainstreaming of dynamic security, and the legal regulation of disciplinary measures. With respect to the latter, the incorporation of a definition of solitary confinement, its

[8] SRT, Interim report of the SRT (A/68/295, 9 August 2013), para. 61.

[9] CPT, Report on the Visit to Spain in 2011, CPT/Inf (2013) 6, para. 75.

[10] As was already incorporated in *UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders* ('the Bangkok Rules')(A/C.3/65/L.5,6 October 2010), rule 22.

general limitation to exceptional cases as a last resort and subject to independent review (see Rule 45(1) of the *Nelson Mandela Rules* and rule 60.5 of the *European Prison Rules*) and the absolute prohibitions as already mentioned were detailed from the drafting process to their implementation. An understanding of meaningful human contact was also drawn from *Essex Paper 3*. Also endorsing *Essex Paper 3*'s position, the need for a more robust understanding of meaningful human contact was underlined. Countering an understanding of solitary confinement as a niche problem, attention was also drawn to the significance of the broader context of imprisonment. The practice of imprisonment and placement in isolation has always gone hand in hand. Therefore, the logics of isolation permeates the prison, as it is a site of isolation on the whole. Relatedly, such a broader approach would also be conducive to capture the use of preventive and protective uses of solitary confinement as perceived as punitive.

All in all, procedural safeguards were underscored to merely be minimum standards. That is, as the maximum level of intrusion beyond which states must not go. Being mindful of regulation as well as practice was observed to be key to combating its excesses, but the minimum should be viewed with scepticism, requiring an ever-decreasing use of solitary confinement.

Key Conclusions and Recommendations

a. Promotion: In terms of the international normative framework, the recent international developments in the normative framework are indeed guided by developments in the human rights and criminal justice discourse as well as best practice and medical evidence about the negative health consequences of solitary confinement, and by international and regional monitoring experience. Thus, they need to be appreciated as being research- and experience-informed.

It is recommended that national authorities take initiative to raise awareness of the *Nelson Mandela Rules* and the *European Prison Rules* among key stakeholders. Moreover, the conference identified that, at a legislative level, reforms need to be immediately initiated to amend current legislation, which does not adhere to these standards, for example with respect to the prohibition of solitary confinement of minors and the 15 days' time limit for adult prisoners.

b. Prohibition: When considering prohibitions, the conference observed that the recent international developments were momentous and essential, particularly with respect to the prohibitions on the use of solitary confinement of minors, women (pregnant, breastfeeding, and with infants) and prisoners with mental health issues. The conference recommended that prohibitions be immediately implemented. Notably, the SPT and CPT emphasised the importance and timeliness of moving towards abolition of solitary confinement as a disciplinary sanction and endorsed the *Nelson Mandela Rules* in this respect.

c. Purpose: Turning to the purpose of use, there existed a general recognition that using solitary confinement as punishment was a particularly harmful form to be avoided. The conference accepted that other uses, such as for preventive/security purposes, may be inevitable for the present. Meanwhile, it emphasised the importance of pursuing alternative and less intrusive forms of disciplinary sanctions. That said, the difficulties in drawing clear boundaries between the different purposes was acknowledged.

d. ***Procedural Safeguards:*** The conference saw it as imperative to also bolster procedural safeguards on the use of solitary confinement as punishment. Access to health monitoring and judicial review, according to the *Nelson Mandela Rules,* were confirmed as critical in limiting the use to an absolute minimum: namely to ensure its use adheres to the law and to mitigate its health impacts. By way of example, in Denmark, the access to judicial review should be enhanced. Raising awareness amongst inmates and lawyers of the existing review mechanisms was also underscored.

4. Health Consequences (Panel 2)

An Overview of Discussion Points

Health studies have documented multi-faceted (physical, mental and social) harms of solitary confinement,[11] and the degree of harm has been shown to be individuated based on the detainee's pre-existing health, as well as environmental (physical conditions) and contextual factors (regime, duration, purpose).[12] The prevalent use of solitary confinement as a disciplinary measure in some countries, including Denmark, pointed us to questioning the extent to which health considerations feature in decision-making processes. The medical ethics and human rights/torture prevention discourses relating to the role of medical professionals in a solitary confinement regime remained a point of discussion as they were seen at times difficult to reconcile (e.g. the duty towards one patient versus the duty to prevent future ill-treatment of the many).

Chaired by Marie Høgh Thøgersen, Deputy Director of the Rehabilitation Department and Chief Psychologist, DIGNITY, the panel members included:

- Marie Brasholt, Chief Physician, Health Department, DIGNITY;
- Ida Koch, Psychologist, and Member of the Isolation Group;
- Sharon Shalev, Research Fellow at the University of Oxford, and Fellow at the Mannheim Centre for Criminology, London School of Economics and Political Science; and,
- Peter Scharff Smith, Professor, Department of Criminology and Sociology of Law at University of Oslo, and Member of the Scandinavian Solitary Confinement Network.

The panel addressed various dimensions of the harm inflicted by solitary confinement.

Main Points of Discussion

Overview of Health and Social Impacts

The severe health effects of isolation on all species, with human beings exhibiting the most extreme health effects, were presented. It was also clear there that minors were more sensitive to these impacts. Underlying this was the necessity for children as well as adults to have adequate social and sensory stimulation.

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'.[13] An experiment from 2014 has found that even very short-term deprivation (for 25 mins) of light, sound, and social interaction can produce psychosis-like symptoms in healthy individuals, stressing the importance of considering health impacts of solitary confinement.

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[11] For a comprehensive review of literature see Smith, Peter Scharff, 'The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature' (2006) 34 *Crime and Justice* 441, pp. 444-450; *Ziglar v. Abbasi*, 2016 WL 7449167 (2016), *Brief for Medical and Other Scientific and Health-Related Professionals in Support of Respondents and Affirmance* (22 December 2016).

[12] Shalev, Sharon, *A Sourcebook on Solitary Confinement* (London: Mannheim Centre for Criminology, LSE: 2008).

[13] Shalev, Sharon, *A Sourcebook on Solitary Confinement*, p. 79; International Psychological Trauma Symposium, 'The Istanbul Statement on the Use and Effects of Solitary Confinement' (9 December 2007, Istanbul); Grassian, Stuart, 'Psychiatric Effects of Solitary Confinement' (2006) 22 *Washington University Journal of Law and Policy* 325, p. 331.

Koch's research on Danish pre-trial detainees in isolation has shown that '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 solitary confinement. This was observed to develop into 'chronic isolation syndrome' within weeks.[14]

The difficulties some Danish prisoners had, due to the anxiety as caused by their solitary confinement, in being around other people, went beyond their time of incarceration and was also seen upon their release from prison.[15] Koch's study in 1983 concluded that social consequences were seen after solitary confinement with detainees not being able to cope with being together, physically or emotionally, when released back to the general population.

Reference was also made to studies indicating that isolated detainees may develop psychiatric disorders,[16] such as adjustment and depressive disorders, and to studies showing that solitary confinement increased the risk of hospitalization to prison hospital for psychiatric reasons.[17] Also, isolated detainees with latent or manifest psychiatric conditions are likely to deteriorate under isolation. Psychiatric symptoms may disappear or improve once the isolation stops.[18]

Surveying recent studies, Scharff Smith and Jacobsen conclude that the rate of mental illness has generally increased in Danish prisons.[19] One study cited relates to *Vestre Fængsel*, where in 2013 the Danish Prison and Probation Service diagnosed 8% of remand prisoners with psychotic disorders and 83% with non-psychotic psychiatric disorders, including substance abuse.[20]

When assessing consequences of solitary confinement, one should be aware that studies have also shown that detainees with major psychiatric disorders were pointed out as being more likely to be placed in solitary confinement than other prisoners.[21] This selection bias may influence the interpretation of results.

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[14] Koch, Ida, 'Mental and Social Sequelae of Isolation: The Evidence of Deprivation Experiments and of Pretrial Detention in Denmark', in Rolston, Bill, and Tomlinson, Mike (eds.) *The Expansion of European Prison Systems*, Working Papers in European Criminology, No. 7, 119 (1986), p. 124 as cited in Haney, Craig, Expert Report in *Ashker v. Governor of California*.

[15] Koch, Ida, *Isolationens psykiske og sociale følgevirkninger*, 60 Månedsskrift for Praktisk Lægegerning, 382 (1982).

[16] E.g. Andersen, HS et al., 'A longitudinal study of prisoners on remand: psychiatric prevalence, incidence and psychopathology in solitary vs. non-solitary confinement' (2000) *Acta Psychiatr Scand*, 102: 19-25.

[17] E.g. Sestoft, DM et al 'Impact of Solitary Confinement on Hospitalization Among Danish Prisoners in Custody' (1998) *International Journal of Law and Psychiatry* 21(1): 99–108.

[18] E.g. Andersen, HS et al., 'A longitudinal study of prisoners on remand: repeated measures of psychopathology in the initial phase of solitary versus non-solitary confinement' (2003) *International Journal of Law and Psychiatry* 26: 165–177.

[19] Smith, Peter Scharff, og Jacobsen, Janne, *Varetægtsfængsling: Danmarks hårdeste straf?* (Djøf: 2017), Kapitel 9, s. 156.

[20] Mette Lindgaard Adamsen, 'Screeningsprojektet for psykisk sygdom', Direktoratet for Kriminalforsorgen, 2013 i Smith og Jacobsen, s. 157.

[21] Hodgins et al., 'The Mental Health of Penitentiary Inmates in Isolation' (1991) *Canadian Journal of Criminology* April: 175-182.

Suicide Risk

The overall results of solitary confinement show a considerable excess risk of suicide – 4.6 times increased compared to non-isolated detainees. Also, studies have shown increased levels of self-harm, and that previously isolated prisoners have a higher risk of trying to commit suicide than other prisoners.[22]

In the discussion, reference was made to a study concluding that self-harm peaks in the first days out of solitary confinement. An additional factor was found to be the level of segregation, with harsher segregation resulting in a higher risk for suicide. It was stressed that the data cannot say anything about the causal factors but just that there is a very high frequency and the common underlying factor is solitary confinement. An explanation was also ventured that it is more difficult for a prisoner to commit suicide in solitary confinement due to closer observation therefore this may be the reason why there are more suicides when in the general prison, notably following 'release' from solitary confinement.

Meaningful Contact

Despite variations in individual, environmental and contextual factors, there is consistency in findings on the health effects of solitary confinement. Sensory stimuli and environmental control are after all a basic need for any individual, with deprivation of these needs, through isolation, increasing the likelihood of causing long-lasting and irreversible health effects. 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. The impact is individuated, taking its toll differently on each isolated person, and, as such, can also be seen at different time points in different persons. The prisoner's total dependence on prison staff limits their already limited autonomy, with staff avoiding any positive contact compounding a prisoner's dehumanisation. The design of the cell, its size, facilities and cleanliness, were also advanced as having a significant impact.

Researching and Debating Effects of Solitary Confinement

Positioning the punitive uses of solitary confinement within the rich history of punishment, the advent of solitary confinement, particularly its importation to Scandinavia from the United States, could be easily outlined. Negative health impacts were recognised early on in this history. Whilst the health impact of solitary confinement is in focus here, one should not forget the harms of imprisonment in general. Moreover, the history of solitary confinement is ingrained as part of the prison system, entwining its reform with broader prison reform.

The connection between the impact of solitary confinement and the purpose for which it is used, e.g. preventive, protective or punitive, was also raised. It was agreed that there was no research that differentiated between solitary confinement as a punishment versus all other forms (judicially imposed during the pre-trial detention or administratively

[22] See for example, Sigurd Benjaminsen & Birgit Erichsen, *Selvmordsadfærd Blandt Indsatte*, p. 16 (Copenhagen. Direktoratet for kriminalforsorgen (2002)) as cited in Scharff Smith, 2006, p. 498; see more generally: Kupers, Terry, 'Isolated Confinement: Effective method for behavior change or punishment for punishment's sake?' in Arrigo, Bruce, and, Bersot, Heather (eds.), *The Routledge Handbook of International Crime and Justice Studies* (Routledge, 2013), p. 215, and see also Matti Joukumaa, *'Prison suicide in Finland, 1969-1992'* (1997) 89 *Forensic Science International* 167.

imposed for preventive or protective reasons). It was ultimately seen to be dependent on the specific triggers of the isolated person and not necessarily on the purpose.

Role of Health Care Professionals
Another significant point at issue raised was the role of healthcare professionals in solitary confinement regimes. Issues of dual loyalty are present where healthcare professionals are faced with considering the – potentially conflicting – interests of the prison authority (who may be their employer), one the one hand, and the duty to care for the health of their patients, the detainees, on the other hand.

Monitoring by a qualified health professional of the health of inmates in solitary confinement was seen as being 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 *European Prison Rules* (*EPR*) and the CPT Standards[23] 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).[24] The *Nelson 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)).

Denmark reserved the right to not comply with Rule 43.2 of the *European Prison Rules* entailing the need for medical practitioners to visit prisoners in solitary confinement each day. The rationale here was that doctors in effect condoned measures that have negative health impacts, if they were seen as assisting with administering measures of discipline. Importance of dual loyalty training generally as well as systematised training of doctors working in prisons was seen as a priority. The systemic fragmentation and limitation of knowledge, given the lack of a database on prisoners specifically at harm if isolated, were raised. This was also compounded, if a prisoner shied away from discussing their health due to it being a taboo subject for them.

Key Conclusions and Recommendations

a. ***Multiplicity of Factors:*** The conference agreed that there are numerous contributing factors to the mental and social harm inflicted by solitary confinement including: duration, degree of isolation, purpose, pre-existing health problems, physical conditions and provisions. Efforts at alleviation and mitigation need to take into account this multiplicity of factors.

b. ***Duration:*** It was the view of the health professionals present that the duration need not be long for likely harm to occur. Notably, it was agreed that we could not predict who or when harm will be inflicted. Relatedly, the two-week prohibition was held, though somewhat arbitrary, to be a necessary safeguard against inflicting avoidable harm on inmates.

[23] CPT, 'Solitary confinement of prisoners: Extract from the 21st General Report of the CPT', CPT/Inf(2011)28-part2, paras. 62-63

[24] The Danish Government, upon ethical concerns raised by Danish doctors regarding effectively pronouncing prisoners fit for solitary confinement, reserved the right to comply with this monitoring requirement

c. ***Mental Harms:*** The conference concluded that a multitude of mental harms on isolated prisoners had been strongly documented. Higher rates of depression, stress, psychiatric morbidity and even suicide. Considering the clarity of the research, health professionals present advocated the abolition of solitary confinement.

d. ***Access to Mental Care:*** Stressing the importance of access to mental care, it was observed that there was a striking prevalence of mental health problems in prisons and detention facilities in Denmark and internationally. Imprisonment was attributed with creating, triggering, or exacerbating these conditions. Health professionals urged decision-makers, in pointing to the *Nelson Mandela Rules,* that they avoid punishing mental illness. The role of health-care professionals was an ongoing concern in Denmark and internationally and it was agreed that more work needed to be done.

Given the extent of mental illness amongst prisoners, the health professionals also recommended that all prisoners be provided with extensive access to health care, including in its physiological, psychological and psychiatric aspects: entailing assessment, particularly for risk of self-harm, continued monitoring and treatment, and documentation.

e. ***Meaningful Contact:*** Another primary means of mitigating the harm recommended by the conference was to focus on ensuring the provision of meaningful human contact including through increased visitation rights and access to recreational material. Accordingly, the duration needs to be kept as short as possible. Opportunities for quality human relationships, including those between the prisoners and prison staff, needed to be harnessed and increased.

f. ***Social Harms:*** The conference drew attention to the notable social damage inflicted by isolation primarily in terms of the deterioration of social skills and functionality, recommending that prison health needed to be situated within public health, and to view such harms as also impacting prisoners' post-prison life and their family and community.

g. ***Dual Loyalty:*** Systematised dual loyalty training and support must be developed and provided to health care professionals working in detention settings as well as to prison administrators, ensuring that conflicts are readily identified and avoided.

5. Reforming Danish Solitary Confinement (Panel 3)

An Overview of Discussion Points

The punishment cell (*strafcelle*) is the most severe disciplinary measure available in Danish and most other European countries' legislation on execution of sentences, with lesser restrictive methods including warnings and fines (*Sentence Enforcement Act* § 68). Pursuant to § 68 (2) of the *Sentence Enforcement Act*, the punishment cell can only to be used as a disciplinary measure in clearly defined situations. By way of example, the use of mobile phones was recently criminalised in § 124 (4) in the *Danish Criminal Code* (Danish: *straffeloven*).[25] In June 2016, changes to legislation regarding the use of disciplinary measures left the prison administration without any discretion.[26]

In total, the use of the punishment cell has more than doubled since 2001[27] 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 cases from 2579 in 2015 to estimated 2995 in 2016 and half related to long-term duration of 15 days or more.[28] This is due to the recent more restrictive regulation of unlawful possession (and use) of mobile phones.[29]

Better understanding the use of solitary confinement as a disciplinary measure in Denmark, among prison authorities, policy makers as well the public at large, in terms of its purpose and prevalence, was of central importance here. Furthermore, the session also was tasked with attempting to draw more clearly the areas of concern, especially from human rights and prison administration perspectives.

Chaired by Tomas Max Martin, Researcher, Prevention of Torture in Detention Department, DIGNITY, the panel members included:

- Annette Esdorf, Director of the Centre for Execution of Sentences, Denmark's Prison and Probation Service;
- Morten Engberg, Head of the Danish Parliamentary Ombudsman's Monitoring Department, Denmark's National Preventive Mechanism;
- Jonas Christoffersen, Director of the Danish Institute for Human Rights and Member of Denmark's National Preventive Mechanism; and,
- Bo Sørensen, Union Secretary (Forbundssekretær) of the Danish Prison Union.

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[25] § 124 (*4*). Den, der i et arresthus eller lukket fængsel som anholdt, fængslet eller forvaringsanbragt uretmæssigt besidder en mobiltelefon eller lignende kommunikationsudstyr, straffes med bøde eller fængsel indtil 6 måneder. På samme måde straffes besøgende og andre personer, som uretmæssigt medtager en mobiltelefon eller lignende kommunikationsudstyr i et arresthus eller lukket fængsel. Tilsvarende straffes en varetægtsarrestant, der som frihedsberøvet i institution m.v. uden for kriminalforsorgen uretmæssigt besidder en mobiltelefon eller lignende kommunikationsudstyr.

[26] *Sentence Enforcement Act* § 67 by Lov 2016-06-08 nr 641.

[27] Solitary confinement as a disciplinary measure increased from 1289 placements in 2001, peaking at 3,044 cases in 2011, to estimated 2995 placements in 2016. Kriminalforsorgens årlige statistik beregninger.

[28] Kriminalforsorgen, Press Release: 'Stigning i brug af strafcelle skyldes mobiltelefoner', 31 March 2017.

[29] LOV nr 641 af 08/06/2016 om ændring af lov om fuldbyrdelses af straf m.v. (styrket indsats mod mobiltelefoner i fængsler m.v.).

Main Points of Discussion

Prevalence of Use

The use of punishment cells remains prevalent. Its use pursuant to the *Sentence Enforcement Act* has virtually doubled from 2001 to 2016. The vast majority of cases relate to men (2918 out of the estimated 2995 cases in 2016). Moreover, the mentioned legislative amendment regarding unlawful possession and use of mobile phones has entailed a significant increase in the use of longer punishment in excess of 15 days. There is, unfortunately, no general statistic regarding the duration of such solitary confinement.

As a starting point, the importance of not falling behind the minimum standards regarding the treatment of prisoners was reiterated. Furthermore, this question was also reframed as not being one of punishment but as government interference with prison administration. It was noted that politicians did not interfere with the administration of hospitals so neither should they interfere with the administration of prison, notably the imposition of disciplinary sanctions.

The Danish Prison and Probation Service presented statistics, which reflected a sharp increase in the use of the punishment cell, which had also been used, in a few cases, as an unsuspended measure for first time offences. This was attributed to the changes to *Sentence Enforcement Act* relating to unlawful possession and use of mobile phones law in 2016. In closed prison regimes, the punishment cell is to be imposed for 15 days for first offences, 21 days for second offences, and 28 days for third offences. In open prison regimes, this was seven days suspended for first time offenders, seven days for second, and 10 days for third time offences. Statistics on durations have not been kept or published. In a rough survey, the Danish Prison and Probation Service found that there had been seven uses of the punishment cell for 15 days or longer in 2015, for all offences. Comparatively, this number has skyrocketed to 222 in 2016, of which 219 related to mobile phones. Interestingly, only very few decisions are appealed to the Danish Prison and Probation Service and the courts, if longer than seven days. More recently, the authorities have further published that that use of punishment cells, for 15 days or more, numbered 380 from 1 January to 31 October 2017, a further steep increase.[30]

The notion and impact of 'sharpened attention', where attention paid to a particular inmate by prison staff resulted in other inmates avoiding him or her causing de facto solitary confinement, was also explored by the panel. Another dynamic of solitary confinement touched upon was that prisoners could essentially be isolated for months as they very often were subjected to one form of solitary confinement and then another, with the prisoners rarely distinguishing one from the other. This alluded to the slippage between different registers of solitary confinement and the leakage between punishment cell and exclusion from association (Danish: *udelukkelse fra fællesskab*).

One explanation for why numbers for 2015 were so relatively low compared to preceding years was that a significant contributing factor was that the prison population was 25% lower that year. While statistics are kept, not much of it is being published. For instance, there are no publicly available figures on the specific periods of solitary confinement or the numbers of individual prisoners being isolated as opposed to the total instances of use. This criticism was accepted by the Danish Prison and Probation Service. Despite not

[30] Jyllands-Posten, 'Stigning i brugen af isolation kaldes "dybt pinlig" og "beskæmmende"', 28 november 2017.

having made a study, prison staff noted that certain individuals were repeatedly subjected to the punishment cell.

Mobile Phones

The regulatory changes in the rules curbing possession and use of mobile phones amongst prisoners, a question which has been a hot-button issue, was also touched upon. This change purportedly arose out of phones being found on terror suspects, as well as due to threats and escape attempts. Danish open prisons have telephones in cells but those in closed prisoners have only 10 numbers they could call from communal phones. It was accepted from a prison staff perspective that there were not enough phones for inmates to freely use to say goodnight to their children in the absence of mobile phones, which make prisoners resort to mobile phones. Prisoners isolated for having mobile phones had claimed that they needed them to contact family. Ultimately, representatives from the Danish Prison Union and Prison and Probation Service recognised that a disproportionate limitation to family contact had been caused.

Necessity and Alternatives

From the perspective of prison staff, what was underlined included the delicacy and difficulty of the issue. The dilemma, it was argued, was between the regard for the inmate in question and regard for prison and its property, often leading to isolating a few for the benefit of the majority. Staff safety also remained a consideration. Prisoners and prison staff health were also considered. Experiences of prison staff were relayed to the conference of isolated prisoners collapsing and giving up on hygiene in a five to seven-day period. Other harms were also observed as exhibited in those isolated for weeks and months. There were also concerns that staff were hardening in these environments, internalising the new normal of harder sanctions before due attention was afforded to prisoner welfare.

Effectiveness of solitary confinement as a tool for increased prison safety proved another key discussion point. Viability and applicability of alternatives in Denmark, such as the use of smaller units in Sweden and deprivation of TV rights in Scotland, was raised and contested due to the physical layout of existing prisons. Alternatives were welcomed to be considered by all present as worries about the harmful environment created for staff and inmates alike were shared. Solitary confinement, it was agreed, did not make prisons safer for anybody. Yet, while prison administrators could not question political decisions, prison authorities saw it as impossible not to react to it when there was an incident.

Furthermore, the centrality of the relationship between the staff and the inmates for improvements was emphasised. The Danish Prison and Probation Service's pilot project in a few prisons where staff and inmates were brought together to discuss how to achieve a win-win situation was noted here. The success was qualified with the observation that not all prisoners wanted to talk to the staff in the manner required.

Complaint and Oversight Mechanisms

Limitations relating to complaint mechanisms were stressed. Decisions on the use of the punishment cell made by local institutions can be complained to Directorate of the Danish Prison and Probation Service (*Direktoratet for Kriminalforsorgen*). The Directorate's decisions are final and cannot be brought before another administrative authority on appeal. A complaint to the Danish Prison and Probation Service has no suspensory effect, unless the Directorate so decides. Decisions regarding punishment 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 court system under § 63 of the Danish Constitution. Yet, only a very small number of decisions are being brought before the courts, with three decisions from 2013 and only in one of these has a court overturned the administrative decision about the punishment cell.[31]

Regarding the oversight mechanisms, it was noted that, before any visit, the NPM asks for statistics from three previous years regarding solitary confinement as punishment in terms of the number of incidents, inmates, total number of days, average number of days, and length. Dialogue then may ensue with prison management regarding the use, including on management's efforts to counteract the health impacts. Interviews with inmates in solitary confinement have also been a focus of the NPM. Other dimensions of solitary confinement were touched upon – constituting significant issues attracting sharpened attention – such as security cells, exclusion from associations, focus wards, asylum seekers (where severe isolation has occurred), and de facto solitary confinement.

Key Conclusions and Recommendations

a. ***Statistics:*** Better monitoring, through data-collection and analysis and NPM involvement, was accepted as a significant need. Identifying the particular dynamics who, when, and why prisoners are being isolated was central to getting a better picture.

b. ***Collaboration:*** Despite the difficulties with the political climate, room for collaboration existed in interactions as NPM members, talking *with* the Danish Prison and Probation Service and the government, not *to* them. In fact, given the climate, the importance of this work (i.e. better treating prisoners) need to be heightened.

c. ***Alternative-Seeking:*** Relatedly, exposing and encouraging prison authorities to consider proven alternatives emerged as a potential avenue for change.

[31] Retten i Glostrup 11 July 2013. The two other decisions relate to decision by Retten i Odense 13 Janaury 2014 and decision by Retten I Glostrup 3 October 2013.

6. Reforms and Alternatives (Panel 4)

An Overview of Discussion Points

Discipline within conventional prison settings centres on maintaining order 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.[32] The primacy of security concerns also means 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.

The international experiences using alternatives and reducing the use of solitary confinement provided another central focus for discussion. Questions raised related to the identification of primary areas where improvements can be realised, lessons learned from reform experiences, factors impending reform (including cost-related arguments), and best engaging with the concerns of prison staff.

Chaired by Andrew Jefferson, Senior Researcher, Prevention of Torture in Detention Department, DIGNITY, the panel members included:

- Jamie Bennett, Governor of HMP Grendon & Springhill, and Editor of the Prison Service Journal, United Kingdom;
- Are Høidal, Governor of Halden Prison, Norway;
- Keramet Reiter, Assistant Professor of Criminology, Law and Society at University of California, Irvine, United States of America; and,
- Peter Scharff Smith, Professor, Department of Criminology and Sociology of Law at the University of Oslo, and Member of the Scandinavian Solitary Confinement Network.

Main Points of Discussion

Psycho-therapeutic Approaches and Activities

Proven alternatives in institutional approaches to limit disciplinary solitary confinement were illustrated to the conference. An entry point to surveying the proven alternatives was represented by HMP Grendon, an English prison opened in 1963, an example of a prison functioning well without resort to punitive or protective solitary confinement, and thereby delegitimising segregation. Pitted against the supermax, Grendon represents a system of incarceration comprehensively informed by a psycho-therapeutic approach. As the only therapeutic community prison in England, it has successfully abolished solitary confinement within its confines, only resorting to transferring its inmates to isolation cells in nearby prisons on the rare occasion.[33] Wings are called communities, and inmates are residents. 230 residents meet Friday and Monday mornings on shared interests relating to sanctions and activities. Tuesdays to Thursdays in-depth psychotherapeutic sessions over a prolonged period are provided. A range of creative therapies are also provided, with external professionals occasionally engaged to facilitate. Visits from family were also regular. Studies on HMP Grendon conclude that this improved behaviour both inside and outside of prison. Incidence of self-harm was also recorded to be at less than a quarter of the rate as

[32] Guenther, Lisa, *Solitary Confinement: Social Death and Its Afterlives* (University of Minnesota Press, 2013), pp. 221-222.

[33] HM Chief Inspector of Prisons, Report on an unannounced inspection of HMP Grendon, 5-16 August 2013, p. 26.

compared to the rest of the UK's prison population, and a conviction study favourably compared those who were admitted to Grendon and those who were eligible and were not admitted. The lesson from HMP Grendon was to *include* rather than *exclude* and to see security as being achieved *dynamically* and not through *complete control*. The utility of the 'enabling environments' concept, a measure endorsed by the Royal Society of Psychiatrists in the United Kingdom, were also touched upon.

Furthermore, a similar example was put forward by Halden Prison in Norway. There, the Norwegian Correctional Services set out to build a prison on ideas of how society is built, importing a model where education and health professionals are brought in from the local community, where officers have a dual role: security and learning (a contact officer being assigned to inmates to ensure support). Architects of the prison were, in turn, tasked with creating a prison which did not look or feel like a conventional prison. The provision of a wide array of daily activities were placed at the heart of prison-life, where every inmate is provided with rights to work, education and other activities.

Dynamic Security, Deterrence and Shared Prison Safety

The recognition that prison safety was to be founded on a shared sense of respect between prisoners and prison-staff received distinct emphasis here. At HMP Grendon, according to the democratic approach of its processes, residents accused of infractions fronted a group composed of residents who upon deliberating made a recommendation to the prison administration. Accordingly, 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'.[34]

Similarly, for inmates at Halden Prison, responsibility for prison conditions were approached as being shared by everyone. However, as a sanction, the prison authorities still retained the power to 'wholly or partly exclude the prisoner from company for up to 24 hours'.[35] Yet, aggression between inmates, between inmates and staff were claimed as being rare. The security cell at Halden has rarely been used with five cases in 2010 and 17 in 2016, with no instance of use longer than one or two days.

Effectiveness of the disciplinary solitary confinement is another aspect of critique here. Even with other factors controlled, a recent study of male inmates in Oregon, the US, concluded that 'disciplinary segregation [double-celled isolation] was not a significant predictor of subsequent institutional misconduct'.[36] That is, segregation did not improve behaviour.

Importantly, prison staff also need to be engaged because solitary confinement has been their tool for a long time, and need to understand that it would be better for prison management to proscribe its use. Otherwise, side-stepping could be anticipated. An example put forward here was that of Washington State where, after curbing the use of solitary confinement in reacting to suicide attempts, prison staff continued its use for property damage instead. Both the *EPR* (rule 51) and the *Nelson Mandela Rules* (rule 76) were noted as incorporating dynamic security into their respective understandings of

[34] *Ibid.*

[35] *Execution of Sentences Act*, section 39.

[36] Lucas, Joseph, and, Jones, Matthew, 'An Analysis of the Deterrent Effects of Disciplinary Segregation on Institutional Rule Violation Rates' (2017) *Criminal Justice Policy Review* 1, p. 1.

prisoner management, a proactive approach which values positive prisoner-staff relationships to better enable staff to anticipate and address security threats early on.[37]

Research-Driven Reform

Local experiences regarding the reform of pre-trial solitary confinement in Denmark also resonated particularly when one drew on the critical parallels between the successful research-informed reform of pre-trial solitary confinement and its current excessive use as disciplinary measure. 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.[38] 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. Law reforms which started in 1978, as sparked by public and international pressure and critique, were put forward as a relevant roadmap. While in 1979, 62% of all pre-trial detainees were isolated, through sustained phases of reform, in 2014 it amounted to only 0.7%.[39]

Cost-Related Arguments and Transferability of Lessons

Countering a disinclination to see the advanced models as being applicable, it was pointed out that almost all of HMP Grendon's prisoners were serving indeterminate sentences, who have relatively more convictions on their records, with over half using drugs before coming to Grendon, with over half having previously had suicidal ideation, and with two thirds having a history of being abused. It was accepted that the assessment process was relatively extensive, entailing the application of a prisoner himself and taking three to six months for final decision regarding the transfer. The critical assessment, as subjected to community-based scrutiny, was of the prisoner's commitment to HMP's psycho-therapeutic philosophy. Another limitation born out of the discussion was the argument that the model functioned best with a maximum of 40 residents residing in each community (with one limited to 20 for those with learning difficulties) as originally designed. Training of prison staff in psychotherapy and being interviewed by the residents in the selection process was presented as playing a central role in the realisation of the model.

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.

Admittedly, 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.

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[37] Coyle, Andrew, *A Human Rights Approach to Prison Management: Handbook for Prison Staff*, (International Centre for Prison Studies, 2nd Ed: 2009), p. 15.

[37] UNODC, *Handbook on the Management of High-Risk Prisoners* (New York, 2016), p. 14.

[38] Smith, Peter Scharff og Koch, Ida, 'Isolation – et fængsel i fængslet, i Kriminalistiske pejlinger' (2015) i af Britta Kyvsgaard (red.), Jørn Vestergaard (red.), Lars Holmberg (red.) og Thomas Elholm (red.), *Kriminalistiske pejlinger - Festskrift til Flemming Balvig* (DJØF: 2015), s. 312.

[39] Rigsadvokaten: Anvendelse af varetægtsfængsling i isolation 2015, 20 oktober 2016.

Litigation and Broad-based Advocacy as Tools for Change

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. The experience in the US, where despite varying degrees of success, the breadth and variety of reform experience has been significant, proved a fruitful case-study. With different systems of federal, state, county jails, there existed a different scale in terms of numbers and durations when solitary confinement is discussed.

A primary avenue of reform had been found through litigation, with a number of important decisions and settlements reached in the last few years. One case even involved an inmate in 30 years who was ordered by court to re-join the general prison population. Another class litigation in California at Pelican Bay had seen improvements there, though incremental, including in the reduction of long-term isolation and better access to activities. Moreover, another channel of change has been through the initiative of law makers and correctional departments. New Jersey proposed a 15-day limit only to be vetoed by the Governor. Another source of lasting reform were state prison administrations in places like Maine and Colorado, where segregated prison populations have been significantly reduced, who initiated reforms on their own volition.

Recent nonviolent strikes by prisoners protesting their regimes have made the public question the rationality of solitary confinement. In addition to these tools, the role of more opinion pieces and more stories published by inmates of their experiences in garnering political momentum and to change public mentality to engage them in conversation to maintain reform were highlighted. Reforms have pointed out the harm done by labelling inmates as being dangerous, and have focussed on diverting some groups from being isolated in the first place: children, pregnant women, mentally ill, transgender.

While these were absolutely the right steps, this risked limiting the discussion to the 'low-hanging fruit' of vulnerable groups when it needed to also be broadened to harder cases. While, there remained strong resistance to follow international law in the United States, the strength of the push back could not be readily dismissed.

Key Conclusions and Recommendations

a. ***Paths to Reform and Abolition:*** Pointing to the examples of Norway and Sweden, where arguments of necessity were overcome, it was noted that an outright abolition of punitive solitary confinement has been successfully demonstrated as the most direct and meaningful action to realise adherence to international obligations. Alternatively, pointing to the limitation under international law that it be used *only* in exceptional cases, the conference urged that the wide-spread use of solitary confinement, especially in Denmark, in response to insignificant disciplinary infractions be immediately reviewed and stopped. Relatedly, complaint and independent oversight mechanisms were observed as needing to be strengthened. It is important to strengthen the capacity of NPMs to monitor and document cases of solitary confinement.

b. ***Research-Driven Reform:*** It was observed that strong parallels between Denmark's research-oriented reform of its pre-trial solitary confinement regime and its need to apply the same process to its use of punitive solitary confinement. Similarly, more research and statistical data were seen as needed to better understand how

punishment cells are used. The difficulties of the political climate and the need to engage politicians were also highlighted.

c. ***Engaging Prison Administration:*** Notably, prison administration urged the conference not to assume that it was they who wanted to preserve the regime of solitary confinement, agreeing that the measure did not make prisons safer. The fourth panel unanimously advocated that a focus on improving positive prisoner and prison staff relations was imperative. The importance of activities was also highlighted through the presented case-studies in Norway and the UK. In their discussions, the members drew attention to the concept of dynamic security. Pointing to recent studies concluding the same, the panel questioned the effectiveness of punitive solitary confinement as a deterrent. Also observed was the proposition that problems were different in different prisons, meaning local differences exist despite tight regulation.

DIGNITYs foretræde for Folketingets Retsudvalg d. 27. april 2017
Anvendelse af strafcelle

DIGNITY – Dansk Institut mod Tortur takker venligst Folketingets Retsudvalg for muligheden for kort at drøfte spørgsmålet om brugen af strafcelle i danske fængsler og arresthuse, dvs. anbringelse i isolation som en sanktion for overtrædelse af en række ordensforseelser, jf. straffuldbyrdelsesloven § 68, stk. 2. Vi ønsker at præsentere:

(A) udviklingen i anvendelse af strafcelle i Danmark;
(B) konklusionerne fra DIGNITYs konference om strafcelle[1]; og
(C) forslag til nye tiltag, som kunne bane vej for bedre løsninger af de konkrete adfærdsproblemer i danske fængsler og arresthuse.

A: Anvendelse af strafcelle i Danmark

I Danmark anvendes disciplinærstraf overfor indsatte, som bryder en række ordensforseelser, jf. straffuldbyrdelsesloven § 67-70. Anbringelsen i isolation (strafcelle) er den alvorligste sanktion, som gennemføres overfor indsatte (også børn og psykisk syge) 22-23 timer i døgnet i op til 4 uger ad gangen, jf. straffuldbyrdelsesloven § 70. [2]

Anvendelsen af isolation som en disciplinærstraf efter straffuldbyrdelsesloven er mere end fordoblet over de sidste 15 år fra 1.289 anbringelser i strafcelle i 2001 til 2.579 i 2015 og 2.995 i 2016.[3] Antallet af langvarige isolation (15 dage og mere) er markant steget siden lovændringen i 2016 vedrørende mobiltelefoner: 222 sager i 2016 (heraf 219 sager vedrørende ulovlig kommunikation) mod 7 sager i 2015.[4] Mindreårige bliver dog i mindre grad straffet med isolation (fald fra 25 sager i 2014 til 14 i 2016).

B: Konklusioner fra DIGNITYs internationale konference om anvendelse af strafcelle

Som kulmination på adskillige års forskning og praksis og i lyset af den internationale retsudvikling afholdt DIGNITY d. 3. april 2017 en international konference om brugen af strafcelle i Danmark og internationalt. Ved konferencen deltog 100 nationale og internationale eksperter, bl.a. repræsentanter fra FN og Europarådets komité til Forebyggelse af Tortur, Kriminalforsorgen, Fængselsforbundet i Danmark, fængselsdirektører fra vores nabolande, Ombudsmanden, Institut For Menneskerettigheder, forskere, læger, psykologer m.fl.

[1] Se endvidere diskussionsoplæg til konferencen (bilag 1).
[2] Se endvidere DIGNITYs fakta-ark (bilag 2).
[3] Kriminalforsorgens tal for 2016 er foreløbigt. Belægningsgraden i 2001 var 3.236 og i 2015 3.421.
[4] Kriminalforsorgens præsentation på konferencen og pressemeddelelse, som er tilgængelig på Kriminalforsorgens hjemmeside www.kriminalforsorgen.dk

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De sundhedsfaglige eksperter konkluderede, at isolation ofte har alvorlige negative sundhedsmæssige konsekvenser. Der er dokumentation for, at isolation kan medføre angst, depressioner og en øget risiko for selvskade og selvmord. Skadevirkninger kan opstå allerede efter kun et par dage og stige for hver dag i isolation. Forskningen har vist, at indsatte efter isolation har alvorlige fysiske, psykiske og sociale problemer.

Juristerne konkluderede, at de internationale regler nu fastslår, at isolation bør afskaffes overfor mindreårige, psykisk syge og andre sårbare grupper, og at langvarig isolation (15 dage eller mere) helt bør afskaffes. Isolation i op til 14 dage må kun anvendes helt undtagelsesvist og i så kort tid som muligt. Der er en klar tendens blandt internationale menneskerettighedsorganer i retning af afskaffelse af isolation som straf, hvilket blandt andet kom til udtryk i FNs Torturkomites anbefalinger til Danmark i december 2015.

Fængselsdirektørerne konkluderede, at isolation som straf ikke virker! Det forebygger ikke vold eller indsmugling af stoffer eller mobiler. Indsatte, som har siddet i isolation, bliver gradvist psykisk dårligere. De får sværere ved at begå sig socialt både blandt medfanger, og isolation modvirker den indsattes re-integration i samfundet, når fængselsstraffen er overstået. Fængselspersonalet ønsker ikke mere isolation – tværtimod! Men man har på samme tid brug for nogle styringsredskaber. Flere andre lande – såsom Sverige, Norge og Canada - har afskaffet isolation som straf og fundet alternative løsninger på de underliggende problemer. De arbejder motiverende og terapeutisk med at påvirke de indsatte i en positiv retning for således at forebygge den uønskede adfærd. Erfaringerne fra disse lande har været positive, og sikkerheden i fængslerne er øget pga. færre fangeovergreb og selvmordsraten er faldet.

C: Nye tiltag – nye løsninger

Overordnet set mangler der viden om effekten af strafcelle – overfor indsatte, personale og samfundet. Gør det fængslerne sikrere? Forebygger det vold og indsmugling? Der mangler særligt viden om, hvorvidt intentionen bag loven om indførelse af strafcelle for besiddelse af mobiltelefon opfyldte formålet: bl.a. at forhindre planlægning af ny kriminalitet. Derfor anbefaler DIGNITY, at Retsudvalget iværksætter en nærmere kortlægning eller undersøgelse af de 222 sager fra 2016, hvor strafcelle blev anvendt i 15 dage eller mere, og af et passende antal af sager vedrørende kortere isolation. En kortlægning, der skal give svar på, om der f.eks. i de 219 tilfælde vedr. ulovlig kommunikation var tale om besiddelse af mobiltelefon med henblik på planlægning af ny kriminalitet, såsom terror, eller om de indsatte blot ønskede at tale med deres børn, ægtefæller og familier. Undersøgelsen skal endvidere give bud på alternative løsninger på de bagvedliggende adfærdsproblemer. DIGNITY stiller gerne ekspertise vedrørende fængselsforhold og voldsforebyggelse til rådighed for en sådan undersøgelse.

DIGNITY foreslår endvidere, at man på lovgivningsniveau tager følgende skridt:

1) På kort sigt, at lovgivningen ændres, således at strafcelle afskaffes i forhold til mindreårige, psykisk syge og sårbare grupper, og at den øvre grænse for isolation sænkes fra fire til to uger, hvilket følger den internationalt anbefalede norm.

2) På længere sigt, at strafcelle helt afskaffes. Metodens effekt er tvivlsom, og der er dokumentation for de sundhedsmæssige skadevirkninger. I det omfang der er behov for at straffe indsatte bør det ske gennem det almindelige strafferetlige system. Formålet med strafcelle kan opnås med langt mindre indgribende metoder, som erfaringer fra Sverige og Norge viser. Fængsler skal ikke være så hårde, at de gør mennesker syge og ude af stand til at genindtræde normalt i samfundet efter endt straf.

Bilag:

1 DIGNITYs diskussionsoplæg fra den internationale konference.
2 DIGNITYs fakta-ark om anvendelse af isolation som straf.

Signe Hovmøller Ellemose

Fra: Andrea Hilden Honoré <AHH@domstolsstyrelsen.dk>
Sendt: 10. september 2018 16:41
Til: Justitsministeriet
Cc: Camilla Marta Giordano
Emne: SV: Høring - Lov om ændring af lov om fuldbyrdelse af straf m.v. (j. nr. 2018-0090-0415)

Til Justitsministeriet

Justitsministeriet har ved mail af 13. august 2018 anmodet Domstolsstyrelsen om en eventuel udtalelse over udkast til forslag til lov om ændring af lov om fuldbyrdelse af straf m.v., retsplejeloven, straffeloven og lov om folkeskolen (Forhold for indsatte i kriminalforsorgens institutioner, varetægtssurrogat m.v.).

Forslaget giver ikke Domstolsstyrelsen anledning til bemærkninger.

Med venlig hilsen

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Sendt: 13. august 2018 10:22
Emne: Høring - Lov om ændring af lov om fuldbyrdelse af straf m.v. (j. nr. 2018-0090-0415)

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Vedhæftede filer:	Høringsliste.PDF; Høringsudgave af 13. august 2018.PDF; Høringsbrev - generelt.PDF
Sag:	2018-0090-0415
Sagsdokument:	827399

Høring over udkast til forslag til lov om ændring af lov om fuldbyrdelse af straf m.v., retsplejeloven, straffeloven og lov om folkeskolen (Forhold for indsatte i kriminalforsorgens institutioner, varetægtssurrogat m.v.)

Fængselsforbundet har modtaget udkast til forslag til lov om ændring af lov om fuldbyrdelse af straf med flere.

Fængselsforbundet bakker op om lovforslaget og har på det foreliggende grundlag ingen yderligere bemærkninger til lovforslaget.

Med venlig hilsen

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10. SEPTEMBER 2018

HØRING OVER LOVFORSLAG OM FORHOLD FOR INDSATTE I KRIMINALFORSORGENS INSTITUTIONER M.V.

Justitsministeriet har ved e-mail af 13. august 2018 anmodet om Institut for Menneskerettigheders eventuelle bemærkninger til et udkast til forslag til lov om ændring af lov om fuldbyrdelse af straf m.v., retsplejeloven, straffeloven og lov om folkeskolen (Forhold for indsatte i kriminalforsorgens institutioner, varetægtssurrogat m.v.).

Udkastet er baseret på regeringens politiske aftale med Socialdemokratiet og Dansk Folkeparti af 28. november 2017 (med efterfølgende tilslutning fra Alternativet, Radikale Venstre og Socialistisk Folkeparti) om kriminalforsorgens økonomi for 2018-2021. Som led i aftalen skal der blandt andet ske en styrkelse af kriminalforsorgens sikkerheds- og efterretningsarbejde.

Instituttet har i sine bemærkninger fokuseret på følgende emner i udkastet:

- Kriminalforsorgens adgang til øget kontrol som led i indsatsen mod radikalisering og ekstremisme
- Etableringen af en efterretningsenhed i Kriminalforsorgen
- Begrænsningen i anvendelsen af strafcelle over for mindreårige

SAMMENFATNING

Udkastet berør i vid udstrækning retten til respekt for privat- og familieliv beskyttet blandt andet i Den Europæiske Menneskerettighedskonvention artikel 8.

Sammenfattende finder instituttet, at udkastets brede og uklare hjemler til indgreb giver anledning til bekymring omkring retten til respekt for privatliv.

Dette gælder navnlig for den foreslåede adgang til øget kontrol med indsatte som led i indsatsen mod radikalisering og ekstremisme,

hvorefter kriminalforsorgen kan overvære besøg, gennemlæse breve, aflytte telefonsamtaler mv.

Det gælder også kriminalforsorgens adgang til at oprette en efterretningsenhed der får adgang til følsomme personoplysninger om en bred skare af personer både inden for og uden for kriminalforsorgens institutioner.

Instituttet bemærker, at bestemmelserne om øget kontrol som led i indsatsen mod radikalisering og ekstremisme samt etableringen af en efterretningsenhed i kriminalforsorgen forfølger anerkendelsesværdige formål og giver adgang til visse indgreb i privatlivets fred. Det er imidlertid af afgørende betydning, at bestemmelserne udformes klart og præcist, samt at indgrebene er proportionale.

Fælles for begge de forslåede ordninger (adgangen til øget kontrol og etableringen af efterretningsenheden) er de ganske uklare bestemmelser og en vidtgående adgang til nærmere administrativ regulering. Dette indebærer, at ordningerne ikke bliver beskrevet detaljeret i lovbemærkningerne og at Folketinget alene kan forholde sig til de generelle bemyndigelsesbestemmelser i udkastet.

- Instituttet anbefaler, at Justitsministeriet i lovbemærkningerne om kriminalforsorgens øget kontrol med indsatte forholder sig til de uklarheder, som afgrænsningen af begreberne radikalisering og ekstremisme giver anledning til, samt beskriver, hvilke processuelle retsgarantier, der skal søge at imødegå uklarhederne.
- Instituttet anbefaler, at Justitsministeriet i lovtekst og lovbemærkninger afgrænser og præciserer bestemmelsen om en efterretningsenhed i Kriminalforsorgen, for at sikre mod vilkårlighed og for at sikre Folketingets stillingtagen til enhedens bemyndigelser og forpligtelser.

- For så vidt angår begrænsningen i brugen af strafcelle anbefaler instituttet, at regeringen indfører et fuldstændigt forbud mod brug af strafcelle over for mindreårige

I de følgende afsnit redegøres nærmere for instituttets bemærkninger til de enkelte dele af udkastet.

RETTEN TIL RESPEKT FOR PRIVAT- OG FAMILIELIV OG BESKYTTELSE AF PERSONOPLYSNINGER

Udkastet berør navnlig retten til respekt for privat- og familieliv, herunder beskyttelsen af personoplysninger.

Justitsministeriet har alene forholdt sig til retten til privat- og familieliv i forhold til tiltagene mod radikalisering og ekstremisme.

Det er imidlertid gennemgående for flere dele af udkastet, at der hjemles en forøget adgang til indgreb i retten til respekt for privat- og familieliv. Instituttet skal derfor kort redegøre for de menneskeretlige forpligtelser, som Danmark skal overholde ved udformningen af et lovforslag.

Retten til respekt for privat- og familieliv samt retten til korrespondance er blandt andet beskyttet i Den Europæiske Menneskerettighedskonvention (EMRK) artikel 8.

Et indgreb i retten kan retfærdiggøres efter artikel 8, stk. 2 såfremt indgrebet sker ifølge lov, har et legitimt formål, og er nødvendigt i et demokratisk samfund.

Beskyttelse af personoplysninger er desuden særskilt reguleret ved siden af beskyttelsen af privatlivet, blandt andet i retshåndhævelsesdirektivet (implementeret ved retshåndhævelsesloven). I forlængelse heraf er staten forpligtet til at overholde bestemmelserne i Den Europæiske Unions Charter om Grundlæggende Rettigheder (EU-chartret) jf. artikel 51. I EU-chartrets artikel 7 beskyttes blandt andet privatlivets fred og i 8 beskyttes personoplysninger.

Myndighedernes systematiske indsamling og opbevaring af persondata udgør et indgreb i privatlivet.[1]

Den Europæiske Menneskerettighedsdomstol (EMD) har i sin praksis blandt andet statueret krænkelse af EMRK artikel 8 for manglende præcision i hjemmelsgrundlaget for efterretningstjenesters registrering af personoplysninger.[2] Det følger af EMD's praksis, at reglerne om indgreb skal indeholde tilstrækkelige begrænsninger i de beføjelser, der overlades til efterretningstjenesterne, herunder begrænsninger i karakteren af oplysninger, personkredsen, betingelserne der skal være opfyldt for indsamling og den anvendte fremgangsmåde for indhentelse af oplysningerne, samt at der skal være fastsat en tidsgrænse for opbevaringen og være tilstrækkelige og effektive retssikkerhedsgarantier til beskyttelse af borgerne.[3]

Retten til respekt for privat- og familieliv og retten til korrespondance ophører ikke, når man bliver frihedsberøvet.[4]

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[1] Se således for eksempel Den Europæiske Menneskerettighedsdomstols dom i Marper 2008.
[2] Se blandt andet Den Europæiske Menneskerettighedsdomstols domme i Amann, 2000 og Rotaru 2000.
[3] Se Kjølbro, Den Europæiske Menneskerettighedskonvention – for praktikere 2017, s. 859f.
[4] Se for eksempel Den Europæiske Menneskerettighedsdomstols dom i Dickson, 4/12, 2007, pr. 68.

Imidlertid kan der være nødvendige og uundgåelige konsekvenser af frihedsberøvelsen eller den indsatte persons omstændigheder, der indskrænker rettighederne. Mens indsatte således som det klare udgangspunkt har ret til for eksempel besøg og til uhindret og fortrolig korrespondance (meddelelseshemmelighed), kan myndighederne imidlertid indskrænke den indsattes adgang til omverdenen i medfør af EMRK artikel 8.

EMD har i sin retspraksis stillet krav til udformningen (legalitetskrav/lovkvalitetskrav) af bestemmelser, der hjemler begrænsninger i besøg eller i korrespondancen for personer under frihedsberøvelse.[5]

Mere generelt har EMD desuden fundet, at kravene til retsgrundlaget (legalitetskrav/lovkvalitetskrav) skærpes, når der er tale om hemmelige indgreb. I disse tilfælde bør retsreglen af hensyn til såvel legalitetskravet og proportionalitetsprincippet indeholde retssikkerhedsgarantier til beskyttelse mod vilkårlige indgreb og anden form for misbrug fra myndighedernes side.[6]

ØGET KONTROL SOM LED I INDSATS MOD RADIKALISERING OG EKSTREMISME

DEN FORSLÅEDE ORDNING

Justitsministeriet foreslår i sit udkast, at indsatte, som er dømt for overtrædelse af bestemmelserne i straffelovens kapitel 12 eller 13 (forbrydelser mod statens sikkerhed, terrorisme mv.), eller som af kriminalforsorgen skønnes at være radikaliserede, ekstremistiske eller i risiko for at blive det, skal have overværet deres besøg, gennemlæst deres breve og optaget, påhørt eller aflyttet deres telefonsamtaler, hvis dette skønnes påkrævet af ordens- eller sikkerhedsmæssige hensyn, af hensyn til kriminalforsorgens indsats mod radikalisering og ekstremisme eller af hensyn til at forebygge kriminalitet.

Justitsministeriet foreslår desuden, at den nævnte personkreds efter omstændighederne helt kan afskæres fra at kommunikere med én eller flere nærmere angivne personer.

Det er Justitsministeriets opfattelse, at bestemmelserne kan gennemføres i overensstemmelse med EMRK artikel 8 og artikel 14

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[5] Se navnlig Lorenzen m.fl., Den Europæiske Menneskerettighedskonvention med kommentarer (art. 1-9), 2011 s. 758ff samt s. 762 med henvisninger til EMD's retspraksis

[6] Se for eksempel Den Europæiske Menneskerettighedskommissions afgørelse i Malone 1984, pr. 67 samt EMD's dom i Amann pr. 65ff, 2000 og Kjølbro, Den Europæiske Menneskerettighedskonvention – for praktikere 2017, s. 876ff med gengivelse af retspraksis

(forbuddet mod diskrimination, som er accessorisk til øvrige rettigheder i EMRK).

INSTITUTTETS BEMÆRKNINGER

Justitsministeriets forslag indeholder ganske brede hjemler for at gøre indgreb i flere aspekter af retten til respekt for privat- og familieliv og retten til korrespondance.

Samlet set indebærer den foreslåede ordning en vidtgående begrænsning af indsattes privatliv ikke blot, når de er dømt for terrorvirksomhed mv., men også, når de – baseret på kriminalforsorgens skøn – anses for at være i risiko for at blive radikaliserede eller ekstremistiske. Begrænsningen i privatlivets fred i form af overvågning kan desuden ske uden den overvågedes viden. Dette skærper kravet til bestemmelsens udformning (legalitetskrav/lovkvalitetskrav) og til proportionalitetsvurderingen, herunder ved et krav om kvalificering af det skøn, som myndighederne skal foretage.

Navnlig det forhold, at definitionerne af begreberne radikalisering og ekstremisme er forbundet med betydelig usikkerhed, bør efter instituttets opfattelse adresseres i lovbemærkningerne.

Justitsministeriet har i udkastet søgt at definere de to begreber. Efter instituttets opfattelse fører dette dog ikke til, at betænkelighederne med definitionerne mindskes væsentligt.

Instituttet støtter sig i den forbindelse til, at flere internationale forsøg på at definere ekstremisme og radikalisering, ikke har ført til enighed om en definition af begreberne og der derfor er tale om uklare og upræcise begreber.[7]

Herudover fandt instituttet i 2017 rapporten "Forebyggelse af radikalisering i fængsler – Menneskerettigheder og retssikkerhed for de indsatte"[8], at en bred definition af radikalisering og ekstremisme kan afføde tvivl blandt fængselspersonalet om forståelsen af begreberne ligesom en bred definition kan bevirke, at der er større risiko for konflikt med de indsattes ret til blandt andet privatliv.

Såfremt man vælger at lovgive på baggrund af disse brede begreber bør der som det mindste gælde nogle effektive processuelle retsgarantier som en art modvægt til begrebernes vaghed.

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[7] Se blandt andet Report of the Special Rapporteur on human rights and counter-terrorism, A/HRC/31/65, 22. februar 2016, pr. 11.

[8] Rapporten er tilgængelig på: https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/udgivelser/ligebehandling_2017/imr_radikalisering_web.pdf

Navnlig bør der efter instituttets opfattelse udarbejdes retningslinjer og indikatorer til at opdage radikaliserede eller ekstremistiske indsatte, ligesom der bør etableres screeningsprocedurer og et sagkyndigt team.[9]

Instituttet bemærker desuden, at ordlyden af bestemmelserne er udformet således, at der er en formodning for, at et indgreb skal finde sted i stedet for en formodning for, at mindre indgribende midler skal tages i brug førend, at et indgreb må foretages. Det fremgår således af samtlige bestemmelser, at kriminalforsorgen "skal" og ikke – som gældende ret for indgreb i meddelelseshemmeligheden i retsplejeloven og i straffuldbyrdelsesloven – at myndighederne "kan" foretage indgreb, hvor dette er nødvendigt. Denne ændring i ordlyden kan risikere at forvrænge den proportionalitetsafvejning, som myndighederne skal foretage.

- Instituttet anbefaler, at Justitsministeriet i lovbemærkningerne om kriminalforsorgens øget kontrol med indsatte forholder sig til de uklarheder, som afgrænsningen af begreberne radikalisering og ekstremisme giver anledning til, samt beskriver, hvilke processuelle retsgarantier, der skal søge at imødegå uklarhederne.
- Instituttet anbefaler, at ordlyden af de foreslåede bestemmelser om øget kontrol ændres, således, at et indgreb "kan" foretages af myndighederne og ikke "skal" foretages

ETABLERING AF EN EFTERRETNINGSENHED I KRIMINALFORSORGEN

DEN FORESLÅEDE ORDNING

I udkastet foreslås etableringen af en ny efterretningsenhed i kriminalforsorgen, der systematisk skal indhente oplysninger til brug for sikkerhedsarbejdet med henblik på udarbejdelse af konkrete og generelle trusselsvurderinger inden for kriminalforsorgens område.

I den forbindelse har Justitsministeriet fundet det afgørende, at efterretningsanalyser og trusselvurderinger af enkeltpersoner skal kunne videregives til for eksempel politiet, såfremt kriminalforsorgen vurderer, at dette er nødvendigt for at understøtte kriminalforsorgens sikkerhedsarbejde eller andre myndigheders opgaver.

Kriminalforsorgens kompetencer i denne forbindelse er hjemlet i den foreslåede § 66 b. Det følger heraf, at: "Kriminalforsorgen kan indsamle, behandle og videregive oplysninger om indsatte og personer, som indsatte har kontakt til, til andre myndigheder, hvis ordens- eller sikkerhedsmæssige hensyn, hensyn til kriminalforsorgens eller andre

[9] Se yderligere i instituttets rapport, kapitel 7.

myndigheders indsats mod radikalisering og ekstremisme eller hensyn til at bekæmpe og forebygge kriminalitet taler herfor"

Hjemlen giver kriminalforsorgen en ganske vid adgang til personoplysninger.

Det er Justitsministeriets opfattelse, at bestemmelsen kan vedtages inden for rammerne af retshåndhævelsesdirektivets artikel 8 og 10. Justitsministeriet har ikke i øvrigt foretaget en vurdering af bestemmelsen i lyset af menneskeretten.

INSTITUTTETS BEMÆRKNINGER

Den foreslåede bestemmelse i § 66 b hjemler kriminalforsorgens oprettelse af en database med personoplysninger, herunder følsomme personoplysninger.

Bestemmelsen skal håndhæves i overensstemmelse med retshåndhævelsesdirektivet, der i Danmark er implementeret ved retshåndhævelsesloven. Det følger blandt andet heraf, at Datatilsynet skal føre tilsyn med kriminalforsorgens databehandling.

Personoplysninger deles efter gældende ret med PET i medfør af en indberetningspligt, som den enkelte medarbejder i kriminalforsorgen har. Instituttet anser det for væsentligt, at der med udkastet nu skabes en udtrykkelig lovhjemmel til kriminalforsorgens indsamling behandling og videregivelse af personoplysninger med andre myndigheder, herunder PET, idet hjemmelsgrundlaget for den hidtidige indberetningspligt har været uklart.[10]

Instituttet bemærker imidlertid, at den foreslåede bestemmelse på grund af ordlyden og den brede bemyndigelse ikke nødvendigvis skaber større klarhed. Dette gør sig gældende af en række grunde:

Årsagen til indsamlingen af oplysninger kan efter udkastet være hensynet til orden- og sikkerhed, kriminalforsorgens eller andre myndigheders indsats mod radikalisering og ekstremisme eller hensynet til bekæmpelse og forebyggelse af kriminalitet. Efterretningsenheden får således til opgave at indsamle, behandle og videregive oplysninger af hensyn til alt fra opretholdelsen af den almindelige daglige orden i institutionen til udformningen af efterretningsanalyser og trusselvurderinger af enkeltpersoner.

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[10] Se således instituttets rapport af 2017: "Forebyggelse af radikalisering i fængsler – Menneskerettigheder og retssikkerhed for de indsatte" tilgængelig på: https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/udgivelser/ligebehandling_2017/imr_radikalisering_web.pdf

Personkredsen omfatter enhver indsat i kriminalforsorgens institutioner samt personer uden for kriminalforsorgens institutioner, som indsatte har kontakt med. Det er ikke specificeret i bestemmelsen eller i bemærkningerne, hvordan "kontakt" skal forstås og afgrænses, herunder om der skal være en mindstetærskel for karakteren af kontakt, som kan udløse den vide adgang til indsamling af personoplysninger. Instituttet formoder, at bestemmelsen i øvrigt ikke gælder kontakt med advokat (som blandt andet er beskyttet i retten til retfærdig rettergang i EMRK artikel 6) og opfordrer ministeriet til for god ordens skyld at lade dette fremgå af lovbemærkningerne.

Som nævnt kan der for indsatte ske visse nødvendige og uundgåelige indskrænkninger i retten til privatlivets fred. Det samme gælder imidlertid ikke andre personer, blot de kommer i kontakt med indsatte. Derfor er der tale om to særskilte vurderinger for de to persongrupper, når man skal vurdere om indgreb kan ske og i givet fald, om det er proportionalt.

Af bestemmelsen følger, at *kriminalforsorgen* hjemles adgang til at etablere databasen med personoplysninger. Det er imidlertid ikke specificeret, om det er personer med bestemte funktioner eller en på anden måde kvalificeret og specificeret personkreds, der får adgang til personoplysningerne. For øvrige efterretningsenheder (hos politiet og forsvaret), er dette udtrykkeligt reguleret i de respektive love. Den manglende afgrænsning rejser spørgsmål om, hvilke processuelle garantier der vil blive etableret for at sikre, at personoplysninger om indsatte og personer, som indsatte har kontakt med, bevares forsvarligt og ikke er tilgængelige for uvedkommende inden for organisationen.

Herudover gælder også for denne bestemmelse – som for bestemmelserne om øget kontrol som led i indsatsen mod radikalisering mv. – at *uklarheden i definitionen* af radikalisering og ekstremisme skaber et usikkert retsgrundlag, som adgangen til personoplysninger hviler på.

Mere generelt mangler der i udkastet en stillingtagen til, hvordan personoplysninger skal opbevares, varigheden heraf, slettefrister mv.

Instituttet formoder, at dette – som øvrige forhold – vil blive reguleret i den bekendtgørelse, som der i udkastets stk. 2 er adgang til at udforme.

Etableringen af en ny efterretningsenhed indebærer en betydelig forandring af retstilstanden og vil fremover åbne op for indsamling af en stor mængde personoplysninger om en bred skare af personer.

Hjemlen bør derfor være tilstrækkeligt afgrænset og bemyndigelse og forpligtelser bør være klart og præcist defineret i lovtekst suppleret af lovbemærkningerne. Dette støttes af EMD's praksis om spørgsmålet og sikrer mod vilkårlighed og indebærer desuden, at Folketinget får

adgang til at tage stilling til de væsentligste afvejninger af, hvordan bestemmelsen skal anvendes og forstås.

Instituttet finder, at bestemmelsen med sin nuværende uklare og brede udformning kan risikere at føre til uproportionale indgreb i retten til respekt for privatlivet.

- Instituttet anbefaler, at Justitsministeriet i lovtekst og lovbemærkningerne afgrænser og præciserer bestemmelsen om en efterretningsenhed i Kriminalforsorgen, for at sikre mod vilkårlighed og for at sikre Folketingets stillingtagen til enhedens bemyndigelser og forpligtelser

BRUGEN AF STRAFCELLE OVER FOR MINDREÅRIGE

DEN FORESLÅEDE ORDNING

I udkastet foreslås det, at anvendelsen af strafcelle over for indsatte og varetægtsarrestanter under 18 år begrænses.

Det følger af de foreslåede regler og lovbemærkninger, at den maksimale varighed af strafcelleanbringelse nedbringes til et tidsrum på ikke over 7 dage og i almindelighed maksimalt 3 dage for mindreårige indsatte eller varetægtsarrestanter. Herudover skaber udkastet adgang til begrænset fællesskab for mindreårige under udståelse af strafcelle.

I sager om vold mod kriminalforsorgens personale vil der – som hidtil – fortsat kunne ikendes strafcelle i op til 4 uger.

INSTITUTTETS BEMÆRKNINGER

Instituttet har kritiseret brugen af strafcelle, herunder over for mindreårige.[11] Mens der med udkastet sker en begrænsning i anvendelsen – som må anses for positiv – er der fortsat alvorlige betænkeligheder ved overhovedet at anvende strafcelle over for mindreårige.

Brugen af strafcelle har ført til kritik af Danmark fra såvel FN's Torturkomité[12] og Europarådets Torturkomité[13] ligesom der findes en

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[11] Se således delrapporten "Frihedsberøvelse", en del af "Menneskerettigheder i Danmark, Status 2015-16" tilgængelig på: https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/udgivelser/status/2015-16/frihedsberoevelse_delrapport_2016.pdf

[12] Se således FN's Torturkomités Concluding observations af 4. februar 2016 tilgængelig på: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/017/75/PDF/G1601775.pdf?OpenElement

[13] Se således rapport fra Europarådets Torturkomité fra sit seneste besøg i Danmark i februar 2014, tilgængelig på:

række internationale anbefalinger og retningslinjer om, at strafcelle ikke bør anvendes over for mindreårige, herunder for eksempel af FN's Børnekomité i General Comment no. 10 (2007) samt i FN's minimumstandarder for indsatte, de såkaldte Mandela Rules.

Instituttet bemærker, at Justitsministeriet i sit udkast ikke har forholdt sig til disse internationale anbefalinger og retningslinjer.

- Instituttet anbefaler, at regeringen indfører et fuldstændigt forbud mod brug af strafcelle over for mindreårige.

Der henvises til ministeriets sagsnr. 2018-0090-0415.

Med venlig hilsen

Marya Akhtar Luckow
SPECIALKONSULENT

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https://menneskeret.dk/sites/menneskeret.dk/files/cpt_denmark_2014_visit.pdf