Opinion Piece

The Law Society of Western Australia
The voice of the legal profession in Western Australia

Monday, 20 March 2023

The Rule of Law – Managing Children and Young People in Detention Centres at Banksia Hill and Unit 18 Casuarina

This Opinion Piece has been prepared with the permission of and based on an article prepared for the Law Society by the Hon Denis Reynolds CitiWA, former President of the Children's Court of Western Australia.

Our democracy and structures of government are underpinned by the rule of law. Fundamental to the rule of law is the concept that all persons and agencies within executive government are bound by and should comply with the laws enacted by the legislature to protect the rights of individuals in our society. That is particularly so if the individuals are children and young people – even more so if they are in the care and control of the State.

It is therefore a very serious matter if the Department of Justice (the Department) has been and is unlawfully managing children and young people in detention centres at Banksia Hill (BH) and Unit 18, Casuarina (U18). Regrettably, the Department is continuing to unlawfully:

1. implement 'rolling lockdowns' when no confinement order exists, resulting in the solitary confinement of detainees in their cell for more than 20 hours a day across the whole or much of the centre(s); and
2. make confinement orders because of staff shortages under the guise of the Y*oung Offenders Act 1994* (the Act) and the *Young Offenders Regulations 1995* (the Regulations); and
3. use Behavioural Management policies, procedures and programs, that allow for the solitary confinement of detainees, and which circumvent and breach express provisions in the Act and Regulations on confinement.

In his paper on "The Rule of Law in a Social Media Age" presented for the Sir Francis Burt Oration 2022, the Honourable Justice Peter Quinlan, Chief Justice of Western Australia, in the context of court orders being routinely treated as aspirational guidelines rather than binding obligations, stated as follows at pp 19 and 20:

"It is most concerning, however, when it is seen in the actions or attitude of the executive government. The courts, after all, are unable to enforce their own orders; they are, in large part, dependent upon officers of the executive government to execute and enforce them. And when those orders are orders directed to the executive government, they are dependent upon officers of the executive government to implement and obey them. It does not take much imagination to see that if executive governments take the view that decisions of courts are simply one point of view among many, or that the executive may take the view that a decision is wrong in law and need not be followed, the rule of law will not long survive."

Reports by the Inspector of Custodial Services in 2012, 2013, 2017, 2018 and 2022, have repeatedly recommended that the Department:

- review, repeal, and re-enact legislation to provide for regimes governing confinement which included adequate protections for detainees; and
- improve its record keeping on in and out of cell hours.

The Law Society of Western Australia
Level 4, 160 St Georges Terrace, Perth WA 6000 | **Postal:** PO Box Z5345, Perth WA 6831
Phone: (08) 9324 8600 | **Fax:** (08) 9324 8699 | **Email:** info@lawsocietywa.asn.au
Website: lawsocietywa.asn.au

In 2018 the Department:

- accepted the recommendation for legislative change and committed to completing it by 31 December 2019.
- claimed it had already introduced an on-line recording process which clearly indicated time in and out of cell.

The Department has failed to deliver on both.

Instead, it has dealt with confinement by using administrative practices which circumvent the express confinement processes required by Parliament in the Act and Regulations. Since November 2020, no magistrate of the Children's Court, as a visiting justice, has heard any charge of a detention offence. And since November 2022, there has been no magistrate even appointed to hear one.

There are two kinds of confinement orders. A Detention offence confinement order (Detention CO) and a Good government, good order or security confinement order (Good government CO).

A Good government CO is governed by s.196(2)(e) and Regs 73, 74, and 78 – 80. Its purpose is to maintain the good government, good order or security of the centre. It can only be made by the Superintendent (or delegate) for a maximum of 24 hours.

Recent cases in the Children's Court show that the Superintendent has started to make Good government COs.

The current 'confinement' procedures for BH are the Commissioners Operating Policies and Procedures 6.1 Behavioural Management (the COPP BM), and the 6.10 Confinement. Previous procedures, and the current procedures just mentioned, allowed/allow for 'custodial officers' to confine detainees in the Intensive Support Unit (ISU) at BH.

Cells in the ISU are small and stark. A detainee is confined alone. The ISU was originally used for observation, crisis care, and monitoring detainees at risk of self- harm. However, its primary purpose for many years and now is discipline/punishment. The Department puts that under the guise of good government, good order or security, and rehabilitation. The fact is that the name ISU belies the harshness of the conditions, and the lack of supports given to detainees confined in it.

BH operates on 12-hour shifts. A night shift of 12 hours is a long time for a child. The obvious question, having regard to the objects and principles of the Act, is why isn't the number of unlock hours in practice at least 12 hours? That would significantly increase, albeit in a relative sense only, the entitlement for time out of cell for both kinds of confinement orders. It would add at least 30 minutes for a Detention CO, and one hour for a Good government CO.

It should be noted that these statutory minimum entitlements breach those in international human rights conventions. If BH was managed in accordance with the objects and principles of the Act, applying a therapeutic model to pursue the rehabilitation of detainees, then unlock hours would be at least 12 hours.

Good government COs which are now routinely made because of staff shortages are unlawful.

The Department is also using administrative practices which circumvent the processes on confinement in the Act and Regulations, and which are also unlawful. An example of a custodial officer using this authority to confine a detainee solitarily in the ISU, is when the officer decides that the detainee is not complying with behavioural requirements of a PSP and is unlikely to or has done something serious enough in nature.

In the *State of WA v Z(J)M, Children's Court of WA*, per President Quail, heard on 10 February 2023, and transcript published on the Children's Court website, reference was made to contents of a detention management report (DMR) filed by the Department. It set out that the Unit 18 Casuarina Multidisciplinary Team (CMT) reviews all referrals for placement in U18. It also set out that the aim of the CMT is to provide oversight, transparency and good government to all young people referred for and placed in U18.

Z(J)M was allegedly involved in incidents on 31 December 2022 and 12 January 2023. As noted earlier, there is currently no visiting justice appointed to hear detention offence charges. However, on 13 January 2023, the CTM recommended that Z(J)M be moved from BH to U18. The recommendation was approved by the Superintendent and Z(J)M was transferred that day.

The DMR also set out that "A move to U18 is not considered a consequence or a punishment for behaviour" and that "Z was moved to Unit 18 based on a determination of his on-going risk to the safety and good order of the Centre."

In the week after he arrived at U18, based on the Department's records, which may not necessarily be accurate, Z(J)M spent one day in his cell for just under 20 hours, one day for over 20 hours, 3 days for over 21 hours a day, then one day for over 22 hours, and then one day for over 23 hours. Over the next 19 days, his time out of cell varied but continued to be minimal.

The simple point is that however the Department dresses up the role of the CTM and the basis of its decisions to transfer detainees to U18, it is clearly a behavioural management procedure. As such, it falls outside of the legislative procedures and protections on confinement that Parliament has required.

The creation of the CTM is not of itself unlawful. However, it is unlawful for it to make decisions based on the alleged behaviour of a detainee and knowing full well that the detainee will inevitably be held in solitary confinement at U18 for more than 20 hours a day, and on consecutive or subsequent days.

Unfortunately, it is clear that the Department is not even complying with the inadequate minimum requirements of the Regulations. It should therefore be no surprise that Unlawful Management has serious direct and indirect consequences and in no order of priority they are:

- BH and U18 are not fit for purpose;
- the safety of detainees and staff is significantly compromised;
- it is exacerbating the behaviours of already vulnerable detainees;
- increased risks of, and realisation of, self-harm and suicide;
- chronic staff dissatisfaction, attrition rates, and shortages;
- compromise of the work of the Children's Court;
- compromise of the work of the legal profession by denial of proper access to, time with, and information on clients;
- family of detainees being denied access to and information on their children;
- compromise of educational, recreational, vocational and cultural programs;
- collateral trauma to people who work in the youth justice system;
- the State being exposed to actions for compensation by children, to whom it owed a duty of care, for potentially large sums.

The extended periods of cell incarceration are completely inappropriate for these children and this form of punishment is contrary to the object and purpose of the Act. The WA Government needs to urgently look at how it can redirect funding to the programmes that work to reduce the root causes of crime before behaviour escalates, and how to house children appropriately when either bail is inappropriate, or a custodial sentence is to be imposed. The system is broken if juvenile detainees are being housed in conditions described as cruel and punishing, and as having no rehabilitative effect. This should not be the intent or the impact of our justice system. Immediate action is required. The rule of law in our society is being ignored. We cannot allow this to continue.

Ante Golem
President
The Law Society of Western Australia

- ENDS -

For comment please contact:

Madeleine McErlain
Manager Corporate Communications
(08) 9324 8650
mmcerlain@lawsocietywa.asn.au

About us: The Law Society of Western Australia is the peak professional association for lawyers in the State. The Society is a not-for-profit association dedicated to the representation of its more than 4,500 members. The Society enhances the legal profession through its position as a respected leader and contributor on law reform, access to justice and the rule of law. The Society is widely acknowledged by the legal profession, government and the community as the voice of the legal profession in Western Australia.

The Law Society OF WESTERN AUSTRALIA
The voice of the legal profession in Western Australia
BRIEF

The Unlawful Management of Banksia Hill and Unit 18, Casuarina Detention Centres

Law Society Member, the Hon Denis Reynolds, was President of the Children's Court of Western Australia from 2004-2018 and Judge of the District Court of Western Australia from 2004-2018 (including Senior Judge from 2016-2018). The Hon Judge Reynolds retired in 2018 after 34 years on the bench. He is the longest serving President of the Perth Children's Court of Western Australia and one of Australia's longest serving judicial officers.

By The Hon Denis Reynolds CitWA

Our democracy and structures of government are underpinned by the rule of law. Fundamental to the rule of law is the concept that all persons and agencies within executive government are bound by and should comply with the laws enacted by the legislature to protect the rights of individuals in our society. That is particularly so if the individuals are children and young people – even more so if they are in the care and control of the State.

It is therefore a very serious matter if the Department of Justice (the Department) has been and is unlawfully managing children and young people in detention centres at Banksia Hill (BH) and Unit 18, Casuarina (U18). Regrettably, the Department is continuing to unlawfully:

1. Implement 'rolling lockdowns' when no confinement order exists, resulting in the solitary confinement of detainees in their cell for more than 20 hours a day across the whole or much of the centre(s); and

2. Make confinement orders because of staff shortages under the guise of the *Young Offenders Act 1994* (the Act) and the *Young Offenders Regulations 1995* (the Regulations); and

3. Use Behavioural Management policies, procedures and programs, that allow for the solitary confinement of detainees, and which circumvent and breach express provisions in the Act and Regulations on confinement.

Confinement Orders under the Act and Regulations

Types of order

Sections 173 (1) - (5), and 196 (2)(e) of the Act and Part 9 of Division 3 of the Regulations govern 'confinement of a detainee' to sleeping quarters or a designated room. There are two kinds of confinement orders. A Detention offence confinement order (Detention CO) and a Good government, good order or security confinement order (Good government CO).

A Detention CO is governed by s.173(2)(e) and Regs 73, and 74 – 77. A Detention Offence can be heard by a visiting justice or the Superintendent at the election of the detainee. Detention offences include threatening or assaulting an officer, damage, or riotous behaviour. A Detention CO is clearly a punishment. A visiting justice may impose a maximum period of confinement of 48 hours, and the Superintendent, a maximum of 24 hours.

A Good government CO is governed by s.196(2)(e) and Regs 73, 74, and 78 – 80. Its purpose is to maintain the good government, good order or security of the centre. It can only be made by the Superintendent (or delegate) for a maximum of 24 hours.

Requirements for time out of cell

Reg 73 relevantly defines "unlock hours" to mean "the period during which detainees who are not subject to confinement are able to leave their sleeping quarters." No maximum or minimum time is fixed. So the amount of time out is dictated by the unlock hours decided by the centre's management. BH operates on 11 hours 15 minutes unlock hours.

Pursuant to Reg 76(3), a detainee on a Detention CO "is entitled to fresh air, exercise and staff company for a period of at least 30 minutes every 3 hours during unlock hours." Pursuant to Reg 79(4), a detainee on a Good government CO "whose confinement is for 12 hours or longer is entitled to at least one hour of exercise each 6 hours during unlock hours."

BH operates on 12-hour shifts. A night shift of 12 hours is a long time for a child. The obvious question, having regard to the objects and principles of the Act, is why isn't the number of unlock hours in practice at least 12 hours? That would significantly increase, albeit in a relative sense only, the entitlement for time out of cell for both kinds of confinement orders. It would add at least 30 minutes for a Detention CO, and one hour for a Good government CO.

It should be noted that these statutory minimum entitlements breach those in international human rights conventions. If BH was managed in accordance with the objects and principles of the Act, applying a therapeutic model to pursue the rehabilitation of detainees, then unlock hours would be at least 12 hours.

Unfortunately, it is clear that the Department is not even complying with the inadequate minimum requirements of the Regulations.

1. The Practice of 'rolling lockdowns' because of staff shortages is unlawful

In VYZ by his next friend XYZ v Chief Executive Officer of the Department of Justice (2022) WASC 274, per Tottle J. delivered 25 August 2022, His Honour made a declaratory order that confinement of VYZ in his sleeping quarters at BH on each of 26 days for more than 20 hours a day between January and June 2022 was unlawful.

VYZ was on remand. He turned 15 years old when in BH. He was not the subject of any confinement order. He was not locked down because of any breach of discipline. 'Rolling lockdowns' is the description used when the whole detention centre or whole units are placed in lockdown and each detainee is solitarily confined. Over the course of the day on a rolling basis, detainees are each rotated out of their cell for a relatively short period of time during which they can make a phone call.

Rolling lockdowns are caused by severe staff shortages. On any given day, only 50 percent of the required staff are on duty.

Because VYZ was not on a confinement order, His Honour's finding on the amount of time in cell of more than 20 hours did not involve any interpretation of the provisions on the minimum entitlement for time out of cell for confinement orders. VYZ's case was focused on him being confined for long periods of time. In His Honour's view, any time over 20 hours a day was unacceptably long and unlawful.

The CEO did not appeal against the declaratory order. It is the law, the Department is bound by it, and detainees are entitled to it.

His Honour made strong and instructive statements in the course of his reasons. At para 71, he described solitary confinement of detainees as a "severe" and also an "extraordinary measure" which "should only be implemented in rare and exceptional circumstances". He also referred to the "significant harm" that it can do to children "many of whom are already psychologically vulnerable".

At para 87 he stated: "I do not accept the respondents' contention that even if the court concluded that the confinement of the applicant to his sleeping quarters in the manner described in these reasons was not authorised by the Act the court should decline to grant declaratory relief because 'locking detainees in their sleeping quarters is a regular occurrence' and the practical problems that granting a declaratory order would create would be 'disproportionate to the consequences of the unlawful decision'. Read in one way the submission might be understood to suggest that even if the practice of locking detainees in their sleeping quarters was beyond the respondents' statutory power, it is a practice that would continue unless a declaration was made. If that is the way in which it was intended to be understood it is to be deprecated in the strongest terms."

Whatever the Department intended by that submission, worse still, since the declaratory order, it has continued to unlawfully lockdown vulnerable children for long hours, including in excess of 20 hours a day, because of staff shortages.

In his paper on "The Rule of Law in a Social Media Age" presented for the Sir Francis Burt Oration 2022, the Honourable Justice Peter Quinlan, Chief Justice of Western Australia, in the context of court orders being routinely treated as aspirational guidelines rather than binding obligations, stated as follows at pp 19 and 20:

"It is most concerning, however, when it is seen in the actions or attitude of the executive government. The courts, after all, are unable to enforce their own orders; they are, in large part, dependent upon officers of the executive government to execute and enforce them. And when those orders are orders directed to the executive government, they are dependent upon officers of the executive government to implement and obey them. It does not take much imagination to see that if executive governments take the view that decisions of courts are simply one point of view among many, or that the executive may take the view that a decision is wrong in law and need not be followed, the rule of law will not long survive."

The Department's conduct of continuing with rolling lockdowns since VYZ fits squarely into that statement. It is treating the decision of Tottle J. simply as one point of view among many rather than obeying it.

2. Good Government COs based on staff shortages are unlawful

The Superintendent has recently started to make Good government COs to deal with practical problems in light of chronic staff shortages. The question is whether that is lawful.

While that question did not fall to be determined in VYZ, Tottle J.'s reasons assist in deciding it. The answer is a matter of statutory interpretation.

The provisions in the Act governing confinement refer to "a detainee". In particular, s.196(2)(e) of the Act, which empowers the making of regulations conferring authority on the Superintendent to make Good government COs, expressly confers authority to order that "a detainee" be confined to "the detainee's" sleeping quarters or to a designated room, for "a period" not exceeding 24 hours (my emphasis).

Clearly these provisions require consideration of the particular circumstances of a particular individual detainee. They do not permit a single net to be cast over the whole population, or any accommodation unit, or any group of detainees. Confinement orders are only justified based on the individual detainee's circumstances.

The fact that the Superintendent's power is a broad discretionary power, and not limited to the detainee's behaviour, does not diminish the statutory requirement that a Good government CO must be based on something "in respect of the particular detainee" against whom it is made.

It follows, that for the relevant regulations on Good government COs to be within the power granted by s.196(2)(e) of the Act, they must be consistent with that interpretation of the Act as just outlined.

A perusal of the relevant regulations, namely Regs 74(2), and 78-80, which are expressly related back to s.196(2)(e), show that to be the case. Reg 78(2) provides that work time can be counted as confinement time. Reg 79(5) provides that confinement time can

be cut short and a detainee be returned to the appropriate program area. Clearly those regulations require a consideration "in respect of the particular detainee" the subject of the order.

Any practice of loudly announcing from some location in the centre or a unit, to all of the detainees in their cells that there is a lockdown for the day, hoping that they will all hear and understand it, and then making a separate record against each detainee, cannot and will not make the lockdown lawful.

In VYZ, the Department's lawyers submitted that s.11D of the Act, was the source of power to implement rolling lockdowns. Tottle J. rejected that submission. He found that s.11D is about the use of personal restraints (e.g. handcuffs) and not about rolling lockdowns.

Section 11D refers to "a young offender" rather than "a detainee" because the power broadly covers every young offender whether outside or inside a detention centre. For present purposes, when inside a detention centre, "a young offender" can be read as "a detainee".

While His Honour rejected the submission on s.11D, it is instructive to note that in para 83 he added: "There is no evidence to support a finding that either the chief executive officer or Mr Reid (the Superintendent at the time) formed an opinion *in respect of the applicant* that it was necessary for him to be restrained by confining him in his sleeping quarters for one of the reasons specified in s.11D."

It should be noted that my interpretation of s.196(2)(e) – as requiring a focus on the individual detainee- is entirely consistent with His Honour's comments.

In short, staff shortages are not a matter 'in respect of a detainee'. Therefore, they do not constitute a proper jurisdictional fact to enliven the statutory authority of the Superintendent to make a Good government CO against a detainee or detainees.

Tottle J. stated at para 72:

"Framing the practice of locking detainees, who are children, in sleeping quarters for between 20 and 24 hours a day on a regular basis, by reference to an inability to provide 'optimal services' grossly distorts the perspective from which the practice should be assessed."

In other words, staff shortages cannot be relied upon to implement rolling lockdowns.

At para 88 he stated:

"Ultimately, the answer to the concern about practical problems is that the detention centre must be administered in accordance with the Act and the Regulations. The chief executive officer is under a statutory duty to administer the Act in accordance with its terms and is empowered to appoint such officers as are necessary for that purpose. It is simply not open to those who are responsible for the care and welfare of detainees to adopt practices which are not authorised by the Act."

By that statement, His Honour succinctly set out the bottom line – the Department needs to obey the law.

I should add that repeatedly making Good government COs on consecutive or any subsequent day(s) because of staff shortages, as is currently routine, is not only unlawful of itself for the reasons just given, but also because Good government COs are limited to a maximum of 24 hours.

3. Behavioural management practices circumvent the legislation and are unlawful.

3.1 Confinement by Custodial Officers.

Reports by the Inspector of Custodial Services in 2012, 2013, 2017, 2018 and 2022, have repeatedly recommended that the Department:

- Review, repeal, and re-enact legislation to provide for regimes governing confinement which included adequate protections for detainees; and
- Improve its record keeping on in and out of cell hours.

In 2018 the Department:

- Accepted the recommendation for legislative change and committed to completing it by 31 December 2019
- Claimed it had already introduced an on-line recording process which clearly indicated time in and out of cell.

The Department has failed to deliver on both.

Instead, it has dealt with confinement by using administrative practices which circumvent the express confinement processes required by Parliament in the Act and Regulations. Since November 2020, no magistrate of the Children's Court, as a visiting justice, has heard any charge of a detention offence. And since November 2022, there has been no magistrate even appointed to hear one.

Recent cases in the Children's Court show that the Superintendent has started to make Good government COs.

The current 'confinement' procedures for BH are the Commissioners Operating Policies and Procedures (COPP) 6.1 Behavioural Management (the COPP BM), and the COPP 6.10 Confinement (COPP C). Previous procedures, and the current procedures just mentioned, allowed/allow for 'custodial officers' to confine detainees in the Intensive Support Unit (ISU) at BH.

Cells in the ISU are small and stark. A detainee is confined alone. The ISU was originally used for observation, crisis care, and monitoring detainees at risk of self-harm. However, its primary purpose for many years and now is discipline/punishment. The Department puts that under the guise of good government, good order or security, and rehabilitation. The fact is that the name ISU belies the harshness of the conditions, and the lack of supports given to detainees confined in it. The provision in COPP BM, para 8.5.2, that a Personal Support Program (PSP) is not to be considered disciplinary is a nonsense considered against the contents of the COPP BM as a whole and how it is used and breached in practice.

An example of a custodial officer using this authority to confine a detainee solitarily in the ISU, is when the officer decides that the detainee is not complying with behavioural requirements of a PSP and is unlikely to, or has done something serious enough in nature.

Under the COPP BM (unlike confinement orders under the Act), there is no time limitation for these confinements and nor are there any safeguard minimum requirements for time out of cell. As a result, detainees have been spending many days, including many consecutive days, in the ISU with very little time out of cell.

Section 11B(d) of the Act relevantly provides that a custodial officer "may issue to a detainee such orders as are necessary for the purposes of this Act, including the security, good order, or management of a facility or detention centre."

In VYZ, Tottle J. considered the power of custodial officers to confine detainees . At para 84, specifically on s.11B(d), he stated:

"However, for the reasons I have already touched on, (the extraordinary nature of the power to order confinement and the existence of express powers concerning confinement) the power to issue orders under s.11B(d) does not extend to ordering that a detainee be confined in the manner and for the periods that the applicant was confined on the days identified in the application."

At para 86, under the heading "Good government, good order or security" he stated that in his view s.11B(d) provided custodial officers "with the power to order detainees to be confined in their sleeping quarters in the event of a disturbance or the existence of a hazard from which the detainees need to be protected." However, he added:

"For the reasons given above, however, it does not extend to ordering that a detainee be locked in his or her sleeping quarters, in effect, resulting in the detainees being kept in a state of solitary confinement all day. The extraordinary nature of the power to confine a detainee for periods not exceeding 24 hours to maintain the 'good government, good order or security' of a detention centre is recognised by the fact that it is conferred on the Superintendent."

For completeness, I refer to ss.181(1) and (2) of the Act. They provide that the chief executive officer may, with the approval of the Minister, make rules for the management, control, and security of detention centres generally or a specified detention centre, and that such rules may confer a discretionary authority on any person or class of persons.

However, it is trite law that such rules cannot be inconsistent with the express provisions of the Act and Regulations. In my view, the COPP BM provisions are inconsistent with the Act and Regulations as they purportedly give custodial officers the authority to confine detainees for behavioural management and for an indefinite amount of time. To that extent, they are unlawful.

3.2 The Unit 18 Casuarina Multidisciplinary Team (the CMT).

In the State of WA v Z(J)M, Children's Court of WA, per President Quail, heard on 10 February 2023, and transcript published on the Children's Court website, reference was made to contents of a detention management report (DMR) filed by the Department. It set out that the CMT reviews all referrals for placement in U18. It also set out that the aim of the CMT is to provide oversight, transparency and good government to all young people referred for and placed in U18.

Z(J)M was allegedly involved in incidents on 31 December 2022 and 12 January 2023.

As noted earlier, there is currently no visiting justice appointed to hear detention offence charges. However, on 13 January 2023, the CTM recommended that Z(J)M be moved from BH to U18. The recommendation was approved by the Superintendent and Z(J)M was transferred that day.

The DMR also set out that "A move to U18 is not considered a consequence or a punishment for behaviour" and that "Z was moved to Unit 18 based on a determination of his on-going risk to the safety and good order of the Centre."

In the week after he arrived at U18, based on the Department's records, which may not necessarily be accurate, Z(J)M spent one day in his cell for just under 20 hours, one day for over 20 hours, 3 days for over 21 hours a day, then one day for over 22 hours, and then one day for over 23 hours. Over the next 19 days, his time out of cell varied but continued to be minimal.

The simple point is that however the Department dresses up the role of the CTM and the basis of its decisions to transfer detainees to U18, it is clearly a behavioural management procedure. As such, it falls outside of the legislative procedures and protections on confinement that Parliament has required.

The transfer of Z(J)M was clearly a punishment for his alleged misbehaviour. Given his harsh and inhumane treatment from as soon as he arrived, it is dishonest and embarrassing to claim otherwise.

The creation of the CTM is not of itself unlawful. However, it is unlawful for it to make decisions based on the alleged behaviour of a detainee and knowing full well that the detainee will inevitably be held in solitary confinement at U18 for more than 20 hours a day, and on consecutive or subsequent days.

Unlawful Management has serious direct and indirect consequences

In no order of priority they are:

1. BH and U18 are not fit for purpose;
2. The safety of detainees and staff is significantly compromised;
3. It is exacerbating the behaviours of already vulnerable detainees;
4. Increased risks of, and realisation of, self-harm and suicide;
5. Chronic staff dissatisfaction, attrition rates, and shortages;
6. Compromise of the work of the Children's Court;
7. Compromise of the work of the legal profession by denial of proper access to, time with, and information on clients;
8. Family of detainees being denied access to and information on their children;
9. Compromise of educational, recreational, vocational and cultural programs;
10. Collateral trauma to people who work in the youth justice system;
11. The State being exposed to actions for compensation by children, to whom it owed a duty of care, for potentially large sums.

All of these systemic failures and their adverse consequences will only end when the executive government starts to obey the rule of law. ■