

the **Howard League** for **Penal Reform**

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Rt Hon Chris Grayling MP
Secretary of State for Justice
Ministry of Justice
102 Petty France
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Legal Team

Contact: Laura Janes
Email: laura.janes@howardleague.org
Our Ref: LJ//030413/920
Your Ref:

21st August 2013

By email Graylingc@parliament.uk and post

OPEN LETTER

Dear Sir,

**Re: Inadequacy of complaints system for children in Secure Training Centres
Letter before action**

We are writing to you in accordance with the Pre-Action Protocol for Judicial Review.

We request a response to this letter **by 5.30pm on Wednesday 4 September 2013**. We genuinely hope that it will not be necessary to issue judicial review proceedings.

Summary of Claim

The Howard League for Penal Reform challenges the failure of the Secretary of State for Justice to implement an effective and independent complaints procedure for children detained in Secure Training Centres (STCs). Children are placed in STCs because they are considered especially vulnerable. Youth Justice Board (YJB) figures show they are subjected to high levels of physical restraints by staff and are often injured as a result.

There is no independent body to consider complaints by children detained in STCs. This includes complaints about restraints.

By contrast, children in Young Offender Institutions (YOIs) who are considered to be less vulnerable than children in STCs and adult prisoners are entitled to an independent review by the Prisons and Probation Ombudsman.

This anomaly has been criticised by the Youth Justice Board (YJB) in a comprehensive report on complaints for children in prison in 2011. The YJB's triennial review published in July 2013 also recommended that children in STCs should have an independent body to appeal to. In 2012 the YJB eventually commissioned ad hoc investigations by the PPO to three individual children represented by Howard League who complained over several years about being restrained in STCs. These investigations are on-going.

Despite these findings and the legal requirement for a "comprehensive grievance procedure" in Rule 8 of the STC Rules, as well as the general principle that those detained should have an effective and independent means of airing grievances in relation to serious matters, the system remains wholly inadequate and without an option to appeal to an independent body. As a consequence the procedure is unfair, discriminatory and contrary to the protections afforded by the European Convention on Human Rights.

The Howard League for Penal Reform has represented and assisted children in prison since 2002. We are deeply concerned by this on-going failure which we can see affects the safety of children in prison and the accountability of staff. We therefore invite the Secretary of State for Justice to put in place a complaints system for children in STCs forthwith that is fit for purpose and includes an accessible right of appeal to an independent body.

1. The proposed Defendant

The proposed Defendant is the Secretary of State for Justice.

2. The Claimant

The Claimant is the Howard League for Penal Reform.

3. Reference details

The Claimant solicitor's reference for this matter is LJ/030413/920. The Defendant's reference is unknown.

4. The details of the matter being challenged

The Claimant challenges the failure of the Defendant to put in place a complaints system for children in STCs forthwith that is fit for purpose and includes an accessible right of appeal to an independent body.

5. Background facts

Children in custody are among the most vulnerable members of society. As with anyone in custody, almost every aspect of their daily lives is under the control of state authorities. There is always the risk that that control will be abused, for example when detainees are subjected to excessive force by prison staff, unnecessary solitary confinement, strip searches or other degrading treatment. In addition, children in custody are removed from their parents and other responsible adults who would be the first port of call for children in the community.

There is a particular risk of abuse when physical force or “restraint” is used by staff on children in STCs. Evidence gathered by the Howard League suggests that such use of restraint is widespread. In January 2006, the Howard League published an independent inquiry by Lord Carlile¹ of Berriew QC which investigated the use of physical restraint and concluded that the use of restraint was widespread and unacceptable. He also highlighted that many of the young people involved had been subjected to serious violence and abuse in the past and needed help to understand that they may make complaints without reprisal. In 2011, Lord Carlile conducted a follow up review through two public hearings in the House of Lords, during which a range of government bodies and other organisations gave evidence. The evidence put forward suggested that there had been little improvement five years on from the initial inquiry.

Figures published by the MOJ on 31 January 2013² showed that in 2011/12 there were on average 111 incidents of restrictive physical interventions per month affecting 18 per cent of all children detained in STCs, many of whom were subject to more than one restraint per month. In the same year, 68 restraint incidents resulted in minor or major injuries requiring medical treatment. In response to a Parliamentary Question tabled by Baroness Stern, Lord McNally confirmed³ that there had been a total of 285 exception reports submitted by STCs concerning warning signs or serious injuries detected during or following the use of physical control in care in STCs between 2006 and 2011. He confirmed warning signs are indicated by “struggling to breathe; complaint unable to breathe; nausea; vomiting; swelling to face or neck; abnormal redness to face; blood spots on face or neck; limp or unresponsive; change in degree of agitation; respiratory arrest; and cardiac arrest.” He confirmed that the category of “serious injury requiring hospital treatment” includes: “serious cut; fractures; concussion, loss of consciousness, and damage to internal organs.”

Through its legal work with young people in prisons, the Howard League has frequently encountered children who have suffered from the use of force whilst

¹ An independent inquiry by Lord Carlile of Berriew QC into the use of physical restraint, solitary confinement and forcible strip searching of children in prisons, secure training centres and local authority secure children’s homes (the Howard League, 2006), available at: http://www.howardleague.org/fileadmin/howard_league/user/pdf/Publications/Carlile_Report_pdf.pdf

² Available at <https://www.gov.uk/government/publications/youth-justice-statistics>

³ Available at <http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/111109w0001.htm>

detained. As set out in its report, “Twisted”, published in 2011⁴, children have described being assaulted, slapped and strangled during so called “*restraint*” scenarios. They have also told us that the threat of restraint is routinely used to make sure children in custody do what they are told or that they are deliberately provoked into situations where restraint becomes necessary. Children in prison have told us that they have no faith in the complaints system to deal fairly with their concerns or get redress for unfair or inhumane treatment, a view supported by evidence from the Children’s Commissioner⁵. The Children’s Commissioner’s report found that many young people had chosen not to make complaints in the first place because they lacked confidence in the system as a means of resolving their problems or concerns.

It is of critical importance that children have access to mechanisms which will ensure that where credible allegations of mistreatment are made, they are effectively, promptly and independently investigated so as to ensure that children’s fundamental human rights are protected, In the absence of thorough and independent investigations, those responsible for inappropriate or unlawful behaviour are unlikely to be appropriately challenged and practices changed.

The current complaints system for children in STCs

While Rule 8 of the STC Rules 1998 provides for a ‘comprehensive grievance procedure’ the Rules confer an element of discretion on STCs as to how this is provided. Each privately run STC has a local policy which must be approved by the Secretary of State. If dissatisfied with the outcome of the complaint, the Rules provide that the child may appeal to a ‘monitor’ who must consider the complaint. They are not, however, legally required to conduct an independent investigation. Monitors are employed by the YJB and generally are based within the STC.

The complaints system for children in YOIs and adults in prison

The complaints process for both adults in prison and children in YOIs is set out in “Prisoner’s Complaints” (PSI 02/2012). The policy and practice for these groups is that if a person is dissatisfied with the outcome of the internal process, he or she can complain to the PPO, the process for which is set out in PSI 58/2010 and in the PPO Terms of Reference (TOR). The PPO is wholly independent of both the National Offender Management Service and the Youth Justice Board and is “*operationally independent*” of the Ministry of Justice. Its role, however, is not merely to consider appeals against the outcome of internal complaints procedures, but to investigate any decisions or actions relating to management, supervision, care and treatment of prisoners in custody. Information about complaints is published annually by the PPO and is therefore subject to public, and Parliamentary scrutiny.

⁴ Twisted – the use of force on children in custody (The Howard League, 2011), available at: http://www.howardleague.org/fileadmin/howard_league/user/pdf/Publications/Restraint.pdf

⁵ Why are they going to listen to me? – young people’s perspectives on the complaints system in the youth justice system and secure estate, page 19 (OCC, 2012), available at: http://www.uservice.org/wp-content/uploads/2012/07/OCC_report-Why_are_they_going_to_listen_to_me.pdf

YJB and other official concerns about the process

The triennial review published in July 2013⁶ acknowledges that the work of STC monitors needs to be delivered independently of the secure establishments being monitored as “*over time, the statutory role of the STC Monitor has become conflated with the other work that the YJB performs as part of its general duty to monitor the youth justice system and the provision of those services*”. The review also refers to “plans to extend the role of the PPO to cover STCs⁷”.

This mirrors the recommendations in the YJB’s Review of the Complaints System in the Secure Estate for Children and Young People, published in, 2011, which recommended that “In order to create consistency across the secure estate, consideration needs to be given as to whether the PPO would be best placed to respond to young people’s appeals against complaints rather than the STC monitors⁸”.

6. Grounds of review

The Ministry of Justice has failed to facilitate means by which children in STCs can secure an effective and independent investigation into credible allegations of mistreatment. This on-going failure is unlawful for two reasons.

First, it is contrary to the STC Rules, unfair and discriminatory.

Second, it is contrary to Articles 3 and 14 of the European Convention on Human Rights.

6.1 Contrary to the STC Rules, unfair and discriminatory.

Rule 8 (1) of the STC Rules 1998 states there “*shall be established and administered at each centre a comprehensive grievance procedure, approved by the Secretary of State, to which each trainee and his parent shall have access.*” As outlined above, in the absence of a right to appeal to an independent body, the current system is neither comprehensive nor accessible. Further, the absence of an independent appeal body for children in STCs, when compared with adults and less vulnerable children in prison service accommodation is in breach of the proactive duty to prevent discrimination towards children underscored by the Equality Act 2010 (section 149) and the common law prohibition on discrimination. There is no rational reason why children in YOIs should be afforded an opportunity to appeal to an independent body and children in STCs should not. In the absence of a material

⁶ Stage One report, page, 25, para 56, available at <https://consult.justice.gov.uk/digital-communications/yjb-triennial-review-2012>

⁷ Paragraph 55

⁸ Review of the Complaints System in the Secure Estate for Children and Young People, page 33 (YJB, 2011), available at: <http://yjbpublications.justice.gov.uk/en-gb/Resources/Downloads/Review%20of%20the%20Complaints%20System%20in%20the%20Secure%20Estate.pdf>

distinction between two cases, it is not logical to treat them differently: "treating like cases alike and unlike cases differently is a general axiom of rational behaviour" (*Matadeen v Pointu* [1999] 1 AC 98, 109 per Lord Hoffmann).

The provision of an independent body for children in STCs to appeal to in accordance with government recommendations would be a straightforward step to ensure that children in STCs are not discriminated against.

6.2 Contrary to Article 3 ECHR and Articles 3 and 14 ECHR

It is well established that Article 3 ECHR, which protects peoples from inhuman and degrading treatment, also imposes an investigative obligation on the State to conduct an "effective official investigation" (*Sahin v Turkey* App No 7928/02 Judgment 25/12/07 [43]).

This requirement for an independent investigation will bite in claims that relate to the unlawful use of restraint against children in custody, incidents of which the Claimant has demonstrated are prevalent. This is because the Court of Appeal in *R(C) v SSJ* [2009] QB 657 held that instances of restraint that are not "*strictly necessary*" would breach Art 3 (see paragraph 650).

In all 4 STCs, the only means by which a child can challenge the outcome of complaints about the unlawful use of restraint is by appealing to a monitor. This is not sufficient to discharge the State's Article 3 investigative obligation because:

- It is not an independent process

The monitor is only required to consider the internal process. It is not required to carry out an independent investigation as required by Article 3. Further, monitors are not sufficiently independent from the YJB or the contractors who run the STCs for the purposes of Article 3.

- It is not an effective process

According to a letter sent from the Youth Justice Board to the Claimant on 17 May 2013, out of 2500 complaints made by children in STCs to the YJB's monitor, only 1 appeal was heard. The YJB monitor has never conducted an Article 3 compliant investigation into an incident of mistreatment of a child in custody.

Therefore the current absence of an independent and effective process for children in STCs is in breach of Article 3 where there are credible allegations of mistreatment.

Further, Article 14 will prohibit discrimination where Article 3 is engaged. As indicated above, adults in prison and young people detained in YOIs are able to complain to the PPO. Children in STCs cannot. This constitutes a difference in treatment within the “*ambi*” of Article 3. This difference in treatment is based upon the age of the individual and the nature of the institution in which they are detained and therefore constitutes discrimination on the grounds of “*other status*” pursuant to Article 14. There is no possible justification for this difference in treatment. Indeed if anything, one might expect that given the vulnerability of children in detention, they should have greater access than adults to an independent complaints mechanism.

Children’s rights: UN Convention on the Rights of the Child (UNCRC)

The UK is a party to the UNCRC and should observe the protections afforded by it, especially where human rights are engaged (see *R(R) v Durham Constabulary* [2005] 1 WLR 1184 [26]).

Article 3 requires the best interests of the child to be a paramount consideration in matters affecting the child; Article 19 requires States to take measures to protect children from all forms of physical or mental violence, injury or abuse and that these measures should, as appropriate, include effective procedure for investigation amongst other things. Finally, Article 40 requires that children involved in the criminal justice system be treated with dignity. The absence of an effective and independent complaints system for children in STCs clearly undermines our obligations under the UNCRC which should be considered in conjunction with the grounds of review outlined above.

7. Details of the action that the defendants are expected to take

We expect the Defendant to agree that it will, within a specified time frame, put in place a complaints mechanism for children in STCs that is effective and independent so as to comply with Article 3 and Article 14 of the ECHR. If the Defendant does not agree to taking such action within 14 days of the date of this letter, the Claimant will issue proceedings for Judicial Review.

8. Details of the legal advisers

We confirm that we act as the Claimant’s legal advisers in this matter.

9. Details of interested parties

Haddockfield (run by Serco Limited), Oakhill, Medway and Rainsbrook STCs (run by G4S Care and Justice Services Limited) are all interested parties in this matter as the grievance procedure operated in each STC is produced by the STC itself, albeit

subject to approval by the Secretary of State. Please inform us if you consider there to be any other interested parties.

10. Address for reply and service of court documents

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11. Proposed reply date

As noted above, we are seeking your initial response by 5.30pm on **Wednesday 4 September 2013** . We hope that you will be able to review this case and confirm to us that the Ministry of Justice will take urgent steps to implement compliant procedures within a fixed timeframe.

If you would like to discuss this matter further, please do not hesitate to contact the writer, Laura Janes, consultant solicitor and Acting Legal Director.

We look forward to hearing from you.

Yours faithfully

The Howard League for Penal Reform

Cc: Directors of Medway, Hassockfield, Rainsbrook and Oakhill STCs