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Dear Sirs

The Howard League for Penal Reform's response to the National Offender Management Service's Amendment to Policy set out in PSO 1700

We welcome the opportunity to respond to this consultation on the revised segregation policy for prisoners. The revision follows a Supreme Court judgment in July 2015 and subsequent revisions to the Prison and YOI Rules (the Rules).

We welcome the efforts within the revised policy to introduce enhanced fairness into the segregation procedure. We also note that judgment in the Scottish case of *Shahid* in the Supreme Court has been handed down since the draft policy was issued for consultation. This case makes it clear that Article 8 of the European Convention on Human Rights also applies to segregated prisoners. We trust that the policy will be further revised to bring it into line with this judgment. It is essential that the policy provides for practices and procedures that enable a prisoner to ensure segregation is in accordance with the law and not disproportionate given his or her needs. We would be happy to comment on a further draft.

Executive summary

External authorisation must take place swiftly to be a proper safeguard

The revised policy recognises that the 42 days, provided for by the Rules before external authorisation is required, will not be an adequate safeguard in all cases.

This recognition is implicit in the provision in the policy of a shorter period of 21 days for children in segregation.

Yet we are concerned that the policy does not go far enough to safeguard children and other vulnerable prisoners against the very real risks associated with segregation.

Even the shortened timeframe represents a seven-fold increase from the original timeframe set out in the Rules. It is also a week beyond the period when international experts believe irreversible damage can set in. It is simply too late. We are concerned that all other vulnerable prisoners, including those with learning disabilities and mental health problems, as well as young adults and older prisoners are not subject to any adjustments in the timeframe.

We are firmly of the view that the 42 day time limit is too long for all prisoners and that the Rules are unlawful. We have urged the Secretary of State to revise the Rules and the Legislative Scrutiny Committee has referred the amendment to the Rules to the attention of the House of Lords. An Early Day Motion has been laid against the provisions in the Commons. In order to avoid the severe consequences associated with prolonged segregation, the policy ought to provide for a much shorter period for all prisoners.

Clear timeframes for submitting information to the DDC are required

We believe that whenever the external review is to be carried out, it must be fully informed and there should be clear guidelines as to how far in advance of the review information must be submitted. Any prisoner who is segregated ought to know what information is being provided, when it is to be provided and to have an opportunity to comment on it before a decision to continue with the segregation is made by an external person.

Decisions within the prison must be independent

We are also concerned about the actual and perceived independence of decision making within the prison. The policy recognises the importance of independence but does not go far enough to ensure that decisions are truly independent.

Effective participation

The policy has been adapted to provide greater clarity around the process for segregated prisoners, including the structure of Segregation Review Boards (SRBs). We are concerned that these adaptations do not go far enough to ensure that segregated prisoners can effectively participate in the process.

Further considerations

In our view the policy must be reviewed urgently with a view to reinstating a regime as close as possible to the procedure originally envisaged by the Rules, ie –external

review after 72 hours. At the very least, the shorter periods for children should be shorter than 21 days and further adaptations should be made for young adults and other prisoners vulnerable due to age or health problems. There should be clear deadlines for when information is required for the external review. Urgent action should be taken to ensure greater independence of decision-making within the prison and effective participation of prisoners at SRBs.

About us

Founded in 1866, the Howard League is the oldest penal reform charity in the world. The Howard League has over 10,000 members, including lawyers, politicians, business leaders, practitioners, prisoners and their families and top academics. The Howard League has consultative status with both the United Nations and the Council of Europe. It is an independent charity and accepts no grant funding from the UK government.

The Howard League campaigns for less crime, safer communities and fewer people in prison. We aim to achieve these objectives through conducting and commissioning research and investigations aimed at revealing underlying problems and discovering new solutions to issues of public concern. The Howard League's objectives and principles underlie and inform the charity's parliamentary work, research, legal and participation work as well as its projects. Since 2002 the Howard League for Penal Reform has provided the only legal service dedicated to representing children and young people (under 21) in custody.

Solitary confinement: The Howard League's expertise

We have represented many children and young people within the secure estate who have been segregated and isolated.

Our legal team initiated the case of *Secretary of State for the Home Department v S.P.* [2004] EWCA Civ 1750 which resulted in an amendment to PSO 1700 to require prisons to listen to children's representations before a decision to segregate was made.

We have also successfully challenged unlawful policies resulting in the isolation of children and young people in the cases of *R(KB) v Secretary of State for Justice* [2010] EWHC 15 (Admin) and *R(M and others) v Director of Ashfield and Secretary of State for Justice* [2013] EWHC 438 (Admin).

We also recently settled a case against Thameside following the introduction of an unlawful violence reduction policy that incorporated automatic periods of segregation outside of the Rules and PSO 1700.

We provided expert evidence and legal argument before the Supreme Court in the case of *R (on the application of Bourgass and another) v Secretary of State for Justice* [2015] UKSC 54 which led to the revision of the Secretary of State's segregation policy.

We have also brought numerous complaints about the use of isolation to the Prison and Probation Ombudsman (PPO).

As a result of the Howard League's concerns resulting from calls to our advice line from children subject to isolation at Feltham prison, the Local Safeguarding Children Board for Hounslow announced an independent inquiry into the issue last year. The inquiry is yet to report.

We have drawn upon our lawyers' experience in practice as well as our expertise in this policy area in this response.

Our legal work on the issue of solitary confinement has been carried out in conjunction with policy work, research and campaigns. The isolation of children was one of three themes that formed part of Lord Carlile's independent inquiry commissioned by the Howard League.

Overview

The revised policy – the context

We welcome the revisions to PSO which aim to enhance the procedural safeguards for segregated prisoners. In particular, we welcome the decision to adopt a different approach with regards to young people, the requirement to provide meaningful reasons for authorising continuing segregation and the more robust mechanisms for monitoring the use of segregation.

However, the policy must be seen against the backdrop of the Supreme Court judgment in *Bourgass* and the extensive evidence considered by the Court regarding the risks to the physical health, mental health and even life of a prisoner subject to a prolonged period of solitary confinement. This evidence included (references are to paragraphs of the judgment):

- The disproportionate number of self-inflicted deaths in segregation (28 between 2007 – 2014) (§36);
- Harmful psychological effects of isolation can become irreversible after 15 days (§37);
- Symptoms of solitary confinement range from insomnia and confusion to hallucinations and psychosis (§38);
- Negative health effects can occur after only a few days in solitary confinement and the health risks rise with each additional day spent in solitary confinement (§38)

Since the Supreme Court's judgment in July 2015, the Office of the Children's Commissioner (OCC) has published a report into the use of isolation and solitary confinement of young people in the secure estate (Office of the Children's Commissioner, 2015). The report concludes that children who present a risk of suicide are 50 per cent more likely to be isolated. Staff in the secure estate for interviewed for the study confirmed that even short periods of isolation could trigger self-harm, exacerbate the impact of previous trauma and cause psychotic episodes. The Harris Review into self-inflicted deaths in custody of 18 – 24 year olds also expressed concerns about the use of segregation and special accommodation (Harris, 2015).

The Prisons and Probation Ombudsman's (PPO) report on deaths in prison segregation affirms the dangers of prolonged periods of segregation (PPO, 2015). The case studies in the PPO report suggest that most prisoners who die in segregation do so before 42 days. Therefore the new 42 day regime would not have been able to save the lives of prisoners who have killed themselves in segregation in this period.

Given the risks associated with segregation it is imperative to get both policy and practice absolutely right in this area. The Howard League has reported that staff numbers across the estate have reduced by around 40 per cent over the past four years (*'Public-sector prison officer numbers cut by 41 per cent'*, Howard League 2014). The consequence of this is that even where the policy is right, it is not always being followed. In particular, in order to be effective and ensure that practice can be properly measured against policy requirements it is essential that policy is clear about what needs to be done, by whom and when.

Key concerns

Decisions within the prison affecting segregation need to be independent

The principle of independence in decision making about segregation had been recognised but the methods suggested to achieve it are inadequate. Decisions are ultimately to be made by operational managers within the prison until the 42 day review point and therefore will be subject to actual bias or the appearance of bias.

The PSO recognises the importance of independent decision making. For example, paragraph 2.3 states that the Segregation Review Board (SRB) "should be composed of an appropriate group of people in order to provide the necessary range of knowledge and experience and a degree of impartiality and independence from the original decision to segregate". It concludes that the "SRB will need to be satisfied that any decisions made about segregation are objective and evidence based, and that they have not been influenced by bias."

Yet the proposal to ensure independence is inadequate. Paragraph 2.5 of the revised policy states:

"The Chairperson will take the final decision on whether to continue segregation but must consider fully the views of the other members of the SRB and references to decisions by the SRB in this policy should be read to mean decisions by the Chairperson acting in this way. Establishments must ensure that the role of Chairperson is rotated between operational managers in order to ensure independence of decision making. The Chairperson at the 72 hour Board and the first 14-day Review Board, must be a different person to the person who authorised initial segregation other than in exceptional circumstances. Exceptional circumstances might include where there is no other operational manager who is able to Chair the SRB within the timescales. Where, in exceptional circumstances, the person who authorises the segregation is the same person that made the initial decision to segregate, a further authorisation must be sought at the earliest opportunity from an operational manager who was not involved in the initial decision to segregate. This can be done outside of a SRB based on the last SRB papers which the second operational manager should countersign."

Despite the multi-disciplinary nature of the SRB, the decision will rest with the chairperson who will always be an operational manager within the establishment. The proposal to rotate the role of chairperson between operational managers within the same institution will compromise the independence of decision-making. The policy explicitly allows for the same person to make the decision simply on the basis that no other operational manager is available. It is also possible that operational managers will be asked to review decisions of their superiors.

It is therefore difficult to see how this process will be free from actual bias or the appearance of bias. In *R(AI-Hasan) v Secretary of State* [2005] UKHL 13, the House of Lords held that the mere fact that a deputy governor had been present when an order to search was made ought to rule him out of conducting the disciplinary hearings which flowed from the challenge by two prisoners of the lawfulness of the order. The Lords' concluded that "a fair-minded observer could all too easily think him predisposed to find it lawful" (§35).

Any "fair-minded observer" might conclude that the influence of institutional ties will impact upon the independence of an operational manager.

It is submitted that to satisfy the requirements of independence, those responsible for reviewing segregation decisions must have the appropriate standing and authority to challenge those decisions and must not be subject to the sorts of professional pressures likely to arise as a result of the proposed arrangement.

The original rules requiring external scrutiny outside the prison could have achieved this.

The timing of external authorisation of segregation

The period of time after which external authorisation must be sought to continue segregation is so long as to undermine the safeguarding purpose of the provision. The revised policy states at paragraph 2.12 that:

"SRBs may authorise segregation through this process for a maximum of 42 days (6 weeks) for adults and for a maximum of 21 days for Young People from the point of initial segregation without the leave of the DDC acting on behalf of the Secretary of State (see Sections 3 and 4 below). Timescales for further reviews must take place as set out below at paragraph 3.4 onwards for adult prisoners, and paragraph 4.5 onwards for Young People."

The Supreme Court in *Bourgass* considered extensive evidence from both international and domestic experts about the risks to the health, mental health and even life of a prison subject to a prolonged period of solitary confinement [§35ff]. The Court held that the rationale for rule 45(2) (the equivalent of YOI Rule 49(2) in the Prison Rules) was to safeguard a prisoner in view of the evidence of those established risks of segregation:

"If, as counsel submitted, rule 45(2) was not intended to provide a safeguard, then the requirement to obtain the authority of the Secretary of State, before segregation can lawfully continue for more than 72 hours, would lack any rationale." [§88]

This is because it is well established that *irreversible damage* can be caused after 15 days (*Bourgass* §37). It is also inconsistent with the rest of the Prison Rules which prescribe a maximum of 21 days for solitary confinement as a punishment for people over the age of 18 (it is prohibited altogether for children):

“The regime which was applied to Bourgass and Hussain is similar to that which applies to prisoners undergoing cellular confinement as a punishment for an offence against discipline. Such a punishment can however only be imposed following disciplinary proceedings conducted in accordance with the Rules. It can, in addition, only be imposed for a maximum of 21 days. That maximum reflects the well-known risks which solitary confinement poses to the mental health of those subjected to it for prolonged periods...” [Bourgass §34].

Parliament cannot have contemplated negative statutory instrument that would allow a person to be isolated for double that period for *their own protection* before the safeguard of external authorisation kicks in.

It is impossible to see how an extended period of 42 days, which surpasses even the 28 day period of review in Scotland, can be justified before external authorisation is required in light of the purpose of the mechanism and the risks associated with segregation. There is a real risk that the 42 day period will just be too late for the most vulnerable prisoners: the case studies in the PPO report on deaths in segregation units suggest that most of these prisoners did not make it to 42 days. As a consequence, this policy runs the risk of being so ‘uncompromisingly draconian in effect that they must indeed be held ultra vires’ (*R v. Secretary of State for Social Security, Ex parte B and Joint Council for the Welfare of Immigrants* [1996] 4 All England Law Reports 385).

The Howard League believes that fairness requires an external review no later than fourteen days after segregation commences. This is based on our own experience of working with segregated prisoners (see statement from Frances Crook submitted to the Supreme Court) and from the evidence set out in *Bourgass*. This is a viable time frame. For example, a person placed under section 2 of the Mental Health Act 1983 is entitled to apply for an independent review by way of an oral hearing within fourteen days of being sectioned. Hearings are routinely listed within seven days. By contrast, the reviews in segregation cases are not conducted by way of oral hearings and it is therefore feasible for a paper review to take place within 14 days.

We appreciate that the 42 day mark set out in the policy follows the requirement set out in the Rules. However, we note that the Secretary of State is not bound as a matter of policy to use the full 42 days, as demonstrated by the shortened period of 21 days for children.

We are concerned that the policy does not go far enough to safeguard children and other vulnerable prisoners against the very real risks associated with segregation. Even the shortened timeframe represents a seven fold increase from the original timeframe set out in the Rules. It is also a week beyond the period when international experts believe irreversible damage can set in. It is simply too late. It was too late for 16 year-old Gareth Price who was found hanging from a bed sheet ligature attached to the window latch of his cell of the segregation unit, where he had been for just a day, at Lancaster Farms prison on 19 January 2005. He died the following day.

We are concerned that all other vulnerable prisoners, including those with learning disabilities and mental health problems, as well as young adults who Lord Harris (2015) has identified as particularly at risk from suicide and older prisoners are not subject to any adjustments in the timeframe.

The need for hard guidance as to when information must be submitted to the DDC

The revised policy states that information must be provided by the establishment in “sufficient time” for a DDC Review to be undertaken but provides no guidance as to what sufficient time means. This is inadequate.

At paragraph 3.40 the review states that:

*“Where the SRB consider that it may be necessary to continue to renew authority for segregation of a prisoner beyond 42 days then the form at Annex D4 must be prepared by an operational manager and submitted to the DDC in **sufficient time** for a DDC Review to be undertaken. This form must have attached any paperwork relevant to the segregation that the prisoner has not had sight of. Where the case involves a vulnerable prisoner, including a prisoner on an open or post closure phase ACCT, the prison must attach any relevant additional information, for example healthcare reports, to the form.”*

The reference to “sufficient time” is inadequate. We believe that whenever the external review is to be carried out, it must be fully informed and there should be clear guidelines as to how far in advance of the review information must be submitted. Prisons are under resourced busy places. Without a clear timeframe as to when information to inform the review should be submitted, it is impossible for prisoners to hold the institution to account or be sure that they have a chance to comment on information before it is submitted to the Deputy Director of Custody.

Any prisoner who is segregated ought to know what information is being provided, when it is to be provided and to have an opportunity to comment on it before a decision to continue with the segregation is made by an external person.

Fairness – meaningful and effective participation

The Howard League is concerned about the lack of detail regarding adjustments to be made to assist children, young people and other vulnerable prisoners to participate in the review of segregation. We note that the process of being segregated can make any prisoner vulnerable and less able to effectively participate.

More support must be made available to enable meaningful representations to be made. Paragraph 2.14 states that:

“The prisoner must be told when an SRB will take place and must be given the opportunity to attend and make representations. Any communication difficulties which may be associated with learning disability or a specific learning difficulty or limited English should be taken into account throughout and appropriate support provided. The prisoner should be allowed to attend

the whole SRB if they chose to do so, and should only be excluded from that part of the meeting where sensitive security information is being discussed.”

A recent Children’s Commissioner Report into the isolation of children in custody in England described how young people interviewed for the purposes of their research reported that the experience of isolation generated feelings of boredom, stress, apathy, anger, depression and hopelessness. Staff interviewed confirmed that even short periods of isolation could trigger self-harm, exacerbate the impact of trauma experienced in the past and cause psychotic episodes. This reflects the Howard League’s experience from working with children in prison that isolating vulnerable and disturbed people tends to exacerbate their existing problems.

Research has indicated that young people who exhibit challenging and anti-social behaviours are more likely to have language and communication difficulties, many of which are undiagnosed. Given the low levels of education and language skills, young people in the prison system are likely to struggle to express themselves through speech, writing and non-verbal communication and likewise have difficulty understanding and retaining information. Even those young people who do not suffer from learning or communication difficulties will struggle to make meaningful representations if appropriate adjustments are not made to accommodate their age.

In *R(SP) v Secretary of State for the Home Department* [2004] EWCA Civ 1750, the Court of Appeal held that the right of young people to make representations regarding decisions to segregate at an was a requirement of fairness. The Court concluded that fairness is an important part of the rehabilitative process and serves a valuable function in combating feelings of isolation and a sense of grievance. The Supreme Court also commented on the importance of fairness in relation to representations, in particular, in affecting prisoners’ attitudes and their prospects of rehabilitation (*R (Osborn) v Parole Board* [2013] UKSC 61). However, the Howard League has never come across a young person who has been afforded an opportunity to make representations in line with the SP judgment. In a recent letter to the Howard League, the Governor of a children’s prison asked what “SP” was in the context of responding to a complaint on behalf of a segregated young person.

Given the disproportionately damaging effect segregation can have on young and vulnerable people, the importance of ensuring that suitable support is available to enable them to participate fully in this process cannot be understated. The Ministry of Justice should seek advice from the Office of the Children’s Commissioner about how to achieve this and we would also be willing to discuss this issue.

Next steps

We hope this response is of assistance. We would be happy to meet with you further to discuss these issues.

Yours sincerely

References

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