



Justice does not stop at
the prison gate:

Justice and fairness in prisons

Photo credit: Andy Aitchison

Howard League for Penal Reform

Key points

- Prisons should be places of justice. As the most absolute expression of the criminal justice system, they should meet the very highest standards of justice
- There is an everyday and structural unfairness built into prison regimes and compounded by prison overuse, overcrowding and rising levels of violence
- Unfair or unjust treatment generates resentment, anger and violence, creating a cycle of conflict and harm
- Injustice in prisons needs to be addressed in order to break this cycle of violence
- A less punitive, fairer culture in prisons would make prisons safer, lower reoffending rates and improve working conditions for staff. Not only prisoners but prison staff and the wider community would benefit
- There is a need for a more robust rights-based approach. Acknowledging people's rights helps them to feel more fairly treated
- A fundamental shift in prisons is needed in order to facilitate a sense of agency and responsibility among prisoners, rather than a culture of compliance and institutionalisation
- Prisons are draconian in their use of punishment. Over a thousand years of additional imprisonment were imposed as punishment for breaking prison rules in 2018
- More restorative and less punitive approaches to resolving conflict would help to make prisons fairer and more just

Briefing one

What does a just prison look like?

Prisons should be places of justice. If prisons – as the most absolute expression of the criminal justice system – are not just, then how can we expect them to foster law-abiding citizens? Arguably, prisons should be the epitome of justice.

A just and fair prison system would have a ripple effect and improve outcomes for our communities and our country.

A just and fair prison system recognises people as citizens who are going to return to the community. It acts with consistency, impartiality and respect. A just prison is a place where conflict is resolved, and people are given the opportunity to turn their lives around. A just prison recognises that punishment is imposed by the courts, and not by the prison.

Everyday unfairness in prison

Prison regimes are rife with everyday unfairness that fuels a sense of injustice: inconsistent processes, arbitrary decisions, bureaucratic delays, ignored complaints, poor living conditions and the lack of privacy afforded by a shared cell. On a typical day, almost 20,000 prisoners are crammed into cells holding too many people (Howard League 2019).

Prisons discriminate against the vulnerable and minorities. The young, the old, those with learning disabilities and Black, Asian and Minority Ethnic (BAME) prisoners are especially disadvantaged by the everyday unfairness of prison regimes. Prisoners with learning disabilities or difficulties are more likely than other prisoners to be accused of breaking a prison rule; they are five times as likely to have been subject to control and restraint, and around three times as likely to report having spent time in segregation (Talbot 2008). There is insufficient provision for prisoners with reduced mobility and health conditions. The Chief Inspector of Prisons has acknowledged that ‘people with social care needs... are at a significant disadvantage’ and found a wide variation in the quality of social care between prisons (HMIP 2018). Men from BAME backgrounds are more likely than white prisoners to report being victimised and unfairly

treated by the Incentives and Earned Privileges scheme (IEP), which is designed to punish and reward prisoners’ behaviour (Lammy 2017). Young men aged 18-24 are overrepresented on the lowest level of the incentives scheme and in disciplinary proceedings (HMIP 2019).

Instead of reflecting the highest standards of justice, our prisons are increasingly punitive in their approach to managing conflict and the most vulnerable and disadvantaged people in prison. Over the last few decades, the UK has been characterised by rapidly increasing rates of incarceration driven by punitive populist narratives. This punitive culture exists within the prison system as well as outside it. A recent report by the Justice Committee concluded that there was ‘an overemphasis on punitive approaches’ in prisons (Justice Committee 2019). Research by the Howard League has revealed an exponential increase in the number of additional days imposed (a punishment for breaking prison rules) as a consequence of this punitive culture. In 2018, over a thousand years of additional imprisonment were imposed across England and Wales (further analysis of these figures will be published in our next briefing in the series). But punishment is not a solution. As the number of punishments handed out increases, so do levels of violence in our prisons.

Procedural injustice in prisons

Procedural justice (or procedural fairness) is when processes are carried out and decisions are made in a fair and just way by people in positions of authority, and when those who are affected by those processes and decisions perceive that they are being treated in a fair and just way. When people in prisons have more positive perceptions of procedural justice in prisons, this predicts less rule breaking (which means less violence), fewer mental health problems and lower reconviction rates (HMPPS 2019). Improving procedural justice in prisons is in the best interest not only of those who live and work in prisons but of the wider community.

Studies have identified a strong link between perceived unfairness and increasing levels of violent disorder in prisons. Studies of the IEP Scheme (Liebling 2008), Offender Management (Bickers) and recall processes (Fitzalan Howard

et al 2018) show that prisoners often feel that they are treated unjustly, which generates anger, resentment and violence. Violence has risen to record levels in prisons across England and Wales. There were over 34,000 assaults in the year to March 2019 – the equivalent of 94 assaults a day (Ministry of Justice 2019).

Unjust conditions fuel a cycle of conflict, as the prison inspectorate has noted on more than one occasion:

“A lack of effective protocols about meeting prisoners’ basic needs contributed to poor behaviour with many prisoners becoming increasingly frustrated by the inability to get basic tasks done, such as their telephone numbers being processed and prison shop queries handled. This often resulted in anger and aggression towards staff. Many prisoners commented that the only way they could get anything done was to ‘kick off’.”

(HMIP Hewell 2019)

Everyday unfairness exacerbates the problem of violent conflict in our prisons.

The Howard League’s programme to make prisons places of justice

The Howard League’s programme on justice and fairness in prisons seeks to create a blueprint to establish what a just prison would look like, eliminate everyday unfairness in prisons, and implement fair and restorative approaches.

The programme will investigate how a non-punitive, holistic approach can reduce violence and conflict in prisons, improve safety and well-being and consequently support rehabilitation and release planning. It will evaluate alternatives to the current punishment-based system of adjudications, including diversionary measures, restorative interventions, staff training and mental health support. The triggers that frequently lead to conflict in prison environments, such as time spent locked up or a lack of purposeful activity, will also be considered. The programme will look at examples of good practice around procedural justice and restorative approaches in prisons, and how these can contribute to a more just system overall.

As part of the Howard League’s programme on justice and fairness in prisons, we are currently looking in detail at the issue of adjudications and additional days as one example of everyday prison policy and practice that fails to meet high standards of justice and fairness. This will form the subject of our next briefing in the series.

How can justice and fairness be improved in prisons?

Everyday injustice must be addressed by implementing strategies to reduce conflict and violence, moving away from a punitive prison culture, and improving procedural justice in prisons.

Improving procedural justice

There are four conditions which need to be met for processes and decisions to be perceived as fair (Jackson et al 2010: 5):

1. **Voice:** Procedural justice requires that people’s voices are heard and that they have had a chance to tell their story
2. **Neutrality:** People need to believe that decisions and rules are made and applied without bias
3. **Respect:** Procedural justice requires that people are treated with respect and dignity
4. **Trust:** People need to believe that authority figures are sincere and authentic, and acting in their best interests

Procedural justice is closely linked to the concept of legitimacy. Authority that is procedurally just is more likely to be perceived as legitimate and encourage compliance (Jackson et al 2010). Consequently, order in prisons depends on the perception that the regime is just and legitimate (Jackson et al 2010), and the correspondent cooperation of the inmates. Legitimacy is important because it reduces the need for prison authorities to resort to force to achieve order and compliance.

The four conditions of procedural justice should be embedded into everyday prison processes and prison culture. Evidence shows that a shift away from unfair processes would help to make prisons safer and improve working conditions for staff.

Staff attitudes are extremely important in improving perceptions of procedural justice. When staff are less punitive and have more positive attitudes towards rehabilitation, prisoners feel more fairly treated and are less likely to break prison rules (Fitzalan Howard and Wakeling 2019). The wider community, too, stands to benefit from a less punitive approach, as prisoners who felt fairly treated were less likely to reoffend (Beijersbergen et al 2016). A fairer prison system leads to fewer victims of crime.

Procedural justice is an important component of a just and fair prison, but it is not enough for the prison system to be perceived as fair. Its practices, outcomes and principles must also be just and fair.

A rights-based approach

A robust rights-based approach would help to make prisons fairer places. People in prison have already had their fundamental right to liberty removed as a punishment. But they remain legally entitled to all their other rights so far as possible. In the uniquely coercive environment of a prison it is all the more important that all other rights are respected. Yet current conditions in prison mean that the punishment goes far beyond the deprivation of liberty. Many rights that should remain, and are even protected by prison laws, are routinely flouted, leading to an enduring sense of injustice among many people in prison.

For example, children in prison are entitled to education: the rules say they must have at least 15 hours a week (Prison Rule 38). Yet many prisons do not achieve this (HMIP 2019). Most separated children in prison experience a regime that, according to HM Inspectorate of Prisons, amounts to the widely accepted definition of solitary confinement, which contravenes the right to not be subjected to torture or inhuman or degrading treatment and punishment (HMIP 2020).

Case study: *R (AB) v Secretary of State for Justice*

The Howard League successfully challenged the isolation and lack of education provision for a boy in Feltham prison in the case of *R (AB) v Secretary of State for Justice* [2017] EWHC 1694. The court found that the failure to provide AB with education was unlawful and commented that “not enough thought, effort and resources” had gone into it.

Contraventions of human rights have important implications for prison legitimacy (Snacken 2016) as acknowledging people’s rights helps them to feel fairly treated (Jackson et al 2010). The Howard League’s briefing *All our children: The work of the Howard League to make the rights of children in trouble a reality in England and Wales* (2019) describes how a rights-based approach has helped the charity to drive some positive change for children in prison. A culture of prisoners’ rights needs to be embedded throughout the justice system to make prisons fairer, and consequently safer, places.

The Supreme Court has recognised the benefits to society of people knowing their rights and responsibilities.

“People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations. That is so, notwithstanding that judicial enforcement of the law is not usually necessary, and notwithstanding that the resolution of disputes by other methods is often desirable.”

(R (on the application of UNISON) (Appellant) v Lord Chancellor, 2017, paragraph 71)

Honouring the rights of people in prison engenders a sense of personal responsibility which ensures less crime and fewer victims of crime. This means creating a culture in which people in prison know their rights and have those rights respected, which in turn engenders respect for the law and empowers people to live positive lives.

Empowering people in prison through restorative approaches

Restorative approaches to resolving conflict empower people in prisons and prepare them for their return to the community. Imprisonment is the most coercive form of the exercise of state power. In prisons, power is concentrated in the hands of prison managers and officers. Prisoners may feel that they are being treated unjustly, but they do not have the power to do anything about it. Last year only 28 per cent of adult men who said they had made a formal complaint said it was handled fairly (HMIP 2019). The level of everyday oppressive control that prisons exert over those who are incarcerated is enough to spark conflict or antagonism (Brauer and Butler 2015). Antagonism is routinely met with more control, compounding prisoners' sense of injustice. Understanding and rebalancing power dynamics is key to establishing a just and fair prison environment:

"Fairness is intrinsically bound up with the quality of the behaviour of individuals, especially those in power"

(Tyler 1990, cited in Liebling 2007)

Restorative justice has a role to play in undoing the power imbalance that exists in prisons. Restorative justice has been defined as 'an empowering mechanism' that redresses the harms caused by crime and facilitates the agency and accountability of participants (O'Mahony and Doak 2017: 66). Restorative justice looks to the future, not the past, and involves mediation and reparation. A restorative approach avoids the need for legal procedures and can break down some of the power structures and hierarchies that exacerbate conflict by introducing dialogue and de-escalation strategies.

Case study: Restorative Prisons pilot 2016-2017

A restorative conference run by a prisoner resolved a conflict between a prison officer and another prisoner, after the prison officer acknowledged that their behaviour had been potentially intimidating.

From 2016 to 2017 the Restorative Prisons pilot ran in three prisons (Buckley Hall, Featherstone and Peterborough). The pilot, developed by

Restorative Solutions, involved the use of restorative approaches to address conflict in prisons (Fair and Jacobson 2018: iii). Restorative approaches, as defined by Restorative Solutions, bring people in conflict into dialogue, give those who have been harmed an opportunity to be heard and hold those that have caused the harm to account. The programme addressed conflict between prisoners and between prisoners and staff, and trained both staff and prisoners to deliver, facilitate and promote restorative approaches in formal and informal settings through a series of key 'restorative questions' (see Fair and Jacobson 2018: iii). An evaluation of the pilot highlighted examples of restorative approaches being used effectively to de-escalate and resolve conflict. However, running restorative approaches as an additional intervention alongside internal prison disciplinary processes is challenging when resources are already overstretched. The pilot had to be discontinued in Featherstone prison, which was struggling with staff shortages and higher levels of violence. We recommend that restorative approaches *replace* punitive disciplinary processes. When restorative approaches are used effectively, additional punishment should not be necessary.

Facilitating agency (that is, the capacity to make empowering choices and decisions) is a key aim of restorative approaches (O'Mahony and Doak 2017: 73). It is crucial to facilitate the agency rather than the compliance of people in prison. Within a prison setting, prisoner compliance is usually considered highly desirable. However, an over-emphasis on discipline and compliance risks encouraging passivity and institutionalisation. Prisons must foster prisoner agency if they are to support people to change their lives. Proactive decision-making and desistance, for example, require people to exercise agency, not compliance.

What could be done differently

Urgent action needs to be taken to address everyday injustice in prisons in order to reduce levels of violence, conflict and disorder.

A number of steps can be taken, including

- Taking a systemic approach to address everyday unfairness in prisons

- Minimising the daily injustices of prison life through improvements to the prison estate and more efficient and transparent processes
- Embedding the four conditions of procedural justice into everyday prison processes and prison culture through training and support for staff
- Adopting a more robust rights-based approach
- Rebalancing the power dynamic in prisons by adopting restorative approaches
- Replacing (rather than layering) disciplinary processes with restorative approaches
- Shifting emphasis from the compliance to the empowerment of people in prison

About the Howard League for Penal Reform

The Howard League is a national charity working for less crime, safer communities and fewer people in prison.

We campaign, research and take legal action on a wide range of issues. We work with parliament, the media, criminal justice professionals, students and members of the public, influencing debate and forcing through meaningful change.

References for this report are available at:

www.howardleague.org

Howard League for Penal Reform

1 Ardleigh Road
London
N1 4HS

t
e
w

020 7249 7373
info@howardleague.org
www.howardleague.org

Registered charity
No. 251926
Company limited by
guarantee No. 898514

ISBN 978-1-911114-41-3



9 781911 114413 >
ISBN 978-1-911114-41-3
2020