

Response to the HMPPS Consultation on the Use of Force Policy Framework June 2020

Summary

The use of force in prison is the ultimate expression of the power imbalance in prisons. The consequences of state authorised use of force by officers in a coercive environment can be grave and vast. It led to the tragic deaths of two children, Gareth Myatt and Adam Rickwood, in 2004. It reinforces cultures of violence and can leave prisoners and staff traumatised and with a stinging sense of injustice.

An opportunity for change

The framework is an opportunity for change, especially now when for the first time in many years prisons have been relatively calm places due to increased staffing and temporary restricted regimes. As presently drafted, despite some welcome developments, the framework is a missed opportunity to show leadership, clear guidance on what last resort looks like in practice and institute better governance that would reduce the use of force and subject it to appropriate scrutiny.

Force should never be used unless strictly necessary to prevent harm

Force should never be used unless it is strictly necessary (i.e. unavoidable) to prevent immediate and serious harm. The framework should set out the serious risks, both physical and psychological, that the use of force poses and which underpin the legal requirement that its use is only permitted when strictly necessary. The guidance should explain the law in a simple way and make it clear that an unjustified use of force is a criminal offence and constitutes inhuman and degrading treatment.

Discrimination in the use of force must be tackled

While the guidance recognises that people from minority groups are restrained more than others, it does not contain sufficient information about the increased risks to those with protected characteristics and the risk that their behaviour will be misunderstood as aggressive and trigger the use of force when it is not necessary. This needs to be spelled out to result in a change in behaviour to ensure compliance with equality law and reduce the disproportionate use of force on these groups. More needs to be done to prevent women, children, people from ethnic minorities and people with health conditions from being disproportionately adversely affected.

Use of force should have consequences

Violence is a corrosive and contagious event and the fall out can be wide and long-lasting. Staff, both officers and managers, should be aware that they may face the full force of the law for unlawful use of force, through prosecution or disciplinary procedures. The guidance should provide a clear framework for governance and scrutiny of the use of force so there are real opportunities to reflect on how force is used and to change practice.

The detail of the framework must better reflect its stated aims

There is a disconnect between the stated aim of the framework, i.e. to ensure all force is lawful, and the detail. The framework should provide practical guidance that will ensure the use of force is lawful and its use is reduced. Despite the reduction in the number of children in prison in the last decade (by two-thirds), in the last three years the use of force has increased significantly. The framework should ensure that people are given time, space and opportunities to deescalate and that force is never used for compliance, for prolonged periods without investigation or in such a way as to inflict deliberate pain. Given the importance of this document, it should be subject to public consultation.

1. About the Howard League for Penal Reform

- 1.1 Founded in 1866, the Howard League is the oldest penal reform charity in the world. The Howard League has some 13,000 members, including prisoners and their families, lawyers, criminal justice professionals and 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.
- 1.2 The Howard League works for less crime, safer communities and fewer people in prison. We 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.
- 1.3 Our legal team works directly with children and young adults in prison. We have drawn on our legal and policy work in responding to this consultation.
- 1.4 The Howard League would welcome the opportunity to provide further information about any of the points below.

2. An opportunity for change

- 2.1 The framework is an opportunity for change, especially now when for the first time in many years prisons have been relatively calm places due to increased staffing and temporary restricted regimes. As presently drafted, despite some welcome developments, the framework is a missed opportunity to show leadership, clear guidance on what last resort looks like in practice and institute better governance that would reduce the use of force and subject it to appropriate scrutiny. The guidance does not presently provide sufficient information as to the risks of harm posed by the use of force to help staff understand why it is essential that it is never used unless strictly necessary. Compliance with rules is always better if people clearly understand the rationale for them.
- 2.2 The guidance should provide a clear message about the use of force with practical examples to guide staff to understand what "*last resort*" looks like, together with examples of bad practice, in the context of restraint. The current proposal has one small paragraph entitled "*What helps to manage or reduce use of force?*" (paragraph 2.9) but does not go anywhere near to providing a clear idea of how officers would ensure that force is never used unless strictly necessary (see section 6 below). Similarly, the acronym "*LACE*" at paragraph 3.3 is not sufficiently grounded in everyday experience to provide a useful guide in the heat of the moment.¹
- 2.3 The guidance mentions the need to avoid discrimination in the context of restraint but does not provide information as to how people with protected characteristics can be particularly adversely affected by the use of force so as to ensure that staff are alive to these issues. The particular risks to children, ethnic minorities, women and people

¹ LACE is said to stand for "*Lawful and reasonable (Proportionate, Reasonable and Necessary); Accountable (All force must be accurately, properly and comprehensively reported); Considered (That situation specific circumstances and options are taken into account before force is used, and when force is used staff act in a controlled manner to determine the level and type of force used); Ethical and Fair (i.e. that use of force is consistent with safeguarding, equalities and procedural justice requirements)*".

who have mental health issues or learning disabilities should be outlined, as has been the case in health settings.

- 2.4 The expectations in respect of scrutiny should be clearly outlined. Staff need to know that a restraint could give rise to an Article 3 independent inquiry, criminal charges of assault and other investigations.
- 2.5 The framework should include practical examples of how the use of force can be avoided and curtailed.

3. Force should never be used unless strictly necessary to prevent harm

- 3.1 The consequences of state authorised use of force by officers in a coercive environment can be grave and vast. It led to the tragic deaths of two children, Gareth Myatt and Adam Rickwood, in 2004. It reinforces cultures of violence and can leave prisoners and staff traumatised and with a stinging sense of injustice. The use of force in prison is the ultimate expression of the power imbalance prevalent in prisons. Force should therefore never be used unless it is absolutely necessary to prevent immediate and serious harm.
- 3.2 We therefore welcome the emphasis in the framework on the use of force as a last resort. However, the framework does not provide sufficient clarity or information to ensure that force is only used as a last resort. It should be clear that force should never be used unless it is strictly necessary (i.e. unavoidable) to prevent immediate and serious harm. The framework should set out the serious risks, both physical and psychological, the use of force poses and which underpin the legal requirement that its use is only permitted when strictly necessary. The guidance should explain the law in a simple way and make it clear that an unjustified use of force is a criminal offence and constitutes inhuman and degrading treatment.

The guidance should contain more information as to why use of force should be a last resort

- 3.3 If the guidance is serious about ensuring that the use of force is used as a last resort, the reasons for this should be made clear from the outset as people are much more likely to comply with policy and guidance when they understand the reason for it. The guidance should clearly set out the potential harm caused by the use of force. The framework provides a short paragraph on the effects of the use of force (at paragraph 2.8) but does not mention the tragic deaths related to the use of force and is couched in very tentative terms stating it “*may be associated with negative mental health, emotional and behavioural outcomes*” and “*may impact on trust in staff and the relationships between staff and prisoners.*” This clearly understates the obvious risk of serious physical and mental harm to both prisoners and staff; let alone the damage it is likely to cause to relationships within prisons.

References to the use of force as potentially supportive of rehabilitation and wellbeing is misconceived

- 3.4 The tone of the guidance rather reinforces the opposite notion that the use of force can be used to support safety and wellbeing. For example, paragraph 1.3 states:

“...it is accepted that in some circumstances force may be the only option for ensuring the safety and wellbeing of prisoners, young people, detainees and staff.”

The language in the framework should not be about use of force as a means to ensure safety and wellbeing. There are much better ways to achieve these aims. It is hard to see how the use of force would be necessary for wellbeing, given that it is almost always going to result in experiences that undermine wellbeing.

- 3.5 Paragraph 1.4 of the guidance also sends out a message that is wholly contrary to the notion that force should be a last resort in that it appears to suggest that restraint can be employed in a way that supports rehabilitation. It states:

“We should furthermore ensure that the use of force is ... employed in ways supportive of our rehabilitative purpose, responsive to our commitment to procedural justice, fairness and equality, and consistent with our duty of care to safeguarding vulnerable prisoners, young people and detainees.”

- 3.6 It is difficult to see how the use of force can ever be employed in a way that supports rehabilitation, procedural justice, fairness, equality or care. The Howard League has worked directly with young people in detention for over 15 years and has never come across a single instance where a young person has reported finding the use of force supportive of these laudable aims but has plenty of evidence of it undermining them (please see Lord Carlile's independent inquiry 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 (Howard League, January 2006);² *The Carlile Inquiry 10 years on* (Howard League, 2016);³ *Twisted: The use of force on children in custody* (Howard League, 25 April 2011);⁴ the Howard League's submissions to the Joint Committee on Human Rights (JCHR) inquiry on Youth Detention: solitary confinement and restraint (Howard League, 22 May 2018);⁵ and the Howard League's second submissions to JCHR inquiry on youth detention: solitary confinement and restraint (Howard League, 18 October 2018)).⁶ Surely the guidance should be clear that a key reason to **avoid** the use of force is to prevent undermining procedural justice, fairness and equality, and to ensure consistency with regard to the need to safeguard vulnerable prisoners, young people and detainees.

The guidance should be absolutely clear about what last resort means in practice and that this is a legal requirement

- 3.7 The language should be that of **strict necessity (i.e. unavoidable) and make it clear that use of force should never be used unless it is absolutely necessary to prevent immediate and serious harm.**
- 3.8 Given that restraint should, as a matter of best practice and law, be an absolute last resort, the framework is oddly worded in its reference to it being a challenge to ensure that “*staff are able to identify instances where use of force as a last resort is justified*” (paragraph 1.3). The language should not be focused on when force can be justified, as if it were reasonable for staff to look out for such instances. Rather it should acknowledge that staff should **never** use restraint as they should be appropriately

² Available at <https://howardleague.org/wp-content/uploads/2016/03/Carlile-Report-pdf.pdf>.

³ Available at <https://howardleague.org/wp-content/uploads/2016/06/Carlile-Inquiry-10-years-on.pdf>.

⁴ Available at <https://howardleague.org/wp-content/uploads/2016/04/Twisted.-The-use-of-force-on-children-in-custody.pdf>.

⁵ Available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/youth-detention-solitary-confinement-and-restraint/written/83307.pdf>.

⁶ Available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/youth-detention-solitary-confinement-and-restraint/written/91777.html>.

supported to manage situations **without** recourse to restraint wherever possible and provided with strategies to avoid the use of force at all cost.

- 3.9 The guidance should also be clear from the outset that the law requires this approach and that failure to follow it is a criminal offence. As presently drafted, there is no outline of the legal framework surrounding the use of force until section four, and even then, it is rather muddled. Officers are not lawyers, and nor are most prisoners who will also be entitled to refer to the guidance as a point of reference in respect of what is and is not allowed. The line between assault and restraint should be set out clearly at the outset of the guidance.
- 3.10 The guidance should explain the law in a simple way and make it clear that an unjustified use of force is a criminal offence and inhuman and degrading treatment (see section 5 below).

4. Discrimination in the use of force must be tackled

- 4.1 The Equality Analysis report which evaluates the equality impact of the existing PSO 1600 recognises that there are disproportionate outcomes around use of force for BAME, young, and disabled people in prisons. We are concerned that these findings are not adequately reflected in the new policy framework. While the guidance recognises that people from minority groups are restrained more than others, it does not contain sufficient information about the increased risks to those with protected characteristics and the risk that their behaviour will be misunderstood as aggressive and trigger the use of force when it is not necessary. This needs to be spelled out to result in a change in behaviour to ensure compliance with equality law and reduce the disproportionate use of force on these groups.
- 4.2 The strengthening of governance and data collection is also welcomed but more needs to be done to prevent women, children, people from ethnic minorities and people with health conditions from being disproportionately adversely affected.
- 4.3 For example, the well-documented risks to children, people with learning disabilities who are much more likely to have respiratory problems or the particularly damaging effects of physical interventions on people with histories of trauma or autism need to be well understood in order to ensure special care is taken to avoid the use of force with these groups. The use of force framework must recognise the specific needs of people with autism and modify its guidance to ensure it takes into account the underlying drivers as well as the impact of the use of force on people with autism. For many people with autism, being touched by another person can result in unbearable anxiety or even physical pain.
- 4.4 Detail is lacking on the impact of the use of force on particular groups of prisoners, such as women, children, prisoners with disabilities and people who have experienced physical or sexual abuse. It is known that the use of force can be re-traumatising for individuals who have experienced abuse. The guidance on medical considerations (UoF5) fails to make clear that the physical effects of the use of force will vary considerably and is dependent on the gender, size, age or other characteristics of the person being restrained.
- 4.5 The framework should make explicit reference to the need to make reasonable adjustments on account of disabilities and require a restraint handling plan to be created where necessary. This needs to be shared widely and followed by all staff that come into contact with the person.

- 4.6 Despite the huge amount of evidence as to the specific risks the use of force poses to children, ranging from the Carlile Independent Inquiry (Howard League, January 2006) to the Independent Inquiry into Child Sexual Abuse (IICSA)'s report on the abuse of children in custodial institutions (IICSA, 28 February 2019),⁷ there is no specific mention of children until section 6 of the framework. Children should be dealt with in a separate framework, or this section ought to be expanded to provide a detailed explanation on the different approach required for children. Any guidance on the use of restraint on children should be firmly grounded in children's rights, with reference to the higher standards that must be applied, as well as the wider behaviour management approach set out in Youth Custody Service policy, *Building Bridges: a positive behaviour framework for the children and young people secure estate* (Youth Custody Service, 27 January 2020).⁸ The reason for this is obvious. Children in prison are particularly vulnerable. The HM Inspectorate of Prisons (HMIP)'s annual survey of children in custody (HMIP, February 2020)⁹ found that over a quarter of the children in custody had a disability and over half had been in the care of the local authority. The consequences of state authorised use of force by officers on vulnerable children in a coercive environment can be grave and vast. Gareth Myatt and Adam Rickwood both died following the use of force in secure training centres in 2004. The guidance should be clear that children should never be restrained for reasons of compliance (*R(C) v SSJ* [2009] QB 657). In that case, the Court held that restraint engages Article 3 of the European Convention on Human Rights and there is a “*need for strict necessity for resort to physical force applies in every such case*” (paragraph 59).
- 4.7 It is obvious that the disproportionate use of force against ethnic minorities is likely to be a consequence of misconceptions and prejudices and the guidance ought to explicitly warn against this.
- 4.8 One independent person on scrutiny boards representing the prisoner's perspective is not enough. A single voice to represent prisoner interests on scrutiny committees is at risk of being drowned out. The Lammy 'explain or reform' principle (Lammy, 2017)¹⁰ ought to be expressly included in the framework. The collation of detailed and accurate data on the use of force on prisoners with protected characteristics is essential for monitoring and governance. At present, there is no breakdown of data on use of force on people with disabilities. The new digital reporting system should break down figures and other data by specific disability.

5. Use of force should have consequences – scrutiny, reflection and learning

- 5.1 Violence is a corrosive and contagious event and the fall out can be wide and long-lasting. Staff, both officers and managers, should be aware that they may face the full force of the law for unlawful use of force, through prosecution or disciplinary procedures. The guidance should provide a clear framework for governance and

⁷ Available at: <https://www.iicsa.org.uk/key-documents/9560/view/sexual-abuse-children-custodial-institutions-investigation-report-february-2019.pdf>.

⁸ Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/863607/building-bridges-positive-behaviour-pf.pdf.

⁹ Available at: <https://www.justiceinspectors.gov.uk/hmiprisoners/wp-content/uploads/sites/4/2020/02/Children-in-Custody-2018-19-Web-1.pdf>.

¹⁰ Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf.

scrutiny of the use of force so there are real opportunities to reflect on how force is used and to change practice.

- 5.2 The current system has failed to pick up on unlawful practices such as ‘preventative strikes’ which were raised in the recent European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)’s report to the United Kingdom Government on its visit to the UK (CPT, 30 April 2020).¹¹ In a number of cases, poor practice in prisons has only been unveiled as a result of under-cover investigations by journalists. For example, poor practice at Brook House immigration removal centre was revealed at the very same time that the prison had been inspected by HMIP and received a good rating. There is nothing in the framework that would help to increase scrutiny in respect of the use of force.
- 5.3 As it stands, governance and scrutiny of the use of force in individual prisons appears to be conducted locally primarily by Use of Force committees which include Independent Monitoring Board (IMB) members. The framework states that use of force statistics for prisons are not officially published by HMPPS. Reports and data on the use of force should be held centrally and be publicly available. This would enable comparisons between prisons and show which prisons were using force disproportionately, for example.
- 5.4 It is essential that staff are aware of the consequences of not behaving in a transparent way, for example by failing to capture the whole incident on CCTV or body worn cameras or moving a restraint into an area not covered by CCTV.
- 5.5 The debriefing process should be done individually with staff not involved in the restraint and senior managers should consider the potential consequences for both staff and prisoners in the aftermath of the use of force, both of whom may feel traumatised and aggrieved.
- 5.6 The framework should include information about whistleblowing procedures and policies so that staff who are concerned about the unlawful or inappropriate use of force have a clear procedure that they can safely follow to report it.
- 5.7 The framework should also outline the circumstances which may lead to a criminal investigation, or an investigation in accordance with PSO 1300 or Article 3 of the European Convention on Human Rights.
- 5.8 It is really important that officers are not given the impression that so long as they have a genuinely held belief that the use of force is required, it will be lawful. For example, the Howard League is aware of an incident where the trigger for the use of force was described as a young black boy having “wide” and “angry” eyes: an objective test would need to be applied in such an instance as to whether a reasonable member of staff working in a prison environment for young people in 2020 would consider the eyes of a young black boy to be sufficient to justify the use of force. The recent report by the CPT (CPT, 2020) stated that the guidance on use of force currently provided to prison officers is “*inadequate and leaves the impression that an entirely subjective apprehension might provide a justification for making an otherwise entirely unprovoked attack on a prisoner.*” The CPT recommended that it be replaced with new guidance that makes clear to prison officers that engaging in so-called “preventive strikes” on prisoners is unlawful and that any officer who is found to have engaged in this practice will be subject to disciplinary and/or criminal sanctions. Stronger wording is needed in

¹¹ Available at <https://rm.coe.int/16809e4404>.

the framework on the law on the use of force to make it clear that officers can be subject to criminal sanctions when force is used unlawfully.

- 5.9 There is often an overlap between the disciplinary process and the use of force. The framework should consider the interplay with the disciplinary process. It should include clear guidance for adjudicating governors to scrutinise the circumstances surrounding the use of force **before** proceeding with an adjudication. The Howard League's legal team frequently hears from young people in prison who are being adjudicated following a restraint. The overlap between the use of force and adjudications can result in children and young people feeling a deep sense of injustice when they are effectively criminalised for being assaulted by officers during a restraint.

6. The detail of the framework must better reflect its stated aims

- 6.1 There is a disconnect between the stated aim of the framework, to ensure all force is lawful, and the detail. It is essential that the framework provides practical guidance that will ensure that the use of force is lawful and its use is reduced. Despite the reduction in the number of children in prison in the last decade (by two-thirds), in the last three years the use of force has increased significantly. In the year ending March 2019, the use of force on young people had increased by 16% compared with the previous year. This continues the upward trend seen over the last three years (Youth Justice Board and Ministry of Justice, 30 January 2020).¹² The framework should guide staff to ensure force really is a last resort, ensuring that where possible people are given time, space and opportunities to deescalate and that force is never used for compliance, for prolonged periods without investigation or in such a way as to inflict deliberate pain.
- 6.2 The use of the acronym LACE reflects important standards by which any incident of force should be judged, but does not translate into simple guidance for prison staff. For example, in the heat of the moment, it will not be a simple task to analyse what is "lawful". Something more practical that relates to the type of behaviour expected would provide a more useful guide. It is not for organisations like the Howard League to write policy. However, the ingredients of an aide memoir might include:
- **Reason** – make all efforts to calmly reason with the person so as to prevent the need for a physical intervention.
 - **Space** – give the situation as much physical space as can be allowed: crowding a person and invading their personal space is likely to increase tension.
 - **Time** – slow the incident down if you can. As much time should be taken as possible to allow de-escalation techniques to work.
 - **Observation** – ensure that the incident is observed as independently as possible by turning on body-worn cameras and ensuring so far as possible that the incident is not moved to a place out of sight of cameras and that there is someone not involved in the incident but who is able to observe the incident if possible.
 - **Minimise** – reduce the intensity by preventing the person from feeling overwhelmed and outnumbered – the fewer people at the scene, the easier it will be to deescalate it and bring it to an end.
- 6.3 The framework should also outline some clear scenarios that should be red flags for staff and will indicate that the use of force is not lawful including:

¹² Available at

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/862078/youth-justice-statistics-bulletin-march-2019.pdf.

- 6.3.1 Force should never be used to secure compliance. At present, the framework is unclear and contradictory on this. For example, paragraph 5.9 states that "*while the law **does not** make explicit provision for officers to use force to maintain the 'good order or discipline' of the establishment, it does allow for all individuals invested with the powers of a constable to use lawful force where it is necessary.*" Yet, use of force for compliance can never be lawful as it is never strictly necessary to prevent harm. The guidance should send a clear and unequivocal message that force should never be used to secure compliance – the consequences of use of force for compliance on children and vulnerable adults can be especially grave.
- 6.3.2 All use of force lasting five minutes (three hundred seconds) should be subject to external review and scrutiny. The requirements of proportionality and reasonableness mean that even if restraint is justified initially, it will not necessarily continue to be justified as the incident continues. The knowledge that any incident lasting more than five minutes will be subject to external review and scrutiny will focus the minds of officers on the need to be alive to the need to continuously review the necessity for the restraint. Time should be counted in seconds given how quickly damage can be done.
- 6.3.3 Force should never be used inside a cell unless there is risk of serious self-harm or risk to cell mates. This is in line with the strict necessity requirement. Clearly, the safer option will always be to walk away.
- 6.3.4 Pain inducing techniques should not be used - this is especially important in the case of children and other vulnerable people. There is copious evidence that such techniques are dangerous and harmful. The IICSA's report on the sexual abuse of children in custodial institutions (IICSA, February 2019) stated that such techniques were a form of child abuse. The UN Committee Against Torture reported that the MoJ had announced a review of the use of pain-inducing restraint across all child prisons, due to be published in the summer of 2019 but at time of writing unpublished. This includes the use of PAVA spray which is currently included in the framework, despite the concerns raised by the pilot study. Its use should be prohibited generally but in particular, it should not be available, as currently envisaged, in the case of prisoners who are self-harming, even in *exceptional circumstances*.

7. Conclusion

- 7.1 Any document governing the use of force should begin with a clear statement about the need to avoid it at all costs and how other conflict resolution, negotiation and de-escalation techniques are always better. If the framework is to result in a much-needed reduction in the use of force, it needs to provide a clear and practical guidance, taking into account the factors we have outlined.
- 7.2 Given the serious implications that arise from the use of force for both people in prison and staff, this framework policy ought to be subject to wider and public consultation.

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