

Howard League for Penal Reform's response to the Draft Framework on Managing Separation in the Children and Young People Secure Estate

July 2021

Summary

1. The Howard League welcomes the opportunity to respond to the consultation on the draft policy framework on separation in the youth secure estate.
2. The overall tone and message of the new policy framework is a step in the right direction. It is right that children's behaviour must be understood in context and that separation must be a last resort. The policy framework recognises the significant harm which can be caused by separation.
3. The framework should be clearer about what it means for separation to be a last resort and should spell out that this means it should hardly ever happen and the practical steps that need to be taken to ensure that. Where children are separated from their peers, the guidance should be clear that this does not mean children should not have meaningful human contact and should set out what this might look like.
4. The Howard League strongly objects to the use of the term "self-isolation", which tacitly legitimises a practice that should never be used on children. In the context of custody, "self-isolation" would only arise as a concept if children are in fear for their safety or unwell and will always indicate an unmet need and failing on the part of the establishment. The language of "self-isolation" and "routine isolation" would not be tolerated in community settings for children.
5. External scrutiny is an essential safeguard for children in custody. The framework states that relevant professionals in both the secure setting and the community, including the child's social worker and YOT worker, will be notified about separation which lasts for more than an hour. The framework should explicitly state that this refers to social workers in the community as well as in custody. Where appropriate, parents should be advised on their rights and actively involved in planning to bring separation to an end.
6. The Howard League agrees that children must be offered access to independent advocacy services and other sources of support and scrutiny while they are in separation. Children should also be reminded that they have a right to seek legal advice and to make representations before they are separated.
7. The "safeguarding" section of the framework should be clear that separation is itself a potential child protection issue.
8. The framework should be made tighter and more user-friendly. Otherwise, there is a risk that staff will instead rely on the flowchart included in Annex B. This flowchart does not include the good practice set out in the rest of a framework and is not child-centred: it should be revised or removed.

1. About the Howard League for Penal Reform and summary of response

- 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 The Howard League's legal team works directly with children and young adults in prison. We have drawn on our legal work in responding to this consultation.
- 1.4 The Howard League welcomes the overall message and tone of the policy framework. The framework will be most effective if it is user-friendly and clearly sets out staff responsibilities and expectations, if there is external scrutiny, and if children are supported to access advocacy and legal advice. The framework should also be amended so that it does not use the unhelpful and misleading concepts of "self-isolation" and "routine isolation", and so that it acknowledges that separation is in itself a potential child protection issue.
- 1.5 The Howard League would welcome the opportunity to provide further information about any of the points below.

2. The overall tone and message of the policy framework is a step in the right direction

- 2.1 The Howard League welcomes the overall message and tone of the policy framework. It is essential that behaviour is seen in context and that the harms of solitary confinement – especially prolonged solitary confinement – are recognised. If children are to be separated at all, it must be as an absolute last resort.
- 2.2 The Howard League has repeatedly raised concerns about the use of solitary confinement for children in prison. It published an independent inquiry into the use of restraint, solitary confinement and strip-searching in 2006, led by Lord Carlile of Berriew QC. The Carlile Inquiry found that isolation was used primarily to punish children for poor behaviour, rather than to deal with an immediate risk. Segregation units were described as "very bleak", to the extent that members of the inquiry "were seriously concerned about the use of such cells for children".¹
- 2.3 In 2016, the Howard League published a follow-up report on the areas covered by the Carlile Inquiry. It found that separation was over-used and that separated children continued to receive what the prison inspectorate described as "bleak, unsuitable care": the regime was inadequate and conditions in segregation units remained extremely poor.² Four years later, in its thematic report on separation in young offender institutions, Her Majesty's Inspectorate of Prisons (HMIP) noted that the segregation unit at

¹ https://www.basw.co.uk/system/files/resources/basw_84407-6_0.pdf

² <https://howardleague.org/wp-content/uploads/2016/06/Carlile-Inquiry-10-years-on.pdf>

Cookham Wood was “still not suitable for children; it was dark and oppressive, and cells remained dirty, covered in graffiti and in need of refurbishment”.³

- 2.4 Howard League lawyers represented AB, who was kept in solitary confinement for 55 consecutive days when he was 15 years old, in a legal challenge heard before the High Court and subsequently the Court of Appeal and the Supreme Court. The courts ruled that AB’s treatment was contrary to human rights law because the prison had not followed the correct procedures. The Court of Appeal and the Supreme Court rejected the argument that the prolonged solitary confinement of a child is necessarily inhuman and degrading. However, the Supreme Court held that:

“there is no doubt that solitary confinement should be ordered only exceptionally ... That must be especially clear in relation to detainees under 18 years of age. Equally, it can hardly be doubted that solitary confinement should be used only when genuinely necessary, especially in the case of persons under 18.”⁴

- 2.5 This policy framework is an important chance to break with the past and ensure that children are no longer locked up in dilapidated cells or deprived of meaningful human contact. Separation should hardly ever happen and, when it does, should not mean that a child receives an inadequate regime.

3. The framework should be clearer about what it means for separation to be a last resort and about the expectations for children who have been separated

- 3.1 The framework needs to be clearer about what it means for separation to be a last resort, including setting out the alternative approaches which must be attempted beforehand and explaining that solitary confinement must be “genuinely necessary”. The framework should also be clearer about the conditions for children in separation, setting out the support and activities which will be provided and explaining that children can still have meaningful human contact while they are in separation.

- 3.2 The framework repeatedly states that separation must be “necessary, reasonable and proportionate” (in paragraph 4 of the mandatory requirements and in paragraphs 1.3, 1.14, 3.1, 3.3, 4.1 and 4.23 of the framework). However, this is not the legal test for justifying separation and these paragraphs should be amended. Reasonableness is not part of the test for separation in either the rules or the caselaw and should be removed from these paragraphs, as it may create a misleading impression that undermines the requirement of necessity. The framework should explain that proportionality is relevant only where it helps staff to judge whether separation is necessary.

- 3.3 Annex C states that separation should only be used when “alternative approaches have been considered, attempted or exhausted”. The framework should include examples of the alternative approaches which must be tried before separation can be considered and should spell out that this means that separation will be extremely rare.

- 3.4 The framework should explain that children in separation can still have meaningful human contact and should set out what this might look like.

- 3.5 The framework is a practical document which will be used by frontline staff. It needs to clearly state what is expected when a child is separated, and which staff are responsible

³ <https://www.justiceinspectorates.gov.uk/hmiprisonson/wp-content/uploads/sites/4/2020/01/Separation-of-children-thematic-Web-2019.pdf>

⁴ <https://www.supremecourt.uk/cases/docs/uksc-2019-0155-judgment.pdf>

for meeting these expectations. The framework should explain which staff members are responsible for therapeutic engagement with children who have been separated, and what this engagement consists of. It should give examples of the “purposeful and distracting activities” which will be provided during regime restriction.

4. The terms “self-isolation” and “routine isolation”

- 4.1 The Howard League is concerned that the framework uses the language of “self-isolation”. This term legitimises a situation which only arises where the prison regime is failing to keep children safe and/or to meet their needs. Neither concept would be used in the community.
- 4.2 Inspectors have repeatedly found that the youth secure estate is an unsafe environment for children. The most recent HMIP report on children in custody found that “none of the STCs were good enough, and violence and self-harm in YOIs remained at or near an all-time high. Only one institution we inspected in 2019–20 was sufficiently safe”.⁵ In June 2021, a joint inspection reported such “serious and widespread concerns about the care and safety of children” at Rainsbrook STC that all children were moved.⁶ The same month, Ofsted reported on high levels of violence in Oakhill STC, an increase in child protection enquiries related to use of force against children, and “unstable, transitory relationships” between children and frontline staff.⁷
- 4.3 The language of “self-isolation” wrongly implies that it is a child’s own responsibility if they are afraid of leaving their cell given these conditions, or if they are unwell and are not being effectively cared for.
- 4.4 The term “routine isolation” is othering and does not reflect a child first perspective. In the community, parents or carers would never use this language to describe a child who is expected to be in bed. It is not clear why the separation framework includes children who are doing chores or are in bed after “lights out”, as they are not separated and do not require additional provision.

5. External scrutiny is an essential safeguard for children in custody

- 5.1 As shown by successive inspectorate reports, the closure of Medway STC and the urgent notifications about Rainsbrook, children in custody are extremely vulnerable to ill-treatment. Systemic issues such as those found at Medway and Rainsbrook can only be discovered through external scrutiny.
- 5.2 The framework states that where a child is separated for more than an hour, relevant professionals in both the secure setting and the community must be notified. It notes that this includes the child’s social worker and YOT worker. The framework should clarify that this refers to social workers in the community as well as the child’s social worker in custody.
- 5.3 The involvement of children’s parents, carers, family members or wider support network should go beyond being informed when a child is separated. In the Howard League’s experience, parents and other relatives feel powerless when their child is placed in

⁵ <https://www.justiceinspectorates.gov.uk/hmiprisonson/wp-content/uploads/sites/4/2021/02/CYP-report-2019-20-web.pdf>

⁶ <https://www.justiceinspectorates.gov.uk/hmiprisonson/wp-content/uploads/sites/4/2021/06/Letter-to-Secretary-of-State-Urgent-Notification-Rainsbrook-STC-June-2021-SC.pdf>

⁷ <https://files.ofsted.gov.uk/v1/file/50164964>

separation and do not know what their rights are or how they can help. The framework should state that where appropriate, parents should be advised on their rights and supported to work towards ending their child's isolation.

6. Children should be reminded that they have a right to seek legal advice

- 6.1 The Howard League agrees that children who have been separated must be offered access to independent advocacy services and other sources of support and scrutiny. Children should also be reminded that they have a right to legal advice before or during separation and that they have a right to make representations before they are separated.
- 6.2 The Howard League runs a free, confidential legal advice line for children and young people in custody. Howard League lawyers provide legal advice to children who call about separation and will be able to ensure that the policy framework is followed. The Howard League can also help children to make complaints if they are being treated unlawfully.
- 6.3 In the case of *SP v Secretary of State for the Home Department*, Howard League lawyers represented a vulnerable 17-year-old girl who was held in segregation for almost three weeks without an opportunity to challenge the allegation that caused her to be segregated. The Court of Appeal concluded that SP should have been given the opportunity to make representations before an order for segregation was made.⁸ The framework should refer to the judgment in *SP* and should explicitly state that children should be informed that they have the right to make representations **before** they are separated.

7. Separation is itself a potential child protection issue

- 7.1 In a community setting, the prolonged isolation of a child would be treated as a potential child protection issue. The “safeguarding” section of the guide should be amended to state that separation may itself be a child protection issue and can trigger a s47 enquiry under the Children Act 1989.

8. The framework should be made more user-friendly

- 8.1 The framework does not include a summary and is not very user-friendly. Without a clear overview of the policy and tight user guidance, staff are likely to gravitate towards the flowchart in Annex B. The Howard League has serious concerns about this flowchart and its likely impact on practice. The flowchart should be amended and a summary of the policy framework should be added at the start of the document.
- 8.2 The flowchart is not child-friendly and does not reflect the positive changes to separation policy set out in the rest of the framework. The title should be changed to reflect the aims of the policy framework – for example, it could be entitled “Process for preventing unnecessary separation”. The flowchart currently implies that children should be restrained, includes the problematic concept of “self-isolation” and focuses solely on risk rather than the welfare of the child. Unlike the policy framework as a whole, the flowchart does not direct staff to assess the child's needs or reflect on the meaning of their behaviour. It does not mention therapeutic engagement.

⁸ https://howardleague.org/wp-content/uploads/2017/06/judgment_SP_2004.pdf

8.3 The flowchart should be amended so that it does not suggest that separation can be considered where there is an identified risk to others, self or from others. Children should not be isolated because they pose a risk to themselves or are at risk from others: like the concept of “self-isolation”, this tacitly punishes children for the failings of the prison regime and the lack of appropriate therapeutic support. Risk to others should be amended to “serious risk to others”. Where risk is identified through prison intelligence, staff should be reminded to investigate this intelligence before taking any action.

9. Conclusion

9.1 The framework is a welcome step in the right direction. However, there needs to be greater clarity about what it means for separation to be a last resort and about provision for children who have been separated.

9.2 The language of “self-isolation” implicitly blames children for feeling unsafe or unwell in custody. If children feel unable to leave their cells, this should prompt reflection on the failings of the regime. It should not be treated as the individual responsibility of the child.

9.3 Separation must be subject to external scrutiny and robust procedural safeguards. It is essential that professionals and loved ones in the community are informed when a child is separated. Children should be supported to access advocacy and legal advice before and during separation and should be reminded that they can make representations before they are separated.

**The Howard League for Penal Reform
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