Howard League for Penal Reform

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Howard League for Penal Reform's response to the Youth Custody Service's Policy Framework on Behaviour Management and Physical Restraint

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Summary

1. The Howard League asks that the Youth Custody Service's draft framework on behaviour management and physical restraint be scrapped.

2. The framework should be rewritten from a child-centred, rights-based perspective that recognises that restraint must never be used for compliance and should only ever be used as a last resort.

3. Restraint is inherently degrading and violent and can never be in a child's best interests. As presently drafted the framework is incompatible with children's rights.

4. The framework wrongly implies that children transition to full maturity when they turn 18.

5. The framework does not reflect the law or government policy on the use of restraint on passive, non-compliant children.

6. Even where restraint is permitted within the rules, it will only be lawful if it is genuinely a last resort – even in cases where there is a clear risk of harm. The framework offers no guidance on de-escalation and does not help staff to ensure that restraint does not happen unless every other option has been tried.

7. If a staff member restrains a child when it is not strictly necessary, it is an assault. Staff should be aware that this is unlawful and wrong, and that restraint (re)traumatises children and encourages them to view violence as normal. It is deeply concerning that the framework instead focuses on the legal defences available for staff who have used force on children.

8. In its current draft, the framework does nothing to address the overuse of restraint on Black and minority ethnic children. It compounds the problem by instructing staff that they can use pre-emptive force against children based on their own (potentially discriminatory) perceptions, and that they can deliberately cause pain if children appear to be "strong" or "fully-grown".

Chair: Professor Fergus McNeill Chief Executive: Frances Crook OBE Charity No. 251926 Company limited by guarantee No. 898514
The Howard League for Penal Reform works for less crime, safer communities, fewer people in prison

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 the United Nations. 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 draft framework is incompatible with children's rights and legitimises violence against children. The Howard League does not believe that it is possible to address these problems by amending a few lines here and there. Instead, the framework must be scrapped and rewritten from a child-centred, rights-based perspective which requires that restraint should only ever be used as a last resort.

1.5 The Howard League would welcome the opportunity to provide further information about any of the points below.

2. The framework is incompatible with children's rights

2.1 The draft framework acknowledges that the unnecessary use of force against a child is "in principle an infringement of [European Convention on Human Rights] Article 3" (4.9), and that Article 8 protects children and adults from ill-treatment which does not reach the threshold for Article 3. Yet the framework legitimises the use of force even on passive, non-compliant children and wrongly suggests that pain-inducing restraint is acceptable.

2.2 The framework fails to mention the greater legal protection afforded to children by the Convention on the Rights of the Child (UNCRC), which the European Convention on Human Rights (ECHR) must be read alongside. In the case of *R(C) v Secretary of State for Justice* [2009] QB 657, Buxton LJ found that physical restraint is "in any normal understanding of language degrading and an infringement of human dignity" (§64), and that the restraint of children in custody was especially likely to engage and potentially breach Article 3 of the ECHR (read with UNCRC).[1]

2.3 The framework also contradicts Article 3 of the UNCRC, which states that children's best interests must be the primary consideration in all actions concerning them. The framework repeatedly suggests that the use of force against passive, non-compliant children may be in their "long term interest" (4.21) or "the best interest of that child" (4.24). Yet the use of force is never in a child's best interests and instead risks causing lasting harm.

[1] http://www.crae.org.uk/media/33597/R-C-v-Secretary-of-State-for-Justice.pdf

2.4 It is not good enough to merely state that the unnecessary use of force is “in principle” an infringement of Article 3. The unnecessary use of force against a child violates Article 3 of the ECHR and Article 37(c) of the UNCRC. It is unlawful and it should lead to legal action being taken against staff.

2.5 As the Howard League has argued in its programme of work on justice and fairness in prison, prisons cannot possibly teach people to respect the rule of law if they are themselves characterised by unlawful and unjust behaviour (Howard League, 2020).[2] The draft framework does not uphold law and justice: instead, it minimises and encourages staff to overlook the law on children’s rights.

2.6 The framework fails to treat children as children, including the unnecessary statement that “most of the children in our care are close to adulthood” (5.1) and the suggestion that it can be acceptable to use pain-inducing restraint on “strong and / or fully-grown children”. In the case of *R(HC) v Secretary of State for the Home Department* [2013] EWHC 982 (Admin), Moses LJ confirmed that children’s rights are no less significant for 17 year olds than for younger children. As his judgment pointed out, the UN Committee on the Rights of the Child had previously identified 16- and 17-year-old children as a particularly vulnerable group.[3]

3. Children do not abruptly transition to full maturity when they reach 18

3.1 The Howard League is a founding member of the Transition to Adulthood (T2A) Alliance, a broad coalition of leading charities working to evidence and promote the need for a distinct and effective approach to young adults in the transition to adulthood, throughout the criminal justice process. The work of the Howard League and T2A has highlighted the overwhelming scientific evidence that young adults are still developing into their mid-twenties: for example, young adults are still developing their decision-making and impulse control skills and remain very susceptible to peer pressure (Howard League, 2020).[4] Her Majesty’s Inspectorate of Prisons has also highlighted the distinct needs of, and inadequate provision for, young adults in custody (Her Majesty’s Inspectorate of Prisons, 2021).[5]

3.2 Staff should not treat 17-year-olds as if they are about to become fully-grown adults, especially when it comes to restraint. In 2011, the Independent Advisory Panel on Deaths in Custody commissioned a review of medical theories and research on restraint-related deaths. The review found that “certain groups are more vulnerable to risks when being restrained”, and that this included young people under the age of 20 (Aiken et al, 2011).[6]

4. The framework does not reflect law or policy on restraint for non-compliance

4.1 The framework does not reflect the law or government policy about restraint for passive non-compliance.

4.2 The Howard League agrees that restraint “should not be used as a response to protesting behaviour, non-compliance or to maintain good order and discipline” (4.24).

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[2] https://howardleague.org/wp-content/uploads/2020/02/Justice-and-Fairness-in-Prison-breifing-one.pdf
[3] https://www.bailii.org/ew/cases/EWHC/Admin/2013/982.html
[4] https://t2a.org.uk/wp-content/uploads/2020/12/JudgingMaturity2020.pdf
[5] https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2021/01/Young-adults-thematic-final-web-2021.pdf
[6] https://www.crisisprevention.com/CPI/media/Media/Specialties/pos/reports-and-guidelines/mapa/Review-of-Medical-Theories-of-Restraint-Deaths.pdf

However, the framework explains this only after stating that YOI staff may restrain passive, non-compliant children, citing examples such as a child who is being disruptive in a class and will not leave, or a group of children who are staging a sit-down protest. It is also contradicted by the point made immediately afterwards: that restraint may be used against non-compliant children "to prevent injury, ensure safety and serve the best interest of that child or others" (4.24).

4.3 It is not clear how passive non-compliance could, in itself, cause injury or risk children's safety. Far from restraint preventing injury, children who are accused of non-compliance are at risk of injury from restraint.

4.4 The courts have held that the use of force against children in custody is unlawful unless it can be shown to be strictly necessary. In the case of *R(C) v Secretary of State for Justice*, the Court of Appeal quashed new rules that permitted staff in secure training centres to restrain children for the purposes of good order and discipline. In his judgment, Buxton LJ emphasised "the need for strict necessity for resort to physical force" (§59). As the Secretary of State had failed to demonstrate that restraint for good order and discipline was necessary, the rules were unlawful.[7]

4.5 In 2015, the UN Committee on the Rights of the Child expressed its concern about the continued use of restraint for the purposes of good order and discipline in Young Offender Institutions (Committee on the Rights of the Child, 2016).[8] MPs have also expressed concern about the use of restraint for the purposes of good order and discipline. In the report of its 2019 inquiry on solitary confinement and restraint in youth detention, the Justice Committee concluded that "[t]he use of restraint in YOIs for the purposes of 'discipline and good order' is not compliant with human right standards, and is counterproductive for children's rehabilitation and the development of beneficial relationships with staff". The Committee also felt that "there can be a blurred line between the use of restraint for 'good order and discipline' and the use of restraint for punishment (which is not allowed in YOIs, or in any other settings), particularly in the perception of the children who are restrained" (Justice Committee, 2019).[9]

4.6 The government has long been clear that restraint should not be used in response to passive non-compliance, and that it cannot be used even when there is a risk of harm if other options have not been exhausted. In 2015, in response to a written question about the use of force in YOIs, the then Parliamentary Under-Secretary of State for Justice firmly stated that "restraint should only be used as a last resort, where there is a risk of harm, and where it is absolutely necessary to do so and no other form of intervention is possible or appropriate" (Selous, 2015).[10]

5. Even where restraint is lawful, it must be a last resort

5.1 The framework states that restraint should be a "last option" if a child does not pose an immediate risk but is refusing to comply. This misrepresents the law and policy on restraint. Restraint must **always** be a last resort, including where children have displayed violent behaviour.

5.2 If staff restrain children without exhausting all other options first, it is impossible to prove that the restraint was strictly necessary and that the incident could not have been dealt with otherwise. This makes the restraint unlawful. The framework should clearly explain

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[7] http://www.crae.org.uk/media/33597/R-C-v-Secretary-of-State-for-Justice.pdf
[8] http://www.crae.org.uk/publications-resources/un-crc-committees-concluding-observations-2016/
[9] https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/994/994.pdf
[10] https://questions-statements.parliament.uk/written-questions/detail/2015-10-09/11257

this and should include examples of the alternatives which staff must try before they can consider a restraint.

5.3 The framework does not offer any guidance for de-escalating a situation (and so preventing restraint). The previous policy on the use of force, PSO 1600, referred to de-escalation 14 times. In contrast, the draft framework mentions de-escalation three times and does not provide any examples.

6. If a staff member restrains a child unnecessarily, this is assault

6.1 The framework should be clear that if staff restrain a child when it is not a last resort and cannot be shown to be strictly necessary, this is assault. The framework claims to reflect a "commitment to procedural justice, fairness and equality" and "our duty of care to safeguarding vulnerable children" (1.6). The legitimisation of violence against children cannot be just or caring.

6.2 Far from establishing a "culture of non-violence" (1.3), the framework legitimises assaults on children. The section on self-defence, which sets out the legal defences for staff who use violence against children, is extremely worrying. It explains that that the use of force may be reasonable if it is based on an "honestly held" belief which is in fact mistaken (4.17) and that staff may have a defence even if they use "pre-emptive" force against a child (4.19). The section on pain-inducing restraint again justifies violence against children.

6.3 Despite the inclusion of an evidence section, the framework does not cite any research on the use or impact of restraint. This research does exist, and it shows that children experience restraint as part of a wider pattern of violence. For example, a recent qualitative study explored how children who had been subjected to violence in the home coped with their experiences in a secure training centre. It found that physical restraint in custody retraumatised children and further normalised violence (Paterson-Young, 2021).[11] Similarly, another qualitative study published this year found that the "use of physical restraint as normal, everyday practice" had the effect of "replicating [children's] prior experiences and expectations", and so reinforcing their sense that they could not be treated otherwise (Shenton and Smith, 2021).[12]

6.4 The section on safeguarding and the Children Act should clearly explain that the use of force against a child can trigger a child protection investigation. At present, it includes information which is not relevant to youth custody but fails to mention that restraint is itself a safeguarding issue. It is hard to see how the point about children being cared for within their families is relevant to children who are being forcibly held away from their families in youth custody.

7. The framework fails to challenge racial disparities in the use of restraint

7.1 The Howard League runs a free, confidential legal advice line for children in custody. Howard League lawyers frequently speak to children about their experiences of restraint, often in cases where a child has been adjudicated after being restrained. In the most upsetting cases, children tell us that they have been assaulted by a staff member and then subjected to an adjudication afterwards.

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[11] https://www.sciencedirect.com/science/article/abs/pii/S0145213421001496
[12] https://onlinelibrary.wiley.com/doi/full/10.1111/chso.12410

7.2 In the Howard League's experience, restraint is used disproportionately against Black boys and is a product of adultification. Adultification happens when Black children are perceived and treated as if they are older than their real age, leading adults to overlook their needs and vulnerabilities (Davis and Marsh, 2020).[13] The draft framework does nothing to counter the adultification of Black children and will likely make things worse, as staff are instructed that it is acceptable to pre-emptively use force against children based on their subjective beliefs or to use pain-inducing restraint against children who they perceive to be "fully grown".

7.3 The framework alludes vaguely to "the particular issues around racial disproportionality" but does not explain what these issues are. The previous draft framework on use of force – covering both children and adults – cited survey data from Her Majesty's Inspectorate of Prisons on racial disparities in the use of remand. This data is not included in the current draft, even though it is directly relevant to children. In the most recent survey, for 2019/20, the responses were particularly troubling: 71 per cent of Black and minority ethnic children in YOIs and secure training centres reported that they had been physically restrained, compared to 59 per cent of white children (Her Majesty's Inspectorate of Prisons, 2021).[14]

8. Conclusion

8.1 The Howard League is deeply concerned by the draft framework, which risks legitimising assaults on children. The framework should be rewritten in its entirety. The revised version should uphold children's rights, recognise that older children are not on the cusp of full maturity, explain that restraint is assault unless it is strictly necessary, and address the discrimination that is currently pervasive in the use of restraint.

The Howard League for Penal Reform
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[13] https://www.ingentaconnect.com/content/tpp/crsw/2020/00000008/00000002/art00009;jsessionid=30tkv8b8d22vp.x-ic-live-02

[14] https://www.justiceinspectorates.gov.uk/hmiprisons/inspections/children-in-custody-2019-20/