

10 January 2020
William Wragg MP
Chair of the Public Administration and Constitutional Affairs Committee

Dear Mr Wragg,

Inquiry: Coronavirus Act 2020 Two Years On

I am writing to provide evidence for the Committee's inquiry into the Coronavirus Act 2020.

The Howard League for Penal Reform has serious concerns about the secondary legislation authorised under the Coronavirus Act which severely curtailed access to education, visits and exercise for people in prison. Prison is the harshest penalty the state can impose and access to these things has a hugely enhanced significance for people deprived of their liberty. These far-reaching changes were brought in with virtually no parliamentary scrutiny.

It would therefore be useful for the Inquiry to consider the suite of secondary legislation that flowed from the Act to bring these restrictions into effect and was rushed through using the negative procedure.

Statutory instruments concerning children and adults in custody during Covid-19

In May and June 2020, respectively, the Prison and Young Offender Institution (Coronavirus) (Amendment) (No. 2) Rules 2020 and Secure Training Centre (Coronavirus) (Amendment) Rules 2020 came into force.

The amended rules give the Secretary of State the power to suspend legal entitlements to visits if the Secretary of State considered this to be necessary and proportionate in relation to coronavirus. Prisons, Young Offender Institutions and Secure Training Centres are no longer required to provide minimum entitlements to education, religious services, training courses, work or exercise as they had previously been required to do. Instead, provision of these things became required "so far as reasonably practicable". The practical impact of this was immense. For example, prior to the pandemic children in custody had to be provided with 15 hours of education a week if they were in a Young Offender Institution and 25 hours of education a week if they were in a Secure Training Centre. Subsequently, children in custody received a tiny fraction of this.

Early in the pandemic, face-to-face education was provided to vulnerable children with special education needs in the community. There was no equivalent attempt to provide face-to-face education for the many children in custody with special educational needs. In the community, computers were provided to enable home learning. In custody, no equivalent provision was made to enable the use of technology during the pandemic. While education slowly and erratically for children in custody over the following 18 months, it was not back to pre-pandemic minimum requirements even before the emergence of Omicron.

The Howard League has published two briefings about the lethargy and mental ill-health experienced by children and young adults in prison during the pandemic, as explained by young people who called Howard League’s legal advice line.¹

As the pandemic exacerbated backlogs in the crown court, a rising proportion of people in prison during the pandemic were on remand – unsentenced, yet subject to extraordinarily harsh conditions of imprisonment. As courts disproportionately remand Black and minority ethnic defendants to custody, these conditions have compounded the already stark racial inequalities in the criminal justice system.²

Prison regimes have been extremely slow to restart, even after all legal restrictions were dropped in the community. Understandably, this has been difficult for people in prison to cope with. Many people in prison, including children, have been locked in their cells for up to 23 hours a day for much of the past two years.

Parliamentary concerns about the statutory instruments

In 2020, the Secondary Legislation Committee and the Joint Committee on Statutory Instruments both expressed concerns about the amended rules.

The Secondary Legislation Committee felt that welfare issues might arise from the denial of visits and the scaled-back minimum regime. It noted that the amendments to the prison and Young Offender Institution rules included a transition of period of at least three months, and that this could be extended by the Secretary of State to a maximum of six months.³

Though the amended rules for Secure Training Centres did not include a transition period, the Committee noted that children could be subjected to a restricted regime for up to two years. It suggested that the Lords might wish to ask how the amended rules would be monitored and whether there would be regular reports to Parliament.⁴

The Joint Committee on Statutory Instruments queried the powers relied on for provisions about the transition period. In a memorandum to the Committee, the Ministry of Justice described this as an example of administrative sub-delegation and argued that the power to extend the transition period was “*very limited*”.⁵ The Committee disagreed, citing the long-standing and strong presumption against sub-delegation in legislation. It reported the amended Prison and Young Offender Institution rules for doubtful *vires*.⁶

Similarly, the Joint Committee reported the amended Secure Training Centre rules for doubtful *vires*, on the grounds that the Secretary of State’s discretion over suspending visits during a transmission control period (as defined in the Coronavirus Act 2020) ran into the same issues. The Committee additionally held that the rules were not clear enough about how notice would be given about the suspension of entitlement to visits, and that this required clarification.⁷

¹ Howard League (2020), *Children in prison during the Covid-19 pandemic*, available at <https://howardleague.org/wp-content/uploads/2020/11/Children-in-prison-during-covid-19.pdf>; Howard League (2020), *Young adults in prison during the Covid-19 pandemic*, available at <https://howardleague.org/wp-content/uploads/2020/06/YA-Covid-19-Briefing-FINAL.pdf>.

² Ethnicity Facts and Figures (2021), *Remand status at Crown Court*, available at <https://www.ethnicity-facts-figures.service.gov.uk/crime-justice-and-the-law/courts-sentencing-and-tribunals/remand-status-at-crown-court/latest>; Howard League (2021), *What’s wrong with remanding children to prison?*, available at <https://howardleague.org/wp-content/uploads/2021/09/Whats-wrong-with-remanding-children-to-prison.pdf>.

³ Secondary Legislation Scrutiny Committee (2020), *16th Report of Session 2019–21*, available at <https://committees.parliament.uk/publications/1352/documents/12229/default/>.

⁴ Secondary Legislation Scrutiny Committee (2020), *22nd Report of Session 2019–21*, available at <https://committees.parliament.uk/publications/1905/documents/18666/default/>.

⁵ Joint Committee on Statutory Instruments (2020), *Fifteenth Report of Session 2019–21*, available at <https://committees.parliament.uk/publications/1545/documents/14277/default/> (Appendix 3).

⁶ *Ibid.*

⁷ Joint Committee on Statutory instruments (2020), *Twenty-First Report of Session 2019–21*, available at <https://committees.parliament.uk/publications/2474/documents/24589/default/>.

As the concerns raised by the Secondary Legislation Committee and the Joint Committee on Statutory Instruments show, secondary legislation to amend prison rules was rushed into law without proper scrutiny and relied on dubious authority. These were not small changes: they removed core safeguards and entitlements for people in custody, with long-term implications for people who have spent time in prison during the pandemic and for the prison estate as a whole.

The ongoing impact of the statutory instruments

The amended Prison and Young Offender Institution rules came into force in May 2020. The amended Secure Training Centre rules came into force in July 2020, as restrictions in the community were eased: pubs and restaurants reopened two days later. The instruments regularised the restrictions which had already been in place, in breach of the existing rules, and provided a legislative basis for an extended period of severe restrictions in custody.

As originally drafted both statutory instruments were to be in force until 25 March 2022 unless revoked earlier. The Secure Training Centre rules were to cease once revoked or on 25 March 2022 and the Young Offender Institution were to be subject to a three month transition period if revoked prior to 25 March 2022.

In September 2021, the Howard League and Article 39 wrote a joint letter to the then-Secretary of State for Justice about the dilution of children's legal protections in custody. The letter noted that there had been no children's rights impact assessment or equality impact assessment and that an explanatory memorandum published alongside the amended Secure Training Centre rules, which stated that children's time out of cell could be restricted to 1.5 hours a day, was unlawful and damaging.⁸ On 12 October 2021, the Minister of State for Justice, Victoria Atkins MP, responded to confirm that the Secretary of State had announced his intention to bring the instruments to an end, noting that the revocation of amendments to the Secure Training Centre rules would be immediate and the revocation of the amendments to the remaining rules would be subject to a three month transition period.⁹ On 22 October 2021, the Howard League and Article 39 wrote to Victoria Atkins highlighting the lack of coherent reasoning for dealing with children differently and purely on the basis of where they are placed.¹⁰

On the 4 January 2022, the Prison and Young Offender Institution (Coronavirus) (Amendment) Rules 2022 was laid, removing the three month transition period and confirming the 2020 amendments to the Prison and Young Offender Institution rules would cease on 25 March 2022. It is not clear whether or not the amendments to the Secure Training Centre Rules have been revoked as yet.

Considering the important issues that these statutory instruments affect, it is deeply concerning that the changes are not clear and have not been widely publicised. It is also unclear why the amendments authorising such severe restrictions on people in prison, including vulnerable people with mental health problems and children, have been permitted to persist for over two years in contrast to significant easements of restrictions in the community.

⁸ Howard League for Penal Reform (2021), *Letter to the Lord Chancellor and Secretary of State about the Covid-19 dilution of children's legal protections in custody*, available at <https://howardleague.org/wp-content/uploads/2021/09/COVID-19-regulations-joint-letter-to-Justice-Secretary-from-Frances-Crook-Carolyne-Willow.pdf>.

⁹ <https://howardleague.org/wp-content/uploads/2021/10/Response-from-Victoria-Atkins-MP.pdf>

¹⁰ <https://howardleague.org/wp-content/uploads/2021/10/COVID-19-regulations-joint-letter-to-Minister-Atkins-from-Frances-Crook-Carolyne-Willow-22-October-2021.pdf>

Conclusion

As the amended prison, Young Offender Institution and Secure Training Centre rules show, the Coronavirus Act led to hurried, legally dubious and far-reaching secondary legislation. This has been especially damaging for people in prison, who are uniquely vulnerable to negligent treatment and the loss of basic rights.

I would welcome the opportunity to discuss any points in this letter with the Committee.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Laura Janes', written in a cursive style.

Dr Laura Janes
Legal Director
Howard League for Penal Reform