Time Better Spent:

Improving Decision-making in Prisons

A Report by JUSTICE

Chair of the Committee
Professor Nick Hardwick CBE

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The views expressed in this report are the cumulation of the collective experience and expertise of the Working Party's members, and may not represent the views of each individual, or the organisation or institution to which they belong.

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FOREWORD: TIME BETTER SPENT

It is a truism to say the prison system in England and Wales is in crisis. Scarcely a day goes by without another inspection report describing conditions of squalor, idleness and despair. Levels of violence, both between prisoners and against staff, and self-harm are rising. Underlying all this is a growth in the prison population to its highest ever levels, outstripping the rate at which the space, staff and services needed to sustain it can be brought on stream. This is not just unacceptable for those who live in prisons and the staff who work in them – it harms us all. Almost all prisoners will be released to live in the community again and without the capacity to do the work necessary to change their behaviour, more than one in three will reoffend within a year.

All of this failure comes at huge economic cost too: annual running costs for the prison system are around £4 billion a year, leaving aside the financial impact of reoffending, all of which diverts funds from where they are desperately needed elsewhere. There is no contradiction between the needs of prisoners, victims and the wider community here – none of us can afford for prisons to fail.

When the prison system last descended into crisis in the 1990s it led to widespread rioting including the infamous Strangeways (now HMP Manchester) riot in April 1990. In his seminal report into the causes of the riots, Lord Woolf stated:

> "*On the evidence, prison riots cannot be dismissed as one-off events, or as local disasters, or a run of bad luck. They are symptomatic of a series of serious underlying difficulties in the prison system. They will only be brought to an end if these difficulties are addressed.*"

No political party has been willing to grasp the current crisis with the seriousness required. The long-term trend has been steady deterioration in treatment, conditions and rehabilitation that a series of short-term measures has done little to alleviate. If we are to avoid a repeat of the events of the 1990s fundamental reform, of the order advocated by Lord Woolf then, is required again now. We hope this report will be a catalyst for the radical thinking that reform requires.

Key to Lord Woolf's findings was the need to find the right balance between security and justice and that:

> "*Justice encapsulates the obligation on the Prison Service to treat prisoners with humanity and fairness and to act in concert with its responsibilities as part of the Criminal Justice System.*"

Ensuring prisoners are treated fairly, and that they have legitimate and effective means to have their concerns addressed and their voices heard in the most important decisions that affect them is thus a crucial part of ensuring we have safe and well-ordered prisons that work not only for those they hold but also for the entire community of which they are a part.

For this reason it was a great privilege and responsibility to be asked by JUSTICE to chair the working party that oversaw the production of this report. JUSTICE itself has an unrivalled reputation for the quality of its work to strengthen the justice system and they were able to convene and support Working Party members whose expertise, ideas and debates provided a rich source for the report's content and recommendations.

Before we turned to how to improve the quality of decision making in the most significant areas, we recognised we first had to address the standards of treatment and conditions that prisoners could legitimately expect and the prison system's capacity to deliver them. These standards are currently set out in the 1999 Prison and YOI Rules which no longer reflect the prison system as it is today or development in human rights standards such as the 2015 United Nations "Nelson Mandela Rules". We call first therefore for the 1999 Rules and YOI Rules be reviewed and updated, taking into consideration the Nelson Mandela Rules and the European Prison Rules. Prisoners' basic entitlements should be expressed in the form of enforceable rights.

We know that some prisons are struggling to deliver even the most basic standards applicable today. In no other public institution providing personal services would this be acceptable – the institution concerned would be closed down. We recognise the special constraints under which the prison system operates but nevertheless argue that when a prison is subject to an 'Urgent Notification' from the prisons inspectorate, in effect put into special measures, all new admissions to that prison should be halted

until the major concerns identified by the inspectorate have been addressed. This is indeed what happens at the prison service's discretion in many cases at present – but as overall population pressures grow, we do believe this is an area where the prison service should no longer have discretion. If a prison can no longer meet the most basic standards of safety and decency, admissions must be halted until they can.

We cannot allow this to simply shift the pressures from one prison to another, so we go further. As I write, increasingly desperate measures are being taken to release prisoners early to reduce pressure on the system as it scrapes along the ceiling of its capacity. In some case this means those released do not have the supervision and resettlement support they need. We argue it would be better to do this the other way around as some European systems do, and when the system is a capacity to have a 'waiting list' so that suitably risk assessed and monitored individuals who have received a custodial sentence are not admitted to begin their sentence until there is space for them to do so, with the time they spend on the 'waiting list' deducted from their sentence. This is in effect what happens now, with some held on pre-sentence bail explicitly to avoid adding to prison population pressures. We believe this should be standardised with prison capacity limits set at a level in which safety and decency can be guaranteed and appropriate rehabilitative activities delivered.

Reducing population pressures should provide the capacity to deliver appropriate standards and so leads to discussion of what if even then the standards are not met in the most important decisions that affect prisoners' lives. We recognise the limitations of our work here – both in our inability to discuss this directly with prisoners themselves and fully address the circumstances of prisoners with different characteristics, and in the choice of topics the time limitations on the project allowed us to consider.

Nevertheless, we hope the issues we have chosen to address have broad applicability and deal with the decision making of most concern. A cross-cutting concern is the need for legal aid for work in prison, subject to means and merit testing, to return to levels available before the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The current position compares unfavourably with European countries such as Germany and Denmark and means that a critical safety valve for frustrations that may arise around decisions that have a fundamental impact on prisoners' lives is blocked.

Foremost amongst these decisions are decisions about risk and categorisation – crucial for the type of prison in which a prisoner may be held on and under which conditions. For indeterminate sentenced prisoners they are crucial steps on their pathway to show they are safe to be released. Categorisation may therefore have life-changing consequences and I, as anyone whose work takes them into prisons, know how concerned prisoners are about them. So in addition to enabling legal advice to assist prisoners with categorisation decisions, we argue the system should be much more transparent with prisoners given much greater clarity about what they are expected to do to reduce their risk and show they have done so. Of course this means the right number of offender behaviour programmes must be available in the right places and where appropriate we believe the Parole Board should be able to direct that a prisoners should be given the opportunity to participate in specific programmes if the prisoner agrees to do so.

Risk assessments and categorisation decisions will be informed by a prisoner's disciplinary record. We recognise that the incentives system that should encourage positive behaviour, and the discipline system that penalises poor behaviour are intertwined. We accept that in most minor cases it is better to deal quickly with behaviour issues, good and bad, and we do not intend to prevent this. For the most serious issues however, particularly where a serious penalty or loss of privileges is involved it is important that the system is fair and is seen to be so. The normal rules of any other disciplinary process should apply – prisoners should be able to be represented in serious cases, they or their representative should be able to see all the evidence against them, and in the event of an allegation not being proven, the prisoner’s status and privileges should return to that which existed before the allegation was made.

In the most extreme cases, when their behaviour is of most concern, a prisoner may be “removed from association” and placed in segregation under Rule 45 of the Prison Rules. We know that prolonged periods of segregation can be damaging for the mental health of any prisoner and is certainly not a suitable response to any prisoner whose mental health is the cause of their behavioural problems. As a matter of urgency therefore, alternative therapeutic environments to segregation must be made available for prisoners whose mental health difficulties cannot be managed on normal location.

Holding any prisoner in segregation for long periods is already regarded as a serious matter and must be reviewed at regular intervals by a Segregation Review Board. In exceptional cases, where this extends beyond 42 days (21 days for a young person) such a review must be conducted on behalf of the Secretary of State. In these cases the prisoner should be able to be represented but all prisoners in segregation should know why they are there and what they need to do to get out.

Members of Independent Monitoring Boards (IMBS) will attend some Segregation Review Boards and we think IMBS need to take more care that prisoners are clear this is for monitoring purposes only and that IMB members are not part of the decision-making process. IMBS are an important part of the prisons complaints system, and the complaints system is a crucial safeguard - not just as a means to address unfairness experienced by any individual prisoner but as a crucial foundation for the legitimacy of the whole system, on which order and constructive progress depends. As Lord Woolf put it:

> "*A fair and ordered grievance procedure with proper avenues of appeal and clear reasons given will help to create a climate in which prisoners feel they can be heard. This should make the day-to-day life of the prison more relaxed and reduce the likelihood of disturbances erupting.*"

We acknowledge there has been improvements in the way these complaints systems operate but these need to go further. The internal systems are slow and bureaucratic, the Prison and Probation Ombudsman needs to be put on a statutory footing to guarantee its independence and the work of IMB volunteers needs to be supported by a better resourced secretariat. Whilst acknowledging some improvements in the complaints systems, that improvement is not perceived equally by all prisoners. There are fundamental issues around race equality, and we hope HMPPS will prioritise the work it already has in progress in this area. We also believe that the categories HMPPS uses to monitor progress on this issue are too broad and fail to distinguish between groups with different experiences and needs. We suggest the categories used by the prisons inspectorate for their surveys are a better model.

Taken together, we hope the content and recommendations contained in this report will encourage a fundamental change in the level at which the current crisis in our

prisons is discussed. I am very grateful to members of the Working Party for sharing their experience and expertise with us and for all those we spoke to in the preparation of this report. These individuals and organisations represented many different perspectives and certainly did not agree about everything – but everyone was agreed that we cannot go on as we are. We hope our proposals will be subject to debate and comment, refined and adapted and we look forward to the discussion that will involve.

If this work has any salience that is largely due to the excellent support the working party received from JUSTICE in the person of Ailsa McKeon who was in turn assisted by Molly Higginson. I am very grateful to all the Working Party members, Ailsa and Molly. I learnt much from them – I hope others will too.

Professor Nick Hardwick CBE

Working Party Chair

EXECUTIVE SUMMARY

Overcrowding and under-resourcing have left the prison system in England and Wales in crisis. Appalling conditions, and high rates of self-harm and violence have become all too common. There is a sense among many prisoners that they are being poorly treated and ignored.

We all expect decisions affecting our lives to be lawful, fair, and correct. Decision-making processes that abide by these principles are paramount in prisons, given the dependency of prisoners on the State to secure even their most basic rights.

This is reflected in the fact that the scope of prison decision-making is vast: every aspect of prisoners' lives is controlled to some degree. In recognition of this, the Working Party has narrowed its inquiry to those areas of decision-making with the greatest reach, and which interact with other aspects of prison life: categorisation and risk, incentives and discipline, and segregation. The Working Party has also considered the basic standards that apply to prisoners, as well as the routes of redress that are open to them in the event of errors or failings.

This report records the findings of the Working Party in relation to these key areas of decision-making, and sets out recommendations aimed at promoting fair and effective decision-making in prisons.

Standards

Overcrowding is placing a significant strain on the prison system in England and Wales, yet the legal routes available for bringing attention to and challenging prison conditions are, at present, severely limited. The result is that prisons become black boxes, where the State both holds the keys to enter and controls what goes on inside. Greater transparency and accountability around decision-making in prisons is imperative to ensuring minimum standards are upheld. To promote this, The Working Party recommends that legal aid funding be available for a broader range of prison law work. We also recommend explicit reconsideration and restatement of prisoners' basic entitlements. Steps should also be taken to ensure individuals understand what they are entitled to, and how the processes they are subject to should work. Most

significantly, we recommend that new admissions to prisons be halted where adequate conditions cannot be secured.

Categorisation and Risk

Following conviction and sentencing, all serving prisoners are assigned to an initial security category, based on their assessed risk. Categorisation (and re-categorisation) decisions have a significant impact on a prisoner's day-to-day life and the opportunities available to them to progress toward release.

Whilst risk is an important element of decision-making in prison, both in terms of categorisation and more broadly, there is an acute lack of understanding among prisoners and prison staff about what risks look like, and what particular risk is being addressed at any given point and how. The Working Party recommends the development of guidance around sentence plans to ensure that offender managers are explicit about the level of risk identified, and how specified rehabilitation programmes are intended to work to reduce those risks.

We also consider that the provision of legal advice and assistance in relation to categorisation processes may reduce levels of grievance by improving the quality of decision-making at first instance, as well as improving prisoners' understanding.

Incentives and Discipline

Since its introduction in 1995, the Incentives and Earned Privileges regime has undergone a series of reforms aimed at reducing inconsistency and a perceived unfairness amongst prisoners. Most recently the Incentives Policy Framework, which was introduced in the summer of 2019 and remains in place today. Despite these reforms, recent prisoner surveys indicate little positive change, both in terms of the perceived effectiveness of incentives schemes to encourage good behaviour and in terms of fairness.

The Working Party found that the interaction of the incentives and adjudications regimes can lead to real perceptions of unfairness, for instance when prisoners' incentive status is downgraded pending adjudication. We therefore recommend that such downgrading should be immediately reversed in the event that the charge is not proven or otherwise dismissed.

In addition, given the impact of adjudication outcomes on future decision-making around categorisation and release, it is vital that adjudication processes be conducted with scrupulous fairness. We identify, and make recommendations to address, several concerns with the adjudication process itself, including limitations on prisoners' access to legal support; failures to follow correct procedures and an overreliance on remote hearings for independent adjudications.

Segregation

The detrimental impact of the social isolation and inactivity experienced in segregation is widely acknowledged. Segregation units often hold the most vulnerable members of the prison population, not least because it has become a means of managing mental health issues within the prison estate. The Working Party heard that whilst being in segregation can seriously exacerbate mental health problems, the lack of therapeutic alternatives means that in some instances segregation may be the safest place for a mentally vulnerable individual to be held. Resolving this tension requires a reconsideration of the purposes of segregation and a prioritisation of mental health provision in prison. More immediately, however, the Working Party emphasises that segregation should be used only as a measure last resort.

In addition to concerns around segregation practice, there is a worrying lack of transparency and scrutiny when it comes to the decision-making process. In relation to all segregation decisions, prisoners must be given clear written and oral explanations in a format they understand, and publicly funded legal advice and assistance should be made more widely available. Finally, the collation and publication of data on segregation is required to promote better understanding of segregation practices and decision-making and facilitate evidence-led reform.

Redress

Improvements to prison complaints systems are also required. Both internal and external complaints processes are viewed with distrust by many prisoners. In addition, these mechanisms can be inaccessible, particularly to those with poor literacy or English language abilities. More needs to be done to ensure that both types of process are straightforward, independent, and effective. Accordingly, the Working Party recommends that use be made of all available tools to improve and promote

access to complaints mechanisms, including via digital access and increased visibility of bodies such as Independent Prisoner Complaints Investigations.

This report is, of course, just a starting point. We hope that it will serve to bring attention to the deficiencies within our prisons – many of which seriously undermine prisoners' capacity to rehabilitate and lead positive lives upon release.

I. INTRODUCTION

1.1 It will surprise few to read that the prison system in England and Wales is in crisis. That term is not used hyperbolically, but rather to reflect the overcrowding, under-staffing and under-resourcing of the estate, and the consequences that those challenges have wrought over time. This includes Urgent Notifications[1] being issued in relation to five prisons in the 12 months to November 2023. In relation to the latest of these, at HMP Bedford, HM Chief Inspector of Prisons Charlie Taylor emphasised that the inspection was "*a damning indictment of the state of prisons. Many of the issues we found… reflect wider problems across the estate*". Appalling conditions, and very high rates of self-harm and violence,[2] have become far too common.

1.2 In 2021, JUSTICE investigated the parole system in England and Wales, and made a variety of recommendations intended to improve it.[3] That work also provided a window through which to observe some of the difficulties that the prison system was already then facing. Although JUSTICE has historically been engaged with the prison system, it is now 40 years since we conducted an overarching review.[4] It was clear, however, that many issues then highlighted were still causes for concern.[5]

1.3 Nonetheless, prisons constitute a broad area of research, and so some narrowing of scope was required. The primary focus of the present Working Party has accordingly been on the processes of decision-making within the prison system. The scope of prison decision-making is vast: every aspect of prisoners' lives is controlled at some level. As such, we chose to concentrate our attention on specific areas of decision-making which could be far-reaching and interact with other aspects of individuals' experiences in prison. These were incentives, discipline, segregation, and categorisation and risk.

[1] That is, a notification made directly to the Secretary of State for Justice where, following an inspection, HMCIP has significant concerns about the treatment and conditions of those detained.

[2] HMIP, 'Fifth Prison in a Year Issued with an Urgent Notification for Improvement as Inspectors Find Violence, Squalid Conditions and Spiralling Self-harm' (Press release, 17 November 2023).

[3] *See* JUSTICE, 'A Parole System Fit for Purpose', (2022).

[4] *See* JUSTICE, 'Justice in Prison' (1983).

[5] JUSTICE's 1983 report, *Justice in Prison*, addressed the topics of General Rights (including information, work and recreation, accommodation, and privileges and property, among others), Complaints and Supervision, Discipline, 'Special Control' (segregation, confinement and restraint), and 'Oblique Disciplinary Devices' (recategorization and transfer when used improperly as a punishment).

We have also considered the manner in which such decisions may be challenged and reviewed, both within and beyond the prison walls, via mechanisms of redress. As observed in the 1991 Woolf Report[6] (discussed further below), unresolved grievances can be a major source of discontent for those in prison.[7]

1.4 This is hardly surprising. We all hope and, indeed, expect that decisions which affect our lives will be lawful, fair, and correct. Yet, we rarely stop to think about how important good decision-making is and why. De Graaf et al turned their minds to this question in the introduction to their 2007 monograph, and identified three primary reasons why good administrative decision-making in particular matters:

> "*First of all, when issuing administrative decisions, public authorities should treat citizens according to their rights, including the right to equal treatment and the right to legal certainty. Secondly, the rights of third parties should be protected; for instance, they should not suffer from the external effects of an administrative decision without adequate compensation. Thirdly, the public is entitled to the protection of general public interests.*"[8]

1.5 Each of these rationales applies equally in the prison context. Given the dependency of prisoners, absent liberty, on the State to secure even the most basic rights, there is a particular imperative for good decision-making in this context. But the quality of decision-making is difficult to assess behind closed doors, and a lack of transparency in itself can give rise to a sense of unfairness.

1.6 It is for these reasons that the Working Party focused on prison decision-making. We have not laboured too greatly on what constitutes an administrative decision from a legal standpoint, but rather have examined the effectiveness of key decision types outlined above and the processes involved in their making.

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[6] *See* Rt. Hon. Lord Justice Woolf and HHJ Stephen Tumim, 'Report of an Inquiry into Prison Disturbances, April 1990' (Cm 1456) (HMSO, 1991)

[7] *See* ibid, para.14.326 *et seq*.

[8] K.J. de Graaf et al, 'Administrative Decision-Making and Legal Quality: an Introduction', in K.J. de Graaf et al, *Quality of Decision-Making in Public Law* (Europa, 2007), p.3.

The Present Context

1.7 In the lead up to the 2024/25 General Election, both Labour and the Conservatives have expressed commitments to make Britain's streets safer – measures which are said to be necessitated by increases in violent crime.[9] However, the Crime Survey for England and Wales, as published by the Office for National Statistics, shows that on the whole, crime has been on a consistent downward trend since 1995.[10] During that peak year, there were just under 20,000,000 crime incidents, while by June 2023, this had reduced to 4,236,000.[11] Violent crime has followed a matching trend: after a peak of 4,464,000 in December 1995, the figure as at June 2023 was 890,000 (a fall of 261,000 from the previous June).[12]

1.8 Turning to the prison population, of the 71,042 sentenced prisoners in custody as at 31 December 2023, over 25,000 had been imprisoned for an offence that did not involve violence (including presence of a weapon) or sexual misconduct against another person.[13] Moreover, an additional 16,005 were on remand, whether awaiting trial or sentencing, and a further 442 were non-criminal prisoners.[14] These figures are worth noting in light of the present emphasis on public protection in political discourse. Whether it is useful in many settings to refer to individuals as 'dangerous' is open to question; nevertheless, the above figures suggest that a significant proportion of those in prison have not (or have not been proven to have) committed offences that could justify that terminology. Any crime can be unpleasant or disturbing for those affected, however it is important that the broader population is given an accurate picture of the risks that in fact exist.

1.9 In a similar vein, the issue of release is an important one: of all sentenced prisoners as at 31 December 2023, 50,009 had received a determinate

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[9] *See* Labour, 'Let's Get Britain's Future Back', pp.17-19; Conservatives, 'Safer Streets' (2024).

[10] Office for National Statistics, 'Crime in England and Wales: Year Ending June 2023' (October 2023).

[11] *Ibid*. These figures do not include fraud and computer misuse, which were not recorded until March 2017. Nonetheless, that dataset follows the same trend: from a peak of 11,216 million in March 2017, the figure dropped to 8,420 million in June 2023. These figures therefore also show the impact that (non-violent) fraud and computer-based offences are a major proportion of crime incidents.

[12] *Ibid*.

[13] *See* MoJ and HMPPS 'Prison Population: 31 December 2023' (January 2024).

[14] *Ibid*.

sentence, meaning that they will ultimately be entitled to release.[15] Of those who are serving indeterminate sentences, the vast majority have a possibility of release on parole: there are presently just 67 people in prison on whole life orders,[16] whose only route to release is on compassionate grounds as identified by the Secretary of State.[17] These facts are significant when considering public protection messaging: if most individuals who are presently in prison will ultimately be released, then public protection is not achieved by simply sending a person to prison. What will keep the public safe is to prevent offending, whether on a first or subsequent occasion, particularly where offences are violent or otherwise serious in nature. This can be achieved by evidence-based rehabilitative interventions, reducing stigma (whether around crime, or catalysts for crime such as poverty and poor mental health), and providing opportunities for work and social reintegration for those released from prison.

1.10 All this said, questions about the purposes of prison within the legal system of England and Wales, and about the operation of the criminal justice system more broadly, are beyond the remit of this report. They are subjects requiring dedicated study in themselves, particularly given the parlous state that both prisons and the broader criminal justice system find themselves in today. The seeds of this situation were sown decades ago by actors on both sides of the political divide, and further exacerbated by continuing reductions to Ministry of Justice budgets affecting all parts of the criminal justice system.

1.11 Alongside this, between 2002 and 2022, "*sentences imposed for the more serious*[18] *offences has* [*sic*] *become more severe*",[19] with immediate custody being imposed in 33.7% of these cases at the end of the period as compared

[15] *Ibid*.

[16] *Ibid*.

[17] *See* Crime (Sentences) Act 1997, s.30. The applicable Policy Framework, 'Early Release on Compassionate Grounds', has recently been updated to reflect the judgment of the Grand Chamber of the European Court of Human Rights in *Vinter v United Kingdom* (Apps. nos. 66069/09, 130/10 and 3896/10) (9 July 2013).

[18] That is, indictable only, or triable either way. Indictable offences can only be tried before the Crown court, while either way offences may be tried before a magistrates' court or the Crown court. The third category, summary-only offences, fall to be tried before magistrates' courts only.

[19] Jose Pina-Sánchez et al, 'Sentencing Trends in England and Wales (2002-2022)' (October 2023), p.2.

with 25.3% at the beginning.[20] As Pina-Sánchez et al also observe, "*In addition to becoming more frequent, prison sentences for indictable and triable either way offences also became longer*",[21] with the average custodial sentence length increasing by 86%, from 15.5 months to 24.6 months, between 2002 and 2022.[22] The reasons for this are not wholly clear but are likely to be multi-faceted.

The Purposes of Prisons

1.12 The primary legislation governing prisons is the Prison Act 1952 (the "**1952 Act**"). The Act is not detailed, and many of the practical arrangements for the operation of prisons are set out in the Prison Rules 1999 ("**1999 Rules**") and Young Offender Institute Rules 2000 ("**YOI Rules**"). These are further supplemented by Prison Service Instructions ("**PSIs**"), Prison Service Orders ("**PSOs**"), and Policy Frameworks ("**PFs**"), which guide the day-to-day running of prisons, both public and private.[23]

1.13 The 1952 Act remains in force today in substantially the same form as it was originally passed. Perhaps the most significant amendment was the introduction of the role of His Majesty's Chief Inspector of Prisons by the Criminal Justice Act 1982. Beyond this, changes have been small and piecemeal, and the 1999 Rules similarly retain much of the content of previous versions. Instead, it is the various policy instruments which have shifted more over time.[24]

1.14 The 1952 Act was not a wholly new piece of legislation. Rather, as its long title explains, the original Bill was introduced to Parliament "*to consolidate certain enactments relating to prisons and other institutions for offenders and related matters…*". In consequence of being merely consolidating legislation,[25] and in contrast to the position in other jurisdictions such as

[20] *Ibid*, pp.2, 4.

[21] *Ibid*, p.3.

[22] *Ibid*, p.3.

[23] The management of 17 of the 122 prisons in England and Wales has been outsourced by government to private contractors: HMPPS, 'HM Prison Service: Prisons in England and Wales'.

[24] An illustration of this can be seen in HMPPS and MoJ's Numerical List of Prison Service Instructions, 1997-2018 (29 February 2024).

[25] That is, drawing together existing principles and powers (so that they have since been within the purview of the Home Secretary), rather than setting new ones.

Germany,[26] the 1952 Act did not identify any explicit purpose of imprisonment – a position which remains today.

1.15 Nonetheless, the Government's Prisons' Strategy White Paper of December 2021, in an introductory section on the Purposes of Prisons, outlined the following:

> "*Our prisons and prison regime must protect the public: this means holding prisoners securely whilst they serve the punishment handed down by the courts, and disrupting criminal activity from within the prison walls. Crucially they must also ensure good order and discipline; work to prevent future victims of crime by tackling the underlying causes of offending; and promote rehabilitation and reform to reduce reoffending.*"[27]

1.16 To a significant extent, the Ministry of Justice's priorities align with the purposes to which courts must generally have regard when sentencing an adult. These are: punishment of offenders; reduction of crime (including by deterrence); reform and rehabilitation of offenders; protection of the public; and making of reparation by offenders to persons affected by their offences.[28] None of these purposes has primacy over any other. Indeed, as the Sentencing Council explains:

> "*The court should consider which of the five purposes of sentencing… it is seeking to achieve through the sentence that is imposed. More than one purpose might be relevant and the importance of each must be weighed against the particular offence and offender characteristics when determining sentence*".[29]

1.17 Whether to expressly identify the relevant purposes is a matter of discretion for the judge when forming their sentencing remarks, and so in any individual

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[26] *See* Prison Act 1976, §2: "*By serving his prison sentence the prisoner shall be enabled in future to lead a life in social responsibility without committing criminal offences (objective of treatment). The execution of the prison sentence shall also serve to protect the general public from further criminal offences*".

[27] MoJ, 'Prisons Strategy White Paper' (Cmd 581) (December 2021).

[28] Pursuant to the Sentencing Act 2020, s.57(3), the court need not have regard to these purposes where a mandatory sentencing requirement applies, i.e., where the sentence is imprisonment for life; the sentence is otherwise fixed by law; the court must impose a serious terrorism sentence; a minimum sentence provision is applied; or where a relevant order under the Mental Health Act 1983 is made.

[29] *See* Sentencing Council, 'General Guideline: Overarching Principles' (2019).

case, it may not be entirely obvious what a sentence is intended to achieve. Arguably this makes carrying out those purposes in the course of a sentence difficult to do. At the same time, in passing mandatory sentences, courts are not required to consider the five purposes above – which raises further difficulties, in light of the European Court of Human Rights' recognition of a right to rehabilitation even for those convicted of the most serious crimes.[30] Again, the sentencing and broader criminal justice processes are beyond the scope of this report, but the task of prisons is not made easier by the need to fulfil contradictory goals that often go unexpressed.

1.18 Finally, rule 3 of the 1999 Rules states (as rule 1 of the 1964 Rules did before it) that: "*The purpose of the training and treatment of convicted prisoners shall be to encourage and assist them to lead a good and useful life*". This is a much broader and vaguer objective than those set out above, and provides little indication of how it is to be achieved. Nonetheless, it suggests that the emphasis once in prison is placed on rehabilitative outcomes – that is, the prevention of reoffending, and therefore also the protection of the public – rather than punitive aims. This appropriately reflects the position that individuals "[are sent] *to prison* ***as*** *punishment, not* ***for*** *punishment*"[31] (emphasis added).

1.19 Looking beyond political statements and legal frameworks, there exists a very large amount of academic scholarship on the theoretical purposes of sentencing generally and imprisonment specifically. It is unsurprising that the criminal justice system of England and Wales expresses the multiplicity of purposes outlined above, and it is reasonably uncontroversial that the response to a crime should be tailored to its particular circumstances.

1.20 Nonetheless, the variability of purposes, and more particularly the changes of governmental or ministerial emphasis, can create difficulties in practice,[32] as was discussed, for example, in the House of Commons Justice Committee's 2009 report, *Role of the Prison Officer*:

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[30] For a discussion of the principle and the relevant case law, *see, e.g.,* Ailbhe O'Loughlin, 'Risk Reduction and Redemption: An Interpretive Account of the Right to Rehabilitation in the Jurisprudence of the European Court of Human Rights' in (2021) 41(2) *Oxford Journal of Legal Studies* 510.

[31] S.K. Ruck (ed.), *Paterson on Prisons* (Frederick Muller, 1951), p.23.

[32] See House of Commons Justice Committee, 'Role of the Prison Officer' (HC 361, 12th report, session 2008-09, 3 November 2009), paras.20-35.

"During the inquiry it became very clear to us that a definition of the role of the prison officers is contingent upon the wider and deeper question of the aim(s) and purpose(s) of prison within the wider criminal justice system. Professor Andrew Coyle told us that the role of the prison officer could only be understood if the purpose of imprisonment was clear, and that remained a matter of debate: 'In general terms, we are fairly clear about the purpose of most of the large institutions in our society: the school, for example, is there to educate young people, the hospital is there to heal people who are sick. There is no similar clarity about the role of the prison.'"[33]

1.21 The Working Party heard similar views expressed on a number of occasions from those who have worked within the prison system for several years. The frequent ministerial changes in recent times have not been helpful in the development of clear and consistent priorities, and the recovery from the COVID-19 pandemic has presented particular challenges. In that respect, some have described a pull between focus on return to normal regimes on the one hand, and security on the other, with little room for balancing the two.

1.22 Accordingly, those charged with the day-to-day running of prisons must often juggle conflicting tasks without a clear sense of what should be prioritised. In an environment of over-crowding, under-staffing and under-resourcing, it is unsurprising that much energy is spent 'fire-fighting' matters of real urgency, while those that are less pressing fester and become chronic.

The Woolf Report

1.23 One further aspect of the prison landscape in England and Wales bears mentioning before turning to the substance of this report. As observed at the outset, the prisons in this country are overcrowded, under-resourced, and generally in a deplorable state. Most prisons have not returned to pre-COVID regimes, so that prisoners are remaining locked in their cells and failing to progress.[34] Living conditions are poor, with multiple prisoners in cells designed for one, lacking ventilation or broken windowpanes.[35] Of the

[33] *Ibid.*, para.18.

[34] HMCIP, 'Annual Report 2022-23' (2023), p.5.

[35] *Ibid.*, p.5.

prisoners surveyed by HMIP during 2022-23, 45% indicated that they had felt unsafe at some time in their current prison.[36]

1.24 This is not, however, the first time that our prisons have been in this state. During April 1990, a series of riots broke out across a number of prisons in England. The impact of the riots led the Home Secretary to instruct the Rt. Hon. Lord Justice Woolf and HHJ Stephen Tumim to review the causes, and to propose recommendations which would reduce the likelihood of a recurrence.

1.25 In examining the causes of the riots as a whole, Lord Woolf wrote:

> "*On the evidence, prison riots cannot be dismissed as one-off events, or as local disasters, or a run of bad luck. They are symptomatic of a series of serious underlying difficulties in the prison system. They will only be brought to an end if these difficulties are addressed.*"[37]

1.26 The difficulties identified were largely agreed, but varied in emphasis between groups. These could be narrowed down, for the most part, to insanitary and overcrowded conditions; negative and unconstructive regimes; lacking respect in how prisoners were treated; imprisonment's degradation of family ties, including through lack of visits; the absence of any independent system for redressing grievances; lack of staff and poor training; an absence of leadership within prisons, as well as support from Headquarters; and a need for coordination between parts of the criminal justice system more broadly.[38] Many of these concerns seem familiar today.

1.27 Lord Woolf then identified "*one principal thread which links these causes and complaints and which draws together all our proposals and recommendations*".[39] That was, according to his lordship, "*that the Prison Service must set security control and justice in prisons at the right level and it must provide the right balance between them*".[40] Security and control are self-explanatory, but his lordship's explanation of justice in this context bears noting: "*Justice encapsulates the obligation on the Prison Service to treat prisoners with humanity and fairness and to act in concert with its*

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[36] *See* HMIP, 2022-23 Annual Survey Results: Men's Prisons (July 2023).

[37] *Ibid.*, paras.1.62, 1.131.

[38] *Ibid.*, paras.1.143-1.146.

[39] *Ibid.*, para.1.148.

[40] *Ibid.*

responsibilities as part of the Criminal Justice System". That concept, and the lack of balance between all three factors, bears contemplation again today as we consider how overly restrictive regimes, poor conditions, understaffing and inadequate avenues for redress may once more create the conditions for a perfect storm.

1.28 Prisoners are rights-bearers and must be treated as such. There are of course the general protections set out in the European Convention on Human Rights ("**ECHR**"), as well as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, that apply to every individual. More particularly, however, a number of instruments exist which recognise the special circumstances of prisoners, such as the European Prison Rules and the United Nations Standard Minimum Rules on the Treatment of Prisoners. Specific instruments, such as the United Nations Convention against Torture, are especially relevant to those in prison owing to their vulnerability to state abuses of power. None of these instruments is expressly recognised by the 1952 Act or any of the rules made under it; the legal lenses which apply to prisoners in England and Wales see them ultimately subjects, rather than individuals.

1.29 Lord Woolf importantly spoke of achieving the right balance between security, control and justice, and the foregoing is not intended to tip the balance too far in the opposite direction. However, as will be further discussed in the next chapter and others which follow, it is arguable that the scale of justice should weigh heavier if equilibrium is to be obtained – and if serious consequences like those of April 1990 are to be avoided.

1.30 All this sets the backdrop to how the Working Party comes to have the task at hand. We acknowledge the very challenging context in which those who work in prisons and HMPPS more broadly operate, and the sense among many prisoners that they are being poorly treated and ignored. These circumstances are not good for those in prison, those who work in or with them, or for society more broadly. We therefore seek to make recommendations that will improve the day-to-day decision-making processes in prisons across England and Wales, as one small but significant step in bettering conditions for all.

The Working Party

1.31 As noted above, the Working Party set out to examine a number of key areas of decision-making, namely categorisation and risk; incentives and

discipline; and segregation. We also looked at the mechanisms for redress which can operate when a prisoner is aggrieved by a decision, as well as the standards which ought to apply to the treatment of prisoners.

1.32 The full Working Party met a number of times, initially to confirm the scope of work, given broad initial terms of reference, and later to consider progress and discuss recommendations. In the intervening period, sub-groups met to discuss each of the specific issues. These were formed based on individual preferences and expertise, and were informed by discussion papers setting out an overview of the legal frameworks and potential concerns arising.

1.33 The Working Party drew on evidence from a broad range of sources and stakeholders, including HMPPS, the Prison and Probation Ombudsman (PPO), HM Chief Inspector of Prisons, legal practitioners, and academics. We also benefited from insights obtained via a roundtable of prison governors. Our desk-based research, conducted with the assistance of Sidley Austin LLP, included comparative research in relation to a number of overseas jurisdictions, including Canada, Norway, Germany, the Netherlands and New Zealand.

Limitations

1.34 One limitation of this report is that, owing to the timeframe available and the practical and ethical restrictions on conducting ad hoc research with imprisoned people, the Working Party was unable to engage to a significant extent with prisoners and former prisoners themselves. We were, however, fortunate to obtain a small number of interviews, and we engaged with research which seeks to give prisoners a voice, such as that of the Prison Reform Trust's Prisoner Policy Network. We have also considered a number of HM Inspectorate of Prisons' prisoner surveys, which are conducted with population samples when a prison is inspected.

1.35 It should be noted that the focus of the Working Party has largely been on convicted, sentenced prisoners, who comprise the majority of the population. Nonetheless, many of the processes and decisions which affect sentenced prisoners also apply to those in custody on remand, or in prison for another reason (for example, civil prisoners, those committed for contempt of court, and foreign national prisoners who have completed their sentences and are awaiting deportation).

1.36 Although we are cognisant of the differing experiences of diverse groups within prisons – be they Black; Gypsy, Romani or Traveller; disabled; over 60; female; transgender; or have any other characteristic, alone or in combination – time and resource constraints have prevented us from delving into the specifics of these particular experiences. Instead, we have sought to approach matters from a point of equal accessibility and non-discrimination, and with especial acknowledgement of racial disparities as an issue for the criminal justice system more broadly.

1.37 Finally, there are many areas where concerns have been raised that this report does not cover, including the use of force and mental health of prisoners. The scope of this report was always ambitious, especially given the one-year investigation timeframe and the significant challenges which the prison system is currently facing.

1.38 The Working Party gathered evidence between May 2023 and January 2024, with drafting commencing in November 2023 and concluding in February 2024. During this period, the poor state of the prison system was made clear to the public, as judges were told to take overcrowding into consideration in sentencing[41] and to delay sentencing those on bail who might be imprisoned,[42] while the escape of a remand prisoner from HMP Wandsworth highlighted issues of security in straitened times.[43]

1.39 Despite the many and varied challenges which are apparent, the Working Party has sought to address significant issues in areas of decision-making that can substantially affect the day-to-day and longer-term experience of those in prison. There will be others that we have left aside, and this report does not pretend to have all of the answers. We hope nonetheless that the report can serve as a starting point for meaningful conversations about what our prison system is there for and what it can properly be expected – and resourced – to achieve.

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[41] *R v Ali (Arie)* [2023] EWCA Crim 232.

[42] *See, e.g.,* Haroon Siddique and Vikram Dodd, 'England and Wales Judges Told Not to Jail Criminals as Prisons Full – Report' (The Guardian, 12 October 2023).

[43] *See, e.g.,* Dominic Casciani, 'How Did Daniel Khalife Break out of Prison?' (BBC News, 7 September 2023).

Terminology

1.40 This report generally refers to ‘prisons’. The majority of the custodial estate is comprised of prisons for adult males and so in some respects this is the default consideration. However, except where it is otherwise expressed or implied, the term ‘prisons’ is intended to refer to adult male and female prisons, and Young Offender Institutions, which are often similarly governed.

1.41 In the same way, the term ‘prisoner’ includes those who are held in Young Offender Institutions. Where it is used, this is done descriptively in relation to the individual’s current status, which is of relevance to this report, rather than in a pejorative or all-encompassing fashion. Similarly, we do not use the term ‘offender’ save where we are adopting the language of a source, such as policy or legislation.

1.42 Finally, a number of acronyms familiar in the prison context are used in this report. They are listed here for ease of reference:

CNA	Certified Normal Accommodation
HMCIP	His Majesty’s Chief Inspector of Prisons
HMIP	His Majesty’s Inspectorate of Prisons
HMP	His Majesty’s Prison
HMPPS	His Majesty’s Prison and Probation Service
IMB	Independent Monitoring Board
IPCI	Independent Prisoner Complaint Investigations
LASPO	Legal Aid, Sentencing and Punishment of Offenders Act 2012
MoJ	Ministry of Justice
PF	Policy Framework
PHSO	Parliamentary and Health Services Ombudsman
PPO	Prisons and Probation Ombudsman
PSO	Prison Service Order
RoTL	Release on Temporary Licence
SRB	Segregation Review Board
YOI	Young Offender Institution

II. STANDARDS

Introduction

2.1 The following observations were expressed among the conclusions of the 1991 Woolf Report:

> "*We are in no doubt about the importance to be attached to having procedures which deal effectively and manifestly fairly with prisoners' concerns. No other conclusion could reasonably be drawn from the evidence we have received or from our discussions with prisoners.*
>
> *A fair and ordered grievance procedure with proper avenues of appeal and clear reasons given will help to create a climate in which prisoners feel they can be heard. This should make the day-to-day life of the prison more relaxed and reduce the likelihood of disturbances erupting. Such a system must be, and must be seen to be, the answer to the sort of letters we received which said: 'no-one listens to us'; and 'no-one answers our questions'. This was well recognised in the evidence presented to us by the Prison Officers' Association which says:*
>
> > *'Prisoners are less likely to turn to, or gain support for, illegitimate methods of drawing attention to their grievances if the procedures for investigating complaints are speedy, thorough and manifestly fair'*." [44]

2.2 The same observations seem equally fitting today. Fortunately, the intervening decades have brought some positive changes, including the disbanding of Boards of Visitors and their replacement with Independent Monitoring Boards ("**IMBs**"); the establishment of the Prisons and Probation Ombudsman ("**PPO**") as an external arbiter of prisoner complaints; revision of the internal complaints system; and the creation of a discrete mechanism for reporting of discrimination incidents.

2.3 Even so, it was apparent to the Working Party that redress mechanisms were not always as effective or accessible as they might be, and so the Working Party examined the operation of each stage in order to identify possible solutions. Before the question of redress may properly be examined, however, it is necessary to consider what entitlements those in prison actually

[44] Above n.6, paras.14.326-14.327.

have, and how they are guaranteed or otherwise within the present system and the capacity of the system to deliver them.

Standards

2.4 As of 9 February 2024, the number of prisoners in England and Wales stood at 87,982.[45] The most current estimate of the rate of imprisonment stands at 159 prisoners per 100,000 of the population,[46] a rate which has increased significantly over time: in 1900, there were 86 prisoners per 100,000 [47] and in the 1940s, this dropped to just 33;[48] and although it rose steadily from then on, by the 1990s, the rate was still just below 100.[49] There does not appear to be any statistical correlation between rates of imprisonment and crime: for example, for the period 2005-2009, crime in England and Wales decreased by 22% while the rate of imprisonment increased by 10%.

2.5 There are currently 123 prisons operating in England and Wales, as well as five Young Offender Institutions for males aged 15-17.[50] As at 31 December 2023, baseline certified normal accommodation ("**CNA**") across all prisons was 83,061, although 3,607 of those cells were not available for immediate use owing, for example, to damage or ongoing building work.[51] Nonetheless, operational capacity[52] was said to be 88,987, while the actual total population was 87,216 – almost 8,000 (c.10%) greater than the in-use CNA figure of 79,454.

2.6 It bears noting that certified normal accommodation is also termed is described as "*the Prison Service's own measure of accommodation. CNA represents the good, decent standard of accommodation that the Service*

[45] MoJ and HMPPS, 'Population Bulletin: Weekly 9 February 2024' (February 2024).

[46] Georgina Sturge, 'UK Prison Population Statistics' (September 2023), p.5.

[47] *Ibid.*, p.7.

[48] *Ibid.*

[49] PRT, 'Prison: The Facts' (Bromley Briefings, Summer 2019).

[50] Gov.UK, 'HMPPS: About Us'.

[51] MoJ and HMPPS, 'Prison Population: 31 December 2023' (January 2024).

[52] That is, "*the total number of prisoners that an establishment can hold taking into account control, security and the proper operation of the planned regime*", as "*determined by the Prison Group Directors on the basis of operational judgement and experience*": *ibid.*

aspires to provide all prisoners".[53] It is also known as "*uncrowded capacity*".[54]

2.7 However, CNA is also a formal legal concept: section 14(2) of the 1952 Act mandates that "*No cell shall be used for the confinement of a prisoner unless it is certified by an inspector that its size, lighting, heating, ventilation and fittings are adequate for health and that it allows the prisoner to communicate at any time with a prison officer*". Moreover, Rule 26 of the 1999 Rules provides:

> "*(1) No room or cell shall be used as sleeping accommodation for a prisoner unless it has been certified in the manner required by section 14 of the Prison Act 1952 in the case of a cell used for the confinement of a prisoner.*
>
> *(2) A certificate given under that section or this rule shall specify the maximum number of prisoners who may sleep or be confined at one time in the room or cell to which it relates, and the number so specified shall not be exceeded without the leave of the Secretary of State*".

2.8 CNA is therefore properly to be regarded as a maximum population level. Straightforwardly, if a prison is populated beyond CNA, that prison faces a fundamental challenge in ensuring that basic standards of treatment can be afforded to all within its walls. As this report elaborates, that is of concern not only to proponents of universal human rights, but to society at large.

2.9 One reason for this is purely economic: one prison place costs approximately £47,000 per year.[55] A broad-brush estimate of the overall annual cost of all prison places based on the current population of at least 87,000 is, accordingly, over £4 billion. That is an enormous cost to the taxpayers of England and Wales, who may legitimately ask what particular benefits are being obtained. Yet, the latest proven reoffending statistics show that, within 18 months of release from custody or onto a court order, or of being cautioned, 25.1% of adults reoffend.[56] However, this reoffending rate

[53] *Ibid*.

[54] *Ibid*.

[55] MoJ, 'Costs Per Place and Costs Per Prisoner by Individual Prison' (March 2023).

[56] MoJ, 'National Statistics: Proven Reoffending Statistics: October to December 2021' (October 2023).

increased to 37.1% where adults released from custody only were taken into account, and to 55.3% where that custodial sentence had been 12 months or less.[57] These statistics suggest that prison does little to prevent recidivism and can, especially in the case of short sentences, do more harm than good by disrupting the positive community ties that do exist.

2.10 The primary reason for concern about prisons' inability to provide adequately for prisoners' needs is, however, the fundamental principle that those in prison are deserving of human dignity and rights, just as any other individual. Although the United Kingdom has historically had difficulty with this concept,[58] it has been the law of this country since *Raymond v Honey* [1983] 1 AC 1 that prisoners remain entitled to all civil rights except insofar as they are taken away by legislation. As the renowned prison reformer Alexander Paterson explained it, people go "*to prison* ***as*** *punishment, not* ***for*** *punishment*"[59] (emphasis added). There are pains inherent in the fact of imprisonment, but these should not be increased by unjust conditions.

2.11 The legal routes available for bringing attention to and challenging prison conditions are, however, limited in England and Wales at present. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("**LASPO**") has decimated the prison law sector in the intervening decade, by removing all but a few subjects – independent and *Tarrant* adjudications, Parole Board release determinations, and sentence calculation issues – from the scope of legal aid.

2.12 This position may be contrasted with comparable European jurisdictions like Germany and Denmark, which expressly provide prisoners with direct access to courts in relation to matters concerning their treatment. In Denmark, section 112 of the Corrections Act permits prisoners within four weeks of a final administrative decision having been taken to bring that decision before a court for review, where the decision concerns matters like disciplinary punishments and confiscation of personal property, as well as refusal of parole and sentence calculation.[60]

[57] *Ibid*.

[58] *See e.g.*, *Justice in Prison*, above n.4, p.31.

[59] *See* Ruck, above n.31, p.23.

[60] See *Lov om fuldbyrdelse af straf m.v.* (nr 432 af 31/05/2000).

2.13 In Germany, direct access to the courts is broader: article 19(4) of the German Constitution grants every individual access to the courts to vindicate any right guaranteed by law. In 1972, the German Federal Court confirmed that this extended to prisoners as much as to those at liberty. There is also a constitutionally-recognised right to rehabilitation,[61] which must be respected in any decision made by prison administrators, the courts and the legislature.[62]

2.14 There may of course be many reasons why prisons fail to provide adequate conditions, including a lack of staff and resources to do so. The key point, however, is that without routes of review, prisons become black boxes where the State both holds the keys to enter and controls what goes on inside. Public legal funding is therefore not simply a mechanism by which lawyers make fees, but also an investment in ensuring minimum standards – both of decision-making processes and substantive decisions – are upheld.

2.15 The existence of the prison complaints system, discussed further below, was a major reason for vastly reducing the scope of prison legal aid in 2013.

2.16 Prior to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("**LASPO**"), prisoners were able to obtain legal aid funding for advice and assistance (including advocacy) on matters relating to treatment (including prison conditions, discrimination, compassionate release and other matters), sentencing (including categorisation and segregation), disciplinary matters (that is, both governors' and independent adjudications) and Parole Board reviews. As with any other legal aid application, those made by prisoners were subject to means and merits testing.[63] LASPO reduced the scope of prison law legal aid to just four areas:

> "*i. Proceedings involving the determination of a criminal charge for the purposes of Article 6(1) of the ECHR* [including independent adjudications, discussed in **Chapter 4** below];

[61] BVerfG, 05.06.1973 – 1 BvR 536/72 (BVerfGE 35, 202 ff.)

[62] See Christine Graebsch and Anette Storgaard, 'Prison Leave and Access to Justice: An Insight into Danish and German Law in Action' (2023) 13(4) *Oñati Socio-Legal Series* 1298, 1313.

[63] Legal aid may be granted to those lacking sufficient funds to pay for legal advice or assistance, taking into account income and other financial information ("means" testing), and whose cases have good prospects of success or otherwise merit use of public funds ("merits" testing).

ii. All proceedings before the Parole Board, where the Parole Board has the power to direct the individual's release;
iii. Advice and Assistance in relation to sentence calculation where the date of release or the date of eligibility for consideration by the Parole Board for a direction to be released, is disputed; and,

iv. Disciplinary cases where the governor has given permission for legal representation after successful application of the Tarrant principles [which guide whether a prisoner would be able to represent themselves, taking into account matters including legal complexity, charge seriousness, and prisoner capacity]."[64]

2.17 Then-Lord Chancellor Chris Grayling repeatedly expressed the opinion that the complaints system was sufficient to deal with any concerns about prisoner treatment, so that these issues need not trouble the courts.[65] An arbitrary line was accordingly drawn between questions affecting liberty and quite literally anything else, despite the deficiencies of the complaints system that were brought to the Lord Chancellor's attention at the time.[66] Indeed, as the PPO pointed out to the National Offender Management Service (now HMPPS) in 2015, the reduction in the number of complaints concerning adjudication between 2012/13 and 2014/15 was arguably "*because reductions in legal aid have made it harder for prisoners to get legal assistance with framing complaints to us*".[67]

2.18 Grayling repeatedly expressed the view that many of these issues were not "*legal matters*" – an idea difficult to defend when those matters entail determination of entitlements according to legislative or policy tests. It also ignores the fact that timely legal advice and assistance can help to an

[64] MoJ, 'Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)' (7 February 2019), para.976.

[65] *See* 'Minutes of Evidence Taken before the Joint Committee on Human Rights: The Implications for Access to Justice of the Government's Proposals to Reform Legal Aid' (26 November 2023), pp.20-21.

[66] House of Commons Justice Committee, 'Transforming Legal Aid: Evidence taken by the Committee' (Third Report of Session 2013-14, HC 91) (2013), Q109-210. Compare also the approach of the German prison system, where "*Each and every decision or action of the prison administration can be subject to judicial review*" before a specialised court: see Frieder Dünkel and Christine Morgenstern, 'The Monitoring of Prisons in German Law and Practice' (2018) 70 *Crime, Law and Social Change* 93, 95.

[67] *See* PPO, *Letter to Simon Greenwood* (7 December 2015).

individual to understand whether there is a problem at all, and to resolve issues before they are progressed through any complaint or court system.

2.19 The fact that other systems should work misses the point that access to the courts should always be an available option when other mechanisms have failed,[68] not least because the principle of open justice that operates in our courts permits scrutiny to play out in public, rather than behind closed doors. Moreover, higher court decisions can influence broader practice beyond the individual case.[69]

2.20 Grayling also expressed the view that cases of poor treatment of prisoners were "*exceptional*" and "*not the norm*", as:

> "*We have a team of pretty dedicated, hardworking people who do their best for the country in what can be sometimes very difficult and trying circumstances, and I do not want a situation where complaints about the actions of people within our prisons, the routine actions in our prisons, where the conditions in our prisons, or where the choice of which prison someone is detained in, is readily a matter for the courts funded by legal aid.*"[70]

2.21 It should go without saying - but is worth restating nonetheless - that those who work in prisons and HMPPS more broadly do challenging jobs and generally endeavour to do them well. The fact of that, however, should not be allowed to shield Government – who ultimately make the overarching budgetary and policy choices that lead to the poor conditions in which staff work and prisoners live – from the consequences of those choices. By way of comparison, nurses and doctors do very difficult jobs in challenging conditions, but NHS Trusts remain liable for errors and misjudgements in individual cases – even though there is a complaints system and ombudsman in place to address healthcare concerns in the first instance.

2.22 Following review by the Court of Appeal,[71] legal aid provision was restored for pre-tariff review hearings and other advice cases before the Parole Board; Category A prison reviews; and decisions to place prisoners in Close

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[68] As Baroness Kennedy of The Shaws pointed out: Minutes of Evidence, above n.65, p.28.

[69] As emphasised in the German context by Dünkel and Morgenstern, above n.66, pp.96-98.

[70] Minutes of Evidence, above n.65, pp.20-21.

[71] *R (Howard League for Penal Reform and The Prisoners' Advice Service) v Lord Chancellor* [2017] EWCA Civ 244.

Supervision Centres (discussed in **Chapter 5** below).[72] Exceptional Case Funding may also be available in relation to mother and baby unit applications, licence conditions, resettlement, and segregation.[73] Issues of prisoner treatment have remained wholly out of scope.

2.23 It bears noting that the decision to cut prison legal aid in 2012 was not wholly necessitated by financial pressures. As explained in the course of the 2019 Post-Implementation Review into LASPO:

> "*Legal aid for Advice and Assistance in all treatment matters was removed, as they were deemed to be not of sufficient priority to justify the use of public funds, considering the alternative means of problem resolution that should be available to prisoners. The changes amending the scope of criminal legal aid for prison law were intended to focus public resources on cases that are of sufficient priority to justify the use of public money.*"[74]

2.24 Table 1 below demonstrates the small proportion of criminal (lower) legal aid which prison law work has always constituted. Even that does not even represent the full picture, given the substantial additional costs incurred in relation to Crown Court, Court of Appeal and Supreme Court cases. Rather, as the above quote demonstrates, the significant cuts to this sector of legal aid provision reflected attitudes toward people in prison and their entitlements.[75]

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[72] Post-Implementation Review, above n.64, para.981.

[73] *Ibid.*, para.987.

[74] *Ibid.*, para.978.

[75] *See, e.g.,* Minutes of Evidence, above n.65, pp.28-30, 32-33, and Hélène Mulholland and Allegra Stratton 'UK May be Forced to Give Prisoners the Vote in Time for May Elections' (The Guardian, 1 February 2011).

Table 1: Legal Aid Funding – Crime, Lower (£000s), 2002-2023[76]							
Financial Year	Police Station Advice	Magistrates' court representation[1]	Advice & Assistance on Appeals	Prison law	Civil work associated with crime cases	Total	Prison law as % of total crime 'lower' work
2002-03	169,655	329,302	683	3,557	3,422	**506,619**	**0.70%**
2003-04	177,303	329,014	923	4,947	3,510	**515,697**	**0.96%**
2004-05	173,530	311,743	1,673	6,731	3,526	**497,203**	**1.35%**
2005-06	185,963	318,063	2,244	8,742	3,799	**518,810**	**1.69%**
2006-07	189,030	310,617	1,804	12,489	3,514	**517,454**	**2.41%**
2007-08	181,340	271,016	1,798	15,992	2,946	**473,093**	**3.38%**
2008-09	192,841	266,781	2,432	21,606	2,782	**486,441**	**4.44%**
2009-10	187,528	256,629	3,632	24,889	2,682	**475,360**	**5.24%**
2010-11	179,598	227,546	3,684	25,381	2,353	**438,561**	**5.79%**
2011-12	169,552	212,830	4,225	22,619	454	**409,679**	**5.52%**
2012-13	160,193	200,306	5,128	21,185	573	**387,385**	**5.47%**
2013-14	163,348	192,019	3,805	19,922	432	**379,527**	**5.25%**
2014-15	146,986	167,693	3,259	15,827	190	**333,956**	**4.74%**
2015-16	129,668	140,201	1,994	14,831	80	**286,774**	**5.17%**
2016-17	130,362	137,061	1,814	14,591	67	**283,895**	**5.14%**
2017-18	127,766	123,877	1,878	17,007	83	**270,612**	**6.28%**
2018-19	124,415	116,819	1,898	17,210	73	**260,413**	**6.61%**
2019-20	126,201	109,380	1,489	17,608	64	**254,742**	**6.91%**
2020-21	114,502	91,144	1,623	16,572	41	**223,883**	**7.40%**
2021-22	115,311	112,952	1,675	18,202	38	**248,179**	**7.33%**
2022-23	128,476	110,640	2,041	17,309	69	**258,534**	**6.70%**

[76] Figures drawn from Table 2.2, MoJ 'Legal Aid Statistics England and Wales Tables Jul to Sep 2023' (December 2023).

2.25 Another fundamental issue is that many prisoners simply do not know what their entitlements are. As noted in **Chapter I**, prisons are governed largely by reference to national and local policies. While it is now the case that all prison libraries should have copies of national policies,[77] it does not always follow that they do have them. While these can be accessed online, that is not an option for those in prison. At the same time, those held in segregation for extended periods are unlikely to be able to access prison libraries with any frequency, if at all. Local policies are rarely made available publicly, whether to those inside prison or on the outside. This state of affairs makes it very difficult for those in prison to know what they are entitled to and can ask for, and for those on the outside to advise. Prison law NGOs such as the Prisoners Advice Service provide useful information sheets for prisoners around key issues, but this does not remove the need for policies to be provided in current and widely-accessible formats.

2.26 At the same time as prisoners lack awareness of their entitlements, there is also a disconnection between the reality of prisons and what they are expected to do. As noted in **Chapter I**, sentencing – and, accordingly, a sentence of imprisonment – may serve multiple purposes. These purposes are a mandatory consideration and so sentencers are entitled to expect that the sentences that they pass are capable of achieving those ends. Unfortunately, at present, that may not be the case and, as the Court of Appeal indicated in *Ali*,[78] that may sometimes be a relevant consideration in sentencing. The Working Party understands that there is presently no requirement for judges and magistrates to visit prisons. As a result of the increase in civil practitioners moving to the criminal bench in recent years, it is also the case that many may never have entered a prison or YOI. While it is right in any individual case that sentencers must reach decisions on the evidence before them, the Working Party is of the view that sentencers should also have some understanding of what life in prison looks like and what the capabilities of the establishments are.

2.27 The general attitude of successive governments toward prisoners in England and Wales may be contrasted with the position in other jurisdictions. Nordic and other European nations such as Germany and the Netherlands adopt

[77] Previously, for reasons known only to the Home Office, Standing Orders (the equivalent of today's PSIs, PSOs and PFs) were considered to be restricted and so not made available to prisoners: see *Justice in Prison*, p.7.

[78] *R v Ali (Arie)* [2023] EWCA Crim 232.

rights- and normalisation-based approaches to imprisonment. The principle of normalisation means that life in prison should approximate, as closely as possible, life outside, with the aim of both treating prisoners humanely and ensuring a positive transition back into society at the end of their period in custody. While no system is perfect, it bears noting that as of 2022, the Norway's reoffending rate was just 20%, whereas in the 1990s and following a more punitive approach, that rate was nearly 70%.[79] Similarly, the prison population of the Netherlands has declined from 50,650 in 2005 to 30,380 in 2022,[80] with the consequence that several Dutch prisons have been able to close.

2.28 The point being made – which is not a new one – is that treating prisoners humanely and providing resources to facilitate meaningful rehabilitation, as well as educational and work opportunities, is more likely to reduce crime and create positive outcomes for society than keeping prisoners behind cell doors for 23 hours each day. The acceptance of overcrowding as a means of dealing with convicted individuals shows both a lack of imagination on the part of policy-makers and a failure to acknowledge that more harm, to both prisoners and society, is likely to follow.

2.29 The Government has been forced to adopt ad hoc and other measures in recent times to deal with the fact that there is simply no space in the prison system for new admissions. These measures include delaying sentencing where immediate imprisonment is a likely outcome; releasing some prisoners from their sentences 18 days early on End of Custody Supervised Licence; and plans in the Sentencing Bill to introduce a presumption in favour of suspending short sentences, and widen the availability of Home Detention Curfew toward the end of some prisoners' custodial terms.

2.30 Unless a systematic approach is taken, however, these measures will remain as they are: a stopgap against a continuous flow. There must be planning for the future which recognises the ineffectiveness of any prison sentence which cannot provide substantial rehabilitative measures within a safe environment. It is entirely possible to monitor the types of cases going through the court system at any given time and the kinds of sentences that are likely to result – financial, community, or suspended, short- or long-term immediate

[79] First Step Alliance, 'What We Can Learn From Norway's Prison System: Rehabilitation & Recidivism' (26 November 2023).

[80] Dave Beakhust, 'Letters: Prison Lessons from the Netherlands' (The Guardian, 6 October 2023).

custodial.[81] It should therefore be possible, between the court and prison systems, to at least approximate what spaces will be required when, and to plan accordingly.

2.31 In this respect, lessons may be learned from other jurisdictions. Returning again to Norway, in that country, sentenced prisoners are placed into a 'queue' after sentencing to await admission to prison at a time where there is space. That system is not without downsides: those sentenced report significant uncertainty while waiting, during which period they can do nothing with their lives and can feel that they are being punished already, although that is not formally the case.[82]

2.32 The Working Party is of the view, however, that a queue system could be made to work by the use of electronically-monitored home detention curfew for the duration of the waiting period. The time spent in home detention should then be deducted from the custodial period of the prison sentence, akin to a qualifying curfew imposed as a condition of bail. This would provide certainty to those awaiting incarceration. Ideally, a maximum expected waiting time (as a proportion of the total sentence) should be set, and rehabilitative interventions developed which can be delivered via home detention and continued in prison. At the same time, a prioritisation system would need to be developed to ensure that those posing the greatest risk to the public, or to those with whom they reside, would enter custody immediately.

Recommendations

2.33 Several recommendations flow from the issues set out above. The first is an overarching, structural one which reflects the evolution of the status and rights of prisoners outside England and Wales in the last several decades. The current prisons legislation dates back to 1952, while the 1999 Rules largely repeat the content of the previous version, dating to 1964. Meanwhile, the 2015 Nelson Mandela Rules represent the evolution of the original 1955 Rules for the Standard Minimum Treatment of Offenders, and the European Prison Rules, first adopted in 1973, have been revised several times including

[81] Remand decision-making occurs more quickly and may therefore be more difficult to predict.

[82] See e.g. Julie Laursen, Kristian Mjåland and and Ben Crewe, '"It's Like a Sentence before the Sentence" – Exploring the Pains and Possibilities of Waiting for Imprisonment' (2020) 60 *British Journal of Criminology* 363.

most recently in 2020. It is time that the domestic legal structure was re-examined to keep apace with international developments.

2.34 **Accordingly, the Working Party recommends that the 1999 Rules and YOI Rules be reviewed and updated, taking into consideration the Nelson Mandela Rules and the European Prison Rules. Prisoners' basic entitlements should be expressed in the form of enforceable rights.**

2.35 Focussing on more immediate changes, a significant means of reducing uncertainty and avoiding grievances is to ensure that individuals understand what they are entitled to and how processes should work. We therefore recommend that **all current national and local prison policies should be made freely available to all staff, prisoners, and legal practitioners in digital formats. This should be prioritised in the course of the digital roll-out across the estate.**

2.36 Crucially, **the Working Party recommends that legal aid funding for prison law work should be returned to the scope that existed prior to LASPO.** Even at the time, the amount of spending in this area was not substantial and we do not anticipate any 'opening of the floodgates'. However, it is crucial that those held in State custody have access to early legal advice and assistance in order to understand their rights and to vindicate them, including via litigation where necessary. No complaints system is an adequate substitute for public justice.

2.37 To assist in access to early legal advice, **prisons should pre-approve phone numbers for prison law NGOs (such as Prison Reform Trust, the Howard League, Prisoners' Advice Service and the Intervene Project) and local prison law solicitors, and calls to these numbers should be made free of charge.**

2.38 As this report has consistently outlined, however, the factor affecting most greatly the effectiveness of decision-making in prisons is the existence of overcrowding. It is beyond the scope of this report to address sentencing policy and, in particular, the increases in sentence length introduced in recent decades which have led to substantial increases in the prison population. Nonetheless, the Working Party considers that it is possible for change to occur within the prison system itself, as a first step to ameliorating this crisis.

2.39 Accordingly, **we recommend that in the event that HMIP issues an Urgent Notification in relation to a prison, the Ministry of Justice should immediately direct the cessation of admissions to that prison until HMIP**

confirms that the concerns identified in the Urgent Notification are satisfactorily addressed.[83]

2.40 At the same time, we recommend that **a queue system should be developed and operated when the estate is at capacity, including arrangements for electronically monitored home detention for those waiting to enter prison, whose custodial period should be reduced by the number of days they spend on curfew waiting.**

2.41 Furthermore, **we recommend that overarching sentencing guidelines should be amended along the lines of *R v Ali (Arie)* [2023] EWCA Crim 232 to allow the judiciary and magistrates to take into account current prison capacity and conditions when making sentencing decisions.**

2.42 Finally, the Working Party is of the view that it is imperative that those who may sentence individuals to custody have some understanding of how prisons operate day-to-day. **We therefore recommend that all judges and magistrates who deal with criminal matters be encouraged, as a minimum, to visit one prison or YOI annually.**

[83] This is, in effect, what took place following HMIP inspections of HMP Liverpool in 2017 and HMP/YOI Feltham in 2019: *see* HMPPS, 'Action Plan: HMP Liverpool – A Response to the HMCIP Inspection Report' (19 January 2018), Recommendation 5.1; HMPPS, 'Action Plan: HMP Liverpool – A Response to the HMCIP Inspection Report' (19 January 2018), Recommendation 5.1.

III. CATEGORISATION AND RISK

Introduction

3.1 Following conviction and sentencing, all serving prisoners are assigned to an initial security category. Within the adult male estate, these progressive categories are A, B, C and D, where A requires the most restrictive conditions and D permits prisoners to be held in open conditions. The adult female estate is smaller and is divided into Closed and Open. Restricted Status is a further categorisation available for "*any female, young person* [under 18] *or young adult* [18- to 20-year-old] *prisoner convicted or on remand whose escape would present a serious risk to the public and who are required to be held in designated secure accommodation*".[84] Individuals held in custody on remand are not assigned to a security category, but are ordinarily housed in Category B prisons unless provisionally assessed as Category A or Restricted Status.[85]

3.2 The system of categorisation dates back to the Mountbatten Inquiry into Prison Escapes and Security, which reported in early 1967. It was accordingly a response to concerns around inadequate prison infrastructure and poor categorisation frameworks which had enabled a number of escapes, including the high-profile one of George Blake, a Soviet double agent who had worked for MI6.[86] While there has been some development of the categorisation scheme in the years since it was introduced, the foundations remain; there has been minimal Parliamentary discussion of categorisation, in the intervening decades.[87]

3.3 Categorisation decisions are arguably among the most important in the prison setting, as they decide the particular location in which a prisoner may be held. Each prison establishment itself has a security categorisation, and prisoners can only be accommodated in prisons of their security category or higher[88] –

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[84] MoJ and HMPPS, 'Security Categorisation Policy Framework' (2021) ("**SCPF**"), para.4.3.

[85] *See* PSO 4600: 'Unconvicted, Unsentenced or Civil Prisoners', para 1.3, and SCPF, para.4.1. Prisons also have other designations – for example, local prisons are often within cities and intended to hold prisoners on remand leading up to their trials, as well as those serving shorter sentences. Dispersal prisons tend to be further afield and to hold those on long or indeterminate sentences.

[86] See HC Deb, vol. 741, 16 Feb 1967.

[87] Notable exceptions include HC Deb, vol. 416, 20 Jan 2004, HC Deb, vol. 455, 10 Jan 2007 and HL Deb, vol. 751, 29 Jan 2014.

[88] SCPF, above n.84, para.5.2.

so, for example, a Category C prisoner could be held in a Category B prison, but not vice versa. The higher the prison category, the more restrictive are the conditions and the fewer freedoms are allowed to those within them.

3.4 Access to educational and work opportunities may be reduced at higher categorisation levels owing to assessments of risk. In addition, Category A prisoners are not eligible for Release on Temporary Licence ("**RoTL**"),[89] which can be an important opportunity for rehabilitation toward the end of a sentence. Categorisation reviews are also the key means by which prisoners serving indeterminate sentences[90] can be assessed for, and demonstrate, progress toward eventual release. Accordingly, categorisation decisions have a significant impact on prisoners' day-to-day life, and also to their futures.

Policy and Process

3.5 The categorisation process is presently governed, for the adult male estate, by the Security Categorisation Policy Framework (the "**SCPF**"),[91] and for the adult female estate, by PSI 39/2011: *Categorisation and Recategorisation of Women Prisoners*.[92] In addition, there are distinct categorisation and review policies in relation to Category A/Restricted Status prisoners.[93]

3.6 As the 'Purpose' section of the SCPF explains:

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[89] RoTL allows prisoners to leave prison for a short time to work, to visit their children, in the case of family illness, or to aid social reintegration prior to release at the end of a sentence.

[90] That is, a life sentence or a sentence of imprisonment for public protection ("**IPP**"). Prisoners serving life sentences are eligible to be considered for release after serving their minimum term, save where the minimum term is a whole life order. These individuals are never eligible for release but it may exceptionally be granted on compassionate grounds by the Secretary of State for Justice, such as when the prisoner is terminally ill. IPP sentences were available between 2005 and 2012 before being abolished. Similar to a life sentence, IPP sentences required the prisoner to remain in prison for a minimum term before being assessed for release by the Parole Board; sometimes these minimum terms were as low as two years. Nonetheless, if released, IPP prisoners would remain on supervised licence for 10 years. Should an IPP prisoner breach their licence conditions, they can be returned to prison for a potentially indefinite period, until they can again establish that they are no longer a risk to the public. Although no new IPPs may be imposed, those which were passed remain in force today.

[91] Above n.84.

[92] See PSI 39/2011: 'Categorisation and Recategorisation of Women Prisoners'.

[93] See PSI 09/2015: 'The Identification, Initial Categorisation and Management of Potential and Provisional Category A/Restricted Status Prisoners' and PSI 08/2013: 'The Review of Security Category – Category A/Restricted Status Prisoners'.

> "*1.2 Security Categorisation is a risk management process, the purpose of which is to ensure that those sentenced to custody are assigned the lowest security category appropriate to managing their risk of:*
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> - *escape or abscond;*
> - *harm to the public;*
> - *ongoing criminality in custody;*
> - *violent or other behaviour that impacts the safety of those within the prison; and*
> - *control issues that disrupt the security and good order of the prison.*
>
> …
>
> *1.4 The security categorisation process provides for a holistic assessment of risk… Any categorisation decision must be taken on risk factors alone.*"

3.7 In terms of process, each individual's Prison Offender Manager ("**POM**") is primarily responsible for their security categorisation assessment. The POM's categorisation recommendation is then referred to a manager, who approves it or refers it back to the POM, with the reasons for this recorded. The decision and reasons are then conveyed to the prisoner. Unlike in Scotland,[94] prisoners have no right to make representations, although the SCPF suggests that "*Prisons should, wherever possible, support individuals to make representations in advance of their scheduled categorisation review*".[95]

3.8 POMs are either probation officers, or more often, HMPPS Band 4 operational or non-operational members of staff[96] (where Band 3 is the entry level).[97] Although those within the latter category will have some specific training in relation to sentence planning and risk assessment, prison officers

[94] *See* Prisons and Young Offenders Institutions (Scotland) Rules 2011, r.21(2).

[95] Above n.84, para.8.15.

[96] *See* HMPPS, 'HMPPS Offender Management in Custody Model - Male Closed Estate'.

[97] *See* HMPPS, 'Become a Prison Officer - Prison Officer Career Progression'.

are not trained in the same fashion as probation officers.[98] Yet, from an early stage in their careers, these officers are expected make difficult and extremely significant decisions affecting prisoners' lives and progression with relatively limited training around what risk can look like and how it may be managed.

The Assessment of 'Risk'

3.9 When speaking of risk, it is necessary always to ask, "*of what?*". The term "*risk*" merely refers to the likelihood or probability of some undesired outcome, without pointing to the nature of that outcome or its seriousness. In the prison context, "*risk*" is often used as a standalone term that tends to conflate different types of outcomes, including reoffending, causing serious harm (across different contexts, including to oneself), and escaping.

3.10 Moreover, sight can be lost of the breadth of risk as a concept and its various dimensions when it becomes simply part of the landscape. Where multiple types of risk are conflated, it makes it more difficult to identify how a prisoner is to supposed to approach and address concerns. In addition, reduction in an individual's risk of reoffending may be overlooked where other risks are (over-)emphasised.[99] Indeed, as Jarman and Vince argue:

> "*the language of 'risk' and of 'risk reduction' can become convoluted and imprecise, to the point of meaninglessness. Factors such as whether a prisoner is compliant might be conflated with the entirely distinct issue of whether and how they are at risk of being reconvicted, or at risk of causing serious harm. The link between compliance and these risks may be strong or tenuous, depending on context.*"[100]

3.11 Probability and risk have not always been of central importance to decisions about people in prison. In fact, assessments of risk came to pre-eminence only in the 1980s and 1990s, replacing earlier focuses on retribution, clinical

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[98] The training requirements to become a prison officer and probation officer may be compared: *see* HMPPS, 'Become a Probation Officer - Trainee Probation Officer Programme (PQiP)' and HMPPS, 'Become a Prison Officer - Prison Officer Training'.

[99] Ben Jarman and Claudia Vince, 'Making Progress? What Progression Means for People Serving the Longest Sentences' (PRT, 2022), pp.17-22.

[100] *Ibid.*, p.21.

diagnosis, and individual rehabilitation.[101] Accordingly, the current emphasis on the value of statistical risk says something greater about the purposes of imprisonment: that is, it is not primarily about 'just deserts' punishment, but rather is more concerned with the prospect of reoffending on release, control of prisoners and the maintenance of order. Writing of this "*new penology*" in the early 1990s, Feeley and Simon observed that, as compared with previous practice:

> "*It does not speak of impaired individuals in need of treatment or of morally irresponsible persons who need to be held accountable for their actions. Rather, it considers the criminal justice system, and it pursues systemic rationality and efficiency. It seeks to sort and classify, to separate the less from the more dangerous, and to deploy control strategies rationally. The tools for this enterprise are 'indicators,' prediction tables, population projections, and the like. In these methods, individualized diagnosis and response is displaced by aggregate classification systems for purposes of surveillance, confinement, and control.*"[102]

3.12 In short, risk assessments do not deal with the individual, but rather with estimations of what populations with the same characteristics as the individual are likely to do. This is important to bear in mind given that it is *individual* liberty which imprisonment and its various restrictions affect. At the same time, it bears noting that, since the imprisoned individual is within State custody for that duration, the responsibility for any efforts to reduce the likelihood of reoffending lies primarily with the State and its institutions.

3.13 Other authors have also pointed to a discourse of "*responsibilization*" of those in prison in relation to their own rehabilitation. Thus:

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[101] Malcolm M. Feeley and Jonathan Simon, 'The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications', (1992) 30 *Criminology* 449, p.449; see also Gwen Robinson, 'Exploring Risk Management in Probation Practice: Contemporary Developments in England and Wales', (2003) 4(1) *Punishment and Society* 5, and Karen Bullock, 'The Construction and Interpretation of Risk Management Technologies in Contemporary Probation Practice', (2011) 51(1) *British Journal of Criminology* 120.

[102] Karen Bullock and Annie Bunce, '"The Prison Don't Talk to You about Getting out of Prison": On Why Prisons in England and Wales Fail To Rehabilitate Prisoners', (2020) 20(1) *Criminology & Criminal Justice* 111, 121-22; see also Esther FJC van Ginneken and David Hayes, '"Just" Punishment? Offenders' Views on the Meaning and Severity of Punishment', (2017) 17(1) *Criminology & Criminal Justice* 62, 73.

"*prisoners are constructed as entrepreneurs of their own personal development and rehabilitation. Under such rendering, prisoners are governed and learn to govern themselves, in ways that emphasize agency and autonomy. In turn, constructed as self-motivated and rational actors, prisoners – rather than wider structures, policies and relationships – can be blamed in the event of failure*".[103]

3.14 While of course the promotion of prisoner agency is positive, it is problematic to ascribe primary agency to those in prison when in fact the State and its institutions remain in control of resourcing and decision-making. As this quote recognises, it can also be disingenuous, when broader societal factors such as poverty, poor welfare provision, and discrimination provide context to individual offending. Arguably, when prisoners fail to progress through their sentences as envisaged, fault may lie in part with higher-level decision-making which allows prisons to be unsafe environments and to offer inadequate opportunities for change.

3.15 Further, who a person is when they come into prison – including their previous interactions with systems of authority – can have a significant impact on how they respond to expectations in prison, as some working in prisons acknowledged to the Working Party. This is particularly significant for ethnically minoritized populations, who have historically faced and continue to endure racial stereotyping and targeting by police and other State actors.[104] Moreover, the messaging to those in prison can be mixed: where compliance is valued (as arguably is reflected in the IEP and adjudications regimes), engaging in acts of agency (for example, expressing assertiveness or raising a complaint)[105] can appear counter-productive. Those inclined to be vocal, for example by raising grievances with respect to their poor treatment, may be seen as a greater risk.[106]

3.16 Moving beyond the beginnings of risk assessments in the late 20th Century, HM Inspectorate of Probation itself locates current practice around offender

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[103] Feeley and Simon, above n.101, p.452 (internal citations omitted). See also Jarman and Vince, above n.99, pp.32-33, with respect to prisoners' own perception of this.

[104] HMCIP, 'The Experiences of Adult Black Male Prisoners and Black Prison Staff' (2022), paras.1.12-1.18.

[105] *See, e.g.,* Dr Sophie van der Valk and Dr Mary Rogan, 'Complaining in Prison: "I Suppose It's a Good Idea But Is There Any Point In It?"' (2023) 264 *Prison Service Journal* 3, p.6.

[106] *See, e.g.,* HMCIP (2022), above n.104, paras.4.5-4.7.

management within the "*fourth generation*". This followed on from the introduction of actuarial tools and their development into the 2000s by incorporation of dynamic, rather than merely static, factors. Thus, current tools:

> "*... are more systematic and comprehensive. They are explicitly founded upon the Risk-Need-Responsivity (RNR) principles ...* [and] *integrate elements of case management, such as intervention planning and implementation along with monitoring and review.*"[107]

3.17 No doubt, theory and practice will continue to evolve. The short point, however, is that risk assessment does not occur in a vacuum. It is undertaken for a purpose, namely to facilitate decision-making about the life of a person in prison, inside or out. Ultimately, the vast majority of those who enter prison will return to the community at some stage. There are enquiries which must be made, therefore, about how release and progression decisions are taken. The question also arises of whether the risk assessment tools currently in use are satisfactory.

3.18 The Offender Assessment System – "*OASys*" – is now the primary tool used by probation practitioners and prisons in England and Wales.[108] There have been a number of studies of the efficacy of OASys since its introduction in 1998, "*all of which*", according to the Ministry of Justice, "*have helped to ensure it remains a valid and reliable tool for assessing offenders' risk*".[109]

3.19 However, some difficulties have been highlighted in practice. The major issue, as neatly summarised by at 2013 Inside Time article, is that "*an OASys* [record] *is only as good as the assessor compiling it and the circumstances for which it is being prepared may determine the amount of information that it contains*".[110] So, for example, the records of foreign national offenders to be deported at the end of their sentences are likely to be less fully completed than those of British nationals, because they are unlikely to be subjected to

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[107] HM Inspectorate of Probation, 'Supervision of Service Users - Assessment' (2020).

[108] Bullock, above n.101, p.122.

[109] See Question for Ministry of Justice, UIN 151243, tabled on 31 March 2022. See also Mia Debidin (ed.), A Compendium of Research and Analysis on the Offender Assessment System (OASys) 2006-2009 (MoJ, 2009) and Robin Moore (ed.), A Compendium of Research and Analysis on the Offender Assessment System (OASys) 2009–2013 (MoJ, 2015).

[110] Jacqueline D. Westdrop, 'OASys – Good Assessment or Mirage', *Inside Time*, 1 September 2013.

domestic probation supervision after release.[111] Similarly, although staff access to computers is being increased, prison officers do not carry mobile technology allowing them to add notes to an individual's file on the spot.[112] Instead, this must be done after the fact, which is likely to reduce the fullness and accuracy of any notes made.

3.20 Transparency also requires express acknowledgement of the cautious approach that the prison and probation system take to risk. Risk aversion is an inherent feature of a system that seeks to predict the probability of rare events. Despite political rhetoric, crime, and especially serious crime, is unusual. It is only then that an open conversation can begin about what risks, as a society, we are prepared to tolerate when weighed against individual liberty.

3.21 It is also important to observe that risk is not only considered formally as part of categorisation or other decision-making processes, but is also relevant to day-to-day interactions within prisons. Perceptions of risk can significantly affect how staff and prisoners interact. As outlined by a 2022 thematic review conducted by HMCIP it is fundamentally problematic when these perceptions are informed by racism, other bias and/or lack of understanding:[113]

> "*Poor relationships between black prisoners and staff that were characterised by mutual suspicion were therefore likely to be contributing to escalation of perceived risk and the disproportionately high use of force that we found against black prisoners.* ***A better understanding of how risk is ascribed to black prisoners and how it then affects their subsequent prison journey is an important challenge for prison leaders.***"[114]

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[111] *Ibid*.

[112] We understand that a limited pilot was undertaken around 2019 involving the use of mobile devices by prison officers to key notes into the Prison National Offender Management Information System, which feeds into OASys. However, this was unsuccessful and was discontinued. Although there are no current plans to resume the previous trial, it is possible that an alternative may be considered in the course of the ongoing Launchpad digitisation programme.

[113] HMCIP (2022), above n.104.

[114] *Ibid*., p.3 (emphasis added).

Concerns

3.22 The Working Party recognises that risk is an important element of decision-making in prisons, seeking to understand the harms that may occur among densely-populated and divergent individuals subject to strict controls. The concern is that there appears to be a lack of understanding among both prisoners and prison staff about exactly what risk looks like, and what particular risk is being addressed at any given point and how.[115] For example, a vague sentence plan that refers to rehabilitation programmes that an individual has a slim chance of accessing, as well as generic references to work and education, do little to help prisoners understand what risks they are seen to pose, or to guide day-to-day action.[116]

3.23 The Working Party heard similar concerns from individuals working in prisons about the lack of clear guidance around what reducing risk looks like and how it should be measured. This is a candid insight, but a troubling one, given the centrality of risk reduction to prisoner progression and release. If those who are controlling risk assessment do not understand how prisoners are supposed to demonstrate change, it is much more challenging for prisoners to do so themselves. That is particularly so given the lack of access to legal advice in order to understand categorisation processes and challenge them where decisions have been incorrectly made.

3.24 Categorisation (including re-categorisation) is accordingly a frequent source of prisoner complaints.[117] This is no surprise given the centrality of categorisation to prisoner progression, but it is not only disappointing outcomes which can cause grievances. Many examples of complaints that have been upheld by the PPO are procedural in nature, including the provision of incorrect information to a Category A review team, and an individual being moved from Category C to Category B in the absence of

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[115] In 2009, it was observed that, during prison officers' eight week training course, "*there was no training for risk assessment, students were shown documents relating to compiling risk assessments but not given exercises in using them*": Role of the Prison Officer, above n.32, para.80. Training duration has now increased to 10 weeks, but it is not apparent that this aspect has changed: see HMPPS, 'Become a Prison Officer - Prison Officer Training'.

[116] *See* Jarman and Vince, above n.99, pp.26-27.

[117] *See, e.g.*, PPO Annual Report, 2022/23, p.13, which shows that categorisation was the fifth-most frequent subject of prisoner complaints during that year.

security intelligence being recorded or the review outcome being communicated to the prisoner.[118]

3.25 One positive aspect of the SCPF is its express emphasis on the importance of "*procedural justice*" in decision-making. The SCPF explains that the framework it sets out allows "*an individual's security categorisation* [to be assessed] *in a fair and just manner and to evidence defensible decision making*".[119] Procedural fairness is, of course, a laudable objective. However, that does not mean that it is easily, or always, achieved. In particular, perceptions of fairness may be undermined where the individual affected has limited opportunity to give input into the decision or seek effective review.

3.26 At the same time, concerns have been expressed among those working in prisons about proper frameworks being bypassed when expedient to Government, most notably via the Restricted Open Estate Transfer scheme, which operated for a period late September and mid-October 2023.[120]

3.27 A similar worry had been expressed by the Prison Officers' Association in 2014.[121] The POA had emphasised that their concern about premature reduction in security categorisation related less to the number of prisoners absconding (which had been reducing) and more to the type. This was because 'riskier' prisoners were being transferred to open prisons earlier in their sentences. Both then and now, this trend has been linked to attempts to reduce overcrowding elsewhere in the estate by filling empty spaces in open prisons, whether or not recategorization is appropriate.[122]

3.28 There is concern that such unassessed or premature transfers are neither in the interests of prisoners or the public. For the public, the question is whether sufficient rehabilitative work can have taken place to reduce the risk of reoffending on release, or if the individual were to escape or abscond. This is the very point that the categorisation scheme is intended to address, and so bypassing it inherently means that that risk level is an unknown value. For

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[118] *See* PPO, 'Complaints Investigation Summaries'.

[119] *See* SCPF, above n.84, pp.5-6.

[120] *See, e.g.,* Rajeev Syal, 'MoJ 'Put Public at Risk' after Quietly Transferring Inmates to Open Prisons (The Guardian, 17 October 2023).

[121] Gabrielle Garton Grimwood, *Categorisation of Prisoners in the UK* (House of Commons Library Briefing Paper No. 07437, 29 December 2015).

[122] *Ibid.*, pp.6-8.

the prisoner, unexpected transfers, whether relating to categorisation or otherwise, can be highly unsettling, disrupting relationships and routines which provide a degree of safety and certainty. Moreover, early research suggests that lower category prisons are not necessarily less restrictive, nor do they necessarily provide clearer information to prisoners about how they are to meet risk reduction objectives. Premature, unassessed recategorization can accordingly disrupt a prisoner's perceptions of certainty and progression.

3.29 The Working Party also heard concerns that the consistency of decision-making, in terms of adherence to policy and taking into account (only) relevant information, varied widely across the estate. Although every Governor must appoint "*a manager whose responsibility it is to ensure that the categorisation/recategorization process is functioning effectively*", including via analysis of protected characteristics and equalities data, it is not clear that there is any mechanism for quality control across the estate.

3.30 This is particularly concerning given the impact that categorisation decisions can have on a prisoner's day-to-day life and the opportunities open to them to progress toward open conditions or release. At present, the only way to appeal a categorisation decision is via the ordinary complaints process, discussed in **Chapter 2** above. This leads to review at a more senior level than the original decision-maker, but still takes places within the prison.

3.31 Categorisation reviews do not generally fall within the scope of criminal legal aid, and judicial review claims, while more easily funded, are challenging to bring from within prison. Prominent prison lawyer Simon Creighton of Bhatt Murphy has elsewhere explained that:

> "*cuts to legal aid had 'effectively removed legal oversight' from the* [categorisation] *process… [W]hile legal challenges to categorisation 'used to be quite routine' they* [are] *now only carried out in a 'tiny minority of cases sufficiently egregious to warrant judicial review'. 'The effect is that decisions that might be on the wrong side of the balance are not challenged,'…* "'[123]

3.32 The same point was underscored in a 2015 House of Commons Library briefing paper, which acknowledged the concern that the removal of legal aid from significant areas "*both leads to poorer quality decisions and makes it*

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[123] Crofton Black, 'The Ministry of Justice's Prisoner Risk Algorithm Could Program in Racism' (The New Statesman, 14 November 2019.)

more difficult for prisoners to challenge those decisions."[124] Public legal funding is therefore not simply a mechanism by which lawyers make fees, but also an investment in ensuring minimum standards – both of decision-making processes and substantive decisions – are upheld.

3.33 Turning to the related issue of allocation, the National Allocation Protocol states that the pathway of a male prisoner through the estate is dependent upon his age, security category and time left to serve, and whether he has been convicted of a sexual offence or is of interest to the Home Office, i.e. liable to deportation.[125] (There are fewer female prisons, and so allocation options are more limited.) It is only once a prisoner reaches Category C and is within the resettlement phase of their sentence that "*their home probation service region must be taken into consideration, where appropriate, as closest-to-home principles should apply*".[126]

3.34 The increasing tendency toward larger (and so fewer) prisons, and the lack of appropriate (including culturally-sensitive) rehabilitation programmes across the estate mean that many prisoners are allocated a long way from home. This has a negative impact on the ability to maintain family ties during the course of their sentence, albeit that these connections can have a positive effect on rehabilitation.

3.35 The position in England and Wales is arguably to the contrary of the European Prison Rules (the "**EPR**"), which effectively give priority to allocation being "*as far as possible, to prisons close to their homes or places of social rehabilitation*".[127] A secondary consideration is then that "*Allocation shall also take into account the requirements of continuing criminal investigations, safety and security, and the need to provide appropriate regimes for all prisoners*".[128] The EPR finally states with respect to allocation that, "*As far as possible, prisoners shall be consulted about their initial allocation and any subsequent transfer from one prison to another*".[129] The Working Party understands that such consultation is not a common

[124] *See* Garton Grimwood, above n.121, p.3.

[125] HMPPS, 'National Allocation Protocol v 3.1' (July 2021), p.13.

[126] *Ibid.*, p.14.

[127] European Prison Rules, r.17.1.

[128] *Ibid.*, r.17.2.

[129] *Ibid.*, r.17.3.

occurrence in England and Wales, and that notification of transfers is often given to prisoners only shortly before it is to take place.

3.36 In theory, allocation close to home becomes more of a priority toward the end stage of an individual's sentence, in order to aid reintegration on release. The Working Party heard, however, that even in this context, individuals were often not being transferred at the point when they should be, so that the resettlement function of local prisons is not operating as it ought to. There are only a small number of Category D prisons and so individuals may end up serving the last part of their sentence some way from home.

3.37 Accordingly, many prisoners are not able to access opportunities for reconnecting with the local community, in the form of social, employment or other ties. This has ongoing implications for their likelihood of social reintegration on the one hand and of reoffending on the other.

3.38 Finally, scarce resources mean that those rehabilitation programme places which are available are allocated according to priority. This tends to mean that those on shorter sentences are able to access them sooner than those on long sentences, who ultimately languish. The need for prioritisation, given resource limitations, is understandable. However, it is unlikely that rehabilitation is most effective when introduced late in a sentence following an extended period of neglect.

3.39 Of course, in many prisons, rehabilitation and other purposeful activities are severely restricted owing to the lack of experienced – or indeed, any – staff to facilitate it. In many prisons, regimes are curtailed and prisoners locked in cells for up to 23 hours each day.[130] It is difficult to envisage much successful rehabilitation and risk reduction being achieved in such conditions.

3.40 Those prisoners who are eligible for, but unable to access, risk reduction activities are placed in an invidious position. At present, there is no ability to enforce an individual's progression by requiring that certain opportunities be afforded to him or her. In particular, the Parole Board has no power to direct that certain activities be provided for, even if they are set out in a prisoner's sentence plan. It may be observed that a previous JUSTICE Working Party recommended that the Parole Board (or a more independent Parole Tribunal) should have oversight of an individual's progression through prison, including of executive decisions upon which they depend for their chance to

[130] HMCIP, 'Annual Report, 2022-23' (HC 1451) (July 2023), pp.43-45.

be released. This would be an important first step in achieving real sentence progression.[131]

Recommendations

3.41 In relation to categorisation decisions, the Working Party is of the view that there is a lack of oversight and transparency, both systemically and in individual cases. In relation to overall standards of imprisonment discussed later in this report, **the Working Party recommends that legal aid funding for prison law work be returned to the levels that were in place prior to the LASPO cuts**, in order that scrutiny may be undertaken of decisions affecting individual prisoners and accordingly better decision-making may follow. In line with that recommendation, **we specifically recommend that publicly funded legal advice, assistance and representation must be made available in relation to all categorisation processes for those who meet the general merits and means tests.** We consider that this could reduce levels of grievance by improving the quality of decision-making as well as allowing prisoners to understand categorisation decisions through the assistance of legal advice.

3.42 In view of the general lack of understanding among prisoners and offender managers alike, **HMPPS and the Ministry of Justice should develop content guidelines for sentence plans to ensure that offender managers are explicit about, and prisoners can understand, levels of risk identified, and how specified rehabilitation programmes are intended to work to reduce those risks.** The specifics will depend on the individual case, however individuals conducting risk assessments as well as prisoners affected by them must have a clear understanding of expectations and their purpose.

3.43 In order to ensure that prisoners are not hampered in their progression, and accordingly to promote public safety, **we recommend that HMPPS and the Ministry of Justice develop a national strategy around the offender behaviour programmes available, the number of locations in which they should be delivered, and the staff and training required to do so effectively. This strategy should be informed by a transparent programme accreditation process** (for example, along the lines used by the National Institute for Health and Care Excellence). This would increase the

[131] JUSTICE, '[A Parole System Fit for Purpose]', para.3.41.

likelihood that interventions will have positive effects; reduce the need for transfers in many instances; and potentially allow prisoners to be allocated to establishments closer to home, aiding prospects of rehabilitation.

3.44 In the same vein, where the Parole Board identifies that an individual's progression has been hampered by lack of access to a specific programme or activity, **the Working Party recommends that the Parole Board be empowered to direct that arrangements be made for the individual to undertake that programme, whether at their current establishment or on transfer, ahead of the individual's next parole hearing.** We acknowledge that it is for the individual to choose to undertake the programme if made available, and that such a direction could not pre-determine the outcome of the next review.

IV. INCENTIVES AND DISCIPLINE

Incentives

4.1 In 1995, the Incentives and Earned Privileges ("**IEP**") scheme was introduced into the prisons of England and Wales.[132] The scheme sought to encourage positive behaviour amongst those in prison by providing access to increased privileges where prisoners behaved well. There were three incentive levels – Basic, Standard and Enhanced – and privileges included such things as improved and extra visits, greater time out of cell, and the opportunity to wear own clothing.[133]

4.2 A similar scheme had been in place previously, however the 1991 Woolf Report concluded that it had operated inconsistently and so was perceived as unfair, leading to prisoner grievances,[134] and so it was replaced.

4.3 The new 1995 scheme was, however, not without its own problems, including the considerable role of discretion and prisoner-staff relationships.[135] In 2013, the scheme was tightened, restricting the types of incentives prisoners could receive; requiring active demonstration of commitment toward rehabilitation in order to receive an upgrade (rather than simply non-performative good behaviour); and presumed downgrading in the event of 'bad behaviour' (not necessarily synonymous with a proven adjudication). These reforms raised concerns about rehabilitation, owing to reductions in family contact, education, and resettlement opportunities; minimum standards afforded to prisoners; and prisoner wellbeing. Concerns about the fairness and legitimacy of the scheme were also expressed.[136]

4.4 In 2019, Prison Reform Trust's Prisoner Policy Network ("**PPN**") published a report examining the IEP scheme as in force during the study period (from

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[132] See 'Punishment without Purpose' (2014, PRT), p.1; Zarek Khan, 'An Exploration of Prisoners' Perceptions of the Incentives and Earned Privileges (IEP) Scheme: The Role of Legitimacy' [2016] 227 *Prison Service Journal* 11, p.11.

[133] Punishment without Purpose, above n.132, p.2.

[134] *Ibid.*, quoting Woolf Report, above n.6.

[135] *See, e.g.,* A. Liebling et all, *Incentives and Earned Privileges for Prisoners: An Evaluation* (1999, HMSO).

[136] *See, e.g.,* Punishment without Purpose, above n.132.

July 2018).[137] PPN's primary methodology is to survey individuals with lived experience, both within prison and post-release. The report highlighted the divergent experiences, needs, and motivating factors among those with lived experience of the IEP scheme. However, in summarising PPN's findings, the report identified the following common themes:

> "*... prisoners often rejected the whole premise of the question. This was because their experience was that the system was failing to deliver a foundation of reasonable basic expectations of decent, respectful treatment. Talking about incentives made little sense when your quality of life was actually dominated by the struggle to get clean clothes or access to fresh air.*
>
> *The existing IEP system was generally held in low regard. Prisoners did not trust it to deliver what it promised. It was seen as a system of punishment, not reward. And it was criticised for a lack of consistency both between and within prisons, and for unfair administration day to day.*"[138]

4.5 The timing of the PPN report coincided with a review of the IEP framework then in place, and it was hoped that recommendations might filter through. That review led to development of the Incentives Policy Framework ("**IPF**"),[139] which was introduced in the summer of 2019 and remains in place today. The IPF explains its purpose as being to "*incentivis*[e] *prisoners to abide by the rules and engage in the prison regime and rehabilitation… whilst allowing privileges to be taken away from those who behave poorly or refuse to engage*".

4.6 Unfortunately, HMIP's prisoner surveys indicate little positive change since the IPF was introduced. In relation to the effectiveness of incentive schemes, just 41% of adult male estate respondents,[140] and 39% of child and youth

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[137] Dr Lucy Wainwright, Paula Harriott and Soruche Saajedi, 'What Incentives Work in Prison?' (2019, PRT).

[138] *Ibid.*, pp.ii-iii. The Howard League for Penal Reform also published a response to a Ministry of Justice consultation commenting on the existing and proposed incentives schemes during October 2018: *see* Howard League for Penal Reform's Response to the Ministry of Justice Consultation on Incentives and Earned Privileges Policy Framework (1 October 2018).

[139] Incentives Policy Framework (2022).

[140] *See* HMIP, 2022-23 Annual Survey Results: Men's Prisons (July 2023).

respondents,[141] said that incentive schemes worked well to encourage good behaviour. Further, only 32% of adult male estate respondents[142] said that they felt they had been treated fairly by the behaviour management scheme of the prison they were in, while 30% of child and youth respondents thought that the system of incentives was fair.[143]

Policy and Process

4.7 The IPF directs that each prison or YOI must have a local system of privileges in accordance with rule 8 of the 1999 Rules, or rule 6 of the YOI Rules. In reflection of prisons' public sector equality duty, Governors are to ensure equality analyses and data monitoring occur. Each local scheme must have at least three incentive levels, equivalent to Basic, Standard and Enhanced, although there may be additional levels above Enhanced. Basic level must not fall below prisoners' minimum requirements (i.e. what they are entitled to pursuant to the 1999 Rules/YOI Rules, including visits, letters, phone calls, food and clothing).

4.8 Eligibility for each incentive level is determined by an individual's degree of adherence to specific "*behavioural principles*", which require them to be respectful to staff and other prisoners; comply with rules and compacts; make progress on personal goals and individual sentence plans; and refrain from using drugs or alcohol.[144]

4.9 Standard, rather than Basic, is the appropriate level for new and recalled prisoners. On transfer, incentive levels must be retained, or if there is no equivalent level, transferred individuals should be placed on the closest level available. There should be a degree of communication between Governors about incentive levels where prisoners commonly move from one establishment to another.

4.10 Reviews may take place at any time, but must occur at least once a year for each prisoner. However, "*Governors must determine the period of time*

[141] *See* HMIP, 2022-23 Annual Survey Results: Children's Establishments (July 2023).

[142] *See* HMIP, 2022-23 Annual Survey Results: Men's Prisons (July 2023).

[143] *See* HMIP, 2022-23 Annual Survey Results: Children's Establishments (July 2023).

[144] IPF, above n.1399, Annex A.

between incentive level reviews and/or what triggers a review".[145] Importantly, "*Prisoners must be given the opportunity to make their case in the review process. The review outcome must be discussed with them, including reasons for any decision made, and the process for appeal explained to the prisoner*".[146] There must be an appropriate appeal mechanism in place.[147] Complaints to the PPO reveal, however, that compliance with the policy framework is imperfect.[148]

4.11 Governors are to develop their own incentives, but six core incentives must be included, namely access to private cash (restricted according to central limits); eligibility to earn higher rates of pay; access to in-cell television;

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[145] *Ibid.*, para.5.15.

[146] *Ibid.*, para.5.20.

[147] *Ibid.*, para.5.22.

[148] *See* PPO, 'Complaints Investigation Summaries', 'Upheld Complaint against the Governor at HMP The Mount' (Oct 2023): ***"Summary:** The prisoner was downgraded to basic regime and his status was not reviewed within the timeframes required by policy.*

***Recommendations/outcome:** The prison accepted they had not reviewed the prisoner's IEP status in line with policy but, as they had acknowledged this and put steps in place to address their errors, no formal recommendations were made.*

'Upheld Complaint against the Governor at HMP Whitemoor' (Aug 2023): ***Summary:** The prison acknowledged a policy breach in the review of the complainants IEP level – the review had not been carried out by a more senior member of staff. The prison overturned the original decision and apologised for the mistake.*

***Recommendations/outcome:** We asked that the prisoner had his enhanced IEP status reinstated, pending a review by an appropriate member of staff and that he should be compensated. We asked the prison to remind staff to act in line with national policy guidelines.*

We hold the view that this complaint should clearly have been resolved by the prison without reference to the PPO."

'Upheld Complaint against the Governor of HMP Lindholme' (Aug 2023): "***Summary:** The prisoner complained that his IEP review was not carried out in line with correct procedures. We found that paperwork was not available, and the prisoner was not given a chance to submit representations.*

***Recommendations/outcome:** We asked the Governor to apologise for failings in this matter, to carry out incentives review in line with local policy, and to satisfy themselves that staff have an appropriate understanding of the policy on order to conduct policy compliant incentives reviews.*"

Partially Upheld Complaint against the Governor at HMP Belmarsh (Jul 2023): "***Summary:** The prisoner received a negative entry, and complained about the way it was delivered.*

***Outcome:** Our investigation found the warning did not comply with the IEP framework. The prison had previously investigated this matter and withdrawn the warning on appeal from the prisoner.*"

opportunity to wear own clothes; additional time out of cell; and extra and improved visits.[149] Among these, the Working Party heard that the inconsistency of pay rates between prisons in connection with incentive levels could be a significant source of grievance for prisoners.

4.12 The IPF makes clear that an individual's incentive level is not only about access to incentives: those on Basic level are not eligible for Release on Temporary Licence,[150] which can be an important factor in an individual's ability to achieve successful social reintegration following release. At the other end of the scale, prisoners on Enhanced are often able to obtain better work and gain higher levels of pay. As one study published in 2016 found, "*IEP was a pervasive tool that had significant impact on prisoners' everyday lives. It was of priority amongst prisoners because of the direct effects IEP cast on them*".[151]

4.13 Adjudication processes, however, are supposed to be separate from incentives, given the distinct aims of the systems: incentives to secure positive behaviour and discipline to punish the bad.[152]

4.14 In practice, however, it seems that the two are not so distinct. Incentives may be forfeited for up to 42 days for adults (21 days for young offenders) as a punishment for a proven adjudication, while the IPF also recognises that an adjudication may lead to a review of a prisoner's incentive level.[153] A real perception of unfairness arises, however, when individuals are downgraded in advance of an adjudication taking place, before any allegation against them has been proven.[154] Often, even if the charge is dismissed, there is a delay

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[149] IPF, above n.139, para.5.35.

[150] *Ibid.*, para.6.1.

[151] Zarek Khan, 'An Exploration of Prisoners' Perceptions of the Incentives and Earned Privileges (IEP) Scheme: The Role of Legitimacy' [2016] 227 *Prison Service Journal* 11, p.11.

[152] IPF, above n.1399, para.7.7.

[153] *Ibid.*, para.7.8.

[154] *See* PPO, 'Complaints Investigation Summaries', 'Partially Upheld Complaint against the Governor of HMP Full Sutton'(Sept 2023): "***Summary:*** *The prisoner complained that he was unfairly downgraded Enhanced IEP to Basic after a fight. However, after the adjudication process his case was dismissed. In line with policy after the case was dismissed, his IEP status should have been reviewed. A review did not take place. Therefore, the complaint was partially upheld.*

before the previous incentive level is reinstated, if this even occurs at all. Loss of an incentive level can have impacts on an individual's work and pay opportunities, and so this can be a substantial source of grievance.

4.15 It is also useful to consider disproportionality in relation to incentive levels. In 2022, after the IPF had been in place for three years, just 2.1% of all prisoners were on Basic. However, Black or Black British prisoners were significantly over-represented, with 4.0% of that population being on Basic, along with 3% of mixed ethnic groups and 3.3% of both Muslim and Jewish prisoners respectively, as against 1.7% of white prisoners – the lowest proportion.[155]

4.16 Different trends can be seen in relation to Enhanced status. In 2022, 51.2% of all prisoners were on Enhanced, with Asian or Asian British (52.5%) and white prisoners (52.3%) being on Enhanced in the highest proportions. For Black or Black British prisoners, this decreased to 48.1%, and for Muslim prisoners, to 47.8%.[156]

4.17 This analysis is necessarily imprecise given that the racial groupings encompass not only white, Asian or Asian British, and Black or Black British, but also 'other ethnic group', 'mixed ethnic groups', and 'not known' – all of which may overlap with narrower, self-ascribed identities. As will be discussed further in **Chapter V**, it is important for data to reflect individual characteristics with accuracy and according to their own identity if they are to permit analysis and change.

4.18 Nonetheless, it appears that the 2019 IPF has not led to equality in incentive outcomes. The statistics cannot explain why that is the case, and these trends must be examined in further detail if the IPF is to achieve in practice the procedural justice and fairness that it extols.

Recommendations/outcome: *The Governor at Full Sutton was asked to remind staff to familiarise themselves with the national and local IEP schemes. Also, we sent an email to the prison the prisoner moved to, to ask them to review the prisoners IEP status if it hadn't already been done since his transfer.*

We hold the view that this complaint should clearly have been resolved by the prison without reference to IPCI."

[155] *See* MoJ, HM Prison and Probation Service Offender Equalities Annual Report 2021 to 2022: 'Chapter 4 Tables: Incentives' (2022).

[156] *Ibid.*

Discipline

4.19 Rule 51 of the 1999 Rules specifies a variety of offences against discipline, extending from assaults and possession of banned items, to disrespecting an officer and disobeying a lawful order. Plainly, some of the conduct prohibited by rule 51 is also criminal, and so some allegations do proceed via the criminal courts. However, the prison disciplinary process – governed by PSI 05/2018: Prisoner Discipline Procedures (Adjudications)[157] – is the starting point for all, and the ending point for many, allegations of prisoner misconduct.

4.20 Some argue that the use of adjudications is excessive: for example, in 2016, the Howard League for Penal Reform pointed to the fact that 84% of adjudications were for non-violent offences,[158] and that the number of external adjudications in particular had increased by 80% from 2010/11 to 2016/17.[159] Certainly, not all prisons make extensive use of adjudications: for example, at HMP Grendon (which operates as a therapeutic community), it was reported in 2017 that incidents of violence were infrequent, and generally issues could be resolved without the need for a formal disciplinary process.[160]

4.21 On the other hand, it is acknowledged that the number of assaults in prisons has increased, and this is likely to be reflected in greater numbers of adjudications. Nonetheless, it is widely understood that disciplinary measures alone are an inadequate response to violence and poor behaviour if the goal is to change that behaviour. Indeed, a lack of perceived legitimacy in decision-making may create (although not excuse) a context in which disorder and violence is more likely.

4.22 Not every rule breach must end up at adjudication: the very first step enables an infraction to be "*deal*[t] *with by alternative means*". Indeed, as the applicable PSI observes, "*The decision whether to lay a disciplinary charge is a discretion, not a duty, and this discretion has to be exercised fairly and*

[157] PSI 05/2018: 'Prisoner Discipline Procedures (Adjudications)' (2023).

[158] *A Million Days: The World of Prison Discipline* (2016, HLPN).

[159] *Ibid.*, p.2.

[160] See Howard League for Penal Reform, 'Howard League for Penal Reform's Response to the Ministry of Justice Consultation on Incentives and Earned Privileges Policy Framework', para.3.4, citing HMCIP, 'Report on an Unannounced Inspection of HMP Grendon' (HMIP, 2017).

be a proportionate response to the offending behaviour".[161] HMIP's Expectations also anticipate that "*formal disciplinary procedures… are only used as a last resort*".[162] However, the majority of the PSI is concerned with formal adjudication processes and so in practice, it seems, that is also where the emphasis lies.

4.23 Essentially, there are three formal ways in which a breach of rule 51 can be addressed. First, and most commonly, it will go down the adjudication route. For this to occur, within 48 hours of the incident occurring, the prisoner must be provided with a notice of report providing details of the charge, the rule allegedly breached, and arrangements for the adjudication hearing. There will then be an initial hearing before the Governor to confirm the prisoner's identity and fitness, and for the charge to be laid. At this stage, if the matter is not particularly serious, it can be dealt with by other means, as noted above. In contrast, if the matter is more serious, then it must – or in some cases, may – be referred to the police for investigation from the outset.[163] Even if the incident initially proceeds as an adjudication, it may later be referred to the police either at the instigation of an independent adjudicator or the Governor.

4.24 Where the matter remains within the adjudication framework, there is still a question of how it should be pursued: whether internally, before the Governor (where approximately 97% of adjudications in Q3 2023 remained),[164] or externally, before an independent adjudicator ("**IA**"; that is, a District Judge). This is ultimately a question about the seriousness of the allegation: if serious enough that additional days should be an available punishment,[165] then an independent adjudication is appropriate. (If the IA considers it insufficiently serious, they may refer it back to the Governor – or, if more serious, may recommend referral to the police.)[166]

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[161] *See* PSI 05/2018, above n.157, para.3.3.

[162] *See* HMIP, 'Expectations: Criteria for Assessing the Treatment of and Conditions for Men in Prison' (v.6, 2023), Expectation 10; HMIP, Expectations: Criteria for Assessing the Treatment of and Conditions for Women in Prison (v.2, 2021), Expectation 19; and HMIP, Criteria for Assessing the Treatment of Children and Conditions in Prisons (v.4, 2018), Expectation 18.

[163] *See* 'Crime in Prison Referral Agreement' (September 2023).

[164] *See* MoJ and HMPPS, 'Adjudications: July to September 2023' (January 2024).

[165] That is, "*further time to be spent in custody*": PSI 05/2018, above n.157, Annex A, para.2.72.

[166] 1999 Rules, r.53A(6).

4.25 It bears noting that additional days can only be imposed on certain prisoners, namely those serving determinate sentences.[167] There remains a discretion, however, for other cases to be referred to an independent adjudication (even where additional days cannot be awarded) where "*it is necessary or expedient for some other reason for the charge to be inquired into by the adjudicator*".[168]

4.26 It is generally only in relation to independent adjudication that prisoners are entitled to legal representation, although Governor's adjudications may be adjourned to allow for legal advice to be taken. Significantly, one of HMIP's Expectations around adjudications is that "*Prisoners are helped to understand the adjudication process and are routinely offered legal advice*".[169] This is an entirely legitimate expectation, and in practice advice is given when requested. However, legal aid is no longer available for the provision of this advice, meaning that it is ordinarily provided for free (as most prisoners will be unable to access funds to pay a lawyer privately in these circumstances). Given the number of adjudications which occur each year, that is an exceptional burden for prison lawyers to bear. The availability of such advice is a cornerstone of the fairness of governors' adjudications, and the policy expectation (in effect) that it be provided at no cost is unacceptable.

4.27 Prisoners must be provided with a notice of report at least two hours before a governor's adjudication in order that they may prepare any defence to the charge.[170] This is when legal advice would normally be taken, as well as during any later adjournment if allowed by the governor. However, lawyers providing advice in these circumstances are unlikely to be provided with access to charge paperwork and evidence, which must come from the prison. Despite best efforts, the advice which can be given in these circumstances is accordingly limited, which undermines its ability to ensure a fair hearing. It is true that "[p]*rison discipline is meant to provide a simple, speedy and*

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[167] PSI 05/2018, above n.157, para.2.72.

[168] 1999 Rules, r.53A(1)(b).

[169] *See* HMIP, 'Expectations: Criteria for Assessing the Treatment of and Conditions for Men in Prison' (v.6, 2023), Expectation 10; HMIP, Expectations: Criteria for Assessing the Treatment of and Conditions for Women in Prison (v.2, 2021), Expectation 19; and HMIP, Criteria for Assessing the Treatment of Children and Conditions in Prisons (v.4, 2018), Expectation 18.

[170] PSI 05/2018, above n.157, para.2.16.

proportionate system of justice"[171] – but the "*justice*" aspect is central and must not be sacrificed to expedience.

4.28 Adjudications (whether by a governor or IA) are supposed to be inquisitorial, rather than adversarial, such that "*the role of the adjudicator is to inquire impartially into the facts of the case*" to determine whether the charge has been proven beyond reasonable doubt. Perceptions of impartiality are, however, just as important as the reality, and it is questionable whether that can be achieved where those in charge of gathering and considering the necessary evidence are 'on the same side', against an unaided prisoner, in an institutional environment.[172] A prisoner's need for assistance may in some cases be redressed by recourse to criteria set down in *R v Home Secretary; ex parte Tarrant* [1985] 1 QB 251.[173] The difficulty with this test is that of course it requires a prisoner to be aware of it in the first place, and to have the ability to argue the point. Prisoners requiring legal assistance at Governor's adjudications are therefore faced with a Catch-22.

4.29 It should not be forgotten that, according to the Government's own statistics, over 30% of prisoners have learning disabilities,[174] while mental ill-health is known to be widespread across the prison estate and particularly among female prisoners. Indeed, in 2021, the Ministry of Justice published a report concerning the effectiveness of adjudication penalties on preventing subsequent adjudications. That report acknowledged that their study group, namely 6,000 individuals who had received a proven adjudication during one four-week period in 2017, "*present as high risk and vulnerable, with high*

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[171] *Secretary of State for Justice v Kane* [2023] EWCA Civ 842, para.51.

[172] PSI 05/2018, above n.157, para.3.8.

[173] That is, the seriousness of the charge and potential penalty; whether points of law are likely to arise; the capacity of the prisoner to present his own case; procedural difficulties; the requirement for reasonable speed in determining the charge and the need for fairness between prisoners and prison staff.

[174] Maria Navarro and Rebecca Clare, 'Education for Prisoners with Learning Difficulties and/or Disabilities' (Ofsted, 2022).

and prevalent levels of criminogenic need[175] *and responsivity factors*".[176] Statistically significant variables for the likelihood of further misconduct occurring at all, and within a shorter time after the original adjudication punishment being issued, included those who had a learning difficulty or challenge ("**LDC**"), or experienced mental health difficulties.[177] The rates of individuals with an LDC or major mental health difficulty was higher, to a statistically significant degree, among those in the study than amongst the prison population as a whole.[178] These findings suggest both that there is a need for individuals facing frequent adjudications to be provided with independent assistance during those proceedings, and for adjudication processes and penalties to respond more effectively to the factors which precipitate adjudicated conduct.

4.30 In addition to creating an even playing field for those with particular challenges, legal advice and advocacy can also help avoid straightforward errors, such as failures to ensure adjudication material is provided to the prisoner;[179] hearings wrongly proceeding in absence where a prisoner is

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[175] Criminogenic needs are "*factors that are strongly related to criminal behaviour and risk of reoffending*": Ben Fortescue, Flora Fitzalan Howard, Philip Howard, George Kelly and Marwa Elwan, 'Examining the Impact of Sanctions on Custodial Misconduct Following Disciplinary Adjudications' (MoJ, 2021), p.19 fn.24. In OASys, these are broken down into attitudes; thinking and behaviour; alcohol; drugs; lifestyle and associates; relationships; education, training and employment; and accommodation.

[176] *Ibid.*, pp.1-2. Although this study had no control group, the study sample was of a significant size and effectively random.

[177] *Ibid.*

[178] *Ibid.*, p.20.

[179] See https://ppo.gov.uk/investigations/make-complaint/complaints-investigation-summaries/, 'Partially upheld complaint against the Governor of HMP Littlehey' (Oct 2023): "***Summary****: The prisoner complained he had not received his adjudication paperwork despite making an application for the relevant paperwork on the day of the Adjudication. He received conflicting responses to the complaints and appeals he lodged, but it was apparent that he had not been provided with all the relevant paperwork to which he was entitled.*

Recommendations*: We upheld his complaint on the basis that the prison had not complied with the provision in the policy stating prisoners should be provided with all relevant paperwork 'without undue delay.' However, during the investigation, the prison subsequently provided evidence that he had been provided with the paperwork and was able to lodge an appeal.*

We hold the view that this complaint should clearly have been resolved by the prison without reference to IPCI."

attending a medical appointment;[180] and simply failing to properly consider all available evidence.[181]

4.31 It bears noting that as far back as 2015, the PPO expressed particular concern that prisoners were not being allowed to seek access to legal support even to the extent that the PSI permits.[182] Further fundamental concerns raised at that time, which seem to mirror more recent errors, included failures to ensure charges were proven beyond reasonable doubt; to follow PSI procedures; and to call necessary witnesses. It is crucial that adjudications be conducted with scrupulous fairness, given the potential for their outcomes to affect future decision-making around categorisation, Release on Temporary Licence, Home Detention Curfew, and release by the Parole Board.

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[180] See https://ppo.gov.uk/investigations/make-complaint/complaints-investigation-summaries/, 'Upheld complaint against the Governor of HMP Stocken' (Oct 2023): "***Summary****: The prisoner complained that their adjudication charge should be dismissed based on procedural error. The prisoner did not attend the hearing due to a medical appointment, and the hearing was not adjourned and heard in their absence.*

Recommendations/outcome*: We asked that the adjudication be quashed, and the prisoner compensated for the cost of damages deducted from their account following the adjudication.*

We hold the view that this complaint should clearly have been resolved by the prison without reference to the IPCI."

[181] See https://ppo.gov.uk/investigations/make-complaint/complaints-investigation-summaries/, 'Partially upheld complaint against the Governor of HMP Littlehey' (Sept 2023): "***Summary****: The prisoner was charged with fighting, but claimed it was self-defence and he was the victim of an assault. The Record of Hearing (ROH) demonstrated the adjudicator did not question the disparity in RO's evidence between the DIS1 and his account during the hearing. Another officer who attended the incident was also not called. There was no CCTV or BWVC footage provided as evidence, nor was there any mention of it during the hearing of any footage. The RO should have been asked to provide more detail or produce the footage which would have clarified the charge laid and the discrepancy between the DIS1 and evidence at the hearing.*

Recommendations/outcome*: We recommend the charge be quashed.*"

[182] See https://ppo.gov.uk/investigations/make-complaint/complaints-investigation-summaries/, 'Upheld complaint against the Governor of HMP Stocken' (Oct 2023): "***Summary****: The prisoner complained that their adjudication charge should be dismissed based on procedural error. The prisoner did not attend the hearing due to a medical appointment, and the hearing was not adjourned and heard in their absence.*

Recommendations/outcome*: We asked that the adjudication be quashed, and the prisoner compensated for the cost of damages deducted from their account following the adjudication.*

We hold the view that this complaint should clearly have been resolved by the prison without reference to the IPCI."

4.32 A further concern relates specifically to the conduct of independent adjudications. During COVID-19, these hearings began to be carried out remotely, as was the case with many court hearings. However, the Working Party understands that independent adjudications have not returned to being held in person. We acknowledge that there can be benefits to the use of video-links, including reduced travel time for legal practitioners and adjudicators, and accordingly increased speed in concluding proceedings. However, there are also disadvantages: communication, both with prisoners in consultation and with the adjudicator, is often less effective remotely rather than in person. This is especially pronounced for those with LDCs and other conditions, as discussed above.

4.33 The presentation and challenging of evidence such as CCTV footage can also be seriously hampered where done via video-link, which is particularly problematic when that material has not been provided to legal representatives well in advance of the hearing, if at all. Indeed PSI 05/2018 prohibits CCTV, body-worn video footage, or PIN phone recordings from being sent to anyone – including a prisoner's legal representative. Instead, "*Arrangements must be made for the accused prisoners and legal advisors or representative to view the evidence at the prison*".[183] This is particularly problematic where the legal advisor or representative is not able to attend the prison, whether before the hearing or at all.

4.34 It is understood that there may be GDPR concerns which impede sharing with legal representatives outside prison walls. However, procedural fairness requires that prisoners have access to legal advice and representation in independent adjudications, which in turn means that such advice and representation be based on the evidence to be put before the adjudicator. Accordingly, if access to the relevant material cannot be provided, then the procedure must be changed or the evidence abandoned.

4.35 Finally, we understand that adjudications are often listed at short notice, which means that legal visits to discuss a charge, whether remote or in-person, can often not be accommodated. It should be recalled that the purpose of providing legal advice based on the available evidence is to help the client to understand their best and most realistic options. This may be to admit to a charge as much as to dispute it. Accordingly, it is in everyone's interests that

[183] PSI 05/2018, above n.157, para.2.19.

early access to both the evidence to be relied upon and legal advice upon it be obtained.

Recommendations

4.36 It has been argued elsewhere that it would be fairer and more transparent if incentive reviews fell within the adjudication process, allowing loss of incentive levels to amount to a penalty, rather than having notionally separate processes that leave the door open for double punishment.[184] Insofar as the incentives and adjudications regimes pursue different aims, we do not make that recommendation here. We also accept that there is also some logic to proven poor behaviour leading to a downgrade if that is what an overall review, taking into account relevant considerations beyond the adjudication, suggests is justified.

4.37 What the Working Party would recommend, however, is that **downgrading of a prisoner's incentive status pending adjudication should only take place where it is explicitly justified. In the event of the charge being found not proven or otherwise dismissed, the prior incentive status should be immediately restored.**

4.38 In relation to discipline, the Working Party is concerned that those in prison are generally required to face internal adjudications without legal advice, assistance or representation. The *Tarrant* criteria are narrow, and it is in any event too challenging for many prisoners – many of whom have significant mental health, literacy and/or language difficulties – to mount such an argument unaided. At present, the ability of prison lawyers to provide assistance is limited by the lack of funding to advise on internal adjudication matters, as well by limitations on their ability to access adjudication materials.

4.39 Accordingly, **in line with our overarching recommendation concerning the reinstatement of prison law legal aid, we recommend that publicly funded early legal advice** (that is, before the day of the adjudication) **should be made available in relation to all adjudications for those who meet the general merits and means tests.** Further, to assist the fair and effective hearing of all adjudications, the Working Party recommends that **prisoners and their legal advisors or representatives be provided with copies of all material, including digital material, that is to be relied upon before the**

[184] Wainwright, Harriott and Saajedei, above n.137, p.10.

day on which any adjudication is to take place. If this does not occur, the hearing should be adjourned. PSI 05/2018 should be amended to provide accordingly.

4.40 In relation to independent adjudications, the Working Party acknowledges that there can be benefits to remote hearings and that this can on occasion be in the interests of all involved. However, speed for its own sake is antithetical to justice. Adjudication outcomes can have serious implications for those in prison beyond the immediate punishment: negative findings can have detrimental effects on future risk assessments and opportunities for progression. Accordingly, it is imperative that they be conducted in a fair and transparent fashion, regardless of convenience.

4.41 **Accordingly, the Working Party recommends that independent adjudications return to being held in person by default and be conducted remotely only where it is in the interests of justice in the specific case (taking into account the parties' representations) for any person involved to attend remotely.**

4.42 Finally, persistent poor behaviour and negative attention may be indications that there are issues going on in the background of a prisoner's life. **It is therefore recommended that prisons be required to track prisoners facing repeated adjudications or incidents of restraint or separation, and develop intervention protocols to identify the cause of and address any broader underlying issues.**

V. SEGREGATION

Introduction

5.1 Segregation in prisons in England and Wales is the separation or "*removal from association*" of certain prisoners from the rest of the prison population. Segregated prisoners are today held in dedicated segregation units or close supervision centres ("**CSCs**"), although segregation practices are also now being seen on ordinary prison wings. Segregated prisoners have limited visitation rights, and can be prevented from attending work, education, and other activities.[185] Although prison-wide solitary confinement was once favoured as a method of prisoner reform, its potential harms are now widely acknowledged, and so segregation today faces significant scrutiny and challenge as a concept.[186]

5.2 Humans are innately social, and accordingly it is self-evident that an extended period in which interaction is severely limited can have detrimental effects. Segregation in prisons in England and Wales is characterised by "*impoverished regimes*" alongside "*social isolation, inactivity, and increased control of prisoners*".[187] HMIP's 2023 Annual Report described the average day for most segregated prisoners as consisting of only "*a shower, 30 minutes of exercise and a telephone call*", while one in five of the segregation units inspected also lacked in-cell electricity.[188] In the youth estate, the worst cases considered by HMIP in 2020 saw children leave their cells for only 15 minutes a day.[189] Alex Sutherland, Chairman of the IMB at HMP Whitemoor and a member of the IMB National Council, has notably described segregation is a "*blight on the prison service*", with prisoners being "*stored rather than progressed*".[190]

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[185] Ellie Brown, 'Prison Segregation: The Limits of Law' (2023), p. 1.

[186] *Ibid.*, p.4.

[187] HMIP, 'Separation of Children in Young Offender Institutions – A Thematic Review by HM Inspectorate of Prisons' (2020), p.8; see also S. Shalev and K. Edgar, 'Deep Custody: Segregation Units and Close Supervision Centres in England and Wales' (PRT, 2015), p. vi.

[188] HMCIP, 'Annual Report 2022-23' (2023), p.31.

[189] HMIP (2020), above n.187, p.5.

[190] Alex Sutherland, 'Monitoring the Use of Segregation' (2018) 236 *Prison Service Journal* 48, p. 48.

5.3 It is with this view in mind that the Working Party has analysed segregation decision-making practices. Ultimately segregation units often hold the most vulnerable and challenging members of the prison population, and it is crucial that the conditions and decision-making processes that govern them are humane, robust, and open to scrutiny.

Policy and Process

5.4 Segregation in the adult estate is presently governed by the 1999 Rules and PSO 1700, plus any local rules applicable in a specific prison. Rule 45 of the 1999 Rules permits segregation for reason of Good Order or Discipline ("**GOoD**"), or in the prisoner's own interests, which may take place on initial reception or at any subsequent stage of their time in custody.[191] GOoD applies when there are reasonable grounds for believing that a prisoner's behaviour is likely to be so disruptive that keeping them in their ordinary location is unsafe. This may be, for example, where they breach security or prison discipline rules, hold drugs, or engage in a dirty protest.[192] A prisoner's own interests are considered in circumstances where a prisoner is at particular risk of assault by other members of the prison population, perhaps due to the nature of their offence.[193]

5.5 For the purposes of this chapter, it is important to distinguish segregation from "*cellular confinement*". The latter, sanctioned under Rule 55, may be enforced in relation to adjudications, either during the period between an alleged offence and an initial hearing (where there is a risk of collusion or intimidation), or as a disciplinary measure when a prisoner is found guilty.[194] Whilst cellular confinement is effectively a form of segregation, the processes which govern each measure differ. The focus of this chapter is therefore segregation under Rule 45 of the 1999 Rules (and its mirror provision, rule 49 of the YOI Rules).

5.6 Despite the authorities that govern segregation focussing on behaviour and protection from harm, research shows that segregation has widely become a means of managing mental health issues within the prison estate. The Prison

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[191] See the Rules 1999, r.45. See also PSO 1700: 'Segregation', p.21.

[192] PSO 1700, above n.191, p.17.

[193] *Ibid.*

[194] PSI 05/2018, above n.157, Annex B, para.2.13 *et seq*.

Reform Trust's 2015 report, *Deep Custody*, examined the use and functioning of segregation units and CSCs in England and Wales. It noted that over two-thirds of the 49 officers interviewed said that "*most*" or the "*vast majority*" of segregated prisoners had mental health needs.[195] Further, the report's recommendations included the following:

> "*Segregation should not be imposed on anyone awaiting assessment for transfer to a secure hospital or on an open ACCT, unless there are truly exceptional circumstances. Segregation managers should work with mental health professionals to ensure that alternatives to segregation are pursued more vigorously.*"[196]

5.7 It is also important to note that such treatment contradicts PSO 1700, which states:

> "*If the mental health of the prisoner is so at risk as to suggest that they will be totally unable to cope with segregation then they should not be kept in the segregation unit. A suggested method of identifying these prisoners who are most at risk is given in the Initial Segregation Health Screen. Prisoners who are awaiting transfer to a secure NHS facility should not normally be kept in the segregation unit.*"[197]

5.8 It is clear that such issues persist, however, with HMIP's 2022-23 Annual Report noting that those in mental health crisis are all too often held in segregation units.[198] Further, considering the youth estate, the Children's Commissioner's 2018 report explained that the pressures on NHS mental health services mean that children can spend long stints in segregation whilst waiting for a mental health bed to become available.[199]

5.9 Segregation health screens are also reported to be inadequate to identify any reasons why an individual should not be segregated. The *Deep Custody* report described these screens, which are designed to be carried out by a doctor or nurse within two hours of segregation, as a "*box-ticking exercise*" which is

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[195] Shalev and Edgar, above n.187, p.vi.

[196] *Ibid.*, p.138.

[197] PSO 1700, above n.191, p.30.

[198] HMCIP (2023), above n.188, p.40.

[199] Children's Commissioner, '[A Report on the Use of Segregation in Youth Custody in England]' (2018), p.7.

often carried out poorly, if at all. In a few cases, a nurse literally ticked boxes without even seeing a prisoner, and elsewhere, the screen was filled out retrospectively.[200] That the processes intended to keep vulnerable individuals out of segregation are being addressed so cursorily is deeply concerning.

5.10 Also pertinent to this issue is the seemingly excessive periods of segregation being implemented. According to PSO 1700, segregation should be used only as a last resort, and evidence suggests that prisoners may start to suffer adverse effects after just 14 days.[201] The data collected for *Deep Custody* showed that the practice of continued segregation was widespread, with one prison even reporting 66 periods of continued segregation.[202] Inconsistency across the estate was noted, however.[203] In one particularly egregious case, an unannounced HMIP inspection of HMP Bronzefield revealed that a woman who had already been in the segregation unit for three years in 2010 was still there in 2013.[204] As we shall explore below, however, a lack of data means that it is hard to draw more concrete conclusions on the length of segregation periods overall.

5.11 Such concerns were equally expressed before the Working Party. We were consistently made aware of the entanglement of segregation and mental illness, with many of those working in prisons expressing deep concern at the current use of segregation. Particularly in prisons where medical, inpatient units are not available, the Working Party heard how those working in prisons often feel they have no choice but to place the vulnerable and mentally ill into segregation, and in fact hold them there until a therapeutic alternative becomes available, if at all. As such, when it comes to the reasons underlying segregation, it is arguable that little decision-making is apparent: segregation has too often become a place for people who cannot be safely held anywhere else, with little hope of progression or improvement.

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[200] PRT Advice and Information Service, '[Segregation]' (2019), p.2; Shalev and Edgar, above n.187, p.27.

[201] PSO 1700, above n.191, p.4. *See also* HMPPS, 'Reviewing and Authorising Continuing Segregation & Temporary Confinement in Special Accommodation' (2022), p. 2.

[202] Shalev and Edgar, above n.187, p.25. "Continued segregation" here refers to segregation periods extended beyond the initial 72 hours.

[203] *Ibid.*

[204] HMCIP, 'Report on an Unannounced Inspection of HMP Bronzefield' (2013), p.5.

5.12 It has also been noted that decisions to segregate may be "*deliberately engineered*" by the individual removed from association. *Deep Custody* commented as follows:

> "*Among the 50 segregated prisoners we interviewed, 19 had deliberately engineered a move to the segregation unit, for example, by refusing to lock up, obstructing their cell observation glass, or climbing on the netting. The most common aim was to pressurise the prison to transfer them to another prison. Other reasons for self-segregation included avoiding debts, not wanting to share a cell, or getting away from drugs on the wings.*"[205]

5.13 It has therefore been argued that prisoners appear to perceive segregation as "*a lesser of two evils*": some prisoners would rather be subject to solitary confinement than endure the poor conditions and ineffective processes available to them as part of the general prison population.[206] Such misuse of segregation can therefore be viewed as a consequence of the wider failures of the prison estate, including severe overcrowding. As Shalev stated in 2018:

> "*That a sizeable number of prisoners are seeking out segregation, with its austere conditions and impoverished regime, seems to me to be a clear marker of a system under pressure… To recognise that segregation is a place of refuge for some, must surely be an indictment of conditions in the general prison population.*"[207]

5.14 The Working Party also heard concerns, however, that such "*engineered*" moves are often conducted by individuals suffering poor mental health. Those working in prisons clearly split those in segregation into two groups: those with mental health issues, on the one hand, and those exhibiting poor behaviour and disrupting GOoD on the other. What also became clear, however, is that these two groups are not mutually exclusive. Disruptive behaviour, or a desire to disrupt order or discipline so as to be placed in segregation, can itself be a sign of poor mental health.

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[205] Shalev and Edgar, above n.187, p.27.

[206] Ben Laws, 'Segregation Seekers: An Alternative Perspective on the Solitary Confinement Debate' (2021) 61(6) *British Journal of Criminology* 1452. *See also* Sharon Shalev, 'Can Any Good Come out of Isolation? Probably Not' (2018) 236 *Prison Service Journal* 11, p.11.

[207] Shalev, above n.206, p.11.

5.15 This is a significant concern, in view of the further detrimental effects that segregation can have on an individual's mental health. Segregation is reported to cause anxiety, depression, anger, cognitive disturbances, paranoia and psychosis, and to reduce protective factors against suicide and self-harm.[208] Indeed, during 2022-23, the PPO conducted a number of investigations into deaths of prisoners in segregation units, as well as of other cases which gave rise to concerns about how recent periods of segregation had been handled.[209] Of the 92 self-inflicted deaths and 97 fatal incidents noted in the 2022-23 PPO annual report, however, it is not clear which took place in normal accommodation or dedicated segregation units/CSCs.

5.16 The hugely detrimental impact of segregation on children should be especially noted. Indeed, in 2018, the British Medical Association, the Royal College of Psychiatrists and the Royal College of Paediatrics and Child Health issued a joint position statement calling for the solitary confinement of children and young people to be abolished and prohibited.[210]

5.17 As to how the overlap between segregation and mental illness may be addressed, the Working Party heard examples of how a more therapeutic environment has assisted individuals held in segregation. Within a sea of overwhelmingly negative accounts of inappropriately resourced and ultimately harmful segregation units and CSCs, we were made aware of one well-staffed segregation unit, resourced with dedicated psychologists and a mental health team. Further, one prison was noted to have benefited from the appointment of a dedicated neurodiversity lead, which is believed to have prevented a number of inmates perceived as being at high risk of segregation from being removed from association at all.

5.18 A general move towards a more therapeutic environment has previously been attempted. In 2008-09, the Prison Service endeavoured to re-design segregation units as "*care and separation*", "*reorientation*" or "*intensive supervision*" units. Such changes proved to be more of a rebranding exercise, however, with segregation units effectively continuing to operate as

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[208] Shalev and Edgar, above n.187, p.93. PPO, 'Annual Report 2022/23' (2023), p.44.

[209] PPO (2023), above n.208, p.44.

[210] Royal College of Paediatrics and Child Health, Royal College of Psychiatrists, and British Medical Association, 'Joint Position Statement on Solitary Confinement of Children and Young People' (2018).

usual,[211] and so it is clear that a more substantial shift would be required if segregation is to take on a new colour.

5.19 Further, the Working Party was also made aware of the real utility of segregation, although only if used sparingly. As discussed below, an individual held in the adult estate may be segregated for up to an initial period of 72 hours, beyond which a Segregation Review Board ("**SRB**") must decide whether segregation should continue.[212] The Working Party heard how removing an individual from association for that short period of time can provide an individual with time to reflect away from a potentially hostile environment, and allow return to the general population calmer and in a state fit to function on the wing. What became clear then was the need for both segregation and therapeutic environments, the former being reserved for prisoners exhibiting more challenging behaviour and the latter for those made vulnerable by mental illness.

5.20 The Working Party also heard of the impact of segregation on prison staff, with those working in prisons stating that prison officers placed in segregation units or CSCs are not trained to manage the mentally ill, but are effectively expected to run a specialised service managing a myriad of complex needs. Such issues do not only lie in a skills gap, however, but the significant understaffing apparent throughout the prison estate. We heard that in one segregation unit, for example, in which 28 individuals were held, only three officers were staffed to oversee the unit in the morning, followed by two in the afternoon. The Working Party therefore supports an emphasis on staff training and wellbeing within segregation units. We heard of the positive impact of the women's estate's psychological programme, for example, under which staff are supervised and provided with a safe space to speak with a psychology team and process trauma.

Review of Decisions to Segregate

5.21 According to the 1999 Rules, a prisoner may be segregated for an initial period of up to 72 hours, beyond which an SRB must decide whether or not to extend the period of segregation.[213] If extended beyond 72 hours, the SRB

[211] Brown (2023), above n.185, p.5.

[212] 1999 Rules, r.45(1)-(2); PSO 1700, above n.191, p.10.

[213] 1999 Rules, r.45(1)-(2); PSO 1700, above n.191, p.10.

must then carry out a review at least every 14 days thereafter.[214] Should an SRB wish to segregate an adult prisoner in excess of 42 days, or a young person for more than 21 days, such decision must be approved by the Secretary of State.[215] In practice, this is reported to mean that a senior manager in the Prison Group Director's Office (or equivalent in the Head of Privately Managed Prisons Office) approves the decision.[216] If segregation continues to be imposed beyond this, decisions to extend must be approved at least every 42 days.[217] There is at present no provision for access to legal advice and representation in relation to SRB processes.

5.22 Turning to how such decisions are reached, PSO 1700 states that SRBs should impartially review all available evidence for and against continued segregation or removing the prisoner from segregation, and will need to be satisfied that any decisions are objective, evidence-based, and not influenced by bias.[218] Such decisions may require that the SRB focus on a range of factors, including the prisoner's ability to cope in segregation, and their behaviour and attitude since the previous review.[219] As such, PSO 1700 states that each SRB should be a multi-disciplinary board capable of considering a range of evidence and views.[220] At both the 72-hour and subsequent reviews, for example, the attendance of a chairperson, healthcare representative and/or member of the Mental Health In-Reach Team, the prisoner (where appropriate), and the ACCT case manager or equivalent (where relevant) is mandatory.[221] PSO 1700 also provides guidance on other, non-mandatory attendees, such as a psychologist and a young person's family or carers.[222]

5.23 Despite their extensive role in segregation decisions, however, SRBs have been described as a "*superficial safeguard*" and sometimes even "*inherently*

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[214] 1999 Rules, r.45(2A); PSO 1700, above n.191, p.10.

[215] 1999 Rules, r.45(2B)-(2C).

[216] HMPPS (2022), above n.201, p.9.

[217] *Ibid.*

[218] *Ibid.*, p.2.

[219] *Ibid.*

[220] *Ibid.*

[221] *Ibid.*

[222] *Ibid.*

flawed".[223] Fieldwork at HMP Whitemoor, for example, showed staff to have limited knowledge of the rules that govern segregation and SRB processes (including the 1999 Rules, PSO 1700, and relevant local rules).[224] Moreover, the composition of SRBs "*perpetuated inconsistency and ineffective decision making*"[225] owing to the changeability of individuals in attendance and the lack of commitment from members to attend. It was also noted that few questions were asked at reviews, while papers were "*quickly glanced at and subsequently signed*".[226]

5.24 Such concerns were also heard by the Working Party, and particularly in relation to the role of IMBs within SRB process. According to PSO 1700, "*Whilst it is not mandatory that a member of the IMB attends the review board, it is highly desirable that they do so in order to monitor that correct procedures are observed*".[227] Accordingly, IMB members do not take part in the decision-making – but the purpose of their attendance is often not made clear to those held in segregation. At the same time, some members sign records of SRB meetings, which can give a suggestion of endorsement where this is neither appropriate or necessarily intended. Unsurprisingly, some prisoners therefore expect that IMB members will speak up on their behalf, but IMB members are in fact discouraged by PSO 1700 from raising any objections in the presence of the prisoner. As such, from the perspective of those held in segregation, the view can easily be taken that IMB members are on the side of the administration, ultimately eroding trust and confidence in the SRB process and IMBs more generally.

5.25 The Working Party also heard how the 42-day mark (or 21-day mark in the youth estate) is of particular concern. We heard that this process appears to be more of a superficial check and balance, rather than one reflective of critical decision-making. It was noted that in practice, paperwork always receives approval, and that the specifics of the process are not clear to those working in prisons. We have, however, been unable to source or review data on such outcomes.

[223] Eleanor Mary Brown, *Prison Segregation: The Limits of Law and Legal Reform* (2021), pp.171-84.

[224] *Ibid.*, p.141.

[225] *Ibid.*, p.184.

[226] *Ibid.*, p.182.

[227] PSO 1700, above n.191, p.11.

5.26 This latter point reflects a broader limitation to both external research and internal analysis, namely the sporadic production and publication of data in relation to segregation. According to PSO 1700, all establishments must have in place arrangements to monitor their use of segregation.[228] This includes sending monthly data to the Prison Group Director ("**PGD**") (or Head of Privately Managed Prisons), including the numbers of prisoners held in segregation pursuant to rule 45 of the 1999 Rules (or rule 49 of the YOI Rules).[229] A quarterly report on the use of segregation must also be submitted to the Governor and the PGD highlighting key observations, including identifying and investigating trends such as "*where the segregation of BAME prisoners is disproportionate to their representation in the general prison's population*".[230]

5.27 Governors should also ensure that a Segregation Monitoring & Review Group ("**SMARG**") is set up in order to review and monitor segregation.[231] What is clear, however, is that segregation data is significantly lacking, and that the reasons for this include both limited budgetary resources and training for collation and analysis. Indeed, despite one of the recommendations of *Deep Custody* being that SMARG data should be collated and analysed nationally, over eight years later such a system remains absent.[232] This not only impedes analysis of who, where and for how long individuals are being removed from association but, crucially, areas of disproportionality. The closed nature of the prison system, as well as the well-evidenced over-representation of racially minoritised groups within the criminal justice system in England and Wales, mean that public scrutiny of such figures is essential. This would be so even if the data were adequately collated and analysed within the prison system, which we understand is not the case.[233]

5.28 Nonetheless, the statistical analysis which is available has highlighted areas of concern. A 2022 thematic review by HMCIP, for example, reported that

[228] HMPPS (2022), above n.201, p.7.

[229] *Ibid*., Annex E.

[230] *Ibid*. JUSTICE is aware that the use of the term "BAME" is no longer widely in use owing both to its over-inclusive and exclusive nature. This is the term used in the amendments to PSO 1700, however, and so we have used it here to accurately reflect the wording.

[231] *Ibid*.

[232] Shalev and Edgar, above n.187, p.31.

[233] HMCIP (2022), above n.104, para.1.31.

Black prisoners were more likely than members of other ethnic groups to have spent time in segregation (15% compared with 9%).[234] Women are also reported to be more at risk of segregation than men, and this is particularly true of Black women experiencing poor mental health. Focus groups conducted by Agenda and Women in Prison, for example, highlighted that a Black woman is more likely to be sent to segregation than to be referred for appropriate treatment.[235] This was deemed to be largely due to racial prejudice and stereotyping.[236] Research by the Prison Reform Trust also indicates that prisoners with learning disabilities or difficulties are more than three times as likely as others to have spent time in segregation.[237]

5.29 Until data is collected and made public, the true realities of segregation practices and decision-making cannot be fully understood and, ultimately, reformed.

Recommendations

5.30 The Working Party understands that a new segregation policy framework is being planned. In view of the issues discussed above, we welcome this development and hope that the recommendations which follow may provide some assistance.

5.31 First, we note the tension between the inappropriateness of holding individuals with mental health difficulties in segregation, and the fact that it can in some instances be the safest place for a mentally vulnerable individual to be held. This is partly the result of an absence of alternatives, as well as

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[234] *Ibid.*, p.37.

[235] PRT, 'Counted Out: Black, Asian and Minority Ethnic Women in the Criminal Justice System' (2017), p.29. *See also* Jane Cox and Katherine Sacks-Jones, '"Double Disadvantage": The Experiences of Black, Asian and Minority Ethnic Women in the Criminal Justice System' (2016).

[236] *Ibid.*

[237] J Talbot, 'No One Knows: Prisoners' Voices – Experiences of the Criminal Justice System by Prisoners with Learning Disabilities and Difficulties' (PRT, 2008), pp.vi, 61. This report aimed to adopt a definition of learning disabilities and learning difficulties that would neither include nor exclude people by a very fine margin. The term learning disabilities or difficulties thus included people who: experience difficulties in communicating and expressing themselves and understanding ordinary social cues; have unseen or hidden disabilities such as dyslexia; experience difficulties with learning and/or have had disrupted learning experiences that have led them to function at a significantly lower level than the majority of their peers; are on the autistic spectrum, including people with Asperger syndrome.

significant difficulties in obtaining referrals to secure hospitals.[238] We also acknowledge the limited resources that are available in relation to prisons generally and segregation units specifically. It is imperative that Government recognise its responsibility toward securing the health and wellbeing of those in its care and accordingly the Working Party strongly favours reconsideration of the purposes of segregation and prioritisation of mental health provision in prisons. More practically and immediately, however, **the Working Party recommends that segregation be used only as a measure of last resort, and not for the management of mental health issues.**[239] Given the few alternatives presently available, **the Working Party also recommends that mental health provision within prisons, including the development of specific mental health and/or therapeutic units, be urgently prioritised.**

5.32 With regard to SRB processes, in line with our overarching recommendation concerning the scope of prison law legal aid, **the Working Party recommends that publicly funded legal advice, assistance and representation be made available in relation to all prisoners who meet the general means and merits tests, and are to be held in segregation beyond 42 days.** In addition, **we recommend that all relevant segregation paperwork should be made readily available to prisoners and their legal advisors/representatives at least 24 hours before any SRB meeting.**

5.33 In relation to the role of IMBs, **the Working Party is of the view that IMB members should continue to attend and monitor a sample of SRB meetings. However, the governing policy should expressly exclude IMB members from involvement in decision-making, and this should be explained to prisoners at every SRB meeting.**

5.34 **In relation to all segregation decisions, both initial and on extension, prisoners must be given clear written and oral explanations in a format they understand.** This may both reduce the likelihood of prisoner's being aggrieved at being segregated, or aid them to identify the appropriate route to challenge decisions they feel to be unfair (including via legal assistance).

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[238] In relation to this issue, and the position of mentally unwell prisoners generally, see HMCIP, 'The Long Wait: A Thematic Review of Delays in the Transfer of Mentally Unwell Prisoners' (February 2024).

[239] PSO 1700 does require that segregation be used as a last resort, but the indication is that this is not always achieved in practice.

5.35 Finally, **we recommend that disaggregated data on segregation be collected in all prisons, analysed on prison-level and national bases, and made publicly available** in the interests of transparency and promoting public scrutiny.

VI. REDRESS

Internal Complaints Systems

6.1 By the time of the Woolf Report, detailed consideration had been given by other bodies to the adequacy of the prisoner grievance procedures then in place, which included raising issues with Boards of Visitors, prison staff and governors, and petitioning the Home Secretary. Full, central records of statistics in relation to the grievance procedure were not held by the Prison Service at that time,[240] and so it is not possible to compare rates of complaint over time.

6.2 Following the April 1990 riots, but before the Woolf Report was finalised, a new internal grievance system was introduced, which counselled first informal discussion, followed by an oral application (to be recorded and discussed the same day), an oral application to the Governor, and finally a formal written complaint. The Board of Visitors could also be spoken with at any time, but there was no other mechanism external to the prison service.[241]

6.3 The system has continued to change over time and the present Prisoner Complaints Policy Framework ("**PCPF**") has been in place since August 2019. At the outset, the PCPF notes:

> "*Evidence indicates that when people believe the process of applying rules (how a decision is made, rather than what decision is made) is fair, it influences their views and behaviour. This is called procedural justice. When people feel processes are applied fairly and justly, they have more confidence and trust in authority figures, see authority figures as being more legitimate, and they are more likely to accept and abide (or commit to abide) by decisions and rules, and comply and cooperate with authority, even if the outcome is not in their favour. It is also necessary in order to ensure prisoners are treated with respect and improve outcomes in terms of their daily life.*"[242]

[240] Woolf Report, above n.6, paras.14.315-14.316.

[241] *Ibid*.

[242] See MoJ and HMPPS, 'Prisoner Complaints Policy Framework' (2013), para.2.1.

6.4 Additionally, the PCPF notes that both staff guidance and revised complaint forms are now available, which "*reduce the potential impact of bias on decision making about handling complaints*".[243]

6.5 The PCPF includes three forms within Annex A: COMP1 for complaints generally; COMP1A for appeals where a complainant is not satisfied with the response; and COMP2 for confidential complaints. The response should be given on the same form. These forms have been made more available since reforms introduced in February 2002, following which there was a significant increase in the number of prisoner complaints – a trend which the data (albeit limited)[244] suggests has continued since.[245]

6.6 Complaints are generally to be responded to within five working days of being logged, or 10 working days if the complaint is against a member of staff or involves another establishment. If a prisoner is unhappy with the response, they have one week to submit a COMP2, and the same timeframes for responding apply. The Working Party understands, however, that timeframes are often not complied with. At the same time, we have heard that it is common for complaints to be rejected at the initial stage because of difficulties with legibility, or because they combine multiple issues, and that in some prisons, standardised responses are used. Standardised responses, while tending to increase administrative efficiency, reduce complainants' perceptions of being listened to and understood. Meanwhile, the Working Party heard that complex complaints, while difficult to deal with, reflect the often compounding difficulties within the prison (for example, being unable to be re-categorised because neither an offending behaviour programme nor a transfer is possible). This is a reality which must be acknowledged in the complaints-handling process.

6.7 Many prisoners also express distrust in relation to the internal prison complaints process, both around raising matters informally and pursuing the COMP form route. This can at least partly be explained by an inherent power differential between prison staff and those in their custody and care, while individual relationships may reduce prisoner likelihood of raising matters

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[243] *Ibid.*, para.2.3.

[244] This lack of data has also been remarked upon by Rebecca Banwell-Moore and Philippa Tomczak in 'Complaints: Mechanisms for Prisoner Participation' [2022] *European Journal of Criminology* 1, 13-15.

[245] See [HC Deb, vol 492, 13 May 2009](#).

with staff on the wing – particularly if the subject of the complaint is a staff member.

6.8 Anecdotal expressions of distrust are borne out by HMIP's prisoner surveys, conducted in the course of inspections. Results indicate that generally less than 30% of those who have made a complaint across the adult male and YOI estate consider that they are responded to fairly.[246] 23% of adult males and 27% of those in YOIs who had made a complaint said they were usually dealt with within 7 days,[247] while approximately 31% of adult male respondents had been prevented from making a complaint.[248]

6.9 Further, as Banwell-Moore and Tomczak summarise:

> "*Prisoner fears of reprisal, which can include for example, downgrading of Incentives and Earned Privileges… level, loss of prison jobs and detrimental impact on release decisions… and being labelled 'troublemakers', pose major barriers to complaints…*".[249]

6.10 This applies as much to direct, face-to-face discussions of prisoner grievances as to the use of COMP forms: although complaints boxes are to be located away from wing offices and emptied by a designated member of staff who is not a residential officer on the wing,[250] prisoners may nonetheless fear forms being tampered with or destroyed by officers.[251]

6.11 It is true that many prisoners do make use of the internal complaints processes; however, lack of faith in their ability to bring solutions remains a perennial refrain, while particular groups, such as women and young people, are particularly unlikely to seek help in this way.[252]

6.12 The Working Party also understands that the key worker scheme introduced to the adult male estate in 2018 is not functioning as intended. The scheme

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[246] *See* HMIP, 2022-23 Annual Survey Results: Men's Prisons (July 2023) and HMIP, 2022-23 Annual Survey Results: Children's Establishments (July 2023)

[247] *See* HMIP, 2022-23 Annual Survey Results: Men's Prisons (July 2023) and HMIP, 2022-23 Annual Survey Results: Children's Establishments (July 2023)

[248] *See* HMIP, 2022-23 Annual Survey Results: Men's Prisons (July 2023).

[249] Above n.244, p.11, internal citations omitted.

[250] PCPF, above n.242, para.4.13.

[251] *See* Banwell-Moore and Tomczak, above n.244, p.11.

[252] PCPF, above n.242, para.4.13.

aimed to improve prison safety (including around suicide and self-harm) by the development of better staff-prisoner relationships: every prison officer was to have 5-6 prisoners that they would manage on a one-to-one basis, with a minimum of 45 minutes each week scheduled for a prisoner and key worker to meet.[253] However, staff shortages endemic to the estate are preventing the scheme from operating effectively, meaning that those individuals a prisoner would in principle be most likely to speak with are not available, or the relationship with them is distant and unhelpful.

6.13 There is a separate system for reporting incidents of discrimination, harassment or victimisation, which is set out in PSI 32/2011: Ensuring Equality. This type of issue should be notified via a Discrimination Incident Reporting Form or 'DIRF' (although in principle a discrimination complaint can still be made on a COMP form as well). The PSI further explains that:[254]

> "*6.5 DIRFs must be explored (when submitted by prisoners or visitors) or reviewed (when submitted by staff) and responded to by a manager. The Governor must put in place a sign off or quality control process involving a Senior Manager* (this should be determined by an assessment of the risk involved, and may vary from a quality control process for a percentage of completed DIRFs, to a process in which all DIRFs are signed off by a senior manager prior to a response being sent).
>
> *6.6 DIRFs must be logged - on receipt and response - and monitored. Data must be analysed and used as management information to inform the equality action plan.*"

6.14 The existence of a separate process for dealing with incidents of discrimination is positive from the perspective of compliance with HMPPS' public sector equality duty pursuant to section 149 of the Equality Act 2010.[255] However, its operation in practice appears to be less than optimal. A 2018 PPO bulletin described the position as follows:

> "*What our investigations show* […] *is that all too often discrimination complaints are not investigated promptly, that the staff who investigate*

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[253] Suzy Talbot, 'Changing the Way We Manage Prisoners' (4 October 2018).

[254] PSI 32/2011: 'Ensuring Equality' (2020).

[255] *See* Dr Kimmett Edgar and Khatuna Tsintsadze, 'Tackling Discrimination in Prison: Still Not a Fair Response' (PRT and Zahid Mubarek Trust, 2017), p.37.

them often lack the training and confidence to address equalities issues effectively, and that prisons often fail to collect the equalities data needed to carry out a meaningful investigation. This risks undermining prisoners' confidence in the effectiveness and legitimacy of the complaints process."[256]

6.15 A 2017 joint report by the Prison Reform Trust and the Zahid Mubarek Trust similarly raised various concerns with how discrimination complaints are addressed,[257] while a 2022 report by HMIP found that "'*Black prisoners were reluctant to use the DIRF system… and had little faith in its value', with complaints against staff rarely upheld*".[258] It bears noting that there are no fixed timeframes for responding to a DIRF: the relevant PSI simply states that "*Governors must ensure that all incidents of discrimination, harassment and victimisation are handled in a proportionate and timely way*".[259] By comparison, a COMP1 "*with an equality aspect*" must be responded to within five working days. It is unclear whether the two are, in practice, dealt with in the same manner.

6.16 In general terms, the Working Party understands that many prisoners simply lack faith in the effectiveness of the complaints and DIRF systems, and that this is borne out by their experiences of delays and inadequate responses; it is felt that complaints are perceived as negative by staff. On the other hand, those who work in prisons feel that they do their best to respond to genuine complaints as best they can, bearing in mind constraints of time and resources. However, it does not appear that systematic review of common causes of complaints or discrimination incidents is either made necessary by policy, nor is in common practice at an individual prison or estate-wide level.

6.17 Discrimination may take many forms, however the overrepresentation of racialised minorities in the criminal justice system generally, and the prison system more specifically, is widely acknowledged. Against that backdrop, it

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[256] PPO, 'Complaints About Discrimination' (Learning Lessons Bulletin – Complaints Investigations, Issue 9, January 2018).

[257] Above n.255.

[258] See 'Prisons to Overhaul Racism Complaints System' (Inside Time, 27 March 2023), quoting HMCIP, 'The Experiences of Adult Black Male Prisoners and Black Prison Staff' (2022), p.6. *See also* Role of the Prison Officer, above n.32, pp.22-23.

[259] PSI 32/2011, above n.254, para.6.2.

is crucial that systems to address discrimination are effective, and ultimately, that a culture of non-discrimination exists.

6.18 One of the first steps in proactively addressing discrimination is collecting data to understand where and then analyse why it is occurring. At present, however, published offender management statistics present data across seven ethnicity bands: Asian or Asian British; Black or Black British; Mixed; Other; White; Unrecorded; or Not Stated. In contrast, a much broader range of options is available to individuals in HMIP's prisoner survey, which is conducted with a sample of prisoners upon every inspection. Statistically, the seven categories used are broad and unhelpful, as they elide potentially significant cultural differences – for example, it is not clear where Gypsy, Roma or Traveller people would be placed.[260] More significantly, on an individual level, ethnic identity can be a complex matter and can have a major impact on how an individual sees themselves. Self-identification is therefore central to a person's sense of self and of individuality, which is critical to maintain in an institutionalised environment.

6.19 The Working Party understands that, following on from HMIP's 2022 report, HMPPS' Race Action section began a root and branch review of the DIRF system, which is due to conclude in early 2024. Areas under consideration include inadequate rates of reporting and recording of DIRFs, as well as insufficient and inadequate follow-up. Poor training has also been a consistent theme between HMPPS' own audits and HMIP reports, as well as prisoner perceptions of unfairness, and accordingly the objective of the present review is to identify best practice that can be implemented across the board.

6.20 The Working Party welcomes this serious engagement with a fundamental issue, as well as broader work that is being done to tackle discrimination and disproportionality. In particular, it is understood that more meaningful data is available within HMPPS such that the different experiences of divergent population sub-groups can be better assessed and responded to. Work is also

[260] This is significant. For example, as the Lammy Review observed, "*Gypsies, Roma and Travellers (GRT) are often missing from published statistics about children in the* [criminal justice system]*, but according to unofficial estimates, are substantially over-represented in youth custody, for example, making up 12% of children in Secure Training Centres…*": 'The Lammy Review: An Independent Review into the Treatment of, and Outcomes for, Black, Asian and Minority Ethnic Individuals in the Criminal Justice System' (September 2017), p.3.

being done to improve prisons' own collection and analysis of data so that the most accurate pictures can be obtained.

External Complaints Mechanisms

6.21 There are essentially three external mechanisms through which those in prison can raise complaints.[261] The first of these is the IMBs, which are provided for by section 6 of the Prison Act 1952. That section requires the Secretary of State to appoint a group of independent monitors for every prison. In practice, these are unpaid volunteers who dedicate on average two to three days each month attending the relevant establishment to fulfil their role. The Act makes no provision for any overarching structure, however a National Chair and Secretariat have been developed to aid individual IMBs to undertake their duties.

6.22 Although IMBs themselves came about in 2007, there is some history to their existence which is of ongoing significance. Section 6 of the 1952 Act originally provided for Boards of Visitors, which were tasked as IMBs are today with "*pay*[ing] *frequent visits to the prison and hear*[ing] *any complaints which may be made by the prisoners*". However, Boards of Visitors also used to be able to impose adjudication sanctions, which came under criticism in the Woolf Report for tending to confuse the Boards' roles and relationships with prisoners, and so leading to distrust.[262]

6.23 Following a recommendation of the Woolf Report, IMBs do not have any role in disciplinary proceedings today.[263] Moreover, since 2009, IMBs have formed part of the UK's National Preventive Mechanism pursuant to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. As such, IMBs work very differently today than their predecessor bodies did, albeit that the fundamental task set out in the statutory wording remains the same.

6.24 Another feature of the landscape which has changed lies in the creation of the PPO (discussed below) as an external complaints mechanism for those in prison. Until that occurred, IMBs (and their precursor bodies) and HMIP

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[261] Additionally, where a complaint relates to prisoner healthcare, there is a separate process via the NHS: *see generally* Prisoners' Advice Service, 'Information Sheet - Healthcare Complaints' (2020).

[262] Nicola Padfield, 'Monitoring Prisons in England and Wales: Who Ensures the Fair Treatment of Prisoners?' in (2018) 70 *Crime, Law and Social Change* 57, 65. Internal citations omitted. See also *Justice in Prison*, above n.4, p.34.

[263] *See* Simon Creighton and Hamish Arnott, *Prisoners: Law and Practice* (LAG, 2009), para.2.78.

were the only outside eyes regularly looking in. It was in that setting that IMBs formalised their task of hearing complaints into their 'applications' system.

6.25 Applications are essentially prisoner concerns or grievances, which may be taken either in writing via special boxes on prison wings or orally in person when IMBs visit. (This is distinct from and unconnected with the internal prison complaints process outlined above.) IMBs operate in accordance with a National Monitoring Framework, which outlines the applications function as follows:

> "*Boards' responsibility to take individual applications from prisoners … put*[s] *IMBs in direct touch with the issues of most concern to those in custody and can help identify themes and monitoring priorities. However, in dealing with applications, Boards' role is not to sort out the problem, or carry out an investigation, but to make enquiries of those who are responsible for doing so, and to satisfy themselves that this has been done.*"[264]

6.26 This process has a number of friction points in relation to the IMBs' broader monitoring role. First, IMB visits are not generally announced in advance. This is because to do so would undermine their monitoring function, which relies on seeing prisons operating as they would ordinarily, without observation. This can be problematic for applications, as prisoners can face uncertainty around when their issue may be addressed. The difficulty is multiplied given that awareness of IMBs and their functions among prisoners is often quite low.

6.27 Secondly, the scope of the applications function as outlined in the National Monitoring Framework is quite limited. It is true that IMB members have greater power than individual prisoners to bring attention to particular issues, but ultimately they are not empowered to do a great deal beyond that, which can lead to frustration on the part of both affected prisoners and IMB members. On the other hand, we understand that many IMBs often receive large numbers of applications concerning similar topics, such as property issues. Much time is accordingly spent chasing up with staff about what is being done to resolve individual issues rather than considering and addressing their systemic implications, as the monitoring function would require. At the same time, many of the issues being raised with IMBs could

[264] See IMB National Monitoring Framework (2021), p.19.

arguably be resolved at an early stage if sufficient staff existed for the key worker scheme to operate effectively, so that time was available for positive interpersonal relations to be developed and for prisoners to voice concerns directly.

6.28 Despite the changes in IMBs' operations, the Working Party understands that a lack of trust remains a barrier to effectiveness of IMBs' applications function. This is in part a reflection of historical linkages between Boards of Visitors and prison administration, as well as ongoing conflict in the role, such as their present involvement in SRBs, outlined in **Chapter IV** above.

6.29 Additional issues also play a role in undermining trust: for example, although efforts are being made to increase the diversity of IMB members, the Working Party understands that the majority are white, and most are retirees with sufficient financial stability to engage in substantial voluntary work. [265] That is not a criticism of the existing members; however, these demographics can give rise to cultural competency challenges or may otherwise discourage prisoners from reaching out, particularly given the overrepresentation of racialised minorities in the prison and wider criminal justice systems.[266] Furthermore, the physical absence of IMBs from prisons during the COVID-19 pandemic had a significant negative impact on prisoner trust which is yet to be fully reversed.[267] However, the National Secretariat is working with IMBs to improve diversity of new recruits and improve retention rates, as well as to raise awareness of the IMB role, which it is hoped will have a positive impact.

6.30 The second external mechanism which receives prisoner complaints is the PPO. The PPO is a non-statutory body[268] which was created in consequence of a Woolf Report recommendation that an independent Complaints Adjudicator be appointed, in part to "*recommend, advise and conciliate at the final stage of the* [grievance] *procedure*".[269]

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[265] See, e.g., Amal Ali and Hannah Pittaway, 'Towards Race Equality' (Criminal Justice Alliance, 2022), pp.9, 32-33.

[266] *Ibid.*, pp.9, 13, 28.

[267] *Ibid.*, pp.9, 21-23.

[268] As to which, see Mary Seneviratne, 'The Prisons and Probation Ombudsman: A Review', (2010) 19(2) *Nottingham Law Journal* 1, pp.2-3.

[269] Woolf Report, above n.6, p.454.

6.31 The office of the Prisons Ombudsman came into existence in 1994, and in 2001 its remit was extended to include complaints from those under probation supervision, so that the office was accordingly renamed.[270] Although addressing complaints was originally the PPO's core purpose, and the gap which the Woolf Report recommended be filled,[271] the office's focus is now split almost equally between this role and the examination of fatal incidents, a further function adopted by the PPO in 2004. Staff and, accordingly, learning cross between the two sides;[272] however the PPO's budget has not been increased to match the greater workload.

6.32 The PPO's ambit is guided by terms of reference agreed between the Ombudsman and the Secretary of State for Justice. The current Terms of Reference were set down in 2021 and are reproduced in Annex C to the Prisoner Complaints Policy Framework. As they explain, the aims of PPO complaints investigations are to:

- "*establish the facts relating to the complaint with particular emphasis on the integrity of the process adopted by the authority in remit and the adequacy of the conclusions reached;*
- *examine whether any change in operational methods, policy, practice or management arrangements would help prevent a recurrence;*
- *seek to resolve the matter in whatever way the Ombudsman sees fit, including by mediation; and*
- *where the complaint is upheld, restore the complainant, as far as is possible, to the position they would have occupied had the event not occurred.*"[273]

6.33 The PPO therefore works to resolve individual complaints as well as to address systemic issues that these suggest.

6.34 In order to complain to the PPO, a prisoner must first have completed the internal prison complaints process. The complaint to the PPO must then be submitted within three months of the last response received via that internal complaints process. The complaint must also raise a substantial issue, and the

[270] *See* 'About the PPO'.

[271] The Woolf Report however recommended a narrower framework, more focussed on the process than substance of decisions, where the PPO today examines both.

[272] Seneviratne, above n.268, pp.5-6.

[273] PPO, 'Terms of Reference'.

subject of the complaint must directly involve the person complaining. Complaints may then be resolved by mediation or investigation, at the PPO's discretion.[274] The PPO's business plan for the current year sets out response time targets, namely that eligibility of complaints will be determined within 10 working days of receipt; and that investigations will be completed and initial reports submitted for consultation within 60 (standard cases) or 130 (complex cases) working days thereafter.[275]

6.35 Because of the pre-requisites outlined above, a significant proportion of complaints to the PPO are rejected as ineligible. For the year 2008-2009, 58% of complaints met this outcome;[276] by 2021-22, the PPO's Annual Report confirmed that 1,936 of 4,442 (prison and probation) complaints were accepted for investigation, meaning that the PPO "*continue*[d] *to assess over 50% of incoming complaints as either ineligible for investigation, or while eligible, not accepted for investigation for some other reason – as set out in our Terms of Reference*".[277] The main reason for this – in 77% of ineligible cases during 2021-22 – was that "*the complainant had not followed the correct procedure before submitting their complaint to* [the PPO]".[278]

6.36 While it is generally reasonable to expect individuals to seek resolution of problems at their source, prisons are something of a special case given the power dynamics which exist. While we were informed that the PPO does sometimes respond to cases where the internal processes have not yet been completed, this is not explicit in the Terms of Reference. The Terms of Reference do refer to a discretion to accept or refuse to investigate complaints for other reasons, however the need for complainants to have first exhausted the internal complaints system is not framed in a similar fashion.[279] Nonetheless, the Working Party understands that exceptions to the eligibility criteria are made on occasion, such as where a prison has not responded adequately or at all to an internal complaint and it appears that this has been the result of negligence. Where it appears that a complaint reflects a broader

[274] *Ibid.*, para.11.

[275] See PPO, 'Business Plan 2022/23', p.8.

[276] Seneviratne, above n.268, pp.5-6.

[277] PPO, 'Annual Report 2021/22', p.3.

[278] *Ibid*. See annual reports for previous years: PPO, 'Annual Reports'.

[279] *See* PPO, 'Terms of Reference', paras.13(i) and 16 (which uses mandatory language); cf paras.14 and 15.

issue, that may also be further investigated, even where no beneficial outcome is available to the complainant.

6.37 The PPO has been making positive strides in recent times to address some of the challenges in its processes. As of November 2023, the arm of the PPO which deals with complaints from those in prison or the youth custodial estate has been rebranded as Independent Prisoner Complaint Investigations ("**IPCI**").[280] The object of this rebranding was to assist those in prison to understand the role of the organisation, given the unfamiliarity of the 'ombudsman' title and the PPO's role. Work is being done to ensure knowledge of IPCI becomes widespread, including features in Inside Time and on National Prison Radio, as well as via visits to numerous prisons. Anonymised complaint investigations summaries are also now being published on the PPO's website, allowing visibility of outcomes in individual cases.[281]

6.38 The IPCI complaint form has also been simplified from the former PPO version, and a durable card explaining briefly how to make a complaint has been developed for inclusion in induction packs. Posters and leaflets for display inside establishments are being refreshed as well. These efforts have been positively received to date, and it is hoped that this will increase awareness and more effective use of the PPO's complaints investigation function. Data will be monitored to identify any trends, and a question about IPCI is to be included in HMIP's prisoner survey as well.

6.39 The PPO is aware of challenges around the accessibility of the complaints system, which is ultimately paper-based. At present, the PPO already provides an easy-read document about how to complain for children and young people, as well as versions in various languages other than English (although it is not known how well these are distributed across the estate). [282] In addition, it is hoped that the ongoing roll-out of digital technology by HMPPS will enable development of more accessible routes to progressing complaints for those with poor literacy or English language abilities,

[280] PPO, 'Prisons and Probation Ombudsman Launch Independent Prisoner Complaints Investigations' (Press release, 23 November 2023).

[281] PPO, Complaints Investigation Summaries.

[282] PPO, 'Publicity Material (Leaflets & Posters)'.

potentially via speech-to-text[283] or automatic translation capabilities. This might also allow prisoners to access the complaints investigation summaries now being published online, so allowing prisoners to see the concrete steps which have been taken in other cases, as well as being able to keep track of documentation relating to their own complaint. Although digitisation is not a panacea, digital literacy is an important skill in modern life, and this kind of exposure is accordingly likely to have positive impacts for those in prison after release.[284]

6.40 Of those complaints that are accepted by the PPO, approximately 30% are decided in favour of the complainant[285] – which ultimately means that an individual's chance of gaining redress via the PPO is, rightly or wrongly, about 15%, or 3 in 20. While these outcome rates may be entirely justified, they are unlikely to increase individuals' faith in achieving change via formal mechanisms. It is to be hoped that the increased visibility and comprehensibility will lead to a greater proportion of complaints progressing to investigation, which itself may have a positive impact on prisoner perceptions. For the same reason, measures to increase the independence of the PPO in appearance and substance would also be welcomed. Fortunately, the Working Party understands that there are no concerns within the PPO about limitations on the organisation's ability to gain necessary access to prisoners and undertake their work. The perception of impartiality is, however, often just as important as the reality of it.

6.41 The final route by which a person in prison in England can make a complaint is to the Parliamentary and Health Service Ombudsman ("**PHSO**"), which "*make*[s] *final decisions on complaints that have not been resolved by the NHS in England and UK government departments and other public organisations*".[286] As with the PPO, it is expected that individuals will raise the issue with the original body, i.e. the prison, and complete its internal

[283] We understand that HMPPS is now considering the possibility of this facility being available for use with applications on prisoner laptops via the Launchpad digitisation programme.

[284] Prisoner Learning Alliance, *The Digital Divide: Lessons from Prisons Abroad* (2020).

[285] See annual reports for previous years at PPO, 'Annual Reports', and *see also* Seneviratne, above n.268, p.8.

[286] *See* Parliamentary Health and Safety Ombudsman. The equivalent for Welsh prison healthcare complaints is the Public Services Ombudsman. A search of the website found only one reference to a complaint concerning prisoner care: 'Prisoner Care: Betsi Cadwaladr University Health Board' (Case ref. 202105815, 16 December 2022).

process first. Referral of a complaint to the PHSO must come from the complainant's local Member of Parliament ("**MP**") and, in relation to prisoners, it is not always entirely clear who this should be, given the disenfranchisement of prisoners in England and Wales. Nonetheless, the position in principle appears to be that the MP for the area in which the prison is located, or of the prisoner's home address outside prison, would be able to make the relevant referral. Alternatively, if neither applies, any MP may be approached, or the chair of the Public Administration and Constitutional Affairs Committee.

6.42 It appears that very few prisoner complaints ultimately make it to the PHSO. In 2022/23, the number of confirmed prisoner complaints was approximately 450, representing less than 2% of all PHSO complaints. Only two of those continued on to a detailed investigation, and one was withdrawn prior to resolution. Of those that did not progress, the vast majority failed to meet procedural requirements around MP referral and completion of internal processes. These figures are consistent with the general picture over time, although a reduction overall was seen during the COVID-19 pandemic.

6.43 Complaints received from prisoners by the PHSO relate most commonly to decisions of the PPO/IPCI, as well as to prison primary care providers and mental health services (that is, at its root, NHS England and NHS Wales). Arguably healthcare complaints is the key area of potential benefit of the PHSO to those in prison, as the NHS England complaint system has only a single tier and complaint to the PHSO is the only way of seeking review of that initial investigation.

6.44 The Working Party understands that the PHSO, which is a small body with a broad remit, does not presently undertake any direct outreach work to prisons. It is difficult to assess how well the PHSO is known to prisoners, however the small number of complaints annually and the large proportion of these which are rejected for failing to comply with procedural requirements may suggest that understanding of the role of the PHSO, and potentially also of the equivalent Welsh Public Services Ombudsman, is limited among those in prison.

Recommendations

6.45 The Woolf Report asserted that, "[i]*f a grievance procedure to be of value, the procedure must:*

i) be straightforward. The prisoner must be able to understand and operate it;

ii) be expeditious. In many situations, unless this is the position, the remedy which it provides may come too late. There must therefore be appropriate time limits;

iii) be effective. It must be capable of providing the remedy which is needed.

iv) be independent. And it must be seen to be so."[287]

6.46 A similar prescription has been made by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in relation to both internal and internal mechanisms: these should entail "*availability, accessibility, confidentiality/safety, effectiveness and traceability*".[288]

6.47 Recent research conducted by Dr Rebecca Banwell-Moore of the University of Nottingham demonstrates that there is significant correlation between good operation of prisoner complaints processes (accessibility, timeliness of responses, fair outcomes) and prisoner perceptions of safety, the sufficiency of their material provisions, being treated as an individual, and appropriate relationships with staff. This builds on earlier work conducted with Professor Philippa Tomczak, which considered complaints as a primary means by which prisoners participate in prison processes and express agency.[289] Although limited research has previously been conducted in this area, there is a growing empirical evidence base aligning with the Woolf Report's conclusions concerning the effectiveness of mechanisms for prisoner complaints.

6.48 However, it is clear that at many levels, prisoner complaints processes are not operating well. First, accessibility of the complaints system at all levels is an area of concern. **The Working Party therefore recommends that, in the course of its digitisation rollout, HMPPS should prioritise enabling improved access for those with poor literacy or English language skills to the internal complaints system and to external complaints mechanisms such as IPCI and PHSO.**

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[287] Woolf Report, above n.6, para.14.309.

[288] *See* European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 'Complaints Mechanisms' (CPT/Inf(2018)4-part) (2018), para.75.

[289] *See* Banwell-Moore and Tomczak, above n.244.

6.49 Relatedly, it is recommended that **individuals who are likely to face difficulties accessing the complaints systems should be identified on induction and proactively offered assistance by trained peers or staff in raising any complaints they may have.** Further, **prisons should ensure that IPCI information materials are contained in induction packs and presented throughout establishments in formats that are accessible to the local population.**

6.50 Secondly, there is a lack of faith in the ability of the various processes to deliver timely and effective outcomes. It is for this reason that **the Working Party is of the view that, where a COMP1, COMP1A, COMP2 or DIRF is not responded to within 15 working days, the prisoner should be permitted to apply directly to the PPO.** (A similar approach is taken by the Prisoner Ombudsman for Northern Ireland).[290]

6.51 It is accepted that there is a balance to be struck between allowing prisons reasonable time to address a complaint on the one hand, and complainants receiving a response in a timely fashion on the other. However, if a prison is not able or willing to resolve a complaint within 15 working days – which provides time beyond the policy framework timeframes – then there may well be greater issues at play which the PPO ought to consider. The ability to proactively progress a complaint and to engage an external player at an early stage may also increase prisoners' sense of agency as well as trust in the system, while the likelihood of IPCI commenting in its complaints investigation summaries on persistent delays may encourage prioritisation of complaints handling within prisons as well.

6.52 A repeated concern beyond the practicalities of access, however, was faith in the ability of the complaints system to provide outcomes for prisoners. **The Working Party is of the view that placing the PPO on a statutory footing would increase confidence in its functions, by making clear beyond doubt that it is not beholden to HMPPS or Government.**

6.53 It additionally appears that the PHSO and, in all likelihood, the Public Services Ombudsman in Wales are not well known to prison populations. **The Working Party recommends that the PPO work together with the NHS and national ombudsmen to provide accessible information on how complaints may be progressed to this final stage.**

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[290] *See* The Prisoner Ombudsman for Northern Ireland, 'Prisoner Complaints'.

6.54 We also consider that **the IMB Secretariat should be given greater financial and other support to enhance their existing ability to drive recruitment of local IMB members, both in greater numbers and from more diverse circumstances.**

6.55 **More fundamentally, and taking a wider view than simply in response to complaints, the Working Party recommends that HMPPS prioritise its present programme of work around race equality in the prison system as a whole.** This should include consideration of issues like increasing staff diversity and provision of culturally-competent rehabilitation programmes. Strong leadership, both from headquarters and in individual establishments, will be necessary if this is to make a difference, as buy-in must be fostered among actors at every level. Ideally, HMPPS' Race Action Plan would be match up with similar endeavours across the criminal justice system of England and Wales to ensure that race equality is prioritised and implemented at every stage, from police forces to the Crown Prosecution Service and the courts. However, action must begin somewhere, and HMPPS seems well-placed to do this given that the population it covers is stable and data is accordingly more straightforward to collect, as well as the existing willingness to engage with this critical issue.

6.56 HMPPS must, however, ensure that it is operating on the basis of the most accurate data available, and that it is transparent about doing so. In the view of the Working Party, this should acknowledge the importance of self-identification to both individual identity, and gaining a meaningful understanding of the interplay between ethnicity and culture on the one hand with the prison environment on the other. **Accordingly, the Working Party also HMPPS statistics concerning race or ethnicity be collated, analysed and published on the basis of individual self-identification upon entry, using HMIP's prisoner survey as a model for disaggregation.**

VII. CONCLUSION AND RECOMMENDATIONS

7.1 This report began with an outline of the troubling state of England and Wales' prisons today. In that context, it highlighted the importance of good decision-making, which Lord Woolf recognised over 30 years ago. The divergent purposes ascribed to imprisonment were highlighted, as were the difficulties that this can give rise to in the day-to-day running of our prisons. At the outset, the parallels between the conditions which precipitated the 1990 prison riots and those which obtain today were underscored.

7.2 It was this combination of background factors which led the Working Party to focus, at this particular point in time, on various processes of decision-making which we considered could have substantial impacts on the daily lives of prisoners. There may of course be others, but it was our view that overarching standards, categorisation, incentives and discipline, segregation, and redress mechanisms represented areas in which change could make a real difference.

7.3 This Working Party has examined processes of decision-making across these varied areas and made a range of recommendations. Some of these may seem small, but have the capacity, we hope, to effect meaningful day-to-day changes. For example, ensuring that those held in segregation understand why they have been placed there, and the role of IMBs at SRBs, has the ability to reduce levels of confusion and grievance. Being returned to the right incentive level on an adjudication charge being dismissed accords with procedural fairness, and allows an individual the opportunity to return to highly-valued jobs which in turn permit development of employable skills.

7.4 Other recommendations are wider-reaching: we acknowledge that at the present time, advocating an increase to legal aid expenditure is ambitious. However, we think this is necessary to ensure that people in prison have meaningful access to the courts: no individual should be excluded from access to justice. At the same time, legal aid funding has the ability to reduce levels of unnecessary complaint, as prisoners can be assisted to understand their entitlements and resolve issues early, where existing complaints systems are not trusted and often feature substantial delays.

7.5 The critical issue of reducing overcrowding in our prison system requires system-wide examination beyond the scope of this report. Nonetheless, we hope that our recommendations concerning the enforcement of minimum standards and the development of a queue system encourage a move toward

practices which simultaneously seek to uphold individual human rights and the British State's obligation to uphold them, rather than attempting to outsource incarceration. At the same time, these recommendations are not breaking new ground: we have already seen sentencing hearings delayed because the prisons cannot take any more admissions. It is logical to rationalise this approach and at the same time seek to prevent overcrowding than to permit the system to stumble onward by means of arbitrary and ad hoc approaches.

7.6 These recommendations are, of course, only a starting point. We hope that this report serves not only to indicate how we would hope to see some issues resolved, but also to bring attention to the numerous problems which exist in our prisons – many of which can have real impacts on prisoners' prospects of rehabilitation and the ability to lead a positive life upon release. Public safety is best served by offering opportunities to lead such new lives, but rehabilitation cannot be achieved on a shoestring, and successful transitions back into the community demand more than tents.

7.7 The Working Party's engagement with diverse stakeholders in the course of our work has shown that, for the most part, deficiencies in our prison system are not for lack of willing. There are many, both in civil society and the civil service, who can bring creative solutions to the table, including by harnessing technological tools, and improving education and training. All of these things, however, require investment – most crucially, investment in the futures of those members of our society who are, for the time being, imprisoned.

Recommendations

Standards

The Working Party recommends that:

1) the 1999 Rules and YOI Rules be reviewed and updated, taking into consideration the Nelson Mandela Rules and the European Prison Rules. Prisoners' basic entitlements should be expressed in the form of enforceable rights;

2) legal aid funding for prison law work should be returned to the scope that existed prior to LASPO;

3) prisons should pre-approve phone numbers for prison law NGOs (such as Prison Reform Trust, the Howard League, Prisoners' Advice Service, and the Intervene Project) and local prison law solicitors, and calls to these numbers should be made free of charge;

4) all current national and local prison policies should be made freely available to all staff, prisoners, and legal practitioners in digital formats. This should be prioritised in the course of the digital roll-out across the estate;

5) in the event that HMIP issues an Urgent Notification in relation to a prison, the Ministry of Justice should immediately direct the cessation of admissions to that prison until the position is improved;

6) a queue system should be developed and operated when the estate is at capacity, including arrangements for electronically monitored home detention for those waiting to enter prison, whose custodial period should be reduced by the number of days they spend on curfew waiting;

7) Sentencing Guidelines should be amended along the lines of *R v Ali (Arie)* [2023] EWCA Crim 232 to allow the judiciary and magistrates to take into account current prison capacity and conditions when making sentencing decisions;

8) all judges and magistrates who deal with criminal matters be encouraged, as a minimum, to visit one prison or young offender institute annually.

Categorisation and Risk

The Working Party recommends that:

9) in line with recommendation (ii) above, publicly funded legal advice, assistance and representation must be made available in relation to all categorisation processes for those who meet the general merits and means tests;

10) in relation to sentence plans, content guidelines should be developed to ensure that offender managers are explicit about, and prisoners can understand, levels of risk identified, and how specified rehabilitation programmes are intended to work to reduce that risk;

11) a national strategy be developed around the offender behaviour programmes available, the number of locations in which they should be delivered, and the staff and training required to do so effectively. This strategy should be informed by a transparent programme accreditation process;

12) where the Parole Board identifies that an individual's progression has been hampered by lack of access to rehabilitation activities, the Parole Board should be empowered to direct that arrangements be made for the individual to undertake that programme, whether at their current establishment or on transfer, ahead of the individual's next parole hearing.

Incentives and Discipline

The Working Party recommends that:

13) downgrading of a prisoner's incentive status pending adjudication should only take place where it is explicitly justified. In the event of the charge being found not proven or otherwise dismissed, the prior incentive status should be immediately restored;

14) in line with recommendation (ii) above, publicly funded early legal advice must be made available in relation to all adjudications for those who meet the general merits and means tests;

15) prisoners and their legal advisors or representatives be provided with copies of all material, including digital material, that is to be relied upon before the day on which any adjudication is to take place. If this does not occur, the hearing should be adjourned. PSI 05/2018 should be amended to provide accordingly;

16) independent adjudications should return to being held in person by default and conducted remotely only where it is in the interests of justice in the specific case (taking into account the parties' representations) for any person involved to attend remotely;

17) prisons should track prisoners facing repeated adjudications or incidents of restraint or separation, and develop intervention protocols to identify the cause of and address any broader underlying issues.

Segregation

The Working Party recommends that:

18) segregation be used only as a last resort and not for managing mental health issues;

19) mental health provision within prisons, including the development of specific mental health and/or therapeutic units, be urgently prioritised;

20) in line with recommendation (ii) above, publicly funded legal advice, assistance and representation must be made available in relation to all prisoners who meet the general means and merits tests, and are to be held in segregation beyond 42 days;

21) all relevant segregation paperwork should be made readily available to prisoners and their legal advisors/representatives at least 24 hours before any SRB meeting;

22) IMB members should continue to attend and monitor some SRB meetings. However, the governing policy should expressly exclude IMB members from involvement in decision-making, and this should be explained to prisoners at every SRB meeting;

23) prisoners must be given clear written and oral explanations in a format they understand for initial and extended segregation;

24) disaggregated data on segregation should be collected in all prisons, analysed on prison-level and national bases, and made publicly available.

Redress

The Working Party recommends that:

25) in the course of its digitisation rollout, HMPPS should prioritise enabling improved access for those with poor literacy or English language skills to

the internal complaints system and to external complaints mechanisms such as IPCI and PHSO;

26) individuals who are likely to face difficulties accessing the complaints systems should be identified on induction and proactively offered assistance by trained peers or staff in raising any complaints they may have;

27) IPCI information materials be contained in induction packs and presented throughout establishments in formats that are accessible to the local population;

28) where a complaint or discrimination incident report is not responded to within 15 working days, the prisoner should be expressly permitted to apply directly to IPCI;

29) the PPO should be placed on a statutory footing;

30) the PPO work together with the NHS and national ombudsmen to provide accessible information on how complaints may be progressed to this final stage;

31) the IMB Secretariat be given greater financial and other support to enhance their existing ability to drive recruitment of local IMB members, both in greater numbers and from more diverse circumstances;

32) HMPPS prioritise its present programme of work around race equality in the prison system as a whole;

33) HMPPS statistics concerning race or ethnicity be collated, analysed and published on the basis of individual self-identification upon entry, using HMIP's prisoner survey as a model for disaggregation.

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