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Liberty's response to the consultation on Plans for Secure College Rules

December 2014

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at
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Introduction

1. In its 2013 consultation document *Transforming youth custody: putting education at the heart of detention*, the Government announced that it would legislate to create secure colleges, a new form of youth custody. In its response to that consultation in 2014, the Government confirmed that a secure college pathfinder would be opened in the East Midlands in 2017. The Criminal Justice and Courts Bill, which at the time of writing has yet to complete its passage through Parliament, contains provisions permitting the Secretary of State to establish secure colleges and to contract out the running of a secure college to private providers. It is stated in the Bill that a contracted out college must be run in accordance with the Secure College Rules. This response to the consultation on the *Plans for Secure College Rules* sets out Liberty's overarching concerns with the information contained in the consultation paper.

Scrutiny

2. During the passage of the CJ&C Bill through Parliament, grave concerns were expressed by Parliamentarians and youth justice experts about the lack of detail in the legislative proposals about how secure colleges would operate, offering no guarantees that the needs and safety of children detained in secure colleges would be protected. These concerns were magnified by the fact that secure colleges will be run by private contractors, for profit. The Government's response was that it wanted to allow prospective contractors the freedom to develop their own approach to secure colleges and that any necessary details would be provided for in the secure college rules.

3. Concerns about the lack of detail and safeguards have not been alleviated by the publication of this consultation paper. The present consultation is on "*policies which will inform the statutory rules governing secure colleges*" rather than on detailed rules themselves. This consultation exercise should present a complete picture of the standards the Government will require private providers to implement and give the opportunity for experts to notice gaps or errors. Instead, it lists a patchwork of policies for consultation creating no certainty as to what the rules will look like. This makes it exceptionally difficult to know whether the rules will constitute an adequate and comprehensive framework. The approach taken leaves a clear scrutiny gap. This is exacerbated by the fact that this consultation takes place so late

in the CJ&C Bill process. It seems likely that the Bill will have received Royal Assent prior to the publication of the Government's response to this consultation. If the rules – when finally published – prove to be inadequate, it will be too late for Parliament to prevent the development of the secure college pathway. **We strongly recommend that draft rules are published as soon as possible and are subject to public consultation and parliamentary scrutiny.**

Human rights of detained children

4. For a document purporting to consult on principles, it is exceptionally worrying that absolutely no reference is made to the rights of children in detention as guaranteed under the *Human Rights Act 1998* (HRA). A number of rights protected by the HRA will be engaged by the detention of children by the state, including the right to life (Article 2), the right to be free from inhuman and degrading treatment and punishment (Article 3), the right to liberty (Article 5), the right to a fair trial (Article 6) and the right to respect for private and family life (Article 8) to name but a few, and it is disappointing that no explanation is made of how these will translate to requirements about the treatment of those detained in secure colleges. In addition, the United Nations Convention on the Rights of the Child was signed by the United Kingdom over twenty five years ago and contains a number of rights particularly relevant to children in conflict with the law. For example, Article 40 sets out that:

“States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.”

The Charter also sets out that in all actions concerning children, the best interests of the child should be the primary consideration (Article 2) and that state parties undertake to ensure such care and protection as is necessary for the child's wellbeing, survival and development (Articles 3 and 6). **As an absolute minimum, the stated purpose and ethos of secure colleges (question 1) should reference the fact that children detained in secure colleges will be treated in a manner consistent with their human rights. In particular, Article 40 UNCRC could helpfully inform any definition of ethos and purpose included in the rules.**

5. Not only is there no overarching reference made to these human rights frameworks, but it is clear from a number of the proposals and misguided assumptions in the document that a rights-based analysis has not been conducted and that the Government fundamentally misunderstands its duty to ensure that the rights of children in detention are respected. For example, the paper makes a number of statements such as *“Do you agree that there should be a rule to ensure a young person has safe and timely access to health services in Secure Colleges?”* (question 8) and *“Do you agree that there is a Rule requiring that young people are provided with bedding adequate for warmth and health?”*(question 13). In a document drafted by the State with a view to setting out the *“core parameters”* within which private providers will run detention facilities for children, it is shocking that these statements are presented as if open for debate. The Government should use this document to make absolutely clear the minimum standards it will insist that providers meet as a matter of law. Given that the State currently runs a number of child detention facilities, these basic requirements should be well known and it is bizarre that they are treated as new and novel concepts requiring consultation. While there are undoubtedly things on which the Government can and should consult on, this does not include the duty to respect fundamental rights.

Cohorts

6. The House of Lords made an amendment to the Bill which would mean that girls and boys under the age of 15 would not be housed in secure colleges. At the time of drafting, the House of Commons has just rejected this amendment and the matter will return to the Lords on 10 December. The consultation paper asks (question 2) whether there should be a rule to ensure that there is separate accommodation for girls and boys. Experts agree that younger children (such as those under 15 years) should not be detained with older children and that girls (who are often the most vulnerable in the child secure estate) should be completely separated from boys. In evidence to the CJ&C Bill Committee, Sue Berelowitz, the deputy Children’s Commissioner for England, expressed grave concerns about the possibility of girls being housed in secure colleges. Describing the vulnerability, past abuse and self-harm of girl children in custody she described them as *“among some of the most troubled youngsters I meet in prison”* and said *“I would be very concerned about girls being put in a large environment with a lot of boys because of issues of sexual violence, sexual abuse, sexual exploitation and misogyny. You get*

*hyper masculine environments in these places...the power imbalance is huge.*¹ The deputy Children's Commissioner was firm that special measures would not be sufficient to ensure that girls were appropriately looked after in secure colleges and explained that secure children's Homes were the only appropriate detention facilities for girls because - *"the size of Secure Children's Homes means that there are high levels of watchfulness and vigilance, because staff are always around, so it is less likely that girls will come under the power of boys...they are exceptionally vulnerable"*.²

7. On the basis of this evidence, Liberty remains strongly opposed to the incarceration of any girls and boys under the age of 15 in a secure college. **We urge the Ministry of Justice to reconsider its position and either to accept changes made to the CJ&C Bill in the House of Lords or to include a rule that would exclude girls and younger boys from inclusion in this scheme. Failure to do so will not be adequately addressed by a rule requiring separate accommodation. Rather, there should be a rule to ensure that girls are protected from contact with boys in all aspects of the regime in a manner that does not undermine their other rights (such as access to facilities, contact with family and friends). This should also be guaranteed for boys under the age of 15.**

Education

8. While the aim of secure colleges to put education at the heart of rehabilitation is laudable, there is very little in this document to suggest how it will be achieved. The Government states that it wants operators to innovate in the delivery of education and that this reflects the Government's wider approach to education in England. We are concerned that this statement reflects a serious misjudgement about the role of secure colleges and the characteristics of children incarcerated in them. The children detained in secure colleges will be among the most vulnerable, challenged and challenging individuals in the country. They should be cared for with expertise rather than treated as guinea pigs for new ideas. In no way can such a loose and high-risk approach be described as putting the "best interests" of the child first. If the State detains children, it must be clear about how rehabilitation is to be

¹ Criminal Justice & Courts Public Bill Committee, 11th March 2014, Hansard Column 11, Sue Berelowitz.

² Ibid.

achieved rather than leave it to the whims of private, non-expert providers operating with a view to creating profit.

Rewards and sanctions

9. The paper asks (question 25) whether the Principal of a secure college should be required to establish a rewards and sanctions scheme and whether the Secretary of State should have to approve this scheme. **For the avoidance of doubt, the rules should state that any rewards and sanctions scheme (whether mandatory or at the discretion of the Principal) must not interfere with the exercise by a child of their human rights.**

10. Of particular concern is the suggestion that some young people could have days added to their sentence as part of an adjudicated sanctions process. **It should not be possible to add time to a child's detention other than by way of a further sentence following a conviction for a new offence as decided by a judge through the normal criminal justice process.**

Use of force

11. The use of force against children in custody is inherently dangerous. Since April 2000, sixteen boys have died in youth detention. The tragic consequences of unnecessary use of force against children in detention is made all too clear in at least two of these deaths. In 2004 Gareth Myatt, 15, died in Rainsbrook STC as a direct result of use of force triggered by his refusal to clean a sandwich toaster. He was 4 ft 10 and weighed under seven stone, yet was restrained by three members of staff who ignored his shouts that he was unable to breathe. He died of 'positional asphyxia' after he choked on his own vomit. Also in 2004 Adam Rickwood, 14, took his life at Hassockfield STC, a few hours after being restrained for discipline purposes. Adam was restrained by staff when he refused, when asked, to move from a communal area to his room. At the second inquest into Adam's death, the jury found that the use of force against Adam "*more than minimally*" contributed to his decision to take his own life. An internal review of deaths in youth custody published by the Youth Justice Board in 2014 further found that -

"When Adam died in 2004, there was confusion at every level within the youth justice system about whether or not restraint for this purpose (maintaining the

good order and discipline of the establishment) was lawful. This confusion led to a systemic failure to identify unlawful practice – an issue which was resolved in 2008 when the Court of Appeal ruled that the use of restraint for the purpose of maintaining good order and discipline in STCs was, and always had been, unlawful.”³

12. The Secure College Rules on the use of force must be simple, clear and set out strict parameters as to when and how force can be used, building on the learning gained and developed in the wake of the tragedies outlined above. The rules should reflect the principles first established in the *Independent Review of Restraint in Juvenile Secure Settings* (2008)⁴ that:

- The use of force should only be permitted as a last resort where absolutely necessary for preventing harm to the child or others or to prevent escape. It should not be used as a punishment.
- Force should be used for the shortest amount of time necessary for that purpose and use the least force necessary for that purpose.
- Only force which is part of an approved restraint system (MMPR) should be permitted.
- This should not include the use of techniques which deliberately inflict pain on children.
- Only people who are appropriately trained should be allowed to use force on children.
- Systems should be in place to monitor and analyse the use of force in secure colleges.

13. Unfortunately, the section on use of force in the consultation document does not come close to the required clarity nor contain sufficient limitations to offer real protection to the life and safety of young people in detention.

³ Deaths of Children in Custody: Action Taken, Lessons Learnt, Youth Justice Board, 2014 available at - <http://www.justice.gov.uk/downloads/youth-justice/monitoring-performance/deaths-children-in-custody.pdf>.

⁴ Independent Review of Restraint in Juvenile Secure Settings, 2008, Smallbridge and Williamson, available at - <http://webarchive.nationalarchives.gov.uk/20130401151715/https://www.education.gov.uk/publications/eOrderingDownload/Review%20of%20restraint.pdf>.

Circumstances in which force can be used

14. During the passage of the CJ&C Bill through Parliament, there was great concern that the otherwise sparse legislation would expressly allow those working in secure colleges to use force against children for the broad purpose of maintaining good order and discipline. At the time, the Government argued that it would be inappropriate to contain further clarifications in primary legislation and that details would be better dealt with in the rules. Why the Government does not consider it appropriate that primary legislation contains clear protections for children against the unlawful use of force remains unclear. The consultation document states that “*We propose that the use of force is authorised in three circumstances: to prevent injury to the young person or others, to prevent escape from custody and to prevent damage to property.*” However the document then adds “*We propose that there is a fourth circumstance – which relates to maintaining good order and discipline – in which force may be used.*” This fourth circumstance is later described as to “*maintain a safe and stable environment and where there is also a risk to the safety or welfare of the young person against whom the restraint is used, or to the safety or welfare of another young person.*”

15. The use of force against children in detention to enforce good behaviour is contrary to basic human rights standards and notions of decency. It has also been found to be unlawful by the Court of Appeal. In June 2007 the Government amended secondary legislation, pursuant to the *Criminal Justice and Public Order Act 1994*, in order to explicitly allow force to be used to enforce good order and discipline (GOAD) in Secure Training Centres.⁵ In *R(C) v Secretary of State for Justice [2009]*⁶ the Court of Appeal looked at the amended rules and the Government’s reasoning for use of force to enforce GOAD and held that the amended rules were unnecessary and in breach of Article 3 of the European Convention on Human Rights as incorporated by the *Human Rights Act 1998*. It follows that primary legislation and rules allowing for such use of force for identical purposes is incompatible with human rights standards.

16. The fourth circumstance listed in the consultation document – maintaining a safe and stable environment – is exceptionally broad. In fact, in the context of the

⁵ The Secure Training Centre (Amendment) Rules (2007) which replaced the Secure Training Centre Rules (1998).

⁶ [2009] QB 657.

detention of young people, it could be argued that on some interpretations, the environment will be fundamentally and consistently *unstable*. In addition, while the phrase is presumably intended to narrow the meaning of GOAD, it has a much looser meaning than GOAD and it simply adds another layer of complexity and confusion. Similarly, references to the “welfare” of a young person have no concrete meaning. The use of these terms to set out the parameters of the use of force will undoubtedly lead to confusion and will result in the use of force in a far greater number of circumstances than is strictly necessary, and is therefore lawful. The Joint Committee on Human Rights recently commented that:

“We are concerned by the vagueness of the Government’s references to maintaining a stable environment and protecting the welfare of the child and others as permissible justifications for the use of force. The law is clear that the use of force on children can only ever be justified in order to protect the child or others from harm and can never be justified for the purposes of good order and discipline.”⁷

Principles which apply to the use of force

17. The document lists a series of different principles that should apply to different uses of force: principles that apply to use of force, principles that apply to use of restraint, application of restraint for maintaining a safe and stable environment to name but a few. The document also draws distinctions between circumstances in which approved techniques must be used and other circumstances in which other force can be used. The document states that not all of this information will be contained in the rules themselves, but may be put in supporting documents.

18. This approach of carving out different uses of force and applying different rules to them is unprincipled and in practical terms fundamentally undermines the purpose in having approved techniques. In addition, the use of multiple sets of guidance – not all of which will be contained in legally binding documents will only serve to create or exacerbate confusion about when and what force is lawful.

19. If the Ministry of Justice wishes to avoid making old mistakes, with potentially tragic and devastating consequences, it must heed the advice of the

⁷ Joint Committee on Human Rights, Second Report of Legislative Scrutiny: (1) Serious Crime Bill, (2) Criminal Justice and Courts Bill (second report) and (3) Armed Forces (Service Complaints and Financial Assistance) Bill paragraph 34.

Joint Committee on Human Rights and others and revisit its proposals on the use of force. Only a simplified and more tightly constrained system will be lawful and safe.

Civil detainees and unconvicted young people

20. We are concerned that unconvicted young people and civil detainees, such as those who have breached a civil order under imposed on them under, for example, the Anti-social Behaviour, Crime and Policing Act 2014, will be detained in secure colleges. Liberty absolutely opposes the imposition of a detention order on children who have those who have been found on the balance of probabilities to have breached a civil order. To deprive a child of their liberty with none of the safeguards of a criminal process is a clear breach of that child's human rights. But our concerns with this policy can only be exacerbated by taking these young people away from their local area and placing them with convicted children in a huge institution. How will this help to keep children who have categorically not been charged with a criminal offence away from the criminal justice system? Conversely, it will directly fast-track them into the criminal justice system. It also appears to go against the spirit of the reforms to take unconvicted young people and place them far away from home in a large, anonymous detention centre. How will this assist with the rehabilitation of those who are found innocent at trial? Further, the purported rules on civil detainees and unconvicted young people do not appear sufficient to reflect their differential status and to offer the necessary protection. Separate accommodation, for example, will be wholly inadequate to the aim of keeping the cohorts truly separate and subject to different treatment if children are then required to participate in classes and other activities. **We recommend that the rules should instead stipulate that unconvicted children and civil detainees will not be detained in secure colleges.**

Communication interception and data retention and disclosure

21. The provisions relating to interception of communications and disclosure and retention of information gathered as a result of interception and CCTV are worryingly vague. In order to avoid breaches of Article 8 of the HRA, we suggest that a number of refinements will be necessary. **We challenge in particular the reference to “protection of morals” as a ground for interception and retention/disclosure.**

Interception is one of the most intrusive types of surveillance that can be undertaken by the State. Interception is not permitted for the ‘protection of morals’ for the rest of the population under the *Regulation of Investigatory Powers Act 2000* and just because this aim forms one of the qualifications inherent in Article 8, it does not mean that such intrusive surveillance will be justified to achieve it. We recommend that this ground is removed. In terms of retention and disclosure, as a minimum, the rules will need to list exhaustively persons to whom disclosure will be permitted.

22. The common law principle of legal professional privilege requires that individuals are entitled to keep communications with the legal advisers confidential. In the European Court of Human Rights, it was held that regular interception of correspondence between a secure category prisoner and his legal team was an infringement of his Article 8 rights.⁸ The consultation proposes violating the principle of legal professional privilege and risks infringing the article 8 rights of children concerned, by stating that *“the interception of that correspondence would only be permitted if the principal is satisfied that the purpose of the communication is the furtherance of a criminal purpose.”* Given the particular vulnerability of detained children, both in terms of their physical and mental wellbeing, we strongly recommend that the greatest protection should be guaranteed to their correspondence, including but not limited to their interactions with lawyers. We are concerned that the approach outlined in the consultation document will not guarantee that protection.

23. We note that under the parallel scheme for adults (Prison Rules, rule 39), privileged mail may only be intercepted *“if the governor has reasonable cause to believe its contents endanger prison security or the safety of others or are otherwise of a criminal nature”*. The threshold for suspicion sets an objective test (*“reasonable cause”*) whereas the proposed test for children is the much weaker and entirely subjective (*“satisfied”*). We also suggest that the reference to mail being *“otherwise of a criminal nature”* is a stricter and clearer test than *“furtherance of a criminal purpose”*. Prison Rules (rule 39(4)) also stipulate that prisoners should be given the opportunity to be present when any such correspondence is opened. **At the very least, children must be afforded the same protections as adults. The Secure College Rules should have an objective basis to justify the opening of correspondence and any rules must include provision allowing the child or a**

⁸ Campbell v The United Kingdom 13590/88

representative of the child to be present when legally privileged material is opened.

Equalities

24. The UK's equalities legislation requires individuals to be treated in accordance with their needs rather than subject to a one size fits all approach. However the consultation paper offers no explanation of how providers will be required to meet their equalities duties, despite recognising that a significant proportion of detained children will possess a protected characteristic. **We strongly recommend that the Ministry of Justice revisits the relevant legislation and includes in the rules clear guidance to providers as to how they will assess and meet the needs of children with a protected characteristic.**

Sara Ogilvie