

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Liberty's response to the draft Home Office DSO on Removal from Association and Temporary Confinement

1. Liberty believes that the use of limitless detention – unashamedly for administrative convenience and far removed from the enforcement of removal decisions – leaves a dark stain on this country’s human rights record. The very fact that the Government claims to need powers of segregation in facilities for administrative detention demonstrates the extent to which this country has come to conflate immigration with criminality, extending punitive and harmful measures to innocent and vulnerable people.
2. Segregation is the high water mark of inhumanity in the immigration detention estate, leading to *“increased rates of anxiety, social withdrawal, perceptual disorders, hallucinations and suicidal thoughts after relatively short periods.”*¹ The UN Special Rapporteur on Torture warns of the risk of permanent negative effects where segregation exceeds 15 days.² The use of segregation in prisons – to which individuals have been confined after conviction for a crime – is regulated and monitored because, as the European Court of Human Rights has stated, *“solitary confinement is one of the most serious measures which can be imposed within a prison”*.³
3. There is ample evidence that this cruel practice is being misused within the immigration detention estate. Systemic problems with the use of segregation have been described in successive HMIP reports, including excessive lengths of time spent in segregation; abusive repeat segregation; use of segregation in relation to individuals who

¹ Medical Justice, ‘A SECRET PUNISHMENT’ - THE MISUSE OF SEGREGATION IN IMMIGRATION DETENTION, p. 5.

² UN, *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. Torture and other cruel, inhuman or degrading treatment or punishment - Note by the SecretaryGeneral*. United Nations General Assembly. 5 August 2011, A/66/268, <http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf>. 2011.

³ See *AB v. Russia* (App. No. 1439/06), paragraph 104.

are mentally ill; and routine use of the powers where it is unnecessary and in breach of the Detention Centre Rules.⁴

4. This is the first time a DSO has been produced governing the use of segregation and it provides no reassurance that the bad practice which has come to characterise this system will be mitigated. Liberty has four overriding concerns with this document which should not be read as an exhaustive list of its inadequacies.

Segregation of “refractory detainees”

5. Rule 40 of the Detention Centre Rules provides for the “*Removal from Association*” of individuals where “*it appears necessary in the interests of security or safety*” that he or she “*should not associate*” with others in the facility. Rule 42 provides for the “Temporary Confinement” of individuals, where they are “refractory or violent”, in “special accommodation”, provided that they are not so confined “*as a punishment*” or after he or she has “*ceased to be refractory or violent*”.

6. The proposed DSO defines, without comment, the phrase, ‘refractory detainee’, as “*someone who is stubborn, unmanageable or disobedient*”. The enforced segregation of individuals on their basis of the view of detention staff that they are ‘stubborn’ is completely unacceptable. There is further no guidance on the circumstances in which an individual is deemed to be ‘unmanageable’ or ‘disobedient’.

7. In recent years repeat failures to meet basic standards in IRCs have emerged including unsanitary conditions, failures to meet the needs of individuals with disabilities and a disregard for the dignity and privacy of female detainees.⁵ The draft DSO leaves individuals at risk of being segregated for speaking out against the conditions of their detention, or simply disagreeing with their treatment by detention centre staff. There is disturbing evidence that this is already happening. In 2015, a woman in Yarl’s Wood was placed in segregation as a result of wearing a T-shirt on which the words, ‘We want

⁴ See e.g. HMIP, *Report on an unannounced inspection of Harmondsworth Immigration Removal Centre*, 5–16 August 2013; HMIP, *Report on an unannounced inspection of Yarl’s Wood Immigration Removal Centre*, 13 April – 1 May 2015; HMIP, *Announced inspection of Yarl’s Wood Immigration Removal Centre*, 4–8 February 2008.

⁵ See e.g. HMIP, *Report on an unannounced inspection of Yarl’s Wood Immigration Removal Centre*, 13 April – 1 May 2015, and Stephen Shaw, *A Review into the Welfare in Detention of Vulnerable Persons*, January 2016.

freedom’, were written.⁶ Medical Justice further detail the case of Ms R, who sought to peacefully protest against conditions in Yarl’s Wood, resulting in her segregation for 14-15 days.⁷

8. Moreover, there is considerable evidence to suggest that segregation is used punitively and retributively as an arbitrary sanction for non-compliance with staff requirements. Reports from HMIP found that, in Harmondsworth IRC, segregation was used as an “*unofficial sanction*’ for non-compliance”, “*when there is no risk of harm to staff or detainees*”, contrary to the Detention Centre Rules.⁸ An HMIP Inspection of Brook House IRC found that segregation was used “*on a daily basis as a punitive response to disruptive or non-compliant behaviour and not on the basis of assessed risk of harm in accordance with Detention Centre rules.*⁹

9. The draft DSO provides no safeguards against the use of segregation as an arbitrary and informal punishment for individuals deemed by detention centre staff, outside any formal disciplinary process, as non-compliant or disobedient.

Extended and repeat segregation

10. Paragraphs 11 – 14 of the draft DSO address the time period for which somebody may face segregation. Rule 40 of the Detention Centre Rules provides for an initial period of removal from association of 24 hours. Rule 40(3) expressly provides that detention may only be extended beyond 24 hours, and to a maximum of 14 days, on the authority of the Secretary of State. No provision is made in the secondary legislation for detention beyond 14 days yet, in a disturbing and illegitimate move, the DSO purports to allow for detention beyond this maximum period.¹⁰

⁶ See Right to Remain, “WE WANT FREEDOM”: the women of Yarl’s Wood demand to be heard’, 20 July 2015, available here: <http://www.rightrightremain.org.uk/blog/we-want-freedom-emergency-action-needed/>.

⁷ See Medical Justice, 2016, p. 60.

⁸ See Her Majesty’s Chief Inspector of Prisons, ‘Report on an unannounced inspection of HAslar Immigration Removal Centre’, available here: http://www.justiceinspectortates.gov.uk/prisons/wp-content/uploads/sites/4/2014/03/Haslar_2009_rps.pdf, p. 52.

⁹ Her Majesty’s Chief Inspector of Prisons, ‘Report on a full announced inspection of Brook House Immigration Removal Centre’, 15-19 March 2010, available here:

http://www.gdwg.org.uk/media/news_2010jul-HMIP-report-IRC-Brook-House.pdf, p. 11.

¹⁰ Paragraph 13 provides: “Authorisation must be sought from the HOIE Area Manager for any use of Rule 40 beyond the maximum period of 14 days”.

11. The DSO similarly attempts to create the possibility of confinement beyond the maximum period of 3 days provided for at Rule 42 of the Detention Centre Rules.¹¹ The draft DSO further does nothing to safeguard against repeat use of segregation.

12. The time periods prescribed in legislation already allow for inappropriately extensive use of segregation and there are frequent recorded incidences of detainees being held for longer than is necessary. A 2015 inspection report of Yarl's Wood made clear that segregation was used for too long and a 2013 report on Harmondsworth IRC concluded that removal from association was used for routine lengths of time to provide a “cooling-off period”.¹² HMIP noted that this was “*contrary to Rule 40 of the Detention Centre Rules... which only allow separation to manage clear and immediate risk*”.¹³ This report further concluded that detainees remained segregated in circumstances where there was no evidence of continuing risk.

13. Shocking examples of repeat or extended use of segregation have emerged in recent years, including an individual held virtually continuously in segregation in Harmondsworth IRC for 22 months and another man for nearly 4 months.¹⁴ Both of these individuals behaved in a way which suggested they were suffering from mental health problems. Multiple examples have emerged of women segregated excessively and inappropriately at Yarl's Wood, including “*a clearly mentally ill woman who had been segregated on 8 separate occasions due to behaviour which should have been properly understood as a symptom of her mental health issues.*”¹⁵

14. In light of the reality of misuse and as a bare minimum of protection, sections of the guidance which undermine the maximum limits prescribed in the DSO must be removed and a clear procedure preventing against abuses of the system through repeat segregation established.

¹¹ Paragraph 14 provides: “Authorisation must be sought from the HOIE Area Manager for any use of Rule 42 beyond the maximum period of 3 days”.

¹² HMIP, *Report on an unannounced inspection of Harmondsworth Immigration Removal Centre*, 5–16 August 2013.

¹³ *Ibid.*, paragraph 29.

¹⁴ Harmondsworth Independent Monitoring Board (IMB), *Annual Report for 2012*, paragraph 14 and Harmondsworth IMB, *Annual Report for 2011*, paragraph 15.

¹⁵ Yarl's Wood IMB, *Annual Report 2014*.

Segregation of those with physical and mental health problems

15. Paragraph 45 of the DSO states that “*when medical advice is given that locating the detainee in Rule 40/42 accommodation would be seriously detrimental to a detainee’s health or is life threatening, the multi-disciplinary team should urgently consider this advice*”. The threshold for considering medical opinion is set unacceptably high. The guidance again appears to frustrate provisions of secondary legislation which provides that “*The manager may arrange at his discretion for such a detained person to resume association with other detained persons, and shall do so if in any case the medical practitioner so advises on medical grounds*”.¹⁶ The DSO must be amended to ensure that where medical advice suggests that segregation would harm an individual’s health in any way, it must not simply be considered but heeded.

16. The DSO further specifically allows for use of segregation as a way to manage those at risk of suicide and self-harm. This amounts to the use of segregation in circumstances where, far from facing a punitive restriction of liberty, an individual should not be in immigration detention at all. Earlier this year, Stephen Shaw produced comprehensive report on the Welfare in Detention of Vulnerable Detainees. He drew on evidence from all corners of the globe that immigration detention has a negative impact on detainees’ mental health – and that the impact increases the longer detention continues. For the many people suffering from serious mental illness in our detention estate, Shaw argued for a removal of the caveat that detention can continue where a condition can be “managed” in detention, concluding: “*people with serious mental illness continue to be held in detention and that their treatment and care does not and cannot equate to good psychiatric practice (whether or not it is ‘satisfactorily managed’). Such a situation is an affront to civilised values*”.¹⁷

17. In its comprehensive report on the misuse of segregation in the immigration detention estate, Medical Justice describe a shocking array of cases in which segregation is threatened or used against individuals deemed to be “unmanageable” as a result of their mental illness.¹⁸ This is particularly disturbing as the draft DSO provides for insufficient healthcare involvement a person’s segregation. Whilst the DSO provides for the hourly observation of those segregated, this is proposed to be undertaken by an “assigned officer”, rather than by anyone qualified to assess the person’s health. In fact, the draft

¹⁶ Detention Centre Rules, Rule 40(7).

¹⁷ Stephen Shaw review, paragraph 4.36.

¹⁸ See Medical Justice, 2016, pp. 58 and 61-84.

DSO only provides for unspecified “Healthcare” to visit the person “within 24 hours of them being located under Rule 40 or Rule 42”, with a target of “within 2 hours or as soon as possible” “where practicable”.

18. In prisons, by contrast, a doctor or registered nurse must complete an initial health screening within 2 hours of a person’s segregation. Where this is not available, a person must be monitored regularly until the screening is conducted, which must be done as soon as possible. A doctor must visit the individual at least every three days thenceforth, with a registered nurse or healthcare officer visiting on all other days, ensuring daily supervision by healthcare staff.¹⁹

19. Seclusion is used in psychiatric hospitals as an exceptional last resort undertaken for the shortest time necessary. Above all, it takes place within a therapeutic environment, and is used only *“where it is of immediate necessity for the purpose of the containment of severe behavioural disturbance which is likely to cause harm to others”*.²⁰ Seclusion must be authorised by a psychiatrist or other medical professional, with documented reporting every 15 minutes, and nursing reviews every two hours, until the involvement of an independent multi-disciplinary team. Moreover, the use of seclusion is subject to review by a court, namely, the Mental Health Tribunal. Indeed, the European Court of Human Rights has found that the use of any form of solitary confinement must be subject to strong periodic review.²¹

20. Even within the therapeutic setting of a psychiatric hospital, seclusion is subject to real safeguards on its use. Immigration removal centres routinely detain individuals with serious mental illnesses, and have repeatedly been found to have detained such persons unlawfully. This DSO further displays complete contempt for procedural fairness by failing to make any provision for communicating in an appropriate manner with those who lack capacity.

¹⁹ For all rules governing the segregation regime, see Prison Service Order 1700, available here: <https://www.justice.gov.uk/offenders/psos>, including ‘Reviewing and Authorising Continuing Segregation & Temporary Confinement in Special Accommodation: Amendment to Policy set out in PSO 1700’, September 2015.

²⁰ See Mental Health Act 1983 Code of Practice, in particular 26.103 onwards. available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/435512/MHA_Code_of_Practice.PDF.

²¹ See *Ramirez Sanchez v France* (App. No. 59450/00).

Fewer procedural protections than the prison regime

21. Individuals who are lawfully imprisoned pursuant to convictions benefit from stronger safeguards around segregation than individuals detained for the convenience of the Home Office. The use of segregation in prisons has been multiply scrutinised by the UK's courts found to breach human rights. In 2015, for example, the Supreme Court found that solitary confinement not authorised under the applicable rules was a breach of Article 8 of the Human Rights Act.²² And the Prisons Rules governing the use of solitary confinement have been strictly interpreted in view of the need for oversight and procedural fairness, and especially in light of the profoundly damaging effects of solitary confinement.²³
22. The oversight of segregation decisions in prisons provide that an initial decision to segregate a prisoner may be made by the prison Governor for up to 72 hours. For segregation beyond 72 hours, and within a maximum period of 14 days, an Independent Review Board must assess the decision. As the Supreme Court recently held, the final decision to segregate an individual for longer than 72 hours must be made by the Secretary of State, and the prisoner must be permitted to exercise his right to make representations as to his or her segregation.²⁴
23. The draft DSO, by contrast, proposes that any use of Rules 40 or 42 for an initial 24-hour period need only be authorised by a manager. For any use of Rule 40 for longer than 24 hours, within a maximum 14-day period, requires written authorisation from another, more senior manager of the facility. In respect of the prison system, the Supreme Court recently found that any safeguard on lengthy segregation “*can only be meaningful if the function...is performed by an official from outside the prison*”.²⁵
24. There is further nothing in the draft which addresses an individual’s ability to make representations to the manager authorising segregation. This is a basic requirement of procedural fairness, and a crucial safeguard against the abusive or inappropriate use of segregation. As the Supreme Court has found in the case of the prison system, “...a

²² *Shahid v. Scottish Ministers (Scotland)* [2015] UKSC 58.

²³ *R (on the application of Bourgass and another) v Secretary of State for Justice* [2015] UKSC 54.

²⁴ See *Bourgass*.

²⁵ See *Bougass*, paragraph 88.

prisoner should normally have a reasonable opportunity to make representations before a decision is taken by the Secretary of State [to segregate him or her]".²⁶

25. Individuals facing segregation must be given an opportunity to exercise their right to make representations at the earliest possible opportunity, if practically feasible at the beginning of their segregation but, at the very latest, before the decision to segregate for longer than 24 hours is to be made. Translation facilities must be provided immediately to individuals unable or unwilling to make their representations fully in English.

26. Additionally, it must be made a requirement that, when an individual is placed in segregation, his or her lawyer is immediately contacted. Moreover, the current draft of the DSO is worded in a manner that places insufficient stress on the importance of an individual's right to the confidentiality of meetings with visitors when in segregation. The DSO must be reworded to state that the detainee has a right to speak to visitors in complete confidence, a right which may only exceptionally be limited where there is a real risk of serious harm to others.

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²⁶ See Bourgass, paragraph 98. Moreover, a detainee must "normally be informed of the substance of the matters on the basis of which the authority of the Secretary of State is sought", since the right to make representations will be "largely valueless unless he knows the substance of the case being advanced in sufficient detail to enable him to respond", Bourgass, paragraph 100.