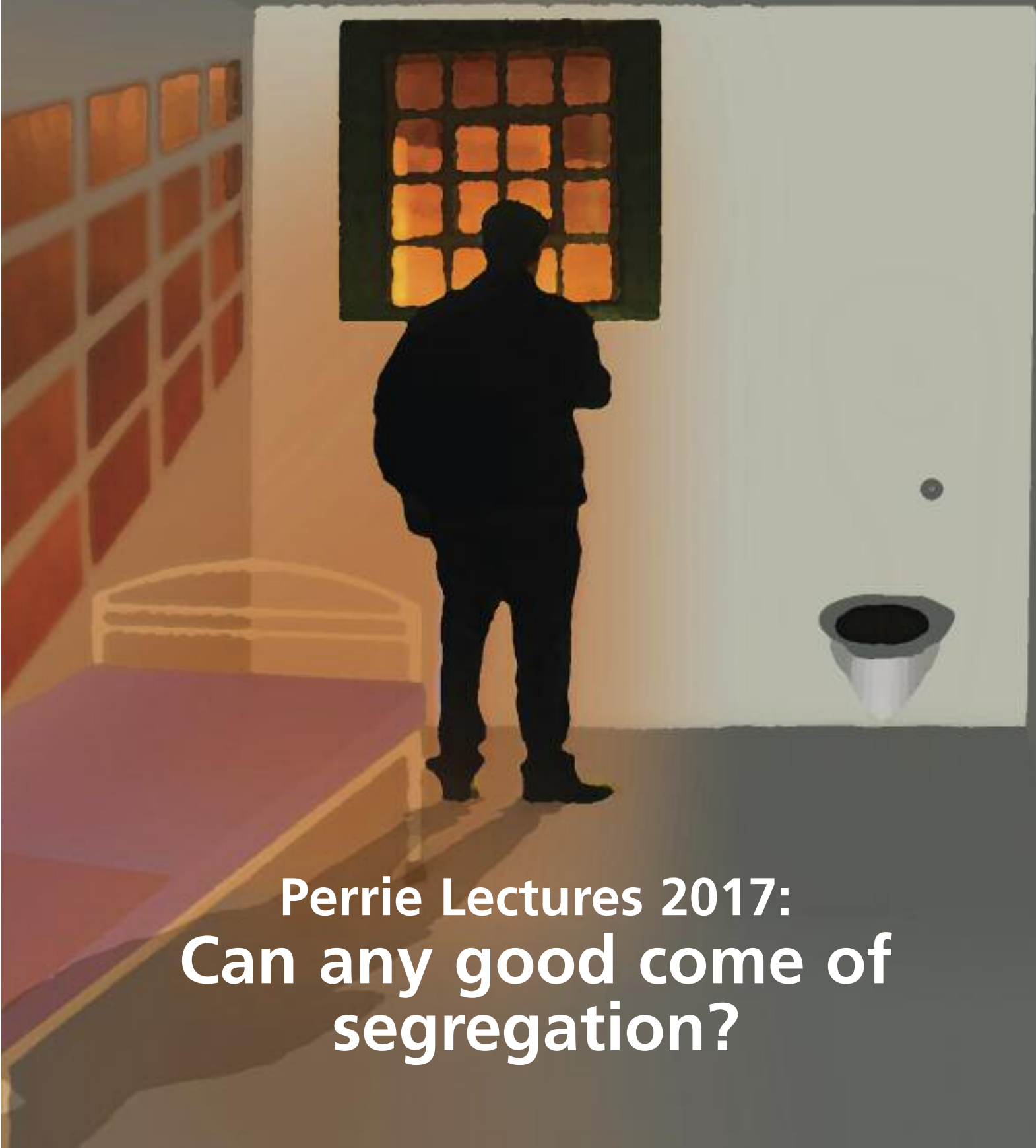


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**Perrie Lectures 2017:
Can any good come of
segregation?**

The isolation of children in prison

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On average, one in every three children in penal custody under the age of 18 is likely to spend time in isolation.¹ Isolation might involve a child being locked in their cell for short or prolonged periods when children would ordinarily be allowed out of their cells. Her Majesty's Inspectorate of Prisons (HMIP) has an expectation that children should be allowed out of their cells for ten hours each day.² Isolation could be for behavioural reasons or as a result of staff shortages. However, isolation will also include time spent in a segregation unit pending adjudication or for reasons of 'good order and discipline'.

Isolation may also include solitary confinement, which is defined in the Istanbul Statement on the Use and Effects of Solitary Confinement, adopted on 9 December 2007, as 'the physical isolation of individuals who are confined to their cells for twenty-two to twenty-four hours a day... Meaningful contact with other people is typically reduced to a minimum'.³ Prolonged solitary confinement is said to be solitary confinement for over 14 days. This definition is not restricted to adults. However the Mandela Rules,⁴ another UN set of standards, envisages that solitary confinement should never be used for children.

As this article deals with children, the broader term, 'isolation' is used.

There are very stringent legal restrictions and safeguards surrounding the isolation of children in prison. Given the irreversible damage that isolation is considered to cause in fully grown adults, there is good reason for this.

Yet these restrictions do not appear to have the effect of curbing the use of isolation for children. Evidence gathered from independent reports and the experience of the Howard League for Penal Reform's specialist legal team for children in prison suggests that the prevalence of child isolation in penal custody in England and Wales requires urgent attention.

Since 2002 the Howard League has run the only legal service dedicated to children and young people in prison in England and Wales. We have worked with many children in isolation through our legal service. The legal work provides the Howard League with a unique perspective on the experience of children in the secure penal estate, what isolation and segregation mean in practice for children, and how the application of isolation to children should be perceived differently from its application to adults.

This article aims to put these issues into context through a brief survey of the characteristics of children in prison, evidence as to the prevalence and impact of isolation in prison, an analysis of the applicable law, lessons from our legal work and some reflections to inform future thinking.

Children in prison today — lonely and unsafe

As of July 2017, there were 924 children in the penal system.

Child arrests have reduced by 64 per cent since 2010 to just over 85,000 in 2016.⁵ The child prison population has reduced by two-thirds in ten years. While it is positive that the number of children in prison has reduced, the reduction has not been equally advantageous to all children. Black and Minority Ethnic (BAME) children make up almost half of all children in prison. Looked-after children are also over-represented in prison.

Fifteen years on from the Howard League's landmark case on the application of the Children's Act for children in custody, Mr. Justice Munby's analysis of the characteristics of children in prison remains sadly relevant:

[Children in custody] are, on any view, vulnerable and needy children. Disproportionately they come from chaotic

1. Office of the Children's Commissioner (2015) 'Isolation and Solitary Confinement of Children in the English Youth Justice Secure Estate' pp. 1-68. Available at: http://solitaryconfinement.org/uploads/Unlocking_Potential_-_supporting_research_1.pdf
2. HMIP (2017) Annual Report 2016-17, pp.1-114. Available at: http://www.justiceinspectorates.gov.uk/hmiprisoners/wp-content/uploads/sites/4/2017/07/HMIP-AR_2016-17_CONTENT_11-07-17-WEB.pdf
3. Istanbul Statement On The Use And Effects Of Solitary Confinement (2007), pp. 1-5 Available at: http://solitaryconfinement.org/uploads/Istanbul_expert_statement_on_sc.pdf p.1
4. 'Mandela Rules' (2015) UN Resolution 70/175 70/175. United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) / Available at: <https://cdn.penalreform.org/wp-content/uploads/1957/06/ENG.pdf>
5. Howard League (2017) Child arrests in England and Wales fall by 64 per cent in six years. Available at: <http://howardleague.org/news/childarrests2016/>

backgrounds. Many have suffered abuse or neglect. The view of the Howard League is that they need help, protection and support if future offending is to be prevented.

Statistics gathered by the Howard League from a variety of governmental and non-governmental sources in the period 1997-2000 paint a deeply disturbing picture of the YOI population. Over half of the children in YOIs have been in care. Significant percentages report having suffered or experienced abuse of a violent, sexual or emotional nature. A very large percentage have run away from home at some time or another. Very significant percentages were not living with either parent prior to coming into custody and were either homeless or living in insecure accommodation. Over half were not attending school, either because they had been permanently excluded or because of long-term non-attendance. Over three-quarters had no educational qualifications. Two-thirds of those who could be employed were in fact unemployed. Many reported problems relating to drug or alcohol use. Many had a history of treatment for mental health problems. Disturbingly high percentages had considered or even attempted suicide.⁶

According to recently published data by the Ministry of Justice,⁷ in 2015/2016 on average there were:

- ❑ **19 assaults** per 100 young people in custody per month. An increase of **95 per cent** from 2010/11
- ❑ **28 incidents of Restrictive Physical Intervention (RPI)** per 100 young people in custody per month. An increase of **36 per cent** from 2010/11
- ❑ **9 incidents of self harm** per 100 young people in custody per month. An increase of **120 per cent** from 2010/11

The prevalence of isolation is not captured by these statistics.

Prevalence of isolation in the children's secure estate

As late as November 2016, the Ministry of Justice refused to answer a Parliamentary Question as to how many times children have been placed in segregation units in each month since January 2015 on the grounds that the information requested could only be obtained at disproportionate cost.⁸

Whilst the lack of centrally-held data on isolation means that it is impossible to quantify the extent to which children are held in segregation, let alone isolation more generally, HMIP's annual report highlighted that 38 per cent of boys reported spending a night in a care and separation (segregation) unit.⁹

HMIP also reports large discrepancies in the uses of segregation across the country HMYO's.¹⁰ Segregation was rare for boys at Keppel, a specialist unit within HM YOI Wetherby, and the lack of a dedicated segregation unit meant use of segregation at Parc was commendably low. But segregation had increased at Cookham Wood and was unchanged at Wetherby; both units were inadequate.¹¹ HMIP also expressed concern that during roll checks, inspectors 'found around a third of children locked in their cells on each inspection. Parc was the only YOI to meet our expectation of providing 10 hours a day out of cell'.¹²

The prevalence of isolation at Feltham was particularly striking according to a 2017 inspection during which 'more than a quarter of the population were being managed on units on a restricted regime which excluded activities and meant that they were unlocked from their cells for less than an hour every day'.¹³

A report by the Committee for the Prevention of Torture, published in 2017, painted a vivid picture of the reality of isolation for children in prison at Cookham Wood:

The delegation interviewed one juvenile who spent 23.5 hours a day lying on his bed, under

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6. The Queen (on the Application of the Howard League) v Secretary of State for the Home Department and the Department of Health [2003] 1 FLR 484.
 7. Ministry of Justice (2017) Key Characteristics of Admissions to Youth Custody April 2014 to March 2016, pp.1-49. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/585991/key-characteristics-of-admissions-april-2014-to-march-2016.pdf
 8. Hansard (2016) Written Parliamentary Questions and Answer 53548, Available at: <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-11-17/53548/>
 9. HMIP (2017) see n.2 p.63.
 10. Ibid (p.63).
 11. Ibid (p.63).
 12. Ibid (p.65).
 13. HMIP (2017) Report of an unannounced inspection of HMYOI Feltham (Feltham A – children and young people), pp. 1-114. Available at: <https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2017/06/Feltham-A-Web-2017.pdf> p.27.

*his covers, blankly looking at a TV screen, talking and meeting no one. It also met a 15-year-old who had been held in these conditions for several weeks and he had no information about how much longer he would be held under such a restricted regime. They were effectively being held in conditions of solitary confinement. In the CPT's view, holding juvenile inmates in such conditions amounts to inhuman and degrading treatment.*¹⁴

The Office of the Children's Commissioner has noted that, 'isolation is typically not a one-off event. Once a child has been in isolation once, they are likely to be isolated at least once more before leaving the establishment'.¹⁵ BAME children are further disproportionately represented amongst those held in isolation. Compared to White British/White Other children, children of Black/Mixed ethnicity were three times (300 per cent) more likely to find themselves in isolation and looked after children were 63 per cent more likely to be isolated than other children.¹⁶

The consequences of isolation: education, regime and mental health

Regardless of the prevalence of isolation within the estate as a whole, the evidence suggests that the impact on any given child can be severe, ranging from exposing children to unsuitable environments, preventing access to education and other aspects of the regime, to psychological and even psychiatric damage.

A report on Feltham in 2017 stated 'boys were still being held in segregation on the young adult site. The environment remained unsuitable for children'.¹⁷ In the case of Cookham Wood, the 2015-16 IMB report criticized the physical environment in which people are held in isolation, stating '[t]he physical environment for

young people in the Phoenix (segregation) unit is very poor — narrow corridors, little natural light, a cramped, box-like exercise yard, and no in-cell telephone or showers'.¹⁸

Whilst recent inspections at Werrington have found some improvement in practice as concerns isolation and segregation, the capacity of the segregation unit and the amount of time young people spent in segregation were nonetheless raised as points of concern. The IMB reported that '[t]he Care and Support unit is often full, and occasionally overflowing with YPs having to remain in their own cell'.¹⁹ The same report praised a preventive approach to self-segregation at Werrington: 'It was rare for boys to choose to self-isolate on residential units for

a significant time. Procedures were in place to identify boys who did not engage in their scheduled regime for more than an hour. Residential staff spoke to the boy to identify any immediate concerns. If self-isolation extended beyond 14 hours, senior managers were informed and an enhanced separation log was opened...The positive ethos in the segregation unit had led to the development of an action plan to achieve enabling environment accreditation'.²⁰

Robust mechanisms to respond to the use of self-imposed isolation chime with the growing body of international and domestic evidence on the

potentially damaging effects of solitary confinement. In *R (on the application of Borgass) v Secretary of State for Justice* [2015] UKSC 54, the Court recognised that 'prolonged' solitary confinement in excess of 15 consecutive days can have an 'extremely damaging effect on ... mental, somatic and social health', and 'some of the harmful psychological effects of isolation can become irreversible' and can prevent a prisoner from 'successfully readjusting to life within the broader prison population and severely impair their capacity to reintegrate into society when released from prison'.²¹

...isolation is typically not a one-off event. Once a child has been in isolation once, they are likely to be isolated at least once more before leaving the establishment.

14. Council of Europe (2017). Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 30 March to 12 April 2016, p.56.
15. Office of the Children's Commissioner (2015) see n.1 (p.14).
16. Ibid (p.23).
17. HMIP (2017) see n.13 (p.14).
18. IMB (2015-16), Annual report HM YOI Cookham Wood, pp. 1-22. Available at: <https://s3-eu-west-2.amazonaws.com/imb-prod-storage-1ocod6bqky0vo/uploads/2016/11/Cookham-Wood-2015-16.pdf>, p.15.
19. IMB (2015-16), Annual report HMYOI Werrington, pp.1-21. Available at: <https://s3-eu-west-2.amazonaws.com/imb-prod-storage-1ocod6bqky0vo/uploads/2016/10/Werrington-2015-16.pdf>, p.14.
20. HMIP (2017b) Report of an unannounced inspection of HMYOI Werrington, pp.1-116. Available at: <https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2017/07/Werrington-Web-2017.pdf>, p.30.
21. Reference missing, paragraphs 37 & 39.

In respect of the impact on children, a recent judgment by a District Court Judge for New York accepted expert evidence that:

*solitary confinement perpetuates, worsens, or even in some cases precipitates mental health concerns that can lead to long-term and often permanent changes in adolescent brain development*²²

VW and others v Eugene Conway, Onondaga County Sheriff [2017] WL 696808.

The use of isolation for children in detention settings in the UK is monitored by the National Preventive Mechanism (NPM). The NPM is made up of bodies that monitor detention facilities in the UK and is coordinated by HM Inspectorate of Prisons (England and Wales). In its sixth annual report, 'Monitoring Places of Detention', for 2014-5 the NPM concluded:

As children have not fully developed cognitively, mentally or emotionally, the possibility that isolation or solitary confinement could cause lasting harm cannot be dismissed. This provides a rationale for rigorous scrutiny of practices that amount to isolation and solitary confinement by NPM members. Children should not be isolated as a punishment, and should never be held in conditions that amount to solitary confinement'.²³

The harmful long-term impact of isolation on children has also been affirmed by the Office of the Children's Commissioner, whose research concluded:

The overall impact of isolation on a child is profound. Mental health issues are likely to be exacerbated and self-harm, although not extremely common, can happen during a prolonged isolation. Interviewed staff and children agree that isolation does not address the deep-rooted causes of a child's behaviour. Prolonged or frequent isolation can often serve to worsen these problems as the children fail to learn the important lessons of social order and interaction which they will need when they leave the establishment. In that sense, isolation can have a long-term negative impact on a vulnerable child and can contribute to the perpetual vicious cycle of release and re-offending'.²⁴

Legal frameworks

Given the potential risks associated with isolation, it is only right that the practice should be subject to a robust legal framework. The relevant legal framework comprises of:

- ❑ YOI Rules;
- ❑ Prison service policy;
- ❑ Domestic law including child protection and human rights; and
- ❑ International norms/standards and children's rights.

Section 47 (1) of the Prisons Act 1952 permits the Secretary of State to make rules for the regulation and management of Young Offenders Institutions (YOIs). These rules take the form of the YOI Rules and as such, they must be followed. Rule 3 of the YOI Rules aims to help children prepare for their return to the outside community by:

- ❑ providing a programme of activities, including education, training and work designed to assist offenders to acquire or develop personal responsibility, self-discipline, physical fitness, interests and skills and to obtain suitable employment after release;
- ❑ fostering links between the child and the outside community; and
- ❑ co-operating with the services responsible for the child's supervision after release.

Additionally, Rule 41 requires that children must have at least two hours physical education a week and Rule 38 provides that children of school age must get at least 15 hours education a week. None of these things are possible if a child is isolated.

Further, if a child participates in 15 hours of education a week, plus two hours of physical education a week, maths dictates that the child will not be kept in his cell for over 22 hours a day of the week and solitary confinement will at least be avoided. It is therefore surprising that solitary confinement remains a live issue for so many children. The High Court has recently noted that the education requirements are strict. In *R (AB) v Secretary of State for Justice* [2017] EWHC 1694, Mr. Justice Ouseley made the following comments in respect of the requirements imposed by Rule 38 of the YOI Rules:

It has not been possible to provide [education] because not enough thought, effort and resources have been put into it. I understand how doing so removes resources from elsewhere for someone who may not be thought deserving of so much attention. But

22. VW and others v Eugene Conway, Onondaga County Sheriff [2017] WL 696808.

23. NPM (2014-15) Monitoring Places of Detention, pp.1-84. Available at: <https://s3-eu-west-2.amazonaws.com/npm-prod-storage-19n0nag2nk8xk/uploads/2015/12/NPM-Annual-Report-2014-15-web.pdf>, p.34.

24. Office of the Children's Commissioner (2015) see n.1 (p.65).

*that is not what the Rule permits, and there are obvious reasons why those who are troublesome in the way AB is and for the reasons he is, cannot be left merely to drift in their education, as if they were responsible adults making adult choices. He is in his GCSE year and has special educational needs.*²⁵

Conversely, the ability of a governor to remove a child from association is only permitted under Rule 49 and only then when 'it appears desirable, for the maintenance of good order or discipline or in his own interests' and 'for up to 72 hours', although following the case of *R (on the application of SP) v Secretary of State for the Home Department* [2004] EWCA Civ 1750 brought by the Howard League in 2004, a child ought to have an opportunity to make representations before the decision to segregate is made. After 72 hours, a system of further checks and safeguards kick in. Following the Supreme Court judgment in *Bourgass* and in line with prison service policy, a governor must obtain leave from the Secretary of State in writing to authorise removal from association beyond 21 days in the case of a child. This is different from the requirements for adults where external authorization is only required after 42 days. However, both longstop periods fall beyond the 15-day mark recognised by international experts and accepted by the Supreme Court as the potential point at which irreversible damage sets in. Meaningful reasons must be given for segregation to continue.

In addition to the specific law affecting the segregation of children, it has been accepted that segregation falls within the ambit of Article 8 of the European Convention on Human Rights, which protects the right to personal development. It was also argued in *R (AB)* that isolation was inhuman and degrading, although the High Court did not find that.

Where children's human rights are engaged, the English courts have found that the provisions of the United Nations Convention on the Rights of the Child (UNCRC) can be 'properly be consulted insofar as they proclaim, reaffirm or elucidate' those rights.²⁶ In the case of a child who is isolated, the requirements under

the UNCRC to act in the best interests of the child (Article 3) and ensure the child is 'treated in a manner consistent with the promotion of the child's sense of dignity and worth' (Article 40) are particularly relevant. A highly critical report published on 12 July 2016 by the UNCRC found the UK Government to be failing to meet international standards on the treatment of children.²⁷ Their concerns included the use of solitary confinement for children.

Learning from Howard League's legal work and reflections

Over the years, the Howard League has worked with many children and young people who have been placed in conditions of isolation and solitary confinement. On several occasions the legal team has brought cases to challenge various aspects of this practice, helping to develop and shape the law in this area.

As a result of a number of cases brought by the Howard League legal team, it should now be clear that ad hoc systems that result in the isolation of children but fall outside the prison rules are simply unlawful. This has been reinforced by the High Court time and again in cases challenging shadow regimes in three children's prisons, including *R (AB)* which concerned the isolation of a 15 year old child at Feltham, who Mr. Justice Ouseley said was 'in his cell for over 22 hours a day for more than 15 days at a stretch'.²⁸

Yet there are many cases that do not go to court but result in changes. For example, until recently there has been no central data on the proportion of children segregated who are BAME. However, in response to the threat of legal challenge the Ministry of Justice has now agreed to collect this data.²⁹

It is also of concern that despite clear rulings from the Courts about the strict legal requirements governing isolation, children continue to experience unlawful isolation, routinely accompanied by exclusion from education. Prison staff need to be better supported to ensure this does not happen. A parent who failed to send their child to school but locked them in their room for hours on end would expect to be subject to a child protection investigation at the very least.

25. *R(AB) v Secretary of State for Justice* [2017] EWH 1694, para 31.

26. **Reference missing – (Howard League [2002] para 51).**

27. UN Convention on the Rights of the Child. (2016). Committee on the Rights of the Child: Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland. [online]. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGBR%2fCO%2f5&Lang=en

28. See n.25 (para 133).

29. Crook, F. (2017). Monitoring isolation of children in prison. [Blog] Frances Crook's blog. Available at: <http://howardleague.org/blog/monitoring-isolation-of-children-in-prison/>