Torture in the UK: update report

Submission to the UN Committee Against Torture in response to the UK List of Issues

May 2019
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<td>ATU</td>
<td>Assessment and Treatment Unit</td>
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<tr>
<td>CAMHS</td>
<td>Child and Adolescent Mental Health Services</td>
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<td>CAT</td>
<td>United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</td>
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<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination Against Women</td>
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<td>CCE</td>
<td>Children’s Commissioner for England</td>
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<td>CICA</td>
<td>Criminal Injuries Compensation Authority</td>
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<td>CJA</td>
<td>Criminal Justice Act</td>
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<td>CMP</td>
<td>Closed Material Procedure</td>
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<td>CO</td>
<td>Concluding Observations</td>
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<td>CPS</td>
<td>Crown Prosecution Service</td>
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<td>CPT</td>
<td>European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment</td>
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<td>Counter-Terrorism and Security Act</td>
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<td>DoLS</td>
<td>Deprivation of Liberty Safeguards</td>
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<td>DWA</td>
<td>Deportation with assurances</td>
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<td>ECF</td>
<td>Exceptional case funding</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>EHRC</td>
<td>Equality and Human Rights Commission</td>
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<td>EU</td>
<td>European Union</td>
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<td>FGM</td>
<td>Female genital mutilation</td>
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<td>HMIC</td>
<td>HM Inspector of Constabulary</td>
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<td>HMICFRS</td>
<td>Her Majesty’s Inspectorate of Constabulary and Fire and Rescue Services</td>
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<td>Abbreviation</td>
<td>Full Form</td>
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<td>HMIP</td>
<td>HM Inspectorate of Prisons</td>
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<td>HM Prisons and Probation Service</td>
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<td>Human Rights Act</td>
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<td>Healthcare Services Safety Investigation Branch</td>
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<td>Iraq Historic Allegations Team</td>
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<td>Independent Inquiry into Child Sexual Abuse</td>
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<td>Immigration Removal Centre</td>
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<td>Intelligence and Security Committee</td>
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<td>Joint Committee on Human Rights</td>
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<td>JSA</td>
<td>Justice and Security Act</td>
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<td>LASPO</td>
<td>Legal Aid, Sentencing and Punishment of Offenders Act 2012</td>
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<td>MCA</td>
<td>Mental Capacity Act</td>
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<td>Mental Health Act</td>
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<td>National human rights institution</td>
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<td>National Preventive Mechanism</td>
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<td>National Referral Mechanism</td>
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<td>ONS</td>
<td>Office for National Statistics</td>
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<td>OPCAT</td>
<td>Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</td>
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<td>OSJA</td>
<td>Overseas Security and Justice Assistance</td>
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<td>Prison and Probation Ombudsman</td>
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<td>STC</td>
<td>Secure Training Centre</td>
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<td>UK</td>
<td>United Kingdom</td>
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<td>Acronym</td>
<td>Definition</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
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<td>VAWG</td>
<td>Violence against women and girls</td>
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<td>YOI</td>
<td>Young Offender Institution</td>
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Introduction

This report is the response of the Equality and Human Rights Commission (EHRC) to some of the issues raised by the Committee against Torture (the Committee) in its list of issues for the UK published on 7 June 2016.1

This report focuses on relevant developments or evidence that has emerged on the issues we covered in our previous report to the Committee in March 2016.2 The Committee included all of the issues highlighted in our 2016 submission in its list of issues for the UK’s examination. This report also covers a number of additional areas in the Committee’s list of issues, which we did not report on in 2016 but where we consider that aspects of the legal framework, policy or practice may be non-compliant with the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

The report contains 14 chapters, focusing on separate policy issues and settings where torture, cruel, inhuman and degrading treatment may occur. At the start of each chapter we set out the relevant CAT Articles, the Committee’s concluding observations and the relevant paragraphs in the Committee’s list of issues. A standalone list of the recommendations contained within each chapter is also presented as an annex to the report.

The Committee has made it clear that a state is responsible under CAT for the prohibited acts committed by non-state actors where the state has failed to develop an effective framework to prevent and protect the victims.3 The report therefore includes chapters on human trafficking and modern slavery, violence against women and girls, child sexual abuse and hate crime, where the state has responsibility to prevent and protect people from torture or ill-treatment by public and private actors.

An important, cross-cutting area of concern runs through several chapters of the report, namely, the state’s obligation to conduct a prompt and impartial investigation wherever there are grounds to believe that an act of torture has been committed (Article 12, CAT). Articles 2 and 3 of the European Convention on Human Rights (ECHR), which the UK has incorporated in the Human Rights Act 1998 (HRA), also require state parties to carry out an effective investigation into any death for which

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the state might be responsible and into any incident where there are clear indications that serious ill-treatment may have occurred.

Case law\(^4\) makes it clear that the duty to conduct an effective investigation requires the state, among other things, to:\(^5\)

- appoint an investigator independent of those implicated in the incident
- begin the investigation promptly and conclude as quickly as is reasonable
- take all reasonable steps to secure relevant evidence
- make the investigation and its results open to public scrutiny
- hold to account anyone found to be at fault as a result of the investigation, and
- share and put into practice lessons learned from the investigation to ensure, so far as is possible, that steps are then taken to minimise the risk of similar incidents in the future.

This report highlights our concerns about possible non-compliance with one or more of these requirements in the UK Government’s response to allegations of torture and/or ill-treatment of:

- overseas detainees
- people held in immigration removal centres
- children and adults in prisons and police custody
- people receiving health and social care services, and
- victims of violence against women and girls, human trafficking and modern slavery, hate crime and child sexual abuse.

Devolution and the geographic scope of this report

The UK comprises four countries – England, Scotland, Wales and Northern Ireland. The UK Parliament has devolved various powers to the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly. It maintains responsibility for matters that have not been devolved (‘reserved’ matters) and for England. Responsibility for implementing CAT therefore lies with the UK and devolved governments.

This report covers England and Wales for all issues and Scotland for issues that are reserved to the UK Parliament (although in some cases, statistics and evidence for the UK or Great Britain as a whole are presented). The recommendations are addressed to the UK and Welsh Governments only, though they may also be

\(^4\) Al Skeini v UK [2011] (Application No. 61498/08); and R (MM) v SSHD [2012] EWCA Civ 668.

relevant to other devolved administrations. The separate submission of the Scottish Human Rights Commission (SHRC) will cover areas devolved to the Scottish Parliament, and the separate submission of the Northern Ireland Human Rights Commission (NIHRC) will cover Northern Ireland.

**Role and remit of the EHRC**

The EHRC was established by the UK Parliament through the Equality Act 2006 as an independent body with a mandate covering equality and human rights. Among other human rights responsibilities, the EHRC is responsible for ‘encouraging good practice in relation to human rights’. Our geographic remit for human rights covers England and Wales and issues in Scotland that are reserved to the UK Parliament.

The EHRC’s role as a national human rights institution (NHRI) requires the EHRC to assess and report on the UK’s progress in realising the human rights in the treaties it has ratified. The EHRC works with other NHRI s in the UK – the SHRC and the NIHRC – and liaises with government departments and agencies to fulfil this role. All three NHRI s hold ‘A status’ accreditation with the United Nations.

**Engagement with civil society**

As part of the EHRC’s NHRI role in supporting the implementation of international human rights instruments, we conducted a competitive tender in 2017 and appointed REDRESS, the civil society organisation dedicated to ending torture and seeking justice for survivors worldwide, to lead a coalition of civil society organisations to independently submit a joint shadow report to the Committee covering England and Wales.

REDRESS was also provided with EHRC funding to hold consultation events and conduct an online call for evidence on the major issues engaging CAT in England and Wales, to provide training for civil society organisations on how to engage with the CAT treaty reporting process, and to support the attendance of REDRESS at the UK’s forthcoming CAT examination in Geneva.
1. Incorporation of CAT into domestic law

Relates to CAT Articles 1, 2, 4 and 16, Concluding Observations (CO) paragraphs 7, 8, 9 and 10, and list of issues paragraphs 2, 3, 4 and 5)

In its 2016 list of issues, the Committee asked about progress made on incorporating all the provisions of CAT into domestic legislation; on ensuring that the level of protection afforded to the prohibition of torture and ill-treatment provided by the Human Rights Act is not eroded; and the need to publicly acknowledge the extra-territorial applicability of CAT. The Committee also asked for information about measures taken to repeal subsections 134(4) and (5) of the Criminal Justice Act 1988 relating to defences for torture.

The UK has not directly incorporated CAT into domestic law and policy. A number of the UN Convention’s provisions are reflected in domestic legislation, most notably in the Human Rights Act 1998 (HRA), which incorporates the ECHR and its prohibition of torture and inhuman or degrading treatment into domestic law in the UK, and makes it enforceable in UK courts. Human rights are also protected in the devolution statute of Wales.

Recent developments and concerns

Following the EU referendum in June 2016, there continues to be significant constitutional uncertainty in the UK, which poses potential risks for the protection of human rights. In particular the removal of the EU Charter of Fundamental Rights from domestic law through the EU Withdrawal Act may result in a loss or weakening of some rights protections (for example, Article 1 on human dignity). In addition, the UK’s future extradition arrangements with the EU and future funding to prevent violence against children, young people, women and other groups at risk, and for women’s services, including for victims of domestic violence, remain uncertain.

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7 Government of Wales Act 2006.
We welcome the UK Government’s commitment to remain a party to the ECHR in its White Paper, ‘The future relationship between the United Kingdom and the European Union’, published in July 2018.10 This now forms part of the draft agreement with the EU and represents an important departure from previous announcements which had indicated an intention to leave the ECHR. We also note the further pledge in the draft political declaration with the EU of ‘continued adherence and giving effect to the ECHR’.11

Ongoing concerns

Despite the Government’s stated commitment to the ECHR, its ongoing commitment to the HRA remains unclear,12 as previous plans to bring forward proposals on a British Bill of Rights to replace the HRA 1998 continue to surface.13 Our consistently stated position is that changing our human rights laws could have significant constitutional and social consequences and should be considered only as part of a broad and participative process that advances human rights protections by maintaining all the protections in the HRA and building on them.

We are also concerned that the UK Government announced in 2016 that it was considering derogating from the extra-territorial application of the HRA, particularly its applicability to the actions of British forces abroad.14 A derogation would be necessary because the European Court of Human Rights has made the extra-territorial application of the ECHR clear.15 Such a derogation would run counter to the interpretation of CAT by the UN Committee.16

There remain inconsistencies between some domestic legal provisions and the UK’s international obligations under CAT, including section 134 of the Criminal Justice Act (CJA) 1988. Contrary to the Committee’s 2004 and 2013 recommendations,17 the UK Government has reported that it has no plans to repeal subsections 134(4) and

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15 Al-Skeini v United Kingdom (Application No. 55721/07); Al-Saadoon and Mufdhi v United Kingdom (Application No. 61498/08); Al-Jedda v United Kingdom (Application No. 27021/08); Hassan v United Kingdom (Application No. 29750/09).
(5)(b)(iii) of the Act, which provide for the defence of ‘lawful authority, justification or excuse’ to a charge of official intentional infliction of severe pain or suffering (subsection 4), and for the defence of conduct abroad that is permitted under foreign law, even if unlawful under UK law (subsection 5(b)(iii)). There can be no justification for relying on lower torture standards in UK overseas operations; subsection 134(5)(b)(iii) of the CJA 1988 should therefore be repealed.

There is a risk that the defence in subsection 134(4) could also permit conduct prohibited under CAT. While this risk is currently limited by the fact that the provisions must be interpreted in a way that is compatible with the ECHR, so far as is possible, the risk will increase should the Government act upon its proposal to derogate from the ECHR’s extra-territorial application, or repeal or amend the HRA.

A further specific rationale offered by the UK Government for maintaining subsection 134(4) is the broader definition of torture in the CJA 1988 as compared to the definition in CAT. According to the UK Government, repealing the defence would result in prohibiting legitimate conduct by state officials, such as ‘serious injury inflicted by a police officer in the prevention of a crime, even when the offender was injuring another person or attacking the police officer’. Based on this reasoning, the Government should circumscribe the defence by specifying the contexts in which it is deemed to be required.

**Recommendations**

As the UK finalises its withdrawal from the EU, the UK and Welsh Governments, where relevant, should ensure that:

- There is no regression in the respect, protection and fulfilment of human rights as a result of changes to domestic legislation.
- The loss of EU funding does not undermine the UK’s equality and human rights infrastructure, including the already scarce funding available to specialist services, such as those that support women survivors of violence and domestic abuse.

The UK Government should:

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21 Ibid.
• Take steps to incorporate all of the provisions of CAT in UK domestic law, including by repealing subsection 134(5)(b)(iii) of the Criminal Justice Act 1988 which permits reliance on lower torture standards that operate outside the UK.

• Commission an independent review to consider ways to ensure the general defence for torture in section 134(4) of the Criminal Justice Act 1988 is further circumscribed and used only in exceptional situations where the defence is appropriate and necessary in the last resort.

• In any future consideration of the territorial application of the Human Rights Act, accept that its obligations in international law under CAT extend to the operations of British forces overseas and to foreign nationals when they are under de facto UK jurisdiction.

As the Welsh Government considers how it can further progress and safeguard human rights in Wales, it should:

• Consider the steps it can take to incorporate any relevant provisions of CAT in Welsh legislation.
2. Overseas detainees

Relates to CAT Articles 2, 3, 12, 13 and 16, CO paragraphs 11, 15, 16 and 21 and list of issues paragraphs 7, 33 and 34

In its 2016 list of issues, the Committee asked about steps to set up an independent judge-led inquiry into allegations of torture and ill-treatment of detainees held by other countries; the adequacy of the Intelligence and Security Committee as an investigation mechanism; and whether there has been an investigation into the alleged torture of Shaker Aamer. The Committee also asked about measures taken to ensure that all allegations of abuse of Iraqi citizens by British service personnel in Iraq between 2003-2009 are fully investigated and addressed, and that systemic issues are identified, and lessons learned. The Committee requested information on steps taken to reword the consolidated guidance to intelligence officers and service personnel on the detention and interviewing of detainees overseas.

Allegations of UK complicity in the torture and ill-treatment of detainees

In previous submissions to the Committee, the EHRC highlighted our concerns about the limited steps taken to investigate all allegations of torture and ill-treatment by British service personnel and intelligence agencies following the UK Prime Minister’s announcement, in 2010, that the UK would be setting up an independent judge-led inquiry into the allegations.

The official inquiry set up in 2010 was concluded early, on the grounds that its work would interfere with ongoing police investigations into alleged renditions to Libya. In 2013, the inquiry was handed over to the Intelligence and Security Committee of the UK Parliament (ISC). The EHRC criticised this decision given concerns about the ISC’s independence and the UK Government’s power to withhold sensitive information from it. The slow progress of the ISC’s investigation was also criticised by the UN Human Rights Committee in 2015.

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24 UN Human Rights Committee (2015), Concluding observations on the seventh periodic report of the United Kingdom [accessed 9 March 2019].

Equality and Human Rights Commission
Published: May 2019
In June 2018, the ISC published its final report on detainee mistreatment and rendition. The ISC stated that it was not able to provide a definitive account of detainee mistreatment nor to report on individual cases, due to government restrictions on its investigation. Nevertheless, it concluded that, in hundreds of cases between 2001 and 2010, UK security and intelligence personnel either witnessed or were informed of mistreatment of detainees in US-led interviews in Afghanistan, Iraq and Guantanamo Bay. In spite of this knowledge, UK personnel continued to supply the interviewers with intelligence or questions, and/or receive intelligence from them.

The report identified serious deficiencies in the training and support provided to the UK personnel concerned. It also included findings on British involvement in the US-led rendition programme. Although the ISC found no evidence of US rendition flights transiting through the UK with detainees on board, it found that British intelligence personnel endorsed the rendition programme, provided intelligence to facilitate renditions and condoned other renditions by failing to prevent them.

The publication of the ISC’s report led to renewed calls for an independent judge-led inquiry into UK involvement in torture and rendition. The Government finally published its response to the report in November 2018 but did not make any commitment to holding a judge-led inquiry.27

In 2010, former detainees in Guantanamo Bay received substantial compensation packages following the settlement of civil claims against the UK Government for complicity in torture. Shaker Aamer, the last UK resident detained without charges in Guantanamo Bay, was released in 2015.28 As a result of the cases being settled, there have been no indictments or prosecutions of individual intelligence or security officers, nor of their commanders.

Allegations of abuse of Iraqi citizens by British service personnel

There is no definitive account of the scale of abuse of Iraqi citizens by British service personnel in 2003–2009. The Iraq Historic Allegations Team (IHAT), set up by the UK Government in 2010 to investigate allegations of mistreatment by British service personnel in Iraq, was closed on 30 June 2017. At the time of its closure, IHAT had

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26 Ibid.
opened more than 3,000 cases concerning allegations of mistreatment, but these had not led to any prosecutions.29

Supporters of the need for an independent inquiry expressed concerns about IHAT’s limited powers and resources, and IHAT was criticised for ineffectiveness and manipulation by ‘unscrupulous’ human rights lawyers.30 The decision to close IHAT was accelerated by the political reaction to the 2014 judgment in the Al-Sweady inquiry, which found that nine Iraqi detainees had been mistreated but that the most serious allegations against British service personnel had been fabricated.31

The small proportion of IHAT investigations which remain open have been reintegrated back into the service police system.32 Over the years, criminal investigations have led to several courts martial and convictions of UK service personnel.33

Civil claims against British service personnel continue to be brought by Iraqi claimants in British courts. So far, the Ministry of Defence has paid out more than £20 million in compensation in over 300 cases.34

These cases have helped to ensure that some individual service personnel involved in abuses in Iraq have been held to account. However, the decision not to pursue an overarching inquiry into the Iraq allegations means that potential systemic issues – such as shortcomings in policy, training or supervision – have not been independently investigated.35 So far, the investigation of systemic issues has been limited to an internal Ministry of Defence Systemic Issues Working Group.36

**Consolidated Guidance**

In 2013, the Committee requested the UK Government reword the ‘Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas’ to eliminate the ambiguity in relation to the way British security personnel should respond where there is a serious risk of torture or
other ill-treatment by foreign security and intelligence services. In particular, the Committee expressed concern about the advice to seek assurances to ‘effectively mitigate that risk to below the threshold of a serious risk’. The Committee recommended rewording the guidance to ‘require that intelligence agencies and armed forces cease interviewing or seeking intelligence from detainees of foreign intelligence services in any case where there is a risk of torture or ill-treatment’.37

In September 2016, the Intelligence Services Commissioner also recommended that the UK Government review the consolidated guidance and consult with the EHRC and NGOs.38

In June 2018, in the context of its reports on detainee mistreatment and rendition, the ISC revealed that the UK Government had undertaken a ‘light touch’ review of the consolidated guidance in 2017. However, this review did not address important limitations with the consolidated guidance, including the ambiguity in the term ‘serious risk’ of torture or ill-treatment.39 The ISC was also critical of the UK Government’s failure to consult with NGOs and the EHRC.

The UK Prime Minister responded to the ISC by calling on the Investigatory Powers Commissioner to make proposals on how to improve the consolidated guidance, ‘taking account of the ISC’s views and those of civil society’.40 In August 2018, the Investigatory Powers Commissioner launched a consultation on the consolidated guidance. The proposals from the Investigatory Powers Commissioner have not yet been published.

**Recommendations**

To satisfy the investigative duty in Article 12 of CAT, the UK Government should set up a full, independent, judge-led inquiry into allegations of British involvement, including by means of complicity, in the mistreatment of detainees held overseas. The inquiry should:

- Have access to key witnesses in order to secure relevant evidence.
- Have adequate powers to hold to account individual security and intelligence officers found to be at fault.

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• Examine systemic issues, including shortcomings in policy, training or supervision so that lessons learned can inform future practice.

When considering proposals to revise the consolidated guidance, the UK Government should:
• Ensure that there is no ambiguity in the meaning of risk/serious risk.
• Require British intelligence and security personnel always to cease any engagement with detainees in the custody of foreign intelligence services where there is a risk of torture or ill-treatment.
• Clarify that the Minister cannot authorise anything contrary to international law.
3. Impact of legal aid reforms on access to justice

Relates to CAT Articles 2 and 16, list of issues paragraph 6

In its 2016 list of issues, the Committee requested information on the recent legal aid reforms and their impact on access to justice and effective remedies.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) significantly narrowed the scope of civil legal aid in England and Wales, with the result that legal aid is no longer available in a number of areas of law.41 LASPO was intended to target legal aid at those who need it most.42 While the EHRC has written elsewhere about ways in which LASPO has failed to do that,43 most areas of law where claims are likely to arise for protection against torture or ill-treatment – for example, asylum applications, forced marriage, and family problems where there is a risk of domestic abuse – were kept within scope.

However, the EHRC is concerned that in a select number of cases, including some brought by survivors of domestic violence, LASPO is having a negative impact on access to justice and effective remedies.44 We are pleased to note that the UK Government is taking steps to address some of these concerns. In March 2018, the Government commenced a post-implementation review to assess the impact of the changes, including whether legal aid is targeted where it is needed most.45 The Government’s final report, published on 7 February 2019, committed to improving access to legal aid, including simplifying the exceptional case funding scheme and reviewing the financial eligibility thresholds.46

41 Legal Aid, Sentencing and Punishment of Offenders Act 2012
Domestic violence and abuse

Legal aid remains available for victims of domestic abuse, both for protective injunctions (such as non-molestation orders) and for private family proceedings where domestic violence can be evidenced. At the introduction of LASPO, the Government anticipated that 40 per cent of private family matters would continue to qualify for funding for legal representation through the domestic violence and child abuse gateway.47 However, the Government’s review of the impact of LASPO acknowledged an ‘unexpected fall in spend on domestic violence cases’.48 This unexpected drop may be attributed to strict rules on the types of evidence required to demonstrate domestic abuse in order to access legal aid.49 These rules were found to be unlawful by the Court of Appeal in 2016.50

From January 2018, the evidence rules were expanded to allow statements from domestic violence support organisations and housing officers, and the time limit on the age of evidence was removed.51 The available data suggests the volume of applications and successful grants for legal aid in cases where there is domestic abuse has increased as a result.52 However, concerns about the evidence rules remain, including that legal aid may be withdrawn where a local authority assesses that there has not been domestic violence despite evidence from a domestic violence support service.53 The UK Parliament’s Joint Committee on Human Rights (JCHR) has called for the UK Government to consider whether further amendments to the evidence rules are needed to ensure victims of domestic violence can access legal aid.54

The Government’s review of legal aid identified that the financial eligibility thresholds and a lack of awareness of the availability of legal aid may present barriers for some victims of domestic abuse.55 The Government has committed to review the financial

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47 Ibid.
48 Ibid.
eligibility thresholds by summer 2020 and to take steps to increase awareness of legal aid to help ensure people are aware of their entitlements.\textsuperscript{56}

**Immigration law**

Legal aid remains available for most asylum law matters.\textsuperscript{57} Refugee Action has highlighted barriers to accessing legal aid in asylum cases in practice.\textsuperscript{58} These barriers include gaps in provision and a complex fee structure for legal aid providers, which creates a disincentive to take on more challenging cases.

Most non-asylum areas of immigration law have been removed from the scope of legal aid under LASPO. Matters relating to immigration detention or bail conditions and rights to enter or remain arising from Article 2 and 3 of the ECHR, including applications for indefinite leave to remain for victims of domestic violence and applications for leave to enter or remain for victims of trafficking and modern slavery, are within scope.\textsuperscript{59}

The EHRC is concerned that, while most immigration cases that engage Article 3 of the ECHR are likely to be covered by legal aid, there are some categories of people who are particularly at risk of mistreatment whose cases may be excluded. For example, legal aid is not available (except possibly through an application for exceptional case funding – see below) to help applicants make a statelessness claim, a restriction which has been criticised by stakeholders for ‘impact[ing] on the length of detention and the outcome of substantive cases’\textsuperscript{60} (see chapter 10.2). Legal aid is also not generally available for people who have been identified as potential victims of trafficking but are awaiting a ‘reasonable grounds’ decision about their status.\textsuperscript{61}

Some unaccompanied and separated children with immigration issues may also be excluded from legal aid, including those whose cases include mixed asylum and non-asylum grounds. However, following judicial review, the Government has


\textsuperscript{57} LASPO, Schedule 1, Part 1.

\textsuperscript{58} Refugee Action (2018), `Tipping the scales: access to justice in the asylum system` [accessed: 8 March 2019].

\textsuperscript{59} LASPO, Schedule 1, Part 1.

\textsuperscript{60} European Network on Statelessness (2016), `Protecting stateless persons from arbitrary detention in the United Kingdom` [accessed: 8 March 2019].

committed to reinstate legal aid in all immigration matters for unaccompanied and separated children by spring 2019.\textsuperscript{62}

**Exceptional case funding**

LASPO set up an exceptional case funding (ECF) scheme for cases that do not fall within the scope of legal aid, but where the failure to provide legal assistance could result in a breach of an individual's Convention rights (within the meaning of the HRA 1998), or rights to the provision of legal services under EU law.

In the first year of the ECF scheme, only 5 per cent of applications (70) were successful.\textsuperscript{63} This falls significantly short of the Government's expectation that 3,700 applications would be granted each year.\textsuperscript{64} While it is not suggested that these are all matters that would engage CAT, it does indicate that the scheme has not functioned as expected and may not provide the intended 'safety net' for matters otherwise outside the scope of legal aid. Over time and following amendments to the scheme, both the number of applications for ECF and the grant rate have improved significantly.\textsuperscript{65}

Following the post-implementation review of LASPO, the Government has committed to simplify the ECF scheme and consider whether it is necessary to introduce a new emergency procedure for urgent matters.\textsuperscript{66}

Inquests play a crucial role in ensuring scrutiny of how states deal with deaths in custody. Legal aid is available for initial advice in preparation for an inquest hearing but not generally available for legal representation at proceedings, except by application to the ECF scheme.\textsuperscript{67} In 2017-18 there were 219 ECF grants for inquests, out of 419 applications.\textsuperscript{68} The JCHR heard evidence that unrepresented families are at a serious disadvantage at inquests compared with state bodies who have publicly-funded legal representation.\textsuperscript{69} The charity INQUEST reported that, for

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\textsuperscript{63} Legal Aid Agency and Ministry of Justice (2018), *Legal aid statistics: July to September 2018*, Table 8.1 [accessed: 8 March 2019]

\textsuperscript{64} Ministry of Justice (2019), *Post-implementation review of part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)* [accessed: 7 March 2019].


\textsuperscript{67} LASPO, Schedule 1, Part 1.

\textsuperscript{68} Legal Aid Agency (2018), *Legal aid statistics: April to June 2018*, table 8.2: Exceptional Case Funding (ECF) by category of law [accessed: 17 March 2019].

bereaved families, the ECF application process is particularly onerous and intrusive.\textsuperscript{70}

In July 2018, the Government announced changes to ECF guidance to make it easier for families to apply for funding for inquest hearings, including by removing the requirement that the applicant’s family, in addition to the applicant, undergo a financial means test.\textsuperscript{71} Following its review of legal aid for inquests,\textsuperscript{72} the Government has agreed to improve guidance for families to help them understand the inquest process.\textsuperscript{73}

In Wales, a Commission on Justice has been established by the First Minister to review the operation of the justice system in Wales and set a long-term vision for its future.\textsuperscript{74} The Commission on Justice is taking evidence on how criminal justice, civil justice, and access to legal advice can be improved.\textsuperscript{75}

**Recommendations**

We welcome the steps the UK Government is taking to progress matters on domestic violence evidence, unaccompanied and separated children and inquests. However, to address the negative impact that LASPO is having on access to justice and effective remedies for certain categories of individuals who have been subject to ill-treatment, the UK Government should:

- Keep under review the accessibility of legal aid for people who may be at particular risk of ill-treatment, including in relation to immigration matters and domestic violence. The Government should ensure that the review of financial eligibility and proposed measures to improve awareness of legal aid address any barriers to access for these groups.
- Bring forward proposals to address the shortcomings of the ECF scheme, including the complexity of the application process, to ensure that people who are at particular risk of ill-treatment do not face barriers to funding in cases where legal aid would not normally be available.

The Welsh Government should:

\textsuperscript{70} INQUEST (2018), ‘Written evidence to the Joint Committee on Human Rights inquiry into human rights enforcement’ [accessed: 8 March 2019].
\textsuperscript{71} Ministry of Justice (2018), ‘Changes to the Lord Chancellor’s exceptional funding guidance for inquests’ [accessed: 9 March 2019].
• Consider the recommendations of the Commission on Justice in Wales that aim to improve access to justice and legal aid, when they are published in 2019.
4. Human trafficking and modern slavery

Relates to CAT Articles 2, 12 and 16, and list of issues paragraphs 12 and 46

In its 2016 list of issues, the Committee requested information on:

- measures adopted to prevent, combat and criminalise trafficking, including the Modern Slavery Act 2015
- measures to ensure victims of trafficking have access to effective remedies and reparation
- the lack of detail in provisions to identify and provide support to victims
- gaps in criminal legislation, and
- limitations in the powers and resources of the Anti-Slavery Commissioner.

The Modern Slavery Act (MSA) came into force in 2015, with the majority of provisions extending to England and Wales only.\(^\text{76}\) Since the MSA came into force, there has been a growing number of referrals of potential victims of trafficking to the National Referral Mechanism (NRM), the mechanism through which victims of human trafficking or modern slavery are identified and receive support. However, the number of people referred to the NRM is still small compared to the Home Office’s estimate of 10,000-13,000 victims in the UK,\(^\text{77}\) which the Independent Anti-Slavery Commissioner at the time considered was far too low.\(^\text{78}\) Moreover, the increasing number of referrals is not translating into increasing numbers of investigations, prosecutions and convictions, which have remained relatively static between 2014 and 2016.\(^\text{79}\)

**Addressing shortcomings in the Modern Slavery Act**

We have repeatedly identified important weaknesses in the MSA that may hinder its effectiveness.\(^\text{80}\) These include:

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79 Ibid.
• Insufficient safeguards for victims: the MSA does not establish a clear obligation of non-prosecution of child victims or make it clear that a child cannot consent to his or her own exploitation.\textsuperscript{81} Although the number of children referred to the NRM increased substantially in 2017, suggesting greater awareness of child exploitation,\textsuperscript{82} reports suggest that trafficked children continue to be arrested, including those involved in so-called ‘county lines’ activity, where organised crime networks exploit children to sell drugs.\textsuperscript{83}

• Absence of an explicit legal duty to provide victims with support: unlike the equivalent Acts in Scotland and Northern Ireland, the MSA does not set out victims’ support entitlements. Instead, it establishes that arrangements for supporting victims shall be set out in guidance, which may be revised.\textsuperscript{84} Withdrawal from the EU, and from the obligation to uphold the 2011 EU Trafficking Directive, may result in a regression of the rights of victims to support and assistance.\textsuperscript{85}

• Access to a remedy: the MSA saw the introduction of reparation orders under which victims of slavery and trafficking can be compensated. However, to date, no reparation orders have been awarded as these rely on convictions for trafficking offences, of which there have been very few.\textsuperscript{86}

Victims of trafficking may apply for compensation through the Criminal Injuries Compensation Authority (CICA). However, CICA only covers sustained physical or mental injuries which result from ‘violent crime’, whereas many victims of trafficking are subjected to psychological control. Victims may sue offenders in civil courts, but there is no specific civil remedy for trafficking so victims must rely on other causes of action.\textsuperscript{87} However, these other routes are not always successful. For example, in \textit{Taiwo v Olaigbe}, the appellants, who were abused by their employers, made a claim for race discrimination – which would have entitled them to damages. This claim was dismissed by the Supreme Court. However, the Court stated that Parliament might

\textsuperscript{81} Ibid.
\textsuperscript{85} Anti-Trafficking Monitoring Group (2017), ‘\textit{Brexit and the UK’s fight against modern slavery}’ [accessed: 8 March 2019].
wish to consider extending the remedy under the MSA 2015 to give employment tribunals jurisdiction to grant compensation for ill-treatment of workers.88

While the EHRC welcomed the UK Government's decision in October 2017 to increase the minimum period of ‘move on’ support (from 14 to 45 days) for recognised victims of trafficking and modern slavery,89 concerns have been expressed that this support is still not sufficient to ensure that victims are adequately supported and protected from the risk of homelessness and re-trafficking.90

In July 2018, the UK Government announced an independent review of the operation and effectiveness of the MSA. This will look at the definition of modern slavery offences, access to legal remedies and compensation for victims, the role of the Independent Anti-Slavery Commissioner, provisions relating to transparency in supply chains, and whether existing safeguards against criminal prosecution for victims, including child victims, need to be strengthened. The review will also consider whether the provisions in the Act regarding independent child trafficking advocates are appropriate. Although victim support entitlements are not expressly listed in the review’s terms of reference, it is hoped that the independent reviewers will consider this matter.91

Abuse of migrant domestic workers

There are particular problems with the operation of the MSA in relation to overseas domestic workers. The MSA contained provisions allowing for an extension of an overseas domestic worker’s visa for a minimum of six months where there is a conclusive decision by the NRM that they are a victim of trafficking or that they have been enslaved and exploited.

In March 2016, following criticism that this did not provide overseas workers who are victims of trafficking with sufficient time to find new employment,92 the Government amended the immigration rules to increase the length of a visa granted to a recognised victim of trafficking from 6 months to 2 years.93 This extension has been welcomed, but civil society organisations are concerned that it will do little to

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88 Taiwo (Appellant) v Olaigbe and another (Respondents) [2016] UKSC 31
90 Kalayaan and Anti-Slavery International (2018), ‘Submission to the UN Special Rapporteur on contemporary forms of slavery’ [accessed: 6 December 2018].
persuade domestic workers to leave their abusive employers and enter the NRM, given the difficulties these workers face in finding alternative employment, and in providing sufficient evidence to the NRM that they are victims of trafficking.94

Weakness in the powers of the Independent Anti-Slavery Commissioner

The EHRC and civil society organisations have been calling on the Government to strengthen the powers and resources of the Independent Anti-Slavery Commissioner since the establishment of this role in 2015.95 In May 2018, the Commissioner resigned, citing government interference in his role.96 A new Commissioner, Sara Thornton, a former police chief constable, has now been appointed and will take up post in May 2019. Anti-trafficking campaigners have expressed concern about the independence of the new Commissioner, particularly in view of the inclusion of annual ‘performance appraisals’ with the Home Office in the Commissioner’s job specification.97

Strengthening the operation of the NRM

In October 2017, following a major review of the operation of the NRM,98 the UK Government announced a number of reforms, including the creation of a single, expert unit to handle all cases referred from frontline staff; an independent panel of experts to review all negative decisions; and a new digital system to make it easier to refer victims and enable data to be captured and analysed.99 The UK Government has announced that the reforms will be completed by March 2020.100

Shortly after announcing the reforms, the UK Government announced a further policy change, which was to reduce by almost 42 per cent subsistence support payments provided to potential victims of trafficking who are also applying for asylum...
in the UK. The High Court recently overturned this decision, ruling it discriminatory.\(^{101}\)

**Reporting obligations**

Tackling slavery is not a devolved responsibility but much of the support for the consequences of slavery falls to devolved services. The Welsh Government appointed an Anti-Slavery Co-ordinator in 2011 and established the Wales Anti-Slavery Leadership Group to provide strategic leadership and guidance on how to tackle slavery in Wales and to provide support for survivors. It is difficult to tell yet what impact this has had on survivors of modern slavery.

In March 2017, the Welsh Government launched its Code of Practice for Ethical Employment in Supply Chains, which aims to make supply chains transparent and prevent exploitation of workers. The code goes further than the reporting obligations in the MSA by including all sectors and not imposing a minimum turnover threshold. All businesses, public and third sector organisations in Wales in receipt of Welsh public sector funding are expected to sign up to the code.\(^{102}\)

**Recommendations**

The UK Government should:

- Ensure that effective remedies are available in law and in practice for all victims of trafficking and exploitation, whatever their legal status, including children who have been involved in county lines activities and domestic workers on short-term visas.
- When responding to the forthcoming independent review of the Modern Slavery Act 2015, address the full range of concerns raised in this report, including victim support entitlements and other issues which currently fall outside the review’s terms of reference.


5. The National Preventive Mechanism

Relates to CAT Articles 2 and 16, CO paragraph 14 and list of issues paragraph 10

In its 2013 concluding observations, the Committee called on the State party to end the practice of seconding individuals working in places of deprivation of liberty to National Preventive Mechanism (NPM) bodies, and to provide the NPM with sufficient resources to discharge their prevention mandate independently and effectively. The Committee requested information on both these issues in its 2016 list of issues.

The UK National Preventive Mechanism was established in 2009 under the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). It is made up of 21 statutory bodies that monitor the treatment of people deprived of their liberty in a range of settings, with a view to strengthening protection against torture and ill-treatment.

In our March 2016 submission, we noted several concerns regarding the resources available to the NPM, including the secondment of individuals working in the custodial estate to NPM bodies, which has implications for the NPM’s independence. The NPM has adopted guidance which commits members to work progressively towards a reduction in their reliance on seconded staff, and the NPM regularly monitors progress towards this goal.103

In April 2016, NPM members recruited a non-executive chair from outside of the NPM.104 The recruitment of an independent chair aimed to raise the profile of the NPM and bring greater support to all members across the UK.105 The last year has seen continued collaboration between NPM members on joint NPM thematic projects and joint inspections.106

In January 2017, the Independent Reviewer of Terrorism Legislation became a member of the NPM in light of his role in monitoring the conditions of detention for

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105 Ibid.

people detained for more than 48 hours under section 1 of the Terrorism Act 2000.\textsuperscript{107} There has been no change to the UK Government’s objection to the inclusion of powers in the NPM to inspect UK-controlled places of detention overseas.\textsuperscript{108}

The NPM has continued to express concern about the lack of legislation setting out its mandate and constituent bodies, the lack of statutory guarantees of independence for the NPM or its members, and the lack of a separate, dedicated budget.\textsuperscript{109} The limited resources available for the NPM secretariat to coordinate the work of its members and ensure their activities are focused on prevention represents a serious constraint.

**Recommendations**

The UK Government should:

- Ensure that the NPM has access to all places of detention and their installations and facilities, including UK-controlled places of detention overseas, to regularly examine the treatment of people deprived of their liberty.

- Introduce legislation to ensure and safeguard the independence of the NPM and provide sufficient resources to permit the effective implementation of its mandate in line with the requirements of the OPCAT.


\textsuperscript{108} Hansard (2014), Statement from the Minister for Armed Forces on the Baha Mousa report [accessed: 8 March 2019].

6. Conditions of detention

This chapter presents information on measures taken to address inadequate detention conditions, which we judge may reach the threshold for torture, cruel, inhuman or degrading treatment in the context of:

- prisons and the youth custodial estate (section 6.1)
- immigration detention (section 6.2), and
- mental health detention (section 6.3).

The use of restraint (defined broadly, to include seclusion and solitary confinement) affecting detained individuals in these and other settings is addressed in chapter 7.

6.1. Prisons and the youth custodial estate

Relates to CAT Articles 2, 11, 12 and 16, CO paragraphs 31 and 32 and list of issues paragraphs 22, 23 24, 26, 27

In its 2016 list of issues, the Committee requested information about:

- measures taken to reduce prison overcrowding, including alternatives to imprisonment
- measures to prevent violence and self-harm in places of detention, including improvements to the provision of mental health care in prisons
- efforts to meet the needs of children and women in detention
- the investigations into allegations of abuse committed by staff in places of detention, including at the Medway Secure Training Centre, and
- the results of investigations into any unexpected deaths in prison, and measures taken to prevent such deaths.

Conditions in the adult estate

In 2017, Her Majesty’s Inspectorate of Prisons (HMIP) reported that too many prisoners are living in poor conditions, especially in Victorian prisons, with reports of inadequate furniture, exposed wiring, graffiti, litter and vermin. The lack of in-cell sanitation is a recurrent problem.\(^{110}\)

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In 2017/18, 20,695 prisoners were held in crowded accommodation conditions, a
crowding rate of 24.2 per cent.\textsuperscript{111} The crowding rate in male local prisons was 48.5
per cent in 2017/18: the highest for any type of establishment. Women’s prisons in
England are generally less crowded, but the crowding rate in female local prisons
increased from 8.3 per cent in 2015/16 to 13.5 per cent in 2017/18.\textsuperscript{112} There are no
women’s prisons in Wales.

A report by the Wales Governance Centre has found that Wales has the highest
imprisonment rate in Western Europe\textsuperscript{113}. In April 2018, the Welsh Government and
Her Majesty’s Prison and Probation Service (HMPPS) in Wales published the
‘Framework to support positive change for those at risk of offending in Wales’.\textsuperscript{114} The
framework seeks to improve services for people at risk of re-entering prison, or those
who are already in the criminal justice system, and to promote continued
collaboration to reduce the number of offenders and re-offenders.

The EHRC is deeply concerned about the over-representation of ethnic minorities in
prisons, which has been attributed to a number of factors including discriminatory
sentencing.\textsuperscript{115} Black people make up 3 per cent of the general population but made
up 12 per cent of the prison population in England and Wales in 2015/16.\textsuperscript{116} The
Wales Governance Centre also found that the level of racial disproportionality was
higher among the Welsh prison population than the English prison population in
2017.\textsuperscript{117} The UK Government has committed to addressing the over-representation
of ethnic minority groups in prisons.\textsuperscript{118} Steps taken so far include the publication of
sentencing data broken down by ethnicity and measures to strengthen the
community engagement work of the Crown Prosecution Service (CPS).\textsuperscript{119} However,
these steps have not yet had an impact on the level of racial disproportionality in the
prison population.

\textsuperscript{111} Ministry of Justice (2018), \textit{HMPPS Annual Digest 2017/18} [accessed: 17 March 2019].
\textsuperscript{112} Ibid.
\textsuperscript{113} Wales Governance Centre (2019), ‘Sentencing and immediate custody in Wales: A factfile’
[accessed: 17 March 2019].
\textsuperscript{114} Welsh Government (2017), ‘A framework to support positive change for those at risk of offending in
Wales’ [accessed: 8 March 2019].
\textsuperscript{115} Lammy, D. (2017), ‘Treatment of, and outcomes for Black, Asian and Minority Ethnic individuals in
the criminal justice system’ [accessed: 8 March 2019].
\textsuperscript{116} Ibid.
\textsuperscript{117} Wales Governance Centre (2019), ‘Sentencing and immediate custody in Wales: A factfile’
[accessed: 17 March 2019].
\textsuperscript{118} Ministry of Justice (2017), ‘Government response to the Lammy Review on the treatment of, and
the outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System’
[accessed: 8 March 2019].
\textsuperscript{119} Ministry of Justice (2018), ‘Tackling Racial Disparity in the Criminal Justice System: 2018 Update’
[accessed: 8 March 2019].
There are significant concerns about the amount of time prisoners spend out of cells. HMIP expects prisoners to be unlocked for at least 10 hours a day but, according to research published in 2018, only 16 per cent of adult male prisoners surveyed said they were unlocked for at least this length of time. One fifth (20 per cent) said they spent less than two hours out of their cells on a weekday.\(^{120}\) In 2016 and 2017, restricted time out of cells was identified as one of the root causes of serious riots and disturbances in some prisons.\(^{121}\)

Levels of self-harm and assaults in prisons have risen significantly in recent years, suggesting mental health and wellbeing have deteriorated.\(^{122}\) Recorded self-harm in prisons in England and Wales reached a record high (49,565 incidents) in the 12 months to June 2018.\(^{123}\) The number of recorded assaults in England and Wales rose to 32,559 in the year to June 2018, including 23,448 prisoner-on-prisoner assaults and 9,485 assaults on staff.\(^{124}\) The number of recorded self-harm incidents and prison assaults in Wales has increased at a higher rate than in prisons in England since 2010.\(^{125}\)

The number of non-natural deaths in custody remains a serious concern and raises questions about the treatment of prisoners with mental health problems.\(^{126}\) In 2015, the EHRC undertook an inquiry into non-natural deaths in custody, reporting that lessons were not being learned from earlier deaths and calling for prisons to have a statutory duty to respond to recommendations from investigations.\(^{127}\) In a 2016 progress review, the EHRC welcomed actions taken to address these issues, including improvements to initial assessments of prisoners' mental health, but we concluded that further improvements were needed.\(^{128}\) In the year to September 2018, there were 87 recorded self-inflicted deaths in prisons in England and Wales (of which 82 were male prisoners), following a steady rise from 58 in 2011 (with a peak of 122 in 2016).\(^{129}\)

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\(^{121}\) Howard League for Penal Reform (2016), ‘Preventing prison suicide’ [accessed: 8 March 2019].
\(^{124}\) Ibid.
\(^{125}\) Wales Governance Centre (2018), Imprisonment in Wales: A Factfile [accessed: 9 March 2019]
\(^{126}\) National Audit Office (2017), ‘Mental health in prisons’ [accessed: 8 March 2019].
\(^{127}\) EHRC (2015), ‘Preventing deaths in detention of adults with mental health conditions’ [accessed: 8 March 2019].
The Government has committed to delivering up to 10,000 decent prison places and investing in more widespread use of liaison and diversion services. While the general direction of these measures is welcome, there are concerns about how effectively they will address the root causes of overcrowding, rising rates of self-harm and increasing violence in prisons. An evaluation of the pilot of the Government’s network of liaison and diversion services reported positive impacts, including better identification of the needs of people in custody, particularly mental health needs. However, there is no data on the number of individuals who have been diverted from the criminal justice system as a result of this engagement.

In June 2018, the UK Government published its female offender strategy, which sets out measures to enhance mental health services for women in prisons, promote alternative sentencing and ensure that that treatment of women in the criminal justice system takes account of gender and sexual violence. The need for special measures to promote alternative sentencing for women is highlighted by the fact that women are more likely to receive short-term custodial sentences than men. Between 2010 and 2017, 78.6 per cent of women sentenced to immediate custody in Wales were handed sentences of less than 12 months, compared to 67 per cent of male offenders.

However, concerns have been raised about the level of funding linked to the strategy. Resources allocated to community services – £5 million – are limited and substantially smaller than the estimated £50 million that the UK Government will save as a result of cancelling its plans to build five women’s prisons.

There are questions over some of the other proposals in the strategy. While we welcome the Government’s emphasis on providing appropriate treatment to women in a pilot to secure more community sentence treatment for ‘vulnerable’ offenders with mental health, drug and alcohol problems, there is a risk that requiring women to undertake treatment in the community as an alternative to imprisonment

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might violate the human rights of disabled women.\textsuperscript{139} This type of sentence raises complex issues in relation to consent and forced treatment which must be taken into account by monitoring and evaluation.\textsuperscript{140}

Urgent steps are needed to ensure that specialist mental health care in the secure estate is tailored to the needs of particular groups.\textsuperscript{141} There is evidence that individuals from minority ethnic groups in prisons are less likely than their white counterparts to be identified as having learning difficulties or mental health concerns.\textsuperscript{142} Evidence suggests that that women from minority ethnic groups in prison have less access to mental health support than white women in prisons.\textsuperscript{143} The Prison and Probation Ombudsman (PPO) has also drawn attention to adaptations needed to improve the treatment of transgender prisoners.\textsuperscript{144}

\textbf{Conditions in the youth estate}

Although the number of under-18s in youth custody in England and Wales steadily decreased between 2010/11 and 2017/18, the over-representation of young people from ethnic minorities in custody increased markedly during this period, and is continuing to rise.\textsuperscript{145} In January 2019, HMIP reported the highest ever recorded proportion of young people from ethnic minorities in Young Offender Institutions (YOIs), at 51 per cent.\textsuperscript{146} In its 2017/18 annual report, HMIP reported that children’s perceptions of their safety in custody continue to be poor: 43 per cent of surveyed children said they had felt unsafe at some point in their current YOI. Rates of violence against staff and peer-on-peer violence were higher than in previous years.\textsuperscript{147}

\begin{itemize}
\item Secretary of State for Justice v. MM [2018] UKSC 60; Welsh Ministers v PJ [2017] EWCA Civ 194.
\item EHRC (2016), ‘Preventing deaths in detention of adults with mental health conditions: progress review’ [accessed: 17 March 2019].
\end{itemize}
The Chief Inspector of Prisons has stated that not a single YOI or secure training centre (STC) is considered to be safe, with staffing constraints identified as a key contributing factor.\(^{148}\) Too many children in custody are deprived of adequate time outside of their cells,\(^{149}\) some because they feel too scared to leave.\(^{150}\)

The number of self-harm incidents in the youth custodial estate has also risen, from 5.1 per hundred young people in 2011/12 to 12.5 per hundred in 2017/18.\(^{151}\) Between 2007 and 2018, there were five deaths among 15- to 17-year-olds in youth custody, four of which were self-inflicted.\(^{152}\)

Limited secure facilities for young people in Wales meant that 45 per cent of all Welsh children in custody in 2017 were held in establishments in England. These children’s limited contact with family members increases their sense of isolation.\(^{153}\)

In May 2016, the Youth Justice Board announced that it had developed a more robust system of monitoring for all STCs, following the reports of physical and emotional abuse at Medway STC\(^{154}\) (see also chapter 7 on the use of restraint and chapter 12, on child sexual abuse). The incidents at Medway led to the formation of the Medway Improvement Board,\(^{155}\) whose advisory report reinforced the interim findings of the Taylor Review, commissioned by the UK Government in 2015 to propose key reforms to the youth justice system in England and Wales.\(^{156}\) Among other things, the Taylor Review recommended that the custodial services for children and young people be provided by highly skilled and specialist staff, operating in smaller units across the regions.

The Government’s vision of replacing STCs with secure schools that will provide a therapeutic and child-focused environment, supported by a specialised workforce, is a step in the right direction.\(^{157}\) However, the decision to trial these schools at


\(^{150}\) HMIP (2017), ‘Children in custody 2016-17: an analysis of 12-18-year-olds’ perceptions of their experiences in secure training centres and young offender institutions’ [accessed: 8 March 2019].


\(^{155}\) Medway Improvement Board and Ministry of Justice (2016), ‘Medway Improvement Board: Final Report of the Board’s Advice to Secretary of State for Justice’ [accessed: 8 March 2019].


Medway STC, which has a problematic history and prison-like dimensions, raises concerns about its chances of success.158

Children held in police cells overnight

According to an inspection report, in the year ending 31 May 2017, around 40 per cent of the 5,658 children brought into police custody in nine boroughs of London were held in police cells overnight.159 This is in breach of the law, which requires that children charged with a criminal offence should be bailed or transferred to local authority accommodation until they are brought to court except in very limited, exceptional circumstances.160 Recently a ‘concordat’ has been signed by police forces and local authorities in England, committing to reducing the number of children held overnight.161

Recommendations

The UK and Welsh Governments, where relevant, should:

- Address overcrowding in adult prisons by investing in appropriate alternatives to imprisonment and widening access to liaison and diversion services, while ensuring that people with mental health conditions are not unduly pressured to receive mental health treatment in order to avoid detention, and that they are required to give valid consent to treatment.
- Improve the provision and availability of mental health services in the adult and youth custodial estate – recognising the different issues women, including transgender women, children and people belonging to ethnic minority groups experience in detention – to prevent suicide and self-harm, and to facilitate resettlement.
- Introduce a statutory obligation on prisons and youth custodial institutions to respond to recommendations from investigations into deaths in custody by publishing an action plan.
- Ensure that children are detained only as a measure of last resort and for the shortest possible time. Children should not be held in prison-like settings – but in safe and appropriate environments, in close proximity to their families, and should

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160 Section 38(6) of the Police and Criminal Evidence Act 1984.
be supported by a sufficient number of highly skilled and specialist staff able to meet their needs.

6.2. Immigration detention

Relates to CAT Articles 2, 3, 11, 12 and 16, CO paragraph 30, list of issues paragraph 28

In its 2013 concluding observations, the Committee urged the State party to ensure that detention is used only as a last resort; that vulnerable people and torture survivors do not enter the Detained Fast Track system; and that a time limit for immigration detention be introduced. In its 2016 list of issues, the Committee asked for information about measures taken to implement these recommendations.

Indefinite detention

The practice of indefinite immigration detention in the UK is contrary to UN High Commissioner for Refugees (UNHCR) guidelines\(^{162}\) and continues to draw criticism from HMIP and a range of civil society organisations, including Amnesty International UK, the Bar Council and the British Medical Association.\(^{163}\)

In the year ending September 2018, 25,061 individuals entered the immigration detention estate. Of the 26,440 who left the immigration detention estate during this period, 33.7 per cent had been held for longer than 29 days and 4.5 per cent had been held for more than six months.\(^{164}\) A 2018 HMIP report into Harmondsworth Immigration Removal Centre (IRC) identified one man who had been detained for more than 4.5 years.\(^{165}\) A 2018 report by independent reviewer Stephen Shaw


concluded that failings in the Home Office’s case progression process were leading to unnecessarily long periods of detention.166

The EHRC is concerned that, for individuals at heightened risk of being harmed by the experience of detention, the lack of a time limit on immigration detention may contribute to violations of the prohibition on torture, inhuman and degrading treatment.167

Conditions in detention

The courts have found several violations of Article 3 of the ECHR in the immigration detention estate.168 These violations largely relate to a failure to identify or respond to the needs of people with serious mental health conditions, including cases where health has been allowed to deteriorate severely in detention.

In its recently concluded inquiry into immigration detention practices, the JCHR raised concerns about the prison-like conditions in several IRCs, including the extended time periods that individuals spend locked in their rooms; the disproportionate use of handcuffs and other restrictive measures; and the inappropriate mixing of detainees, including ex-foreign national offenders (awaiting deportation at the end of a prison sentence) with other detainees.169 In the EHRC’s submission to the inquiry, we raised concerns about a lack of safeguards to protect people in detention from violations of the right to be free from torture and cruel, inhuman or degrading treatment.170

In 2017, the BBC aired an episode of Panorama which included undercover footage of treatment at Brook House IRC. The abuse, which included a choking incident that appeared to amount to an unlawful physical assault, arguably reaches the threshold for torture and cruel, inhuman or degrading treatment.171 The EHRC considers that Panorama revealed arguable systemic failures not only by the contracted centre operator G4S, but by the Home Office. We are concerned, in particular, about the adequacy of government systems to ensure human rights compliance in the outsourcing of contracts for Home Office functions. In October 2018, the Home

Office agreed to commission the PPO to carry out an investigation into the issues arising from the Panorama footage.\textsuperscript{172} It is not yet clear whether this PPO investigation will meet the investigative duty in Article 12 CAT.\textsuperscript{173}

**Detention of torture survivors and other people at particular risk of harm**

The UK Government’s Adults at Risk policy introduced in September 2016, includes statutory guidance designed to enhance protections against detention for individuals at particular risk of harm in detention.\textsuperscript{174} This guidance has been criticised for weakening safeguards for such people.\textsuperscript{175} In particular, the guidance narrowed the definition of torture in Rule 35 of the Detention Centre Rules, which provides a mechanism for medical practitioners to identify and report people at particular risk of harm in detention, including torture survivors, to the people responsible for reviewing and authorising detention.\textsuperscript{176} The restricted definition excluded individuals whose experiences of severe pain and suffering were inflicted by a non-state actor, making it much harder for such victims to demonstrate they were unsuitable for detention.

In October 2017, this more restrictive definition was found by the High Court to be unlawful.\textsuperscript{177} In response to the judgment, the Government introduced another definition of torture, in which torture is restricted to situations where the perpetrator has control over the victim, and where the victim is powerless to resist.\textsuperscript{178} The EHRC is concerned that this new definition, which came into force in July 2018, again reduces the protection for some individuals at risk of harm in detention as it excludes certain types of serious violence previously accepted as torture, such as street attacks arising from discriminatory persecution.\textsuperscript{179} In his 2018 report, Stephen Shaw concluded that the Rule 35 process is still not functioning as intended.\textsuperscript{180}

Broader criticism of the Adults at Risk policy has focused on the difficulties caused by the evidential thresholds that detainees must meet to be recognised as being at particular risk of harm in detention.\textsuperscript{181} The Adults at Risk guidance categorises


\textsuperscript{176} The Detention Centre Rules 2001 [accessed: 8 March 2019].

\textsuperscript{177} Medical Justice & 7 Others v SSHD [2017] EWHC 2461 (Admin).

\textsuperscript{178} Home Office (2018), ‘Adults at risk in detention: 3.0’ [accessed: 8 March 2019].

\textsuperscript{179} The Detention Centre (Amendment) Rules 2018 (SI 411/2018).

\textsuperscript{180} Shaw, S. (2018), paragraph 2.145.

\textsuperscript{181} Home Office (2018), ‘Adults at risk in detention: 3.0’ [accessed: 8 March 2019].
evidence as level 1, 2 or 3. Level 1 focuses on self-declaration, level 2 applies to those cases where an individual has professional or documentary evidence indicating they are an adult at risk, and level 3 applies where an individual has professional evidence indicating both that they are at risk and that a period of detention would be likely to cause harm. The guidance specifies that only level 3 evidence should be afforded ‘significant weight’. The 2018 Shaw report indicated that the Home Office’s approach to evidence deflected attention from assessment of the risks of detention and how these could change over time.\(^{182}\)

The Shaw report identified the need for robust independent oversight of the process of screening people at particular risk of harm.\(^{183}\) In its recent inquiry on immigration detention, the JCHR supported this position and called for the introduction of independent decision-making on detention, among other things ‘to reduce the significant numbers of vulnerable people being detained each year.’\(^{184}\)

Two recent judgments have also highlighted the lack of Home Office policies or procedures to ensure that immigration detainees with serious mental health conditions can assert their right to challenge the decision to detain them.\(^{185}\)

The Home Office has stated it intends to undertake a review of the Detention Centre Rules, including further potential revisions to Rule 35.

**Return of the detained fast track**

The detained fast track rules were suspended following a Court of Appeal ruling in 2015 that the tight time limits for appeals made the scheme ‘structurally unfair and unjust’.\(^{186}\) In October 2016, the Ministry of Justice (MoJ) launched a consultation on proposals for the creation of a new detained fast track.\(^{187}\) The majority of respondents to this consultation disagreed with the introduction of an expedited process.\(^{188}\)

In April 2017, the MoJ re-introduced a proposal that rules be created to provide for a time limit of 25-28 days for determination of a detained immigration and asylum appeal by the First-tier Tribunal, with an additional 20 working days for determination

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\(^{184}\) JCHR (2019).

\(^{185}\) R (on the application of VC by his litigation friend the Official Solicitor) v SSHD [2018] EWCA Civ 57 (VC Court of Appeal judgment); R (on the application of MDA by his litigation friend the Official Solicitor) v SSHD, EHRC intervening [2017] EWHC 2132 (Admin).

\(^{186}\) R (Detention Action) v First-tier Tribunal [2015] EWCA Civ 840.


\(^{188}\) Ibid., paragraph 19 and 25.
of permission to appeal to the Upper Tribunal.\textsuperscript{189} In July 2018, the Tribunal Procedures Committee launched a consultation seeking views on the introduction of an expedited procedure.\textsuperscript{190}

The EHRC has advised against the introduction of an expedited procedure.\textsuperscript{191} We are particularly concerned that it might disproportionately disadvantage groups with certain protected characteristics, in particular people with mental health problems or cognitive impairments who may face additional difficulties in preparing an appeal in detention within a tightened timescale.

**Recommendations**

The UK Government should:

- Introduce a 28-day time limit on immigration detention in line with the recommendations of the UNHCR\textsuperscript{192} and ensure that detention is used only as an administrative measure of last resort.
- Ensure effective oversight, monitoring and complaints policies and procedures in the immigration detention estate to ensure that any ill-treatment is immediately identified, that steps are taken against the people who are responsible, and that lessons are learned to prevent any further ill-treatment occurring.
- Introduce independent processes, both when a decision to detain is made and during detention, for the identification of those people who may face a particular risk of harm in detention, and review detention policies and rules to ensure such individuals are detained only in exceptional circumstances.
- Ensure all detainees have effective access to fair and accessible procedures to challenge the decision to detain or deport, including by rejecting an expedited procedure for determining a detained immigration or asylum appeal.


\textsuperscript{191} EHRC (2016), ‘Response to the Ministry of Justice consultation on proposals for an expedited appeals process for detained immigration and asylum appellants’ [accessed: 8 March 2019].

6.3. Mental health detention

Relates to CAT Articles 11 and 16, CO paragraph 31, list of issues paragraphs 24, 27, 30

In its 2016 list of issues, the Committee requested information about:

- the number of people deprived of their liberty in psychiatric hospitals and other institutions
- the availability of community-based services and other forms of outpatient treatment support
- the number of people deprived of their liberty without authorisation
- measures taken to address deficiencies in access to mental health services for children, and
- what steps had been taken to end the practice of detaining children with mental health conditions in police custody.

The Committee also requested information about the number of deaths in mental health detention, the results of investigations into those deaths and measures taken to prevent similar cases occurring in the future. This last issue is considered in chapter 9, which looks at ill-treatment of people receiving health and social care services.

Increasing use of mental health detention

Although data is incomplete, estimates suggest that the number of people detained under the Mental Health Act 1983 (MHA) in England continues to rise. According to NHS Digital, there were 49,551 new detentions recorded in 2017/18, representing a 2.4 per cent increase since 2016/17 (although overall national totals will be higher as not all providers submitted data).193 In Wales, detentions under the MHA (excluding place of safety detentions, where a person is removed by the police to a place of safety for a health assessment) increased from 1,732 in 2015/16 to 1,776 in 2016/17.194

While there are multiple reasons for the rising rates of detention, insufficient investment in core mental health services, such as community mental health teams,
has been identified as a core contributing factor.\textsuperscript{195} The compulsory detention of people in circumstances where early interventions could have prevented the need for detention arguably engages the state’s responsibility to prevent inhuman and degrading treatment.

The EHRC is concerned by evidence of ethnic disproportionality in compulsory detentions under the MHA. According to the available (incomplete) data, black or black British people are likely to be detained over four times more often than white people in England.\textsuperscript{196} There is also evidence that treatment is often imposed involuntarily on people with learning disabilities and/or autism for the purpose of treating their symptoms and not the underlying condition, and in a manner which fails to take fully into account their best interests and the need to enhance their wellbeing and enable them to live fulfilled lives.\textsuperscript{197} In 2017, Healthcare Inspectorate Wales found that individual MHA administration teams were struggling to undertake their role in ensuring patient safeguards are upheld (that is, appeals against detention, provision of rights monitoring, consent to treatment safeguards), mainly due to a lack of resources.\textsuperscript{198}

In 2012, the UK Government initiated the Transforming Care programme in England, in response to the abuse of people with learning disabilities and/or autism at a specialist psychiatric hospital. The aim of the programme was to develop appropriate community services to support people with learning disabilities and/or autism, and to end all inappropriate placements in psychiatric hospitals by 2014.\textsuperscript{199} However, this target has not been met. In 2014, there were 2,577 people with learning disabilities/autism in psychiatric hospitals in England, although this number includes compulsory/involuntary detentions and people with voluntary status under the MHA. In July 2018, 2,380 of this number were still in these hospitals. More than half (1,390 people) had been in hospital for more than two years.\textsuperscript{200} In Wales, incomplete data showed there were 103 people with learning disabilities registered with local authorities residing in ‘health service accommodation’ in 2018.\textsuperscript{201} The lack of data makes it difficult to understand the situation and respond to need.

\textsuperscript{195} All-Party Parliamentary Group on Mental Health (2018), ‘Progress of the Five Year Forward View for Mental Health: On the road to parity’ [accessed 8 March 2019].
\textsuperscript{196} NHS Digital (2018).
\textsuperscript{197} EHRC (2018), Our recommendations to the Independent Review of the Mental Health Act, 19 November.
\textsuperscript{198} Health Inspectorate Wales (2017), ‘Annual report 2016-17’ [accessed: 8 March 2019].
\textsuperscript{201} Welsh Government (2018), ‘Local authorities registers on people with disabilities’ [accessed 8 March 2019].
The institutionalisation of children with learning disabilities and/or autism in psychiatric settings for prolonged periods has been described by one government-commissioned review as a ‘denial of the basic rights of childhood.’\footnote{Council for Disabled Children (2017) ‘These are our children: A review, by Dame Christine Lenehan Director, Council for Disabled Children’ [accessed 8 March 2019].} As part of its inquiry into the conditions in learning disability inpatient units,\footnote{JCHR, ‘Inquiry on conditions in learning disability inpatient units, oral hearing’ [accessed 8 March 2019].} the JCHR heard evidence about an autistic teenager who had been detained for nearly two years in a psychiatric assessment and treatment unit (ATU), behind a locked door and fed through a hatch. The EHRC is funding this case against the ATU, local authority, clinical commissioning group and NHS England, claiming breach of the teenager’s equality and human rights, including her right to be free from torture and other cruel, inhuman and degrading treatment.\footnote{EHRC (2018), Twitter statement [accessed 9 March 2019].}

In October 2017, the Government set up an independent review of the MHA.\footnote{Department of Health and Social Care (2017), ‘Terms of Reference - Independent Review of the Mental Health Act 1983’ [accessed on 8 March 2019].} The final report of the independent review, published in December 2018, reflected several key recommendations made by the EHRC to the review team.\footnote{EHRC (2018), Our recommendations to the Independent Review of the Mental Health Act, 19 November.} It called for more accessible and responsive mental health crisis services and community-based mental health services to prevent people from reaching crisis point. It emphasised the need to support the recruitment and progression of people of ethnic minority backgrounds across all relevant professions. It also recommended strengthening the criteria for detaining people under the MHA so that people are treated with consent wherever possible, and said that involuntary detention should be considered only if this would benefit the patient, rather than just serving public protection.\footnote{Department of Health and Social Care (2018), ‘Modernising the Mental Health Act: Increasing choice, reducing compulsion’ [accessed 9 March 2019].}

In Wales, the Mental Health (Wales) Measure (2010)\footnote{Welsh Government (2015), ‘The duty to review: Final report: Post-legislative assessment of the Mental Health (Wales) Measure 2010’ [accessed 8 March, 2019].} aims to improve mental health and wellbeing and improve the care and treatment of people accessing mental health services. The measure focuses on improving treatment in primary care with an emphasis on early intervention, which should help prevent the need for detention.
Unauthorised detention of people who lack capacity

Following a Supreme Court decision in 2014, which gave a significantly wider interpretation of ‘deprivation of liberty’ than had been previously applied in the health and social care context, there was a dramatic increase in the number of applications for deprivation of liberty authorisations in England, under the Mental Capacity Act 2005 (MCA) Deprivation of Liberty Safeguards (DoLS), in 2014/15 and 2015/16. Since then, the number of applications for DoLS authorisations has continued to grow in England, with an 11 per cent increase recorded between 2015/16 and 2016/17, although the growth is slowing each year. The DoLS regulate deprivation of liberty for the purpose of care and treatment of people who are deemed to lack capacity to make the relevant decisions themselves. However, the large number of applications, combined with what has been described as an excessively complex application procedure, has resulted in a substantial backlog of applications before the Court of Protection.

As a result, substantial numbers of people – especially older people in care homes and people with learning disabilities and autism – have been subject to deprivation of liberty without authorisation, and therefore without access to the safeguards intended under the MCA. In Wales, applications for authorisations of deprivation of liberty are also increasing, with a 9 per cent increase recorded between 2015/16 and 2016/17. A recent inspection report indicated that local authorities and health boards in Wales are finding the volume of authorisations and subsequent reviews challenging, with more applications received each month than can be processed.

The EHRC is concerned that depriving people of liberty without robust independent scrutiny and authorisation of care and treatment arrangements, in addition to violating their right to liberty and security, increases the risk of inhuman and degrading treatment as such individuals are particularly vulnerable to abuse. Moreover, reports suggest that health and social care professionals often make deprivation of liberty decisions in relation to people considered to be incapacitated without sufficiently trying to ascertain their wishes and feelings, for example with the support of an independent mental capacity advocate. The MCA establishes the

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principle that any such decision must be in the best interests of the individual, but where deprivation of liberty takes place without robust independent authorisation, there is a strong risk that the decision may overlook the individual's preferences.

In July 2018, the UK Government introduced the Mental Capacity (Amendment) Bill to reform the deprivation of liberty authorisation process. The EHRC is concerned that the UK Government has, at the time of writing, failed to use the opportunity of the Bill to strengthen safeguards against unlawful deprivation of liberty. The Bill makes no provision for people deprived of their liberty to be supported and enabled to appeal to the Court of Protection, and does not provide for automatic independent mental capacity advocacy support and representation for all people for whom a deprivation of liberty is being sought. Ehrc met with government officials to raise these concerns.

**Deficiencies in access to mental health services for children**

The Care Quality Commission (CQC) has found that many children in England find it difficult to access Children and Adolescent Mental Health Services (CAMHS). In 2017, out of 338,000 children referred to CAMHS in England, 37 per cent were either not accepted for treatment or were discharged following assessment. Of those accepted for treatment 32 per cent had not started treatment by the end of the year. A reduction in the number of CAMHS available, with a severe shortage of specialist professionals, amid rising demand has also created prolonged delays for young people in accessing support in Wales. The EHRC is concerned that the failure to provide adequate treatment to children with mental health conditions may amount to inhuman or degrading treatment, in particular where the children are at risk of self-harm.

The introduction of the Policing and Crime Act 2017 outlawed the use of police cells as 'places of safety' for children with mental health needs. Since the change, there has been a substantial reduction in the use of police cells for children, declining from 161 cases in 2014/15 to 12 cases in 2017/2018. However, inadequate provision of community services in many parts of the country means that inappropriate

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placements of children continue to take place, including in police cells,\textsuperscript{221} in adult wards\textsuperscript{222} and in wards located far away from their homes.\textsuperscript{223}

**Recommendations**

The UK and Welsh Governments, where relevant, should:

- Ensure there are sufficiently funded, appropriate and high-quality mental health services in the community to support the needs of all adults and children, including those with learning disabilities and/or autistic spectrum disorder, in order to reduce the need to resort to involuntary admission and treatment.

- Strengthen the criteria for detaining people under the MHA in order to ensure that the least restrictive intervention is used, and improve the ability of people detained to obtain a timely and meaningful review of the decision to detain/prolonged detention. In the case of people whose liberty is restricted under the Mental Capacity Act, ensure that they are supported and enabled to appeal to the Court of Protection and have access to an independent advocate.

- Collect, analyse and publish disaggregated data on the experience of people sharing protected characteristics in all mental health settings, with a particular emphasis on people from ethnic minority groups, in order to understand who is being detained and treated and in what circumstances, and take action to tackle mental health inequalities.

The Welsh Government should:

- Fully evaluate progress made under the Mental Health (Wales) Measure 2010 with a focus on preventing unnecessary detentions.

\textsuperscript{221} Ibid.


7. Use of restraint

Relates to CAT Articles 2, 10, 11, 16, CO paragraphs 26, 28 and 29 and list of issues paragraphs 20, 22, 31, 40 and 41.

In its 2016 list of issues, the Committee requested information on the rules, practices and training methods relating to the use of restraint in policing, prisons and youth custody centres, and in health and social care settings. It expressed particular interest in the allegations concerning the use of force by staff at the Medway STC. In its 2013 concluding observations, the Committee recommended the prohibition of all forms of corporal punishment and a ban on the use of any technique of restraint designed to inflict pain on children.

The EHRC defines restraint broadly as an act carried out with the purpose of restricting an individual’s movement, liberty and/or freedom to act independently. It may therefore include chemical, mechanical and physical forms of control, coercion and enforced isolation (segregation).

In England and Wales, restraint may lawfully be used in numerous settings, particularly health, social care, criminal justice, immigration and education settings, subject to the safeguards set out in legislation and guidance. Each of these sectors, and sometimes the different settings within them, have separate rules about the use of restraint. For example, pain-inducing restraint is banned in secure children’s homes, which provide secure accommodation to ‘at risk’ children (including those who are likely to cause harm to themselves or others) but not in escorts to and from these homes. Pain-inducing restraint techniques may also be used in YOIs and STCs.

Adult prisons

HMIP has found that high levels of force are used on prisoners in England and Wales and that prisoners at risk of suicide and self-harm continue to be

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226 YOI Rules r. 52 (1) [accessed: 8 March 2019].
227 STC Rules r. 38 (1) [accessed: 8 March 2019].
unnecessarily segregated.\textsuperscript{229} During 2017/18, at least six prisoners took their own lives while in segregation units. The UK Government is revising existing guidance on the use of force in prisons.\textsuperscript{230}

The EHRC has serious concerns about the UK Government’s announcement, in October 2018, that it plans to introduce PAVA spray for use by all officers in adult male prisons in England and Wales.\textsuperscript{231} This disregards the recommendations of the European Committee for the Prevention of Torture (CPT) that ‘PAVA should not form part of the standard equipment of custodial staff’.\textsuperscript{232} According to the announcement, PAVA spray ‘will only be deployed in limited circumstances when there is serious violence or an imminent risk of it taking place, and where its deployment will reduce the risk of serious injury.’\textsuperscript{233} However, the Government’s evaluation of a pilot of the use of PAVA spray in prisons found that staff became over-reliant on the spray and often did not follow correct procedures, which could lead to increasing use of restraint.\textsuperscript{234} In view of evidence regarding the disproportionate use of force on prisoners with certain protected characteristics (see below), we are also concerned that roll out of the use of PAVA spray was announced before a meaningful equality impact assessment had been completed.\textsuperscript{235}

\textbf{Youth custody}

In the last decade, there has been a substantial rise in the use of restraint in the youth custodial estate in England and Wales, including pain-inducing restraint.\textsuperscript{236} A police investigation into allegations of abuse and unnecessary use of force on children at Medway STC in 2015 led to criminal charges against a number of staff at the STC. None was found guilty of a criminal offence.\textsuperscript{237} However, an inspection that was conducted following the allegations was highly critical, highlighting weak

governance, poorly-trained staff and the absence of a strategy in the centre for dealing with violence.238

While subsequent inspections have reported some improvements at Medway STC,239 a serious case review into the abuse allegations at Medway, published in January 2019, highlighted ongoing widespread and unlawful use of painful restraint at the STC.240 HMIP has also raised concerns about the frequent use of pain-inducing restraint in other parts of the youth custodial estate.241 The UK Government announced a review of the use of pain-inducing restraint across the youth custodial estate, which is due to report in summer 2019.242

The use of segregation on children for disciplinary reasons is also increasing, especially in YOIs where children have been segregated for 22 hours or more a day, for periods extending to 30 days or more,243 amounting in practice to solitary confinement.244

**Policing**

The EHRC has concerns about the increasing use of Tasers on children in England and Wales. In 2017/18, there were 16 incidents involving the use of Tasers on children appearing to be under the age of 11, including five occasions on which the Taser was fired at the child.245 The number of police forces authorising the use of spit hoods on children in police custody is also increasing in England and there has been criticism that the risk assessments conducted do not take into account the specific dangers which spit hoods can represent to children.246

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244 General Assembly (2011), ‘Special Rapporteur on Torture Tells Third Committee Use of Prolonged Solitary Confinement on Rise, Calls for Global Ban on Practice’ [accessed: 8 March 2019].
Mental health units

The CPT recently identified a range of concerns about the use of force on patients in mental health settings and the use of long-term segregation and night-time confinement in high secure hospitals in England.\(^{247}\) There is evidence that chemical restraint is being misused on people with learning disabilities. For example, between 2009 and 2012, 13 per cent of people with learning disabilities in England (around 23,800 people) were being prescribed antipsychotic medication in the absence of a psychotic illness.\(^{248}\) There are also concerns about the use of restraint on people held in ATUs, notwithstanding the harm that such interventions can cause to people with learning disabilities (see also section 6.3). Between 2016 and 2017, the number of recorded restraints for learning disability and autism patients in contact with secondary mental health services in England increased by 73 per cent.\(^{249}\)

In 2005, the Welsh Government advised that no individuals receiving mental health services should ever be restrained in a face-down (prone) position under any circumstances.\(^{250}\) However, more recent guidance states that physical restraint should be carried out as a last resort and that prone restraint should only be used in exceptional circumstances.\(^{251}\) In 2014/15, there were 382 recorded uses of face-down restraint in mental health services in Wales.\(^{252}\)

It is hoped that the recent introduction of the Mental Health Units (Use of Force) Act 2018 in England will help to address some of these issues by requiring mental health units to train staff on how to reduce the use of restraint, providing patients with information about their rights and improving monitoring (see below).\(^{253}\) The Independent Review of the Mental Health Act 1983, published in December 2018, made a number of recommendations to the UK Government, including promoting greater use of therapeutic environments which are less coercive and which should involve fewer situations that result in restraint.\(^{254}\) In December 2018, the UK Government commissioned the CQC to conduct a review into the use of restraint, prolonged seclusion and segregation in England for people with mental health

\(^{247}\) CPT (2017), ‘Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the CPT from 30 March to 12 April 2016 (20)’ [accessed: 8 March 2019].
\(^{253}\) Mental Health Units (Use of Force) Act 2018 (‘Seni’s Law’).
\(^{254}\) Independent Review of the Mental Health Act (2018), ‘Modernising the Mental Health Act: increasing choice, reducing compulsion’ [accessed: 9 March 2019].
conditions, learning disabilities and/or autism. The CQC will publish an interim report in May 2019 and a full report with recommendations in March 2020.

Schools

The EHRC is concerned that UK Government guidance on the use of force in schools in England does not provide children with sufficient safeguards against abuse. For example, it does not spell out the principle that certain forms of restraint should be used only as a last resort. In 2016, the UN Committee on the Rights of the Child criticised the use of restraint and seclusion on children with psychosocial disabilities, including children with autism, in schools. The Children’s Commissioner for England (CCE) recommended that existing standards for residential schools should be revised to ensure stricter rules around the use of restraint, including better recording practices and monitoring.

The limited data available suggests that restraint is being used unlawfully on children with learning disabilities. A Freedom of Information request to local authorities across Britain revealed 13,000 physical restraints in special schools between 2014 and 2017, resulting in 731 injuries. Over 80 per cent of local authorities subject to the request said that they did not have the relevant information requested, suggesting the actual figure may be much higher.

Promoting greater consistency across settings

According to Welsh Government officials, the Welsh Government is updating government guidance on the use of restrictive practices for children and adults in a range of settings, including health, education and social care settings. The updated guidance will aim to promote a human rights-based approach to the use of restraint practice. The timing of this is unclear.

Between November 2017 and January 2018, the UK Government consulted on draft guidance on reducing the need for restraint for children and young people with learning disabilities, autistic spectrum disorder and mental health needs in health

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261 Information provided by the Welsh Government on 13 February 2019.
and care settings and special educational settings. The outcome of this consultation has not been announced.262

**Disproportionate use of restraint on specific groups**

There is evidence of excessive force being disproportionately used on people from ethnic minorities, especially black and Asian detainees in police custody and the wider secure estate, and people with mental health conditions. This has been linked to a disproportionate number of ethnic minority restraint-related deaths in custody in England and Wales.263 The CCE found that specific groups of children in the youth custodial estate, including disabled and ethnic minority children, are at increased risk of being placed in isolation.264

There is also evidence of disproportionality in the use of restraint in healthcare settings. Both the United Nations Committee on the Elimination of Racial Discrimination (UNCERD) and the United Nations Committee on the Rights of Persons with Disabilities (UNCRPD) have raised concern about the disproportionate use of restraint, seclusion and medication on black people in mental health settings.265 The disproportionate use of physical restraint, including face-down restraint, is also reported for women and girls in mental health wards in England.266

**Data collection and monitoring**

In recent years there have been improvements in monitoring the use of restraint during police arrest and custody, in mental health units and in youth custodial settings. However, there are significant gaps and inconsistencies in recording practices. A recent CQC report noted that staff in mental health trusts in England ‘were not recording all incidents of restraint and not documenting or recording seclusion or long-term segregation as required by the Mental Health Act Code of Practice’.267 Improvements can be expected from the recently adopted Mental Health Units (Use of Force) Act 2018, which requires mental health units in England to

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make provision for improved data collection, including by protected characteristics under the Equality Act 2010.268

In December 2018, the Home Office published restraint statistics by police force in England and Wales for the first time. However, due to quality and other limitations, including inconsistencies in recording within and across police forces, the data remains experimental at this stage.269

Currently there is no national level data on the use of restraint in the adult prison estate for men or women.270 In his review of the treatment of, and outcomes for, people from ethnic minorities in the criminal justice system, David Lammy MP called for every prison to have ethnically diverse Use of Force Committees to monitor and guard against the disproportionate use of restraint. He also called for escalating consequences for officers found to be misusing force on more than one occasion.271 The UK Government has announced that it accepts this recommendation and is working towards its implementation.272

There are set core standards on the use of restraint for inspectors to monitor in residential special schools.273 However, the use of restraint is not explicitly referred to in the inspection framework for mainstream schools, although supplementary guidance exists on the use of restraint for cases in which inspectors are aware of a particular issue in a mainstream school and wish to raise it.274

**Complaints mechanisms and investigations**

Procedures for bringing complaints about the misuse of restraint exist in mental health, prison and police custody settings, but there are problems with their accessibility and lack of accountability.

After exhausting the internal prison complaints process,275 detainees can send complaints to the independent PPO for England and Wales. In 2017/18, the PPO received 71 complaints alleging physical abuse by staff, compared with 53 the

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268 Mental Health Units (Use of Force) Act 2018 (‘Seni’s Law’).
previous year, and it upheld 38 per cent of complaints. A disproportionate number of complaints received by the PPO are from black and Asian prisoners.

A 2017 study found significant flaws in the system that is used to handle discrimination complaints in prisons. A recent inquiry found that children in the youth custodial estate do not have confidence in complaints procedures. This is reflected in the very small number of complaints from children that reach the PPO.

In 2017, the UK Government introduced reforms to the Independent Police Complaints Commission with the aim of streamlining decision-making. The reformed organisation, which was renamed the Independent Office for Police Conduct (IOPC) for England and Wales, has the power to initiate its own investigations.

A key concern is that there is no requirement for prisons or police forces to implement the PPO and IOPC’s recommendations, with the exception that the IOPC can direct a force to take disciplinary proceedings against officers for misconduct/gross misconduct if such a recommendation is ignored.

Current arrangements for investigating complaints of ill-treatment due to restraint in health settings are inadequate. Our concerns about the body responsible for these investigations – the Healthcare Safety Investigation Branch (HSIB) – are dealt with in chapter 9 of this report.

The CCE has found that children and their carers lack confidence in the system for bringing complaints in mainstream schools and do not understand how to use it.

Corporal punishment

In its 2003 concluding observations, the Committee recommended that the State party prohibit corporal punishment of children in all settings, repealing all legal defences currently in place. However, in England and Wales, parents and those
acting ‘in loco parentis’ charged with the common assault of a child can still seek to rely on the common law defence of ‘reasonable punishment’ if the act is committed for the purpose of correcting the child’s behaviour. This means that children do not have the same level of protection from violence as adults.

Since the enactment of the Rights of Children and Young Persons (Wales) Measure 2011, Welsh ministers have been obliged to have due regard to the Convention on the Rights of the Child when making decisions. In 2018, a Welsh Government consultation came out narrowly in favour of the view that removal of the defence of reasonable punishment will protect children’s rights. In July 2018, the then First Minister announced the Welsh Government would introduce a bill to remove the defence of reasonable punishment in the third year of the legislative programme (September 2018 - July 2019). In January 2019, the current First Minister reaffirmed this commitment.

Recommendations

Given the similarities and interfaces across sectors, the UK and Welsh Governments, where relevant, should:

- Promote consistent legal and policy approaches to restraint, based on human rights principles, with cross-sector learning, in line with the EHRC’s human rights framework for restraint. This should include a ban on any technique that deliberately inflicts pain on children.
- Harmonise approaches to recording incidents of restraint to allow for improved monitoring, evaluation and learning, and more comprehensive and comparable data. This will help build a robust evidence base to underpin efforts to tackle restraint, particularly its disproportionate use on groups of people who share certain protected characteristics.
- Improve complaints and investigation processes so that they are effective and accessible.

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• Ensure substantive action to implement recommendations and lessons learned from investigations in order to address the risk of breaches of human rights standards.

The UK and Welsh Governments should:
• Prohibit all forms of physical punishment of children, including through the abolition of the ‘reasonable punishment’ defence.
8. Counter-terrorism measures

Relates to Articles 2, 10, 15 and 16, CO paragraph 12 and list of issues paragraphs 8 and 48

In its 2016 list of issues, the Committee asked for information on progress made to ensure that all measures used to restrict or limit fair trial guarantees on national security grounds, including the use of closed material procedures, are fully compliant with the provisions of CAT. It also asked about measures taken by the State party to respond to threats of terrorism, and if and how those measures have affected human rights safeguards in law and in practice.

The UK Prime Minister responded to a series of terrorist attacks in 2017 by pledging to ‘review Britain’s counter-terrorism strategy to make sure the police and security services have all the powers they need’ to address terrorist threats. The EHRC is concerned that several counter-terrorism powers, including some of those included in the Counter-Terrorism and Border Security Act 2019, have the potential to erode important safeguards that are needed to prevent torture and other cruel, inhuman or degrading treatment.

**Port and border control powers**

The EHRC has previously expressed concerns about the discriminatory effects of Schedule 7 of the Terrorism Act 2000, which gives police the power to stop, question, search and detain individuals at airports and ports without a requirement to have reasonable grounds for suspicion. The disproportionate number of people from ethnic minority groups who have been subject to this power has been widely recognised. While the ethnic disproportionality in numbers detained has slightly decreased in the last two years, the number of Asians detained under Schedule 7 is

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289 Prime Minister’s Office and The Right Honourable Theresa May MP (2017), ‘PM statement following London terror attack’ [accessed: 2 November 2018].
still disproportionately high when compared to white people. The EHRC shares the concerns of the JCHR and others about measures in the Counter-Terrorism and Border Security Act 2019 to expand these powers, including additional powers to question and detain individuals who are suspected of hostile activity for or on behalf of another state, without introducing a ‘reasonable suspicion’ threshold.

**14-day pre-charge detention**

The Protection of Freedoms Act 2012, applicable in England and Wales, retains the 14-day limit for terrorism suspects to be detained before being charged, with judicial authorisation. The EHRC shares the Human Rights Committee’s views on the need to reduce the maximum period of pre-charge detention in terrorism cases, and considers that it should be four days in line with criminal law in England and Wales.

**Use of closed material procedures**

Closed material procedures (CMPs) were created to address the concern that disclosure of sensitive material under the usual rules of the civil litigation process could compromise national security. Although they have been in place now for over five years, they still constitute a departure from longstanding fundamental legal principles of open justice and the fair trial of claims. In the small number of cases in which they are used, claimants are denied access, on national security grounds, to sensitive evidence that is potentially relevant in assisting the determination of claims.

In 2013, the Committee expressed concern about the statutory extension, through the Justice and Security Act (JSA) 2013, of CMPs to civil cases. Previously, they could be used only in criminal proceedings. It recommended that intelligence and other sensitive material should be disclosed if a court determines that it might reveal evidence of human rights violations such as torture or cruel, inhuman or degrading treatment.

In recent years, British courts have ordered CMPs in a number of cases in which claimants have alleged ill-treatment and wrongful detention by British and American...
In these cases, Special Advocates were appointed to examine the intelligence/sensitive material and to represent the interests of the claimants. We do not know whether evidence of human rights violations has been withheld from the public in these cases.

It has been argued that, compared with greater use of public interest immunity certificates, CMPs can play a positive role in facilitating judicial scrutiny of the executive in cases where there are important national security concerns. However, the EHRC remains concerned that the non-disclosure of material information to the excluded party may in some cases compromise the right to a fair trial and prevent other human rights violations from coming to light.

The UK Government publishes very limited information on the use of CMPs in civil cases beyond the Secretary of State for Justice’s annual statutory reports. The basic information provided in these reports is not sufficient to assess whether CMPs are being used appropriately.

The forthcoming review of the JSA 2013, trailed by the UK Government but not yet launched, presents an opportunity to consider whether CMPs are operating only when strictly necessary, to assess the quality of safeguards provided through the use of judges and Special Advocates, and to examine whether there are better alternatives to CMPs that can still achieve the legitimate aim of protecting national security without unjustifiably compromising open and fair civil justice. The public interest in ensuring allegations of torture, inhuman and degrading treatment are thoroughly investigated should be viewed as an important dimension of this review.

Treatment of terrorist suspects referred by the Prevent duty

In its 2016 concluding observations, UNCEDR urged the UK to review the implementation and evaluate the impact of the Prevent duty to ensure that there are sufficient safeguards against abuse, and that it is implemented in a manner that does not constitute racial discrimination.

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297 Alasdair Henderson (2017), ‘When can a closed material procedure be used?’ [accessed: 8 March 2019].
The Prevent duty, introduced by the Counter-Terrorism and Security Act 2015 (CTSA), places local authorities, schools, colleges, universities, health bodies, prisons, probation organisations, and the police under a statutory duty to ‘consider the need to safeguard people from being drawn into terrorism’. Following a preliminary assessment, the police may refer the individual to a multi-disciplinary Channel panel. This panel discusses the circumstances of the case and may proceed to develop a support package for the individual.301 The new Counter-terrorism and Border Security Act 2019 has extended the Prevent duty by allowing local authorities, as well as police, to refer individuals to a Channel panel.302

In 2017/18, 7,318 individuals were referred to the Channel programme, a 20 per cent increase compared with 2016/17. Of these, 44 per cent were referred due to concerns related to Islamist terrorism and 18 per cent to right wing extremist ideology.303 Of the 7,318 people referred, only 394 (5 per cent) received Channel support. This has raised concerns about the effectiveness of the referral process and has led to criticism that it is discriminatory and risks violating human rights, including freedom of speech, the right to private life and the right to manifest a religion.304

**Use of diplomatic assurances to prevent torture**

In July 2018, the UK Government decided to extend mutual legal assistance to the United States over the possible prosecution of two terrorist suspects without seeking assurances that the death penalty would not be used.305 This went against usual UK practice of seeking diplomatic assurances over the use of the death penalty, although reports have suggested that the UK Government has failed to seek death penalty assurances on at least two other occasions since 2001.306 The Overseas Security and Justice Assistance (OSJA) guidance, adopted in 2011, permits the provision of assistance without seeking assurances ‘where there are strong reasons for doing so.’307

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302 Section 20 of the Counter-terrorism and Border Security Act 2019.
The EHRC is concerned that recent failures to seek death penalty assurances and the relevant provisions of the OSJA may contravene the UK’s international obligation to prevent torture under Article 2 of CAT, as well as UK compliance with domestic legal requirements under the Human Rights Act 1998 in relation to Article 3 of the ECHR.

**Recommendations**

The UK Government should broaden its review of current counter-terror strategy to consider the impact on human rights of existing and proposed measures. In particular, it should:

- Introduce a threshold for reasonable suspicion for arresting individuals at airports and ports, and any new powers introduced in this area.
- Reduce the limit on pre-charge detention for terrorist suspects to four days, in line with the criminal law in England and Wales.
- Use the forthcoming review of the JSA 2013 to consider whether CMPs are operating appropriately and, if CMPs are retained, to consider ways to strengthen transparency around their use to ensure they are used sparingly and only when strictly necessary.
- Conduct a full evaluation of the impact of the Prevent strategy on equality, good relations and human rights, and ensure that people responsible for Prevent in public bodies are trained in their equality and human rights obligations.
- Ensure there is no deviation from the UK practice of seeking diplomatic assurances that the death penalty will not be used when extending mutual legal assistance, and revise the relevant provisions in OSJA guidance.
9. Ill-treatment of people receiving health and social care services

Relates to Articles 11, 12 and 16, CO paragraph 33 and list of issues paragraph 29

In its 2016 list of issues, the Committee requested information on the measures in place to prevent ill-treatment of people receiving healthcare services, and in particular to ensure the effective implementation of the recommendations of the Francis Inquiry into failings in care at Mid Staffordshire NHS Foundation Trust. This followed the Committee’s previous concluding observations, which identified the failure of NHS managers and regulators to identify and act on the problems at Mid Staffordshire as a violation of Article 11 of CAT.

Ill-treatment of people receiving healthcare services

The 2013 Francis Inquiry report examined the causes of the failings in care at Mid Staffordshire NHS Foundation Trust between 2005 and 2009. In June 2018, another high-profile public inquiry found that hundreds of older people had died prematurely between 1988 and 2000 at Gosport War Memorial Hospital as a result of the ‘almost routine use of opiates’ without medical justification.308

Following the publication of the Francis Inquiry report, the UK Government, NHS and the CQC in England have taken steps to improve healthcare safeguards and oversight mechanisms. In 2014, a statutory duty of candour was adopted,309 placing a legal requirement on health and adult social care providers in England to be open and transparent with patients, families and carers when a patient has suffered harm from their care or treatment. A CQC report found, however, that the duty of candour is not working as intended in many acute, community and mental health services.310

The Welsh Government is planning to bring forward a bill to establish a duty of candour. The proposed legislation would place statutory obligations on providers of NHS services, requiring them to be open and honest with individuals when things go

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wrong. This is designed to promote a culture of openness in the health service and will strengthen existing processes for raising concerns. The proposed bill will also bring forward a duty of quality, which will ensure the concept of quality is the driving force behind improvements to NHS services in Wales. The bill will also establish a new independent citizen voice body which will operate across both health and social services.

NHS trusts in England are now required to appoint a Freedom to Speak Up Guardian to support staff who report concerns about patient care and safety. Although it is too early to assess the effectiveness of these guardians, nearly 4,000 members of staff spoke to their Freedom to Speak Up Guardian up to June 2017, raising more than a thousand patient safety incidents. In Wales there is no equivalent requirement but a helpline and campaign to help staff speak up have been launched in one health board.

NHS trusts in England are required to report on the number of deaths that occur due to failures of care in their premises and on the steps taken to investigate these deaths. While these are welcome developments, we are concerned that the duty to report on deaths does not require the collection of data about the protected characteristics of patients, which would help to identify any disproportionality.

In April 2017, the Healthcare Safety Investigation Branch (HSIB) was set up to investigate patient safety incidents in all NHS settings in England. There is no equivalent body in Wales. The establishment of an independent investigatory unit was one of the key recommendations in the EHRC’s ‘Preventing Deaths in Detention of Adults with Mental Health Conditions’ report.

However, we have a number of concerns about the operation of the HSIB, including the limited number of investigations (30) it can take on annually. This is inadequate given the large number of safety incidents that take place each year, which result in

311 Welsh Government (2018), 'First Minister sets out legislative priorities' [accessed: 8 March 2019].
312 The Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017.
317 EHRC (2018), Written evidence to the draft Health Service Safety Investigations Bill committee [accessed: 8 March 2019].
319 EHRC (2015), 'Preventing Deaths in Detention of Adults with Mental Health Conditions' [accessed: 8 March 2019].
12,000 avoidable deaths and 24,000 serious patient safety incidents. In one study, the CQC identified 58,664 reported safety incidents in 54 mental health trusts between April and June 2017. Moreover, the HSIB lacks any mechanism to ensure that its recommendations are acted upon.

A bill is currently before the UK Parliament proposing to create a separate body which will establish the HSIB’s independence in statute. The EHRC welcomes the proposal to establish the Healthcare Services Safety Investigation Branch (HSSIB), but we have concerns about some aspects of the bill. In particular, the ability of HSSIB to conduct investigations that are fully compliant with Article 12 of CAT requires the extension of its investigative function to any incident where there are clear indications that serious ill-treatment may have occurred, even if it did not result in a death. We also have concerns about the procedure for appointing key officers of HSSIB, which may prevent it from conducting investigations that are fully independent of the organisations it investigates.

Ill-treatment of older and disabled people receiving social care

Substantial reductions in government funding to local authorities since 2010-11, combined with growth in the adult population, has resulted in a growing number of older or disabled people in England not receiving the care services they require in their homes or in residential settings. In its 2017 concluding observations, UNCRPD found this to be undermining the right of disabled people to live independently and be part of the community. By affecting the ability of people to access basic needs such as eating, washing and going to the toilet, it may also amount in extreme cases to inhuman and degrading treatment.

In recent years, there has been a substantial increase in the number of reports of abuse and neglect of older people in care homes. Data obtained from the CQC by the Sunday Times newspaper show a 40 per cent increase in notifications of serious injury of residents in care homes in England between 2012 and 2016, from 26,779 to

323 EHRC (2018), Written evidence to the Draft Health service Safety Investigations Bill Committee [accessed 8 March 2019].
327 Care and Support Alliance (2018), ‘Voices from the social care crisis: An opportunity to end a broken system, once and for all’ [accessed: 8 March 2019].
38,676. Injuries included infected bedsores, broken bones and burns, some of which were due to neglect and other failings in care.

The Welsh Government has prioritised social care in budget allocations to local authorities since 2010 and has committed to continue to do so. However, there has been a real terms reduction in budgets for social care services of over 12 per cent due to increasing need for services. A 2018 report by the Older People’s Commissioner in Wales commended improvements in inspection frameworks and training provided to social care workers, but found that significant action is still required so that older people can have a good quality of life.

Under the Care Act 2014, local authorities in England must set up safeguarding adult boards to respond to safeguarding inquiries and to conduct Safeguarding Adults Reviews when people die as a result of neglect or abuse or have experienced serious abuse or neglect. Between 2016 and 2017, 109,145 people were the subject of a safeguarding inquiry in England, representing an increase of 6 per cent since 2015/16, although the increase needs to be considered with caution due to changes in the system for reporting inquiries during this period. Inquiry rates were higher for people aged over 75; for women than for men; and for ethnic minorities than for white people.

In 2016, the Welsh Care Inspectorate expressed concerns about the leadership and governance of safeguarding for adults with learning disabilities. Under the Social Services and Well-being (Wales) Act 2014, a National Independent Safeguarding Board was set up to provide advice and support, and to report and make recommendations to Welsh ministers on the adequacy and effectiveness of arrangements to safeguard children and adults in Wales.

**Recommendations**

The UK Government should:

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• Use the process of placing the HSIB on a statutory footing to clarify and strengthen its role in conducting investigations compatible with the requirements of Article 12 of CAT into patient safety incidents in all healthcare settings.

The Welsh Government should:
• Consider establishing an independent body to investigate patient safety incidents in all healthcare settings in Wales.

The UK and Welsh Governments should:
• Monitor the impact of any reductions in the availability of adult social care on the dignity and wellbeing of older and disabled people, including their right to live independently.
• Monitor the extent of unmet needs, and develop plans to progressively close gaps in meeting needs.
10. Asylum and migration procedures

10.1 Use of diplomatic assurances

Relates to CAT Article 3, CO paragraph 18 and list of issues paragraph 14

In its 2016 list of issues, the Committee requested information about the number of refoulements, extraditions and expulsions carried out by the State party on the basis of diplomatic assurances; the minimum contents of any such assurances; and the measures taken to monitor them.

Diplomatic assurances are used by the UK Government in relation to extradition and deportation proceedings to try to mitigate risks of torture and other ill-treatment that would otherwise prevent the transfer of people, in particular terror suspects (see also chapter 8).

The UK Government has concluded deportation with assurances (DWA) arrangements with five countries: Algeria, Ethiopia, Jordan, Lebanon, Libya and Morocco. DWA to Algeria was ruled out by the Special Immigration Appeals Commission in April 2016 due to a lack of adequate monitoring. There has been one instance of administrative removal with assurances to Morocco, but no requests in relation to Lebanon. In July 2016, DWA proceedings relating to Jordan were withdrawn by the UK Government after the Jordanian authorities refused to provide the assurances sought. Undisclosed evidence led the former Independent Reviewer of Terrorism Legislation to conclude, in a July 2017 report, that DWA to Ethiopia is not feasible.

In July 2017, the former Independent Reviewer of Terrorism Legislation, David Anderson QC, stressed that the use of DWA can ‘be delivered effectively and legitimately only if laborious care is taken’. He concluded that ‘the key consideration to be taken into account in developing safety on return processes is whether compliance with assurances can be objectively verified through diplomatic or other monitoring mechanisms’.

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In a response to David Anderson’s review, published in October 2018, the Home Secretary confirmed that, while there are currently no live cases, ‘in the longer term, the Government remains committed to pursuing DWA in appropriate cases’.\textsuperscript{338} He confirmed the Government’s intention to seek independent monitoring where necessary and possible, but said that in some cases a ‘more flexible approach’ may be needed, based on ‘urgently negotiated agreements’.\textsuperscript{339} This raises concerns about a weakening of protections in cases deemed urgent by Government.

**Recommendations**

The UK Government should:

- Ensure effective verification and independent monitoring in all cases where assurances are sought in the event of a deportation, preferably in the context of both parties having ratified the Optional Protocol to the UN Convention against Torture (OPCAT).
- Lay the text of each future DWA arrangement before Parliament and ensure that no arrangement shall come into force before 14 sitting days have elapsed, during which time MPs may signify any objection.

10.2 Identification and determination of statelessness

Relates to CAT Article 3, list of issues paragraph 15

The UN CAT’s 2016 list of issues requests information about legislative and other measures taken to improve the identification and determination of statelessness and to introduce procedural safeguards to improve access to the statelessness determination procedure.

In 2013, the UK introduced a procedure for the identification and determination of statelessness.\textsuperscript{340} Since then, a growing body of evidence has emerged of problems associated with the procedure, including long delays in the determination of applications (more than three years in some cases, including some involving


\textsuperscript{339} Ibid.

\textsuperscript{340} UK’s Immigration Rules, Part 14 [accessed: 10 October 2018].
children)\textsuperscript{341} and the use of administrative detention without a defined time limit in the case of many applicants.\textsuperscript{342}

The number of stateless persons in detention is unknown, as individuals are not usually recorded as stateless when they enter detention unless they have previously been recognised as stateless.\textsuperscript{343} There is no obligation on immigration officers to refer people who may be stateless, or at risk of statelessness to the statelessness determination procedure at the outset of detention or at regular intervals during the detention period. Although individuals in immigration detention have a right to apply to be recognised as stateless, the cumbersome nature of the application process makes it difficult for them to apply, especially if they do not have legal representation. These barriers for detainees to access the determination procedure are concerning, given the intrinsic difficulties in removing stateless persons, and therefore their greater risk of enduring prolonged and repeated detention.\textsuperscript{344}

Applicants who are not detained do not have permission to work or be self-employed while awaiting a decision, and access to other socio-economic rights is limited. As a result, many may experience extreme poverty that could be considered degrading.\textsuperscript{345} As a result of the burdensome and costly application process, some children born stateless or at risk of statelessness in the UK remain stateless or undocumented despite various provisions in UK law to prevent childhood statelessness.\textsuperscript{346}

There is a very low rate of success for statelessness applications.\textsuperscript{347} Research indicates that this reflects significant errors in Home Office decision-making as a result of high levels of discretion, insufficient training of case-workers on the relevant rules and insufficient assistance provided to applicants in obtaining the necessary evidence.\textsuperscript{348} Individuals applying to be recognised as stateless have neither a free-standing right to free legal assistance nor a right to appeal decisions at an immigration tribunal. The only possibility to appeal a decision is through an internal administrative review, which is limited in scope and is not in line with the procedural


\textsuperscript{342} European Network on Statelessness (2016), ‘Protecting stateless persons from arbitrary detention in the United Kingdom’ [accessed: 8 March 2019].

\textsuperscript{343} European Network on Statelessness (2016).

\textsuperscript{344} Migrants Resource Centre (2016), p.12; European Network on Statelessness (2016).


\textsuperscript{348} Home Office (2016), ‘Asylum Policy Instruction - Statelessness and applications for leave to remain’ [accessed: 8 March 2019].
guarantees recommended by the UNHCR. A judicial review can be brought by a refused applicant after exhausting all other remedies; however, the scope of judicial reviews is limited to considering the lawfulness of the original Home Office decision rather than examining a case on its merits.\(^{349}\)

**Recommendations**

The UK Government should:

- Adapt Home Office policies and procedures for administrative detention by obliging immigration officers to refer a person who may be stateless, or at risk of statelessness, to the statelessness determination procedure at the point of the decision to detain and at regular intervals during the detention period.

- Improve the speed and quality of the statelessness determination procedure by increasing the number of staff involved in processing applications and improving the training they receive, and by providing applicants with free legal aid and an effective right to appeal decisions in the event of refusal.

\(^{349}\) European Network on Statelessness (2016).
11. Violence against women and girls

Relates to CAT Articles 2, 12 and 16, list of issues paragraph 11

In its 2016 list of issues, the Committee requested information on

- measures taken to eliminate all forms of violence against women, including domestic violence, sexual harassment, gender-based bullying in the education system and female genital mutilation
- the protection and support services available to victims of gender-based violence, and
- the extent to which cases of gender-based violence are effectively dealt with by the criminal justice system.

The number of sexual offences recorded by the police in England and Wales increased by 89 per cent between 2013/14 and 2016/17, reaching 121,187 in the year ending March 2017.\(^{350}\) According to self-report statistics, in the same year, fewer than 0.1 per cent of men had experienced rape or assault by penetration (including attempts) compared with 0.9 per cent of women.\(^ {351}\) In England and Wales, 599,549 domestic abuse related crimes were recorded by the police in 2017/18, up by 23 per cent from the previous year.\(^ {352}\) Reports of so-called ‘honour-based’ violence in the UK increased by 53 per cent between 2014 and 2017.\(^ {353}\) Yet, under-reporting and under-recording, low referral rates to support services and low prosecution and conviction rates of violence against women and girls (VAWG) are persistent problems.\(^ {354}\)

Response of the criminal justice system

A 2016 review of rape and serious sexual offences units in the CPS found that existing policy and legal guidance is sufficient but that compliance with the guidance needed to improve. For example, cases were not always handled by a specialist

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\(^{353}\) IKWRO (2017), ‘53% rise in “honour” based violence cases reported to the police since the criminalisation of forced marriage’ [accessed: 29 April 2018].

prosecutor. While steps have been taken to improve the handling of these cases by the police and CPS, low referral and prosecution rates continue. In 2018, a Supreme Court case found that two victims of rape had been subjected to inhuman or degrading treatment under Article 3 of the HRA as a result of failings by the police to effectively investigate allegations of rape. According to a recent inspection report, the number of police referrals and decisions to prosecute so-called ‘honour-based’ crimes has remained low due to insufficient preparedness and understanding of these crimes within the police and CPS.

The UK Government has adopted a number of policy and legislative measures to improve the criminal justice system’s response to VAWG. In 2014, domestic violence protection orders (DVPOs) were rolled out across England and Wales. Their purpose is to provide urgent protection for victims following domestic incidents. In 2015, a new offence of ‘controlling or coercive behaviour in an intimate or family relationship’ came into force in England and Wales.

In 2016, the UK Government published a revised VAWG strategy for England and Wales which aims to reduce all forms of VAWG and increase reporting, police referrals, prosecutions, convictions and prevention work. To support the strategy, the UK Government pledged to provide £100m before 2020. The EHRC has raised concerns about the risks to implementation of the VAWG strategy due to the lack of a central budget, and the strategy’s emphasis on local decision-making. The implementation of the strategy is overseen by an inter-ministerial group but there has been little clarity about how departments report progress on the strategy.

The UK Government’s recent announcement that it will be introducing changes to the governance of a ‘refresh’ VAWG strategy is therefore welcome. These changes include setting up a stakeholder advisory group to involve victims’ groups. The UK

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360 CPS, ‘Domestic Abuse Guidelines for Prosecutors’ [accessed: 8 March 2019]
363 EHRC (2014), ‘Written evidence submitted by the EHRC to the JCHR Inquiry into violence against women and girls’ [accessed: 8 March 2019].
Government has also committed to conducting a review into how the criminal justice system responds to rape and serious sexual offences. 365

The Welsh Government has introduced policy and legislative measures to improve the public sector response to VAWG. In 2015, the Welsh Government passed a Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act. 366 Among other things, it allows Welsh ministers to place a duty on local authorities to report on how they are addressing violence against women, domestic abuse and sexual violence within their educational institutions. The Act requires Welsh ministers to appoint a national adviser to monitor implementation of the Act and undertake research on any aspect related to the implementation of the Act. It also requires the Welsh Government to establish national indicators to measure progress. In June 2018, the Welsh Government’s progress report identified a number of impacts including a 6 per cent rise in the use of the Live Fear Free website and a large increase in the number of public sector workers trained to provide effective responses to victims and survivors.367 However, there are still no finalised national indicators.

The Serious Crime Act (2015) strengthened the legal framework on female genital mutilation (FGM) which applies in England and Wales. It introduced lifelong anonymity for victims; created an offence of failing to protect a girl from FGM; and introduced FGM protection orders. It extended the coverage of extra-territorial offences and introduced a mandatory reporting duty for known cases in girls under 18.368 However, to date only one person has been convicted of FGM in the UK.369 The Welsh Government funded the development of an FGM toolkit for professionals and parents in 2011,370 provided training to frontline staff and, in 2018, the first clinic in Wales was opened to provide medical and psychological help to victims of FGM.371

368 Serious Crime Act 2015 [accessed: 3 December 2018].
371 Royal College of Midwives (2018), ‘A major step in the campaign to stop FGM in Wales’ says RCM on opening of first specialist FGM clinic in Wales’ [accessed 8 March 2019].
On 21 January 2019, the UK Government published a draft Domestic Abuse Bill for England and Wales. The draft Bill proposes a number of measures, including the creation of a Domestic Abuse Commissioner; a statutory definition for domestic abuse; a new domestic abuse protection notice and order; and various measures to strengthen safeguards for victims of domestic abuse in judicial proceedings. The EHRC urged the UK Government to ensure the Bill covers all aspects of violence against women and girls, not just domestic abuse. Disappointingly, this has not happened.

Despite signing the Convention on Preventing and Combating Violence Against Women and Domestic Violence (the Istanbul Convention) in 2012, the UK has not yet ratified it. Several outstanding actions are required to ensure compliance, including extending extra-territorial jurisdiction over a range of offences. The decision to include provisions in the draft Domestic Abuse Bill that will ensure the law in England and Wales on extra-territorial jurisdiction meets the requirements of the Istanbul Convention is a step in the right direction.

Protection and support services

There is insufficient funding for refuges and specialist domestic abuse services. It was reported in 2017 that, in response to budget cuts, council funding for refuges in England dropped from £31.2m in 2010/1 to £23.9m in 2016/7. Welsh Women’s Aid reported that specialist VAWG services in Wales saw an overall loss of up to 5 per cent of funding between 2016/17 and 2017/18, while demand increased. Funding shortages are having a direct impact on service provision. Women’s Aid advised that 1,695 more spaces are needed in England to meet Council of Europe guidelines. Welsh Women’s Aid reported that in 2016/17, 500 survivors of domestic abuse (of which 90 per cent were women) were unable to be supported in refuges in Wales because of a lack of service resources or capacity.

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373 EHRC (2018), ‘Response of the EHRC to the Consultation: Transforming the response to domestic abuse’ [accessed: 7 March 2019].


376 HM Government (January 2019).

377 The Bureau of Investigative Journalism (2017), ‘Revealed: Thousands of vulnerable women turned away as refuge funding is cut’ [accessed: 20 March 2019].


violence services face similar challenges. At the end of the 2017/18 financial year, there were 6,355 victims and survivors waiting to access support from Rape Crisis centres across England and Wales, with waiting lists ranging from 3 to 14 months.\textsuperscript{381}

In 2015, the All-Party Parliamentary Group on Domestic and Sexual Violence reported that funding cuts by statutory agencies have had a disproportionate impact on black- and ethnic minority-led VAWG organisations.\textsuperscript{382} Research has shown that just 11 per cent of refuges in England had an alcohol or drug support worker, and less than a third of refuge services employed specialist mental health workers.\textsuperscript{383}

The need to address funding gaps is acknowledged by the UK Government, which is carrying out a review of how domestic abuse services are locally commissioned and funded across England.\textsuperscript{384} The UK Government recently announced a 10 per cent increase in funding for services that support victims of sexual violence and abuse.\textsuperscript{385} The Welsh Government has taken steps to compensate for funding reductions from other sources by providing additional funding to reduce waiting lists for counselling services and to train independent sexual violence advisers.

**Recommendations**

The UK and Welsh governments, where relevant, should:

- Improve the reporting and recording of all forms of violence against women and girls and increase prosecution and conviction rates, ensuring police forces take a victim-centred approach.
- Ensure the sustainability of funding for support services that address all forms of violence against women and girls, including those that provide specialist services for disabled and ethnic minority women and girls.
- Put in place the remaining changes to law, policy and practice needed to enable ratification of the Istanbul Convention; and
- Fully implement and resource their VAWG strategies, undertaking co-ordinated cross-government action and reporting on progress.

\textsuperscript{383} Women’s Aid (2018).
12. Child sexual abuse

Relates to CAT Articles 12, 13 and 16, CO paragraph 35 and list of issues paragraphs 32, 37 and 42

The Committee’s 2016 list of issues requested information about the investigations and disciplinary actions taken in relation to the allegations of child sexual abuse in detention, including in the Medomsley Detention Centre; and on the reports that a number of high-profile independent inquiries have highlighted serious issues in relation to child sexual abuse and exploitation in England and Wales, in terms of its prevention and the investigation of victims’ allegations.

In recent years, there has been increasing concern about child sexual abuse and exploitation in the wake of high-profile cases and growing awareness of the scale of abuse previously hidden from public view. Examples include allegations of child sexual abuse by staff members of Medomsley Detention Centre during the 1970s and 80s, allegations of child sexual abuse by the staff of a residential school in Rochdale between 1988 and 1992, and sexual abuse and exploitation of hundreds of girls by organised networks in Rotherham, Rochdale and Telford since the 1980s. In March 2019, five former officers were convicted of physically abusing children at the Medomsley Detention Centre.386

The cases have been publicised against a backdrop of increasing sexual offences against children recorded by the police in England and Wales. Between 2013/14 and 2016/17, the number of sexual offences against children aged under 16 recorded by the police increased by 89 per cent in England, and by 92 per cent in Wales. Improved recording by the police and an increased willingness of victims to come forward appear to have contributed to the increase.387 The increase appears to be due to increased reporting.

A number of the high-profile cases have become the subject of independent inquiries.388 The Independent Inquiry into Child Sexual Abuse in England and Wales

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Torture in the UK: update report

Child sexual abuse

Equality and Human Rights Commission
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(IICSA) was established in March 2015.\textsuperscript{389} IICSA’s interim report, published in April 2018, states that it found extensive evidence that public authorities that were supposed to be responsible for the welfare of the children concerned – including social services, police services and local councils – were aware of allegations of child sexual abuse but failed to intervene in spite of numerous opportunities to do so.\textsuperscript{390}

The inquiry identified a number of systemic issues which made it possible for such abuse to continue. These included a culture of denial within public institutions, in some cases driven by assumptions held about the victims and the perpetrators; political and professional issues, including a lack of leadership among senior officials and gaps in checks over recruitment of staff responsible for the care of children; policy and legal issues, including inadequacies in the criminal and civil justice systems; and financial issues, including a lack of funding for specialised services to support children.\textsuperscript{391}

In a more recent investigation, IICSA has reported that a large number of allegations of sexual abuse of children in custodial institutions, mostly against staff, including at Medway STC in 2015 and 2016, continue to be made and are rarely investigated properly.\textsuperscript{392}

The measures taken so far to address some of these problems have mostly consisted of changes to policy and guidance. In 2017, the CICA adopted new staff guidelines to ensure that child victims of sexual abuse are not denied compensation on the mistaken grounds that they consented to a relationship.\textsuperscript{393} In 2018, a new cross-government Victims Strategy set out specific measures to protect survivors of a range of crimes, including child sexual abuse. These measures include a review of spending on services for victims of child sexual abuse, and a review of the Criminal Injuries Compensation Scheme to take account of grooming.\textsuperscript{394} In 2018, the UK Government ratified the Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention).

\textsuperscript{389} IICSA [accessed: 9 March 2019].


\textsuperscript{391} IICSA (2018).


\textsuperscript{393} Victim Support (2017), ‘Charity coalition responds to updated CICA guidelines for child sexual abuse victims’ [accessed: 7 March 2019].

The other three areas (culture, leadership and financial issues) require further, sustained attention. The increased number of convictions for child sexual abuse in England and Wales suggests that attitudes may be beginning to change. In 2016/17, there was a record number of convictions for child sexual abuse in England and Wales (5,374).\textsuperscript{395} However, recent statistics on reporting of sexual offences indicate that a large majority of victims aged 16+ (83 per cent) do not inform the police.\textsuperscript{396} The UK and Welsh Governments have both accepted IICSA’s interim recommendation to review current levels of expenditure on support available for child victims of sexual abuse.\textsuperscript{397} However, it is disappointing that the UK Government has rejected IICSA’s recommendation to make progression within the police dependent on achieving accreditation and operational experience in dealing with child sexual abuse.

**Recommendations**

The UK and Welsh Governments, where relevant, should take action in response to the recommendations in the interim report of the IICSA, in particular by:

- Commissioning a joint inspection of how well the police, the CPS and other agencies comply with the Victims’ Code in relation to victims and survivors of child sexual abuse.
- Strengthening the capacity of local police forces to prevent and respond to child sexual abuse by reconsidering the possibility of making progression within the police dependent on achieving accreditation and operational experience in this area.
- Establishing current levels of public expenditure, and the effectiveness of that expenditure, on services for child victims of sexual abuse.


13. Hate crime

Relates to CAT Article 16 and list of issues paragraph 43

In its 2016 list of issues, the Committee requested information about:

- measures to combat hate crimes under Article 16 of CAT, which covers acts of cruel, inhuman or degrading treatment which do not amount to torture, when such acts are committed by or with the acquiescence of a public official
- the rise in Islamophobic and anti-Semitic hate crimes, and
- specific measures taken to address under-reporting of disability- and transgender-motivated hate crimes.

The legal framework for hate crime in England and Wales protects the characteristics of race, religion, disability, sexual orientation and transgender identity. Police forces are required to record hate crime for these characteristics, although individual forces can monitor additional strands. For example, a number of police forces in England have piloted recording incidents of misogyny hate crime.

Police-recorded hate crime in England and Wales has increased year-on-year, rising from 42,255 offences in 2012/13 to 94,098 in 2017/18. The majority of recorded hate crimes are racially motivated, accounting for 76 per cent of all hate crime in 2017/18. Hate crime based on religion, disability and transgender identity have seen particularly steep increases: the level of recorded transgender hate crime, for example, increased by more than 4.5 times between 2012/13 and 2017/18. It is likely that action by police to improve recording practices, greater awareness of hate crime, and greater willingness among victims to come forward are factors in the increase. However, it continues to be the case that hate crime is significantly under-reported to the police. Research by Stonewall found that four in five

402 Ibid.
transgender people who had experienced a hate crime did not report it to the police, and some of those who did make a report felt unsupported by the police or experienced further discrimination.  

A recent inspection by Her Majesty’s Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS) highlighted inaccuracies in the recording of hate crime data by the police, which has ‘serious implications for forces in terms of their ability to understand hate crime and how it affects victims and their communities, and then respond appropriately’.  

A significant number of hate crime cases drop out of the criminal justice system at each stage of the proceedings. It is estimated that only 2 per cent of all hate crimes result in a successful conviction with a recorded uplift in the sentence to recognise that the offence is motivated by hostility on the basis of a protected characteristic. For disability hate crime, the figure is 0.1 per cent. No estimates are available for transgender hate crime.

One of the barriers to the effective investigation, prosecution and sentencing of hate crimes is the complexity of the legislative framework. The current framework does not provide parity of protection and remedy in respect of the protected characteristics. Whereas enhanced sentencing powers exist for crimes involving hostility based on a person’s actual or perceived race, religion, sexual orientation, disability or transgender identity, the law only provides for specific ‘aggravated’ offences on grounds of race or religion, and ‘stirring up hatred’ offences for race, religion or sexual orientation. This complexity creates uncertainty about the way in which such prohibited activity ought to be treated by law enforcement agencies and the courts.

In 2016, the UK Government published an action plan on hate crime for England and Wales, which focused on preventing, responding to and reporting hate crime, improving support for victims, and increasing understanding of hate crime’s causes and effects. Some commentators held that, while the aims were commendable, the action plan failed to outline the specific ways in which progress would be

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408 Ibid.
409 Ibid.
achieved and particular interventions would be evaluated. An update to the action plan in 2018 highlighted areas of progress including funding for community projects to tackle hate crime and new guidance for victims.

A separate framework has been developed to address hate crime in Wales. A 2016/17 progress report on the implementation of the framework identified an increase in the use of sentence uplifts, which recognise that hostility on the basis of a protected characteristic is an aggravating factor in the offence. The report also suggested there had been progress on increasing awareness about reporting, particularly among groups in which under-reporting is common, including transgender people, disabled people, and people from gypsy and traveller communities.

A joint inspection by HMICFRS and Her Majesty’s Crown Prosecution Service Inspectorate focusing on disability hate crime identified significant progress within the CPS in the handling of disability hate crime cases, for example improvements in the effectiveness of area hate crime coordinators, but stated that further improvements were needed by both prosecutors and the police. Issues requiring improvement included consideration of the needs of victims, particularly in relation to providing reasonable adjustments to support victims to give evidence. The Government’s Victim Strategy in 2018 announced measures to improve the Victims’ Code, including ensuring that victims of hate crime receive the enhanced support to which they are entitled, such as special measures when giving evidence in court.

The UK Government recently committed to a wide-ranging review of hate crime law covering England and Wales. The Law Commission, which is undertaking the review, has a remit to ensure the legislative framework provides more consistent and effective protection, and to consider whether the protections should be extended to additional characteristics such as sex and age.
Recommendations

The UK Government has introduced numerous legislative and policy measures aimed at combating hate crimes. However, there is scope to improve before these can be described as offering an effective framework to prevent hate crime and protect victims.

The UK Government should:

- Improve the reporting of hate crime, including by strengthening the initial handling and recording of hate crime reports; improving the quality of support to victims, including directing victims to support services and keeping them informed about the progress of their case; and improving the effectiveness of hate crime training for police forces.

- Ensure its forthcoming review of hate crime law in England and Wales results in reforms that provide equal and adequate protection to different protected groups, and that improve the ability of criminal justice agencies to understand and enforce the law effectively in response to hate crime.
14. Minimum age of criminal responsibility

Relates to CAT Articles 2, 11 and 16, CO paragraph 27 and list of issues paragraph 25

In its 2016 list of issues, the Committee referred to its 2013 recommendation and to repeated recommendations made by the UN Committee on the Rights of the Child with regard to raising the minimum age of criminal responsibility.

In England and Wales, the age of criminal responsibility is 10 years old, which is significantly lower than many European countries and inconsistent with accepted international standards. In Scotland, the Government has put forward proposals to raise the minimum age of criminal responsibility to 12.

The UN Committee on the Rights of the Child (UNCRC) is currently revising its General Comment on children’s rights in juvenile justice. The draft General Comment indicated that there may be an uplift of the internationally acceptable minimum age of criminal responsibility to 14.

In the year ending March 2018, 47 10-year-olds and 229 11-year-olds received a youth caution or court conviction in England and Wales. This means that a large number of children at a vulnerable age are being exposed to a judicial system which may potentially have harmful effects on their wellbeing and development. There is evidence that criminalisation makes these children more likely to reoffend as adults.

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419 Section 50 of the Children and Young Person’s Act 1933 (as amended).
421 UN (1989), Convention on the Rights of the Child, Article 40(3)(a); UNCRC General Comment no. 10 addressing Article 40 UNCRC; UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), adopted by General Assembly resolution 40/33 of 29 November 1985.
422 Age of Criminal Responsibility (Scotland) Bill stage 2, 31 January 2019.
The UK Government has continued to indicate that it has no plans to raise the age of criminal responsibility,\(^426\) despite calls to do so from numerous organisations and experts in the UK.\(^427\) The EHRC considers the re-introduction of a Private Members Bill by Lord Dholakia as an opportunity to bring UK law in this crucial area in line with international standards.\(^428\)

Any increase in the age of criminal responsibility would need to be accompanied by the development of a welfare-based system, including early intervention and therapeutic services for dealing with the harmful behaviour of children. Some of these services already exist, albeit with significant regional variation. The services include the possibility of detaining children who pose a danger to themselves or to others in a local authority secure children’s home on welfare grounds.\(^429\)

**Recommendations**

The UK Government should:

- Develop a welfare-based system, including early intervention and therapeutic services for dealing with the harmful behaviour of children; and significantly raise the age of criminal responsibility in line with international human rights standards, taking account of any recommendations of the forthcoming UNCRC General Comment.

- Where children under the age of criminal responsibility need to be detained because they are a risk to themselves or others, ensure that there are robust legal safeguards, including judicial authorisation of the decision to detain, access to free legal representation and frequent reviews. Detention should take place in a non-penal setting, and should be used as a last resort and for the shortest possible time.

\(^{426}\) UK Government, ‘Sixth periodic report of the United Kingdom, British Overseas Territories and Crown Dependencies to the UNCAT’ [accessed: 7 March 2019].


\(^{428}\) Age of Criminal Responsibility Bill 2017.

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