

## **Prison Reform Trust response to the HMPPS draft Use of Force framework and associated documents – June 2020**

The Prison Reform Trust (PRT) is an independent UK charity working to create a just, humane and effective penal system. We do this by inquiring into the workings of the system; informing prisoners, staff and the wider public; and by influencing Parliament, government and officials towards reform. The Prison Reform Trust provides the secretariat to the All Party Parliamentary Penal Affairs Group and has an advice and information service for people in prison.

The Prison Reform Trust's main objectives are:

- reducing unnecessary imprisonment and promoting community solutions to crime
- improving treatment and conditions for prisoners and their families
- promote equality and human rights in the criminal justice system.

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### **General comments**

The Prison Reform Trust is very grateful for the opportunity to comment on these documents, and applauds the transparent approach that is being taken to their development.

We have had the benefit of seeing responses from both the External Advice and Scrutiny Panel, and the Howard League for Penal Reform, and support the comments that they have made.

We attach versions of the circulated documents with tracked changes and comments for its authors to consider. The purpose of this covering note is to identify the main policy issues which we think need further thought or clarification, or where we think the framework needs to be significantly altered.

We acknowledge that the use of force against prisoners (and on occasion, members of the public) will sometimes be necessary, but it always represents an extreme manifestation of the authority vested in prison officers (and PCOs) in particular. Even where justified, it will always do harm of some kind, and always represents a failure to resolve or prevent conflict in the first place. Historically, and across the world, the abuse of force within custodial institutions is common, and the prison service in this country is far from immune from such abuse. Complaints about abuse of force feature regularly in the correspondence and calls received by our advice service, as do complaints about inadequate investigation after the event. Abuse of force is corrosive of trust and undermines the safety of everyone who lives or works in a prison.

It follows that the standards that apply to the use of force and its governance are absolute, rather than relative. The increase in violence in prisons in recent years does not alter when force is justified, nor the safeguards that must apply. Ultimately, the standards involved are also objective rather than subjective. The Governor in the context of a disciplinary hearing, or the court in the context of criminal proceedings or a civil action, must decide whether the use of force was lawful or not, however reasonably the officer concerned believed their actions to be.

In places, the policy framework and its annexes recognise this fundamental issue. Paragraph 7.3 of the Framework, for example, captures it well:

*“All managers and staff **must** understand and be confident in making sound decisions about the need to use force on a prisoner. It is incumbent on all staff to understand their personal responsibilities and apply force as a last resort only where it is lawful (necessary and reasonable), **and**, where it meets the professional standard set for trained prison professionals in this Policy Framework. Indiscriminate, unnecessary, discriminatory or unprofessional use of force is both unlawful and unacceptable, and individuals will be personally accountable for such improper use. HMPPS will appropriately investigate when such concerns are raised and take robust and appropriate action against any such behaviours.”*

But far too often the framework fails to insist on this standard, and presents shortcomings in conduct as opportunities for learning, or excused by the stress and pressure of the role. It talks of standards that are “expected”, on one occasion even “advocates” for an approach towards governance, and allows for local discretion on issues where an absolute national standard is essential.

There is a great deal of scope for local innovation in conflict resolution and building safer prison communities. But policy on the use of force is not an area where local discretion or experimentation is likely to be appropriate. Prisoners have a right to expect that all staff with the authority to use force have been trained to do so, are competent and safe to exercise that authority, and that where they are not, they will be prevented from doing so. They also have a right to expect that the standards applied to both its use and governance are consistent across the estate. All too often, that has not been true – prisons have acquired cultures, sometimes with the acquiescence or prompting of management, where the interpretation of what justifies the use of force is unique to that prison. The framework in its current form could even encourage that wholly reprehensible state of affairs. Much of what is presented as guidance should be instruction, and the latitude given to ignore instruction must be removed.

In addition, crucial elements of the framework can only be delivered centrally (in particular a national system for data collection, and centrally prescribed rules and presentation for its analysis). It is vital that those central tools are finished and delivered to coincide with the publication of this framework. There is little point exhorting Governors to have a robust approach to eliminating disproportionality, for example, if the tools to monitor it do not exist and if the expert interpretation and presentation of potentially complex statistical information has to be worked out in every individual prison. Only the most fortunate of Governors will have the skills on site to create an adequate framework for that analysis and, in any event, HMPPS cannot meet its corporate obligations if it must rely on over 100 separate data analysis approaches in order to do so. Providing the tools for reliable and consistent data collection and analysis is at least as important a central function as procuring the physical equipment to which the policy refers. It has rarely been given the same priority.

## **Specific issues**

### **Body Worn Video Cameras**

As mentioned above, we receive regular complaints about the abuse of force. Just as they are for Governors, these complaints can be difficult to assess. But what is far easier to assess is the failure of prisons on too many occasions to make use of the technology which now exists to resolve disagreements about whether force was used lawfully or not. Video evidence is regularly not obtained, or lost, or destroyed. It is also clear that both we and prisoners are sometimes misled about its availability. The Chief Inspector has raised similar concerns following individual prison inspections. But we have no evidence of any case in which anyone has been held to account for the failure to obtain and preserve evidence about incidents which could amount to serious criminal offences.

This framework presents an opportunity to put that right, and to reduce radically the scope both for abuse of force and for the work associated with complaints and investigations into allegations of abuse. A failure to record a spontaneous use of force, without good cause (which should be exceptional), should be considered as serious a disciplinary matter as abuse of force. There should be a starting presumption that failing to make use of technology designed to protect both staff and prisoners represents a serious breach of professional standards.

In the case of planned use of force, it is hard to think of any defence to such a charge. The evidence should always be on camera. Similarly, standards for the preservation of video evidence should be national, mandatory, and the consequences of failing to meet them equally serious.

The current draft allows far too much scope for BWVC evidence not to be obtained in the first place and for its retention to be subject to local discretion. There are no apparent consequences for failure on either. The investment that HMPPS has rightly made in the technology is largely wasted for as long as that remains the case. A more robust policy, by contrast, offers the opportunity both to prevent abuse in the first place, and to change permanently the culture of impunity which still exists in some places.

### **Use of force to prevent self-harm**

We recognise that this is a difficult issue, and that occasionally an individual member of staff will be faced with a very distressing situation where the preservation of life may be at stake. The main framework document does not deal with it explicitly. It should, in consultation with experts in the field, for example the IAP, Inquest and the Samaritans.

By contrast, the issue is tackled in the PAVA guidance, but in a contradictory and confusing way. Para 5.2 of that guidance contains a test which would clearly exclude the use of PAVA to prevent a person from harming themselves. In our view, that is the right approach and the prohibition should be explicit. But paragraph 6.1 then allows for its use in those circumstances where a prisoner “may also be threatening others with serious harm”. That test wholly undermines what has gone before, first because of the use of the word “may”, which falls far short of the standard required to justify pre-emptive use of force in any circumstances, and secondly because the harm threatened can be serious but not immediate, also far below the threshold set for every other use of PAVA.

The problem is exacerbated by the use of two deeply troubling examples in the PAVA guidance. In both, the text gives no indication that the threshold of “last resort” has been passed in the way that the guidance at paragraph 6.1 requires. There is an assumption that the only way to resolve the situation will be through the physical restraint of the prisoner self-harming, and that because of the risks that form of intervention will create, PAVA represents the least worst option. But in both examples, it is the assumption that use of force will be necessary that creates the risk to staff, and the options for non-violent de-escalation are not described. The risk of PAVA making both situations worse is also overlooked.

The policy on batons contains no such confusion, although we are aware that there have been instances where batons have been used improperly to strike prisoners who are self-harming, and the framework could helpfully make a prohibition on such acts explicit.

### **Use of force against the public**

We could not see any specific reference to the use of force against members of the public (typically in visits, and potentially involving children). Although rare, such incidents do occur and are obviously both dangerous and very distressing when they do, and the framework should explain both the powers under which staff are operating in those circumstances and the extra considerations that need to be taken into account.

### **Use of force at night**

Similarly, we would suggest that a specific section of the framework should deal with this, including the importance of any use of force at night being video recorded, and all the relevant paperwork completed before staff are relieved.

### **Response protocols**

One of the most common reasons for violence escalating is a lack of control over the response to incidents notified over the radio network as a general alarm. The guidance requires the person controlling an incident to remove surplus officers from the scene, but in practice this is extremely difficult to achieve. Better practice prevents excessive staff attending incidents in the first place (with all the risks that generates both at the scene and in the areas they have left behind). The framework would seem to offer an opportunity to standardise practice and avoid those risks.

### **PAVA**

Unsurprisingly, given the confusion that has attended its acquisition and deployment, the guidance on PAVA is the least coherent section of the framework overall. This is especially concerning given the degree of harm that PAVA can inflict, and the evidence from its use to date of, at best, confusion in the minds of staff about when it can be used and, at worst, a rapid development of informal standards.

The core problem is that so many different formulations have been offered for what justifies the use of PAVA. The self-harm issue is described above, but in a single document the draft guidance provides no fewer than ten descriptions of when PAVA use can be justified, together with examples which contain at least six elements

which appear to undermine the preceding text. These include failing the last resort test, but also implications that being verbally aggressive, threatening to fight staff and refusing instructions might all justify PAVA use. Perhaps most worryingly of all, the justification as described to prisoners against whom PAVA has been used is “situations so serious and dangerous to you or the people around you...” (sic). This gives only the broadest approximation of the tests that actually determine whether use against that prisoner has been lawful or not, and therefore whether or not they have grounds for complaint.

Guidance intended to describe specific exclusions is welcome but in places contradicts what has gone before. For example, staff may not use PAVA against someone “showing other signs of immediate symptoms of acute ill health which are likely to be significantly exacerbated by PAVA” (para5.4.viii), but in paragraph 5.3.iv) the guidance has specifically allowed for the possibility that PAVA may be considered for use against someone whose behaviour has been triggered by a mental health crisis.

Similarly, paragraph 5.3.vi) refers to the “suspected influence of drugs” without describing what the significance of that factor might be in the decision making process.

The confusion may be understandable given the variety of justifications that ministers and senior officials have given on different occasions over the last two years or so for PAVA use, but that does not make it an acceptable or safe basis for what should be the definitive policy and instruction. The document is also fatally weakened by its insistence that PAVA will only be available in prisons after it has passed a readiness assessment, a requirement which HMPPS has decided to ignore. It is hard for the many stipulations of how local managers and staff should behave to carry weight, when the main requirement on the corporate leadership of the organisation has been so blatantly put to one side.

Just as the disciplinary process exists to make sure that an individual who cannot be trusted to exercise their power to use force properly can have that authority rescinded, so this framework must provide a mechanism for that authority to be rescinded when a prison falls below the standards the framework requires in order to meet its aim that “The introduction of PAVA must not undermine wider efforts to improve safety and rehabilitation”. Without such a mechanism, and in the light of the service’s cavalier attitude to the public commitments it has given on PAVA, the protections this guidance theoretically provides through its exhortations on governance count for little.

### **Paperwork completion**

The quality of use of force paperwork is notoriously poor, as we see in our advice work and as the inspectorate and PPO’s office has noted in multiple reports on individual prisons and complaints. In its current format, this framework will not improve that situation. We are aware that plans are in hand to make the completion of use of force paperwork easier for staff through the use of ICT, but there is still a need to change behaviour through this framework. Specifically, other than in exceptional circumstances such as serious injury, staff, including medical staff, should be required to complete paperwork before going off duty rather than within 72 hours. 3 days gives far too much time for memory to fade or be affected by conversations with colleagues. It also deprives the prisoner of the evidence they

need if they wish to make a complaint, and is likely to hamper the conduct of any adjudication linked to the incident.

Failure to complete paperwork adequately or on time should have an immediate and serious consequence. Given that accountability is one of the pillars on which a safe system is built, failure to provide it represents a fundamental flaw. The current text gets close to excusing poor accountability because there are so many uses of force – a dangerously circular argument. Proper accountability will reduce use of force – a lack of accountability will inevitably increase it.

## **Complaints**

The focus on learning in the post-incident guidance risks impeding the crucial processes of investigation in incidents where a complaint is made or there is otherwise reason to be concerned. Investigation and responding to a complaint must take priority, and there is a risk that the post incident processes described will contaminate evidence or lead to self-incrimination by both prisoners and staff. It is also crucial that the first question when there is cause for concern should always be “is it safe for the staff member concerned to continue to be allowed to use force while this incident is investigated”. We have suggested in the text ways in which the formal processes can be taken into account so that the laudable objective of learning from any incident and looking for ways to avoid its repetition can still be undertaken. But as the framework stands, there is too much scope for concerns to appear to be “brushed under the carpet”. Given that prisoners will very often find themselves in segregation or facing adjudication following use of force against them, a heavy responsibility lies with the prison to ensure that they suffer no detriment if they believe they have been unfairly treated.

The framework helpfully recognises that feedback from prisoners who have been forcibly restrained can be instructive in reflecting on practice. But more detailed instruction is needed about what prisons must do to reassure these prisoners that they will be protected from retaliation for either a complaint or their post-incident interview.

## **The role of medical staff**

We suggest that the role of medical staff needs to be framed as more proactive than reactive. The guidance is clear that the advice of medical staff takes precedence should they be concerned about a serious threat to a prisoner’s wellbeing under restraint, but is otherwise described in terms of monitoring, and post incident care. Particularly in relation to planned interventions, medical staff have a duty to “first, do no harm”, and the deliberate infliction of violence will always call that duty into question. In simple terms, in the planning of an intervention, the question medical staff should ask is “why” rather than “why not”. They also have a particular responsibility in relation to protected characteristics involving a prisoner’s health.

## **Reporting and monitoring**

As noted above, we recognise that there are well advanced plans for a major improvement in the way use of force data is collected. HMPPS needs to give priority to completing that work and rolling out a new system so that it is in a position to assess whether its obligation to ensure that force is used lawfully is being met. We

would suggest that the guidance on reporting and monitoring requires very substantial revision in the light of that new technology. The obligation lies on HMPPS corporately as well as on individual prisons, managers and staff. It is crucial therefore that reporting standards are common across the estate. Individual prisons may have the capacity to carry out additional analysis locally, but this framework should describe a minimum data set for all prisons, including rules for its interpretation and presentation. The current guidance risks generating multiple sets of indicators interpreted with varying degrees of reliability, and subject to continual adjustment as managers and Use of Force committee members change. That is not helpful at a local level, but also risks perpetuating the current unacceptable situation in which the prison service's national awareness of the use of force appears to be extremely restricted.

Similarly, on governance, while we understand that some prisons will need to devote more management attention to this issue than others, too much of the guidance on governance is discretionary or optional. It also risks failing to meet a key recommendation from the Lammy report about the representation of prisoner views, and confusing that with the separate requirement for a robust independent element within use of force governance. The balance between centrally mandated procedures and local discretion is too weighted towards the latter given the need both for national consistency and adherence to the law on these issues.

## **Diversity**

The EASP response covers this territory comprehensively. We would only add that it is very concerning to read in the draft framework the phrase: "BAME prisoners' treatment is perceived to be unfair and discriminatory". This gives the clear impression that the problem is one of perception rather than reality, despite the hard evidence from multiple sources that the problem is about actual—not perceived—unfairness, and decision making that does discriminate, knowingly or otherwise, on the basis of ethnicity. It also appears at odds with the equality assessment. The task prisons and HMPPS corporately face is to change what is actually happening, not the perceptions of the people who are suffering as a consequence of it.

## **Women and children**

We have not commented on the sections relating to children, purely on the basis that we expect the Taylor review and the government's response to it to require a separate policy framework dedicated to the use of force in that context.

There is no section relating to women, however, and we would urge you to consider that. Of course there are some very specific issues, most obviously in relation to women who are pregnant. But we would suggest that what we know about the high incidence of trauma amongst the female population justifies guidance on that issue and the re-traumatising impact of violence, legitimate or otherwise, especially though not exclusively at the hands of a male officer.

## **Conclusion**

The length and detail of our comments reflect a sincere acknowledgement that this is a thorough and open consultation on issues of great importance and complexity. We hope that they are helpful and would be pleased to continue to be involved in an exercise that plainly has a safer and fairer prison system as its goal.