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Dear Jo,

## **Prison Reform**

Thank you for your letter of 25 June inviting written comments following the roundtable you hosted on a “Chatham House” basis on 7 June. Your office kindly agreed to extend the deadline you gave of 30 June (3 working days), but only by a further 3 working days. Inevitably, our comments are therefore written in haste and in some confusion about the process to which they are contributing.

We read in the Daily Mail on 19 June that a Ministry of Justice “source” expected a White Paper on prisons to be published later this year, and offered a simplistic and misleading summary of what might be learned from the experience of prisoners over the last 15 months<sup>1</sup>. We also, sadly, have seen how the ministry has approached consultation on other matters of strategic significance—in particular sentencing changes and the parole system. Both have been characterised by opaque internal processes resulting in policy announcements that have not been subject to transparent or detailed public scrutiny.

We are only too pleased to work closely with officials as policy is developed, and have already done so in relation to many of the subjects we discussed at the roundtable. We are continuing to contribute on a very regular basis, and in particular to help the department hear from prisoners. But we are deeply suspicious of these constructive and candid conversations being presented as a sufficient process to inform a White Paper on prisons, especially when the press is being fed what appears to be advance notice of a policy decision to reduce the time prisoners will spend unlocked.

We would welcome your assurance that, if there is to be a White Paper, it will be preceded by a full and transparent process of public consultation, based on clear proposals about which there is a genuine desire to listen and adjust if the arguments for doing so are persuasive.

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<sup>1</sup> <https://www.dailymail.co.uk/news/article-9704689/How-BBC-prison-drama-Time-helped-make-Governments-case-planned-crackdown-jails.html>

There is without doubt an opportunity to set a new and much better direction for the prison service. While we share the general admiration for the stoicism of people who have lived and worked in prisons during the pandemic, and relief that the original estimates of lives that might be lost have not been realised, it would be quite wrong to see the last 15 months as anything other than a catastrophe in our prisons. The frailties of our overcrowded and under-resourced system have been utterly exposed, and the political decisions taken neither to release a significant number of prisoners, nor prioritise prisoners and staff for vaccination, have deepened and prolonged the suffering that has resulted.<sup>2</sup>

It is crucial that any plan for the future starts from the recognition that, despite the best efforts of prison managers and staff, our prison system has failed to an unprecedented degree to deliver humane or constructive custody during the pandemic. Any plan's starting point must be that such a failure cannot be repeated.

For that objective to be met, the plan must start with some fundamental policy objectives which require political commitment, and which did not feature in the questions you posed for the roundtable discussion.

## **Overcrowding**

The first of these is that the government must ensure that the supply and demand for prison places are kept in balance. No government has achieved this since the mid 1990s, and then only briefly. The current government has no plan to do so. It is dishonest for ministers to claim that they will always provide sufficient space to accommodate people sent to prison by the courts (and, increasingly, those recalled to prison by administrative decision), when 20–25% of prisoners are routinely held in overcrowded conditions. An overcrowded prison is not sufficient space, but rather a dangerous failure of public policy.

Overcrowding affects every aspect of the prison system and undermines all of the objectives governments set for it. It is the single biggest obstacle to safety, security and rehabilitation as well as, most obviously, the humane and decent treatment of prisoners. In the pandemic, it is the factor that has driven the worst aspects of a restricted regime, with prisoners forced to share cells despite the obvious risk of transmission, confined in physical spaces that make social distancing impossible, and for many denied the progressive moves which are essential to their eventual release.

The history of prisons for the last 4 decades makes it plain that prison building does not solve or even reduce the problem of overcrowding. Yet in the reduction of child imprisonment the government has a perfect example of how reducing demand for custody can go hand in hand with a reduction in crime. A plan for prisons must start with a commitment to a system that is not overcrowded and is not forced to continue to use accommodation that is plainly unfit for purpose. It is inconceivable that plans

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<sup>2</sup> PRT's CAPPTIVE project has documented prisoners' experience—<http://www.prisonreformtrust.org.uk/PressPolicy/News/Coronavirus/CAPPTIVE>  
As has the prisons inspectorate—<https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2021/02/What-happens-to-prisoners-in-a-pandemic.pdf>

for education and health in the aftermath of the pandemic will consider overcrowded hospitals or classrooms to be an acceptable element of policy, and the same must be true for prisons.

### **The principle of normality**

The law on what governments can and cannot permit in terms of regime design is clear but routinely ignored. It is that the day-to-day additional restrictions imposed on a prisoner by virtue of their being in prison must be justified either on the basis of statute, or that the restriction represents a “necessary implication” of imprisonment<sup>3</sup>. In countries that are closer to achieving our often stated ambition for a humane and rehabilitative prison regime, this is described as the principle of normality<sup>4</sup>. It is also central to international instruments to which the UK is a signatory<sup>5</sup>. In practice, it leads to a way of life in prison that represents the best possible preparation for life after release, requiring prisoners to make choices and take responsibility for their consequences. It puts into everyday practice the commitment to treating people fairly which our prison service rightly holds but all too often fails to deliver.

Successive ministers have accepted the maxim that we send people to prison “as punishment, not for punishment”, but the reality of life in prison has fallen a long way short of that ideal, and never more so than in the last 15 months.

In the context of the pandemic, the principle of normality found expression in the stated policy of aiming to match restrictions in prisons with restrictions in the community. But that principle was quickly eroded, as overcrowding and a failure to respond to the particular vulnerabilities of people in prison and their environment meant that the restrictions imposed on prisoners far exceeded those endured in the community.

For the future, taking the current legal duty to normality seriously should inform every aspect of regime design. It is a simple test against which every aspect of design can be measured, as well as the thousands of day-to-day discretionary judgments that staff in prison must make.

The first and most important of these is the extent to which it is legitimate to require prisoners to remain locked in their cell.

The principle of normality requires that the government starts from the presumption that the statutory authority for imprisonment extends only to keeping prisoners within the secure perimeter of a prison. Further confinement within that perimeter must be justified either as a necessary implication of imprisonment or on the strength of

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<sup>3</sup> Raymond vs Honey [198] AC1

<sup>4</sup> <https://www.kriminalomsorgen.no/information-in-english.265199.no.html>

<sup>5</sup> Council of Europe’s recommendation on Prison Rules (2006) part 1, number 2: “***Life in prison shall approximate as closely as possible the positive aspects of life in the community***”[2]. Also, the United Nations Standard Minimum Rules for the Treatment of Prisoners, better known as the Nelson Mandela Rules, include an explicit statement that... *the prison regime should seek to minimize any differences between prison life and life at liberty that tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings.*

specific legislative provision approved by parliament (such as internal disciplinary punishments under Prison Rules). In other words, if the government wants to keep a prisoner locked in their cell it must have a compelling reason to do so.

A deeply disturbing narrative has emerged that reductions in recorded violence and self-harm due to the enforced confinement of almost all prisoners for 23 hours or more every day may be a useful lesson for regime design. That narrative is only possible because of the appalling condition of many prisons before the pandemic began, with violence and self-harm at levels that were unthinkable before staff numbers were savagely cut from 2012 onwards.

Prior to that disastrous decision, prisons operated on the basis that safety, security and every other attribute of a healthy prison were best served by prisoners being unlocked, not the reverse. Too little for prisoners to do, inadequate supervision, poor relationships, sentences that destroy hope, debt resulting from low pay, unreliable processes that generate legitimate grievance, all feed the potential for violence and self-harm that have characterised prisons for nearly a decade. But none of those issues are solved by locking prisoners up for longer. Exactly the reverse is true, and it is plainly unjust that prisoners should be expected to pay the price for government's strategic failure to sustain a safe environment for people in its care.

There is nothing normal, humane, decent or rehabilitative about keeping a human being confined to a 9ft by 6ft room for most of any day, still less for months and years on end. There could be no more wrongheaded a starting point for a serious discussion of prison reform.

### **Minimum standards**

In the aftermath of a previous catastrophe in our prisons in 1990, Lord Woolf recommended that there should be a code of standards governing the way of life in prisons, and that a government should only be able to derogate from those standards in exceptional circumstances and with parliamentary approval.<sup>6</sup> The pandemic has shown why that recommendation holds good and the dreadful consequences of failing to implement it. In reality, prisoners have had no effective protection against a government that chooses to treat them badly. This is a moment to provide that protection, and certain areas demand priority attention.

### The right to life

Ministers and senior officials often state that they have an absolute duty to receive prisoners sent to prison by the courts (or by administrative decision in the case of recalls). But that duty is not absolute, and the law allows for the possibility of criminal prosecution where systematic failure in a duty of care leads to death.<sup>7</sup> In a normal

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<sup>6</sup> Prison Disturbances April 1990: Report of an Inquiry. Cm 1456. February 1991

<sup>7</sup> Corporate Manslaughter and Corporate Homicide Act 2007. An offence is committed by a department or corporation under Section 1 when: *the way in which its activities are managed or organised—*

year, over 300 people now die in our prisons, and the repeated reports of the Prison and Probation Ombudsman and of successive inquests show that many of those deaths need not have occurred. Governors should have the right to refuse admission to their prison where they cannot reasonably guarantee the safety of the person concerned, whether that be because of the particular vulnerability of that individual, or the impossibility of providing a safe environment with the resources available to them. And all policy changes affecting prisons should be assessed against a test of their impact on the safety of the people who live in them.<sup>8</sup>

By the same token, ministers should understand that if their plan for the future of prisons, and the way in which it is resourced, fails to reduce the death rate from the unprecedentedly high levels it has reached, then the responsibility for that failure will rest at their door.

### Space

The prison service has very detailed operating standards<sup>9</sup> that should regulate cellular conditions—including the amount of space that any prisoner should have to live in—and these are informed by international standards. In practice, however, between a fifth and a quarter of all prisoners are held in cells which do not come close to meeting those standards, and are forced to share. That creates very obvious and avoidable difficulties in the management of infectious disease. But it also drives much of the bullying, violence and self-harm that so many prisoners suffer. In the worst cases, enforced cell sharing has led to homicide<sup>10</sup>, and the daily reality is that it constantly requires prison staff to take risks which any civilised system would avoid.<sup>11</sup> Space standards should be put into law and their breach subject to an exceptional circumstances test and specific parliamentary approval.

### Equivalence in health, education and social care

Current policy aspires to provide prisoners with access to healthcare, educational opportunities and social care provision that is equivalent to that to which citizens in

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*(a) causes a person's death, and*

*(b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.*

These provisions were extended to Crown bodies, including the prison service, by an amendment to the Act in 2011

<sup>8</sup> The Independent Advisory Panel on Deaths in Custody made this proposal in 2019. It has yet to be taken up.

<https://static1.squarespace.com/static/5c5ae65ed86cc93b6c1e19a3/t/5fabe117afc6d879073a0165/1605099800504/Safety+Assessment+%28Board+Paper%29.pdf>

<sup>9</sup>

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/889689/prisons-national-framework.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/889689/prisons-national-framework.pdf)

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/231789/1082.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/231789/1082.pdf)

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/910904/PSI\\_20\\_2015\\_Cell\\_sharing.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/910904/PSI_20_2015_Cell_sharing.pdf)

the community are entitled. On the ground, practice falls short of those aspirations in many respects. A plan for prisons should turn those aspirations into standards, giving prisoners the same rights of access and redress as citizens outside prison. A practical implication will be that prisoners must be given controlled access to the internet, as a key mechanism by which all those services are now delivered.

The exceptionally harsh treatment of prisoners during the pandemic, including both the restrictions placed on their life inside and the trauma of witnessing the impact of the pandemic on their loved ones in the community, has generated an unprecedented mental health challenge in prisons. The report, “The future of prison mental healthcare in England”, recently published by the Centre for Mental Health and commissioned by NHS England and NHS Improvement, sets out both the scale of the challenge and the response it requires. We strongly support its recommendations.<sup>12</sup>

### The right to family life

The pandemic has shown all of us the critical importance in a crisis of the relationships we have with those dearest to us. Imprisonment is a permanent crisis for those affected by it, and the measures the government rightly took to mitigate the impact of the pandemic on family contact reflected that understanding. Prisoners and families have appreciated the rollout of in-cell telephony, additional free access to phone calls, and the provision of video calls. All of those mitigations should now become permanent and universal elements of prison regimes, but a plan for prisons should go further. It should enable secure electronic communication such as email, the ability to receive as well as to make phone calls, and the range of reforms set out in two reports by Lord Farmer.<sup>1314</sup> At the same time, improvements in the provision and availability of electronic communication and in-cell telephony must not become a substitute for face-to-face social visits, and we welcome the Justice Secretary’s previous assurances that this would not be the case. Restrictions imposed on social visits as a result of the pandemic must not be allowed to continue indefinitely or become an accepted part of any post-Covid prison regime.

### Justice

The prison service already has an admirable policy that seeks to place procedural justice at the heart of a “rehabilitative culture”. In practice, the implications of that commitment are either not adopted in individual policy frameworks, or are not consistently delivered on the ground. Our own research, for example, showed that prisoners making a complaint about discrimination had a 1 in a 100 chance of such a

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[https://www.centreformentalhealth.org.uk/sites/default/files/publication/download/CentreforMentalHealth\\_TheFutureofPrisonMentalHealthCare\\_0.pdf](https://www.centreformentalhealth.org.uk/sites/default/files/publication/download/CentreforMentalHealth_TheFutureofPrisonMentalHealthCare_0.pdf)

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/809467/farmer-review-women.PDF](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/809467/farmer-review-women.PDF)

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/642244/farmer-review-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/642244/farmer-review-report.pdf)

complaint being upheld<sup>15</sup>. Our advice and information service deals with thousands of cases each year in which prisoners have not been informed of their rights or the rules which apply to them, or have received inadequate responses to requests or complaints that they have made. The work of the Prisons and Probation Ombudsman and Independent Monitoring Boards shows how certain key areas of day-to-day life in prison—such as the handling of prisoners’ property—routinely fail to work properly, generating legitimate grievance.

Justice should also extend to the way prisoners are paid. Repeatedly, we are told by prisoners that debt results from inadequate pay, and unreasonable living costs—in particular the cost of phone calls, goods in the prison shop and the requirement to buy items through it rather than have them sent in. We expect and support a plan for the future that puts work at its centre. That accords with the principle of normality and is the pattern of life to which the majority of prisoners should aspire on release. But justice requires a fair day’s pay for a fair day’s work, and Governors simply do not have the resources to deliver that reasonable expectation. Ending prisoner poverty is crucial to providing a safe environment.

But the requirement for a standard that insists on the fair treatment of prisoners extends beyond these crucial day-to-day issues. In a prison system where people from minority communities are grossly over-represented, the failure to meet public sector equality duties is especially serious. The government’s own figures show that the experience of prison is likely to be worse if you are black, for example<sup>16</sup>. You are more likely to be physically restrained, to be punished and to be placed on the lowest level of privileges. A plan for the future of prisons, especially a system which already holds a chronic over-representation of young black men serving exceptionally long sentences, cannot afford to turn a blind eye to the clear and continuing evidence of discrimination across all protected characteristics, and race in particular.

### The right to be heard and to be involved

Within our prison system there is a huge gulf between the best and the worst. Our best prisons already deliver many of the elements of a good plan for all prisons, and a key feature of healthy prisons is that prisoners play a key part in how they operate. They are meaningfully consulted about their way of life and any changes to it. But they also take responsibility for making the prison a safe and compassionate place to live and work. There is an expectation that prisoners will have choices to make about how they spend their time, with consequences for those choices—with responsibility comes accountability. That represents good preparation for life beyond prison just as much as a sound basis for life inside.<sup>17</sup>

In the worst prisons, and in the worst policies about prisons, prisoners are “done to”, not “done with”, generating predictable consequences of grievance,

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<sup>15</sup> <http://www.prisonreformtrust.org.uk/Portals/0/Documents/Tackling%20discrimination.pdf>

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/643001/lammy-review-final-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf)

<sup>17</sup> Auty, K. and Liebling, A. (2020) 'Exploring the Relationship between Prison Social Climate and Reoffending', *Justice Quarterly* 37(2): 358-381. <https://doi.org/10.1080/07418825.2018.1538421>

institutionalisation and resentment. In the best, prisoners are asked about their strengths and ambitions as well as their needs. They are given the opportunity to take responsibility for their own future, and for the community in which they are living. Invariably, part of what results is a strong desire to do good and make amends, which shows in everything from the roles prisoners play as peer advisers to the organisation of events to support charities and other good causes. A plan for the prison system should generate a new standard for the active citizenship of prisoners.

### **Delivering a plan informed by these principles and standards**

It is all too obvious that the prison service was inadequately resourced to deal with the pandemic. Prisoners have paid the price, spending most of the last 15 months in conditions falling catastrophically short of any domestic or international definition of decent and humane confinement. A plan for the future of prisons must not duck the resource consequences of avoiding a recurrence of that failure. They include:

- A costed policy to end overcrowding within a set time frame, and to end the enforced sharing of cells regardless of their size.
- A costed policy to remove permanently from use prisons and parts of prisons that are no longer fit for purpose.
- The provision of in-cell telephony, controlled internet access and in-cell ICT across the prison estate.
- Maximising opportunities for meaningful face to face contact with families, including through the provision of regular social and family day visits, properly resourced visitors centres and opportunities for temporary release.
- Until such time as prisoner wages are reformed (see below), the maintenance of additional PIN credit, and free video calls.
- Sufficient staffing resources to allow for prisoners to be unlocked for the equivalent of a normal day for an adult in the community—we suggest from 8am until 8pm—and sufficient paid work or education provision for a normal working week of 30 hours.
- The provision of non-work activity and opportunities for the hours that prisoners are not at work and for prisoners beyond retirement age.
- Where prisoners prefer to associate in smaller groups, staffing levels and physical arrangements that will support that approach.
- The universal provision of privacy locks for cell doors so that prisoners can choose not to associate with other prisoners, and have a safe space in which to keep their property; in the process removing the need for staff to lock or unlock cell doors on every occasion that a prisoner leaves or returns to their cell.
- Revised minimum pay rates for prisoners that prevent prison poverty.
- A significant increase in the provision of specialist mental health support based on a national needs analysis that takes into account the short and long term impacts of the pandemic.



Our focus is on prisoners, but we acknowledge that a prisoner's experience is governed by the support which prison staff and managers receive in the challenging roles they fulfil. So we would wholly support long overdue improvements in the training and development of both officers and governors, including provision for professional supervision. For officers we suggest that a benchmark of 10% of their available hours should be devoted to continuous professional development, including supervision.

The money to deliver such a plan could be made available by reducing the number of people who go to prison and the length of the time that they spend in custody. The costs of failing to do that are already clear, with the government committed to funding a 25% increase in prison capacity. Leaving aside the £4bn capital allocation, this commitment also implies new running cost provision in the region of £800m annually<sup>18</sup>. That financial commitment represents a policy choice rather than an inevitability. The money would be better spent on a system equipped to deliver all the rehabilitative ambitions which this and previous governments have set out for prisons but never delivered.

## Conclusion

We understand why the prison service has developed an expertise in “the art of the possible”—making do with the inadequate physical and staffing resources which it receives. But the consequences of that approach have been exposed by the pandemic and the ambitions the government holds for a rehabilitative system cannot be delivered for as long as it fails to attend to the fundamental problems we have described. There is an opportunity to reset policy on imprisonment and our prison system from first principles and we urge the government to seize it. For that reason, we look forward to the open and transparent consultation which a project of this importance and scale clearly demands.

With best wishes



Peter Dawson  
Director  
**Prison Reform Trust**

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<sup>18</sup> Derived from average cost per place in 2019/20  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/929417/costs-prison-place-costs-prisoner-2019-2020-summary.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/929417/costs-prison-place-costs-prisoner-2019-2020-summary.pdf)