



Patient or prisoner

Representing people in the criminal justice system
with mental health problems

Dr Laura Janes, Legal Director, Howard League for Penal Reform
laura.janes@howardleauge.org
www.howardleague.org
22 November 2019

1

Overview

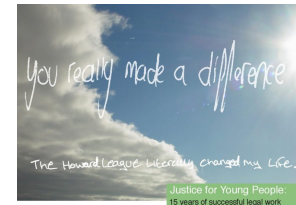
- About the Howard League for Penal Reform
- Mental health and criminal justice
 - Some numbers
 - Recent policy and other developments
- Patient v prisoner - differing experiences and legal frameworks
- Getting the sentence right – post Vowles review
- Other cases/developments affecting parole and people with mental health issues in prison



2

The Howard League for Penal Reform

- England and Wales, since 1866
- Less crime, safer communities, fewer people in prison
- Policy, research, direct legal work for young people under 21 since 2002 – free helpline for young people in prison
- Membership organisation – no government funding – join up online!



Howard League for Penal Reform

Key points

- 150 years ago the Howard League introduced legal work to help support to achieving less crime, safer communities and fewer people in prison.
- The Howard League has transformed the policy and practice for children and young adults in the criminal justice system. Our legal team has helped to achieve this through legal cases, research papers and participation work with thousands of young people each year.
- Our legal education work empowers young people and professionals to understand and use the law to improve outcomes.
- The legal work began with a pilot in 2002, which changed the law to ensure that the jurisdiction of the Children Act 1989 applies to children in custody.
- We represent young people to establish and enforce local authorities' duties to support children, care leavers and vulnerable adults in and out of custody.
- Our legal work raises the intensity and quality of criminal justice system contact with young people. We have achieved this through legal challenges to local authority work at all stages of the criminal justice journey, from sentencing to supervision on release.
- We have an ongoing business for young people across the country to successfully challenge policy and practice, from setting conditions and programmes to holding courts to account. It is an absolute must for 17-year-olds at the police station.
- We have focused across a range through our own work and our successful legal challenge to government legal aid on the prison law for children and adults.

[Howard League for Penal Reform](#)

3

Mental health and criminal justice – some numbers

- Max Hill, DPP, 2019, Howard League Parmoor lecture:
 - One in five criminal cases involves a victim, witness or defendant with a mental health condition (CPS research, 2017);
 - 76% of female and 40% of male remand prisoners have a mental health condition,
 - 29% of those serving community sentences.
 - People from black and ethnic (BAME) minorities are disproportionately represented in the criminal justice system (Lammy 2017);
 - BAME groups are 40% more likely than white people to access mental health services via a criminal justice pathway (Healthcare Commission Census, 2007).
- Between April 2014 to March 2016, assessments of young people entering custody showed concerns relating to: **self-harm or suicide (31%); physical health (3%); mental health (33%); learning disabilities or difficulties (32%);** (MOJ, 2017)

[Howard League for Penal Reform](#)

4

MHA transfers and hospital orders– some numbers

Table 7: Restricted patients admitted to hospital in England

	2003	2013	2018
All admissions⁽²⁾	1,086	1,564	1,553
Transfers from prison	722	990	958
Transferred from Prison Service establishment while unsentenced or untried	426 ^(r)	533	494
Transferred from Prison Service establishment after sentence	296	457	464
Other Admission Types	364	574	595
Hospital order with restriction order	198	294	252
Recalled after conditional discharge	121	211	259
Transferred from Scotland, Northern Ireland etc.	0	2	0
Unfit to plead	39	45	42
Not guilty by reason of insanity	2	4	11
Hospital and limitation direction	4	18	31

Howard League for Penal Reform

5

SSJ discharge – FOIA response

(1 Jan - 31 Dec)	Conditional Discharge Requests	Conditional Discharge Approved	Absolute Discharge Requests	Absolute Discharge Approved
2014	149	126	21	7
2015	143	111	23	21
2016	142	113	28	18
2017	142	101	37	20
2018	120	85	26	18

Howard League for Penal Reform

6

Recent policy and other developments

- **Sentencing Council** - has consulted on its overarching principles for sentencing people with mental health conditions and disorders – final version awaited. This follows revised Definitive Guideline for Manslaughter (in force 1/11/18)
- **The Equality and Human Rights Commission** - inquiry into adjustments that are made for defendants with cognitive impairments, mental health conditions and/or neuro-diverse conditions.
- **CPS** - issued new guidance, 14 October 2019 on its approach to defendants' mental health conditions and disorders (replacing the "uncomfortably" outdated phrase 'Mentally Disordered Offenders') aimed at enabling people to participate effectively and ensuring full information is available to inform decision-making in cases...

[Howard League for Penal Reform](#)

7

Recent policy and other developments

- **Joint Committee on Human Rights - Inquiry on Youth Detention: solitary confinement and restraint (2019)** - found that children in prison and hospital settings are subjected to isolation too often and for too long in breach of human rights; follow up inquiry on mental health detention for children
- **Safety statistics (2019) for quarter ending June:** huge increases in self-injury
 - The number of individuals self-injuring increased by 5%, to the highest recorded figure of 12,740 individuals (a rate of 154 individuals per 1,000 prisoners)
 - In children and young people's institutions, there was an 83% increase in self-injury incidents (from 539 in the previous 12 months to 985 in the most recent 12 months) and an 88% increase in the self-injury rate per 1,000 prisoners

[Howard League for Penal Reform](#)

8

Recent policy and other developments

- **HMIP Annual report (2019) found:**
 - In over half the adult male prisons inspected, a lack of assessment and treatment for prisoners with mental health, learning disabilities or emotional needs.
 - Many prisoners were held in conditions that were in no way therapeutic, and which often clearly exacerbated their condition.
 - Severe delays in transfer to secure mental health beds. In the vast majority of prisons, the 14-day target for transfer was not met; eg 7 months for a prisoner at Swinfen Hall.
 - Poor governance of medicines management, with many prisons lacking on-site pharmacists to provide oversight of medicines
- **Prison healthcare inquiry (Health and Social Care Committee, 2019):**
 - Found the Government is failing in its duty of care towards people detained in England's prisons.
 - Recommended CQC assess the range of services provided in prisons, including mental health. [Howard League for Penal Reform](#)

9

Criminal v Civil law - two different approaches

- **Criminal:** fitness to plead – Pritchard criteria (1836) and Criminal Procedure and Insanity Act 1964 - focused on 6 specific tasks (understand the charges; decide whether to plead guilty or not; exercise the right to challenge jurors; instruct solicitors and counsel; follow the course of the proceedings; and give evidence).
- **Civil test:** Mental Capacity Act 2005 – “a modern understanding of someone’s cognitive capacity - to support a modern understanding of what it means to fully participate in proceedings”
- **Law Commission report Unfitness to Plead (2016)** – the difference in these definitions ‘creates the potential for seemingly conflicting assessments of the same individual who, for example, could be found fit to plead in relation to a murder allegation, but lacking in capacity for litigation about the less critical issues of an inheritance dispute’.

[Howard League for Penal Reform](#)

10

Patient v prisoner - differing experiences and legal frameworks

Patient/hospital	Prisoner/prison
Therapeutic?	Counter-therapeutic?
Seclusion and long term segregation	Segregation
No formal adjudication process for poor behaviour	Formal process incl extra days (1,000 years+ last year)
Multi-disciplinary team, CPAs	OMIC (probation led), sentencing planning if lifer/lucky
Section 17 leave	Restricted to Category D prisoners generally
Possibility of indeterminate detention	Sentence end date (unless indeterminate)
Regular recourse to MHT and other safeguards	Rare access to Parole Board (for limited prisoners)
Treatment options including medicine generally led by need	Treatment options limited and often led by availability
Section 117 aftercare	Through the gate?

Howard League for Penal Reform

11

Appealing sentence to see a substituted hospital order – Vowles – 4 questions

- Are the requirements of section 37(2) of the Mental Health Act 1983 met now?
- Would the requirements of section 37(2) of the Mental Health Act 1983 have been met at the point of sentence?
- Was the index offence attributable to the disorder?
- Can the public be adequately protected both while in hospital and beyond under the auspices of the sections 37/41 regime?

Howard League for Penal Reform

12

Rectifying sentence – post Vowles

- Considered 23 cases, of which 16 successful in the Court of Appeal
- Each case is determined on its facts
- Possibly less likely in the case of personality disorder, learning disability, autism (but not ruled out)
- Clear and explained distinction between the position at point of sentence and point of appeal
- Consensus of medical opinion
- Clear evidence on best future pathway to protect risk
- Cases this year include R v Fisher [2019] EWCA Crim 1066 and R v Michael Paul Rendell [2019] EWCA Crim 621 – both successful

[Howard League for Penal Reform](#)

13

Practical issues – out of time appeals

- Appeals can be brought out of time but there should be good reason – the need to balance progression and meeting the test (catch 22)
- Check whether an appeal has already been made to Court of Appeal > may need to go to the Criminal Cases Review Commission
- Find a criminal appeal lawyer – remember the original lawyer will need to be involved, so start there, or find a specialist – note Criminal Appeals Lawyers' Association and Centre for Criminal Appeals
- Funding is available, but miniscule
- Avoid further delay by getting up to date medical evidence, ideally addressing the four questions in Vowles – the Court will always want to know the view of the RC

[Howard League for Penal Reform](#)

14

Parole reviews: Effective participation/developments

- **Parole Board Rules 2019 – Rule 10(6) (b):** power to appoint a representative where the prisoner lacks the capacity to appoint a representative and the panel chair or duty member believes that it is in the prisoner's best interests for the prisoner to be represented.
 - But no practical mechanism to achieve this as yet
 - Is this power sufficient to enable effective representation in the parole context
- **R (EG (by Official Solr)) v Parole Board and SSJ** on the duty to ensure prisoners without capacity can effectively participate in parole hearings (to be heard this year)
- Intermediary possible at parole hearings (legal aid)
- New Parole Board rules on summaries (R27) and reconsideration of extended and indeterminate cases - all decisions provisional for 21 days subject to an appeal (R28) - note decisions as to reconsideration published in full

[Howard League for Penal Reform](#)

15

MHT/Parole Board delay

- **LV v UK 50718/16 [2019] MHLO 32 (ECHR):** S47/49 patient, had argued that there had been a delay, in breach of Article 5(4), in securing her release, in particular because of the two-stage process involving both the Mental Health Tribunal and Parole Board. Settled.
- **Tribunal to Parole streamlining process under consideration:** following Mental Health Act Review made a recommendation regarding transferred prisoners (s47 and 45A MHA patients) to substantially reduce the length of time between a Mental Health Tribunal's decision that they are suitable for discharge from hospital and the subsequent Parole Board review to consider suitability for release from their prison sentence. Working group to discuss after purdah...

[Howard League for Penal Reform](#)

16

Discrimination in prison

- Equality Act 2010 and Article 14 ECHR (in the enjoyment of other human rights) - duty to make reasonable adjustments for disabled prisoners
- But difficult and usually very fact specific – eg R (Hall) v Secretary of State for Justice [2018] EWHC 1905 (Admin). Failed challenge by an autistic prisoner on the failure to provide specialist services and trained staff for managing those with autistic spectrum disorder.

[Howard League for Penal Reform](#)

17

Concluding thoughts

- One client, two systems of care and representation often at odds with each other
- Development of OPD pathway in prison continues - can be positive for prisoners who do not meet criteria for hospital but for many interventions in prison are undermined by counter-therapeutic environment
- Real risk of being forced to do offending behaviour programmes that are not evidence based (SOTP!)
- Lifers in high secure hospitals cannot be recategorised, even if they reduce risk
- A wrong turn at point of sentence can undermine progress and rehabilitation and is hard to fix

[Howard League for Penal Reform](#)

18