

Independent Advisory Panel on Deaths in Custody submission to the inquiry by the Joint Committee on Human Rights into The Government's response to Covid-19: human rights implications – July 2020

About the Independent Advisory Panel on Deaths in Custody

The Ministerial Council on Deaths in Custody formally commenced operation on 1 April 2009 and is jointly sponsored by the Ministry of Justice, the Department of Health and the Home Office. The Council consists of three tiers:

- Ministerial Board on Deaths in Custody
- Independent Advisory Panel (IAP)
- Practitioner and Stakeholder Group

The remit of the IAP (and overall of the Council) covers deaths, both natural and self-inflicted, which occur in prisons, in or following police custody, immigration detention, the deaths of residents of approved premises and the deaths of those detained under the Mental Health Act (MHA) in hospital. The principles and lessons learned as part of this work also apply to the deaths of those detained under the Mental Capacity Act in hospital.

The role of the IAP, a non-departmental public body, is to provide independent advice and expertise to Ministers, senior officials and the Ministerial Board. It provides guidance on policy and best practice across sectors and makes recommendations to Ministers and operational services. It assists Ministers to meet their human rights obligations to protect life. The IAP's aim is to bring about a continuing and sustained reduction in the number and rate of deaths in all forms of state custody in England and Wales.

Juliet Lyon CBE chairs the IAP.

Members of the IAP appointed in July 2018:

- Deborah Coles, Director, INQUEST
- Professor Seena Fazel, professor of Forensic Psychiatry, University of Oxford
- Professor Jenny Shaw, professor of Forensic Psychiatry, University of Manchester
- Jenny Talbot OBE, Prison Reform Trust
- John Wadham, Chair, National Preventative Mechanism

Further information on the IAP can be found on its website: www.iapondeathsincustody.org

Contact: juliet.lyon@justice.gov.uk
piers.barber1@justice.gov.uk Head of Secretariat

Key points:

- **While the numbers of deaths related to COVID-19 in state custody have not reached predicted worst-case levels, the Government faces continued challenges to balance the need to prevent contagion with a responsibility to alleviate the impact of continued isolation and restrictions on time in the fresh air, exercise, purposeful activity and family contact.**
- **In prisons, early release programmes announced by the Government, including those concerning compassionate release for the most vulnerable, have been mired in risk aversion and complexity. They have failed to deliver on their stated intent to protect vulnerable people and provide additional headroom to enable HMPPS to comply fully with Public Health England guidance.**
- **Consulting, and taking account of the views of, those detained by the state, combined with enabling and responding to the recommendations of robust independent scrutiny, must be prioritised as establishments gradually emerge from what remains significant levels of lockdown and extreme detention.**

-
1. The IAP welcomes the opportunity to submit evidence to this inquiry examining the human rights implications to the Government's response to COVID-19, most importantly the absolute right to life set out in Article 2 of the European Convention on Human Rights.¹
 2. Within their overall areas of accountability, Ministers have a distinct and fundamental duty to protect the lives of people detained in state custody. The role of the Independent Advisory Panel on Deaths in Custody (IAP) is to advise Ministers and officials on how they can meet their human rights obligations, prevent deaths and keep those under the care of the state safe.²
 3. COVID-19 has presented – and continues to present – significant challenges to meeting these responsibilities.³ As of 19 June 2020, 24 prisoners who tested positive for COVID-19 have died.⁴ Commendably, this number pales in comparison to the worst-case scenario figures initially posed in April by Public Health England of a possible 2,300 deaths.⁵
 4. Statistics provided to the IAP through two COVID-19-focused sub-meetings of the Ministerial Board on Deaths in Custody indicate that deaths related to COVID-19 have also been minimal in other secure settings. There have been no COVID-related deaths in Immigration Removal Centres or police custody suites. Problems remain with data on deaths produced by the Department of Health and Social Care, NHS England and Care

¹ European Convention on Human Rights, https://www.echr.coe.int/Documents/Convention_ENG.pdf

² About the Independent Advisory Panel on Deaths in Custody, <https://www.iapondeathsincustody.org/about-us-1>.

³ As part of this work the IAP has developed a [COVID-19 Information Hub](#) which covers, among other topics, provision for oversight, national and international guidance and research and includes IAP correspondence with Ministers on these matter and replies where received.

⁴ Justice Committee, 'Coronavirus (Covid-19): The impact on prisons Fourth Report of Session 2019–21', <https://committees.parliament.uk/publications/2154/documents/20016/default/>.

⁵ Public Health England, Briefing paper- interim assessment of impact of various population management strategies in prisons in response to COVID-19 pandemic in England, 24 April 2020, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/882622/covid-19-population-management-strategy-prisons.pdf.

Quality Commission (CQC) on the deaths of people detained under the Mental Health and Mental Capacity Acts in medium and high security hospitals and inpatient settings. Such data rarely tallies and indicates that insufficient differentiation is made between voluntary patients and those detained by the state as well as between deaths in mental health settings and on transfer to general hospitals. This is a long-standing problem thrown into sharp relief by the pandemic.

5. Every death that occurs in state custody is a tragedy. Efforts to prevent deaths and limit the transmission of the virus in secure settings, partly through the implementation of a strategy of 'compartmentalisation', have largely proved effective. The IAP recognises the unique human rights challenges posed by a pandemic, which require the state to balance the need to prevent transmission through the imposition of restrictions with the impact of such restrictions on the freedoms of those in its care. Yet those in state detention cannot take precautionary steps for themselves and are reliant on authorities to protect them: it is essential that rules provided by international human rights standards are adhered to at all stages of the response to the virus.

Release of the most vulnerable

6. At the start of the pandemic, the IAP provided the Secretary of State for Justice with advice on how his duty to protect the rights of those detained could be met. This advice outlined the duty to protect detainees in the face of real and immediate threat to life.⁶
7. IAP advice highlighted how the absence of appropriate medical and other necessary care for those in prison engages Article 3 of the European Convention covering the prohibition of torture, inhuman and degrading treatment and punishment. It outlines that the state must provide a place of detention tailored to the needs of those "mentally disabled", "physically disabled" persons with a serious physical illness, and people who are elderly.⁷
8. As a result, and through drawing on international evidence, on 2 April the IAP wrote to Prisons Minister Lucy Frazer advising a programme of planned prison releases for the most vulnerable.⁸

People who should be considered for immediate safe release include those near the end of their sentences and those in the open prison estate; those serving short sentences; or held on remand, for non-violent crimes; those recalled for technical breach of licence; those who are elderly often with co-morbid health conditions; pregnant women and mothers and babies – where an important start is being made. For individuals approved for, but still awaiting, transfer from prison to psychiatric care (a comparatively small group but in high need and one that inevitably makes for disproportionate calls on staff time) this work should be expedited.⁹

9. On 24 April, the Lord Chancellor announced the End of Custody Temporary Release scheme (ECTR) to enable risk-assessed prisoners, who are within two months of their

⁶ Juliet Lyon to Rt Hon Robert Buckland QC MP, 25 March 2020, <https://static1.squarespace.com/static/5c5ae65ed86cc93b6c1e19a3/t/5e7cb064470b79446261a9da/1585229928168/IAP+to+Robert+Buckland+25+March+covid-19+and+human+rights+%2BDC.pdf>.

⁷ Dybeku v Albania, WD v Belgium, MS v UK, Price v UK, Mouisel v France, and Papon v France (No 1).

⁸ Juliet Lyon to Minister of State Lucy Frazer QC MP, 2 April 2020, <https://static1.squarespace.com/static/5c5ae65ed86cc93b6c1e19a3/t/5f1ad64d0c8d655845936c67/1595594318517/02042020+Juliet+Lyon+to+Lucy+Frazer.pdf>.

⁹ Ibid.

release date, to be temporarily released from custody.¹⁰ It was suggested that up to 4,000 prisoners were in line to be released early. Criteria for consideration for compassionate release was also announced, for example for women who are pregnant, women prisoners with babies and very young children and people who are extremely medically vulnerable who would have been shielded if in the community.

10. Yet in the months since it has become clear that the ECTR Scheme and plans for temporary release of exceptionally vulnerable people are both mired in complexity and risk aversion. Release numbers are low: as of 17 July 2020, the prison service had released 227 prisoners.¹¹ Correspondence from prisoners' families sent to the IAP has highlighted cases where administrative complexity has appeared to block the best outcome for particular at-risk individuals.
11. In line with our guiding principle to consult people in custody and their families wherever possible, the IAP has worked with National Prison Radio to conduct a rapid review of prisoners' experience under COVID-19.¹² Messages received highlighted the confusion caused by the early release announcements:

*'...no sign of early release, no staff have any clue if it's even true but it's on the news. Prisoners feel like they're sentenced to [a] death sentence if it spreads and it's on several wings.'*¹³

12. There are strong grounds to argue that further action must be taken – both to protect those at risk and create the space required for the necessary isolation within a grossly overcrowded prison system. Without further amendment, these programmes will not play their part in creating the headroom necessary to meet public health advice and keep people safe, especially as courts resume and prison numbers rise.

Regime, staffing and decency

13. Messages received from prisoners as part of the IAP's rapid review also highlighted the need to meet, at an absolute minimum, the basic needs of people in prison, including by providing opportunities for exercise and time in the fresh air, nutritious food and clean clothes.¹⁴
14. Prisoners featured in the review were keenly aware that, in the absence of PPE, especially for staff, the risks of spreading the virus were heightened. Social distancing was hard to practice. Some wings and cells were not being cleaned. In some prisons, there was no hand sanitiser, no clean clothes and, for some, no toilet paper. Some

¹⁰ MoJ / HMPPS policy document: End of Custody Temporary Release scheme, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/881061/end-custody-temporary-release.pdf.

¹¹ HM Prison and Probation Service COVID-19 Official Statistics, 24 July 2020. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/903420/HMPPS_COVID19_WE_17072020_Pub_Doc.pdf.

¹² Independent Advisory Panel on Deaths in Custody, "Keep Talking, Stay Safe": A rapid review of prisoners' experience under Covid-19', 1 June 2020, <https://static1.squarespace.com/static/5c5ae65ed86cc93b6c1e19a3/t/5ee115af9592717e002903f8/1591809460419/200601+IAP+rapid+review+of+prisoner+experiences+under+Covid-19+-+FINAL+CLEAN.pdf>.

¹³ Independent Advisory Panel on Deaths in Custody, "Keep Talking, Stay Safe": A rapid review of prisoners' experience under Covid-19', 1 June 2020, <https://static1.squarespace.com/static/5c5ae65ed86cc93b6c1e19a3/t/5ee115af9592717e002903f8/1591809460419/200601+IAP+rapid+review+of+prisoner+experiences+under+Covid-19+-+FINAL+CLEAN.pdf>.

¹⁴ Ibid.

messages suggested areas where government guidelines to prevent the spread of the virus were not followed.

'People are in isolation but the same staff rotate round the whole prison touching everyone's handles, buzzers, paperwork, door - fast way to kill all the prisoners.'

*'Things are bad in here, we have no toilet roll, no hand sanitiser, we've been locked down 23 hours. They're given us frozen food, frozen sandwiches been in the freezer for months.'*¹⁵

15. The IAP notes that efforts have been made by the Ministry of Justice and the prison service to maintain, and in some instances increase, family contact during the pandemic. This drive to comply with Article 8 includes additional payments onto phone cards, in-cell telephony, the introduction of hand-held phones and video calling facilities in some establishments. Some improvements have been made to emergency helplines for prisoners' families but this remains variable across the estate. Re-introduction of family visits during recovery has been prioritised by HMPPS.
16. The review also highlighted how prisoner-staff relations have been enhanced in many cases during this period by the keyworker scheme and increased opportunity for prisoners to have trusted people they can turn to. Their input show that good professional relationships and mutual respect between staff and prisoners protects lives.

*'Massive respect for all of them, It takes a strong type of person to do what they're doing.'*¹⁶

17. The risk of undermining a developing culture of trust and cooperation is partly why the IAP has opposed the rapid roll out, without further consultation, of PAVA chemical pepper spray during the pandemic to over 80 prisons within the adult male closed estate.¹⁷ Anticipating possible insurgence which thankfully did not materialise, this roll out went against clear IAP advice issued previously citing recommendations made by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment that "...[P]epper spray is a potentially dangerous substance and should not be used in confined spaces".¹⁸ The IAP remains concerned about its use, particularly on people with respiratory problems, highly prevalent in the prison population, and its potential for disproportionate use on black and minority ethnic people. Use of PAVA should be reviewed urgently.

Recovery

18. The IAP welcomes the identification of the preservation of life as the top priority of the prison service's National Framework for Prison Regimes and Services, a conditional roadmap for the easing of restrictions in prison.¹⁹

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Juliet Lyon to Rt Hon Robert Buckland QC MP, 6 July 2020

<https://static1.squarespace.com/static/5c5ae65ed86cc93b6c1e19a3/t/5f0c1b9f7185980e1918ef22/1594629029919/200624+Juliet+Lyon+to+LC+-+PAVA+spray+-+DRAFT.pdf>.

¹⁸ Juliet Lyon to Rory Stewart MP, 31 October 2018,

https://static1.squarespace.com/static/5c5ae65ed86cc93b6c1e19a3/t/5d9f0b258f915868c829627a/1570704167270/MCDC_IAP_20181031_JL+to+RS_PAVA.PDF.

¹⁹ National Framework for Prison Regimes and Services,

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/889689/prisons-national-framework.pdf.

19. During these uncertain times, timely and accessible information, produced and presented in a range of forms – from detailed explanations and translated versions to easy read and word of mouth – is of the greatest importance in helping prisoners to understand and to cope with detention. One message included in the IAP’s review stated:

‘Everyone’s frustrated. We’re behind these doors, we don’t know what’s going on. We’ve stopped having updates now. I used to get updates every 2 days or so explaining what’s going to happen. We’re just frustrated because we don’t know anything.’²⁰

20. Messages from prisoners serve as a clear reminder that the privations of loss of liberty and damage done by extremes of lockdown cannot, and should not, be sustained over time. The IAP’s rapid review highlighted the impact of restricted regimes on mental health:

‘I’m sure there is a lot of prisoners suffering from severe anxiety, isolating in their cells not knowing when they’re going to be unlocked.’²¹

21. These are only likely to be exacerbated as long-term isolation continues, an issue highlighted in early June by the IAP to the three Ministers who co-chair the Ministerial Board on Deaths in Custody.²² Combined with continued uncertainty, there is a serious risk of a rise in suicide and self-harm and mitigating steps need to be taken.

22. The IAP has particular concerns about the mental health and well-being of children and young people during lockdown and now in this period of recovery where restrictions remain in place. Short thematic investigations of young offender institutions by HM Inspectorate of Prisons reveal significant disparities between institutions for time out of cell and protracted periods of isolation in contravention of the Convention on the Rights of the Child (CRC).²³ The IAP regrets the temporary cessation of the provision of independent advocacy, again in contravention of Article 12 of the CRC. This facility should be re-instated. The IAP has concerns about suggestions that the Government has taken steps, without consultation, to derogate temporarily from relevant human rights rules and guidance regarding time out of cell for children and young people in custody.²⁴

23. In parallel with the duty to protect life under Article 2 and protect prisoners from Article 3 violations, there are strict investigatory duties which are particularly important for learning lessons and safeguarding lives in the future. The IAP have highlighted the risk that this duty is lost sight of during the current emergency. Despite inevitable delays, independent scrutiny and investigation must be maintained and reinstated as establishments continue to recover from the virus.

²⁰ Independent Advisory Panel on Deaths in Custody, “‘Keep Talking, Stay Safe’”: A rapid review of prisoners’ experience under Covid-19’, 1 June 2020.

²¹ Ibid.

²² Juliet Lyon to members of the Ministerial Board on Deaths in Custody, 2 June 2020, <https://static1.squarespace.com/static/5c5ae65ed86cc93b6c1e19a3/t/5ed764c88535f82b063d986a/1591174346874/200601+Juliet+Lyon+IAP+to+MBDC+members+-+2+June+FINAL.pdf>.

²³ HM Chief Inspector of Prisons, ‘Report on short scrutiny visits to young offender institutions holding children’, 7 July 2020, <https://www.justiceinspectors.gov.uk/hmiprisoners/wp-content/uploads/sites/4/2020/07/YOI-SSV-2.pdf/>.

²⁴ Government changes law to legitimise abusive conditions in child prisons, 7 July 2020, <https://article39.org.uk/2020/07/07/government-changes-law-to-legitimise-abusive-conditions-in-child-prisons/>.