FIGHTING FOR CHILDREN'S RIGHTS IN INSTITUTIONAL SETTINGS

**Independent Commission on Freedom of Information**
**Call for Evidence**

**Submission from Article 39**
**20 November 2015**

**Introduction**

I am a children's rights campaigner and registered social worker. Between 2000 and 2012, I ran the Children's Rights Alliance for England, during which time myself and colleagues made frequent use of the Freedom of Information Act 2000 ('FOI Act'). In February 2015, my book 'Children behind bars. Why the abuse of child imprisonment must end' was published by Policy Press. I made hundreds of FOI requests whilst researching the book, and thereby elicited extensive information never before placed in the public domain. Article 39 was formed in April 2015, to promote and protect the rights of children living in institutional settings. These children are extremely vulnerable, often placed many miles from home with limited or non-existent family contact. Children in locked environments are particularly vulnerable, since their contact with the outside world is restricted, and penal settings implicitly rely on fear, intimidation and secrecy. Poor children, disabled children and children from Black and minority ethnic communities are disproportionately more likely than their peers to be living in institutional settings. The FOI Act remains a vital safeguard for them, and must not be weakened.

**Question 1: What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?**

Article 39 does not support any changes to the FOI Act which would make it more difficult to obtain information about how laws and policies have been developed for children.

Case study 1 provides evidence of statutory exemptions being used to prevent information being placed in the public domain about the lawfulness of the infliction of pain as a form of restraint in child prisons. This compromises the safety of extremely vulnerable children. That the infliction of pain is authorised in some custodial settings

but not in others contradicts one of the principal recommendations of the Children's Safeguards Review, that "Government should ensure legal protection against abuse and harm is consistent in all settings in which children live away from home".[1] The Review was established 20 years ago in the wake of widespread revelations of child abuse in residential settings. Notwithstanding questions about the general lawfulness of inflicting severe pain on children as a form of restraint, and the insurmountable opposition to such practices, we believe the unequal protection from pain-inducing restraint could constitute a violation of Articles 3, 8 and 14 of the European Convention on Human Rights, together with Articles 2, 3, 19 and 37 of the UN Convention on the Rights of the Child (UNCRC). We therefore contend there is overwhelming public interest in the government being transparent about the legal basis for its policy in this area.

**CASE STUDY 1**
**Infliction of severe pain as a form of restraint in child prisons – lawful?**

In 2014, I obtained the report of the medical panel which considered the inclusion of the mandibular angle technique in the new system of restraint in child prisons.[2]

The mandibular angle technique appears to involve digging the tip of a thumb or finger into a sensitive area of the child's neck, in order to cause severe pain.[3]

The medical panel which reviewed the application of the mandibular angle technique on children gave its provisional approval to its authorisation **"conditional on legal advice to the effect that the use of a pain-inducing technique for restraint is lawful in England and Wales"**.[4]

Further to receiving the medical panel's report, I submitted an FOI request to the Ministry of Justice with three parts:
a) A request for the date on which the government **requested** legal advice on the use of pain-inducing techniques for restraint in the children's secure estate in England and Wales.
b) A request for the date on which the government **received** legal advice on the use of pain-inducing techniques for restraint in the children's secure estate in England and Wales.
c) A request for a copy of the legal advice obtained by the government on the use of pain-inducing techniques for restraint in the children's secure estate in England and Wales.

I had anticipated a refusal to the third element, but not the first two. All three elements were refused under Sections 35 (1) (a) and 42(1) of the FOI Act. I pursued to internal review, which supported the blanket refusal.

A parliamentary question from Baroness Stern also failed to establish whether ministers have obtained the legal advice upon which the medical panel's authorisation relied.[5]

The following demonstrates the very high level of concern among statutory agencies, human rights bodies and others, bringing into question the legality of inflicting pain as a form of restraint:

- In 2006, the independent inquiry into physical restraint, solitary confinement and strip-searching in child prisons conducted by Lord Carlile concluded, "Pain compliance and the infliction of pain is not acceptable and may be unlawful"[6]. The inquiry was established following the restraint-related deaths of two children, Gareth Myatt and Adam Rickwood, in custody in 2004. Fourteen year-old Adam Rickwood hanged himself after being unlawfully restrained in Hassockfield secure training centre. Adam was subject to the 'nose

distraction'. He left behind a note asking what gave staff the right to hit a child in the nose

- In 2008, the parliamentary Joint Committee on Human Rights declared, "There can be no justification for [restraint] practices which involve the deliberate infliction of pain…and we therefore recommend their abolition without delay"[7]
- In 2009, the European Torture Committee recommended the UK "discontinue the use in juvenile establishments of manual restraint based upon pain compliant methods"[8]
- In 2011, statutory guidance prohibited the deliberate infliction of pain as a form of restraint in all children's homes, including secure children's homes (which care for remanded and sentenced children)[9]
- In 2011, the Office of Children's Commissioner recommended the prohibition of the deliberate infliction of pain to enforce order and control[10]
- In 2012, the Restraint Advisory Board, established by ministers to review the techniques in the Minimising and Managing Physical Restraint (MMPR) system, reported that restraint without the infliction of pain *had never been considered* by those commissioning and developing the new methods[11]
- In 2013, the UN Committee Against Torture recommended the UK "ban the use of any technique designed to inflict pain on children"[12]
- Also in 2013, the National Preventive Mechanism, charged with preventing torture in places of detention, told the UK Government, "The use of pain to secure compliance is unacceptable"[13]
- In 2014, the Prisons and Probation Ombudsman published a bulletin on the use of force in prisons. This stated, "One area where we have expressed concern is the use of pain compliance techniques. There are specific, approved techniques for pain compliance such as the Mandibular Angle Technique, which uses a pressure point below the ear. The justification for such techniques is to end resistance quickly. However, their use on young people is particularly controversial and the Ombudsman has been very critical where it cannot be demonstrated that a non-painful alternative could not have achieved the same outcome"[14]
- In 2015, the four UK Children's Commissioners, in their submission to the UN Committee on the Rights of the Child, stated, "pain should never be deliberately inflicted in order to restrain a child"[15]
- Her Majesty's Inspectorate of Prisons reported on 18th November 2015 that officers in young offender institutions **commonly inflict pain, including through the mandibular angle technique**, in breach of policy (and therefore the law): "Restraint policy agreed by ministers states that staff should only use pain as a last resort to prevent an immediate risk of serious physical harm, but we found that pain-inducing techniques were used frequently in YOIs, and that in most cases staff were not compliant with this requirement."[16]

Case study 2 provides evidence of statutory exemptions being used to <u>prevent</u> information being placed in the public domain about the sexual abuse of female prisoners (women and girls).

**CASE STUDY 2**
**Sexual abuse in Downview prison – what lessons to be learned?**

Acting prison governor Russell Thorne was jailed in July 2011 for five years for misconduct in a public office after coercing a young female prisoner to engage in sexual acts with him.[17] Allegations were made about other prison officers at Downview prison in Surrey,[18] which had a dedicated unit for girls, and a prison service review was established in 2012.[19] Surrey police established a special investigation, called Operation Daimler, which involved interviews with over 200 present and former prisoners. Using the FOI Act, I asked the force how many girls were seen as part of this investigation: the answer was none.

After being instructed by the Information Commissioner to release the information,[20] the

Ministry of Justice confirmed in May 2014 that four officers working at Downview prison had been suspended, dismissed or convicted between January 2009 and October 2013 "as a result of a sexually inappropriate behaviour with women prisoners or a young offender". However, the ICO did not support disclosure of the report from the prison service review, so this remains hidden.

Downview prison no longer holds girls or women, though clearly there are lessons to be learned about preventing the abuse of prisoners elsewhere. Furthermore, without publication of the internal review report, it is impossible to assess whether the prison and other bodies (including the prison service, the Youth Justice Board and local authorities) acted appropriately to protect girls and women once they became aware of the abuse.

**Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?**

Article 39 does not support any changes to FOI legislation which would make it more difficult to obtain information about Cabinet discussion and agreement in respect of children. Public interest considerations must continue to apply. The Commission will be aware that the coalition government pledged in 2010 to give due consideration to the UNCRC when developing law and policy.[21] This commitment was reasserted by the current government in July 2015.[22] The FOI Act provides a vital mechanism for scrutinising the implementation of the UNCRC pledge.

**Question 3: What protection should there be for information which involves candid assessment of risks? For how long does such information remain sensitive?**

Article 39 does not support any changes to FOI legislation which would make it more difficult to obtain information about Cabinet discussion and agreement in respect of children. Public interest considerations must continue to apply. We note the ICO and tribunal have set a very high threshold for release of Cabinet minutes.

**Question 4: Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?**

Article 39 does not support any changes to FOI legislation which would make it more difficult to obtain information in respect of children. We note the Supreme Court ruling in respect of the disclosure of letters written to government departments by HRH The Prince of Wales. This reiterated the longstanding constitutional principle that ministers are subject to the rule of law.[23] We urge the Commission to unequivocally support this principle.

**Question 5: What is the appropriate enforcement and appeal system for freedom of information requests?**

Case study 3 provides evidence of the appeal system supporting public knowledge of restraint techniques used in secure training centres, which are places of detention for children aged 12 to 17.

**CASE STUDY 3**
**The release of the manual governing restraint in secure training centres run by G4S and Serco**

In May 2007, as National Co-ordinator of the Children's Rights Alliance for England (CRAE), I made an FOI request to the Youth Justice Board (YJB) for a copy of the manual governing restraint in secure training centres. The request was refused initially, and on internal appeal. The YJB stated the security of secure training centres would be compromised by disclosure "because young people could learn and practice against the restraint techniques taught in the manual, which could result in staff and other young people being injured if a violent individual could not be restrained effectively".[24]

CRAE appealed to the ICO, which supported disclosure. Its decision notice, issued in December 2009, said:

*Given the level of debate and controversy surrounding the use of physical restraint, on both legal and ethical grounds, and the evidence that these techniques can result in physical harm, the Commissioner believes there is a significant public interest in full disclosure of information about these techniques.*[25]

The YJB appealed the ICO decision. Days before the scheduled First-tier Tribunal hearing, in July 2010, the YJB informed CRAE it would disclose the manual. CRAE received a settlement of £3,000 for some, but not all, of its in-house legal costs. Throughout these proceedings, the YJB was funded by the taxpayer.

Following receipt of the manual, CRAE and its lawyer conducted a legal review and successfully persuaded the Ministry of Justice to remove information from the document which contravened the law. These amendments were made prior to the Ministry of Justice uploading the information onto its website. The charity also wrote to every Director of Children's Services and Chair of Local Safeguarding Children Board (LSCB) in England alerting them to the shocking methods approved for use on children and urging them to use their statutory powers to protect children. On this latter point, the Commission may be interested to note that statutory safeguarding guidance has, since March 2010, required LSCBs to scrutinise restraint in custodial settings. Moreover, Her Majesty's Inspectorate of Prisons has recommended in its report on behaviour management, published this week, that "LSCBs and local authorities should ensure that they have sufficient expertise to enable effective independent oversight of restraint".[26]

This successful FOI appeal led to information about restraint techniques authorised for use in child prisons being placed in the public domain for the first time. This was 13 years after the Children's Safeguards Review recommended public education for parents and staff on the risks children can face in institutional and foster care settings. "Policy for child discipline, including measures of control" was included in the list of information the Review said parents need in order to assess whether their child is safe.[27]

The Commission should be aware that secure training centres no longer use the restraint techniques covered by the FOI disclosure above, the details of which were placed in the public domain in 2010. All three secure training centres, together with three young offender institutions holding juveniles, now follow the Minimising and Managing Physical Restraint (MMPR) system. The manual depicting MMPR techniques was published in July 2012 with 182 redactions. My FOI request to the Ministry of Justice for an unredacted copy of the 2012 manual was refused on much the same grounds made by the YJB between 2007 and 2010. In this latest case, the ICO has not supported disclosure; my appeal to the First-tier Tribunal failed; and the case is due to be heard at the Upper Tribunal on 11 February 2016.

**Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FoI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?**

Article 39 sees the FOI Act as a vital component of a healthy democracy. The work of public bodies is funded predominantly by the taxpayer and citizen. Transparency should be embraced as a one of the key functions of public bodies, rather than as an optional extra or burden. When public bodies are responsible for the care and well-being of children, the case for transparency becomes ever greater (with safeguards to protect the privacy of children and their families). We urge the Commission to consider the extension of FOI responsibilities to organisations, public and private, who are publicly funded to look after children in residential settings. Of 1,760 children's homes in England on the Ofsted register on 31 March 2014, 73% were run by private companies, 21% by local authorities and 6% by voluntary sector organisations.[28] All three secure training centres are run by multinationals.

The Commission conspicuously does not ask for evidence of the FOI Act safeguarding the rights of vulnerable people. Case study 4 illustrates how the legislation has played a significant role in protecting vulnerable children from abusive strip-searching.

**CASE STUDY 4**
**Strip-searching in child custody**

During research for Children behind bars, in 2013, I submitted an FOI request to the Youth Justice Board (YJB) for data on strip-searching in young offender institutions, secure training centres and secure children's homes. Several years earlier, the Carlile Inquiry had found appalling examples of children being subject to degrading strip-searches, including when being held under restraint by groups of officers. It had concluded, "Strip searching is not necessary for good order and safety".[29] Children who took part in research for the Youth Justice Board, itself a consequence of the Carlile Inquiry, described strip-searching as being like rape and other forms of sexual abuse.[30] Routine strip-searching had been banned in all women's prisons in 2009 because it was accepted by ministers to be demeaning and abusive.[31]

My request sought to find out the frequency of strip-searching, the ages of children being subject to such treatment and the number of times force was used to remove children's clothes. The YJB provided all of the data I requested. Headline points include:

- There were 43,960 recorded strip-searches in 25 child prisons and secure children's homes in the 21 months up to December 2012 (the figures are incomplete so this is an under-estimate)
- The youngest person to be strip-searched was aged 12
- Physical force was used to remove children's clothes 50 times in 3 prisons (34 times in Wetherby young offender institution)
- Forty-five percent of those made to remove their clothes were children from Black and minority ethnic communities (they comprised 29 percent of children in custody at the time)
- Just 226 items were found in 2011/12 and 49 items in 2012. The single most common contraband was tobacco.

Parliamentary questions were subsequently asked about strip-searching and the Howard League for Penal Reform cited the data, which was reported by the Guardian newspaper[32] and by many other media outlets, in its government lobbying. A few months after the release of the information, the government announced a pilot of risk-assessed strip-searching[33] and the policy of routinely strip-searching children ended in all child prisons in 2014.

Other information about the care and treatment of children which would not be in the public domain without the FOI Act includes:

- The number of prison officers subject to disciplinary proceedings for mistreating children (released following internal review)
- The number of abuse allegations made by children in young offender institutions and secure training centres, and the response of local authorities to such allegations
- Information about incidents where children have struggled to breathe or been seriously injured during restraint in secure training centres and young offender institutions
- Details of broken bones and fractures suffered by children during restraint in Castington young offender institution
- Information about the use of restraint for concerted indiscipline in Hassockfield secure training centre *after* the Court of Appeal ruled such use to be unlawful
- The frequency and types of self-harm occurring in young offender institutions and secure training centres
- The placement of children in special cells in young offender institutions
- Children's use of the Prisons and Probation Ombudsman complaints procedure
- Children's use of the Youth Justice Board appeals procedure operating in secure training centres
- Children's use of the Office of Children's Commissioner for England advice service
- The payment of £1.1 million to Serco for running Hassockfield secure training centre for 50 days when there were no children on the premises.

We would be happy to provide further information to the Commission.

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## References


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[2] Ryan, J. (2012) Report of the panel of specialists, chaired by Professor Jim Ryan, to assess the mandibular angle technique for use on young people under 18 in secure establishments.
[3] Ministry of Justice (2012) Minimising and Managing Physical Restraint. Volume 5, page 45.
[4] Ryan, J. (2012) Report of the panel of specialists, chaired by Professor Jim Ryan, to assess the mandibular angle technique for use on young people under 18 in secure establishments, page 17.
[5] Baroness Stern asked the question on 6 October 2014, and received this reply on 23 October: "Legal advice was obtained throughout the development of Minimising and Managing Physical Restraint. The requirements of the Convention on the Rights of the Child together with all other requirements of international, domestic and common law are taken into account by the Government in determining its policy and practice of the use of restraint in the under-18 secure estate." www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2014-10-06/HL1974
[6] Carlile, A. (2006) An independent inquiry into the use of physical restraint, solitary confinement and forcible strip searching of children in prisons, secure training centres and local authority secure children's homes. The Howard League for Penal Reform, page 12.
[7] Joint Committee on Human Rights (2008) The use of restraint in secure training centres, page 28.
[8] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (2009) Report to the government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 18 November to 1 December 2008, paragraph 107.
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[17] BBC news, 18 July 2011, 'Downview sex case prison governor jailed'.
[18] Epsom Guardian, 12 December 2011, 'Sutton prison officer fell to death day he faced sex with inmates trial'.
[19] This is Surrey Today, 13 January 2012, 'Review launched at HMP Downview after prison sex scandal'.
[20] ICO Decision Notice FS50525192, 24 April 2014. https://ico.org.uk/media/action-weve-taken/decision-notices/2014/981636/fs_50525192.pdf
[21] In her written ministerial statement in response to the Dunford review of the Office of Children's Commissioner for England, the former children's minister, Sarah Teather MP, stated: "Dr Dunford recommends that a reshaped Children's Commissioner for England holds Government to account against the UNCRC. I agree with Dr Dunford that for this to deliver benefits to children, Government and policy makers must be receptive to that approach and advice. I can therefore make a clear commitment that the Government will give due consideration to the UNCRC Articles when making new policy and legislation. In doing so, we will always consider the UN Committee on

the Rights of the Child's recommendations but recognise that, like other State signatories, the UK Government and the UN Committee may at times disagree on what compliance with certain Articles entails", 6 December 2010.

[22] In response to a parliamentary question, Lord Nash stated on 22 July 2015: "The government remains committed to giving due consideration to the United Nations Convention on the Rights of the Child (UNCRC) when developing new policy and legislation and the commitment given by the coalition government stands. We believe that embedding children's rights in government policy can strengthen services and improve outcomes for children." www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2015-07-16/HL1585

[23] [2015] UKSC 21 https://www.supremecourt.uk/decided-cases/docs/UKSC_2014_0137_Judgment.pdf

[24] Letter to CRAE's Legal Director from YJB, dated 17 July 2007.

[25] ICO Decision Notice FS50173181, 10 December 2009, paragraph 41. https://ico.org.uk/media/action-weve-taken/decision-notices/2009/504630/FS_50173181.pdf

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