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Your ref: SRC/NMA/002471-4-5/8499
Our ref: Z2004533/JBD/JD5

28 April 2020

FAO. Mr Simon Creighton

Dear Sir

Letter before claim under the pre-action protocol for judicial review by Howard League for Penal Reform and Prison Reform Trust

We write in response to your pre-action letter of 17 April 2020.

THE PROPOSED CLAIMANT

The Proposed Claimants are the Howard League for Penal Reform and the Prison Reform Trust.

THE PROPOSED DEFENDANT

The Proposed Defendant is the Secretary of State for Justice.

REFERENCE DETAILS

Reference Z2004533/JBD/JD5 – case officer John Davis.

DETAILS OF THE MATTER BEING CHALLENGED

Your letter of 17 April 2020 states that this is a proposed challenge to steps taken by the Secretary of State for Justice to mitigate the impact of the Covid-19 pandemic on prisons. You contend that there is an '*obvious need*' to '*substantially reduce the prison population*' in the present circumstances and that the measures adopted to date are '*manifestly insufficient*' in their impact upon the prison population as a whole and on many of the prisons at highest capacity within the estate.

Gilad Segal - Head of Division
Nic Newling - Deputy Director, Team Leader MOJ, Public Law



On that basis you assert that the Secretary of State has acted unlawfully. The grounds upon which you rely are (i) public law irrationality; (ii) breach of legitimate expectation; (iii) a Padfield challenge by reference to Prison Rule 9A(1); and (iv) the Secretary of State's common law and HRA duties to protect life and health without discrimination.

In addition, you assert that the fact that the Secretary of State has not published the operational details of release schemes he has introduced is contrary to the legal requirements of fairness and transparency.

RESPONSE TO THE PROPOSED CLAIM

A. MEASURES ADOPTED BY THE SECRETARY OF STATE IN RESPONSE TO THE COVID-19 OUTBREAK

1. The Covid-19 outbreak has given rise to unprecedented, difficult challenges both as a matter of policy and as a matter of operational logistics.
2. In response, the Secretary of State has adopted a series of exceptional measures specifically aimed at protecting prisoners and staff within the prison estate, and in order to mitigate the impact of the Covid-19 outbreak upon the operation of Her Majesty's Prison and Probation Service ("HMPPS"). Those measures have been developed at pace, in close partnership with Public Health England ("PHE"). They remain the subject of ongoing review and development.
3. The Secretary of State has ensured that the response is a co-ordinated one. On 23 March the prison estate entered command mode, with the implementation of a national incident command and response structure to co-ordinate HMPPS's response to the Covid-19 outbreak. This is overseen by the national COVID Gold Command.
4. Your challenge focuses almost exclusively upon release. There have been exceptional policies introduced bearing on the possibility of release. However, the possibility of exceptional release in response to an issue such as this is a very serious step indeed. Importantly, it is but one part of the picture in terms of managing the risks posed by Covid-19 in prisons. Your letter fails to address (or in most cases even mention) all of the other elements in the Secretary of State's response. The lawfulness and rationality of the Secretary of State's current policies and systems for dealing with the risks of Covid-19 in prisons must be judged by reference to the totality of those systems. For that reason it is necessary to set out, in some detail, the range of measures already adopted by the Secretary of State in response to the Covid-19 outbreak.

Policy and operational guidance

5. A number of policy and operational guidance documents have been issued. That has necessarily occurred at pace, with the emphasis on ensuring that prisons receive and can implement new operational guidance and other measures as speedily as practicable. As already noted, the guidance is under continual review. Such guidance documents include:
 - a. COVID-19 Operational Guidance – Exceptional Regime & Service Delivery, first issued on 19 March 2020, and updated on an ongoing basis¹ [**Disclosure Bundle 1**]. This requires all prisons to plan for the critical staffing reductions that were forecast as a result of COVID, and to produce an Exceptional Regime Management Plan ("ERMP") outlining how they will

¹ Available online at <https://hmppsintranet.org.uk/prison-ersd/>.

consistently deliver key regime priorities if and when staffing levels during this period fall below what would normally be minimum staffing levels.

- b. A suite of national staff special payment schemes launched on 23 March 2020 to boost the numbers of available staff on the frontline by paying additional supplements to those reporting for duty and working additional hours during the COVID-19 period [**Disclosure Bundle 3-5**].
- c. COVID-19 Operational Guidance: Temporary regime to reduce risk: A temporary guidance framework that seeks to apply the principles of social distancing and shielding to the prison setting (whilst ensuring that essential services continue to be delivered, and individual rights are respected), first issued on 24 March 2020, most recently updated on 15 April 2020 [**Disclosure Bundle 2**].
- d. Cohorting guidance for prisons during the COVID-19 period, first issued on 31 March 2020, updated on 15 April 2020 [**Disclosure Bundle 6**]. This introduced mandatory “cohorting” of prisoners, requiring each prison to establish designated areas or units for the protection of specific cohorts within the population. It also introduced the immediate cessation of all routine Inter-Prison Transfers, which would in future only be allowed by exception on the authority of COVID Gold Command.
- e. Interim Guidance for Personal Protective Equipment and Hygiene provision to manage Coronavirus across HMPPS business areas, issued on 31 March 2020 [**Disclosure Bundle 7**].
- f. COVID-19: End of Custody Temporary Release Guidance for Prisons, a new scheme created under Rule 9A of the Prison Rules 1999 for the temporary release of low risk offenders nearing the end of their sentences, updated on 15 April 2020 [**Disclosure Bundle 8**].
- g. COVID-19: ROTL on Compassionate Grounds – Pregnant Women, MBUs and the Extremely Medically Vulnerable, guidance (issued on 9 April 2020, updated on 27 April 2020) on the use of release on temporary licence (“**ROTL**”) powers under Rule 9 of the Prison Rules for prisoners who are particularly vulnerable and at risk during the Covid-19 outbreak [**Disclosure Bundle 9**].

6. So far as the current position on releases is concerned, on 24 April 2020 the Secretary of State published two policy documents (“End of Custody Temporary Release”² and “Covid-19: Use of Compassionate ROTL”³) explaining how the End of Custody Temporary Release (“**ECTR**”) scheme and ROTL on compassionate grounds respectively are being operated.

The measures taken

General operational measures to protect offenders within the adult prison estate

(a) Cessation of routine Inter-Prison Transfers

7. From 31 March all routine Inter-Prison Transfers (IPTs) were stopped, save in exceptional circumstances. Where transfers are required, all prisons are required to establish a Reverse Cohort Unit for the temporary separation of newly received prisoners for up to 14 days. All transfers between prisons are subject to approval by COVID Gold Command. As set out below, controlled

²

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/881061/end-custody-temporary-release.pdf

³

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/881060/covid19-use-compassionate-rotl.pdf

prisoner movements are now being carried out in order to most efficiently utilise additional capacity created within the prison estate.

(b) Social Distancing in the Prison Estate

8. Social distancing has been introduced across the prison estate. The following are key elements of the temporary regime introduced to mirror the Government's general guidance on social distancing in the community:
 - a. All non-essential activities involving groups of people have been stopped. This includes social visits, education, non-essential work, association, communal dining, periods of mass prisoner movement, religious services and access to the gymnasium.
 - b. Prisoners are being unlocked in small groups to facilitate social distancing when they access essential services such as phone calls, showers, open air, collection of meals and healthcare.
 - c. All domestic visits have been stopped.
 - d. Legal visits are only allowed in exceptional circumstances/if necessary.
 - e. Essential work (cleaning, laundry, catering) is permitted but essential prison workers are being briefed regularly on social distancing measures.
9. Each establishment is taking its own steps to implement and enforce social distancing, but measures adopted include the use of existing incentive schemes to encourage social distancing; placing distance markers in communal spaces to demonstrate the need for social distancing; circulating information leaflets and displaying posters reminding prisoners of the importance of social distancing; and supervision by staff in communal areas to remind prisoners of the importance of social distancing.

(c) Cohorting

10. HMPPS 'Cohorting guidance for prisons during the COVID-19 period' [**Disclosure Bundle 6**] requires each prison to establish designated areas or units for the protection of specific cohorts within the population.
 - a. A Protective Isolation Unit (PIU) for residents who are symptomatic or have been diagnosed with Covid-19, to be used if isolation within their current cellular location is deemed inappropriate.
 - b. A Reverse Cohort Unit (RCU) to accommodate newly transferred prisoners for a period of 14 days.
 - c. A Shielding Unit (SU) for prisoners identified as being at very high risk from COVID-19 and requiring shielding.
11. The implementation of the Cohorting Guidance depends on a range of local factors, including the physical layout of the particular establishment, the population profile, the size of each cohort and the headroom available. For some establishments, cohorting has been achieved through creation of contained units in a particular building. In other establishments, cohorting has been implemented through use of specific areas such as cells or landings. It has not yet been possible for all prisons to establish SUs, PIUs and RCUs, but progress is being made. COVID Gold Command is provided with regular updates on the position at individual establishments. HMPPS is now authorising controlled prisoner movements between select establishments to utilise the headroom that has

been created in certain establishments by the recent fall in the prison population and the population management measures set out in more detail below.

(d) Hygiene

12. Information posters and leaflets advising on hygiene measures which will help reduce the spread of Coronavirus have been distributed across the prison estate.
13. HMPPS COVID-19 Operational Guidance – Exceptional Regime & Service Delivery – [**Disclosure Bundle 1**] states that consideration should be given to a range of measures aimed at ensuring that prisoners have access to hygiene products. These include enhancing the level of spend permitted by prisoners at the prison shop, subsidising it with HMPPS funded additions to help prisoners maintain their personal hygiene and relaxing the rules on items a prisoner can receive to include extra clothing and personal hygiene products. The Guidance states that, as a minimum, prisons must ensure that prisoners are given sufficient soap for hand-washing and, where possible, provide materials for laundry in sinks where access to a laundry cannot be guaranteed.

(e) Personal Protective Equipment

14. HMPPS has issued the guidance on the allocation and use of PPE during the outbreak of COVID-19. This is set out in 'Interim guidance for Personal Protective Equipment and Hygiene provision to manage Coronavirus – 2019 (COVID-19) across HMPSS' business areas (first response)' [**Disclosure Bundle 7**] and a number of Standard Operating Procedures (SOP) [**Disclosure Bundle 11-14**]. PPE is required (i) for activities requiring close contact (i.e. within 2 metres) of a possible Covid-19 case, (ii) for bedwatches and hospital escorting of prisoners with suspected or confirmed Covid-19, and (iii) for the purpose of visiting residents who are self-isolating within their rooms and are assessed by their medical practitioner as suspected or confirmed Covid-19 cases. Beyond that, the use of PPE for operational tasks requiring compromising social distance involving a non-suspected case requires a local risk assessment, involving considerations of availability. The current guidance is that PPE is not required when staff are in contact with prisoners being shielded, on the basis that other safeguards ensure that social distance between staff and the prisoner will be maintained. Where demand for PPE and hygiene products proves problematic, HMPPS HQ will coordinate allocation of supplies between different regions and seek support from the Department of Health and Social Care.

(f) Contingency planning

15. All prisons are required to produce an ERMP outlining how they will consistently deliver key regime priorities during the outbreak of COVID-19. Regime priorities are provision of meals; provision of healthcare services including medications; provision of prisoner safety and welfare services; and, provision of family contact.

(g) Support measures

16. A package of measures has been offered in order to support prisoners during this period to ensure that they have access to activities and can maintain contact with family members. These include a free £5 phone credit every week, a reduced call charging rate, the provision of mobile phones in cell that use the PIN phone system for those prisons that do not have in cell telephones and various local schemes to facilitate other mediums of contact such as message passing via social media. In cell activities have also been provided to offer distraction and engagement. Further no charges are

being made for access to televisions and normal incentives scheme restrictions on access to televisions have been lifted.

Specific measures to shield those at high risk within prisons

17. On 16 March 2020, Public Health England issued guidance on social distancing for everyone in the UK.⁴ This guidance set out two COVID-19 risk categories:

- a. The vulnerable category: these are people at increased risk of severe illness from Covid-19, who are advised to be particularly stringent in following social distancing measures. Falling into this category are those aged 70 or older, as well as those under 70 who are instructed to get a flu vaccination as an adult each year on medical grounds. This includes those with chronic (long-term) respiratory diseases, such as asthma, chronic obstructive pulmonary disease (COPD), emphysema or bronchitis.
- b. The clinically extremely vulnerable category: these are people at even higher risk of severe illness, to whom the NHS in England has written directly, with advice about the more stringent “shielding” measures that they should take to keep themselves and others safe. Falling into this category are:
 - i. Solid organ transplant recipients.
 - ii. People with cancer who are undergoing active chemotherapy
 - iii. People with lung cancer who are undergoing radical radiotherapy
 - iv. People with cancers of the blood or bone marrow such as leukaemia, lymphoma or myeloma who are at any stage of treatment
 - v. People having immunotherapy or other continuing antibody treatments for cancer
 - vi. People having other targeted cancer treatments which can affect the immune system, such as protein kinase inhibitors or PARP inhibitors
 - vii. People who have had bone marrow or stem cell transplants in the last 6 months, or who are still taking immunosuppression drugs
 - viii. People with severe respiratory conditions including all cystic fibrosis, severe asthma and severe COPD.
 - ix. People with rare diseases and inborn errors of metabolism that significantly increase the risk of infections (such as SCID, homozygous sickle cell).
 - x. People on immunosuppression therapies sufficient to significantly increase risk of infection.
 - xi. Women who are pregnant with significant heart disease, congenital or acquired.

(a) Shielding measures

18. “Shielding” is defined by Public Health England to mean⁵ (i) not leaving your house; (ii) not attending any gatherings; and (iii) strictly avoiding contact with anyone displaying symptoms of Covid-19.

19. To that end, pursuant to HMPPS guidance⁶ prisons have taken the following specific measures to protect higher risk prisoners:

- a. All prisoners falling within the vulnerable or extremely vulnerable categories have been identified by the healthcare providers at each prison.

⁴ <https://www.gov.uk/government/publications/covid-19-guidance-on-social-distancing-and-for-vulnerable-people/guidance-on-social-distancing-for-everyone-in-the-uk-and-protecting-older-people-and-vulnerable-adults>

⁵ <https://www.gov.uk/government/publications/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19>

⁶ See (i) COVID-19 Operational Guidance: Temporary regime to reduce risk [Disclosure Bundle 2] and (ii) Cohorting guidance for prisons during the COVID-19 period [Disclosure Bundle 6].

- b. Those prisoners identified as being “extremely vulnerable” must be offered the opportunity to follow social shielding guidance and self-isolate for a period of at least 12 weeks from the date at which they are notified. They must be given the opportunity to relocate to the Shielding Unit.
- c. Prisoners who require shielding must adhere to a separate regime. They must remain in their cells as much as possible. When they are unlocked in order to access showers, phone calls and other necessities, they must be unlocked individually. Where this is not possible, public health advice must be sought on alternative arrangements. Ideally, those prisoners who are being shielded should be located in a single cell.
- d. Staff assisting/supervising these prisoners must pay particular attention to maintaining high levels of personal hygiene and adhering to social distancing regulations wherever possible. Food must either be delivered to the cell door or the prisoner should collect it individually. Where food is taken to the prisoner’s cell, this should be done with as much space as practical being maintained between the prisoner and the staff member.
- e. Where possible social shielding prisoners should be the first to be given the opportunity to use equipment or access a service. All equipment and surfaces must be cleaned at the start of the day before use by a socially shielding prisoner.

20. In addition, prisons are offering shielding to prisoners falling within the wide cohort of individuals who are “vulnerable” to COVID-19 within their shielding arrangements.

(b) ROTL on Compassionate Grounds

21. All prisoners falling within the “extremely vulnerable” category referred to above are pro-actively being considered for ROTL under Rule 9 of the Prison Rules 1999, pursuant to guidance issued on 9 April 2020 (“**the Covid-19 ROTL Guidance**”)⁷, and as now explained in “Covid-19: Use of Compassionate ROTL”, published on 24 April 2020.
22. As set out in those documents, the Secretary of State has decided that in the present circumstances of the Covid-19 pandemic, prisoners in the following groups merit pro-active consideration for ROTL under a Special Purpose Licence:
- a. Pregnant women
 - b. Prisoners with their babies in custody
 - c. Those falling within the PHE COVID-19 risk category of “extremely vulnerable” to COVID-19.
23. The Secretary of State decided that the appropriate procedure for the release of prisoners on compassionate grounds, on the basis of health conditions or particular vulnerability during the COVID-19 outbreak, is the ROTL by way of Special Purpose Licence (SPL). This is because release on compassionate grounds for vulnerability reasons will only be justified for the duration of the Covid-19 outbreak. The ROTL scheme ensures that prisoners can be returned to prison once the justification for temporary compassionate release ends, if they are still serving the custodial element of their sentence at that point.
24. Prisons are required to take active steps to identify all prisoners in the groups above and to invite them to apply for ROTL, in accordance with the ROTL Policy Framework⁸, where they are eligible and willing.

⁷ “COVID-19: ROTL on Compassionate Grounds – Pregnant Women, MBUs and the Extremely Medically vulnerable (updated 27 April 2020) [**Disclosure Bundle 9**].

⁸

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/863600/rotl-pf.pdf

25. An assessment process under the ROTL Policy Framework will then be carried out. The operational guidance and the published policy explain how the ROTL Policy Framework should be interpreted and applied in the context of the Covid-19 pandemic.
26. Prisoners falling outside of the groups identified above may still apply for ROTL on compassionate grounds. The published policy explains that the fact of the Covid-19 epidemic will not normally, without more, provide sufficient grounds for proceeding to undertake a risk assessment in cases falling outside of those groups. However:
- a. All the relevant circumstances put forward by the prisoner must be considered, and the policy emphasises that ROTL may still be justified in exceptional circumstances which '*stand out*' for release. In considering whether exceptional circumstances apply, '*a highly relevant factor will be the prisoner's precise individual medical condition, the risk to their health, and potentially their life, if temporary release is not granted.*' The policy provides that this '*will need to take into account the extent to which their health can be protected by shielding measures in custody.*'
 - b. Prisons are required to seek advice from the establishment's healthcare provider to confirm the medical status of prisoners identifying themselves as in the groups above, but also '*may need to seek advice in the cases of prisoners who do not fall directly within the three groups above but who, in the clinical judgment of the establishment's healthcare provider, face an equivalent level of extreme vulnerability that would justify their consideration for temporary release.*'
27. The COVID-19 ROTL Guidance also requires that decisions on ROTL release are informed by the specific areas of support individuals will need in the community. A prisoner should only be released if their accommodation, immediate social care and health needs can be met post-release, and they can travel safely to their accommodation.
28. The COVID-19 ROTL Guidance makes special provision for financial support and discretionary accommodation payments for prisoners released in these circumstances. In summary:
- a. The Department for Work and Pensions has made a Statutory Instrument to ensure that prisoners released on compassionate grounds can claim Universal Credit and other benefits whilst on temporary licence.
 - b. Prisoners released on compassionate grounds will receive £80 and HMPPS is working closely with the Ministry for Housing, Communities and Local Government to ensure that no one will be released without housing and healthcare support in place.
 - c. Through the Gate (TTG) and probation teams will provide support and engagement by telephone, to those on compassionate temporary release, while they are in the community.
29. Consideration of COVID-19 SPL cases has additional complexities. These releases will be for longer than normal release on SPL, will concern some prisoners who would not normally be considered for ROTL but for the unique circumstances of Covid-19, and in some cases may be assessed by prison Governors who do not frequently conduct ROTL assessments. This has implications for the degree of supervision required and the support necessary. Prisons are therefore required to seek additional clearance, via the Central Offender Management Unit (OMU) Hub, from

the Deputy Director of Prisons before a final decision is made. The final decision on ROTL for COVID-19 vulnerability rests with the Deputy Director of Prisons.

30. Due to the complexities involved in this process initial releases under ROTL have been relatively few. As of 27 April 2020 21 pregnant women and mothers with babies have been released under the ROTL provisions. No prisoners falling within the extremely vulnerable category have yet been released.

Creating additional capacity

31. The Secretary of State has, in addition to all of the measures set out above, adopted a multi-faceted approach to the creation of additional capacity within prisons, in order to facilitate the effective implementation of social distancing, cohorting and shielding measures.
32. Alongside these steps, there has been a reduction in the prison population owing to a reduction in reported and recorded crime, police charges and reduced court activity. Since the beginning of the lockdown period, changes in demand have reduced the prison population by approximately 2500. This reduction in demand is expected to continue during the lockdown period.

(a) Additional accommodation

33. HMPPS is driving a programme of work to create 2,000 places within the existing prison estate through the provision of temporary accommodation units. This target is being kept under review as the demand across the prison estate continues to be assessed in the light of reduced inflows into prisons. Good progress has been made in installing temporary accommodation across the estate, with 300 units now delivered to six HMPPS sites and in the process of being installed and deployed. In total, as of 27 April, 628 rental units have been secured, and hundreds of additional units (for purchase) have been identified.
34. HMPPS is also repurposing an existing HMPPS site, recommissioning the former Medway Secure Training Centre as a 70 place satellite of HMP Rochester for low risk adult men (and anticipate that this site will begin taking its first prisoners later this week). In addition, HMPPS is working with both the Home Office and the MoD to identify sites that could be repurposed into prisons as a contingency measure.

(b) Expedition of remand hearings

35. HMPPS is working with HM Courts and Tribunals Service through the Covid-19 Criminal Justice System Strategic Command to expedite sentencing hearings for those convicted prisoners who are unsentenced. A proportion of this cohort will, when sentenced, be immediately due for release due to the time already served or because they will receive a non-custodial sentence. This will help to reduce the pressure on the prison estate.

(c) Controlled prisoner movements between different parts of the estate

36. As of 14 April, COVID Gold Command authorised controlled prisoner movements between establishments in order to utilise the headroom created by population control measures. This principally entails moving prisoners from local prisons to training prisons to increase headroom within the local estate. This is necessary in order to ensure there is sufficient headroom within the local estate to receive all newly remanded or convicted prisoners from the courts, whilst also making

progress with setting up the separate units for different prisoner cohorts. All such moves require COVID Gold Command authorisation and only take place once the receiving prison has an RCU established to receive incoming prisoners.

(d) The End of Custody Temporary Release Scheme

37. In addition to those measures, the Government has taken the exceptional step of creating a scheme for temporary release of certain medium and low risk offenders nearing the end of their custodial periods. This was publicly announced on 4 April 2020 (with an accompanying notice being issued to prisoners).
38. Under Rule 9A of the Prison Rules 1999, inserted by the Prison and Young Offender Institution (Coronavirus) (Amendment) Rules 2020 on 6 March 2020, the Secretary of State has the power temporarily to release certain categories of prisoners falling within a description specified in a direction made by the Secretary of State under the rule. On 7 April 2020, the Secretary of State made the Coronavirus Restricted Temporary Release Direction pursuant to rule 9A of the Prisons Rules 1999 [**Disclosure Bundle 10**]. On the same day, operational guidance on the ECTR scheme was issued to prisons ("**ECTR Operational Guidance**") [**Disclosure Bundle 8**].⁹
39. To be eligible for release under this direction, prisoners must (amongst other things):
- a. Be serving a standard determinate sentence with an automatic release date or committed to custody (i) in default of payment of a sum adjudged to be paid by a conviction or (ii) for contempt of court.
 - b. Have served at least half of the requisite custodial period of their sentences.
 - c. Be assessed as of low or medium risk of harm.
 - d. Be within 61 days of their conditional release dates.
40. Those excluded from the scheme include: those whose release is at the discretion of the Parole Board; those serving indeterminate sentences, extended sentences or sentences for offenders of particular concern; offenders serving sentences for terrorist and terrorist related offences listed in Schedule 19ZA to the Criminal Justice Act 2003; and prisoners subject to the notification requirements of Part 2 of the Sexual Offences Act 2003.
41. The ECTR Guidance makes special provision for financial support and discretionary accommodation payments for prisoners released in these circumstances. In summary:
- a. The Department for Work and Pensions has made a Statutory Instrument to ensure that prisoners released on under the ECTR scheme can claim Universal Credit and other benefits whilst on temporary licence.
 - b. Prisoners released on compassionate grounds will receive £80 and HMPPS is working closely with the Ministry for Housing, Communities and Local Government to ensure that no one will be released without housing and healthcare support in place.
 - c. Through the Gate (TTG) teams will provide support and engagement by telephone, to those on compassionate temporary release, while they are in the community. The TTG staff will use the early custody temporary release period to continue to deliver the resettlement plans, which

⁹ COVID-19: End of Custody Temporary Release Operational Guidance, updated 15 April 2020.

would normally be in train 12 weeks prior to release. This includes the duty to refer in relation to the key resettlement pathways.

42. To date, a small number of offenders (20 as of 27 April 2020) have been released under the End of Custody Temporary Release Scheme and approximately 200 additional offenders have been either approved for release awaiting tagging, or are approved for release pending accommodation being provided or immigration checks. An additional 300 are currently awaiting further information from partner agencies before a final decision is completed. The process for end of custody release is new and involves a number of key partners to align services and information to ensure that those released meet the policy and guidance, have suitable accommodation, have their health needs met on release and are able to be fitted with an electronic monitoring device at the point of release. As such, it is expected that once the process has embedded releases will increase.
43. On 16 April 2020 HMPPS identified that six prisoners had been released in error prior to their ECTR eligibility date. Five of these prisoners were asked to return to custody and did so compliantly. One prisoner was permitted to remain in the community on Special Purpose Licence pending transfer to ECTR licence when he reached the eligibility period a few days later. Between 18 April 2020 and 22 April 2020, releases were stopped in order to update guidance to prisons and add to the checks and processes required before release, to provide further assurance to HMPPS and the Lord Chancellor. Within that period applications continued to be considered, and releases resumed from 22 April 2020. In order to ensure that these additional checks do not cause delays in the releases, the assessment process starts earlier for prisoners approaching their eligibility dates. The expectation therefore remains that the rate of releases will increase once the process has embedded.

Measures taken in response to COVID-19 in the Youth Custody Service

44. The response to the outbreak of COVID-19 in the Youth Custody Service (YCS) has been informed by particular features of the Youth Justice and Secure Estate, the needs and vulnerabilities of children in custody and the risks presented by COVID-19.
45. The risks and challenges posed by COVID-19 to the Youth Custody Service are different to those posed to the adult estate. The cohort of children are all 18 or under and therefore in a group that is less vulnerable to the virus. Epidemiological information on COVID-19 available to date shows that the majority of children - those without additional health vulnerabilities - will experience a mild version of COVID-19 infection and will then recover. That does not mean that they are immune from the virus. However it is not anticipated that there will be a need to care for significant numbers of severely unwell children. A very small number of children in the Youth Custody Service have been identified as in an 'at risk' group due to a pre-existing medical condition. Sites have been asked take steps to shield these children in accordance with HMPPS guidance.
46. In terms of capacity, there is sufficient headroom currently within the YCS to absorb any additional demand on bed spaces. There are currently (as of 27 April) approximately 291 unoccupied beds across the three sectors (Young Offender Institutions, Secure Training Centres and Secure Children's Homes) compared with a total population of 764. The YCS is not dependent upon 'prisoner flow' in the same way that the adult estate is. All of the sites are multi-functional and accommodate remand and convicted young people, so movement around the estate is kept to a minimum. In the event of an explosive outbreak at a YCS site which resulted in the whole establishment being locked down, the YCS could probably absorb the loss of beds, despite the restriction on capacity. Staffing levels are more favourable in the YCS than in the adult estate, and establishments are mostly smaller than in other sectors.

47. For the reasons set out above, COVID-19 poses less of a risk to the YCS in terms of outbreaks of the disease. The YCS population, while not at high risk of contagion is nevertheless a complex group of children with other vulnerabilities. The Youth Justice and Secure Estate now holds a small cohort of 764 children and young people, down from around 3,000 a decade ago. The children and young people within the estate are some of the most complex and vulnerable children in society, with high levels of mental health disorder, and high levels of neurodisabilities such as Autistic Spectrum Conditions and Attention Deficit Hyperactivity Disorder, with many children in the estate serving sentences for particularly serious offences. Over many years now, partnership working within the Youth Justice and Secure Estate has created a specialist response for these children. SECURE STAIRS is the framework for a psychologically informed trauma-based framework for integrated care jointly led by NHS England and NHS Improvement and the YCS, which provides the foundations as to how the secure settings work with children. It is vital that during the COVID-19 pandemic, this specialist level of care and oversight of children and young people in the Youth Justice and Secure Estate is maintained.
48. The release of children for the Youth Justice and Secure Estate presents particular challenges. As set out above, the children in custody are some of the most challenging and emotionally vulnerable in our society. Given the high threshold for sentencing children to custody, they will also have committed serious offences. Whilst in custody they benefit from high levels of specialist support, both educational and psychological.
49. It is therefore vital that children are only released early where it is safe to do so, both for the individual being released and the wider public, and that suitable accommodation and support is in place.
50. The End of Custody Temporary Release scheme described above applies to children in Young Offender Institutions and Secure Training Centres. The Prison and Young Offender Institution (Coronavirus) (Amendment) Rules 2020 introduced a new Rule 5A into the Young Offender Institution Rules 2000, which provides that the Secretary of State has the power temporarily to release certain categories of prisoners falling within a description specified in a direction made by the Secretary of State under the rule. No amendment was made to the Secure Training Centre Rules as the existing power to release under Rule 5 is sufficiently broad to enable temporary release in these circumstances.
51. A Temporary Direction made by the Lord Chancellor on 24 April 2020 specifies children who are eligible for release under rule 5A of the YOI Rules [**Disclosure Bundle 15**]. To be eligible, children must: be on a standard determinate sentence (including s.91 sentences) released under section 244 of the Criminal Justice Act 2003; be a fine defaulter or contemnor released under section 258 of the Criminal Justice Act 2003; be serving a detention and training order under s.100 of the Powers of Criminal Courts (Sentencing) Act 2000; have served at least half of the custodial term they were sentenced to; have their risk of serious harm (ROSH) assessed as “low” or “medium”; be on a specified list of offences in scope; and be within 61 days of their automatic release date or within 61 days of the one-half point of the term of the detention and training order. There are also a number of criteria whereby children are excluded from ECTR, including if they are a registered sex offender; have previously committed offences whilst released on temporary licence; are serving a sentence of any length for any serious violent, sexual, terrorist or drug offence listed in the specified excluded offences; are serving a sentence of four or more years for specified offences such as possession of an offensive weapon in a public place. Given the high threshold for sentencing children to custody, only a small number meet the criteria for early release under this scheme. This is why Jo Farrar, CEO of HMPPS, in her recent evidence to the Justice Select

Committee (referred to at paragraph 30 of your letter), explained that fewer children will be eligible for early release under this scheme.

52. As set out above, release of children under the ECTR scheme presents particular challenges. It has therefore taken longer to develop the process for these releases. Operational guidance will be finalised and shared with establishments this week.
53. If it were necessary for a child to be released from a YOI on the basis that they were particularly vulnerable to COVID-19, they could be released pursuant to Special Purpose Licence. Prison Service Order 6300¹⁰ sets out the policy governing ROTL on compassionate grounds for juveniles in YOIs. Paragraph 3.3.1 states that “... *all juveniles can apply for special purpose licence, at any stage of their sentence, subject to successfully passing the specific risk assessment...There is no minimum eligibility period for this licence*”. If it were necessary for a child to be released from a Secure Training Centre on the basis that they were particularly vulnerable to COVID-19 they could be released under Rule 5 of the Secure Training Centre Rules.
54. At present, there is no power in place for ECTR to be applied to Secure Children's Homes and work is underway to resolve this.

B. THE ROLE (AND LATEST ANALYSIS) OF PUBLIC HEALTH ENGLAND

55. Overall responsibility for the development and provision of health in prisons in England and Wales resides with NHS England and NHS Wales. Public Health England is part of a National Partnership Agreement concerning the provision of healthcare in prisons. The other parties to that agreement are the Department of Health and Social Care, NHS England, HMPPS and the Ministry of Justice. In that role, Public Health England has provided advice to the Secretary of State, HMPPS and local establishments on the response to the COVID-19 outbreak.

The briefing paper of 24 March 2020

56. In formulating the range of measures set out above, the Secretary of State has accordingly worked in close partnership with PHE. Many of the measures adopted were recommended by PHE in a briefing paper entitled “Prison population management considerations in response to COVID-19’ prepared by Dr Éamonn O’Moore, National Lead for Health & Justice and Director UK Collaborating Centre, WHO Health in Prisons Programme and dated 24 March 2020 [**Disclosure Bundle 16**].¹¹ That paper identified a worst-case scenario in prison (in the event that no mitigating strategies were adopted) of between 2,500 and 3,500 deaths within the prison estate. It recommended the following key strategies for the management of the Covid-19 outbreak within prisons, each of which built on longstanding advice from PHE on the prevention and control of infectious diseases within prisons, and each of which have been adopted (as set out above) by the Secretary of State:
- a. First, the *‘isolation of prisoners known to be or believed to be infected (based on clinical signs/symptoms meeting the case definition and/or diagnostic testing)’*. To the extent that any isolation facilities become overwhelmed by numbers of cases/probable cases, the advice is to *‘cohort people together.’* The aim of those measures is to *‘reduce the transmission of infection*

¹⁰ Available online at <https://www.justice.gov.uk/offenders/psos>.

¹¹ The Briefing Paper was prepared by Dr O’Moore at the request of Phil Copple (Director General, Prisons). It was provided as a working draft pending final internal PHE approved and shared with a number of HMPPS and Ministry of Justice officials and Ministers in draft form. The paper was subsequently signed-off in accordance with PHE procedure without amendment.

among the wider population of staff and prisoners as well as enable effective deployment of healthcare and custodial staff.'

- b. Secondly, where there are 'particularly vulnerable population', it may be considered useful 'to "reverse cohort" people i.e. place them into a part of the facility with high levels of bio-security, enhanced care and segregation from the general population'.
- c. Thirdly, to 'reduce "seeding and feeding" of outbreaks by reducing or eliminating transfers out and new receptions, respectively.'

57. On the basis of PHE modelling, and an analysis of prison capacity as at the date of that briefing paper, the paper also recommended, as strategies to consider:

- a. Reducing the prison population generally: in that context the paper identified as a specific objective ensuring only single cell accommodation would be in use throughout the pandemic period. It identified that a population reduction of around 16,000 would (at that time) result in single-cell only accommodation across the estate.
- b. Reducing the prisoner population at highest risk of complications of infection: in that context the paper noted that the NHS had identified up to 20,000 prisoners in this category (this was a reference to the estimated number of prisoners eligible for the annual flu-jab). The paper noted that:

'...many such prisoners have complex social needs, which may not be met easily in the community. Others may have specific security concerns which restricts the desirability of release. However, there will be cases where the risks of complications from the infection are heightened, and where in general removing them from closed settings would improve the chances of better clinical outcomes. But reducing the prisoner population generally may also protect these vulnerable prisoners specifically by enabling implementation of 'reverse cohorting'/cocooning; enabling isolation and cohorting of cases, and allowing more efficient use of healthcare and custodial resources.'

Ongoing engagement with PHE

58. In addition to producing this Briefing Paper, Dr O'Moore and other PHE colleagues, have attended numerous meetings with HMPPS and Ministry of Justice officials, including meetings with the Secretary of State, and are providing ongoing operational advice, alongside Public Health Wales, on the response to the COVID-19 outbreak. Due to the speed of developments, much advice PHE has been delivered verbally, in daily conference calls and local through Outbreak control Teams.

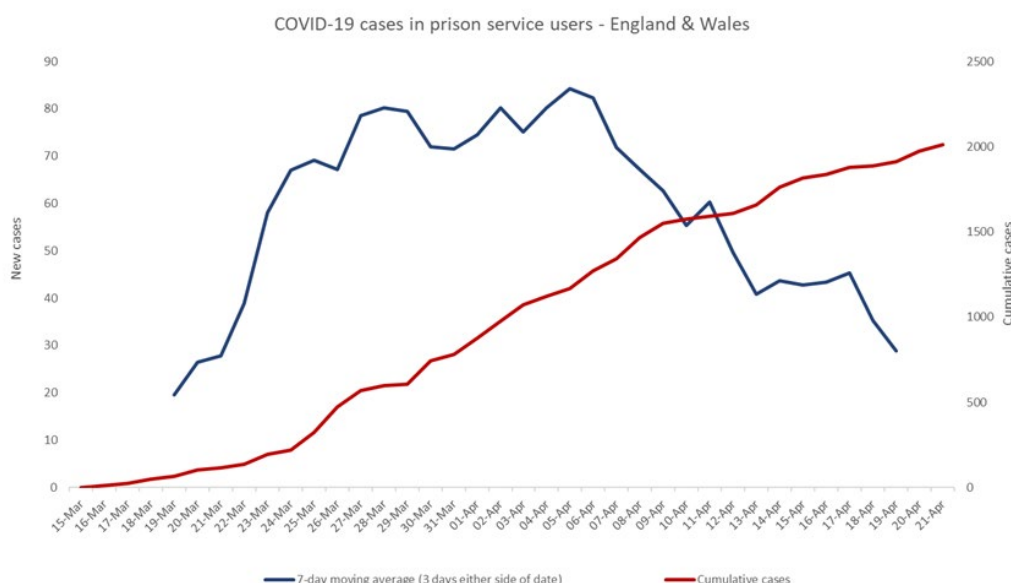
The updated analysis and briefing paper of 23 April 2020

59. On 23 April 2020, Public Health England produced a briefing paper containing an interim assessment of the impact of the measures taken by HMPPS in prisons in response to the Covid-19 pandemic. This was prepared by Dr Éamonn O'Moore, National Lead for Health & Justice and Director UK Collaborating Centre, WHO Health in Prisons Programme and is now available

online.¹² It has had the benefit of assessing, over the initial period of their implementation, all of the measures identified above.

60. PHE's interim assessment, on the basis of the emerging data, is that the 'explosive outbreaks' of Covid-19 which were feared at the beginning of the pandemic wave are not being seen: p.3. Instead there is evidence of containment of outbreaks. This is the pattern across the prison estate as well as at prison level. At the macro-level, the frequency of new cases is reducing and the number of cases recruited to outbreaks over time is reducing indicating that the initial outbreak is being contained effectively. This is illustrated in **Figure 1**, reproduced below.

Figure 1: Cumulative frequency curve and 7-day moving average curve of cases associated with incidents and outbreaks of COVID-19 in prisons in England & Wales (Source: PHE Health & Justice).



61. This is also the position at prison level, with the typical experience of many prisons being an initial upsurge of cases in both prisoners and staff followed by a deceleration with falling off in recruitment of cases, especially among prisoners.
62. The paper identified that (as at the date of the paper):

'PHE data showed there had been 279 laboratory-confirmed cases of COVID-19 diagnosed in prisoners in England & Wales but also over 1,600 possible/probable cases. Our data further shows that 33 people had been hospitalised for complications of COVID-19 infection, and 15 deaths were attributable directly or indirectly to COVID-19 infection.'

63. The PHE Briefing Paper states that the containment of outbreaks and deceleration of the rate of increase represents the impact of social distancing and isolation of infectious cases, leading to a reduction of the Reproduction Number (R_0) (the number of cases generated by one case): p.3.
64. Revised modelling undertaken by PHE in collaboration with HMPPS compared outcomes in an unmitigated scenario to those under the current strategy. It suggests that the measures taken by the Secretary of State to introduce regime changes, and compartmentalisation (cohorting) within prisons, if fully implemented may result in a reduction of the number of people infected with Covid-

19 from 77,800 to 2,800 cases, reducing the number of deaths from 2,700 to 100, and reducing the number of NHS beds required for Covid-19 cases from 4,500 to 200.

65. That analysis is based on the current population level:

- a. Without any further reduction in the prison population; and
- b. Subject to the key findings and assumptions listed within the paper.

66. The biggest risk of new infection being introduced to an establishment is identified as being new receptions and possibly infected staff. This is shown from the study of the outbreak at HMP Birmingham: p.7.

67. It concludes that the best defence against incursions of infection into prisons is to maintain RCUs going forward for the remainder of this financial year. There will also need to be careful consideration about how and when to relax strategies around social distancing.

C. THE GROUNDS OF CHALLENGE

Protective duties under articles 2 and 3 ECHR and the common law

(a) The positive obligations owed under Articles 2 and 3 ECHR

68. Articles 2 and 3 ECHR impose carefully circumscribed positive obligations on the state to protect prisoners from death and serious harm.

69. First, there is a systems duty. This imposes a general duty on the state to put in place an appropriate legislative and administrative framework to that end, including specific systems and procedures to cater for risks to life commonly arising in a prison or other place of detention (*Savage v South Essex NHS Trust* [2009] 1 AC 681 at §§40, 67-71, 76; *Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72 at §§12, 93; *Keenan v UK* (ECtHR, 3 April 2001) at §§89 & 111; *Edwards v United Kingdom* (2002) 35 EHRR 19 at §54).

70. Second, there is an operational duty. This only arises when the relevant authorities are aware, or ought to be aware, of a '*real and immediate risk*' of death or serious harm to the prisoner, at which point the authority must take reasonable steps within the scope of their powers to protect the individual from such death or harm (*Savage* at §§40-41, 72, 77; *Rabone* at §12; *Keenan* at §89; *Edwards* at §54). In that regard:

- a. The threshold for triggering the operational duty is a high one (*Savage* §§41 & 66; *Rabone* at §36). A '*real*' risk is one which is '*substantial or significant*' (*Rabone* §32). An '*immediate*' risk is one which is '*present and continuing*' (*Rabone* §39).
- b. If and when the duty is triggered, the standard is one of reasonableness, which brings with it '*consideration of the circumstances of the case, the ease or difficulty of taking precautions and the resources available*' (*In re Officer L* [2007] 1 WLR 2135 at §21, *Rabone* at §43). The duty is '*not particularly stringent*' (*Savage* at §41).
- c. Bearing in mind '*the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources*' the scope of this obligation '*must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities*' (ibid, derived from *Osman v United Kingdom* 29 EHRR 245 at §116).

71. For the purposes of Article 3 ECHR, the harm or ill-treatment must attain a minimum level of severity if it is to fall within the scope of the article. The assessment of the threshold will depend upon all the circumstances of the case, such as *'the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim'* (Selmouni v France (1999) 29 EHRR 403, Keenan v UK (ECtHR, 3 April 2001) at §109). The threshold is a high one: see Grant & Gleaves v Ministry of Justice [2011] EWHC 3379 (QB) at §46; Razumas v Ministry of Justice [2018] EWHC 215 (QB) at §239. In particular:
- a. It is not the role of the court to assess whether the care provided to the prisoner, or the conditions of their detention, *'fell short of the optimal or even a reasonable standard'*: Article 3 ECHR was drafted *'in the shadow of the Second World War'* and the minimum level of severity has variously been described as *'serious suffering'* or *'intense physical or mental suffering'* (R (on the application of Hall) v UCL Hospitals NHS Trust & SSJ [2013] EWHC 198 (Admin) at §26).
 - b. Absent physical injury, it requires *'such severity that undermines or has a significant adverse impact on the personality or will of the individual, or some impact akin to that'* (ibid, citing Kalashnikov v Russia (2003) 36 EHRR 34 at §95).
 - c. The fact that the individual is detained by the state is material, but that does not of itself diminish the threshold of severity for the invocation of Article 3 (see the analysis in Grant (above) at §§44.1 to 44.11).
72. The proposed claimants do not explain how it is said that they are victims for the purposes of s.7(1) of the Human Rights Act. It is also evident that, in a context in which the relevant ECHR duties require an intensely fact specific analysis, the proposed challenge is based on no individual facts. You appear to suggest that, even without such a case on which to test the facts and the application of the various policies and sets of guidance, the court could or would conclude that the system itself is in breach of the ECHR. That is a very high hurdle, if permissible at all as a basis of challenge. These points are acute in circumstances in which there are prisoners who are capable of bringing challenges – and indeed, as the recent *Davis* case of which you are aware demonstrates, have in fact done so (in the event, following the filing of the Secretary of State's evidence, Mr Davis discontinued his claim the day before the hearing and was ordered to pay the costs of the case).
73. Your central contention appears to be that Articles 2 and 3 ECHR and/or the common law require the release of a large number of offenders. There is no support for that contention in the case law of the ECtHR. The systems duty imposes on the state an obligation to take reasonable steps – that is the standard, taking into account all of the matters set out in the jurisprudence.
74. The core assertion you make is that the measures the Secretary of State has adopted to date have had a *'manifestly insufficient impact'* on the prison population. That is simply wrong once (i) the full range of the measures adopted by the Secretary of State is considered and (ii) in the light of PHE's latest advice and modelling. The measures have been adopted having regard to the particular challenges and risks faced within the prison estate – risks which have been acknowledged and reacted to. They have had a profound and manifest impact upon the risks to the prison population, the number of anticipated cases, and the number of anticipated deaths, according to PHE's latest modelling. That is unsurprising, given the extent (and exceptionality) of those measures. The measures set out in detail in Section A above (most of which receive no mention in your letter) plainly satisfy the systems duty under Articles 2 and 3.
75. We would only add, by way of emphasis, that the scope and extent of the release schemes presently being implemented by the Secretary of State (which of course remain under review)

represent the product of a careful and difficult balancing exercise involving a consideration of all the relevant factors, including (i) all the potential measures available for the management of risks associated with Covid-19; (ii) the risks to the public (and in some cases to the prisoners themselves) of release and (iii) the administration of justice and public confidence in the justice system. Indeed, it is simply not possible to consider exceptional release in response to the Covid-19 issues other than in the round – including by reference to current capacity, and the various ways in which the risks can be, and are successfully being, managed within the prison system.

76. Neither you, nor Professor Coker, have carried out any such exercise. You appear to start with Professor Coker's view that '*prison should be a last resort*' (see page 3 of his report dated 1 April 2020). That is a political proposition which falls outside of his expertise and which appears to have coloured (or limited) his analysis. The Secretary of State proceeds from a different (and entirely lawful) starting premise, which is that release (and its associated risks) will only be justified upon a proper consideration of all the relevant circumstances, the wide variety of mitigation strategies being adopted, and the facts of a particular case.

(b) Common law duty of care

77. As explained above, since 2006 the statutory obligation to provide healthcare to prisoners has been the responsibility of the Department of Health (now Department of Health and Social Care) and the NHS. Following the passage of the Health and Social Care Act 2012, NHS England is responsible for the commissioning and delivery of healthcare services relating to prisons. Consistent with their duties of co-operation, the Secretary of State and HMPPS support the commissioning and delivery by NHS England of healthcare in English prisons under the National Partnership Agreement for Prison Healthcare in England (2018-2021)¹³.

78. It is against that background that the Ministry of Justice continues to owe a common law duty of care to prisoners, but one which is limited (1) to matters arising out of the custodial relationship between prison and prisoner and (2) by reference to the transfer of headline responsibility for the provision of healthcare to the NHS. In *Razumas v Ministry for Justice* [2018] EWHC 215 (QB) the Court made the following observations on the content of that duty (at §§116-119):

'Logically that duty extends to matters arising out of custody; so a duty does exist to take care as to a safe environment, and also as to the less obvious risks such as that of suicide which has been found to be linked to the state of custody. The duty also probably extends to matters relating to access to healthcare; as indeed was conceded by the Defendant in its pleading. So if a PCT [Primary Care Trust] made provision for GP services for a prison, but the governor failed to put in place arrangements to enable the prisoners to attend the GPs at all, a duty owed by the Defendant would have been breached....

117. ...there may be an interesting argument as to whether the Defendant as well as the PCT would be in breach of any duty if the PCT made no arrangements for healthcare in a particular prison at all, but that does not arise here.

118. What, though, of such matters as clinical governance? Again it seems likely that a duty exists but is limited to the responsibility assumed for this in the light of the statutory and regulatory framework; that, on the evidence both documentary and oral,

¹³

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/767832/6.428_9_MoJ_National_health_partnership_A4-L_v10_web.pdf

is as to oversight of systems (e.g. regarding discharge routines and filling in of the medical part of PER forms) and does not extend to putting systems in place. It probably extends somewhat further still – to raising and seeking solutions to identified problems as part of the clinical governance process. Again there may be interesting questions if it came to a governor's attention that a healthcare provider did not have systems in place and was not taking steps to put them in place – by analogy with the situation when no healthcare is in place at all. There might also, it seems to me, be questions as to whether a governor would be discharging his duty if he had done no more than rely on positive outcomes from prison inspectorate reports, if it later emerged that a system which came within the purview of clinical governance was not in fact in place or running properly.

119...Against the context of the assumption of healthcare responsibility by the NHS/PCTs taken together with the steps taken to ensure that healthcare providers had systems in place to provide equivalent care to the extent possible in the prison context the assumption of responsibility by the Defendant goes no further than the clinical governance responsibility adverted to above. It does not include a responsibility to actively reinforce the role of the healthcare operators on day to day matters.'

79. It follows that the Secretary of State owes common law duties relating to:

- a. the maintenance of a safe prison environment;
- b. protection from risks linked to the state of custody; and
- c. in broad terms, cooperation with the NHS so as to facilitate the provision of healthcare services, by the NHS, equivalent to those accessible by the general public.

80. So far as the standard of care is concerned, as a general matter it must be demonstrated that the action or omission fell short of that set by the test in Bolam v Friern Hospital Management Committee [1957] 1 WLR 582. As Lord Clyde observed in Phelps v London Borough of Hillingdon [2001] 2 AC 619 at 672-673, that is 'a deliberately and properly high standard in recognition of the difficult nature of some decisions which those to whom the test applies require to make and of the room for genuine differences of view on the propriety of one course of action as against another.' Moreover, the practicability of any particular remedial measure 'must clearly take into account the resources and facilities at the disposal of the person or body owing the duty of care' (Walker v Northumberland CC [1995] 1 All ER 373; King v Sussex Ambulance NHS Trust [2002] EWCA Civ 953 at §23).

81. Your proposed challenge under the common law duty of care is not separately articulated (see §66 of your letter). It fails for the same reasons as those set out above in respect of Articles 2 and 3 ECHR.

(c) Discrimination

82. Under this same heading you have also made passing reference (at §§49 and 64) to the duty of the state to avoid indirect discrimination against prisoners with protected characteristics (under the Equality Act 2010 and Articles 2, 3, 8 and 14 ECHR). Again, you have not developed at all how those duties are said to be engaged or breached in the present circumstances, beyond relying upon the vulnerability of some prisoners to Covid-19 and the asserted failure of the Secretary of State to release enough of those prisoners. The answer to any such challenge, as already set out above, is that the vulnerabilities of particular prisoners are specifically being catered for under the measures in place, both through shielding measures and through the consideration of ROTL on compassionate grounds.

Rationality

83. You contend, at §51 of your letter, that the measures which the Secretary of State has put in place “*clearly do not do not add up to a package that will meet what is required to protect the NHS and save lives*” and are therefore irrational. Again, this assertion is contradicted by the assessment carried out by PHE of the impact of the measures taken to reduce the impact of the COVID-19 pandemic on prisons in England and Wales.
84. Beyond that, you assert at §56 of your letter that it is now “*widely accepted...that a response to the current pandemic requires a substantial reduction in the prison population to avoid significant loss of life (both in terms of the overall population and the population of overcrowded prisons)*”. You say that the Secretary of State has accepted that proposition. He has not, and none of the public announcements upon which you rely say otherwise. The aim of the Secretary of State, in responding to the Covid-19 outbreak, is to manage the risks of Covid-19 to the prison estate in a manner which is reasonable and which takes into account all the relevant factors. The measures adopted (as set out above) achieve that aim. This is plainly a rational response.

Legitimate expectation

85. The challenge under this heading again proceeds from the premise that ‘*the anticipated releases in the short term fall woefully short of constituting the release of sufficient prisoners to have any real likelihood of reducing the risk of the virus spreading through the prison estate*’ (at §59 of your letter). On that basis, it is contended that ‘*the reality*’ is ‘*drastically different*’ from the Secretary of State’s public announcements on 31 March 2020 and 4 April 2020, and that the Secretary of State has ‘*not dealt “straightforwardly and consistently with the public”...his current and proposed actions to date mean that releases from custody will not have any prospect of significantly reducing the prison population...that is a breach of the legitimate expectation that the Secretary of State would take such measures.*’
86. **First**, this challenge relies upon a representation that was never made. The promulgated aim of the Secretary of State throughout the Covid-19 crisis has, as set out above, been to manage the risks posed by the outbreak through a range of reasonable measures. The release of prisoners is one measure forming part of that response, as set out above. There has been no commitment to the absolute release of any particular number. Nor should there be, in the light of the need in any particular case to have regard to all the relevant risks and circumstances; and in light of the fact that the possibility of release needs to be considered in the light of current prison capacity and the impact of the current range of policies and measures set out above. In that regard:
- a. Neither the 31 March 2020 announcement¹⁴ nor the 4 April 2020 announcement¹⁵ contain any words committing the Secretary of State to ‘*a significant reduction of the prison population.*’ None have been cited in the letter. Those announcements go no further than explaining the steps taken to release pregnant women and to put in place the ECTR scheme, against the background of all the other measures being taken to manage the risks of Covid-19 in prisons. The announcements also expressly set out the competing policy considerations, and key caveats and conditions, associated with such release.
 - b. The summary note of the Justice Select Committee meeting on 7 March 2020 [**Disclosure Bundle 17**] contains no such representation either. The note records (accurate) statements from Jo Farrar, Chief Executive of HMPPS, and the Secretary of State, to the effect that up to 4,000 prisoners would be eligible for consideration under the ECTR scheme, and that there

¹⁴ <https://www.gov.uk/government/news/pregnant-prisoners-to-be-temporarily-released-from-custody>

¹⁵ https://www.gov.uk/government/news/measures-announced-to-protect-nhs-from-coronavirus-risk-in-prisons?utm_source=244b0709-9e03-4ec5-97d9-a629f13045a2&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate

would be a potential release of 70 pregnant prisoners and mothers with babies (with it being made clear at page 7 that this was the number to be considered). The same note records that six had been released to date. It does not record any absolute commitment to reach single cell occupancy across the prison estate. It does not record either the Secretary of State or the Chief Executive committing to release 15,000 prisoners. On the contrary, in response to a specific question about numbers to be released, the Secretary of State expressly made the points (at page 2) that:

'...The MoJ had to balance the need for a safe prison estate with the public being safe too. Whilst it was right to look at reasonable worst case scenarios, the Government also had to make sure to use as many different means as possible to achieve the safest possible conditions. It should be recognised that they could only minimise risk not eliminate it. Measures taken were not only about release of prisoners, but about creating more capacity within prisons, and number of prisoners would also reduce as the courts took listing decision and cases of remand prisoners, who might face sentences that could result in release on time served or alternative types of sentences, were dealt with.'

The point was also made that, as time went on, more prisoners would become eligible under the ECTR scheme (by virtue of their proximity to end of sentence).

- c. The evidence of Ms Frazer MP, Minister of State at MoJ, on 14 March 2020 was, again, that there would be a release of 'up to' 4,000 prisoners as '*one part*' of the MoJ strategy (see the full answer at page 22).

- 87. **Secondly**, even if such a representation could somehow be derived from any of the materials above, it would not be '*clear, unambiguous and devoid of relevant qualification*' as it would need to be in order to found any legitimate expectation (let alone a substantive one) (*R v IRC ex p MFK Underwriting Agencies Ltd* [1990] 1 WLR 1545 at 1570 per Bingham LJ).
- 88. **Thirdly**, if and insofar as it is contended instead (it is not clear from the letter) that the Secretary of State has committed to the release up to 4,000 within a particular timeframe, that is likewise denied, again because there has been no such representation, let alone one clear, unambiguous and devoid of relevant qualification. The Secretary of State is moving as quickly as possible to implement the release schemes adopted. However as explained above, this is a complex and difficult task; especially in circumstances in which the prison estate is having to implement a whole range of necessary measures, developed at speed, whilst coping with reduced operational resources and increased pressures as a result of the outbreak.

Padfield challenge

- 89. Your letter further contends (at §§61& 62) that the Secretary of State is frustrating the purpose of rule 9A of the Prison Rules 1999, contrary to the principle in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.
- 90. In order to make that challenge good, it would have to be shown that when making his direction under rule 9A(1) of the Prison Rules 1999, the Secretary of State was using his power for an extraneous or improper purpose. That is untenable:
 - a. Rule 9A(1) makes provision for a direction enabling the temporary release of prisoners. That is exactly what the direction does.
 - b. Rule 9A(4) provides that the description of eligible prisoners specified in the direction '*may be framed by reference to whatever matters the Secretary of State considers appropriate.*'
 - c. Rule 9A confers a general discretion upon the Secretary of State in relation to such releases, and nothing in the rule establishes any requirement to release any particular number of prisoners.

Fairness and transparency

91. The policies and operational guidance responding to the Covid-19 outbreak have been developed at pace, and in far shorter timeframes than would be normal. The priority has been to get operational measures in place first, to communicate those measures to prisons (and, through prisons, to prisoners). Insofar as has been practically possible, the Secretary of State has kept the wider public abreast of the measures being taken through, amongst other things, public announcements, information made available on the Government website, and his evidence to the Justice Select Committee.
92. At §§67 & 68 of your letter, you seek publication of the PHE advice received (which we understand to mean the briefing paper of 24 March 2020 and the latest PHE briefing paper dated 23 April 2020) and the operational details of the release schemes in place. As set out above, the relevant policies in relation to both ECTR and ROTL on compassionate grounds have now been published. The relevant PHE advices have been provided with this letter or published.

CONCLUSION

93. For the reasons set out above the Secretary of State is in breach of no obligation, whether under the common or public law or under the ECHR. In particular, he is under no legal obligation to expand the scope of the release schemes currently being operated.
94. We reiterate that the Secretary of State will continue to keep those schemes under review, to carefully consider relevant medical and scientific advice, and will continue to engage with relevant stakeholders (including the proposed claimants to this action).
95. The fact that you and your legal team have agreed to act under the terms of a Conditional Fee Agreement is noted. We will consider any application for a CCO when it is made. We do not agree to give an undertaking that we will not pursue your clients for costs.

DETAILS OF OTHER INTERESTED PARTIES

Prison Governors' Association

RESPONSE TO REQUESTS FOR INFORMATION AND DOCUMENTS

A list of the documents included in the accompanying disclosure bundle is annexed to this letter.

ADDRESS FOR FURTHER CORRESPONDENCE AND SERVICE OF COURT DOCUMENTS

If, despite the above, your client decides to commence proceedings then they may be served upon this office by email: please see <https://www.gov.uk/government/organisations/government-legal-department>. Due to COVID-19 and the current circumstances all documentation should be sent by e-mail rather than by post to limit the handling of materials.

Yours faithfully

A handwritten signature in black ink, appearing to be 'J. D. S.', written over a light blue horizontal line.

John Davis
for the Treasury Solicitor

D 020 7210 3353

F 020 7210 3410

E [REDACTED]

Annex: Index to Disclosure Bundle