Care Quality Commission consultation on approach to regulating health and social care in prisons and young offender institutions and health care in immigration removal centres

Response by the Immigration Law Practitioners' Association (ILPA)

Introduction

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous government committees, including Home Office, and other consultative and advisory groups.

ILPA's expertise is in work with persons under immigration control and we have answered the questions accordingly.

1. Do you agree with the proposal for a joint Her Majesty's Inspectorate of Prisons / Care Quality Commission inspection framework?

ILPA agrees with this proposal.

We support the stated aim of the joint inspection framework: to facilitate the monitoring, regulation and inspection of health care providers within secure settings by the Care Quality Commission alongside work with Her Majesty's Inspectorate of Prisons to identify wider health issues within secure settings. The adoption of an holistic approach to monitoring health in secure settings is of importance as regards to the care of immigration detainees given the evidence that immigration detention is likely to be detrimental to the mental and physical health of detainees[1]; the role of detention centre staff other than health professionals in identifying and responding appropriately to health problems experienced by detainees; and the significance of health considerations to the ongoing duty of the Secretary of State to review the decision to detain.[2]

[1] Burnett, A. Peel, M. (2001). 'The health of survivors of torture and organised violence.' BMJ, 322, pp.606-609; Steel Z et al. (2006) 'Impact of immigration detention and temporary protection on the mental health of refugees' British Journal of Psychiatry 188: 58-64. 2006; Pourgourides C, et el. (1996) 'A second exile: the mental health implications of detention of asylum seekers in the United Kingdom'. In: Birmingham: North Birmingham Mental Health Trust, 1996; Robjant K, et al, Mental health implications of detaining asylum seekers: systematic review. Traumatic Stress Service, Clinical Treatment Centre, Maudsley Hospital, Denmark Hill, London SE5 8AZ, UK.
[2] Home Office Enforcement Instructions and guidance, Chapter 55, at 55.3.1.

Short-term holding facilities[3] and pre-departure accommodation[4] should be specifically referenced within the consultation document. NHS England is responsible for commissioning health services in short-term holding facilities and pre-departure accommodation in addition to immigration removal centres and these secure settings are also subject to inspection by Her Majesty's Inspectorate of Prisons. It would therefore be appropriate for short-term holding facilities and pre-departure accommodation to be included within the scope of the joint inspection framework in the same way as immigration removal centres and prisons. This is particularly important given that there is no equivalent of the Detention Centre Rules 2001[5] for short term holding facilities, despite these having been consulted on since 2006.[6] Ministers promised during debates on the Bill that became the Immigration and Nationality Act 2014 that draft rules would be published before the summer recess of 2014,[7] but this did not happen and draft rules have yet to be published.

The joint inspection framework should encompass social care in immigration removal centres. The consultation document states that the inspection will not cover social care in these settings on the basis that the Care Act 2014 does not cover immigration removal centres. We assume that this is on the basis, that the responsibilities of local authorities subject to the regulations of the Care Quality Commission would not be engaged. We disagree. We do not consider that this accurately reflects the position in law.

Under s.76 Care Act 2014, prisons and approved premises are excluded from certain provisions of the Care Act 2014 including the duties on local authorities with regard to safeguarding adults under ss.42-47 of the Care Act 2014. However, s.76 of the Care Act 2014 does not similarly exclude immigration removal centres from these provisions and the local authority retains duties under Part 1 Care Act 2014 to those, including asylum seekers, who are not excluded from receiving services by virtue of Schedule 3 of the Nationality, Immigration and Asylum Act 2002. The Department of Health has confirmed in its guide for local authorities that the introduction of the Care Act 2014 has not changed the legal position for asylum seekers or foreign nationals in immigration removal centres[8]. It would be important therefore that the Care Quality Commission ensures and exercises oversight over the exercise by local authorities of their duties and responsibilities towards detainees. The importance and complexity of social care provision within immigration removal centres make it a particularly appropriate focus for a joint approach to monitoring and inspection between the Care Quality Commission and Her Majesty's Inspectorate of Prisons, drawing on the specialist expertise of the former in relation to social care practice.

ILPA also urges that health care provision in immigration removal centres is inspected with greater frequency than once every four years (compared with annually for young offender institutions and every two to three years for prisons) which the consultation document indicates may be achieved through conducting more frequent and focused, intelligence-led

[3] Immigration and Asylum Act 1999 s. 147.
[4] Immigration and Asylum Act 1999 s. 6(2)(b).
[5] SI 2001/248, as amended.
[6] See ILPA's 13 February 2006 response to this consultation at http://www.ilpa.org.uk/pages/non-parliamentary-briefings-submissions-and-responses.html (accessed 23 May 2014).
[7] Hansard HL Report 3 March 2014, col 1140; 1 April 2014, col 856.
[8] http://www.local.gov.uk/care-support-reform/-/journal_content/56/10180/6522988/ARTICLE

inspections. The UK has been found to have breached detainees' rights under Article 3 of the European Convention on Human Rights, the prohibition on torture, inhuman and degrading treatment and punishment in no less than six cases involving mentally ill individuals held in immigration detention in the last four years.[9] Other cases are pending or have settled. The judgments record how some of these individuals' mental illnesses were managed within the prison estate, but how rapidly their condition deteriorated when they were transferred to immigration detention.[10] Individuals whose condition was managed within the prison estate deteriorated rapidly in immigration detention.

Failings reaching the high threshold of Article 3 have been identified in the provision of health care as well as in wider systems relating to maintaining the decision to detain. . For example, the High Court in *S v Secretary of State for the Home Department*[11] catalogued a series of failings which led to its finding that those responsible for the assessment, treatment and illness management of S at Harmondsworth Healthcare Centre and Colnbrook Healthcare centre, as well as those responsible for his detention, had breached his rights under articles 3 and 8 of the European Convention on Human Rights.

Detention under Immigration Act powers is without limit of time and there is no automatic judicial oversight of either the decision to detain or to maintain detention, making it particularly important that systems to safeguard persons in detention function effectively. The need for monitoring, inspection and oversight of health care provision is therefore acute and urgent within immigration removal centre, requiring a sustained and in-depth inspection regime.

2. Do you have any comments on the assessment framework of key lines of enquiry, prompts and characteristics set out in Appendix A?

Yes.

General comments

ILPA welcomes the setting of standards for healthcare in detention by the Care Quality Commission in consultation with Her Majesty's Inspectorate of Prisons as it is important that robust and objective standards are set based on clinical considerations. The need for independent assessment of health and social care in settings where immigration detainees are

[9] (All accessed 23 May 2015). *R (S) v* Secretary of State for the Home Department [2011] EWHC 2120 (Admin) (5 August 2011), http://www.bailii.org/ew/cases/EWHC/Admin/2011/2120.html; *R (BA) v* Secretary of State for the Home Department [2011] EWHC 2748 (Admin) (26 October 2011) (http://www.bailii.org/ew/cases/EWHC/Admin/2011/2748.html;*R (HA) v* Secretary of State for the Home Department [2012] EWHC 979 (Admin) (17 April 2012), http://www.bailii.org/ew/cases/EWHC/Admin/2012/979.html; *R (D) v* Secretary of State for the Home Department [2012] EWHC 2501 (Admin) (20 August 2012), http://www.bailii.org/ew/cases/EWHC/Admin/2012/2501.html; *R (S) v* Secretary of State for the Home Department [2014] EWHC 50 (28 January 2014), http://www.bailii.org/ew/cases/EWHC/Admin/2014/50.html; *R (MD) v* Secretary of State for the Home Department [2014] EWHC 2249 (Admin) (8 July 2014), http://www.bailii.org/ew/cases/EWHC/Admin/2014/2249.html

[10] See e.g. *R (BA) v* Secretary of State for the Home Department [2011] EWHC 2748 (Admin) (26 October 2011), *op.cit.*

[11] *R (S) v* Secretary of State for the Home Department [2014] EWHC 50 (28 January 2014), http://www.bailii.org/ew/cases/EWHC/Admin/2014/50.html;

held is particularly pressing in light of the history of identification in judgments of poor standards of health care provision in immigration removal centres.

The inspection framework needs to take account of the particular status of immigration detainees who are subject to administrative detention rather than following a sentence by a court. This distinction gives rise to different considerations in law. For example, immigration detention should only be used sparingly, with a presumption in favour of temporary admission or release[12]. This means that, in contrast with those subject to a prison sentence following conviction, release should be considered actively. It is Home Office policy that those suffering serious medical conditions or serious mental illness which cannot be satisfactorily managed within detention, torture survivors or trafficked persons may only be considered "suitable" for detention in 'only very exceptional circumstances'[13].

These considerations have particular implications for the management of those with mental health or other medical conditions. For example, it is the position of the Royal College of Psychiatrists that immigration detention militates against successful treatment of mental illness. The focus of current NHS mental health services is to not only treat the symptoms of mental disorder but also to support community rehabilitation. The Royal College of Psychiatrists identifies that the recovery model that is not possible to put into action in a detention centre[14]. It is important that the standards fully reflect the need for health care professionals to be considering and making recommendations for appropriate alternative provision of care to the individual in a community-based setting.

The duties on the Home Office actively to reconsider the decision to detain immigration detainees place further responsibilities on health care staff to identify relevant health concerns and indicators of torture or trafficking and to communicate these appropriately to detention centre staff responsible for the decision to maintain detention so that those unsuitable for detention are released. Standards reflecting the duties on health care professionals in relation to bringing concerns to attention in this way under Rule 35 of the Detention Centre Rules 2001[15] should be incorporated into the inspection framework.

As indicated above, ILPA supports the aim of the joint inspection approach to monitor health care provision whilst examining wider factors in detention that impact on health and well-being. This has particular importance in relation to the implementation of Rule 35 of the Detention Centre Rules 2001 which requires a whole systems approach of health care providers identifying

[12] UK Visas and Immigration, Chapter 55: Detention and Temporary Release, Enforcement Instructions and Guidance, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/400022/Chapter55_external_v19.pdf at 55.1.1 (accessed 23 May 2015).
[13] UK Visas and Immigration, Chapter 55: Detention and Temporary Release, Enforcement Instructions and Guidance, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/400022/Chapter55_external_v19.pdf at 55.10 (accessed 23 May 2015).
[14] The Royal College of Psychiatrists, Position Statement on detention of people with mental health disorders in Immigration Removal Centres, October 2013, updated January 2014 at: http://www.rcpsych.ac.uk/pdf/Satisfactory%20Treatment%20in%20Detention%20document%20March%202014%20edit.pdf (accessed 23 May 2015).
[15] Detention Centre Rules 2001, SI 2001/238 at: http://www.legislation.gov.uk/uksi/2001/238/pdfs/uksi_20010238_en.pdf

health concerns and detention centre staff making decisions on continued detention to ensure the effective operation of the rule. Consideration therefore needs to be given as to how the Care Quality Commission will identify relevant issues to Her Majesty's Inspectorate of Prisons as part of the joint inspection framework.

Are services safe? Key lines of enquiry, prompts and characteristics

A further standard should be included at S3 monitoring the use of segregation, which should not be used to manage mentally ill and other detainees. Mental illness is often treated as 'behavioural' and dealt with through disciplinary measures such as the use of force and segregation. The use of these measures on the mentally ill will have disproportionate effects. In the case of *MD*[16], in which a breach of Article 3 European Convention on Human Rights was found in relation to the lack of measures or ineffective application of measures to ensure that MD's mental health was properly diagnosed, treated and managed, MD suffered from major depression with psychotic features and generalised anxiety disorder and was held at Yarls' Wood. The response to her distress, self-harm and aggressive outbursts was to remove her from association and isolate her, actions that an independent doctor identified as liable to make her condition worse. The independent physician also identified that physical force was used in response to her distress, frequently increasing her anxiety and experienced by her as traumatic. The High Court held:

> *I also accept that removal from association and isolation and restraint in its various forms whilst carried out without any intention to inflict suffering on the Claimant increased her suffering and was degrading because it was such as to arouse in the Claimant feelings of fear, anguish and inferiority likely to humiliate and debase the Claimant in showing a serious lack of respect for her human dignity.*[17]

In our experience, the use of force and segregation for mentally ill detainees is far from isolated. For example, both the 2012[18] and 2013[19] reports of the Harmondsworth Independent Monitoring Board pointed to other cases where mentally ill men had been segregated for prolonged periods of time.

Standards at S3 should make clear that the use of force is limited to physical intervention required to prevent harm to the individual or others in addition to the requirements that it be used as a last resort and for no longer than necessary. The framework standards should encompass specifically the use of physical restraints in a wider range of circumstances. For example, immigration detainees have been escorted to secondary health care settings in restraints where security is not a concern, stigmatising them and failing to respect their dignity.

Are services effective? Key lines of enquiry, prompts and characteristics

Standards should be included to monitor whether healthcare staff have been proactive in identifying torture, trafficking or health concerns relevant to the question of whether someone

[16] *R (MD) v* Secretary of State for the Home Department [2014] EWHC 2249 (Admin) (8 July 2014), http://www.bailii.org/ew/cases/EWHC/Admin/2014/2249.html
[17] *Ibid*, para 141
[18] http://www.imb.org.uk/wp-content/uploads/2015/01/harmondsworth-2012.pdf
[19] http://www.imb.org.uk/wp-content/uploads/2015/01/harmondsworth-2013.pdf

is unsuitable for detention and reporting these, with the informed consent of the detainees, promptly and accurately to casework staff. The quality and outcome of those reports should be monitored.

A further standard should be developed assessing whether active consideration has been given, and recommendations made, as to whether treatment would more appropriately be provided in a community setting and whether concerns have been raised with detention centre staff as appropriate. This section should also specify that, where treatment is continued in detention, this is provided to at least an equivalent standard as that provided in the community in all areas of healthcare.

Specific standards should be included addressing the need for recruitment, training, and ongoing professional development of staff and their demonstration skills pertaining to, and knowledge and experience of, the common health problems of immigration detainees, including the health needs of refugees and asylum seekers, survivors of torture and ill-treatment, and those with mental health problems.

Standards related to care planning, continuity of care and management of care records are particularly important given the frequency of moves of immigration detainees within the detention estate and the need to make arrangements for medical care on release or on removal. These concerns must be monitored and addressed. It would be useful for the framework to include examination of action taken by health care professionals to raise concerns with detention centre staff about inappropriate or frequent moves affecting an individual's continuity of care. ILPA members also have experience of seriously ill detainees being released from detention without accommodation being put in place, without appropriate care plans or referrals to community mental health services or without medication or prompt access to medication being organised, giving rise to serious risks to the person. Particular attention should be given to this issue in the application of the standards in this area, including through following the care pathways of individuals on release from detention.

ILPA has raised concerns in relation to the absence of systems for identifying and making provision for those who lack mental capacity to make decisions about their immigration cases, particularly in the context of the detained fast track process operated at Yarls' Wood and Harmondsworth, where the speed of the process places individuals at particular disadvantage in pursuing their case. The claimants in *R (S) v Secretary of State for the Home Department*[20] and *R (BA) v Secretary of State for the Home Department*[21] had not been identified by the immigration authorities as lacking capacity to participate in their immigration cases; no adjustments had been made to the process for determining their immigration applications for ensuring that they had understood the reasons for their detention and how to go about challenging it. It would be useful for the Care Quality Commission to consider and monitor the role of health care

[20] *R (S) v* Secretary of State for the Home Department [2014] EWHC 50 (28 January 2014), http://www.bailii.org/ew/cases/EWHC/Admin/2014/50.html

[21] *R (BA) v* Secretary of State for the Home Department [2011] EWHC 2748 (Admin) (26 October 2011), http://www.bailii.org/ew/cases/EWHC/Admin/2011/2748.html.

providers in detention in identifying and supporting individuals who do not have the capacity to engage with their immigration case.

Are services caring? Key lines of enquiry, prompts and characteristics

Immigration detainees report being treated with disbelief or with a lack of compassion by health care staff in detention so these standards are very relevant. A specific standard should be included in this section assessing the use of interpreting services for health care appointments.

Are services responsive? Key lines of enquiry, prompts and characteristics

As discussed above, standards in this section must take account of the need actively to consider release and treatment in the community for those detained under administrative powers in immigration detention, contrasting with those confined to detention having been sentenced to imprisonment. In August 2010, Home Office policy[22] changed. Prior to that date the policy was that those with physical and mental illnesses and/or disability would be "suitable" for detention only in the most exceptional circumstances. After that date the policy was changed to refer to those with such conditions "which cannot be satisfactorily managed within detention." Therefore management of these conditions must be kept under close review. It is ILPA's position that immigration detainees who are physically or mentally ill should not be managed in the detained setting at all.

Are services well led? Key lines of enquiry, prompts and characteristics

The framework should also take account of the need for health professionals working to be aware of, to manage appropriately, and to be supported to manage, tensions which may arise from their dual obligations within the detained setting, so that medical professionals may advocate appropriately, in line with their primary duty to the patient, where threats are posed to an individual's health within detention. The Istanbul Protocol[23] provides a useful reference point for principles regarding dual obligations on medical personnel and the management of these.

3. We do not intend to rate health and justice services in 2015/16. Do you agree with this approach?

ILPA does not have a view on whether a rating be given to locations or providers in 2015/16. Any rating that is given should be specific to the particular detained setting so that the particular

[22] Chapter 55.10 of the Enforcement Instructions and Guidance. Version 9 was replaced with version 10 in August 2010.

[23] United Nations (2004) *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* at: http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf. See particularly paras 66-73. (accessed 23 May 2015).

issues arising in the particular setting relate directly to the rating provided. It is important, in all cases, that detailed narrative reports of inspections are published to provide a transparent description and analysis of the concerns identified.

4. Should we consider a single rating for health and social care within a secure setting? Should this be a joint rating with Her Majesty's Inspectorate of Prisons or a Care Quality Commission Rating?

Findings from inspections should clearly identify the responsibilities of health care providers and detention centre staff to ensure that responsibilities may be delineated effectively and recommendations implemented by the appropriate body. We consider that separate ratings by the Care Quality Commission and Her Majesty's Inspectorate of Prisons, alongside detailed narrative reports highlighting the concerns identified, would most effectively support this accountability.

It is important, however, that the Care Quality Commission and Her Majesty's Inspectorate of Prisons adopt a joint approach to information-gathering and inspection as well as to the formulation of recommendations to address concerns about processes such as those under Rule 35 of the Detention Centre Rules 2001 which require a whole systems approach across health care providers and detention centre staff for their successful operation.

5. Do you agree without our approach to concerns, complaints and whistleblowers?

As discussed below, detainees rarely make complaints or feel entitled to complain about the treatment they receive in detention and therefore it is important for the Commission and Her Majesty's Inspectorate of Prisons additionally to develop the proactive gathering of information about the experience of individuals subject to immigration control held in secure settings.

6. Do you agree with our proposals for gathering detainees' experience of care? Are there any other ways we could gather this information?

Yes, but the Care Quality Commission and Her Majesty's Inspectorate of Prisons should invest in researching, developing and evaluating proactive methods of gathering information about detained persons.'

Persons subject to immigration control are frequently reticent about making complaints for fear that speaking out may affect the determination of their immigration case, their likelihood of removal from the UK or their ongoing treatment in detention. Sometimes they do not see themselves as holders of ,. Detainees may therefore not recognise or assert their rights as a result . This makes a proactive approach to obtaining information important.

Provision should be made to enable those detained to provide information in individual interviews in addition to the suggested focus groups, both for reasons of confidentiality and because of the difficulties of overcoming language barriers in mixed groups.

Consideration should be given to how detained persons may be able to telephone from prison settings and the Commission should ensure that provision for raising concerns and providing feedback by telephone is via a dedicated and free telephone service (including free from mobile 'phones in immigration removal centres), which affords the opportunity to telephone in private.

Interpreting and translation services should be ensured for all mechanisms developed for obtaining information from detained persons, whether face-to-face, by telephone or in writing.

Freephone telephone lines should be supported by interpretation services. Material must be available in a variety of languages and it must be acceptable to submit material in the language of the person's choice.

7. Do you agree with our approach to working with national and local organisations? Is there anything else that we should be doing?

ILPA welcomes the willingness of the Care Quality Commission and Her Majesty's Inspectorate of Prisons to engage with national and local organisations, including voluntary organisations working in secure settings and with families in the community. We consider that the views of legal practitioners with experience of representing persons in immigration detention and of representative bodies such as ILPA must be considered. It is important for the Commission and Her Majesty's Inspectorate of Prisons to be able to receive intelligence from voluntary organisations such as case studies and information that have been anonymised to maintain the confidentiality of thee person concerned.

It would be useful for the Commission to engage with bodies which deal with complaints about health care professionals, such as the General Medical Council. As indicated above, the number of formal complaints is unlikely to be indicative of the level of concerns present in immigration detention settings because persons detained under Immigration Act powers are reticent about making complaints.

The Care Quality Commission and Her Majesty's Inspectorate of Prisons should obtain and review internal audit and monitoring information from the Home Office.

8. We have described how we will gather the views of detainees in advance of the inspection. Do you think this is an effective approach to supporting our work?

See response to question six above. It is vital that the views of persons detained under Immigration Act powers be gathered. The effectiveness will depend upon the Commission's ability to obtain information from them and language support is an important part of this. Persons in detention who are unwilling to make a formal complaint may be prepared to provide intelligence: information that is anonymous or whose source is anonymous. Such intelligence can help to inform decisions on when and where to carry out an inspection and what to look for.

9. We have described how we will gather information and evidence while on site at the secure setting. Do you think this is an effective approach to supporting our work?

It is important to ensure that the inspection evaluates services that are actually provided rather than just assess the quality of aspirations as set out in policies. In addition to the steps outlined above for obtaining information from persons in detention, the Care Quality Commission and Her Majesty's Inspectorate of Prisons should also speak with voluntary organisations, visitor groups and legal representatives working with persons detained Under Immigration Act powers in the secure setting under inspection.

The Care Quality Commission should give particular consideration as to the manner in which it informs persons in detention of the Commission's right of access as regulators to detainees' medical records as these may contain sensitive information, including about torture and abuse and those in immigration detention may have fears about the use and disclosure of their information.

Undercover filming by television reporters uncovered ill-treatment and abuse in immigration detention in Yarls' Wood. Legal judgments have done so and there are very many cases that do not come to court, including a very significant number of damages cases which settle.

What was filmed tallied with accounts persons who had been detained there had been giving over a considerable period, and that accounts of persons held at different times, and who did not know each other, also tallied. Reports of formal inspections failed to give an impression of what was happening, despite being critical.

It is very difficult to gather information. It is necessary to be prepared to receive and consider intelligence. Persons in detention need not only to be listened to, but their accounts believed. We consider that interviews with persons formerly detained are a way of checking information and, with the consent of a detainee or former detainee, legal representatives can assist.

The gap between policy and practice in immigration detention is striking and careful and sustained observation of practice, whether observation of conduct, reading records or studying figures to understand how they relate to practice, will often open up further avenues for inquiry. Time needs to be allowed for this. We strongly support carrying out unannounced inspections wherever this is permitted, and following up all inspections with visits to see whether recommendations have been implemented.

Adrian Berry

Chair

ILPA

26 May 2015