

**Written evidence to the Joint Committee on access to justice of the Government's proposed judicial review reforms**

**1. Executive summary**

- 1.1 These submissions deal with government proposals to overturn carefully thought out rules and approaches developed over decades by the independent judiciary and to restrict civil society organisations from using the law effectively to protect those who are unable to protect themselves<sup>1</sup>.
- 1.2 The proposed changes to funding and standing for judicial review will be a disaster for penal reform, civil society and the safety and rights of those in contact with the law whether as defendants or victims, including children.

**2. About the Howard League for Penal Reform**

- 2.1 Founded in 1866, the Howard League for Penal Reform is the oldest penal reform charity in the world. The Howard League has some 7,000 members, including prisoners and their families, lawyers, criminal justice professionals and academics. The Howard League has consultative status with both the United Nations and the Council of Europe. It is an independent charity and accepts no grant funding from the UK government.
- 2.2 The Howard League campaigns for less crime, safer communities and fewer people in prison. We achieve these objectives through conducting and commissioning research and investigations aimed at revealing underlying problems and discovering new solutions to issues of public concern. The Howard League's objectives and principles underlie and inform the charity's parliamentary work, research, legal and participation work as well as its projects.

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<sup>1</sup> We refer the Committee to our submissions of June 2013 which deal with our concerns about proposed funding restrictions to legal aid for judicial review. Available at: [http://d19ylpo4aovc7m.cloudfront.net/fileadmin/howard\\_league/user/pdf/Consultations/Summary\\_of\\_Key\\_responses\\_on\\_prison\\_law\\_appeals\\_and\\_judicial\\_review\\_-\\_consolidated.pdf](http://d19ylpo4aovc7m.cloudfront.net/fileadmin/howard_league/user/pdf/Consultations/Summary_of_Key_responses_on_prison_law_appeals_and_judicial_review_-_consolidated.pdf)

- 2.3 Since 2002 the Howard League has provided the only legal service dedicated to representing children in custody. We also provide a dedicated legal service for young adults in prison (under 21 years of age) and, where appropriate, comment on the particular considerations that are required to ensure that this age group is dealt with fairly and appropriately.
- 2.4 We have therefore drawn upon our lawyers' experience in practice as well as our expertise in this policy area when submitting this written evidence.

### **3. Evidence**

- 3.1 This submission illustrates the grave consequences of the proposal by providing an in depth analysis of the impact of a judicial review brought by the Howard League for Penal Reform in 2002, *The Queen (on the Application of the Howard League) v Secretary of State for the Home Department and the Department of Health* [2003] 1 FLR 484 ['The Children Act case'].
- 3.2 The proposed restriction on standing would have prevented the Howard League for Penal reform from bringing this case.
- 3.3 As set out below, there is considerable evidence that the impact of this case was wide-ranging and important. Where there is a genuine public interest, it can only be right and proper in a civil society that organisations have the opportunity to bring these pivotal cases to court. The judiciary must be allowed to exercise their constitutional function to provide judicial scrutiny of important issues brought to their attention by organisations as well as individuals.

#### *The issues in the Children Act case*

- 3.4 **In this case, the Howard League for Penal reform** challenged the legality of the Secretary of State's policy guidance on the treatment of children under 18 years of age held in Young Offender Institutions. The Secretary of State had asserted in Prison Service Order No 4950, which governed the regime for children detained in Young Offenders' Institutions, that the Children Act 1989 did not apply in respect of such children. We argued that policy guidance was wrong in law. The main issues for determination were the extent to which the 1989 Act applied to children in Young Offenders' Institutions, the legality of the Secretary of State's treatment of juveniles in Young Offender Institutions and whether child protection work in Young Offenders' Institutions should be led by local authorities.
- 3.5 The judicial review was successful. The Court held that although the

1989 Act did not confer or impose any powers or obligations on the Secretary of State or the Prison Service, the duties owed by a local authority to juveniles under section 17 (duties towards 'children in need') and section 47 (duties towards children at risk of serious harm) of the Act did not cease merely because a juvenile was in a young offender institution. However, a local authority's powers and duties under the Act took effect and operated subject to the necessary requirements of imprisonment.

- 3.6 This meant that children in prison were not offenders to be treated differently from children in the community, but children who were entitled as a matter of law to full rights under the Children Act 1989. This meant that if they were in need and appeared to the local authority to require help to prevent the any further impairment to their health and development, the local authority was required to provide it under section 17 of the Children Act 1989. Similarly, if there was reason to believe a child was at risk of serious harm, the local authority where the prison was based was required as a matter of law to investigate this.

#### **4. Impact of the case on policy, practice and children's lives**

- 4.1 The judgment itself identified the specific vulnerabilities of children in prison (paragraph 10):

*"[Children in custody] are, on any view, vulnerable and needy children. Disproportionately they come from chaotic backgrounds. Many have suffered abuse or neglect".*

- 4.2 As a result of this ruling, the law changed as reflected in a raft of policies and references to the case in government guidance. For instance, following the case, Prison Service Order 4950 was amended so that Governors/Directors of Young Offender Institutions were required to 'have regard to the policies, agreed by the Prison Service and the Youth Justice Board for safeguarding and promoting the welfare of children held in custody' ('Working Together', 2006:12). As a result every single Youth Offender Institute must have a child protection protocol and mechanisms to ensure child protection and the welfare of children in custody.

- 4.3 According to the Working Together guidance<sup>2</sup> (2006) these arrangements include, amongst other things, the following measures:

- Designated Child Protection Co-ordinator, or the Safeguards Manager, who is responsible to the Governor/Director for child protection and safeguarding matters,

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<sup>2</sup> It is noted that the Working Together guidance has since been revised but there are no changes diminishing the duties to children in custody in the revised version.

- a child protection committee, whose membership includes a senior manager as the Chair, multi-disciplinary staff and a representative of the local safeguarding board,
- a local, establishment-specific child protection and safeguarding policy,
- suicide and self-harm prevention and anti-bullying strategies procedures for dealing proactively, rigorously, fairly and promptly with complaints and formal requests, complemented by an advocacy service,
- specialised training for all staff working with children, together with selection, recruitment and vetting procedures to ensure that new staff may work safely and competently with children,
- action to manage and develop effective working partnerships with other organisations, including voluntary and community organisations, that can strengthen the support provided to young people and their families during custody and on release.

4.4 In due course, social workers were introduced into Youth Offender Institutes to assist in compliance with duties under the Children Act 1989.

4.5 The relationship between these changes and the Children Act case are outlined on the Ministry of Justice's website as follows:

*"On 29 November 2002, Mr Justice Munby judged that the Children Act (1989) should apply to children detained in young offender institutions (YOIs), that duties owed by local authorities continue to be owed to children in YOIs and that human rights legislation, particularly the Human Rights Act (1998), applies to children in custodial facilities.*

*"The report, [The Application of the Children Act \(1989\) to Children in Young Offender Institutions](#) examines the application of the Children Act to children in custody, in light of this judgement.*

*"The [National Children's Bureau](#) (NCB) has produced a document entitled [Tell them not to forget about us](#) a guide to practice with looked-after children in custody. Aimed primarily at children's services authorities, this guide will also be of use and interest to secure estate and YOT staff as it outlines roles and responsibilities for all partnership agencies.*

*"The revised [Working Together](#) [guidance] provides further detail on how secure establishments and local authorities should discharge their statutory duties. Importantly, agreed procedures must be in place between secure establishments and those local authorities (in particular the LSCB) that have secure establishments in their area, outlining how to deal with and undertake child in need assessments and child protection allegations. LSCBs will have oversight of the safeguarding arrangements within secure settings in their area.*

*“In discharging these duties, local authority children’s social care services should consider seconding social workers to work in secure establishments and establish effective links with a child or young person’s home local authority. The home local authority and YOT have continuing responsibilities to children and young people in custody.*

*“The Working Together document includes further details for secure providers on how to effectively work with young people who are looked after as well as arrangements for successful transitions between custodial establishments and community services.”*

- 4.6 It should be noted that Working Together is statutory guidance that must be followed in relation to child protection issues. These changes represented a sea change in the way in which children in prison were considered. In a report by the Association of Directors of Social Services, the Local Government Association and the Youth Justice Board, *The Application of the Children Act (1989) to Children in Young Offender Institutions (2003)* at page 2 it was noted that prior to the judgment:

*“once inside a prison, it appeared that children lost the entitlement to services under the Children Act 1989, to health provision from local health authorities, and to education services from local education authorities...It seemed to be a case of “out of sight, out of mind.”*

## **5. The legal impact of the Children Act (1989) case**

- 5.1 Since the judgment, the case has been cited in over 20 other cases and has become a key case in the interpretation of children’s rights. This is because in passing judgment Mr Justice Munby affirmed that in his view the rights contained in the United Nations Convention of the Rights of the Child and the European Charter can ‘*properly be consulted insofar as they proclaim, reaffirm or elucidate the content of those human rights that are generally recognised throughout the European family of nations, in particular the nature and scope of those fundamental rights that are guaranteed by the European Convention*’ (paragraph 51).

## **6. Why was the case brought by the Howard league for Penal Reform**

- 6.1 At the point when the charity brought this claim, it did not provide legal services to young people, as it now does. However, the charity carefully considered in liaison with expert counsel whether or not this challenge should be brought instead of by a child affected. The charity decided to bring the case as an organization in order to ensure a thorough review of the principles in issue. A claim on behalf of an individual child may or may not have arisen – that was not an issue that the charity had any control of. However, it would have appeared

wrong in principle to wait for a child to be at real risk of failures by the system to protect his or her welfare and there would have been a real danger that the litigation would become focused on that individual 'risk child' rather than the systemic issues that affected all children in custody.

- 6.2 In any event the Court was in no doubt as to the appropriateness of the charity bringing these important issues to its attention. Mr Justice Munby stated:

*"The proceedings have been brought by The Howard League for Penal Reform whose history and credentials need no introduction. It undoubtedly is, as it claims to be, the leading non-governmental organisation in this country concerned with penal issues and policy. Here I need only to note that in the last decade or so it has had a particular focus on children and young people in the criminal justice system.*

*"It is not disputed by the defendant that the Howard League has a "sufficient interest" in the matter so as to give it locus to make the current application: R v Secretary of State for Foreign and Commonwealth Affairs ex p World Development Movement Ltd [1995] 1 WLR 386 and R v Somerset County Council ex p Dixon [1998] Env LR 111."*

- 6.3 Since the judgment, the Howard League for Penal Reform legal service has developed and now represents many individual children and young people in or affected by the criminal justice system every year. Where appropriate, we have represented individual children and young people in judicial reviews concerning issues that directly affect them, as well as raising issues of public importance. Many of these cases have relied and built on the principles set out in the judgment. Whilst it is recognised that there will only be rare occasions when it is appropriate and necessary for an organisation such as the Howard League for Penal Reform to bring a legal challenge in its own right, it is essential that such an approach remains an option

## 7 **Conclusion**

- 7.1 Under the proposed regime, the Howard League for Penal Reform would have been unable to bring this judicial review to court. Even if the safeguarding policies and promotion of safety across the entirety of the secure estate had been introduced as a matter of good practice, it would not have had a statutory footing. Children would not be entitled to be protected and assessed under the Children Act 1989 while in detention.
- 7.2 The opportunity facilitated by the Howard League for Penal Reform for the Court to consider these important issues and to clarify the law had a major impact on the development of law, policy and practice in

this important area. Any rules to restrict the ability of the Court to determine important issues of law raised by organisations such as the Howard League for Penal Reform should be resisted. The Courts are best placed to determine these issues and to continue to exercise their discretion wisely and appropriately.

7.3 We would be willing to provide oral evidence if required.

## References

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