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Government consultation: Changes to statutory guidance: Working Together to Safeguard Children; and new regulations

We welcome the opportunity to respond to this important consultation.

1. About us

Founded in 1866, the Howard League is the oldest penal reform charity in the world. We have some 12,000 members, including lawyers, politicians, business leaders, practitioners, prisoners and their families and top 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.

The Howard League works for less crime, safer communities and fewer people in prison. We aim to 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 work.

Since 2002 the Howard League has provided the only legal service dedicated to representing children and young people in custody. Our legal work began with a landmark case in 2002, brought by the charity in its own name, to successfully challenge the assumption that the protections of the Children Act 1989 did not apply to children in prison.

Our case work includes advising young people on their entitlements from children's services and, where necessary, challenging local authorities who fail to provide appropriate support.

Howard League lawyers make safeguarding referrals on behalf of children and young people in custody. In 2017 Howard League lawyers made over 80 safeguarding referrals. The range of safeguarding issues includes children and vulnerable young adults at risk to themselves from self-harm, at risk from other prisoners or from staff, physical restraint and neglect. It is not always clear what happens in response to safeguarding concerns that we make and the fact that our lawyers regularly make referrals about similar issues within the same establishment suggests that lessons are not learned. Several years ago, we raised our concerns about the high levels of isolation at Feltham with the Local Children's Safeguarding Board. The Board agreed to investigate the issue but never reported back on its findings or published the outcome of what it later described as an audit. Since then, Her Majesty's Inspectorate of Prisons has repeatedly highlighted the increasing levels of isolation that children at Feltham face.

This response seeks to deal with certain key points that fall within our expertise, drawing on our lawyers' experience in practice, our direct participation work with children and young adults and our policy work.

2. Context of this response – urgent safeguarding concerns about children in prison and at risk of criminalisation in care

In 2002 the Howard League brought a case about the application of the Children Act 1989 to children in prison, *R (on the Application of the Howard League) v Secretary of State for the Home Department and the Department of Health* [2003] 1 FLR 484. Mr Justice Munby summarised our evidence about children in prison in the judgment:

“[Children in custody] are, on any view, vulnerable and needy children. Disproportionately they come from chaotic backgrounds. Many have suffered abuse or neglect. The view of the Howard League is that they need help, protection and support if future offending is to be prevented. Statistics gathered by the Howard League ... paint a deeply disturbing picture of the YOI population. Over half of the children in YOIs have been in care. Significant percentages report having suffered or experienced abuse of a violent, sexual or emotional nature. A very large percentage have run away from home at some time or another. Very significant percentages were not living with either parent prior to coming into custody and were either homeless or living in insecure accommodation. Over half were not attending school, either because they had been permanently excluded or because of long-term non-attendance. Over three-quarters had no educational qualifications. Two-thirds of those who could be employed were in fact unemployed. Many reported problems relating to drug or alcohol use. Many had a history of treatment for mental health problems. Disturbingly high percentages had considered or even attempted suicide.”

This summary remains as true today as it was 15 years ago. Data from the Ministry of Justice shows that in the period April 2014 to March 2016, Youth Offending Team assessments of children entering youth custody from the community showed that:

- Two thirds of children were not engaging in education
- 45 per cent had substance misuse concerns;
- There were concerns relating to suicide or self harm, physical health, mental health and learning disabilities or difficulties in respect of around one third of children
- There were concerns around sexual exploitation for per cent of children
- between one third and a half had been “looked after” children prior to admission to custody

Research conducted by the Howard League (2017) has revealed that children in residential care are fifteen times more likely to be criminalised than children living at home.

Things do not improve for children when they enter custody. Even though the child prison population has reduced by two thirds in the last ten years, the children who remain are at increased risk of harm. In the five years leading up to 2015/2016, according to the Youth Justice Board (2017), use of force on children in youth custody increased by 36 per cent, assaults increased by 95% and self-harm increased by 120%. According to the office of the children's commissioner for England, one in every three children in prison spends time in isolation. Many spend prolonged periods locked in their cells when they should be out. In the report about Feltham released by Her Majesty's Chief Inspector of Prisons in June, one quarter of the boys were spending over 22 hours a day locked in their cells.

In July 2017, Chief Inspector of prisons said: “By February 2017, we concluded that there was not a single establishment that we inspected in England and Wales in which it was safe to hold children and young people.”

The Local Government Association (LGA) issued a call for action on 22 September 2017: “There is no other situation in which children and young people would be placed into environments that are known to be unsafe, and youth custody should be no exception. Any local authority found to be running institutions where tragedy is “inevitable”, to use the Chief Inspector’s recent description of the secure estate, would quite rightly be under intense pressure and would at the very least be required to produce a plan with clear timescales for action to ensure that improvements are made quickly and children are kept safe. Her Majesty’s Prison and Probation Service were made aware of these issues in July, yet we still have no clear idea of what action will be taken, and by when, to rectify the situation and make sure our young people are safe in custody. This situation would not be acceptable for local authorities, schools or any other public institution charged with the care of children, and it should not be acceptable for HMPPS. Action needs to be taken to ensure that young people are safe in custody.”

In his report on the experiences of children in the youth estate, issued in November 2017, the Chief Inspector stated:

“Last year I invited those with the responsibility to develop and improve policy to take our findings seriously. I trust that the realignment of responsibilities between the Youth Justice Board, the Ministry of Justice commissioners of services and the new Youth Custody Service within HM Prison and Probation Service will lead to improvement, and that the process of restructuring and reform will not detract from the urgent need for an effective operational response to the issues raised in this report. The need for this to be the case has actually increased, particularly when it comes to improving both the perceptions and the reality of safety. Until this is addressed, the broader objectives of delivering education, training and creating a rehabilitative environment will not be achieved.”

There are also serious concerns about the safety of children leaving prison, many of whom do not know where they will be living on release. This is despite the clear ruling in the House of Lords case of *G v Southwark* that spelled out the clear duties on local authority children’s services to provide accommodation to children in need who had nowhere to live as looked after children. Sir James Munby provided a chilling reminder of the risks of not making proper provision for children leaving custody in the case of girl X [2017]:

“X is, amongst all her woes, a young person convicted in the Youth Court and a prisoner of the State. As long ago as 1910, a Home Secretary, speaking in the House of Commons, asserted that “The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country.” In modern times the principle has expanded, so that, as is often said, “One of the measures of a civilised society is how well it looks after the most vulnerable members of its society.” If this is the best we can do for X, and others in similar crisis, what right do we, what right do the system, our society and indeed the State itself, have to call ourselves civilised?”

It is against this background that we consider that the Working Together guidance provides an important opportunity to ensure that there is an and robust legal framework in place that can be enforced effectively to safeguard children at risk of prison, in prison and on release

from prison. Given the test set out in the X case, it would be a sign of failure of the revised guidance was insufficient to protect such children.

SAFEGUARDING

3. Early help

The early help aspect of the guidance has not been substantially revised other than to add children at risk of radicalisation to the list of children who might require early intervention. Children who are “showing signs of engaging in anti-social or criminal behaviour, including gang involvement and association with organised crime groups” are also listed. However, there is very little here to urge practitioners to take action to *prevent* children from being criminalised. We note that other guidance is being developed to tackle the risk of criminalisation in care. There is no reason why this guidance should not also enforce the importance of ensuring that practitioners develop an understanding of the underlying causes of a young person’s behaviour or take affirmative action to prevent the unnecessary criminalisation of children. This is entirely in keeping with the statutory duty set out in the Children Act 1989 at Schedule 2, paragraph 7 which requires local authorities to take steps to reduce the need to bring criminal proceedings against children in care, to encourage children within their area not to commit criminal offences and to avoid the need for children within their area to be placed in secure accommodation. Given the serious safeguarding issues that arise when children are criminalised and subsequently detained, we consider this section ought to be strengthened.

4. Referrals

The guidance remains clear that anyone can make a child in need or a safeguarding referral. Chapter 1, paragraph 21 states:

‘Anyone who has concerns about a child’s welfare should make a referral to local authority children’s social care and should do so immediately if there is a concern that the child is suffering significant harm or is likely to do so. Local authority children’s social care has the responsibility for clarifying the process for referrals. This includes specific arrangements for referrals in areas where there are secure youth establishments.’

We welcome the expansion of the 2015 guidance on the local criteria for action to specifically refer to children in custody.

Howard League lawyers represent young people or make safeguarding referrals on behalf of many children who have been subject to painful physical restraint, sometimes resulting in physical injury, or neglect as a result of an impoverished, restrictive regime, segregation, lack of food or access to healthcare and medication.

Exposure to, let alone experience of these things, would give rise to a child protection referral in the community.

However, the lawyers at the Howard League have often experienced resistance and bureaucratic responses from children’s services when trying to make such referrals on the basis that it must be done on a particular form. There is no legal requirement as to the format of a referral and rigid bureaucratic requirements as to how a referral should be made are incongruent with the ethos that referrals can and should be made by any concerned person. The guidance should spell out that the duty to assess or respond is triggered once the local authority is on notice, regardless of the form that notice takes.

5. Assessments under the Children Act 1989

This section now contains a specific provision for children in prison who are assessed and provides that all children in prison should have a single support plan (Chapter 1, paragraph 33):

“33. Any assessment of young people in secure youth establishments should take account of the specific needs that these young people will have. In all cases, the local authority in which a secure youth establishment is located is responsible for the safety and welfare of the children in that establishment. The host local authority should work with the governor, director, manager or principal of the secure youth establishment and the young person’s home local authority, their relevant Youth Offending Team and, where appropriate, the Youth Custody Service¹⁷ to ensure that the child has a single, comprehensive support plan.”

The inclusion of a specific reference to children in youth detention is very welcome, provided it is made clear that children in prison deserve at least as good a service as children in the community. There is no further information about what a comprehensive support plan looks like. In the fifteen years that the Howard League has been providing a specialist legal service for children, we have rarely seen a support plan for a child in prison that deals comprehensively with the child’s needs rather than focused on either their offending behaviour or behaviour management. In fact, we have seen some examples of extremely concerning so-called support plans, including one that threatened to keep a child looked in her room for 24 hours if she did not behave. In the circumstances, it would be helpful if the guidance could provide more information about what is expected and set a clear line of accountability in terms of who should be responsible for finalising the plan and who should be responsible for providing the assessment of needs upon which it is to be based.

6. Contextual safeguarding

Given the concerns raised by the Chief Inspector of Prisons about the safety of children in prison, it would be appropriate for Chapter 1, paragraph 34 to refer to the potential need for safeguarding children in prison.

7. Safeguarding children in prison – the application of s47 procedure

The guidance in respect of the process for safeguarding referrals remains comprehensive and useful. However, as already noted, its application to children in prison remains patchy. It may be that by referring to children in prison in the contextual safeguarding section that it will be easier to ensure that children in prison are provided with the same level of input as children in the community.

8. Children returning home

The guidance that deals with children who return home neglects to mention children who return home, often in an unplanned way, from custody. Now that all children who are remanded to custody become looked after, children who receive bail or are acquitted may return home in this way. There is often insufficient planning in such instances and it would be helpful if the guidance could highlight this as another instance where children may be returning home.

9. Organisational responsibilities – The secure estate for children

Chapter 2, paragraph 39 provides from an additional duty on the secure estate establishments for children:

“Each centre should work with their local safeguarding partners to agree how they will work together, and with the relevant YOT and placing authority (the Youth Custody Service), to make sure that the needs of individual children are met.”

This is welcome in principle. However, it is not sufficiently clear how this will work in practice. The relevant YOT could be different for every child in some establishments. While the establishment has a duty of care to the children within it, children's services need to retain a strong chain of accountability for the welfare of children. The Medway panorama shows how important independent scrutiny and accountability is for children in prison. In addition to this clause, the guidance must require that arrangements must be clear, published and accessible, and that they include a clear line of accountability to children's services in accordance with the requirements of sections 17 and 47 of the Children Act 1989. This requirement will need to complement the new requirements for partnership arrangements set out in Chapter 3. In particular, as the published local safeguarding arrangements will need to include "how any youth custody and residential homes for children will be included in the safeguarding arrangements" (paragraph 9), it will be essential that the establishments own arrangements are consistent with those of other partners.

10. Multi-agency partnership arrangements – publication

In respect of the multi-agency partnership arrangements, we have grave concerns as to whether that will work in respect of children in custody. We are particularly concerned that the arrangements for children in custody will need to be carefully thought out, if not bespoke, will be geographically complex and will require the greatest possible transparency and independence. The single line requirement at paragraph 9 of Chapter 3 that the published arrangements will need to say how children in custody will be included is unlikely to be sufficient to ensure this.

11. Multi-agency partnership arrangements – independent scrutiny

The provisions at paragraph 20 of Chapter 3 are very important. Given the concerns about the efficacy of arrangements for children in prison, it would be appropriate for the situation of children in prison to be specifically considered by the independent person and included in the annual report.

12. Multi-agency partnership arrangements – reports

We welcome the continued requirement in the guidance for annual reports to include a review of the use of restraint within that establishment in their report, and the findings of the review should be reported to the Youth Justice Board (Chapter 3, paragraph 31). However, the Howard League has repeatedly asked the Youth Justice Board for these reports and never been provided with them. We consider that the findings in respect of restraint ought to be published rather than simply reported to the Youth Justice Board and they ought to include the use of solitary confinement and other matters of concern relating to children in prison, as well as the use of force.

SERIOUS CASES

We welcome the enhanced provisions for learning in respect of serious cases.

13. HMIP concerns should trigger serious case reviews

Given the current widespread concerns about the safety of children in prison, we consider that the provision for local and national reviews will need to be applied to children in prison. Paragraph 38 of Chapter 4 should include Her Majesty's Inspectorate of Prisons among the list stakeholders who might provide wider evidence that ought to trigger a review.

14. The need for reviews to result in action

The revelations about the alleged abuse of children in Medway Secure Training Centre have shown that a culture of abuse existed among staff at the STC despite the presence of YJB monitors on site and regular inspections by HMIP, Ofsted and the YJB. The government

commissioned an improvement board to investigate. The Board reported in 2016. Yet the concerns expressed by HMIP continue. A serious case review has now been commissioned.

Similarly, the Howard League raised concerns about the use of isolation at Feltham with the local children's safeguarding board several years ago. A review was promised but never published and the situation for children worsened.

Reviews are important but affirmative action to prevent abuse including empowering children to understand their rights must accompany such reviews.

CHILD DEATH REVIEWS

16. *The need to specifically refer to children in custody*

We are disappointed that children in custody are not specifically referred to in serious child safeguarding cases.

The 2015 guidance specifically refers to children in custody:

'SCR should always be carried out when a child dies in custody, in police custody, on remand or following sentencing, in a Young Offender Institution, in a secure training centre or a secure children's home.'

This should continue to be the case when a child dies in custody. When a child dies in the care of the state, it is always an issue of national importance.

17. *Interplay with the role of the Prisons and Probations Ombudsman*

We note that while the Prison and Probations Ombudsman has a statutory duty to investigate deaths in prison, his investigations focus on the prison rather than the wider circumstances of the child, and how it is that the child ended up in prison in the first place. There is surely and important role for CDOP in looking at the wider picture to complement the PPO investigations.

18. *Thematic reviews*

We are also strongly of the view that there is a real benefit in looking at deaths by theme so that any incidents of deaths of children in custody ought to be considered together.

19. *Perinatal deaths in custody*

We note a reference in the footnotes to perinatal deaths. The experience of miscarriage in custody can be extremely distressing and it may be that there are specific issues that women in prison face that are distinct from experiences of girls and women in the community that would benefit from a themed CDOP.

We would be happy to discuss any of these points with you in further detail.

Yours sincerely,



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