

**Howard League for Penal Reform's response to the LASPO Post-Implementation
Review
October 2018**

Summary

1. The Howard League for Penal Reform provides a unique legal service to children and young adults in prison.
2. Cuts to legal aid for prisoners have resulted in a significant drain on the Howard League's resources as it has had to undertake additional pro bono work – requests for legal assistance have almost doubled during the review period.
3. Access to justice is very important for people in prison, especially for children, young adults and people with mental health problems.
4. The Howard League brought a legal challenge to the cuts to legal aid for prisoners culminating in a Court of Appeal judgment that led to important changes to legal aid. But many of the improvements will not help children and more needs to be done to ensure people in prison are not denied access to justice.
5. Subject to the usual merits test, areas of legal work connected to liberty and all prison disciplinary matters should be brought back into the scope of legal aid. Matters that are currently only available under the exceptional case funding (ECF) scheme should be included in the scope of normal legal aid.
6. Children in prison should be entitled to legal aid. In addition, young adults in prison should be presumed suitable for legal aid.

1. About the Howard League for Penal Reform

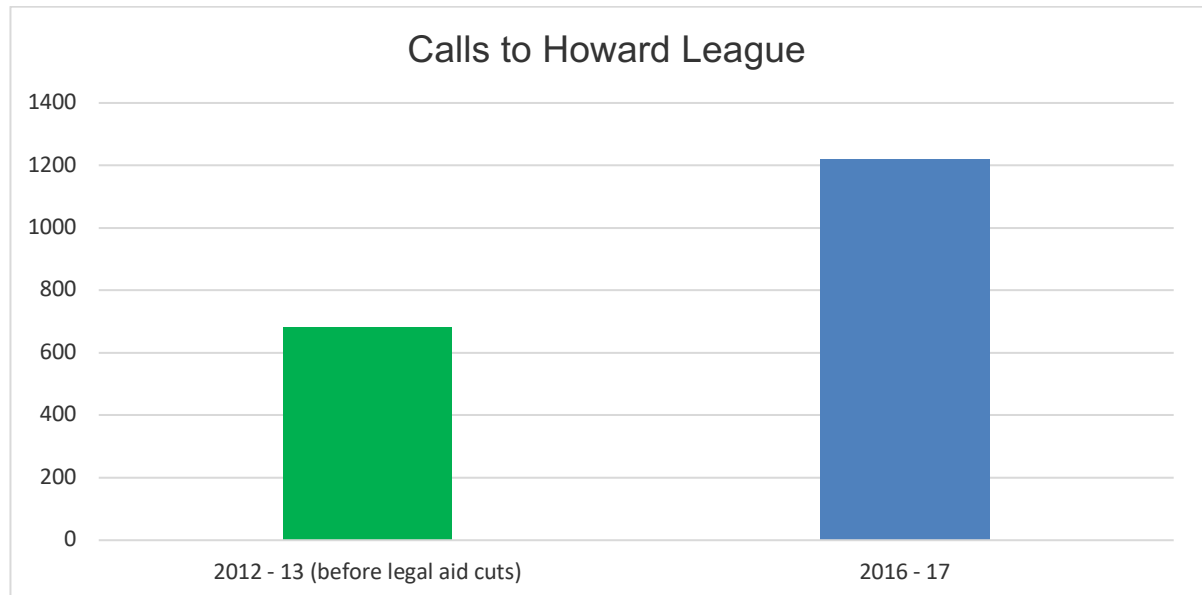
- 1.1 Founded in 1866, the Howard League is the oldest penal reform charity in the world. The Howard League has some 13,000 members, including prisoners and their families, lawyers, criminal justice professionals and academics. The Howard League has consultative status with both the United Nations and the Council of Europe. It is an independent charity and accepts no grant funding from the UK government.
- 1.2 The Howard League works 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.

2. The legal work of the Howard League and the impact of legal aid cuts

- 2.1 The Howard League provides a unique legal service for children and young adults in prison. 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. The case demonstrated that legal work can achieve change for children in the criminal justice system and supported the Howard League's vision for less crime, safer communities and fewer people in prison.
- 2.2 Since 2002 we have provided the only dedicated legal service for children under the age of 18 in prison in England and Wales. We expanded our service in 2007 to include young adults aged 21 and under, recognising that young adults are still developing and require specialist support.
- 2.3 At the heart of our legal service is our free and confidential advice line that is available to young people in prison. Our legal team provides legal advice and representation on a wide range of issues, from parole, recall and criminal appeals against sentence, to help with resettlement into the community and treatment while in prison. We work both under legal aid contracts (civil and criminal) and for free.
- 2.4 We also undertake direct legal education and participation work to empower young people to understand, use and even change the law by providing a space for them to feed back their experiences of it.
- 2.5 We have changed the law through many cases in court. We also use the evidence that arises from our legal and participation work to identify systemic issues and to achieve change. In 2017, the Howard League published a report celebrating 15 years of legal work (the Howard League, 2017).¹
- 2.6 Cuts to legal aid have had a significant impact on the volume of requests for help that the Howard League has received, despite a significant decrease in the numbers of children and young adults in prison. The Ministry of Justice reported that the average

¹ Available at: <https://howardleague.org/wp-content/uploads/2017/11/Justice-for-Young-People.-15-years-of-successful-legal-work.pdf>

monthly population of children in custody has fallen from 1,544 children in 2013 to 868 children in 2017.² The population of 18-20 year olds in prison also fell from 6,272 in 2013 to 4,570 in 2017.³ In the same period, calls increased from almost 700 calls to our advice line in the 12 months before December 2013 to around 1220 in the 12 months prior to December 2017. In other words, during the review period, requests for help almost doubled. This has placed a significant strain on the charity's resources.



2.7 There are a number of reasons why requests for help from the Howard League may have increased. First, this group has a greater need than ever before (see below). Second, due to the cuts to legal aid, children and young adults cannot get legal advice and help from other legal aid providers in private practice as they are no longer paid to do the work. Children and young adults have to rely on charitable funding to fill in the gap that used to be provided by legal aid.

3. Why access to justice is very important for people in prison and especially for children and young adults in prison

3.1 The unmet legal need that prisoners face generally is well documented and includes a host of social welfare needs that often have a significant impact on their ability to remain offence free (see the submission of the Association of Prison Lawyers to this review).⁴

3.2 Given the Howard League's direct work, this response deals with the particular problems children and young adults in prison face in terms of unmet legal needs. These needs are particularly acute as a result of children and young adults unique vulnerabilities, the situation they are in and their powerlessness to help themselves.

² Available at: <https://www.gov.uk/government/statistics/youth-justice-annual-statistics-2016-to-2017>

³ Available at: <https://www.gov.uk/government/statistics/offender-management-statistics-quarterly-january-to-march-2018>

⁴ Available at: <https://www.associationofprisonlawyers.co.uk/apl-response-to-the-laspo-pir/>

Needs and characteristics of children and young adults in prison

- 3.3 The needs and characteristics of children and young adults in prison mean that they are often extremely vulnerable and/or have faced multiple disadvantages.
- 3.4 Data suggests that between April 2014 and March 2016 there were extensive needs among children entering custody including concerns about:
- mental health in 33% of boys and 41% of girls;
 - sexual exploitation in 6% of boys and 60% of girls;
 - risk of suicide or self-harm in 30% of boys and 63% of girls and
 - substance misuse in 45% of boys and 50% of girls
- (see Youth Justice Board, Key characteristics of admissions to youth custody: April 2014 to March 2016).⁵
- 3.5 There is a growing consensus that young adults in the criminal justice system have distinct characteristics and needs (Justice Committee, 2016 and 2018)⁶. There is evidence of disproportionate levels of neurodisability among young adults in custody when compared to the general population, including higher rates of learning disability, traumatic brain injury and communication impairment (Hughes et al, 2012; T2A, 2018)⁷. There is also neurological and psychological evidence that development of the frontal lobes of the brain does not cease until around 25 years old, (Blakemore et al 2006, T2A, 2012; T2A, 2018).⁸
- 3.6 Children and young adults from a Black, Asian and Minority Ethnic (BAME) background are over represented in custody. In 2017, on average 870 children were in penal detention at any one time, almost half of whom were from BAME backgrounds (Ministry of Justice, 2018).⁹ Black children are seven-and-a-half times more likely to receive a long term custodial sentence (Bateman, 2017).¹⁰ BAME young adults are also disproportionately represented in custody. Although non-white young adults only constitute 18.5% of the general population aged 18 to 24 in England and Wales, 39 per cent of 18 to 20 year-olds and 34 per cent of 21 to 24 year-olds in prison self-report as “Black”, “Asian”, “Mixed”, or “Chinese or Other” (Office for National Statistics, 2011; Ministry of Justice, 2016)¹¹. Young adults from BAME backgrounds are also more likely to distrust the criminal justice system due to experiences of stereotyping and harassment (T2A, 2017).¹²

⁵ Available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/585991/key-characteristics-of-admissions-april-2014-to-march-2016.pdf

⁶ Available at:

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justicecommittee/the-treatment-of-young-adults-in-the-criminal-justice-system/oral/27782.html> and <https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/419/419.pdf>

⁷ Available at: <http://dera.ioe.ac.uk/16045/>; https://howardleague.org/wp-content/uploads/2018/09/Sentencing-Young-Adults_final.pdf

⁸ Available at: https://howardleague.org/wp-content/uploads/2018/09/Sentencing-Young-Adults_final.pdf

⁹ Available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/676072/youth_justice_statistics_2016-17.pdf

¹⁰ Available at: <http://thenayj.org.uk/wp-content/uploads/2017/09/State-of-Youth-Justice-report-for-web-Sep17.pdf>

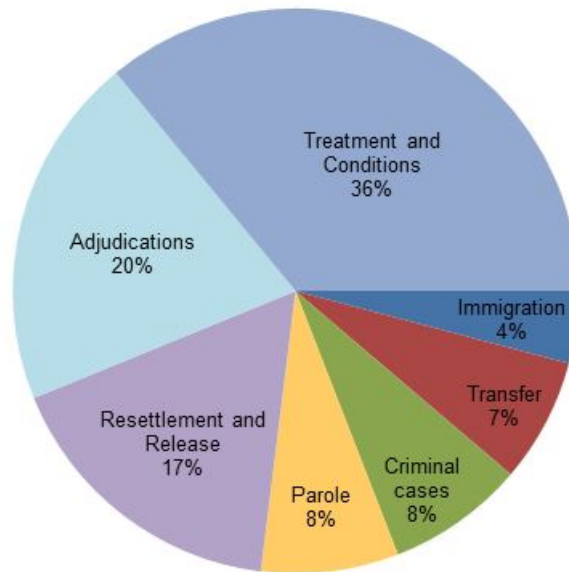
¹¹ Available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/669094/statistics_on_race_and_the_criminal_justice_system_2016_v2.pdf

¹² Available at: http://leaders-unlocked.org/wp-content/uploads/2017/07/Race_criminalJusticeReport_v6-1.pdf

Issues faced by children and young adults in prison

3.7 The Howard League receives a range of requests for legal support. The following pie chart shows the range of issues that led young people to contact the Howard League in 2017:



3.8 The following case studies from the Howard League’s legal work illustrate the complex and urgent legal work that is no longer funded.

Isolation of a child

A 17 year-old boy in a YOI told the Howard League that he had been in his cell for 96 consecutive hours “from Thursday afternoon, all day Friday, all day Saturday, all Sunday with no gym or exercise, no association” (which he had not had in 2 and a half weeks). The child said he had “no education, no phones and showers in cell” and that the only reason he was allowed out on Monday was for a 20 minute review. The Howard League made a safeguarding referral to the prison and also submitted a complaint on his behalf. His regime improved.

Young adult in prolonged segregation

An 18 year-old in a YOI told the Howard League that he had been in segregation for 24 days. The young adult told the Howard League he was receiving no education, was having suicidal thoughts and had lost 15 kilos since being put in segregation. The young adult also asked for assistance on being transferred to another prison. The Howard League made a safeguarding referral to the prison, submitted a complaint on his behalf and submitted a transfer application on his behalf. The young adult received assistance from mental health and was transferred.

Young adult denied early release

A 20 year old at a YOI told the Howard League he had been denied release on Home Detention Curfew (HDC) because his probation officer had told him that he was required to stay at an Approved Premises (AP) on release but there were no available beds between his early release date and his final release date three months later. His probation officer refused to assess the suitability of a relative's address. The young adult therefore remained in prison despite good progress. The Howard League challenged the failure of the probation officer to either assess the family address or secure a bed at an earlier date to enable release on electronic monitoring in accordance with government policy that early release on electronic monitoring should be granted whenever possible.

Young adult needing advice before attending a disciplinary hearing before a governor

A young woman in a YOI contacted the Howard League about a governor's adjudication. She had been charged with "disobeys or fails to comply with any rule or regulation" after she collected some sweets from her friends to pass to another friend for her birthday. She did not realise she had broken any rules in doing this. She told the Howard League that at Christmas the prison encouraged young people to give each other gifts so she assumed the same would be said for her birthday. She was very surprised and upset to get a formal charge, particularly as she had had four months adjudication free and so she was in the process of applying for remission of extra days awarded at the independent adjudication.

The Howard League advised the young woman over the phone about the procedural errors in the charge sheet: the charge sheet did not describe the rule or regulation she was alleged to have broken, it just described the event that took place. The Howard League also advised the young woman about her possible defence in the event that the charge did proceed: that she was not aware that she had broken any rule or regulation and the prison had not taken reasonable steps to make her aware that she had done so.

The case was dismissed and her application for the remission of additional days following a period of good behaviour could be proceed.

Power imbalance

- 3.9 Legal advice and representation is particularly important for prisoners who in the words of Lord Brown of Eaton Underwood are “members of a closed community uniquely’ subject to the exercise of highly coercive powers.” For that reason, “far from having fewer rights of recourse to independent courts than most of us, should, rather, have at the very least equal access to justice.” (Lord Brown of Eaton Underwood, HL Deb 29 January 2014, vol 751, col 1279 [4/834-835])
- 3.10 Similarly, the former chief inspector of prisons, Nick Hardwick, has previously said “people in prisons are uniquely vulnerable...there is a power imbalance between the prisoner and the jailer. If I am a warder and you are a prisoner I can use physical force on you. But also you are dependent on me for absolutely every aspect of your life” (Hardwick, 2014).¹³
- 3.11 Due to this power imbalance, children and young adults feel like they are not being believed. For example, for child victims in sexual abuse cases, feelings of not being treated with respect and not being believed can be a traumatic experience (IICSA Research Team, 2017).¹⁴ Therefore, the combination of vulnerability and powerlessness of children and young adults creates a great need for good quality and free legal advice and representation.

4. Impact of R (Howard League for Penal Reform and the Prisoners’ Advice Service) v The Lord Chancellor and remaining gaps in provision

- 4.1 The Howard League for Penal Reform and the Prisoners’ Advice Service argued in the case of *R (Howard League for Penal Reform and the Prisoners’ Advice Service) v The Lord Chancellor* that, as a result of the cuts to legal aid, a significant number of prisoners stuck in the system had been deprived of important legal assistance to enable them to progress.
- 4.2 While the Court of Appeal judgment resulted in important changes to legal aid, many prisoners remain at a significant disadvantage in the absence of appropriate legal support. The Howard League has identified three key outstanding concerns; (1) exceptional case funding (ECF) applications, (2) discipline and early release cases and (3) children and young adults.

Exceptional case funding applications

- 4.3 In the course of the Howard League judicial review on legal aid for prisoners, the Secretary of State confirmed that certain cases, which include the entitlements of prisoners to support on release, licence conditions and segregation, as well as mother and baby cases could fall under the ECF scheme.
- 4.4 The current on-line system of applying for ECF is not available to prisoners and so we are unsure how prisoners are meant to exercise this right. Data released by the LAA suggests that it is not used by prisoners and their lawyers. Even if ECF is granted, it is understood that the fixed fee will be paid at the “miscellaneous” rate of

¹³ Hardwick, N. (2014) ‘Chief prisons inspector Nick Hardwick interview: ‘You need to make rehabilitation the central point’’. *The Independent*. Available at <https://www.independent.co.uk/news/uk/politics/chief-prisons-inspector-nick-hardwick-interview-you-need-to-make-rehabilitation-the-central-point-9662761.html>

¹⁴ Available at: <https://www.iicsa.org.uk/key-documents/1534/view/iicsa-impacts-child-sexual-abuse-rapid-evidence-assessment-full-report-english.pdf>

£79 for the whole case. There is no justification as to why the rate for this type of work, which by definition must engage human rights, should be significantly less than the usual modest fixed fee of just over £200 per case. The reduced rate combined with the additional administrative burden of having to apply for funding makes this work financially unsustainable for most providers and a drain on the resources of the LAA as each application will require careful consideration. The administration of this type of prison law legal aid properly belongs with the rest of prison law work.

- 4.5 There is no guidance for ECF applications for this category of law either for providers or prisoners. Most prisoners cannot access the internet. Many cannot read or write.
- 4.6 Most of the issues that fall under the ECF scheme, such as mother and baby unit applications or segregation, are very urgent and time sensitive. Yet the LAA has no effective procedures for dealing with urgent ECF applications.
- 4.7 ECF is particularly unsuitable for children and young adults. In July 2018, the Joint Committee on Human Rights (JCHR) published a report on enforcing human rights. The JCHR stated that the revisions to financial eligibility criteria for legal aid have had a disproportionate impact on children (Joint Committee on Human Rights, 2018).¹⁵ In its Seventh Report, the JCHR stated that ECF gives little consideration to the access of justice problems that it creates in relation to children, such as the potential complexity and urgency of the cases for which children would need advice and representation (Ministry of Justice, 2014).¹⁶

Discipline and early release cases

- 4.8 Prison life is highly regulated. The disciplinary system has the potential to affect a prisoner's long term progress and prospects of release, as well as create an enduring sense of injustice if it is not perceived to be fair. As illustrated by the case studies above, legal advice can make a difference. Applications for early release can be complex and cause prisoners to spend additional time in prison if not dealt with properly. These cases should be funded subject to usual means and merits.¹⁷

Children and young adults

- 4.9 The changes to legal aid following the abovementioned Court of Appeal judgment mainly affected older adults as pre-tariff reviews, placement in category A prisons and Close Supervision Centres (CSCs) do not affect children. The Howard League is only aware of three cases in the last 10 years where children were eligible for pre-tariff reviews. Children cannot be in category A prisons and there are no CSCs for children
- 4.10 For the reasons set out above, children and young adults require special assistance. Children and young adults make up a small and vulnerable proportion of prisoners. No child or young adult with a legal problem should be left to defend themselves without access to free legal advice and representation.

¹⁵ Available at: <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/669/66906.htm>

¹⁶ Available at: <https://www.parliament.uk/documents/joint-committees/human-rights/government-response-to-legal-aid-report.pdf> at page 10

¹⁷ See the submission of the Association for Prison Lawyers, available at: <https://www.associationofprisonlawyers.co.uk/apl-response-to-the-laspo-pir/>

- 4.11 Children in should be entitled to legal aid (Bach Commission, 2017).¹⁸ Children in prison should not be treated differently from children in the community and may have an even greater need for legal support than other children in light of their needs and situation as outlined above. Such an approach would accord with our obligations under Article 12 of the United Nations Convention on the Rights of the Child (UNCRC) which states that “the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”
- 4.12 In addition, young adults in prison should be presumed suitable for legal aid. The Ministry of Justice has accepted that young adults have distinct needs (Ministry of Justice, 2017).¹⁹ Their distinct characteristics are often highly-relevant to decision-making and therefore, they must also be provided with the opportunity to be represented by an appropriate body.²⁰

5. Conclusion

- 5.1 Legal work connected to liberty and fairness for prisoners should be brought back into the scope of legal aid. Legal work currently now under Exceptional Case Funding should also be brought back into the scope of normal legal aid given the hurdles posed by the scheme for prisoners. If these steps are not taken, at the very least, special provision should be made to ensure access to justice for children and young adults in prison for these areas of work. Even if these steps are taken, provision should be made to enable access to justice for children and young adults for any issues that affect them in prison. In the case of children, legal aid should be provided automatically. There should be a presumption in favour of legal aid for young adults in prison.

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¹⁸ Available at: http://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission_Right-to-Justice-Report-WEB.pdf

¹⁹ Available at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/1530/1530.pdf>

²⁰ For more on the need for a distinct approach for children and young adults, see JustRights response to this review, available at:

<http://justrights.org.uk/gateway/download/152/1540854887>