

Howard League for Penal Reform's response to the Ministry of Justice consultation on home detention curfew (HDC)

January 2019

Summary

1. The Howard League broadly welcomes the codification of home detention curfew (HDC) policy framework into a more user friendly single document. Early release is an important mechanism to ensure people who can be safely managed in the community are released at the earliest opportunity. A single document assists in making the process accessible, fair and transparent.
2. The proposed framework introduces a significant change to accountability in decision making by allowing directors of private prisons to determine HDC applications. There is an obvious conflict of interest in allowing directors of private prisons to determine whether or not people held in their institutions should be released early.
3. At the same time, the proposed framework presents a missed opportunity to create meaningful change to give effect to the Secretary of State's vision concerning release on HDC and make amendments to the policy to bring it in line with other legal developments such as taking a distinct approach to young people.
4. There are still many prisoners who are not released due to operational difficulties. The Howard League has come across a number of instances where a person who is suitable for HDC has not been released due to lack of effective cooperation between statutory agencies, for example children's social care and the youth offending team. There is nothing in the new guidance to encourage or mandate greater cooperation. There is no penalty for agencies' failure to comply with statutory duties. There is also a lack of an effective remedy where a person does not get HDC due to statutory failures. A fast track complaints system is required given that liberty is at stake.
5. The "presumed unsuitable" category encompasses thousands of prisoners each year who may well be suitable for release from a risk management perspective. The blanket presumption should be removed. Failing that, guidance on what qualifies as "exceptional circumstances" should be developed so that people convicted of these offences who can be managed safely in the community can be released. The current guidance sets too high a threshold and risks discriminating against those with protected characteristics, such as children and people with mental health difficulties.

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.
- 1.3 Our legal team works directly with children and young adults in prison.
- 1.4 The Howard League would welcome the opportunity to provide further information about any of the points below.

2. Context

- 2.1 The Howard League welcomes the renewed focus of attention on HDC and the proposal to draw together the disparate policies that have been published over the years. The Ministry of Justice's single departmental plan, published on 23 May 2018, explicitly mentions making "effective use" of HDC. It is encouraging that the number of HDC releases in April to June 2018 was 3,836 compared with 2,267 in the same period in 2017 – an increase of 69 per cent.¹ Making sure HDC processes are clear and accessible is important in its own right as a means of promoting justice.
- 2.2 The effective use of HDC can have a significant impact on the prison population at time when resources are scarce and appears to have been a contributing factor to the reduction of the prison population in 2018. But the prison population is still far too high.
- 2.3 There is much more to be done. We need a situation where HDC processes are used effectively and fairly to achieve the right outcomes for people in prison. Use of HDC is rising but still a minority of those eligible are actually released on HDC – less than a third in April to June 2018.² As the draft policy framework notes, there is a lack of conclusive research evidence about the impact of HDC. There are significant data gaps which need addressing urgently.³ Research highlights the importance of proper accountability in HDC processes, especially when much of it is outsourced to the private sector.⁴ The tracking, monitoring and evaluation of HDC must be made much more robust. If this is not done it will inhibit learning about how to do things better and also threatens to undermine the legitimacy of HDC. Getting people out on HDC is just the beginning of the process: making sure that they are not recalled to prison is also important and that means ensuring that HDC plans are appropriate and not setting people up to fail.

¹ Table 3.4i, Offender management statistics quarterly: April to June 2018

² Table 3.4i, Offender management statistics quarterly: April to June 2018

³ <http://trackingpeople.leeds.ac.uk/files/2017/07/Report-seminar-3-V.2.pdf>

⁴ See Moss, B (2018) *Electronic monitoring and monitoring probation: The case of Ireland*, European Journal of Probation 1-16

3. Codification

- 3.1 The main purpose of the new HDC policy framework is consolidatory. The new policy framework incorporates existing policy, previously spread across multiple Prison Service Instructions (PSIs) into a single policy document. The Howard League broadly welcomes the codification of policy framework into a more user friendly single document. Early release is an important mechanism to ensure people who can be safely managed in the community are released at the earliest opportunity. A single document assists in making the process accessible, fair and transparent.
- 3.2 However, it remains an area that is often not understood by people in prison with literacy and learning difficulties. The Howard League receives many calls each year on and behalf of young people with questions about the process that demonstrates a poor understanding of it – in the last year the Howard League received over 60 calls to our specialist legal advice line about HDC. There is no legal aid available to assist people with HDC applications or appeals, even though these decisions affect liberty.
- 3.3 The onus is on the detained person to apply for early release and the Ministry is encouraged to consider what steps can be taken to ensure that the policy is clear and accessible to all prisoners.

4. Accountability in decision making – private prisons

- 4.1 Until now, the grant of HDC has been entrusted to a person employed by the prison service. The new Policy Framework gives Directors of Contracted Prisons the power to take decisions on HDC, shifting the decision-making powers in private prisons from the Controller to Directors of contracted prisons. It is proposed that the public sector employee in private prisons (the Controller) will perform a monitoring, rather than a decision-making, function in respect of HDC, although it is not clear what the monitoring requirements will be and how they will ensure accountability.
- 4.2 There is an obvious conflict of interest in allowing directors of private prisons to determine whether or not people held in their institutions should be released early. Private prisons are paid for keeping people there. On the other hand, some private companies running prisons are also involved in electronic monitoring.
- 4.3 The Howard League is concerned that shifting the decision-making powers to employees of private companies, whilst providing no additional detail within the Framework on the level of monitoring to which they will be subject by the Controller's, may undermine the quality of HDC decision-making in the private sector. The proposed framework states this will not apply to secure training centres (which detain some of the most vulnerable children in the country), two of which are privately run (§4.11.2). Research highlights the importance of proper accountability in HDC processes, especially as outsourced to the private sector.⁵

5. Opportunity to strengthen the policy

- 5.1 As it stands, the proposed framework presents a missed opportunity to create meaningful change to give effect to the Secretary of State's vision concerning release on HDC and make amendments to the policy to bring it in line with other legal developments.

⁵ See, for example, Moss, B (2018) *Electronic monitoring and monitoring probation: The case of Ireland*, European Journal of Probation 1-16

- 5.2 For example, the policy applies to children and young adults but does not advocate a distinct approach for this group, despite a growing recognition that children and young adults require a distinct approach.
- 5.3 While the majority of the framework applies to adults and children, where the framework does distinguish (as at paragraph 4.11), the document does not contain child friendly language. Rather than referring to children as children, the document refers to them as “offenders aged under 18”. This is out of step with the law. The Children Act 1989 defines children as people under 18 (section 105). Official bodies, such as the Sentencing Council and the Law Commission have accepted the benefits of referring to people under 18 as children.⁶ There is nothing in the framework to reflect the duty to ensure that children are detained for the shortest appropriate period of time in accordance with Article 37 of the UN Convention on the Rights of the Child. This is contrary to stated government policy which states that “the Government has made a commitment to give due consideration to the articles of the UN Convention on the Rights of the Child (UNCRC) when making new policy and legislation.”⁷
- 5.4 Many young adults, typically aged 18 – 25, are eligible for HDC. Young adults are still developing physically and psychologically until their mid-twenties (Royal College of Psychiatrists, 2015)⁸. Young adults should be unambiguously singled out as a distinct category within the criminal justice system (Justice Committee, 2016).⁹ There is nothing in the revised policy to reflect this.
- 5.6 The proposed framework does not provide any further guidance as to the importance of multi-agency working to ensure that all statutory agencies comply with their duties to ensure that applications can be meaningfully considered at the earliest opportunity. The Howard League legal team has represented a number of children and young people who have done very well in custody and been considered suitable for release on electronic tag by the establishment but have not been approved for release due to the lack of suitable accommodation. This has highlighted a serious obstacle to the Ministry of Justice’s policy that release on Home Detention Curfew should be granted more readily. The cases we have worked on revealed the following thematic issues (1) inadequate provision whether from social services or probation, (2) lack of effective cooperation between those responsible for the young person in and out of custody and (3) lack of an effective remedy for the young person. In one case we were able to secure the young person’s release on home detention curfew following representations. The head of Children’s Services for the local authority has additionally asked to discuss “lessons learned” with the Legal Director. In the other two cases, provision was not found in time for release on HDC and we are pursuing complaints on behalf of both young people. To the best of our knowledge, data is not collected on the reasons why HDC is not granted, even though that would assist agencies in learning lessons. There is also a lack of an effective remedy where a person does not get HDC

⁶ Sentencing council (2017), Sentencing Children and Young People Overarching Principles and Offence Specific Guidelines for Sexual Offences and Robbery, Definitive Guideline, available at https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide_FINAL_WEB.pdf

Law Commission (2018), Sentencing Code report §7.28 available at <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2018/11/Sentencing-Code-report-Web-version-1.pdf>

⁷https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/645652/Guide_to_Making_Le_gislation_Jul_2017.pdf

⁸ Written evidence submitted by the Royal College of Psychiatrists to the young adult offenders inquiry, HC 937, 13 October 2015 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justicecommittee/the-treatment-of-young-adults-in-the-criminal-justice-system/written/22190.html>

⁹ Justice Committee (2016) *The treatment of young adults in the criminal justice system* <https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/169/169.pdf> page 9

due to statutory failures by statutory agencies such as children's services or probation services who are responsible for providing or approving release address. The usual complaints processes are too lengthy - a fast track complaints system is required given that liberty is at stake.

- 5.7 While the policy proposes a modest change to the way in which presumed unsuitable cases are dealt with, there is scope for more fundamental revisions that would enable more people in this category to be safely released (see below).

6. "Presumed unsuitable" cases

- 6.1 The proposed framework states that it will no longer be necessary to consult or notify the central HDC policy team in "presumed unsuitable cases". The Howard League welcomes the decision to remove this requirement and reduce the bureaucratic hurdles towards granting HDC in exceptional circumstances.
- 6.2 However, the "presumed unsuitable" category encompasses thousands of prisoners each year who may well be suitable for release from a risk management perspective. The blanket presumption should be removed as it results in many prisoners who would otherwise be released safely on electronic tag from being released. The categories provide a blunt mechanism which effectively excludes people depriving them of the opportunity to be considered.
- 6.3 Failing that, guidance on what qualifies as "exceptional circumstances" should be developed so that people convicted of these offences who can be managed safely in the community can be released. The current guidance sets too high a threshold and risks discriminating against those with protected characteristics, such as children and people with mental health difficulties, who may have particular difficulties in securing suitable accommodation and support for release under the scheme.
- 6.4 For example, the Howard League recently represented a young person who was "presumed unsuitable" due to his offence and was refused HDC. The Howard League helped him appeal this decision and argued that he did meet the threshold of "exceptional circumstances" given his age and stage of development. The "exceptional circumstances" of the child concerned included that he had been successfully completing releases on temporary licence to go to college and release under the scheme would have allowed him to start college full time. The Governor agreed that he should be granted HDC on the basis of these exceptional circumstances, thereby affording the child educational opportunities that he would have missed out on had he had to wait for release at his mid-point. This was a good example of taking a young-person centred and flexible approach to the criteria that supported a young person's successful and constructive reintegration into his community. There is nothing in the proposed new policy that promotes this kind of approach.

7. Conclusion

- 7.1 The Howard League recognises the importance of the way that the HDC operates and would welcome the opportunity to discuss further modifications with the Ministry of Justice.

The Howard League
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