

Howard League for Penal Reform's response to HMPPS consultation on transition of young people from youth to adult custody policy framework

February 2019

Summary

1. The Howard League acknowledges the importance of the decision to move a child or young adult from one secure establishment to another and welcomes the acknowledgement of the need for clear, transparent guidance to govern such decisions.
2. Children in custody are some of the most vulnerable young people in society. Decisions about their placement are crucially important both in the short and long term.
3. The importance of placement does not vanish overnight when a child turns 18. It is now well established that young adults are typically maturing until their mid-twenties. Young adults often retain the vulnerabilities of childhood, which are often exacerbated by the sudden withdrawal of services and support. A change in placement in the secure estate makes that withdrawal particularly acute as the change invariably means that all aspects of the young person's life change at once.
4. Given the profound implications of transfer, this consultation process ought to be open, transparent and engage with the widest possible range of stakeholders and young people themselves.
5. There is a clear legal framework governing the decision-making process which ought to be central to the guidance.
6. The language in the guidance ought to match its stated rehabilitative philosophy – children should not graduate to become “offenders”.
7. The guidance ought to be revised to ensure it is a principled and easily used document. Some key concerns about the proposed guidance are raised.

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 12,000 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 –children and young adults' needs and legal obligations

Children and young adults' needs

- 2.1 The extensive needs of children under the age of 18 in custody are well established. As Mr Justice Munby observed in *R (Howard League) v SSHD* [2003] 1 FLR 484 §10, children in custody are “on any view, vulnerable and needy children. Disproportionately they come from chaotic backgrounds. Many have suffered abuse and neglect”. Statistics of the population of children in YOIs paint a “deeply disturbing picture” with over half having been in care, “significant percentages report having suffered or experiences abuse of a violent, sexual or emotional nature” and “many ha[ving] a history of treatment for mental health problems” (paragraph 11).
- 2.2 The needs of young adults, typically aged 18 to 25, have also recently been recognised following extensive work in this area by the Transition to Adulthood Alliance (T2A).¹ There are well-documented high levels of difficulties and unmet need among young adults in the criminal justice system, many of whom have multiple vulnerabilities that impact on their mental health and life chances. These include their mental health, psychological history, cognitive functioning, histories of placement in care facilities and their own early caring responsibilities (Justice Committee 2016: 11 – 12).²
- 2.3 Young adults are still developing physically and psychologically until their mid-twenties (Royal College of Psychiatrists, 2015).³ Young adults have a greater capacity for change in a shorter period of time than older adults (*R v Lang* [2005] EWCA Crim

¹ <https://www.t2a.org.uk/>

² Justice Committee (2016) *The treatment of young adults in the criminal justice system* <https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/169/169.pdf>, paragraphs 18 – 19 and 21 - 22

³ 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>

2864, paragraph 17(vi)). They often retain the vulnerabilities of childhood (Centre for Mental Health 2014: 3).⁴

2.4 In *R v Clarke* [2018] EWCA Crim 185 the Lord Chief Justice observed:

“Reaching the age of 18 has many legal consequences, but it does not present a cliff edge for the purposes of sentencing. So much has long been clear... Full maturity and all the attributes of adulthood are not magically conferred on young people on their 18th birthdays. Experience of life reflected in scientific research (e.g. *The Age of Adolescence*: thelancet.com/child-adolescent; 17 January 2018) is that young people continue to mature, albeit at different rates, for some time beyond their 18th birthdays.”

Legal obligations

2.5 In light of the significant needs and distinct characteristics of children and young adults in custody, there is a legal requirement to take a careful approach to decisions affecting them. To that extent, the Howard League for Penal Reform welcomes the acknowledgement of the need for clear, transparent guidance to govern such decisions. However, as it stands, the proposed policy does not sufficiently promote the rights and protections that children and young adults in custody as required.

2.6 The decision to place a child clearly engages Article 8 of the European Convention on Human Rights. Article 8 protects the right to respect for private and family life and provides:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

2.7 “Private life” is a broad concept for the purposes of Art 8(1). It covers physical and psychological integrity, the securing of a sphere in which an individual can freely pursue the development and fulfilment of their personality, and a right to personal development and to establish and develop relationships with others. The notion of personal autonomy is an important principle underlying the interpretation of the guarantees of Article 8.

2.8 The Supreme Court recently summarised interpretation of the guarantees contained within Article 8 (*McCann v State Hospitals Board for Scotland* [2017] 1 WLR 1455, §45-48). The Supreme Court noted that the “concept encompasses securing a sphere within which an individual can freely pursue the development and fulfilment of his

⁴ Centre for Mental Health (2014) *The Bradley Commission, Young adults (18-24) in transition, mental health and criminal justice*

https://www.centreformentalhealth.org.uk/sites/default/files/2018-09/briefing_Bradley_youngadults.pdf

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personality". The Supreme Court cited the summary set out in *Pretty v United Kingdom* (2002) 35 EHRR 1, which concerned the statutory ban on assisted suicide, the ECtHR summarised its jurisprudence (para 61):

"[T]he concept of 'private life' is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can sometimes embrace aspects of an individual's physical and social identity. Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by article 8. Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world. Though no previous case has established as such any right to self-determination as being contained in article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees."

- 2.9 The Supreme Court also emphasised that Article 8 encompasses "the inviolability of the personal and psychological space within which each individual develops his or her own sense of self and relationships with other people."
- 2.10 There is no reference in the proposed policy either to human rights or children's rights. 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."⁵
- 2.11 Where the rights of children are directly involved, the UNCRC must be taken into account in interpreting rights in the European Convention applicable to children. That was made clear by Baroness Hale in *R(R) v Durham Constabulary* [2005] 1 WLR 1184. She held at paragraph 26: "[the UNCRC] is not only binding in international law; it is reflected in the interpretation and application by the [ECtHR] of the rights guaranteed by the European Convention...it must be taken into account in the interpretation and application of those rights in our national law."
- 2.12 In considering the placement of children in custody, Article 37 (C) of the United Nations Convention on the Right of the Child ("UNCRC") applies. It states:

"Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances."

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/645652/Guide_to_Making_Legislation_Jul_2017.pdf

- 2.13 The UN Committee on the Rights of the Child has provided authoritative guidance on how the Convention should be interpreted. General Comment No 10 CRC/C/GC/10 dated 25 April 2007 deals with children in detention.⁶ Para 38 of the Comment states:

“The Committee notes with appreciation that some States parties allow for the application of the rules and regulations of juvenile justice to persons aged 18 and older, usually till the age of 21, either as a general rule or by way of exception.”

- 2.14 The Comment further states:

“Treatment and conditions (art. 37 (c))

85. Every child deprived of liberty shall be separated from adults. A child deprived of his/her liberty shall not be placed in an adult prison or other facility for adults. There is abundant evidence that the placement of children in adult prisons or jails compromises their basic safety, well-being, and their future ability to remain free of crime and to reintegrate. The permitted exception to the separation of children from adults stated in article 37 (c) of CRC, “unless it is considered in the child’s best interests not to do so”, should be interpreted narrowly; the child’s best interests does not mean for the convenience of the States parties. States parties should establish separate facilities for children deprived of their liberty, which include distinct, child-centred staff, personnel, policies and practices.

86. This rule does not mean that a child placed in a facility for children has to be moved to a facility for adults immediately after he/she turns 18. **Continuation of his/her stay in the facility for children should be possible if that is in his/her best interest and not contrary to the best interests of the younger children in the facility.** [emphasis added]

- 2.15 This comment is being revised at the present time.⁷ It is proposed that this section remains the same. However, additional amendments to the comment deal with the growing consensus that children do not suddenly mature at the age of 18. For example, one proposed amendment to the Comment reads:

“Continuation of the juvenile justice measures after criminal majority

When a child in conflict with the law is the object of a measure of probation, education or curative treatment, or stays in a placement or is detained in a centre for children in conflict with the law, reaching 18 years does not mean the end of the juvenile justice specialised measures. The Committee recommends to States parties to ensure that these young persons can continue the completion of the programme or sentence in conditions suited to their age, maturity and needs and are not sent to centres for adults.”

⁶ <https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>

⁷ <https://www.ohchr.org/EN/HRBodies/CRC/Pages/DraftGC10.aspx>

2.16 The Howard League welcomes the recognition of the need to support children and young people who transfer to adult prisons in order to comply with the principles of equal access to the law and legal certainty. However, if it is to be valid, the policy must best reflect the law.

3. The importance of this policy and the need for the widest possible consultation

3.1 As the draft policy notes, *‘the transition process is a critical time, where extra effort, early planning, accurate assessment and the active involvement of key professionals from both youth and adult services is required to ensure young people’s transition experience is both safe, positive, and which aids resettlement’*. The Howard League for Penal Reform agrees with this statement. In addition, it is noted that the reason why this is a crucial time is because of the combination of the on-going vulnerabilities that remain and that much of the support that is available to children is suddenly withdrawn. This is particularly acute for children who turn 18 in prison where every aspect of their life is transformed. The ability of parents, carers and professionals to support and access the young person changes dramatically, as does the physical environment and the regime. This should be specifically acknowledged in the policy.

3.2 It is therefore crucial that the policy is properly formulated and informed by the widest possible consultation. We consider that the Transition to Adulthood Alliance in particular should be consulted.

4. Language matters

4.1 The language in the guidance ought to match its stated rehabilitative philosophy – children should not graduate to become “offenders”. It is entirely contrary to the intention stated at paragraph 2.10 that *“the transition of a young person/offender facilitates continuation of the identity shift of the young person/offender from pro criminal to pro social identity”* to call the young person a “child” until the age of 18 and an “offender” thereafter as envisaged at paragraph:

“An individual within the youth estate will be referred to as a young person irrespective of whether they are aged 18.” The same paragraph [check] states that *“An individual within the adult estate will be referred to as an **offender** unless they are aged under 18”* [emphasis added]

4.2 The language used to describe people in prison matters. A child goes from being a young person to an ‘offender’ undermines the framework is meant to enable the establishment of a pro-social identity and minimise anxiety and risks (see points 2.4 and 2.10). The terms should reflect the relevant age of the young person, using the term child for a person under 18 and young adult for a person aged 18 and over. This would accord with the legal definition of a child (s105, Children Act 1989).

5. Key concerns about the main body of the guidance

5.1 The guidance ought to be completely revised to ensure it is a principled and easily used document. Some key concerns about the proposed guidance are raised.

5.2 It is not clear to whom the guidance applies. The title states that it is about “youth” to “adult” transition within custody but there are numerous references to transfers within the children’s secure estate. This is an entirely separate and complex issue that

requires a careful approach and detailed up to date guidance in its own right. We do not think that transfers within the children's estate should be included in this guidance.

- 5.3 Paragraph 1.2 states that the purpose of the guidance is to clarify purposes and promote consistency. However, as is clear from the legal framework the purpose ought to be on ensuring that transfers comply with the legal requirements to meet the needs of the child and young adult. Consistency is desirable if it leads to consistently lawful practice such that the needs of children and young adults are met. However, it is not an end in its own right.
- 5.4 The outcomes in paragraph 2 are generally positive, save for the use of the word "offender". However, the guidance should ensure the specified outcomes are met.
- 5.5 For example, the participation of the child or young adult is specified as an outcome but there is nothing in the guidance to ensure that is meaningful. For example, the guidance makes little provision for young people to engage in the process other than by meeting people and receiving information. There is no provision for a familiarisation visit to the new prison. Young people are specifically prohibited from knowing the date of transition (other than the week) for "security reasons", although it is hard to see what the concern is here. Young people often know about specific dates of movements such as court dates. Spending a week not knowing when you will be suddenly told to pack your bags, not being able to know when your last association session is with peers or the last time you will see a particular member of staff must be hugely distressing.
- 5.6 We particularly welcome paragraph 2.6 which states that "*transition planning should always take place with resettlement in mind, with all interested parties working to ensure that resettlement planning starts when the young person enters custody.*" However, the rigidity of the transition process as it stands in this policy will almost certainly undermine this. For example, a young person who is being considered for Home Detention Curfew would clearly have his or her resettlement disrupted if moved during that process. However, early release is not even listed as a "constraint" on the default process at paragraph 4.
- 5.7 The different types of transition set out in section 3 are very concerning. In the most recent parliamentary question on the practice of placing children in prisons designed to hold people aged 18 and over, it was clear that this practice was exceptional.⁸ The United Kingdom withdrew its reservation to Article 37 of the UNCRC some time ago. Having the first transition type marked "early transition" is a worrying indication that the government may be rowing back on its international obligations. While the summary states that "*such moves should only ever take place in exceptional circumstances and in line with the agreed approval process set out in the Youth Custody Service's Placement Guidance*" listing it as one of three "types" of transition gives the impression that it is a route that can be considered. The term "standard" transition is misleading as it implies this is the default position when in fact it should only apply as the default position if, and only if, (1) the young adult is NOT on a DTO and (2) the young adult's needs will not require him or her to remain in the children's estate – for example due to a pending parole review, early release application, to complete a course or some other reason. The "discretionary" transition category in fact applies to rebutting the presumption that applies when a child serving a DTO turns 18. Yet that presumption is not included in the default category. Further, it should be made clear that as a

⁸ <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-07-03/2539/>

matter of law there is a presumption that it will not be in a young person's best interests to be moved: that is the guiding force behind Children Act 1989 decisions and the ethos that underpins the UNCRC, as noted in the extracts from the current and revised General Comment referred to above.

- 5.8 In any event, setting out these three "types" of transition, leads the decision making into first putting a child or young person into one of the three categories and then moving on to consider individual needs when the child or young adult's needs should in fact come first.
- 5.9 In relation to planning for transitions, it is noted at paragraph 3.4 that young people who fall into "standard" or "automatic" transitions will move one month after their 18th birthday. This is arbitrary and fails to flag the legal requirement to consider the needs of the young person. It is not clear from this paragraph that there is no legal reason why young adults should be transferred at 18 years and one month. In addition to the issues raised under the "constraints" heading (noted above), it may be that it is just not right to send a young adult to adult prison for six months. At a time when the Secretary of State for Justice has recognised the damage of short sentences on adults to the point where government policy is to abolish such sentences, it cannot be right to transfer a vulnerable young adult to an adult prison for less than six months.
- 5.10 We welcome the requirement at paragraph 3.14 for "*establishments case management systems care leaver alert is activated before young people who qualify as Care Leavers move to the adult/young adult establishment*". We would be interested to hear more about this alert and how it is determined. We note that children become care leavers at 16 and that many children in custody are legally care leavers but have not had their status recognised by the home local authority. As the entire spirit of the Leaving Care Act 2000 was to support young people to make the transition to adulthood, we consider that these rights are vital. We would be happy to discuss this with you further to ensure all care leavers are recognised as early as possible and local authorities encouraged to support care leavers in prison appropriately, especially with regard to transfer.
- 5.11 We note that paragraph 3.24 states that "*an appropriate member of staff is allocated to the young person and meets with him/her within 72 hours of his/her arrival at the adult/young adult establishment.*" Seventy-two hours is a long time. Just as it is well known that the risk of self-injury and suicide is greater on the first night in custody, surely this period is also critical for a vulnerable young person entering an adult prison for the first time. In the circumstances, young adults should not be transferred on a Friday and should be seen within 24 hours of arriving by an allocated member of staff.
- 5.12 Paragraph 3.28 deals with the requirement for care leavers to be permitted to have their personal advisor present at the first sentence planning meeting. It is unclear why the invitation is restricted to the first meeting as the young adult will have on-going needs. Further, for young adults who are not care leavers, there is no obvious reason why parents or carers should not be permitted to attend such meetings.
- 5.13 The paragraph headed "constraints" has been considered above. The term "constraints" gives the wrong impression in that it suggests that these factors may be responsible for holding back the preferred course of action. Instead, these factors, which should be expanded to cover a child or young adults' needs and prospects of rehabilitation, should be the first consideration. The heading should be more positive and highlight the common factors that may require a young adult to remain in the children's estate. The list should not be exhaustive but should also include instances

where a child or young adult is going through an early release process, only has six months or even a year until release, is undertaking a programme of ROTL or mobilities that cannot continue in the adult estate or other welfare issues such health concerns or bereavement.

- 5.14 In respect of transfers of children and young adults who are remanded, the Howard League welcomes the steps designed to ensure a person who has just been sentenced returns to the same establishment that day. However, a transfer pending sentence can have a huge impact on a young adult at a very distressing time and should also be prohibited. Transfers from court can never be properly planned and should not happen. In fact, the Howard League has come across a number of examples where the fear of being sent to another prison has caused a young person to be fearful of even attending court. Appearances at court are stressful for young people.

6. Further advice and guidance

- 6.1 The further advice and guidance contains a great deal of additional information. As noted above, we do not consider it appropriate for this guidance to deal with transfers within the children's estate which are complex matters that require separate consideration. In particular, we strongly object to the notion at paragraph G.1 that *'it is desirable for young people, where applicable and appropriate, to transition to the young adult/ adult estate from an under 18 YOI, as this often offers the best preparation for young people who are eligible for transition to the young adult/ adult estate. In addition, throughout their journey in youth custody, the needs of a child or young person may change overtime, and they may therefore be better suited to an alternative sector of the youth custodial estate as they grow older, and as they mature.'* There is no evidence to support this proposition. As the guidance notes, it is not possible for girls. It is therefore discriminatory.
- 6.2 Paragraph A1 deals with support available with the transition process but does not mention a young person's right to legal support with this.
- 6.3 Paragraph B deals with "female transitions". Language matters and it would be preferable to refer to women and girls as appropriate.
- 6.4 We welcome the acknowledgement at paragraph C.1 and C.2 of the importance of this issue and the recognition of the process of maturation but these points should be highlighted much more forcibly and earlier in the document. We also welcome the difficulties that a young adult will face when transferring from the children's estate to the adult estate at paragraph C.4. Again, this should be highlighted much earlier in the document. Paragraph C.10 sensibly states it is good practice for establishments to engage with the young adult's Youth Offending Team worker. The transition from YOT to probation can be particularly difficult for young people and establishments should support a proper handover to probation, as well as ensuring that this happens where a young person on a Detention and Training Order is to be subject to post sentence supervision (where he or she had turned 18 prior to the mid-point release date).
- 6.5 The additional information at paragraph F about care leavers and the law is welcome, although the guidance should also include information about "qualifying children" and the extended Personal Advisor service which means that any care leaver can request a personal advisor service until the age of 25, even if they have lost contact with social services. Establishments should ensure that, where children have Education, Health and Care Plan, this information is transferred to the new establishment.

7. Concluding observations

- 7.1 The Howard League has come across many examples where young adults have feared that their progress and rehabilitation will be undermined by being transferred to the young adult estate without appropriate planning or at a crucial time in their journey. We have also come across a number of young adults in the adult estate who have been transferred without proper support and planning who have struggled terribly as a result. Young adult prisons and adult prisons can be terrifying places. For two years running the Chief Inspector of Prisons has found that around 40 per cent of young adults in adult prisons get less than two hours out of their cells each day.
- 7.2 While we welcome the notion of clear progressive guidance to better support children and young adults manage this transition, the proposed guidance is unlikely to do that without radical change.
- 7.3 We would be happy to meet with you to discuss this further.

The Howard League for Penal Reform

February 2019