

## Howard League for Penal Reform's response to the Department for Education's consultation on reforms to unregulated provision for children in care and care leavers

3 June 2020

### Summary

- The Howard League welcomes the opportunity to comment on the Department for Education's consultation about proposed reforms to unregulated provision for children in care and care leavers.
- It is right that this consultation has been launched without delay ahead of the promised comprehensive Care Review. However, we are concerned that attempts to reform the unregulated sector are doomed to failure if they do not seek to address the underlying problems in the care system that are contributing to the reliance on, and the issues with, unregulated accommodation.
- Government needs to urgently address issues raised in its own research report, namely: lack of sufficient provision nationally for children in care; lack of specialist support for the growing numbers of older children with complex needs; providers' risk adversity related to Ofsted ratings; costs of private provision; and lack of accountability on the part of private providers.
- The government needs to take back control of the residential care sector which has been allowed to develop according to market forces rather than in response to the needs of the highly vulnerable children who desperately need excellent care and accommodation in order to turn their lives around.
- We strongly disagree with the proposal that local authorities liaise with police forces when making all out-of-area placements. This is stigmatising and runs the risk of contributing to processes of criminalisation. No child should be known to the police just because they are in care.

## **1 About the Howard League for Penal Reform and summary of response**

- 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 We have drawn on our legal and policy work in responding to this consultation.
- 1.5 The Howard League would welcome the opportunity to provide further information about any of the points below.

## **2 Background to our interest in this consultation**

- 2.1 Since 2016, the Howard League has been working on a programme to end the unnecessary criminalisation of children in residential care, both regulated and unregulated. As part of the extensive research we have carried out, we have spoken with hundreds of people including police, directors of children's services and other children's services staff, youth offending teams, the owners and staff of private, voluntary and local authority run homes, magistrates, youth justice lawyers, politicians, academics and other third sector organisations. We have heard from children and young people who are, or who have recently, lived in regulated and unregulated provision.
- 2.2 We are pleased to say that during the course of our research, the proportions of children in residential care who have been criminalised each year have fallen from 15 percent in the year ending 31 March 2014 to seven per cent in the year ending 31 March 2019. There is still much to be done to understand and tackle the factors causing high levels of criminalisation and to ensure children living in residential provision, both regulated and unregulated, are protected from unnecessary criminalisation.
- 2.3 More details about this programme of work, including our six briefings are available on our programme webpage at <https://howardleague.org/our-campaigns/programme-to-end-the-criminalisation-of-children-in-residential-care/>.

### 3 Concerns about the unregulated sector

- 3.1 We welcome the government's commitment to addressing concerns about unregulated provision and its clear statement that:

*"It is unacceptable for any child or young person to be placed in a setting that does not meet their needs and keep them safe, for any amount of time"* (p3, consultation).

- 3.2 We read Professor Greatbatch's and Ms Tate's research report, which the Department for Education commissioned to inform this consultation ("the consultation research report"), with great interest. It accorded very much with the discussions we have had with local authorities about unregulated accommodation. From the research that we have done, we can state with confidence that an even bleaker picture would have been painted by other groups, particularly the police and children and young people with experience of this type of accommodation. Local authorities are, of course, cognisant of the fact that they are open to criticism and worse for having placed children in unsuitable and even unsafe environments. The fact that they were as open as they were with the government's research team is indicative of the depths of this problem and it should be deeply troubling to government.
- 3.3 From our own research, we know that children are most likely to be criminalised in poor, unsuitable settings where they do not have the support and structures that they need to thrive. Concerns about unregulated and unregistered provision have very frequently been raised with us in this regard.
- 3.4 Children are also most vulnerable to child criminal exploitation in poor, unsuitable settings. It is evident from our research that people involved in crime, including those operating 'county lines', are taking advantage of failings in children's social care and central government oversight to exploit and abuse children in residential care, with children in unregulated settings at particular risk. More detail on this research is set out in our March 2020 publication, *Victims not criminals: protecting children in residential care from child criminal exploitation* (Howard League, 2020). Our concerns were reported at length by The Observer in its article on 28 March 2020, *Privatising children's homes is 'playing into the hands of abusers'*.
- 3.5 The government will also be aware of the series of reports broadcast by Newsnight in 2019 which contained very disturbing evidence about the unregulated sector. We contributed to this work through supporting Newsnight's case study and it accords with our research.
- 3.6 We have spoken to a number of young people about their experiences in unregulated accommodation. We cannot go into detail about everything we have been told in this consultation. We think it would be helpful, however, to provide some insight from two young people with recent experience of the sector which gives a very striking picture of the poor accommodation and lack of care (and by this we mean some providers simply not caring about the

welfare of children in their accommodation rather than the legal sense of the provision of care) which is all too common in the sector at present.

- 3.7 In September 2019, we were asked to speak about our work at a forum for unregulated providers arranged by Central Bedfordshire local authority. The forum also included a presentation by the local authority's two "Quality Assistants". This was a very unusual role that had been created by the local authority to gain some "user insight" into unregulated provision in its area. The Quality Assistants roles were filled by two young adults with recent experience of living in 16+ unregulated accommodation. The primary task of the Quality Assistants was to inspect 16+ accommodation with a member of the local authority's commissioning team and to report on the standard, highlighting areas of good practice and any issues. They came across as fair and objective: good practice was praised; bad practice was objectively and rationally explained.
- 3.8 The Quality Assistants presented a shopping lists of essential "asks" that were frequently not being met by unregulated providers. This list included the following: fresh mattress or mattress cover; more than one set of bed sheets; curtains and blinds; bathroom mats; cutlery/tin openers/crockery; aerials for all TVs; bathroom plugs for shaving; improvements to the condition of the house e.g. repairing damage; toilet brushes; mirrors; door locks; more than one staff member on shift; homely touches; teaching independence skills/ key work sessions/ social skills to help young people; support with health issues; help accessing food banks/ emergency/ additional food if needed; moving in packs including emergency toiletries, useful telephone numbers and details of who to contact if you had a concern.
- 3.9 One of the Quality Assistants reported having brought tins home from a food bank only to find they did not have a tin opener. This is shocking on two levels: firstly, why are 16 and 17-year-old children in the care of the state relying on food banks when they are entitled by law to have their needs met?; and secondly, why aren't they being housed in basically equipped accommodation? This story really brings into focus how badly the system is failing some children.
- 3.10 Sadly, this anecdote was not surprising or novel to us. In our legal work, for example, we frequently hear of children who have been placed by children's services in wholly unsuitable, sometimes dilapidated and unclean, accommodation before and after periods in custody.

#### **4 Achieving appropriateness of placements**

- 4.1 We commend the government for recognising the urgency of the situation and tackling it now rather than waiting for the promised Care Review, which we appreciate is likely to be delayed for an indefinite period in light of Covid-19. However, we are concerned that seeking to reform unregulated provision in isolation from the rest of the care system is doomed to failure because many of the problems in this part of the residential care sector are driven by issues in other parts of the care system, some of which appear to already have been exacerbated by the pandemic.

- 4.2 The consultation document sets out a number of core requirements and expectations for children who are in the care of the state. It says: “*for looked after children, making the right placement decision is paramount to meeting their individual needs*”; “*each placement must, at the very least, keep the child safe and provide them with the care and support that they need to achieve positive outcomes*”; and “*local authorities have a duty to safeguard and promote the welfare of looked-after children*” (page 8). The fact that these requirements are not being met is not just down to problems with unregulated and unregistered provision; it is, to a very great extent, the consequence of a dysfunctional children’s residential care sector.
- 4.3 As the consultation research report evidences, whilst some children are placed in unregulated provision for good, informed reasons too often local authorities are placing very vulnerable children in these types of placements purely because they have nowhere else to put them.
- 4.4 The difficult situation facing councils is largely a consequence of government policy since the 1990s to take a backseat and allow the sector to develop according to market forces. We now have a residential care market where three quarters of children’s homes are owned by private providers; supply has not kept up with demand; there are huge concerns over cost and quality; homes are unevenly distributed around the country and tend to be in poorer areas; and nearly half of looked-after children in independent or semi-independent accommodation are in “out-of-area” placements. Our legal team has recently worked with two children in cases that illustrate the difficulties caused by this situation: in one, an English boy has been offered accommodation in Wales on the basis that this is the only placement in the country that can be identified to meet his needs. In another instance, a child from Wales has been placed in England as the local authority cannot find any provision in Wales and has indicated that this is because all the placements have been provided to children from English local authorities who are able to pay higher prices.
- 4.5 Despite costs which sometimes exceed £200,000 a year for a single placement (Housing, Communities and Local Government Committee, 2019), it is a seller’s, not a buyer’s, market and local authorities often feel unable to confront powerful providers. Financial analysis conducted on behalf of the Local Government Association (“LGA”) revealed that the six largest independent providers of children’s social care services made £215 million in profit in 2019, with some providers achieving profit of more than 20 per cent on their income. The LGA’s research showed that in just three years, eight of the biggest providers had merged to become the three largest groups in the sector. Councils are concerned about the levels of debt and financial risk being employed by these big companies, the LGA reported, and about the fact that there is no system in place to track the impact of such mergers on the market and issues such as quality and children’s outcomes (Rome, 2020).
- 4.6 Ofsted regulates individual homes but there is no central government oversight of the market in its entirety or governmental control over market development. Unregulated providers have entered the marketplace to fill gaps in the market

lured by the huge profits that are available even for those providing poor quality and/or unsafe provision.

- 4.7 Previous government reports have highlighted the lack of sufficiency and the financial burden on local authorities. In its January 2019 report, *Pressures on children's social care*, the National Audit Office reported that the increase in the use of residential care had “*exposed the lack of suitable placement capacity available to local authorities: only 32 per cent of local authorities report that they have access to enough residential homes for children aged 14 to 15 years, and 41 per cent for those aged 16 to 17*”. The House of Commons Committee of Public Accounts has said that this lack of availability was placing local authorities under extreme financial pressure. It said, “*There is a lack of residential capacity for children's social care and its use is often unplanned, leading to 'bidding wars' between local authorities for places for children*” (2019). It is also, as the local authorities told the government's researchers, forcing them to make decisions which are badly failing the children in their care.
- 4.8 Any reform of the unregulated sector must be cognisant of the needs of the children using this accommodation and seek to provide placements that are able to support them and keep them safe. The consultation research report paints a very troubling picture of the problems facing children living in unregulated provision. They included multiple placement breakdowns; risk of exploitation; involvement in gangs; mental health issues; self-harm; and violent and aggressive behaviour. Clearly these are children who require specialist care and support. The residential care “market” is unable to provide that for too many children and these children are effectively being dumped in unregulated and unregistered provision as a last resort.
- 4.9 One Director of Children's Services we spoke to described a “*wild west*” market in residential care (Howard League, 2018). The lack of placements has created a situation where power lies with the providers not, as one might expect, with those commissioning and paying for placements. Local authorities are too frightened to tackle private providers who can easily find business elsewhere. Concerns about making the sector unattractive to private providers were reflected in evidence given to the Housing, Communities and Local Government Committee's inquiry into the funding of local authorities' children's services. In discussions about a potential non-profit making clause, which could prohibit or limit profits, the Children's Commissioner for England, Anne Longfield, said it was “*very enticing*” but “*the main drawback with it is that we are where we are and we already have a shortage of places. We would fall over if we did not have the private sector within it*” (Housing, Communities and Local Government Committee, 2019, para. 108).
- 4.10 Government needs to take back control of the residential care sector rather than applying sticking plasters, which is what attempts to reform unregulated provision in isolation from the rest of the care system would amount to.

## 5 Raising standards

- 5.1 We agree that there is a need for clear, consistent national standards and that poor provision that fails children must not be tolerated. We also agree that there must be an enforcement mechanism.
- 5.2 At the above-mentioned forum for unregulated providers that we attended in Central Bedfordshire in September 2019, providers were asked for their thoughts on regulation. The consensus was that providers were aware some form of regulation was on the cards and they said that they welcomed it.
- 5.3 The benefits of regulation the providers noted included the following: better standards; clearer standards; guidelines; consistency/ standardisation; filtering out of those who are in it for the wrong reasons; training; more support; a voice for the 16+ sector; recognition of skills and experience; less anxiety on the part of local authorities; transparency as to what other providers are doing; more joint/collaborative working; clarity over grey areas, such as the administration of medication; knowledge of specialist providers; effective moving on strategies for young people; social workers knowing what providers deliver.
- 5.4 The perceived disadvantages were much fewer: there had been concerns about the additional costs but these were brushed off as standard business expenditure; some felt that the sector might get swamped by larger providers; there were worries about how to prepare for an inspection.
- 5.5 We welcome proposals for national standards that set out expectations clearly and unequivocally. Our experience of the residential care sector, however, is that a “stick” is needed to ensure local authorities and providers comply with standards. Local authorities have little power as commissioners to drive standards or require accountability. Placing the burden for enforceability entirely on local authorities will not work given the current power imbalance, as we described in paragraph 4.7 above.
- 5.6 For the regulated sector there is plenty of legislation and regulation but essentially enforcement comes down to homes wanting to achieve a good Ofsted rating, not the possibility of legal proceedings. We hear concerns from local authorities that a similar regime for 16+ accommodation will put some providers off from entering the market or from taking the most vulnerable and “complex” children, leaving local authorities unable to house children. This is a very valid and deeply troubling concern. It simply cannot, however, be the reason why government fails to protect our most vulnerable children. There *must* be a proper mechanism for enforcing national standards and government *must* tackle issues such as lack of provision and the other underlying problems that have put so much power in the hands of the large, private providers.

## 6 Requiring local authorities to liaise with police forces when making out-of-area placements

- 6.1 We do not agree with the proposal to require local authorities to liaise with police forces when making out-of-area placements in the case of every child.

Whilst we agree that if a child is at significant risk, the police should be consulted, we do not think the police should be involved with children coming into the area for whom there are no known or immediately serious risks. **No child should be known to the police purely because of their care status.**

- 6.2 The National Police Chiefs' Council's *Strategy for the Policing of Children and Young People* (2016) notes that every interaction with a police officer leaves a mark on children. Evidence shows that unnecessary police contact with children can be harmful to children and make it more likely they will be criminalised either during that particular moment of contact or at some point in the future. In December 2019, a new study was published which supported this thesis. The study involved 2,000 British adolescent twins. It found that contact with the justice system—through spending a night in jail/prison, being issued an anti-social behaviour order (ASBO), or having an official record—promotes “delinquency” because that contact with the criminal justice system acts as a form of labelling that affects self-identity (Motz *et al*, 2019). This is, we would argue, even more of a problem for children in care who already feel stigmatised and labelled.
- 6.3 Local authorities should not need to rely on the local police for information about the local area or the quality of the provider. Local authorities should, as with currently regulated provision, reach decisions about the suitability and safety of placements through professional conversations with trusted, quality providers who are informed about and aware of potential issues in their area.
- 6.4 We advocate for as little contact as possible between the police and children. Work that needs to be done with the homes should, wherever possible, be done without children's knowledge, by phone or e-mail, outside the home or at times when the children are out.
- 6.5 We are aware that some forces are keen to obtain information on all children in care who come into their area. We are against this. For those very high-risk children, then yes, the police will need to be involved. For less high-risk children, we would want to see homes and local authorities ensuring that they have a recent photo and all relevant information ready to immediately hand over to the police if the child goes missing or is at risk. Children should not be known to the police just because they are in care.

## 7 Other points

*Ending the use of independent and semi-independent provision for children under the age of 16*

- 7.1 We are very much in support of this proposal and believe that it would be an extremely positive step forward. We further strongly support calls to provide additional protection of some form to all children aged 17 years and under who are in semi-independent or independent accommodation. This would be in accordance with the UN Convention of the Rights of the Child and it is essential to ensure the safety of vulnerable children. As with any reforms to the unregulated sector, changes would need to be introduced alongside additional



measures to ensure sufficient, suitable accommodation would be available for all children who needed it, including children released from the youth secure estate.

### *Unaccompanied Asylum-Seeking Children*

- 7.2 As the consultation document notes, Unaccompanied Asylum-Seeking Children are frequently placed in unregulated settings. This group of children remains largely invisible and we know very little about their experiences in these settings or their outcomes. Our research indicates that they are extremely vulnerable to exploitation and criminalisation but we lack the data and other evidence to substantiate our concerns. We would encourage government and academics to commission research to highlight the specific needs of this group and to improve understanding about what is happening to them.

## **8 Concluding observations**

- 8.1 We very much welcome the government's recognition of the urgent need to reform unregulated provision for children in care and care leavers. As set out in this response, this must, if it is to be more than a temporary sticking plaster, be part of a larger reform of the entire residential care market and a taking back of control of the sector by the government.
- 8.2 We hope that this response is of interest and use. We would be pleased to provide further detail if that would be helpful.

**The Howard League for Penal Reform**  
**3 June 2020**

## References

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