

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

October 2020

Summary

1. The Howard League welcomes the opportunity to comment on the second draft transitions policy. Every year hundreds of children are transferred to the adult or young adult estate. It can be a devastating experience for young people in prison, most of whom are still developing and many of whom are extremely vulnerable. The reduction in support and the change in services available to young adults compared with what is available in the adult estate can be traumatic. The policy governing this process is therefore very important.
2. Several changes to the draft policy deal with the Howard League's concerns about language and accessibility in the original draft and the need to refer to the United Nations Convention on the Rights of the Child (UNCRC) and human rights.
3. However, the revised policy still fails to place the legal framework at its centre.
4. Further, the revised draft fails to clarify that Article 37 of UNCRC does not require children to leave the children's estate when they turn 18. Turning 18 is not a cliff edge. The revised policy as it stands does not elucidate the various circumstances in which it would be highly inappropriate to effect a transfer for a vulnerable young person for reasons of their age alone. It is further confusing that the policy does not make clear that young people serving DTOs should not as a matter of course be transferred to the adult estate when they turn 18 years old.
5. The guidance acknowledges at paragraph F2 that a local transitions policy must include active engagement with the young person. However, the policy should go much further to enshrine the principle of active engagement with young people at the point of transition. Suggestions are made as to how the policy should be adapted to achieve this.
6. The current guidance fails to set out any mechanism by which a child or young person can challenge or dispute a decision about transition planning. This is contrary to procedural justice and Article 12 of UN Convention on Children's Rights.
7. A copy of the Howard League's original response from February 2019 is appended: The Youth Custody Service is urged to consider all the remaining points within it that have not been addressed in this version of the draft policy.

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 The Howard League 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

- 2.1 According to Ministry of Justice data, in the three years from 2017 to 2019, over 1000 young people transferred from the children's estate to the adult estate (over 300 each year).¹ It is anticipated that this number will rise as more and more children turn 18 during the criminal justice process due to the delays caused by Covid.
- 2.2 The extensive needs of both children and young adults, and the legal obligations towards them, are set out in our previous response to the HMPPS consultation on the transition of young people from youth to adult custody policy framework, dated February 2019.² To avoid repetition, this response will focus only on the issues raised in the latest draft of the policy framework.

3. No bar in law to a young person staying in the children's estate

- 3.1 The Howard League welcomes the fact that the UNCRC and Article 8 of the European Convention on Human Rights ("**ECHR**") are now mentioned at paragraph 3.2 of the draft framework. It is essential that the policy properly applies the legal framework. Whilst the UNCRC and Article 8 are referred to, there is no explanation as to why these considerations underpin all decisions to move a young person out of the children's estate or exactly what kind of steps ensure that the legal duties under Article 8 and the UNCRC are met.
- 3.2 The reference to Article 37(c) of the UNCRC does not make it clear that there is no bar in domestic or international law to a young person remaining in the children's estate once they turn 18. Instead, the tone of the entire draft framework is that transitions within one month of the young person turning 18 are normal apart from certain discrete, exceptional circumstances. For instance, paragraph 4.1 provides that a transfer will "*normally occur within one month of a young person's eighteenth birthday except when:*

¹ Answer to FOI 200118002

² https://howardleague.org/wp-content/uploads/2019/02/HL-response-on-transition-from-youth-to-adult-services_2019_02_26-final.pdf

- *the young person has less than one month left to serve before release;*
- *the parole process has started or is about to commence; or*
- *approval has been sought from the YCS to delay Transition so that YCAB approved interventions can be completed before s/he moves into the adult estate.*
- *The full transitional procedure has not yet been completed."*

In order to meet the legal obligations under Article 8 ECHR and Article 37 UNCRC, the process should instead be considering each young person's situation on a case by case basis to see whether they are suitable for transfer once they have turned 18 – not making it automatic unless they fit into a certain category.

3.3 The United Nations Committee on the Rights of the Child has issued a General Comment (2019/24) to make it clear that where a child in detention turns 18, he or she should not be moved immediately:

“92. Every child deprived of liberty is to be separated from adults, including in police cells. A child deprived of liberty is not to be placed in a centre or prison for adults, as there is abundant evidence that this compromises their health and basic safety 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 the Convention – “unless it is considered in the child’s best interests not to do so” – should be interpreted narrowly and the convenience of the States parties should not override best interests. States parties should establish separate facilities for children deprived of their liberty that are staffed by appropriately trained personnel and that operate according to child-friendly policies and practices.

*93. **The above rule does not mean that a child placed in a facility for children should be moved to a facility for adults immediately after he or she reaches the age of 18. The continuation of his or her stay in the facility for children should be possible if that is in his or her best interests and not contrary to the best interests of the children in the facility.”***

3.4 Turning 18 is not a cliff edge. The draft policy as it stands not only presumes transition to the adult estate but also does not elucidate the various circumstances in which it would be highly inappropriate to effect a transfer for a vulnerable young person for reasons of their age alone. It is further confusing that the policy does not make clear that young people serving DTOs should not as a matter of course be transferred to the adult estate when they turn 18 years old.

3.5 It is often best practice is for young people to stay in the children’s estate when they turn 18. This is especially the case while they are on remand. Going through a criminal trial and sentence is extremely stressful and it will rarely be in a young person’s best interests to be moved to the adult or young adult estate where the conditions are harsher and the support much reduced at this time, especially in light of all the evidence that young people continue to mature and develop beyond the age of 18, as recognised by the Lord Chief Justice in the case of *R v Clarke* [2018] EWCA Crim 185.

3.6 The harm is illustrated by the case of Andrew³, a young person the Howard League assisted who was placed in the children's estate and spent a year on remand awaiting trial for a

³ All names have been changed.

serious offence but transferred to an adult prison shortly after his 18th birthday and just three weeks before his trial began. This was not in his best interests as a vulnerable young adult dealing with the stress and anxiety of an impending criminal trial. These issues were not taken into account in the decision to move him. By contrast, another young person the Howard League assisted was due to move between his conviction and sentence but was permitted to remain in the children's estate until he was sentenced and in order to enable his pre-sentence report to be completed and for a planned transition to take place.

- 3.7 The policy should clearly specify that there no legal bar to a young person remaining in the children's estate if it is in their best interests, but that each case must be considered individually as to whether transfer is suitable. Transition should not be presumed and children should be provided with sufficient support and notice to explain why they might wish to stay in the children's estate.

4. Involving the young person and key people – procedural fairness

- 4.1 The guidance acknowledges at paragraph F2 that a local transitions policy must include active engagement with the young person. There is also a requirement at paragraph 3.13 that "*Sentence/remand planning and review meetings involve and prepare the young person and their parents/carers/social workers in transition planning...This should include exploring any specific needs or anxieties with the young person to ensure concerns are addressed*".
- 4.2 The key to any successful transition is that a child or young person feels like they have been listened to and treated fairly. The policy should go much further to enshrine the principle of active engagement with young people at the point of transition.
- 4.3 It is not sufficient to include only broad guidance and a general requirement of involvement. The guidance should spell out that the child or young person must be fully involved in every stage of the process. It is not enough to require an "exploration" of the young person's specific needs or concerns. It must be an explicit requirement that the young person's views are taken into account at every stage of the process, both when it comes to planning the transition and as to whether transition happens in the first place. The young person must be allowed to make representations as to whether they are transferred. This is crucial in addressing the issues raised in paragraph 3, and ensuring that Article 8 ECHR and Article 37(c) of the UNCRC are satisfied. They must also be given the opportunity to make representations as to when they are transferred and which prison they are transferred to. It must be mandatory for these representations to be given proper consideration in the decision and planning process. This is all in line with the obligations under Article 12 of the UNCRC, which provides that children must be provided with the opportunity to be heard in matters affecting them.
- 4.4 The need to involve the young person and key professionals in the transition decision and planning is illustrated by the case of Nick, an autistic child with significant health needs and a restraint handling plan following serious concerns about restraints he had been subjected to in the children's estate. He was on medical hold due to his health needs and we had requested that he also remained in the child estate whilst his Education and Health Care Plan (EHCP) was updated to ensure a transition was properly informed. His operation was cancelled but this was not communicated to him. He was then transferred to the adult estate without warning and without suitable planning being effected prior to the move. Of significant

concern was his transition plan which made no mention of his EHCP, health needs or restraint handling plan.

- 4.5 It is crucial that the involvement of the young person is given greater primacy and emphasis in the draft framework to enable specific issues to be raised and addressed as part of the planning process.

5. Early planning to ensure a smooth transition

- 5.1 Early planning is essential to ensure a smooth transition. The policy does not set out any specific timelines for when elements of the transition process need to be completed by (it simply states it must begin six months prior to the young person's 18th birthday). There is a risk that if it begins late or is not resolved close to the 18th birthday, then it will be rushed. There should be a clear period during which transition planning takes place once a decision has been made as to where a young person will go.

- 5.2 The draft framework also does not provide specific examples of what should happen before transfer takes place. This should include visits from key staff the new prison. Visits from a member of staff of the receiving prison are suggested in paragraph 3.25. However, these should be a mandatory part of the process, again with a specific timeframe for when they should happen. Further, steps should be taken before transition to ensure that relationships with changes in external agencies such as probation and social care are firmed up. It may also be sensible to offer young people with the opportunity to visit the receiving prison before transferring, especially if they have specific needs or vulnerabilities. At present, the planning guidance is too vague.

- 5.3 The damaging effects of failing to plan properly can be seen in the case of Sarah, a young person that the Howard League represented. Sarah was sentenced for a non-violent offence when aged 17 and 7 months. She was pregnant at the point of sentencing and gave birth to her baby in custody. She was transferred when she was 18 years old and not given the opportunity visit the receiving prison beforehand. The transition planning took place in such a way that she had no idea about the reality of the receiving mother and baby unit or what her life would be like there. She had been given the impression that she had to move because of her age and was only too happy to accept the transfer to a prison with a mother and baby unit to avoid the possibility of being separated from her baby. When she arrived she was very distressed. No consideration had been given to the fact that the unit was not geared towards young people and she was surrounded by much older women with whom she had nothing in common. Staff levels were low and she became very distressed about the childcare provisions. As she had already left the children's estate we advised her that it would be much harder to argue that she should return. She was frustrated that the reality of the situation had not been made clear to her before she willingly accepted the transfer.

6. Absence of a mechanism for challenge

- 6.1 The current guidance fails to set out any mechanism by which a child or young person can challenge or dispute a decision about transition planning. This is contrary to procedural justice and Article 12 of UN Convention on Children's Rights. There is a clear and actionable right available in law for children and young adults to dispute decisions that they feel do not

take into account relevant information or have not been made in accordance with their best interests.

- 6.2 Fairness requires that this process is not only obvious and open to children and young people in contact with specialist lawyers: it should be embedded into the policy so that children and young people are aware that they can ask to participate in multidisciplinary meetings, along with a professional or adult of their choice, and can challenge the resulting decision.

7. Concluding observations

- 7.1 As emphasised throughout this consultation response and our previous response in February 2019, the Howard League has come across many examples where young adults have struggled with transfers from the children's estate to the adult estate. This has included instances where the young person has wanted to challenge the decision to transfer itself, as well as the lack of proper support and planning. On several occasions, young people have had difficult and sometimes unnecessarily traumatic experiences. We hope that the revised policy can be further refined to avoid this in the future.

- 7.2 We would be happy to meet with you to discuss this further.

**The Howard League for Penal Reform
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