Howard League for Penal Reform
1 Ardleigh Road
London N1 4HS
Tel: 020 7249 7373
Email: info@howardleague.org
Web: www.howardleague.org

Howard League for Penal Reform's response to the Draft Framework on Early and Late Release for Detention and Training Orders

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1. The Howard League welcomes the opportunity to respond to the Draft Framework on Early and Late Release for Detention and Training Orders.

The stated overall aim is inconsistent with the legal test and purpose of the youth justice system

2. The framework does not acknowledge that the welfare of the child, as well as prevention of offending, is a principal aim of the youth justice system.

3. The draft framework says that the scheme aims to incentivise good behaviour but maintains there is still a presumption that early release will be granted to all eligible children (paragraph 4.13).

4. The framework suggests the release scheme will act as a deterrent. Yet, there is no evidence that deterrence works for children.

5. The concerning shift in tone from the previous guidance risks misleading staff and children about the legal test for early release.

Additional time in prison is contrary to the welfare principle

6. Additional time in custody can never promote children's welfare and is instead likely to cause significant further harm

Undue emphasis on late release

7. The framework is likely to mislead staff and children about the availability of late release. As Holroyde LJ noted in *R(X) v Ealing Youth Court (DC)* [2020] EWHC 800, the legislative provisions for late release had previously been used "very rarely, if indeed at all" (paragraph 11). The guidance should be clear that late release will not happen in anything other than the most exceptional circumstances.

Legal advice

8. The framework needs to be clearer about children's right to legal advice, particularly for children who may struggle to participate effectively in the process (e.g. children with learning difficulties or disabilities).

Resettlement

9. The practicalities of resettlement need to be front and centre in the guidance and flag children's entitlement to legal advice from community care lawyers.

Evidence base

10. The framework is theory-heavy and misuses the concepts of "Child First", constructive resettlement and procedural justice. The framework does not promote these ideas and should not claim that it does. Threatening to keep children in custody for longer can never be child-centred or procedurally just.

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 The Howard League's legal team works directly with children and young adults in prison. We have drawn on our legal work in responding to this consultation.

1.4 The framework risks misleading staff and children about the likelihood of both early and late release. Misleading children about their prospects of release is unethical and is clearly contrary to the principles of "child first" and procedural justice. The framework should be amended so that it clearly sets out the presumption in favour of early release for eligible children and explains that applications for late release will only take place in the most exceptional of circumstances.

1.5 The Howard League would welcome the opportunity to provide further information about any of the points below.

2. The stated overall aim is inconsistent with the legal test and purpose of the youth justice system

Welfare is as important as prevention of offending

2.1 The draft framework appears to be based on a flawed conception of the youth justice system, overly focused on prevention of offending rather than welfare. It highlights that the Crime and Disorder Act 1998 describes the principal aim of the youth justice system as preventing offending by children and young persons (paragraph 1.2). It then goes on to state that the "Youth Custody Service (YCS) will pay due regard to the welfare of children in its care and work with its partners to achieve this aim" and that the "rehabilitation of the child will always be the key driver for the application of the early and late release provisions." The draft framework fails to acknowledge that the welfare principle also underpins the youth justice system and places due regard for welfare as something to be taken into account when fulfilling the primary aim of preventing reoffending. This is flawed. As the Sentencing Council's overarching principles for children state, the two principles, both grounded in law, are of equal importance. Paragraph 1.1 of the Sentencing Council Guidance states:[1]

> "When sentencing children or young people (those aged under 18 at the date of the finding of guilt) a court must have regard to:
> • the principal aim of the youth justice system (to prevent offending by children and young people);and
> • the welfare of the child or young person.

[1] https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-Young-People-definitive-guideline-Web.pdf

The welfare principle can be found in section 44 of the Children and Young Person's Act 1933 and is further reflected in s11 of the Children Act 2004, which directly applies to those responsible for children in prison. The draft framework should acknowledge that the welfare of the child is as important as the prevention of offending. It should also acknowledge, consistent with the welfare principle, that additional time in prison is never consistent with a child's welfare (see below).

Tone of the guidance is based grounded in deterrence, which does not work for children

2.2 The flawed conceptualisation of the system appears to have underpinned the tone and focus of the draft policy. The draft framework says the scheme aims to incentivise good behaviour in custody. It envisions that staff will continually remind children about the possibility of both early and late release, encouraging them to earn early release through their engagement, progress and good behaviour. Paragraph 1.3 states that the "overall aim" of the early and late release provision is to "encourage and motivate children from the point of entry into custody and throughout their custodial journey to proactively engage with their resettlement plans and address their offending behaviours, shifting their identity from pro offending to pro social." Early release will no longer be solely reliant on children's behaviour in custody: it will now also depend on "the child's overall progress and journey towards desistance which contributes to the protection of the public from serious harm" (paragraph 3.1).

2.2 The draft framework assumes that the incentive of early release and the disincentive of late release will shape children's behaviour. This suggests the release scheme will act as a deterrent. Yet, there is no evidence that deterrence works for children

2.3 Decades of criminological research have found little evidence that people rationally consider the consequences of offending before they act (Nagin, 2013; Bun et al, 2020).[2] Young people are especially unlikely to report that they knew and considered the consequences of their behaviour or that their offences were planned (Nacro, 2020; Corrado et al, 2007).[3]

2.4 An extensive body of scientific evidence shows that young people are still developing until their mid-twenties and that the views of their peers are much more influential than potential negative consequences (T2A, 2017; Blakemore, 2018).[4]

2.5 Children are least likely to respond to deterrence when they feel that they are at risk. For example, children who carry knives report that fear and self-preservation matter more to them than the harsh potential penalties (Nacro, 2020).[5] In the Howard League's experience, these concerns are very real for children in custody. As the prison inspectorate has recognised, Young Offender Institutions and Secure Training Centres are antagonistic, unsafe environments where many children feel continually under threat (HMIP, 2020).[6] It is well established that early release with electronic monitoring supports desistence and therefore the presumption is consistent with the aim of preventing further offending. A previous study by the Ministry of Justice examining releases on the similar home detention curfew between January 2000 and March 2006 found that only 2% of the sample of around 63,000 were recalled for committing an additional crime.[7]

[2] https://kilthub.cmu.edu/articles/journal_contribution/Deterrence_in_the_Twenty-first_Century_A_Review_of_the_Evidence/6471200/1; https://link.springer.com/article/10.1007/s00181-019-01758-6
[3] https://3bx16p38bchl32s0e12di03h-wpengine.netdna-ssl.com/wp-content/uploads/2020/01/Lives-Not-Knives.pdf; https://cbr.cba.org/index.php/cbr/article/view/4063/4056
[4] https://howardleague.org/wp-content/uploads/2017/07/Judging-maturity.pdf; https://journals.sagepub.com/doi/abs/10.1177/0963721417738144
[5] https://3bx16p38bchl32s0e12di03h-wpengine.netdna-ssl.com/wp-content/uploads/2020/01/Lives-Not-Knives.pdf
[6] https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2021/02/CYP-report-2019-20-web.pdf
[7] Ministry of Justice (2011) The effect of early release of prisoners on Home Detention Curfew (HDC) on recidivism

Tone of guidance is inconsistent with the legal test

2.6 The tone of the draft framework presents a huge shift from the existing guidance, which states that young people who meet these criteria will only be refused early release if they display violent, dangerous or destructive behaviour and/or make exceptionally bad progress in custody (YJB Casework Team, 2009).[8] Paragraph 4.13 of the draft framework states that there is still a presumption that all children who are presumed suitable will be granted early release but does not mirror the strong language of the current guidance. Further, the presumption comes after three sections which imply that children must earn release by going far beyond the expectations about satisfactory behaviour set out in the 2009 guidance.

2.7 As the presumption in favour of early release has not changed, the tone of the new framework is misleading. The first three sections of the framework read as though eligible children can no longer expect that unless they make exceptionally poor progress or behave in a violent, dangerous or destructive way they will be granted early release. This represents a significant break with the 2009 guidance and with existing practice. Yet the only practical change to the test for release is that children who are judged to "present an unacceptable risk to their victims or members of the public" will now have their applications refused (4.23d). In the Howard League's experience, children are already only granted early release if there is a suitable release plan in place to manage any risk which they pose to themselves or others in the community.

The guidance may risk children being given wrong messages

2.8 The guidance wrongly encourages prison staff to incentivise good behaviour by encouraging children to believe that they are less likely to be released early, or more likely to be released late, even though the presumption has not been removed. The draft guidance as currently framed is unlawful as it is inconsistent with the legal test and, if followed, would see staff acting in ways contrary to the principles of procedural justice by giving children false messages.

3. Additional time in custody can never promote children's welfare

3.1 The framework should be amended so that it does not wrongly suggest that additional time in custody may be beneficial for children. It should instead be clear that, in line with Article 37(b) of the UN Convention on the Rights of the Child, child imprisonment must be used "only as a measure of last resort and for the shortest appropriate period of time".[9]

3.2 The impact of additional time in custody must be considered in the context of a youth custodial estate which is inadequate and unsafe. As the prison inspectorate concluded in its last annual report on children in custody, "none of the STCs were good enough, and violence and self-harm in YOIs remained at or near an all-time high. Only one institution we inspected in 2019–20 was sufficiently safe" (HMIP, 2021).[10]

3.3 It must also be considered in the context of Covid-19. For much of 2020, lockdown restrictions meant that many children were kept in their cells for more than 22 hours a day for months at a time (Howard League, 2020).[11] Lockdown restrictions have eased far more slowly in custody than in the community. Independent Monitoring Boards have

[8] This document is no longer in the public domain.
[9] https://www.ohchr.org/en/professionalinterest/pages/crc.aspx
[10] https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2021/02/CYP-report-2019-20-web.pdf
[11] https://howardleague.org/wp-content/uploads/2020/11/Children-in-prison-during-covid-19.pdf

warned that the restrictions are likely to have a lasting impact on both individual children and the youth secure estate as a whole (Independent Monitoring Boards, 2021).[12]

4. Too much emphasis on late release

4.1 The guidance places too much emphasis on late release. It should be clear that late release will not happen in anything other than the most exceptional circumstances. The guidance should not prompt automatic consideration of late release.

4.2 The Secretary of State can apply to the youth court to delay release on a DTO for either one or two months, depending on the length of the DTO (Powers of Criminal Courts (Sentencing) Act 200, s102(5)). Very few applications have been made. In *R(X) v Ealing Youth Court (DC)* [2020] EWHC 800, Holroyde LJ noted that: "It appears that, before the application to the youth court in the present case, section 102(5) of the PCC(S)A had been used very rarely, if indeed at all" (paragraph 11).[13]

4.3 The guidance on late release has treated it as an exceptional matter which should not be used as a tool for behaviour management. In 2000, a joint circular from the Home Office, the Lord Chancellor's Department and the Youth Justice Board described late release as a "serious sanction" involving "extended loss of liberty". The circular stated that recommendations for late release should not be used as a disciplinary sanction (Paragraph 2.78 of Joint Home Office/LCD/YJB circular: the detention and training order, 9 February 2000).[14]

4.4 Further (interim) guidance on late release was published in 2002 and 2009. It stated that late release "should only be used in the most exceptional circumstances" and that it was "not appropriate if the young person has merely failed to perform satisfactorily against their training plan, or has been involved in disruptive behaviour. These concerns should be reflected by the young person not being granted early release" (YJB Casework Team, 2009).[15]

4.5 The draft framework instead suggests that children should be reminded about the possibility of late release throughout their time in custody, that "[e]arly and late release should be understood as being on a continuum" and that staff should routinely consider both possibilities. This normalisation of late release is both concerning and, like the sections about early release, misleading. Applications for late release continue to depend on judgments in the youth court and are in practice unlikely to be made or to succeed very often. As Holroyde LJ confirmed in *R(X) v Ealing Youth Court*, "we anticipate that applications and orders pursuant to section 102(5) will continue to be rare" (paragraph 47).[16]

4.6 *R(X) v Ealing Youth Court* was an exceptional case where the High Court refused permission for judicial review in respect of a late release order imposed on a young adult. The Secretary of State had applied for late release outside of the guidance, based on the exceptional circumstances that:

> "the National Probation Service assess you to pose a high risk of harm to yourself and to the public should you be released [at the mid-point]. This is because it is assessed that you are vulnerable to grooming due to your psychological risk factors, in light of in combination with [sic] your conversion to Islam, your previous association

[12] https://s3-eu-west-2.amazonaws.com/imb-prod-storage-1ocod6bqky0vo/uploads/2021/06/YOI-annual-report-2019-20-for-circulation.pdf
[13] https://www.judiciary.uk/wp-content/uploads/2020/04/X-v-Ealing-Youth-Court-judgment-approved-final-as-handed-down-on-03.04.20.pdf
[14] This document is no longer in the public domain.
[15] This document is no longer in the public domain.
[16] https://www.judiciary.uk/wp-content/uploads/2020/04/X-v-Ealing-Youth-Court-judgment-approved-final-as-handed-down-on-03.04.20.pdf

with TACT offender Sudesh Faraz/Amman, and the recent terrorist attacks at Fishmongers' Hall, Whitemoor Prison and in Streatham" (§6).[17]

4.7 The National Probation Service had planned out a targeted intervention programme for the applicant to complete if he spent an additional two months in custody. The youth court ordered late release on the grounds that the young person posed a serious risk to the public and that there was "a realistic prospect that the risk would be reduced by further rehabilitative work which could most effectively be carried out in custody" (§47).[18]

4.8 It is concerning that Paragraph 4.62 of the framework appears to generalise from a distinct and extremely rare case, describing late release as a public protection measure and stating that it "should be reserved for children for whom an extension of the custodial portion of the sentence is likely to have a positive effect on their reintegration or rehabilitation". As explained above, additional time in custody is extremely unlikely to have a positive effect on a child's reintegration or rehabilitation and is far more likely to cause significant and lasting harm (Gooch, 2016).[19]

4.9 As *R(X) v Ealing Youth Court* shows, the youth court can already grant late release in exceptional cases which fall outside of the operational guidance. Indeed, Holroyde LJ held that:

> "If Parliament had wished to set specific criteria for the exercise by the youth court of that power [to grant late release] it could, and in our view would, have done so … Parliament has in our judgment conferred on the youth court an unfettered discretion to make an order for late release" (§45). [20]

Exceptional cases are better left to the discretion of the judiciary. They should not and cannot be pre-emptively addressed in operational guidance. The guidance is instead likely to have a more general and unintended impact on other children who are serving DTOs.

5. Staff and children should be aware that children have a right to legal advice

5.1 Children should be encouraged to seek legal advice if they wish to challenge a refusal to grant early release or if the Secretary of State is applying to the court for late release.

5.2 It is concerning that solicitors are not included in the list of professionals who can support children to appeal if they are denied early release (paragraph 4.50). The list should be amended to include lawyers for children. While many solicitors will cease to have involvement with children once their criminal case ends, the Howard League's specialist free legal service is available to all children in custody and advises children on early release issues.

5.3 Whenever late release is discussed with children, including at entry to custody and in review meetings, staff should explain that late release requires an application to the youth court and that children are entitled to legal advice if this happens.

5.4 The framework should explain that children who are presumed unsuitable for early release are still eligible to apply. Staff should explain this to children and should

[17] https://www.judiciary.uk/wp-content/uploads/2020/04/X-v-Ealing-Youth-Court-judgment-approved-final-as-handed-down-on-03.04.20.pdf
[18] https://www.judiciary.uk/wp-content/uploads/2020/04/X-v-Ealing-Youth-Court-judgment-approved-final-as-handed-down-on-03.04.20.pdf
[19] https://onlinelibrary.wiley.com/doi/abs/10.1111/hojo.12170
[20] https://www.judiciary.uk/wp-content/uploads/2020/04/X-v-Ealing-Youth-Court-judgment-approved-final-as-handed-down-on-03.04.20.pdf

encourage them to seek legal advice if they wish to apply but are unsure about the process.

5.5 Many children in custody will struggle to effectively participate in decisions made about them without additional support. More than eight in ten children in custody are assessed as having mental health issues and 77 per cent are assessed as having difficulties with speech, language and communication (Ministry of Justice, 2021, Table 1.1d).[21]

5.6 It is especially important that children who may struggle to participate are encouraged to seek legal advice, not least because they may also be disproportionately penalised for their level of engagement with the custodial regime. The framework mentions that staff should factor any identified special educational needs into decision-making, but it does not explain how they are meant to do this. It should be amended to explicitly state that children will not lose out if they do not take up opportunities or engage with the regime because of their mental health or any learning difficulties/disabilities.

7. The practicalities of resettlement should be front and centre

7.1 The framework erodes certainty about when children will be released, which will make it harder for professionals to plan effectively. For example, children's services have to pay retainer payments to hold placements for children's expected release dates. If the release date becomes increasingly uncertain, there is a risk that either placements will not be held (which would breach the statutory duty for local authorities to provide accommodation for children in need) or public money will be wasted on unnecessary payments.

7.2 The deadline for confirming a release address should be earlier than the deadline for making a decision about early release (4.60), to encourage local authorities to secure accommodation in a timely way. The Howard League often advises and represents children who are eligible for or about to be released but who do not have suitable accommodation in place. Children are entitled to instruct a community care lawyer to help them in this situation and the guidance should expressly flag this. The Howard League has produced a guide to support custody caseworkers to support children to access legal advice in respect of their community care needs as and when it is required.[22]

8. The framework is theory-heavy and misuses key concepts

8.1 The framework should be a practical and user-friendly document for front line staff, children and their advisors and carers. The first three sections are overly theoretical and should be shortened. Readers are only told about how release is administered in practice from section four onwards.

7.2 Though Section 3 is titled "Evidence", it is in practice closer to a list of policy principles. It does not include any research evidence which supports the aims of the framework itself (for example, evidence about whether and how children are likely to respond to a "carrot and stick" behaviour framework).

7.3 The framework claims that the policy "embeds, and draws out the key principles of procedural justice and constructive resettlement" (3.3). The framework also claims to

[21] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/956054/experimental-statistics-assessing-needs-sentenced-children-youth-justice-system-supplementary-tables.xls
[22] https://howardleague.org/publications/supporting-children-from-custody-into-the-community/

adopt a “Child First” approach – prioritising the best interests of children, promoting their strengths and capabilities, encouraging their active participation and promoting minimal intervention and a childhood removed from the justice system (1.13).

7.4 As explained above, the draft framework understates the presumption in favour of early release for eligible children and overstates the likelihood of late release. This clearly contradicts the principles of procedural justice and is neither transparent nor fair. Similarly, threatening children with additional time in custody does not promote their best interests or a childhood removed from the justice system and consequently cannot be child first.

7.5 The framework cites the Youth Justice Board document *How to make resettlement constructive*, which seeks to embed the lessons from a six-year programme of research carried out by the Beyond Youth Custody partnership (Youth Justice Board, 2018).[23] The research found that resettlement services failed to support children’s shift in identity, but that this was a crucial part of children’s desistance from offending.

7.6 The framework misuses the research on constructive resettlement by shifting responsibility for desistance onto children in the way it presents the test for early release, rather than requiring services to provide more effective support. Time spent under supervision in the community is far more likely to help a child to change how they see themselves than additional time in custody.

9. Conclusion

9.1 The draft framework is based on flawed assumptions about the youth justice system, children’s behaviour and the effectiveness of deterrence. However, the presumption in favour of early release has not changed and is instead buried pages into the document. The draft should be amended to accurately reflect the presumption in favour of early release and the exceptional nature of late release, to take the practicalities of securing accommodation and support into account and to inform children about their right to legal advice.

9.2 The draft currently fails to do justice to the concepts of child first, procedural justice and constructive resettlement. Either these concepts should be removed or the framework should be changed to promote transparency, fairness, minimal intervention and children’s desistance in the community.

The Howard League for Penal Reform
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[23] https://yjresourcehub.uk/custody-and-resettlement/item/610-how-to-make-resettlement-constructive-yjb-document.html