Howard League for Penal Reform

1 Ardleigh Road
London N1 4HS
Tel: 020 7249 7373
Fax: 020 7249 7788
Email: info@howardleague.org
Web: www.howardleague.org

Howard League for Penal Reform's submission to the Independent Review of Legal Aid

October 2020

Summary

1. Since 2002 the Howard League has provided a legal service for children and young people in prison.

2. The Howard League has used the availability of judicial review as a mechanism for getting local authorities to adhere to national legislation on behalf of children who need accommodation, care and support.

3. These cases have resulted in young people receiving suitable accommodation, care and support to help them turn their lives around. The vast majority of cases never get to Court: the threat of legal enforcement through judicial review is usually enough to ensure local authorities comply with the law.

4. The Howard League has used the experiences from its legal work to develop materials to support professionals responsible for supporting young people to help avoid the need for legal action.

5. On only two occasions in the last 20 years has the Howard League brought cases as a charity in its own name. These cases have led to significant changes in the law that have helped to ensure children have the right to feel safe in prison and to ensure vulnerable people in prison can access legal advice.

6. Judicial review is an extremely important way of ensuring the law set by Parliament is adhered to, as well as improving and developing the law.

7. Any changes to judicial review should be approached with extreme caution and should be subject to full public scrutiny.

Chair: Professor Fergus McNeill Chief Executive: Frances Crook OBE Charity No. 251926 Company limited by guarantee No. 898514
The Howard League for Penal Reform works for less crime, safer communities, fewer people in prison

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 and this submission draws on the legal work of the charity.

2. The availability of judicial review as a means of enforcing national law at a local level

2.1 The Howard League has used the availability of judicial review as a mechanism for getting local authorities to comply with national legislation on behalf of children who need accommodation, care and support. We have represented hundreds of children and young people who have been failed or overlooked by local authorities at a time when they have desparately needed support they are legally entitled to under the Children Act 1989 to turn their lives around. On occasion, we have had to bring judicial reviews that go to a full hearing to protect individual young people.

2.2 However, the vast majority of our cases never get to Court: the threat of legal enforcement through judicial review is usually enough to ensure local authorities comply with the law.

2.3 Take for example a case the Howard League team worked on in recent weeks concerning a child who had been remanded to a prison pending his trial during the Covid pandemic. The child was on a full care order and there was no doubt that he was entitled to accommodation and support. His youth justice worker considered he could be managed safely on bail in the community and had put together a robust community package of monitoring available to him. He was one of the children that is referred to in the Government White Paper, Smarter Sentencing, which accepts that too many children are remanded to custody and aims to reduce the use of unnecessary remands. However, his social worker had failed to provide him with anywhere to live. He told us that he had been told he would be "better off" in prison. The Howard League wrote to the local authority setting out the law and made it clear that if the local authority failed to comply with its duties, the legal team would have no choice but to send a formal letter before claim in contemplation of judicial review proceedings. Within a few days, accommodation was found and he was released on bail. Another recent case, in which the Howard League lawyers secured a similar result, concerned a child who had been remanded for ten months at a cost of tens of thousands of pounds: he had also not been granted bail as he had nowhere suitable to live.

2.4 The power of judicial review means that when the Howard League lawyers write on behalf of individual children, local authorities know they must comply with their legal duties and if they do not, they risk being taken to court.

2.5 The Howard League has used the experiences from its legal work to develop materials to support professionals responsible for supporting young people to help avoid the need for legal action. For example, the Howard League has produced a comprehensive guide to the law around resettlement and a custody caseworker toolkit to help professionals in prisons understand the law and how to maximise the chances of it being enforced. These publications are freely available on our website and we have provided workshops to professionals in custody to assist them in understanding how to use them to best effect.

3. The importance of civil society organisations being able to bring judicial reviews

3.1 On only two occasions in the last 20 years has the Howard League brought judicial review cases that went to a full hearing as a charity in its own name: the Howard League Children Act case (The Queen (on the Application of the Howard League) v Secretary of State for the Home Department and the Department of Health [2003] 1 FLR 484) and a case about the scope of legal aid for people in prison (R (Howard League for Penal Reform and The Prisoners' Advice Service) v The Lord Chancellor [2017] EWCA Civ 244).

3.2 These cases led to significant changes in the law that have helped to ensure children have the right to feel safe in prison and to ensure vulnerable people in prison can access legal advice.

3.3 In the Children Act case, the Howard League successfully utilised judicial review to challenge the legality of a policy that stated that the Children Act 1989 did not apply to children under 18 years of age held in Young Offender Institutions. The court was entirely satisfied that the Howard League was the appropriate body to bring the case. Mr Justice Munby (who later became President of the Family Division) stated: *"It is not disputed by the defendant that the Howard League has a "sufficient interest" in the matter so as to give it locus to make the current application".*

3.4 As a result of this judicial review, children in prison are legally entitled to full rights under the Children Act 1989. The positive impact of this case has been extensive. For example, the 'Working Together Guidance' introduced in 2006 requires every prison to have a child protection protocol and mechanisms to ensure child protection and the welfare of children in custody. Later, social workers were introduced to Young Offenders Institutions to help prisons to adhere to the requirements of the Children Act.

3.5 The second case that the Howard League brought in its own name was a case about the availability of legal aid for people in prison. In 2013, the then Lord Chancellor, Chris Grayling, removed virtually all legal aid for prisoners, except for direct release parole hearings and prison discipline hearings where extra days can be added.

3.6 The Howard League, along with the Prisoners' Advice Service, issued a judicial review in 2013 to challenge these cuts. The Howard League runs a specialist legal service for children and young adults in prison, the only national front line service of its kind. Calls to our advice line have increased by 62 per cent since the cuts came into force in December 2013, placing

a huge burden on the charity. The cuts coincided with record high prison numbers, self-injury and suicide rates.

3.7 In the course of the case the government conceded that legal aid could be available for certain types of cases upon application through the existing exceptional case funding scheme and the Court of Appeal ultimately found in favour of bringing back a number of other areas of work into scope, including pre-tariff reviews by the Parole Board, Category A reviews, and decisions to place people in deep custody (special units within prisons).

3.9 In each of these cases very careful thought was given to the appropriateness of the Howard League bringing the cases in its own name. In each case, it was a significant risk to the organisaiton but considered appropriate. In the case about the Children Act, the matter was a pure point of law that affected all children and it was clearly the right thing to do as a matter of principle. In the prison law case, it was a systems challenge: had we decided not to step in, many individual claimants who were directly affected would have likely had to bring individual cases. By working alongside Prisoners' Advice Service we were able to marshall the evidence and provide a coherent and clear overview to the court of the arising issues.

4. Concluding observations

4.1 Judicial review is an extremely important way of ensuring that the law is improved and developed and that the most vulnerable in our communities get what has been legislated for.

4.2 Any changes to judicial review should be approached with extreme caution and should be subject to full public scrutiny.

The Howard League for Penal Reform
October 2020