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# Youth Crime briefing

## Children in custody: local authority duties, responsibilities and powers

the Howard League for Penal Reform

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### Introduction

This briefing clarifies the duties and responsibilities of key agencies with regard to children and young people who are detained in custody in the youth justice system in England and Wales. It describes the statutory and regulatory provisions that apply in recent case law. In particular, the briefing turns to case law relating to the duties of local authorities, mainly through their social services departments, and how this impacts on the work and approach of youth offending teams and secure estate facilities.

Many of the cases that have added clarity, perhaps most notably the 'Munby judgement', have resulted from the activities of the Howard League for Penal Reform. This briefing draws substantially from a recently published article detailing recent judgements and the responsibilities and duties of local authorities toward children and young people in, and leaving, custody.<sup>1</sup> The Howard League has established a legal department for supporting children and young people who might otherwise not challenge decisions and actions that have great impact on their lives, welfare and liberty (see Appendix 2 for detail and contact arrangements).

The main points addressed in this briefing are:

- the application of the *Children Act 1989*<sup>2</sup> to children and young people in custody
- the responsibilities of different agencies with regard to assessment of need, reviewing and planning for children and young people in, and leaving, custody
- duties and responsibilities regarding children and young people who enter the secure estate having previously been looked after under s20 of the *Children Act 1989*

- provisions for children and young people in, and leaving custody, who are compulsorily looked after under care orders (or remanded to local authority accommodation with a secure requirement)
- provisions for children and young people (and young adults) who qualify for support under the terms of the *Children (Leaving Care) Act 2000* and the related regulations<sup>3</sup>
- the provision of services and supports for children and young people on their release
- decisions to provide support and/or services under either s17 or s20 of the *Children Act 1989*
- tensions between the provision of housing or accommodation (for those aged 16 and over) under the terms of the *Children Act 1989* and the *Children (Leaving Care) Act 2000* on the one hand, and the *Housing Act 1995* and the *Homelessness Act 2002* on the other
- in particular, the duties and responsibilities of local authority social services departments.

Recent case law has shed light on these issues and, in many cases, has indicated that some local authorities have been found wanting with regard to the proper application of the law in meeting the needs of children and young people in and leaving custody. This has amounted to 'side stepping' duties and responsibilities.<sup>4</sup>

### The statutory and regulatory framework

#### Custodial facilities

There should be a range of facilities for detained children in order to meet complex needs close to home. However, at present, the three main types of facility making up the secure

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juvenile estate are not subject to common legal frameworks or standards. What is therefore a complex legal and regulatory framework for the detention of children is exacerbated by the range of custodial facilities in which placements may be made, with different profiles regarding the status of the resident and the standards and regulations that apply.

The Youth Justice Board for England and Wales (YJB) is responsible for commissioning and purchasing places in the juvenile secure estate and spends over two thirds of its budget in this way. The YJB is also responsible for arranging placements for individuals across England and Wales. There are three main types of facilities in which children and young people who lose their liberty under criminal law are held:

- Secure children's homes
- Secure training centres
- Young offender institutions

Secure children's homes are mainly provided by local authorities, although they can be provided by the private or voluntary sector (there are none of the latter at present). These units are expensive, being small and with high staff to child ratios. They are regulated under the *Children Act 1989* and related regulations. Although children of all ages may be placed in secure children's homes, those arriving through a criminal law pathway are normally males and females aged between 10 and 15, together with older females for whom other facilities are limited. This is also the venue for children who are detained subject to secure accommodation orders under s25 *Children Act 1989* for 'welfare' reasons<sup>5</sup> and for some whose detention is transferred from the police to the local authority pending a court hearing.<sup>6</sup>

Secure children's homes are subject to inspection by the Commission for Social Care Inspection.

It is rarely noted that secure accommodation orders are available all for children and young people aged from 10 to 16 (inclusive) who are refused bail and where the statutory criteria are met. Such orders are made on the application of a local authority and provide better arrangements in the context of children's rights (particularly regarding looked after child arrangements and periodic review of detention criteria) than those who are remanded with a security requirement (normally referred to as a court ordered secure remand (COSR)) or, even more so, those aged 15 and over who are remanded in custody (who do not even gain looked after status and who are placed in prison service facilities). The reasons for the low use made of secure accommodation orders of this sort is not clear although it is a more time consuming court process and incurs a high financial cost on the local authority that makes the application (placements are largely paid for centrally in the case of COSR and remands in custody). There may, therefore, be cases which are in tension with children's human rights not taking full account of the best interests of the child.<sup>7</sup>

Secure training centres (STCs) are larger facilities run by profit making private companies. Apart from some older females, the population is mainly below the age of 15 on placement. These units, like secure children's homes, are expensive. Children are placed subject to

custodial sentences under which they do not gain looked after status. However, and something of an anomaly, children who are held under a COSR, and who therefore gain looked after status automatically, can be held in STCs. This provision was introduced under s133 of the *Criminal Justice and Police Act 2001*. It stands alone in the context of the placement of looked after children not being regulated by the Children (Secure Accommodation) Regulations. As such, it can be contrasted with the intentions of the *Care Standards Act 2000* which established a principle that all looked after child placements should be registered and inspected in accordance with the Children Act. STCs are governed by the Secure Training Centre Rules made under s47 of the *Prison Act 1952* and, like secure children's homes, are inspected by the Commission for Social Care Inspection (not statutory in the same way as secure children's homes). National Standards for Youth Justice (2004) provide a number of minimum standards for the regimes in both STCs and secure children's homes.

Young offender institutions (YOIs) are prison service facilities holding the large majority of children and young people in custody, mainly 15 to 17 year old males together with some facilities dedicated to a smaller number of older, 17 year old, females. YOI places are less expensive (but still very costly) than secure children's homes and STCs but tend to be much larger, with low staff to child ratios. It is well documented that conditions are less than satisfactory in many respects. Children may not be placed in YOIs if subject to COSR or secure accommodation orders. Thus, YOIs detain those subject to custodial sentences and remands in custody. Thus, no child or young person sent to a YOI on sentence or on remand is automatically a looked after child. The question of the status of those who were looked after children prior to being sent to a YOI is addressed below.

YOIs operate under the Young Offender Institution Rules 2000 made under s47 of the *Prison Act 1952* and the (amended following the 'Munby judgement') Prison Service Order 4950.<sup>8</sup> They are inspected by HM Inspectorate of Prisons.

Smaller numbers of children and young people are detained through criminal proceedings under the *Mental Health Act 1983* and may face similar difficulties regarding provision of support and services as do others in the context of this briefing.<sup>9</sup>

## Sentencing and remand: legal status

Children and young people are detained in secure accommodation subject to a variety of orders. Those dealing with remand periods are:

- Secure accommodation orders
- COSR
- Remand in custody for males aged 15 and 16 (under children and young persons legislation)
- Remand in custody for males and females aged 17 (adult legislation).

Of these, secure accommodation orders and COSRs automatically result in looked after status and placement in secure children's homes or, in the case of the COSR, in STCs.

Those remanded in custody (as 'children or young persons') are males aged 15 and 16 and are overwhelmingly assessed as being vulnerable in such

settings. The law (*Children and Young Persons Act 1969*, as variously amended) requires the making of a COSR, rather than remand in custody, if the court has formed an opinion that the young person is vulnerable (in prison) unless there is no placement in secure accommodation available. This is invariably the case, resulting in placement in a YOI with no looked after status. This is something of a lottery with a lack of parity between similar cases and a stark contrast in terms of conditions experienced and looked after status. Such remand in custody placements are, in practice, not returned to court for regular review of placement availability.

It is a concern to Nacro and many other children's charities and penal reform organisations that all males and females aged 17 are remanded in custody under adult legislation, thus not being treated as 'children' and in clear tension with children's rights obligations and recommendations to the UK from the United Nations Committee on the Rights of the Child.<sup>10</sup>

Custodial sentences may be determinate or indeterminate (in duration). None of them result in looked after status regardless of the type of facility concerned:

- Detention and training orders (DTO) are determinate sentences of between 4 and 24 months for those aged from 12 to 17 (criteria differ according to age). Males aged 15 and over are normally placed in YOIs.
- Long term detention under s91 *Powers of Criminal Courts (Sentencing) Act 2000*, a determinate sentence for very serious and grave offences for all age groups from 10 to 17 inclusive.
- Extended sentence under s228 *Criminal Justice Act 2003*, a determinate sentence applying to 'dangerous' offenders of all age groups from 10 to 17 inclusive.
- Detention for public protection (a 'preventive sentence'<sup>11</sup>) under s226 *Criminal Justice Act 2003*, an indeterminate sentence applying to 'dangerous' offenders of all age groups from 10 to 17 (inclusive)
- Detention for life under s226 *Criminal Justice Act 2003*, an indeterminate sentence for all age groups from 10 to 17 (inclusive), and
- Detention during Her Majesty's Pleasure under s90 *Powers of Criminal Courts (Sentencing) Act 2000*, an indeterminate sentence for all age groups from 10 to 17 inclusive.

Of these, most attention has been given to those serving DTOs (with regard to duties and responsibilities of different agencies and the application of the *Children Act 1989* and *Children (Leaving Care) Act 2000*). There is clearly a chance of serious neglect of the needs of those serving long and indeterminate sentences that are still being served after attaining the age of 18, particularly as such detention does not clearly 'count' in the context of leaving care eligibility (unless attained prior to being detained). Even in cases that do qualify for leaving care support, there is potential for a young adult to fail to seek, or be offered, services if released.

It might be noted that children and young people (10 - 16 inclusive) may be detained under s38(6) *Police and Criminal Evidence Act 1984* (when that detention may be transferred to the local authority pending a court appearance). This form of detention is to be addressed in a Nacro Youth Crime briefing in the near future.

### Looked after status before, during and after detention

The table below provides a basic overview of the impact on looked after status when a child or young person is detained.

Legal status/event	Effect of detention
Care order	Looked after status remains during and after detention
'Section 20' Children Act 1989	Looked after status ends on either a remand in custody or custodial sentence and is effectively displaced by a COSR. Is not automatically re-instated on release.
Remand to local authority accommodation with a secure requirement (COSR)	Compulsorily looked after for the duration of the remand period only. Looked after status ends on either remand in custody or custodial sentence.
Secure accommodation order under s25 Children Act 1989 ('welfare')	Made in criminal proceedings on children already looked after (normally remand to local authority accommodation). The order is linked to the remand period. Looked after status ends with a custodial sentence.
Custodial sentence	No form of detention results in the child or young person becoming looked after. Only those subject to a care order retain looked after status. The few who are detained under the Mental Health Act 1983 do not gain looked after status.
Eligible/relevant child under leaving care legislation	Obligations to young people aged 16 and over who are eligible/relevant children under the Children (Leaving Care) Act 2000 remain during and after detention. Where a child or young person under the age of 16 is looked after at the point of being detained (including in a hospital) and had previously been looked after for the qualifying period (a total of 13 weeks since attaining 14 years), he or she becomes an eligible child on attaining 16 in detention. <sup>12</sup>

It is only those subject to care orders who remain looked after during custodial sentences. Those on remand face a complex range of legal provisions which can seem to be, and sometimes are, unjust. Looked after status can be gained, denied or lost according to age, gender, assessed vulnerability, placement type and availability and the approach of individual local authorities (regarding applications for secure accommodation orders). A set of three case studies, at Appendix 1 below, illustrates the way in which the law is complex and can seriously lack parity between similar cases. The case studies also support the position that social workers should be responsible for looked after children and that YOTs and secure facilities should maintain a high level of expertise

and knowledge within teams to be able to identify those children who are 'in need' (and may have previously been looked after), qualify for services under leaving care legislation and who might need to be accommodated under the *Children Act 1989* on release.

Particular complexities and neglect of duties can arise where a child is subject to long term detention or an indeterminate sentence, particularly where the age of 18 is attained whilst in custody. Some such children may not qualify for leaving care services (some of which are applicable up to the age of 24) despite having been in the 'public care' (the secure estate or hospital) for many years.<sup>13</sup>

## Other provisions

*Despite the legislation, some young people leave the secure establishment without knowing where they will spend the first night. This generates a great deal of uncertainty and worry, particularly where the young person has not lived independently before.*

*Additionally, the lack of an address may mean missing out on early release, since a condition of early release will be the provision of an address.<sup>14</sup>*

The concept of the corporate parent is now well known and has been bolstered by the provisions of the *Children Act 2004* which puts in place many of the developments heralded by the Green Paper *Every Child Matters*. It provides for integrated services for children with improved planning, commissioning and delivery by statutory Children's Services Authorities and partners. The providers of secure accommodation in the juvenile secure estate and YOTs are defined as partners in the context of cooperation to safeguard and promote the welfare of children and young people (not just those who are looked after). The relevant partner agencies must have clear reasons if departing from duties as laid out in statutory guidance.<sup>15</sup> The approach laid down in the statutory guidance includes the need for:

- inter-agency working
- assessments of need (using the *Framework for the assessment of children in need and their families*) carried out with a child centred focus
- clear lines of accountability
- early identification of needs and contingency planning, and
- effective supervision and review of needs assessments and services.

Of particular relevance to children and young people who are detained and not looked after are duties on local authorities to children in need under s17 of the *Children Act 1989* (as amended). These duties apply where a child is assessed as a 'child in need' (as defined in the 1989 Act) and to provide a range and level of services to meet identified needs. High levels of need are certainly apparent and recent research found, of its sample of children and young people in community and custodial settings, some 40% had been abused, 49% had been in care and 71% had a social worker (not a YOT social worker).<sup>16</sup> Children and young people who are detained might all be considered to be 'children in need' and to require assessment accordingly. However, it is apparent that this has not been routinely undertaken.

*Every local authority must take reasonable steps to identify the extent to which there are children in need*

*in their area. Unfortunately, many vulnerable children in custody have not previously been identified as in need, have been identified but not assisted, or have been identified and assisted but their file has been closed as soon as they enter custody. For those who have never been identified, entry to the prison system becomes an opportunity for their needs to be assessed and services provided.*

It is, however, not always clear whether local authorities should provide help and accommodation for children and young people under the provisions of s17 or under s20 of the *Children Act 1989* (under the latter, the child becomes looked after and longer term responsibilities may fall upon the local authority under leaving care arrangements).

Another contentious area has been the relationship between local authority duties under the *Children Act 1989* and homelessness legislation. The YJB has addressed this issue recently:

*Young people involved in the youth justice system are aged between 10 (the age of criminal responsibility) and 17: and each individual can have quite different housing and support needs. Under the Housing Act 1996, local authorities have a duty to ensure that accommodation is available for 10 to 17-year-olds if they are homeless or threatened with homelessness through no fault of their own. Determining which statutory agency is primarily responsible for providing this accommodation depends largely on the young person's age and legal status.*

### **Under the age of 16**

*Children and young people under the age of 16 who are unable to remain in the family home, or stay with relatives, are the statutory responsibility of social services.*

### **16 and 17-year-olds**

*For those aged 16 and over, statutory responsibility for accommodation is determined by the young person's legal status:*

- *social services has statutory responsibility for 'eligible' and 'relevant' children, and for young people who are deemed to be vulnerable and in need under s17 and s20 of the Children Act 1989*
- *the local housing authority has a duty to ensure that accommodation is available for young people aged 16 and 17 who do not meet the above criteria, and who are homeless through no fault of their own.*

*The Homelessness (Priority Need for Accommodation) (England) Order 2002 extended the Housing Act 1996 by adding 16 and 17-year-olds, looked-after children, and those leaving custody to the list of young people whose accommodation is the responsibility of local authorities. However, YOT accommodation officers have raised concerns that these priority-need categories, and other elements of the Order, do not always seem to be properly applied. In some areas, there is considerable uncertainty over whether responsibility for housing individual young people lies with social services or local housing authorities.<sup>17</sup>*

In its work representing over 100 children and young people leaving custody, the Howard League has identified, *inter alia*, a number of examples of poorly met, or unmet, needs:

- Children and young people leaving custody with no support and accommodation, or inadequate accommodation
- Children and young people being directed to Homeless Persons Units or to bed and breakfast (rather than being provided for under the *Children Act 1989*, by social services)
- Failure by professionals to refer cases to social services for assessment of need (under s17)
- Large numbers of vulnerable children and young people not being identified as children in need when detained
- Assessment functions being passed from the social services to the YOT inappropriately
- Children and young people not being eligible/relevant children under leaving care legislation as a result of previous failures by local authorities to accommodate appropriately when required
- Children and young people in custody, being eligible/relevant children under leaving care legislation but not being allocated a personal advisor
- Poor levels of engagement of children and young people in decisions affecting them in and on leaving custody.

A body of case law has emerged (and continues to emerge) that helps to clarify some of the key contentious issues.

### The application of the *Children Act 1989* in prison service institutions

The *Children Act 1989* contains provisions that notionally apply to all children in England and Wales. However, it was not thought to apply to those in prison (and secure training centres). Similarly, the duties of local authorities under the Act were thought to be limited in prisons. Essentially, in law, the provisions of the *Prison Act 1952* were considered to apply exclusively and to supercede other provisions. The Howard League, in what is viewed as a landmark case, brought a judicial review and contended that the *Children Act 1989* should apply in prisons (as it does in local authority secure accommodation).

In the 'Munby judgement' or 'Children Act case'<sup>18</sup> Mr Justice Munby ruled that the Prison Service is not subject to the *Children Act 1989*, but that local authorities have duties to safeguard children and young people held in prison service facilities (and presumably in secure training centres). These duties are subject to the requirements of custody and so, for example, a child would be unlikely to be removed from prison under the *Children Act 1989* for their protection, as might be the case in other settings.

Further guidance was produced on the basis of the case by the YJB, Association of Directors of Social Services and the Local Government Association<sup>19</sup> and the Prison Service had to revise Prison Service Order 4950 dealing with regimes for children and young people to incorporate child protection arrangements.

Subsequently, in 2004, a Local Authority Circular, *Safeguarding and promoting the welfare of children and*

*young people in custody*, was issued detailing responsibilities to children in custody, including action regarding those who were previously looked after under s20 *Children Act 1989*.<sup>20</sup> Importantly, social services should:

- Ensure that they fulfil their statutory responsibilities for contact with any children for whom they have parental responsibility who are placed in custody
- Where they were previously responsible for accommodating a child who is now in custody, or where a child who is now in custody, who was previously looked after by another local authority under s20, now plans to live in their area on release, establish arrangements to promote and safeguard his or her welfare on release.

The Circular requires the local authority to maintain contact by visiting and regularly reviewing care and pathway plans. The authority should facilitate contact by siblings and make appropriate plans in advance of release.

Where the child or young person was accommodated under s20 prior to detention, although he or she is no longer looked after, the local authority should put in place detail of ongoing assessment of needs and arrange services prior to release. Services can include accommodation and resumption of looked after arrangements as appropriate and necessary.

The YJB has also asked local authorities<sup>21</sup> in whose area there is a YOI or secure training centre to ensure that:

- they have agreed local protocols with custodial establishments for referral, assessment and the provision of services to children in custody in line with legislation, guidance and local procedures, including those of the Local Safeguarding Children Board (LSCB).
- the governor of the custodial establishment is invited to be a member of the LSCB
- the LSCB considers what arrangements they require to be put in place in order to safeguard children in custody

The YJB also budgeted for the provision of local authority social workers to work in secure establishments to review:

- services in relation to safeguarding children
- services in relation to looked after children and relevant care leavers
- services where there are concerns that a child is suffering or likely to suffer harm
- services should a young person die in custody or is seriously injured

and to:

- engage with home local authorities and remind them of duties and responsibilities

To help agencies to work together with clear roles and responsibilities and to better understand looked after status and planning, the government commissioned the National Children's Bureau to produce a guide, *Tell them not to forget about us*.<sup>22</sup>

## Assessment to determine need

The duty of local authorities to assess children and young people in detention who are potentially 'in need' under the *Children Act 1989* is now established.<sup>23</sup> Furthermore, a local authority failing to carry out the duty to assess may be given a mandatory order.<sup>24</sup>

It may be that such an assessment leads to identification of the need to plan to accommodate a child or young person on release under s20 *Children Act 1989*. It has also been established that the assessment process is dynamic and should not only assess current need but future imminent need.<sup>25</sup> The same judgement stated that assessments under the *Children Act 1989* should be carried out by social services rather than the YOT – it is a function that cannot be delegated.

## Providing accommodation under s17 or s20

Amendments to the *Children Act 1989* allowed local authorities to assist in the provision of accommodation under s17. This may have resulted in cases where local authorities have chosen to provide services under s17 even where the criteria for looking after a child or young person under s20 are met (using s17 does not result in looked after status and does not 'count' towards leaving care eligibility). The amendment had better intentions, being a response to cases which did indeed fall short of s20 criteria but where the local authority was not properly endowed with the means to provide accommodation support. A Local Authority Circular<sup>26</sup> described some difference between circumstances where providing or supporting accommodation under s17 was appropriate and normally concerned supporting arrangements for children and young people to live with family or kin. But some confusion may have arisen about unsupported young people:

*However, there may be cases where a lone child who needs help with accommodation, but does not need to be looked after, might appropriately be assisted under section 17 ... including help with accommodation ...*

Janes L, Gallagher C and Wise I (2008) note recent case law that clarifies the situation:

*In a recent judgement, Holman J carefully dissected the statutory provisions and LAC (2003) 13 in light of a submission that the circular was erroneous in its guidance about the law in that it suggested that local authorities could 'choose' to accommodate a child under s17 despite the apparent existence of a s20(1) duty: R (H and others) v Wandsworth LBC and others [2007] EWHC 1082 (Admin), 23 April 2007. He noted that the circular's phrasing is misleading, and that it appeared to mislead one of the defendant local authorities in that particular case. He made clear that, once the s20(1) criteria are met, local authorities cannot evade their s20 duty by purporting to classify the child's status as s17 instead.<sup>27</sup>*

The case referred to (the 'Holman Judgement'<sup>28</sup>), established that the essential test is whether the child or young person requires accommodation (in which case s20 is appropriate) or requires help with accommodation (in which case s17 might be appropriate). The case also clarified that a 's20' placement need not be in accommodation such as

children's homes or foster care, and can be alone or (not to be recommended) bed and breakfast.

## Providing accommodation under housing legislation

Accommodation may be provided to young people aged 16 and above (categorised as priority need cases) under the *Housing Act 1996* (as amended). An exception concerns those who are provided for under the *Children (Leaving Care) Act 2000* whose accommodation and financial needs are the responsibility of the local authority, and those who are looked after either under s20 *Children Act 1989* or a care order.

The important rule is that local authorities cannot avoid providing services, where criteria are met, under the *Children Act 1989* by referring the young person to housing services, such as Homeless Persons Units. A recent case, involving the London Borough of Sutton, stated that local authorities should not 'side step' duties under s20 by having young people declare themselves homeless (on release from custody) to obtain state benefits for housing.<sup>29</sup>

A very recent case<sup>30</sup> shed further light on the issue and suggested what should happen with regard to housing authorities and children's social services working together, in essence it is stated that:

- Where a child or young person is a relevant child or the criteria for s20 are met, the children's social services are responsible
- In cases of uncertainty, involving young people aged 16 and 17 presenting to the housing authority, that authority should contact social services who, in turn, should carry out an assessment (a framework for joint assessment is required locally<sup>31</sup>)
- The housing authority should provide interim accommodation during assessment if required (it should also be noted, however, that local authorities should accommodate a child, perhaps younger than 16, pending a s17 assessment if required<sup>32</sup> – similar to practice with unaccompanied asylum seeking or refugee children)
- The judgement noted that provision of housing alone may not be effective without the supports that are needed – needs are often 'over and above a simple roof over her head'
- The judgement noted that, in the particular case, it may have been that the YOT had taken for granted that the case was a housing authority matter, rather than social services
- Young people at the age of 16 and 17 should not be expected to be able to identify and request services themselves, they are often unaware of services and, due to circumstances, may even fail to cooperate.

## Conclusion

It is incumbent on managers and staff working in YOTs, secure facilities and partner agencies to be alert to the duties and responsibilities owed to children and young people in, and leaving, detention. It is not sufficient to merely focus on cases where there is a care order in existence. In many cases, the child or young person may have been in need, but with those needs unidentified, prior to and during custodial episodes. In others, the application of complex leaving care legislation and regulations may have been overlooked

and it is commonly beyond the capacity of the child or young person to be fully appraised of what obligations they are owed. This is particularly likely where a child was detained for an indeterminate or long period and might even attain adulthood in custody. There should be clarity as to the roles of different agencies and professionals in referring, assessing and providing services to children and young people and strong advocacy where there appear to be shortcomings in provision. It is over a decade since Sir William Utting warned of the consequences for children and young people where their welfare does not remain central.

*Finally, there is the impersonal harm wrought by malfunctioning systems and institutions ... affecting whole cohorts of children in ways which might permanently damage their prospects of successful and happy adult lives. The factor common to this malfunctioning is the substitution of other goals – whether of policy, management, administration or professionalism – for the primary objective of promoting the welfare of children.<sup>33</sup>*

## Appendix 1

### Case studies (differences in looked after status in practice)<sup>34</sup>

**Case A** involved a 15 year old female. She had previous convictions and appeared before the court for a serious offence. The court decided that bail conditions did not satisfy the objections to bail, remanded her to local authority accommodation and then decided that the criteria were met to make the remand with a secure requirement (COSR). The order was made and she was taken to a local authority secure unit. She became a looked after child in a facility subject to the *Children Act 1989*.

**Case B** involved a 15 year old male with a similar history and current charge. The court followed a similar legal process but at the last stage, because B was a male, considered whether he would be vulnerable in prison. The court decided that he would, and heard that a place was available in a local authority secure unit. Accordingly, the court made the same order as for Case A and he became a looked after child in the same way.

**Case C** was similar to Case B. The young male was deemed to be vulnerable in prison. However, the court heard that no local authority secure unit place had been identified, remanded him in custody and he was taken to prison. The local authority did not gain any specific duties or responsibilities, he was designated a looked after child and, despite his vulnerability, he was held in a place where the *Children Act* did not clearly apply.

In all three cases the court subsequently declined jurisdiction and the three proceeded to the crown court for trial. The cases each took near to the current average of six months before conviction and sentence. They were each given an 18 month detention and training order.

Case A was taken to a secure training centre, lost her looked after status and was placed in a facility

not clearly subject to the *Children Act*. Case B was taken to prison and remained there for 9 months. He was no longer designated a looked after child. Case C remained in prison for 9 months and was still not a looked after child.

Upon release from the custodial part of their sentences, all three were unable to return to their parental homes and they all agreed (they were by now aged 16) to be accommodated by their respective local authorities. There histories were scrutinised to establish whether they qualified for longer term services under the *Children (Leaving Care) Act 2000*. Cases A and B already qualified due to the period of the secure remand earlier, despite losing looked after status for the subsequent nine months. The local authority was thus obliged to provide comprehensive services to them to help them through adolescence. Case C, however, was never looked after before attaining the age of 16 and did not qualify.

When this was explained to each, A and B could not understand why they had lost looked after status for nine months. C felt aggrieved and discriminated against – it was only the lack of an available placement at a time of remand that made his case different from B's.

## Appendix 2

### The Howard League for Penal Reform's legal work with children<sup>35</sup>

The Howard League for Penal Reform's legal team was established in 2002 following the landmark victory the organisation achieved in the *Children Act* case. The team has evolved and now has a criminal defence (prison law) contract with the Legal Services Commission, for which it has been awarded the Quality Mark. The team provides the only dedicated legal service for young people in custody in England and Wales.

The Howard League for Penal Reform's legal team acts on behalf of young people under the age of 21 in custody.

Young people in custody are amongst the most vulnerable groups in society in terms of accessing justice: they tend to have only come across criminal practitioners who may have limited knowledge of prison law or community care law and tend to remain unaware of their rights and potential legal remedies.

The work of The Howard League for Penal Reform's legal department has provided access to justice for many young people in custody. Not only does the team deal with treatment and conditions inside prison but has increasingly dealt with issues concerning the provision of support and accommodation for children on release from custody, enabling children to leave custody with improved lives that are far less likely to accumulate a "cluster" of legal problems in the future.

The Howard League for Penal Reform operates a Legal Advice Line for practitioners and carers to access. Qualified lawyers are available to answer queries from YOT and social workers, solicitors and barristers, other professionals and concerned relatives or friends of

children in custody. The team are able to offer specialist advice on the law pertaining to children and on prison law. Issues raised include:

- Applicability of the Children Acts 1989 and 2004 and the Leaving Care Act 2000 to children in and leaving prison
- Sentence length and type
- Aspects of the Criminal Law
- Prison Service Orders (eg regime, the use of segregation, access to visits)
- Treatment of juveniles in prison.

For advice on these and other matters, YOT workers, solicitors and family members should call 020 7249 7373 extension 102.

## References

- 1 Janes J. Gallagher C. and Wise I. (2008) *Rights of children and young people in prison to housing and care on discharge*. Legal Action Group
- 2 This Act and others mentioned in this briefing, together with secondary legislation (statutory instruments etc) with many updated according to subsequent amendments, are available on a useful website <http://www.statutelaw.gov.uk/>. Thus, for example, the *Children Act 1989* is available as it has been amended by the *Children (Leaving Care) Act 2000*.
- 3 These are, for provisions in England, the *Children (Leaving Care) (England) Regulations 2001* and, in Wales, the *Children (Leaving Care) (Wales) Regulations 2001*.
- 4 This term was used with regard to a local authority in the case of *R(S) –v- London Borough of Sutton* [2007] EWCA Civ 790in.
- 5 This provision remains the only means by which children aged 10 and 11 may be held on remand.
- 6 Under the provisions of s38 *Police and Criminal Evidence Act 1984*.
- 7 Article 3(1) of the United Nations Convention on the Rights of the Child provides a legal obligation that ‘*in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*’. For detail, visit <http://unhchr.org>
- 8 Prison service order relating to the care of juveniles and now including orders on the relevant provisions of the *Children Act 2004*, LSCBs, local authority social workers in prisons etc. Available at [http://pso.hmprisonservice.gov.uk/PSO\\_4950\\_care\\_of\\_young\\_people.doc](http://pso.hmprisonservice.gov.uk/PSO_4950_care_of_young_people.doc)
- 9 For further detail see for example, Nacro Youth Crime Briefing *Mental health legislation and the youth justice system* (September 2005), available for download at <http://www.nacro.org.uk/publications/YouthBriefings.htm>
- 10 UN Committee on the Rights of the Child, 31st Session, Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations of the Committee on the Rights of the Child: UK. United Nations (CRC/C/15 Add.188), 4 October 2002. Available on <http://www.unhchr.org>
- 11 Detention for public protection is defined as a ‘preventive sentence’. See para 2(5) Schedule 18 *Criminal Justice Act 2003*
- 12 This provision is contained in the *Children (Leaving Care) (England) Regulations 2001* and the *Children (Leaving Care) (Wales) Regulations 2001*.
- 13 For detail of anomalies in law for looked after children and detail of leaving care legislation and practice, see Nacro Youth Crime Briefings, *Looked after children: anomalies in the law and The Children (Leaving Care) Act 2000*, available for download at <http://www.nacro.org.uk/publications/YouthBriefings.htm>
- 14 See YJB website guidance: *Accommodation: Leaving custody or secure accommodation* at <http://www.yjb.gov.uk/en-gb/practitioners/Accommodation/LeavingCustodyorSecureAccommodation/>
- 15 DfES guidance: *Statutory guidance on making arrangements to safeguard and promote the welfare of children under s11 Children Act 2004*. Available at <http://www.everychildmatters.gov.uk/resources-and-practice/IG0042/>
- 16 YJB (2007) *Accommodation needs and experiences*. London: YJB. This publication was based on research by Arnall E., Bateman T., Eagle S., Gammampila A., Patel S. L., Sadler J and Thomas S.
- 17 YJB (2006) *Suitable, Sustained, Supported: A strategy to ensure provision of accommodation for children and young people who offend*. Available at <http://www.yjb.gov.uk/Publications/Scripts/prodDownload.asp?idproduct=307&eP=>
- 18 *R (Howard League for Penal Reform) v Secretary of State for the Home Department and the Department of Health (interested party)* [2002] EWHC 2497 (Admin)
- 19 Association of Directors of Social Services, Local Government Association and Youth Justice Board (2003) *The Application of the Children Act 1989 to Children in Young Offender Institutions*. London: YJB
- 20 Local Authority Circular LAC (2004) 26
- 21 See detail of safeguarding in custody at <http://www.yjb.gov.uk/en-gb/practitioners/ImprovingPractice/SafeguardingandBehaviour/>
- 22 Hart D. (2006) *Tell them not to forget about us*. London: National Children’s Bureau
- 23 *R v Barnet LBC ex p G* [2004] 2 AC 208; [2003] UKHL 57, 23 October 2003
- 24 *R (on the application of AB and SB) v Nottinghamshire County Council* [2001] EWHC Admin 235 [2001] CCLR 295
- 25 *R (K) v Manchester City Council* [2006] EWHC 3164 (Admin)
- 26 Local Authority Circular LAC (2003) 13
- 27 See reference 1 above
- 28 *R((1) H, (2) Barhanu (3) B) v (1) London Borough of Wandsworth (2) London Borough of Hackney (3) London Borough of Islington (Secretary of State for Education and Skills (interested party))* [2007] EWHC 1082 (Admin)
- 29 *R (S) v London Borough of Sutton* [2007] EWCA (Civ) 790
- 30 *R (on the application of M) (FC) (Appellant) v London Borough of Hammersmith and Fulham Respondents* [2008] UKHL 14
- 31 Department for Communities and Local Government (2006) *Homelessness code of guidance for local authorities*. Available at <http://www.communities.gov.uk/documents/housing/pdf/152056>
- 32 This is contained in *Local Government Circular LAC (2003) 13*
- 33 Utting, Sir William (1997) *People Like Us: The Report Of The Review Of The Safeguards For Children Living Away From Home*. London: The Stationery Office
- 34 The case studies are taken from Nacro (2005) *A handbook on reducing offending by looked after children*. London: Nacro
- 35 This information is taken from the website of the Howard League. For more detail of the legal team, referrals and to keep abreast of new judgements, visit <http://www.howardleague.org/index.php?id=lawdeptindex0>