Response to New Custodial Arrangements for Children: Proposals for Consideration

Children's Law Centre
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Introduction

The Children's Law Centre (CLC) is an independent charitable organisation which works towards a society where all children can participate, are valued, have their rights respected and guaranteed without discrimination and where every child can achieve their full potential.

We offer training and research on children's rights, we make submissions on law, policy and practice affecting children and young people and we run a free legal advice, information and representation service. We have a dedicated free phone legal advice line for children and young people and their parents and carers called CHALKY as well as a Live Chat service for young people through REE Rights Responder and a youth advisory group called Youth@clc. Within our policy, legal, advice and representation services we deal with a range of issues in relation to children and the law, including the law with regard to some of our most vulnerable children and young people, such as looked after children, children who come into conflict with the law, children with special educational needs, children living in poverty, children with disabilities, children with mental health problems and complex physical health needs and children and young people from ethnic minority backgrounds.

Our organisation is founded on the principles enshrined in the United Nations Convention on the Rights of the Child (UNCRC), in particular:

- Children shall not be discriminated against and shall have equal access to protection.
- All decisions taken which affect children's lives should be taken in the child's best interests.
- Children have the right to have their voices heard in all matters concerning them.

From its perspective as a children's rights organisation working with and on behalf of children, CLC is grateful for the opportunity to make a submission to the proposals for consideration in relation to new custodial arrangements for children.

Minimum duration of 6 months

CLC's view is that a minimum sentence duration should not apply. CLC would submit that a minimum duration in custody is contradictory to Article 37(b) of the UNCRC, which provides that detention and imprisonment should only be used as a measure of last resort and for the shortest appropriate period of time. It is also contradictory to other international standards, such as Rule 19.1 of the Beijing Rules and Rule 2 of the Havana Rules, as well as the Council of Europe Guidelines on Child-Friendly Justice (Chapt. 4A6, Para. 19). If custody is necessary as a measure of last resort, imposing a minimum sentence duration in all cases removes the ability of the judge to use their discretion to decide the shortest appropriate period of time the child should be in

custody. Rule I.2 of the Havana Rules states that the length of the sanction should be determined by the judicial authority, without precluding the possibility of early release.

We agree that a 'short, sharp shock' option of a few weeks in custody would indeed be contrary to the principle that custody be used as a measure of last resort, however we do not believe that to avoid this it is necessary to have a minimum duration for a sentence. Instead, we believe that the full and correct application of the principle that custody be used a measure of last resort and for the shortest appropriate period of time, supported by widespread and ongoing training as outlined above is the correct and children's rights compliant approach to the use of custody for children and young people.

Maximum duration dependent on age

CLC would submit that whichever length of sentence is chosen as the statutory maximum, the principle that custody should only be used as a measure of last resort and for the shortest appropriate period of time should again be emphasised and applied by the courts when setting the actual period any young person will spend in custody.

Custody/ Community Split

In principle, CLC recognises and accepts that a period of supervision in the community has the potential to support children to reintegrate into society and to prevent them re-offending. Successful reintegration and rehabilitation should be the key objective in dealing with young people who are detained within the criminal justice system. Article 40 of the UNCRC provides that the treatment to be accorded to children in conflict with the law should take into account the child's age and promote the child's reintegration and the child assuming a constructive role in society. The UN Committee on the Rights of the Child General Comment No. 24 on Children's Rights in Juvenile Justice makes it clear that this principle must be applied, observed and respected throughout the entire process of dealing with the child, including within and post custody.[1]

The Havana Rules provide that all children should benefit from arrangements designed to assist them in returning to society, family life, education or employment after release and that procedures, including early release, and special courses should be devised to this end.[2] The Beijing Rules also provide that conditional release should be used by the appropriate authority to the greatest possible extent, and should be granted at the earliest possible time. Children released conditionally should be assisted and supervised by an appropriate authority and should receive full support by the community.[3]

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[1] CRC/C/GC/24

[2] United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules), Adopted by General Assembly resolution 45/113 of 14 December 1990, Rule 79.

[3] United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), A/RES/40/33, 29th November 1985, Rule 28.

CLC note that it is proposed that no more than half of the total sentence duration would be spent in custody before release. CLC would recommend that based on the principle that custody should be for the shortest possible time, that the supervision period should be considerably longer in duration than the custody period.

We wish to emphasise that it is vital that any period of supervision in the community is no longer than is absolutely necessary, given the serious consequences that can flow from failing to comply with supervision requirements. Supervision must be aimed at assisting children with re-establishing themselves in society and ensuring that they are provided with suitable residence, employment, clothing, and sufficient means to maintain themselves upon release in order to facilitate successful reintegration, in line with the Havana Rules.[4] In addition, there must be the provision of other support services which are central to successful reintegration for children upon release, including the provision of benefits, financial support and advice, healthcare services, including CAMHS, and addiction services. In particular, there should be a seamless transition of service provision and education, training and employment opportunities offered to young people upon release from custody. The success of this policy proposal is totally dependent on the provision of these support services which require cross Departmental co-operation. It is therefore imperative that the Department secure such co-operation including in relation to funding from all relevant Departments.

Age applicability

CLC agree that it is a positive position that the courts are not using custody as a sentencing option for younger children.

This very clearly could not and should not be seen as an attempt or an alternative to raising the minimum age of criminal responsibility, as in the absence of raising the MACR children aged 10 – 13 will still be capable of being found liable for criminal offences in the criminal justice system. Even with the proposals that the new order will only apply to children aged 14+, Northern Ireland will still have an unacceptable and extremely low minimum age of criminal responsibility and will still clearly be in breach of international children's rights standards. Notwithstanding the imperative to raise MACR, to ensure some semblance of compliance with International Human Rights obligations CLC note that the new order should only apply to 16+.

In relation to a the new 'youth' order being served at the YOC rather than the JJC if a child turns 18 before or shortly after sentencing, it is CLC's longstanding position, based on international human rights standards, that children (i.e. anyone that has not reached their 18th birthday) should never be detained in Hydebank Wood Young Offenders Centre (YOC). CLC would assert that all children and young people who have been sentenced whilst under the age of 18 should be sent to Woodlands JJC. Upon their 18th birthday, there should be an individual assessment of need, based on the best interests' principle, taking into account factors such as time left to serve,

[4] Ibid, Rule 80.

engagement in a specific education or training course, and their personal vulnerabilities.

Transition/ Transfer to YOC

CLC agrees with the approach that no child serving a custodial order would transfer to the YOC automatically on turning 18, but could stay at Woodlands for up to a further 6 months, depending on factors such as time left to serve, engagement in a specific education or training course, and their personal vulnerabilities.

Supervision in the community

CLC agree that the community element of the new order should be aligned to the current JJCO supervision model with help and support, rather than the more punitive, risk-based licence model which applies to YOC and other adult orders.

It appears reasonable that YJA should undertake this supervision role and CLC welcome the proposal for YJA staff to continue this responsibility even where an individual turns 18 before or during their sentence. CLC welcome any moves to improve support and arrangements for transitioning to adulthood, which are often seen as a cliff edge for young people.

Breach procedures

If a child is found to have breached the conditions for their release, then once again the principles of the best interests of the child and that custody must only be used as a measure of last resort and for the shortest appropriate period of time must be applied.

Article 40(4) of the UNCRC provides that States should ensure that there are a variety of dispositions in place for children in conflict with the law, such as care, guidance and supervision orders, counselling, probation, foster care, education and vocational training programmes and other alternatives to institutional care to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence. The UN Committee on the Rights of the Child General Comment No. 24 on Children's Rights in Juvenile Justice states that a strictly punitive approach is not in accordance with the leading principles for juvenile justice set out in Article 40(1) of UNCRC.[5]

CLC is therefore not in agreement to the change to the current arrangements proposed i.e. rather than a maximum of 30 days in custody for breach, the new provisions would enable the court to send the child back to custody for any length of time, up to the maximum time remaining on their sentence.

Furthermore, a serious and longstanding concern with regard to the imposition of bail conditions on children is the fact that many bail conditions imposed are unrealistic and that children and young people find them impossible to uphold. The Youth Justice

[5] CRC/C/GC/24

Review noted that the imposition of unrealistic bail conditions on children puts them at risk of being set up to fail, particularly where their lives are already chaotic and unsettled. This longstanding issue needs to be addressed as a matter of urgency.

Bail conditions will also only be successful where children and young people are aware of and understand them. All children should be made fully aware of and have sufficient understanding of bail decisions and conditions to allow them to fully participate as is their right under Article 12 of the UNCRC, one of the principles of the UNCRC. We wish to see a statutory duty being imposed upon decision makers to ensure that young people understand bail decisions and conditions. Article 12 of the UNCRC enshrines the right of the child to be heard and actively participate in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body. This is of particular importance when one considers the profile of children who are likely to be subject to bail decisions and conditions, including much higher incidences of mental health problems, special educational needs, learning disability, poor levels of literacy, English as an additional language and disability. It is also extremely important that children and young people understand bail decisions and conditions when one considers the extremely serious consequences of breaching bail conditions.

Repeal of uncommenced Custody Care Order provisions

CLC appreciate that there have been significant reductions in the number of children, particularly in the younger age group, being held in youth custody. We also note that the new type of secure accommodation managed by the health/care sector (proposed in the 2003 consultation) is unlikely to be built due to the costs in building/ creating/ staffing a new facility for so few children.

CLC would disagree with the proposal to repeal uncommenced Custody Care Order provisions. When creating these provisions, Parliament was displaying a clear intention to remove all children under the age of 14 from the criminal justice system. Therefore, the Minimum Age of Criminal Responsibility needs to be raised as a matter of priority, in line with international human rights standards.

Suspended Sentences

CLC believes that children should be provided with community-based interventions, rather than any sentence at all, either suspended or otherwise.

However, CLC would assert that there should be the option to suspend sentences (in very limited circumstances) and that this should apply equally to all under 18s. Failure to allow for this option is discriminatory on the grounds of age.

We consider that if the aims of the youth justice system are amended to make the best interests of the child a primary consideration and if the principle that custody can only be used as a measure of last resort and for the shortest appropriate period of time is

enshrined in legislation, the imposition of community based interventions would be further facilitated and a suspended sentence would be rarely used.

However, we are concerned that to remove provision to suspend a period in custody altogether could unnecessarily fetter the discretion of the courts and result in children being detained in custody for offences which should be dealt with by a suspended sentence. If there is proper guidance, training and awareness-raising around a new statutory principle that custody should only be used as a measure of last resort, then a suspended sentence should only ever be imposed effectively as a measure of last resort, given the seriousness of the consequences that can flow from reoffending during the period of the suspended sentence.

If concerns exist that children on a suspended sentence will not receive adequate support to rehabilitate and reintegrate themselves into their communities and to avoid reoffending, we would suggest that the Department explore this issue as part of taking forward a programme of work on rehabilitation and reintegration, rather than removing the option to suspend a sentence altogether. If the option to impose a suspended sentence is retained, which we believe it should be in the limited circumstances set out above, then the DoJ must ensure that adequate support is provided to children to allow them to comply with the terms of the suspended sentence in line with the Havana Rules. If the child breaches the terms of the suspended sentence consideration must be given as to whether the child was provided with the necessary level of support to allow them to comply with the terms of the sentence, particularly with regard to housing, healthcare, financial support and advice, education, training and employment when determining the reasons why a suspended sentence may have been breached by a young person.

Other custodial sentences

CLC welcome the proposed amendment to the legislation for clarity to ensure that there are no circumstances in which the detention of children alongside adults in Hydebank Wood YOC can take place.

Section 75

CLC notes that there has been no consideration of any section 75 equality duties within this consultation document.

CLC would be grateful if the Department could clarify how it has or intends to fulfil its statutory equality obligations under section 75 of the Northern Ireland Act 1998 in respect of proposals relating to Bail, Remand and Custodial Arrangements for children. This is clearly a policy and therefore subject to section 75 statutory equality obligations. The Equality Commission for NI, in their Guidance for Implementing Section 75 of the Northern Ireland Act 1998 clearly states that:

“Whatever status or label is accorded to an amended or new policy…. The equality and good relations implications must be considered in terms of assessing the likely

impact of a policy and the Commission recommends applying the screening procedure and, if necessary, subjecting the policy to an equality impact assessment."[6]

The Department of Justice is clearly required to assess and consult on the likely impact of proposals contained within the consultation document on the promotion of equality of opportunity. In order to assess the impact of a new policy on the promotion of equality of opportunity among members of the nine section 75 categories, public authorities must firstly screen the policy to determine whether there is potential for adverse impact on any members of the nine groups and where there is potential for adverse impact, an EQIA should be carried out.

The Equality Commission's Guidance for public authorities on implementing Section 75 of the Northern Ireland Act 1998 is very clear with regard to the need for designated public authorities to carry out screening and consideration of undertaking EQIA's on all policies. It states that:

"…effective assessment of the equality implications of a policy includes screening of all policies (see Annex 1 of this Guide) and consideration of undertaking an equality impact assessment… Section 75 is important to policy formulation (new or proposed policies) and policy review (existing policies). It is important that public authorities use the assessment of policies for impact on equality of opportunity, including screening and equality impact assessment, as part of their policy development process, rather than as an afterthought when the policy has been established."[7]

We believe that the failure to screen this consultation document constitutes a breach of the statutory duties under section 75 of the Northern Ireland Act 1998, particularly when the previous consultation (and equality screening) on these proposals was undertaken as far back as 2013. The equality screening therefore needs to be revisited and refreshed to take account intervening years of policy, practice and statistics.

CLC would also highlight the need for direct engagement with children and young people on the proposals contained within this consultation. Such engagement is essential not only in ensuring compliance with section 75, but also in ensuring the Government's compliance with Article 12 of the UNCRC (respect for the views of the child). In examining the government's compliance with Article 12, the UN Committee on the Rights of the Child recommended that the government:

"Establish structures for the active and meaningful participation of children and give due weight to their views in designing laws, policies, programmes and services at the local and national levels, including in relation to discrimination, violence, sexual exploitation and abuse, harmful practices, alternative care, sexual and reproductive education, leisure and play. Particular attention should be paid to involving children and children in vulnerable situations, such as children with disabilities…. [and] ensure

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[6] https://www.equalityni.org/ECNI/media/ECNI/Publications/Employers%20and%20Service%20Providers/S75GuideforPublicAuthoritiesApril2010.pdf

[77] Ibid

that children are not only heard but also listened to and their views given due weight by all professionals working with children."[8]

As age is one of the nine categories specified in section 75 the NI Act 1998, there is a need to consult directly with children and young people in policy formulation and developments on matters which affect their lives. The Equality Commission's Guidance states that consultation must be meaningful and inclusive, in that all persons likely to be affected by a policy should have the opportunity to engage with the public authority. It also states that targeting consultation at those most affected by particular policies is also beneficial, in terms of identifying any adverse impact of policies or proposed policies at the earliest possible stage.

The Equality Commission's Guidance for public authorities on implementing Section 75 of the Northern Ireland Act 1998 states that as part of consultation:

"...specific consideration is given to how best to communicate information to children and young people...".[9]

CLC would therefore seek details vis-à-vis direct consultation with children and young people that the Department has carried out, or intends to carry out in relation to this consultation. CLC would also request copies of any child friendly documentation developed as part of this consultation.

It is incumbent upon us to raise the timeframe for responses to the consultation. Respondents have been given from 7th July 2022 to 5th August 2022 i.e. 4 weeks. The Department's approved Equality Scheme states that:

"The consultation period lasts for a minimum of twelve weeks to allow adequate time for groups to consult amongst themselves as part of the process of forming a view. However, in exceptional circumstances when this timescale is not feasible, for example when implementing EU Directives or UK wide legislation, meeting Health and Safety requirements, addressing urgent public health matters or complying with Court judgements, the Department may shorten timescales to eight weeks or less before the policy is implemented. The Department may continue consultation thereafter and will review the policy as part of the monitoring commitments. Where, under these exceptional circumstances, the Department must implement a policy immediately, as it is beyond our control, it may consult after implementation of the policy to ensure that any impacts of the policy are considered."

As this consultation does not engage any of the exemptions which allow for a reduced consultation period, the required 12 weeks consultation period should have been adhered to, particularly as some of the consultation period covered the July holiday period:

"If a consultation exercise is to take place over a period when consultees are less able to respond, for example, over the summer break, or if the policy under consideration

[8] CRC/C/GBR/CO/5 para 31 (a) and (d)

[9] Ibid

is particularly complex, the Department will give consideration to the feasibility of allowing a longer period for the consultation."

Given CLC's concerns outlined above, we request the Department comply with its obligations under section 75 of the Northern Ireland Act 1998 and their Equality Scheme as a matter of urgency by carrying out a screening exercise on these propsals and if differential adverse impact or ways to greater promote equality of opportunity are identified to carry out a comprehensive EQIA in compliance with the Equality Commission's Guidance and the DOJ's approved Equality Scheme, including direct consultation with children and young people as per the Equality Commission's Guidance.

Conclusion

CLC is grateful for the opportunity to respond to this consultation. We hope you find our comments constructive and useful. CLC are happy to engage with officials on our comments above, if required.