the Howard League for Penal Reform

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Prison Law, Criminal Appeals and Judicial Review

Summary of key responses to Transforming Legal Aid
June 2013

The Ministry of Justice received an overwhelming 13000 responses to its consultation, Transforming Legal Aid. The important changes concerning price competitive tendering have been widely discussed and will form the subject of evidence before the Justice Select Committee on 11 June 2013. The Howard League has produced this summary of responses by key stakeholders in relation to the proposed changes for:

(i) prison law;
(ii) criminal appeals; and
(iii) judicial review work.

The Howard League for Penal Reform

Our response is available on our website[1]. Our consultation response, informed by our legal work with young people in prison, raised key concerns:

> "*As they stand, the proposals are likely to result in consequences that undermine the Ministry's commitment to rehabilitation and progression for prisoners. They are likely to disadvantage children and young people and will act as an effective impediment to access to justice for prisoners. Unless amended, it will be impossible for the Howard League to continue its legal work under the legal aid scheme.*"[2]

We urged the Ministry to rethink these proposals andensure that:

(i) prison law and appeals and reviews work can continue as a standalone contract;
(ii) quality should come first: 'good enough' is not sufficient to protect vulnerable young people and the public;

[1] www.howardleague.org
[2] The Howard League Response to Transforming Legal Aid (The Howard League, 2013), page 9

(iii) at the very least special arrangements should be made to safeguard children and young people;
(iv) judicial review work should remain available to ensure that state abuse of power does not go unchecked and to enable wider change and progress where necessary.

1. Prison law changes

The Parole Board responded to the consultation, stating:

> *"The Parole Board values the very skilled and experienced practitioners who have specialised in prison law andparticular the conduct of parole reviews. The Parole Board recognises the very significant impact which these practitioners have in ensuring the system works as efficiently as possible."*[3]

It highlighted the following concerns:

- The removal of treatment, categorisation and resettlement issues from the scope of legal aid will have a dramatic effect on the ability of the Parole Board to make effective and timely decisions;
- Costs of conducting parole reviews will increase as will the number of offenders who remain in prisons or higher security prisons longer than they might otherwise have needed;
- More cases overall will be referred for a decision;
- Vulnerable groups of prisoners will be particularly affected by the de-scoping of prison law matters from the ambit of legal aid.

The Council of Her Majesty's Circuit Judges (CMCJ) response[4]stated it was **"***gravely concerned about the potential effect of most of the proposals upon access to justice for the most vulnerable members of society.*"[5] It noted:

- The practice of prison law is so unique; its impact on the most vulnerable within society so profound; and the potential savings suggested by these reforms so limited at best, and so obscure in any event, prison law should be removed altogether from the scope of the legal aid reforms;
- The MOJ has failed to identify any estimate of the savings likely to result from reducing the scope of prison law from legal aid;
- The proposal that only bidders which offer a comprehensive criminal legal aid service, i.e. both criminal law and prison law is a "dangerously inappropriate model" as it will lead to the dilution of expertise.

The Association of Prison Lawyers'[6] response is comprehensive and highlights:

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[3] Parole Board Response to the Government's consultation on Transforming Legal Aid (June 2013), page 4
[4] http://www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/response-cocj-legal-aid-consultation-summary.pdf
[5] Response of the Council of Her Majesty's Circuit Judges to the Consultation Paper CP 12/10 'Proposals for Reform of Legal aid in England and Wales' (CMCJ, 2013), page 1
[6] http://www.associationofprisonlawyers.co.uk/wp-content/uploads/2013/06/APL-Legal-Aid-Consultation-Response.Final_.03.6.13.pdf

- The proposals to de-scope prison law from legal aid will mean that many important matters will not be funded, leading to unsafe prisons and communities;
- There is no evidence to support the use of the complaints system as a viable alternative to legal advice and representation;
- The proposal that prison law cases will only be dealt with by firms who have won criminal contracts will end years of specialism and expertise and will prevent organisations such as Prisoners' Advice Service and the Howard League from being able to take on cases;
- The proposals are likely to increase overall costs to the public as many more complaints will be directed to the PPO where each investigation costs five times the fixed legal aid fee and many prisoners will remain in custody longer than necessary at enormous expense;
- The lack of effective redress for prisoners may lead to more disciplinary problems in prison.

Prisoners' Advice Service[7] raised similar concerns.

The Bar Council response[8] concluded:

- The proposals relating to de-scoping of legal aid funded prison law work will make it impossible for prisoners to access advice on a range of issues vital to prison conditions and prisoner wellbeing;
- The proposals risk undermining children's ECHR Article 8 rights as children will no longer have access to specialist criminal legal advisers;
- The suggestion that prison law issues could be adequately addressed by the prison complaints system is unrealistic and will not save money overall but will merely transfer the burden of cost to another area of the criminal justice system;
- The proposals present a real risk to charities such as the Howard League and the Prisoners' Advice Service and the invaluable work that they do.

HM Inspectorate of Prisons (HMIP)also expressed its concerns on the proposals[9], in particular, their impact on vulnerable prisoners who suffer from learning disabilities and mental illness suggesting that:

> "*at the very least, prisoners who have identified communication and mental health problems and learning difficulties should be able to obtain legal aid on the current basis*".

[7] http://prisonersadvice.org.uk/news/?p=344
[8] http://www.barcouncil.org.uk/media/213867/the_bar_council_response_to_moj_transforming_legal_aid_consultation.pdf
[9] http://www.justice.gov.uk/downloads/about/hmipris/transforming-legal-aid-response-hmip.pdf

Itfurther highlighted the inadequacies of the prison complaints system, citing some concerning statistics from its 2012/2013 survey:

- 13% of prisoners said that it was not easy to make a complaint.
- of those prisoners who reported that they had made a complaint, nearly two-thirds (62%) felt that it had not been sorted out fairly
- the highest percentage of prisoners who felt their complaint had not been sorted out fairly was found in high security prisons
- of those prisoners who had made a complaint, over half (59%) felt their complaints were not dealt with promptly (within seven days).
- overall, 17% of prisoners said that they had been prevented from making a complaint when they wanted to; the highest proportion (27%) of prisoners reporting this was found in high security prisons.

It concluded that "*our inspection evidence is that the internal prisoner complaints system cannot be entirely relied on to consistently resolve prisoner complaints and concerns in a fair way*."

2. Criminal appeals and reviews

Specialist criminal appeal work will not be subject to competition but this work will be restricted to providers with a contract who will be forced to provide this specialist work.**The Criminal Appeal Lawyers Association's**response[10] states that the main PCTproposals "*threaten to undermine the fabric of the criminal justice system in such a way as to increase the risk of miscarriages of justice*." The implication is an increase in the need for specialist appeals and review work. The Association also highlights:

- Appeals and review work is important as it is one mechanism by which miscarriages of justice can be and are identified and corrected;
- Appeals and review work is currently a very small part of the budget, generally undertaken by a relatively small number of firms and is specialised work that is already badly remunerated and generally seen by firms as a loss leader or an area of work that is done more on principle than for any potential profit. The proposed cut of 17.5 per cent is not sustainable;
- Mandatory requirement for firms to do appeal and review work is reversal of the lack of choice at first instance and cuts across the current approach taken by the LAA to question why firms at a distance from certain prisons are taking on cases from those prisons. Removal of standalone contracts for appeals work is retrograde;
- Cut to experts' rates of 20% on top of recent cuts is unacceptable and will remove a large number of experts from defence lawyers altogether. Many miscarriages of justice over the years have resulted from inadequate expert evidence and have been overturned by the instruction of experts at the appeal stage of a case.

3. Judicial review

[10] https://skydrive.live.com/?cid=c9cf3340d60f0176&id=C9CF3340D60F0176%2120326&authkey=!APR5vGN4fRtmnZc

Treasury Counsel, the panel of lawyers selected to act for the Government responded[11] stating:

> *"We consider that the proposals in the Consultation Paper will undermine the accountability of public bodies to the detriment of society as a whole and the vulnerable in particular. Those who are reliant on legal aid are most likely to be at the sharp end of the exercise of government power and are least likely to be able to fund judicial review for themselves, or effectively act in person."*[12]

The proposed arrangements relating to payment pre-permission and borderline cases are dealt with separately from the residence test proposal.

Payment for pre-permission and borderline cases

In relation to these proposals, **Treasury Counsel**noted:

- The Consultation Paper misconceives the level of certainty achievable when advising on the outcome of claims;
- Government lawyers do not undertake their work on the basis that they will only be paid if they have accurately predicted the outcome of the litigation and to require this of legal aid lawyers is, in effect, to severely cut their rates;
- The majority of successful claims are conceded pre-permission and so to use permission as a the test for whether payment is made may reduce rates even further;
- The proposal might be counter-productive leading to more disputes about pre-permission costs which will require public money to resolve;
- Figures provided in the Paper do not suggest that legal aid is being granted in significant numbers of unmeritorious cases and that is also not Counsel's experience when it comes to defending such claims;
- To require that even cases which meet the merits test will be conducted at risk will create a "fundamental asymmetry" ;
- When coupled with significant reductions, work in this area might become unviable.

In its response, the **Council of Her Majesty's Circuit Judges** raised concerns that**:**

- The proposal relating to payment for permission for judicial review will unduly restrict access to justice. It will transfer the risk of the permission process to legal advisers who will be less willing to take on cases due to the financial risk involved, therefore meaning claimants with strong claims will be denied access to justice;
- The "borderline cases" proposal will prevent individuals who may well have a completely valid claim from accessing justice and referral to an independent funding adjudicator will not provide a safety net as they will apply the same criteria;

[11] http://legalaidchanges.wordpress.com/
[12] Response of the Treasury Counsel to Transforming Legal Aid (Treasury Counsel, 2013)

- The role of legal aid in past cases in refining and clarifying common law and statute should not be underestimated;
- Insufficient regard has been paid to the increased burden, and increased cost upon the courts, both staff and judiciary, of a substantial increase in the number of litigants who are neither represented nor have the benefit of legal advice in formulating and preparing their cases.

The Bar Council echoed these concerns, stating:

- The proposal relating to payment for permission for judicial review will reduce access to legal representation for judicial reviews, including claims against the government itself. In this way, the proposal has the appearance of self-interest;
- The payment for permission proposal is "disproportionate" and an "irrational blanket rule" which is unlawful in itself and will also capture meritorious cases.

The **Public Law Project's** response[13] endorsed many of these concerns, and also noted:

- There is a lack of clarity in the permission threshold which will lead to uncertainty and disparity in different judge's approach to permission;
- The financial risk that practitioners will be required to bear, will have a chilling effect on claims which have a good prospect of success;
- The proposal is inconsistent with upholding the rights of individual claimants with modest means, good public administration and the rule of law;

In its response, the Parole Board also noted that the only means of challenging a decision of the Parole Board is via judicial review and therefore the proposal relating to payment for permission, by limiting access of offenders to judicial review, will deny justice in many cases.

Residence test

Strong concerns were also raised about the plans to introduce a residence test for civil work. **Treasury Counsel** noted:

- Judicial review is vital to this class of people as they have fewer rights than British citizens and to deny legal aid to these people would be unconscionable;
- To prevent people from bringing legal proceedings who are subject to the actions of the UK acting abroad, often in ways which are alleged to be contrary to the most fundamental human rights is impossible to reconcile with the rule of law.

The Public Law Project also raised procedural and practical concerns about the residence test:

[13] http://www.publiclawproject.org.uk/documents/PLP_legal_aid_consultation_response_4_June_2013.pdf

- The residence test proposal is so draconian in nature, the government should not be proposing it by means of secondary legislation – rather it should be scrutinised by both Houses of Parliament;
- The residence test proposal will force all legal representatives to act as immigration officers. It will fall on them to determine whether residence criteria are met. Given the complexity of this determination and administrative burden involved, lawyers will be disincentivised from taking on cases where it cannot readily be determined.

An advice from leading counsel outlining why the residence test is unlawful has been published.[14]

HM Inspectorate of Prisons shared these concerns[15], suggesting that the proposed residence test will:

- disproportionately impact foreign nationals and is therefore discriminatory. Immigration detainees should be funded to challenge the lawfulness of their detention regardless of their ties to the UK.
- will restrict access to justice for vulnerable immigration detainees, remove funds for mentally ill detainees to challenge the lawfulness of their detention and will not assist failed asylum seekers with further representations.

Further information
Please contact Laura Janes, Consultant Solicitor, for further information.
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[14] http://www.publiclawproject.org.uk/documents/Fordham%20disclosable%20opinion%20FINAL.pdf
[15] http://www.justice.gov.uk/downloads/about/hmipris/transforming-legal-aid-response-hmip.pdf