Consultation Response

PAS's Response to the Ministry of Justice Consultation: Transforming Legal Aid

1st June 2013

www.prisonersadvice.org.uk

Introduction

The Prisoners' Advice Service (PAS) was launched as an independent charity in 1991.

It is the only charitable organisation in the UK with a specific remit to provide free legal advice and information to adult prisoners in England and Wales, and provides advice and assistance on the application of the Prison Rules and conditions of imprisonment.

PAS has a stand-alone prison law contract, with an associated LCS contract that allows us to take discrimination claims and Judicial Reviews. In addition we have a public law contract. This is therefore work that is funded by the Legal Aid Agency.

PAS also runs a free advice line on Monday, Wednesday and Friday, and responds to some 4000 letters from prisoners requesting advice and information per year. This is again free and is not part of any LAA funding.

PAS does not accept Home Office or Prison Service money as this may affect our independence. We receive most funding from charitable trusts and foundations.

PAS does not conduct litigation on behalf of clients to make money. The legal aid element to our work provides costs protection to our clients. We do not undertake conditional fee arrangements

PAS was awarded Legal Aid Lawyer of the year award in the category Legal Aid Firm/Not for Profit organisation in 2011. We were also awarded the Longford Prize in 2012.

Prison law and the relevant Schedule of Consultation Questions are set out at page 11ff:

Q1. Do you agree with the proposal that criminal legal aid for prison law matters should be restricted to the proposed criteria? Please give reasons.

No.

The MOJ has indicated that these proposals will reduce costs, however PAS believes that there is no evidence to support this assumption and, on the contrary, these proposals will actually increase the overall criminal justice spend in the long term.

- The MOJ has said 11,000 cases will be taken out of scope by these proposals, making a saving to the legal aid prison law budget of £4 million. No breakdown or explanation is given anywhere within the consultation document as to how these figures are arrived at, whether they are cumulative savings and over what period or if they constitute a 'one off' saving.

- Nor is it clear what the MOJ factors into its estimates of 'savings'. It would have to factor into its model how much it costs to keep someone in prison, such as when people are not released because of a lack of independent legal advice that challenges unlawful or unreasonable decisions contrary to the MOJ and prison service's own guidance: in such cases there will be an additional cost. The MOJ appears not to have set this against its total savings.

- The prison law legal aid budget is, in any case, less than 0.1% of the criminal legal budget for England and Wales. The prison law spend has increased over the last 10 years but this seems to be entirely due to factors beyond prison lawyers control, such as the dramatic increase in the lifer population following the introduction of Indefinite Sentences for Public Protection (IPPs) by the Labour government under the CJA 2003. As the courts have recognized, the introduction of IPPs was not resource-

neutral.[1] As regards legal aid expenditure, the introduction of IPPs was accompanied by a massive increase in numbers of oral hearings in parole and disciplinary cases, which are precisely the cases that will remain in scope even were the proposals in the consultation document to come into effect. In 2001/2 the Parole Board held 466 oral hearings.[2] In 2011/12 the Board held 4,216 oral hearings,[3] a nine-fold increase over the period. The rise in the number of oral hearings has been brought about by judgments of the domestic and Strasbourg courts confirming the applicability of article 5(4) of the European Convention of Human Rights when the Parole Board is considering whether to release indeterminate sentence prisoners,[4] and when the recall of determinate sentence prisoners is being considered.[5] So around 75% of the prison law budget is currently spent on parole cases (or Independent Adjudication), and this will not alter. These proposals are therefore simply tinkering around the edges in terms of savings, if that is really what they are about

- If the Justice department is really interested in economics then £220m could be saved from the MOJ budget by reducing the prison population by 6000, which would still leave England and Wales with the largest prison population in Western Europe. These savings would not even require a change in sentencing provisions or policy. They could largely be achieved through implementing the change in the release test set out in LASPO 2012. This could be done through Statutory Instrument and would be directly applicable to the 6,000 or so IPP sentence prisoners left in the system and of whom two-thirds are past their punitive term.

- The current standard fee for advice and assistance cases is £220. In contrast the cost of the Prison and Probation Ombudsman investigating a

[1] See, amongst other authorities, *R (James, Lee, and Wells) v Secretary of State for Justice* [2010] 1 AC 553, at paragraph 3, and *R (Faulkner and Sturnham) v Parole Board* [2013] 2 WLR 1157, per Lord Reed, at paragraphs 2 and 4.
[2] http://www.insidetime.org/articleview.asp?a=566
[3] http://www.justice.gov.uk/downloads/publications/corporate-reports/parole-board/parole-board-annual-report-2011-12.pdf
[4] See, for example, *Stafford v UK* (2002) 35 EHRR 32.
[5] *R (Smith and West) v Parole Board* [2005] 1 W.L.R. 350.

single case is over £1,000. The likely exponential rise in the number of complaints that will have to be dealt with by the PPO (and a similar rise in the number of complaints appealed internally), suggest that any 'savings' made in cuts to legal aid will be lost through an increase in the work (and budgets) of organisations like the PPO. The likely increase in the PPO caseload and the attendant cost implications are considered below

Nor does PAS accept the basis upon which prison law should be reduced in **scope**.

In respect of scope the MOJ is seeking to limit legal aid to a tiny rump of prison law matters, restricting legal aid to matters which engage either Article 5 (the right to a review of on-going detention, such as parole and minimum tariff cases) or Article 6, (disciplinary hearings before an Independent Adjudicator, where added days imprisonment can be given as a punishment, or in front of a prison governor, where legal representation has been granted under the Tarrant principles). All other matters, such as categorisation reviews, allocation in a mother and baby unit, internal disciplinary matters such as governor's adjudications and segregation, licence conditions, and resettlement are to be excluded.

PAS notes that there are no exceptions for children or vulnerable adults.

The implication is that unless a matter engages Article 5 or 6 then it can be dealt with through the complaints system, because it does not raise any real or important legal argument. However the matters under threat of exclusion from public funding often raise issues which involve complex legal argument and which have real importance to both the prisoner, wider society, and ultimately to how much the taxpayer has to contribute to the spend on the criminal justice system as a whole.

Categorisation decisions - although such decisions have been held by the European Court of Human Rights not to engage Article 5(4) or Article 6[6], individual allocation decisions may engage a range of rights under the ECHR. The positive duty to protect prisoners that arises under Articles 2 and 3 may, for example, require placement in a

[6] Aerts v Belguim (1998) 29 EHRR 50, R (Sunder) v Secretary of State for the Home Department ([2001] EWCA Civ 1157

vulnerable prisoners or protected witness unit. A transfer of a prisoner pending trial that prejudices the right to a fair trial may breach Article 6[7]. Similarly a prisoner's right to family or private life under Article 8 may be engaged by allocation decisions[8].

Issues of procedural fairness have also been regularly highlighted within categorisation decisions. For example, the Court of Appeal held in *R (Hirst) v Home Secretary* ([2001] EWCA Civ 378) that where a post-tariff discretionary life sentence prisoner is re-categorised from Category C to B fairness required that the decision should not be taken unless the prisoner has had a full opportunity to be involved, including being given the opportunity to make representations after he had been told the grounds upon which it was appropriate to re-categorise him and before the decision was taken. This was because the Court recognised that in the context of a life sentence prisoner "the re-categorisation of a prisoner from Category C to Category B significantly affects his prospects of being released on licence" (*per* Lord Woolf CJ at para. 18).

Similarly in *R v Governor of HMP Latchmere ex parte Jarvis* (CO 4141/98 20 July 1999) the case of a prisoner who had been transferred on grounds of good order and discipline in breach of the procedures set out in the then guidance on categorisation and allocation was considered. The judge rejected the governor's submission that he had an inherent power in cases of urgency to deal with prisoners without going through the necessary procedure and without filling in the necessary forms. He held that the whole purpose of the re-allocation and re-categorisation procedures were to take all relevant factors into account and to ensure that these important matters were dealt with in a considered fashion – the very antithesis of the pre-emptory manner in which the applicant's case had been dealt with. The court held that at the very least the applicant had a legitimate expectation that his case would be dealt with in accordance with normal procedures unless very good reasons were advanced why this was impossible (which had not been). The purpose of the procedure was to ensure that considered judgements were made which achieved consistency and are

[7] R v Secretary of State for the Home Department ex p Quinn [1999] Prison LR 35
[8] McCotter v UK (1993) 15 EHRR CD 98.

objectively based and that there is an opportunity for reflection and consultation. Consequently the transfer was neither fair nor lawful.

A recent case taken by PAS involved a young post-tariff IPP prisoner who was returned from open to closed prison conditions on the basis of two incidents that should have been dealt with by way of the IEP scheme, rather than the adjudication process. Lengthy representations to the Public Protection Casework Section were successful, and the prisoner was able to return to open conditions well in advance of his parole board review. Had he remained in closed conditions prior to his parole hearing, his eventual release would have been significantly delayed.

We also represented a foreign national prisoner who had been returned to closed conditions after he had been served a notice of intent to deport by UKBA. He was in paid employment when he was returned. He exhausted the internal prison service complaints procedure and had not received any determinative decision about his security grading. PAS obtained his paperwork and it showed that the prison service had erroneously concluded that because the UKBA had issued an intent to deport letter this required them to remove the prisoner from open conditions. No individual risk assessment had been conducted and his appeals had not been dealt with *de novo* as they were required to do. After representations and contacting NOMS directly around the correct procedure to be adopted for foreign national categorisation decisions, the Area Manager eventually authorised his return to open conditions following the issue of a letter before claim. The prisoner had lost his paid job but was at least able to volunteer at Oxfam for the remainder of his sentence.

These cases have **cost** implications for the MOJ budget, because greater conditions of security require greater provision of costs (the cost of maintaining at Category A is some £61k per prisoner, whereas for Category B it is around £34k, and Category C some £31k, with the cost per prisoner in open conditions being much less and can be as low as £17k). This is largely to do with the additional prison staffing costs involved. If a prisoner is kept in conditions of greater security than he requires under the prison service own policy, it costs the taxpayer more money.

Category A decisions – these cases can of course engage Article 5; the Court of Appeal in the *Williams* decision[9] holding that in certain circumstances, fairness required an oral hearing to determine Category A status. However the right to an oral hearing is not automatic and can be contentious. It remains unclear therefore whether all the work up to and including the granting of an oral hearing would be covered by legal aid under the new proposals or if legal aid would only be granted for the oral hearing itself.

In addition, Category A status should be reserved for 'highly dangerous' prisoners as it represents a significant restriction upon prisoners' remaining liberty. In *R v Secretary of State for the Home Department ex p Duggan* [1994] 3 All ER 277 Rose LJ commented that:

It is common ground that a prisoner in category A endures a more restrictive regime and higher conditions of security than those in other categories. Movement within prison and communications with the outside world are closely monitored; strip searches are routine; visiting is likely to be more difficult for reasons of geography, in that there are comparatively few high security prisons; educational and employment opportunities are limited.

In respect of decisions relating to Category A status, the Courts have repeatedly held that an indeterminate sentence prisoner who is held in Category A conditions will not be released by the Parole Board.[10] As Rose LJ held in *R v Secretary of State for the Home Department, ex parte Duggan* [1994] 3 All ER 277, at 288B-D,

"So long as a prisoner remains in category A, his prospects for release on parole are, in practice, nil. The inescapable conclusion is that which I have indicated, namely, a decision to classify or continue the classification of a prisoner as category A has a direct impact on the liberty of the subject."

[9] R (Williams) v Secretary of State for the Home Department [2002] 1 WLR
[10] See, amongst other authorities, *R v Secretary of State for the Home Department, ex parte Duggan* [1994] 3 All ER 277.

In 2003 PAS brought the case of *Lord*[11] which established the right, subject to exceptions, to full disclosure of the Category A reports. However in our experience the Prison Service will still seek to rely on reports of unidentified security issues etc, which they do not disclose to the prisoner. These cases then require arguments around the Data Protection Act, which by their nature are not easy for a prisoner to deal with in the absence of any legal advice.

PAS recently represented someone who had made numerous attempts to seek his removal from High Risk Category A status, arguing that prison service information was either wrong or was not based on evidence. Representations were made around factual errors involved with his index offence, security intelligence, consistency in public policy decision making, and the policy guidance contained in the National Security Framework, a document which is neither in prison libraries or available on the intranet. The end result was that the prisoner was downgraded to Category B. This had wider implications than simply for the particular prisoner, given that his disabled mother was able to visit more regularly, he was able to engage with external educational courses and was able to start to address the rest of his sentence plan.

Also again these decisions have serious **cost** implications, as the cost of keeping someone in Category A is around £61,000 per annum, almost double the average cost of prisoners in the lower security classifications.

Mother and Baby Units (MBUs) - it has long been the practice of the Prison Service to allow imprisoned women to keep their babies with them in limited circumstances. The allocation of women to MBUs is a highly sensitive issue as separation of a baby from its mother will require strong justification and fair procedure to protect the interests of both the baby and the mother, in order to avoid breaching the right to family life. There are often legal arguments around the policy on flexibility in respect

[11] R (Lord) v Secretary of State for the Home Department [2003] EWHC 2073 (Admin)

of the age limits for the children[12], and over what is in the child's best interests[13]. A mother-to-be does not have an automatic right to a place in a MBU – she has to apply. Over the years PAS has advised numerous women in this process – women whose babies might have otherwise been placed into care. It is vital that assistance continues to be available for this vulnerable group of prisoners.

PAS was contacted by a prisoner after she has been refused a place on the MBU. She said that social services were unsupportive of her application for a place on the MBU and that subsequently a decision had been made to refuse her a place on the basis of social services' position. The prisoner's baby was due in less than 10 days' time. We made urgent representations as to her suitability, and obtained permission from Social Services to examine her file. On considering the file there were un-substantiated allegations of behaviour which Social Services had reported as fact. We obtained statements from both family members and professionals involved in her care previously which cast significant doubt on these allegations, and after submitting these statements the prisoner was granted a place on the MBU. The cost of the case was some £500 to the LSC, and a baby was able to remain with her mother. If the baby had been placed in care the **cost** both financial and emotionally would have been incalculable.

Close Supervision Centres (CSC) - the Operating Standards say that lawyers can attend two out of four of the Care and Management Plans which are supposed to take place each year. This is in recognition of the complexity and seriousness of confinement in the CSC. But it does not come under Advocacy Assistance. If it goes out of scope there will be no legal aid for this, even though the guidance permits/encourages it.

DSPD – this group of prisoners, both because of their particular personalities, vulnerabilities, and location often find access to legal advice very difficult. There are

[12] R (P and Q) v Secretary of State for the Home Department [2001] EWCA Civ 1151 and CF v Secretary of State for the Home Department [2004] EWHC 111(Fam)
[13] R(CD) v Secretary of State for the Home Department [2003] EWHC 1555 (Admin)

often legitimate disputes over whether there is an identified mental health treatment need as required under the Planning and Delivery Guide, a sufficient PCL-R score to warrant admission, and whether in the case of 18-21 year olds the exceptional basis criteria are met. The entry criteria for women is also slightly different. A prisoner can spend up to 5 years in a DSPD and so the ramifications for them are grave. To expect a prisoner to be able to challenge an admission assessment without any external legal and specialist assistance is simply not a sustainable proposition. Again the **cost** of someone being treated in DSPD is far higher than the cost of a placement within normal location and legal representation will often ensure that people who do not need such an intensive placement are not sent there, saving the public money.

Adjudications – currently internal adjudications are in scope where they satisfy the sufficient benefit test. This can be satisfied for instance where the adjudication decision is likely to have some impact on sentence progression or release, such as an impending categorisation or parole review. There seems absolutely no reason why this current test is not sufficient to ensure that the majority of adjudications will continue to be dealt with by prisoners without legal assistance but, in cases where a finding of guilt will impact on a prisoners progress or sentence plan, why legal advice and assistance should still not remain available where it can be justified. The minimum requirement of legal advice and assistance is also reflected in the detailed policy guidance on the conduct of prison disciplinary hearings most recently updated in PSI 47/2011. The grant of representation remains especially important for lifers whose charges are not so serious as to engage Article 6 but where a finding of guilt will have severe consequences (for example if an allegation relevant to the lifer's risk factors arises which may jeopardise a parole hearing), or where the prisoner is particularly vulnerable.

In our experience it is extremely rare for governors to grant representation under *Tarrant*. PAS recently represented a determinate sentence prisoner with a long history of mental health problems. His application to Category D was delayed pending his appeal against two findings of guilt (despite his recognised mental health

history he had been refused representation under *Tarrant*). After legal arguments to the Public Offender Management Group, both charges were quashed and the Prison Service then made the decision to re-categorise him and transfer to open conditions. The question is not whether the appeal process was satisfactory in this particular case, clearly it was, but rather whether this prisoner with his particular issues would have appealed or felt able to.

PAS has represented some 45 prisoners over the last 3 years who because of legal intervention have had their adjudications either dismissed or quashed on appeal, and who without such intervention would have ended up in conditions of greater security that they required (either as a result of an upgrade in security and a return from open to closed conditions or who would not have been able to achieve a downgrade).

Segregation – the negative effects of imprisonment are massively compounded when prisoners are segregated and held separately from other prisoners. Although in the case of *Munjaz*[14] it was held that unlawful seclusion would not breach Article 5, other articles of the ECHR such as Article 3 or 8 may be breached on the particular facts of a case. This includes the vulnerability of the prisoner[15]. Cellular confinement can be imposed as a punishment by governors or Independent Adjudicators following a disciplinary hearing.

PAS was contacted by a prisoner held in segregation after he had been placed on the escape list when he had been transferred to prison from a medium secure mental health unit. He had a history of mental health problems and severe self-harming behaviour and had managed to hang himself in segregation before being resuscitated. He had complained that he had not been subject to regular reviews, denied being an escape threat and said such information had been supplied by a patient at the mental health unit who disliked him. His complaints had been ignored.

[14] R (Munjaz) v Mersey NHS Care Trust [2006] 2 ac 148
[15] Keenan v UK 92001) 33 EHRR 38 where a breach of article 3 was contributed to by the imposition of cellular confinement as punishment against a mentally ill prisoner.

We obtained the security reports relevant to the prisoner after a freedom of information request threat, the disclosed the evidence against him was unsubstantiated and according to their own reports might be false. We also obtained a statement from the mental health unit which indicated that they had concerns around where the information of an escape had come from and its validity. Finally we argued that the case law around segregation and article 3 made it clear that special consideration needed to be given to the continuation of segregation or solitary confinement where there were mental health issues or where the prisoner concerned was vulnerable. After correspondence and the threat of legal action over the course of a week, the prisoner was removed from the escape list and segregation, and returned to normal location. This would clearly not have been something that could have been adequately and urgently resolved through the PPO even as an urgent complaint and the threat of the prisoner managing to take his own life was of course significant.

Incentives and Earned Privileges (IEP) – These are not matters that simply have no importance and little consequence. PAS represented someone given an IEP warning after complaining that the prison only issued 28 days of medication even though 11 of the 12 months were longer than 28 days. Repeat prescriptions were only provided on a monthly basis and he therefore went without medication and suffered pain and deterioration for between 2 and 3 days every month save for February. He had been warned that his complaint, in which he described staff as lazy, was rude. He said he had been told what the policy in operation around medication was, and therefore any further complaint would be considered to be harassment and might be subject to further IEP warnings. We argued that this treatment was an abuse of the IEP Scheme. We contacted the Chief Inspector of Prisons (HMCIP) who had visited the prison and had discussed the issue of medication with this particular prisoner. The Inspector confirmed that they had read the complaint letter and also felt this was an abuse of the IEP system. The IEP system, as set out in PSO 4000 must not be used to punish prisoners and that the *Department for Health 2004 Guidance performance Standard 22* confirms that prisoners are entitled to parity of medical treatment under the NHS with other members of the public. After forwarding the

HMCIP response the Governor, somewhat reluctantly, agreed to remove the IEP warning and to review the medication policy.

Release on Temporary Licence (ROTL) – Over the last two years PAS has successfully challenged the then policy that no lifer in Category C conditions could be released on temporary licence save for exceptional circumstances where s/he had been re-categorised to Category D but could not be transferred to an open prison for medical reasons. It has also challenged the policy in respect of Child Care Resettlement leave and also how ROTL eligibility dates were calculated where there were on-going confiscation proceedings. In all these cases the complaint procedures were utilised and the complaints were either dismissed or no adequate response was received. In all of three cases the client eventually successfully challenged the decisions, with this leading to a wholesale revision of the policy operated by the Prison Service, incorporated in PSI 21/2012. It has also led to these prisoners being legitimately released earlier than would otherwise have been the case, which has significant **cost** implications.

Resettlement - the cases that PAS deals with often involve extremely vulnerable prisoners and their access to and the provision of care needs applicable to them on release, pursuant to s47 of the NHS and Community Care Act 1990 and s21 of the National Assistance Act 1948 in respect of residential accommodation. There are frequently legal arguments as to the meaning of 'ordinary residence' in prisoners' cases, and the presumption in the Department of Health Ordinary Residence Guidance that that a person remains ordinarily resident in the area in which they were living before the start of their sentence.

Recent examples we have dealt with include a 66-year-old, post-tariff automatic life sentence prisoner who has suffered multiple strokes that has left him with dysarthia (poor speech articulation due to problems with speech muscles), weakness of all limbs, difficulty with swallowing, poor appetite and weight loss. The local authority refused to assess him for services, which led to his application for compassionate release being delayed.

Another was a 79-year-old woman prisoner, who suffered a severe stroke which left her bed-bound. Her local authority refused to assess her for 24 hour care on the basis she was not physically present in their area, rather than applying the ordinary residence test as above.

We were contacted by a prisoner who had severe physical disabilities. We instructed an occupational therapist, who visited the prison and carried out a needs assessment for activities of daily living on the prisoner and the facilities available to him at the prison. The report recommended that: (i) amendments be made to the bath or shower; (ii) a remote controlled call bell system be installed in the cell; (iii) an adjustable perching stool be installed in the cell, to allow him to use the sink; and (iv) that prison staff consider a degree of adaptation to provide independent wheelchair access to the Astroturf area. The prisoner had been unable to take a shower, and instead has to go to healthcare once a week to have a bath. However, there continued to be on-going delays with the provision of these facilities and the prisoner was struggling with inappropriate cell conditions 6 months after the needs assessment was carried out. We were able to refer the prison service to their obligations under the Disability Discrimination Act 1995, which makes it unlawful to discriminate against disabled people and paragraph 2.5 of PSO 2855, which specifies that unlawful discrimination occurs when a service provider (such as the Prison Service) fails to make alterations to a service or facility which makes it impossible or unreasonably difficult for a disabled person to use those services or facilities. As a result of this intervention the prisoner's cell was adapted, he was better able to engage with his sentence plan, and the prison service avoided the **cost** and likely compensation that would have resulted from further litigation.

On all of these occasions the availability of legal advice meant the prisoners were able to secure services they had previously been told they were not eligible for, and to their being released earlier and with the proper support than would otherwise have been the case.

Home Detention Curfew – The Legal Services Commission has already set out its

position through the audit process that these matters will only be funded where there is a clear need for a lawyer, either because they engage article 5 issues or where the HDC is subject to an appeal or it can be shown that the lawyer is not simply repeating information the prison already has or is considering. There therefore seems absolutely no need to take HDC out of scope entirely and instead the current arrangements and funding should continue where a lawyer can show it was necessary for legal advice to be sought. A successful application for HDC also saves money, as tagging and supervision in the community on HDC is a lot less expensive than the prisoner remaining in prison for another 135 days.

PAS represented a prisoner who had received consecutive sentences under the 1991 and 2003 Criminal Justice Act legislation. He had been refused HDC. He had sought to use the internal complaints process without success. The Ombudsman was not an effective remedy because by the time they considered his case, his HDC curfew period would have passed. We argued for 'exceptional reasons' based around his disability and age. It was also clear once we had obtained his legal paperwork that they had not followed their own policy on disclosing the reasons for refusal and had also mistakenly calculated his eligibility period because they had not taken into account the case of *Noone* when calculating his eligibility period for HDC. After a significant amount of correspondence over several weeks, the prison service eventually conceded that the prisoner's dates had been incorrectly calculated, that he was eligible for consideration under the 'exceptional reason' provisions and released him on HDC. The case **cost** the Legal Services Commission £220, the savings were that a man who had been refused early release was now considered suitable, with a saving to the public purse of around £11,000 by his not remaining in prison for a further 135 days.

Licence Conditions – These types of cases are invariably complicated by the number of different agencies involved and the resolution of the case has not only an impact on the prisoner but also on matters such as the likelihood of recall and even the wider economy.

PAS represented a 17 year old female with ADHD. She was released from prison with

only minimal supervision despite being on MAPPA. When she was released to a hostel she found she was sharing a room with a much older woman with a history of alcohol issues, the room had no pillow and no lighting. She was unsupervised during the evenings and had no purposeful activities. She was told on release that she would be referred to employment access services but this did not happen. Despite her clear needs she was subject to a Community Assessment Framework (which is a simple information sharing report) rather that a s17 Children Act 1989 assessment which imposes on local authorities a general duty to safeguard and promote the welfare of children 'in need' in their area. She and her mother had made several complaints about the support she was receiving but Social Services and the Youth Offending Team had failed to respond. It was after legal intervention that a S17 assessment and an attendant assessment for accommodation under s20 could be obtained. She was provided with a care plan, placed in suitable and age appropriate accommodation and has not returned to custody since. If she had remained in the hostel without support, her mother is of the view that she would have been recalled because her daughter would have become frustrated and angry at her situation or tried to get breached in order to get out of the hostel. The **cost** of this case to the Legal Services Commission (now LAA) was £220, she had a 12 month licence period and so the cost of her recall would have been over £40,000 to the public purse.

PAS represented a 47 year old man who was coming to the end of a 4 year sentence. He had cognitive dysfunction, severely impaired memory and focal functioning and language impairments; he had learning disabilities, extremely low IQ (mental age of 10 ½ - 11 ½ years); immature behaviour, obsessional tendencies and disinhibition; depression, paranoid thoughts and thoughts of self-harm; post traumatic amnesia; and epilepsy. The Health Care at the prison took the very unusual step of contacting us themselves. They had been unable to secure any services for him on release from Social Services and were concerned as to how he was going to cope in the community. He was himself unable to properly utilise the complaints procedure because of his health issues. After a significant amount of correspondence and the threat of legal action around the issue of ordinary residence Social Services agreed to

assess him under the Community Care legislation and he was released with what Health Care considered an appropriate level of support.

After dealing with a Mandatory Lifer parole case, the prisoner was released with licence conditions which excluded him from two London boroughs. Initially he was content to accept these licence conditions as he did not have a job on release. However soon after release he started to apply for jobs. He asked us to look at his licence conditions because as they were then framed he was unable to obtain driving jobs as they might require him to enter the exclusion zones. We argued that the licence conditions were neither necessary nor proportionate, whilst the Public Protection Team argued to the contrary. The Parole Board agreed to removing the conditions, and he obtained a driving job soon after. The **cost** of the case was £220, the ex-prisoner now pays NI and is able to contribute to the economy.

PAS was contacted by a female prisoner who was in a relationship with someone in the community who had been the victim of the index offence. Both wanted the relationship to continue on release and for them to be able to live together. The area where they proposed to live had further family support available to them both and the offer of employment for the female prisoner. Probation had however insisted that she could not live with her partner because he was the victim of the index offence and that she would have to be released to a hostel in the area she was living in at the time. The issue was further complicated by this particular prisoner having suffered years of domestic abuse whilst in a relationship with another man who continued to reside in the area proposed by probation. Representations around risk and the right to family life were sent to both the prison and probation area involved, and after several months of appeals it was agreed that she could be released to live with her current partner and that arrangements would be made to transfer her case to a different probation area for supervision. It is to be noted that the internal complaints system as utilised by the prisoner had failed to resolve this matter until we intervened.

<u>Foreign National Prisoners</u>

PAS will comment more generally on our concerns around the residence test later on, but specifically in respect of prisoners and immigration detainees we would wish to highlight the effect upon foreign national prisoners (FNPs) and ex-offenders held in prison at the end of their criminal sentence under immigration act powers.

Such detention is without limit of time and without any oversight of the courts; the detainee only appears before a court or tribunal if s/he is able to instigate this. Claims and judicial reviews for challenging detention under immigration powers were also kept in scope by LASPO 2012 due to the importance of the issues at stake. The courts have on a very large number of occasions found that FNPs who have served their sentence have been detained unlawfully, and clearly the ability to challenge the lawfulness of detention should not depend on immigration status. There is no justification for removing such claims from scope now. The Supreme Court found that the Home Office has operated an unlawful and secret detention policy for FNPs[16]. The proposed changes risk increasing the chance that such abuses, on both an individual and systemic level, will go unchecked.

Detention under Immigration Act powers is frequently lengthy, and not infrequently for years[17]. Family members, for example of those whose claims for asylum have failed, who are likely to be subsisting on non-cash support under section 4 of the Immigration and Asylum Act 1999, have difficulties in visiting at all, so the location of the detained person may result in isolation from the family and breaches of the Home Office duty under section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of the child, whether the detainee's child be a person under immigration control, settled or a British citizen.

[16] R (Lumba) v SSHD [2012] 1 AC 245

[17] See *The effectiveness and impact of immigration detention casework A joint thematic review,* Her Majesty's Inspectorate of Prisons and the Independent Chief Inspector of Borders and Immigration, December 2012, available at http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/thematic-reports-and-research-publications/immigration-detention-casework-2012.pdf

Home Office concerns about the risk of absconding affect prison categorisation. Access to rehabilitation programmes[18] and/or planning for release are affected by presumptions that the person will be removed at the end of the sentence, however strong the case against this may be and however unlikely it is in any event that a decision on return will rapidly be resolved. This all has cost implications for the MOJ if the prison or immigration authorities adopt overly prescriptive policies in these areas.

Section 134 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 amended the Criminal Justice Act 2003. It now allows for "foreign offender conditions" to be attached to a conditional caution. The cautions are imposed with the object of bringing about the departure of the prisoner from the United Kingdom and/or ensuring that they do not return for a period of time. A conditional caution can only be given if the five requirements set out in section 23 of the Criminal Justice Act 2003 are met. Immigration advice is likely to be necessary for the person to understand the effects of the caution as required by section 23 (4) of the 2003 Act. This is also the case with the requirement in the accompanying code to explain the implications of accepting the conditional caution[19]. Removing legal aid from such cases may well prove an "own goal" for the Ministry.

Mental Health

We are particularly concerned for those with mental health problems. The Government has four times in the last year been found guilty of breaches of Article 3 of the European Convention on Human Rights for its treatment of foreign national ex-offenders with mental health problems, although the worst problems have consistently occurred in immigration removal centres rather than with the prison

[18] See Bail for Immigration Detainees' February 2013 submission to the Ministry of Justice consultation *Transforming rehabilitation: a revolution in the way in which we manage offenders 2013*, available at http://www.biduk.org/154/consultation-responses-and-submissions/bid-consultation-responses-and-submissions.html.

[19] For further information see ILPA's 1 November 2012 response to the Ministry of Justice consultation on the draft code for conditional cautions, available at http://www.ilpa.org.uk/data/resources/16088/12.11.01-ILPA-to-MOJ-conditional-cautions-1-Nov-2012.pdf

estate (see for example *R (BA) v Secretary of State for Home Department* [2011] EWHC 2748 (Admin) and *R (S) v Secretary of State for the Home Department* [2011] EWHC 2748 (Admin)). These cases were brought by niche firms specialising in this type of work in the context of a civil practice. They would be cut out from this work if prison law were made part of competitively tendered criminal contracts. We do not see how the expertise thereby lost to the field could be made good and nor do we understand how criminal law firms could be put in the position of having to represent prisoners for matters remaining within the scope of civil legal aid wherever in the country those prisoners were located.

More generally we represented a prisoner who had been transferred from hospital to prison after an anonymous tip off that he was due to plan an escape. The prisoner was a prolific self- harmer with a long history of mental health issues. We successfully argued that if the prison service has reasonable grounds to believe that a prisoner requires treatment in a hospital, the Secretary of State comes under a duty to take reasonable steps to obtain the relevant medical advice, and if necessary effect the transfer: *R (D) v SS* [2005] MHLR 17 para 33. A failure to take, or delay in taking, suitable steps to transfer the inmate to hospital may form grounds for judicial review, and may breach Article 3 ECHR (as it did in *Riviere v France* 33834/03, 11th July 2006) or Article 5(1) (as it did in *Pankiewicz v Poland* 12th Feb 2008). We were also able to establish through the police that the anonymous tip off was made from the patient's phone in the hospital and that the ward manager believed that the call was malicious. The prisoner had been told by both the prison service and forensic services that they were not willing to transfer him back to hospital. However after legal intervention the local forensic services said that they would assess the prisoner again. He was deemed to satisfy the criteria for transfer back to hospital under s47 of the Mental Health Act 1983, to be of low enough risk to be held in a hospital, and was duly transferred so he could receive appropriate treatment in a safe environment.

<u>The viability and merits of the complaints system to resolve issues</u>

Governors are not independent of the institutions in which they work

The Independent Monitoring Board's caseload is almost totally now to do with property complaints (some 90-95% on their own estimates), which are not legally aided. They have no enforcement powers anyway.

There are many areas of concern regarding the Prisons and Probation Ombudsman (PPO):

- The PPO is subject to systemic delays. Non urgent cases are not being allocated for 10-12 weeks and often a decision will not be made until many months after that. In PAS' experience 6-8 months is not an uncommon time delay between sending a complaint and receiving an actual decision. There is no defined policy on what constitutes a serious case and therefore these cases may be missed.

- There is no specialism within the PPO in terms of dealing with children, women, race or disability complaints etc

- PPO investigators are not qualified lawyers and there is no legal training given for the role. The Courts that has conclusively found that the Ombudsman represents a valid alternative remedy for serious legal complaints.[20] Nor is there any qualitative analysis of the effectiveness of the Ombudsman in the consultation document.

- The PPO, as we understand it only accepts 50% of complaints. The rest are returned to the prison to sort out and resolve again, often because they have not been adequately responded to by the prison's internal complaints process.

- The PPO's remit is not all encompassing and several areas are excluded, including policy decisions and the merits of decisions taken by ministers, and

[20] Rather, one fully reasoned permission decision suggests that the Ombudsman is not an effective remedy in allegations relating to fairness (*R (Akbar) v Secretary of State for Justice* [2011] EWHC 3439 (Admin), per Wilkie J. at paragraph 11). This decision is consistent with prior authority (*Leech v Deputy Governor of Parkhurst Prison* [1988] A.C. 533).

decisions by outside bodies such as the Parole Board. The PPO has no enforcement powers but can only make recommendations, which the prison service are free to ignore.

- After the previous Government made changes to prison legal aid the number of complaints to the PPO increased by 14% in 2010/11 from the previous year which itself had seen an 8% increase. Although there was no increase last year, for the first time in almost a decade at the same time it was the first year that their budget was reduced. If there was a similar increase of 14% next year that translates to an increase in the budget of £1.4 million or so. [21]. If only 10% of the 11,000 cases the MOJ seeks to take out of scope go on to the PPO this would still be an additional £1 million. We are concerned that the Ministry of Justice by failing to attempt to forecast the number of additional cases likely to go to the PPO could risk overburdening them and risk yet further increases in delays with prisoners unjustifiably going even longer without redress[22]. Simply stating that they believe the complaints procedure should be able to deal with most cases and only a "small number" being left to the Ombudsman is not in our eyes at all sufficient.

- On a practical level the suggestion that the complaints system is entirely adequate to deal with the majority of legal issues, ignores the accepted and very high levels of mental health and learning disability concerns within the prison population[23], and the generally poor literacy levels. It also ignores the

[21] If we look at annual report last year the budget was £5,496,000, a decrease of 8% on the previous year. Total spend was 5,306,634. 5,294 complaints were received, 2,667 investigations started and 2,360 were completed. So very roughly, averaged out for every complaint received it costs the PPO £1,002. For every complaint completed it is £2,248.

[22] There is of course the risk that with further increasing caseloads arriving at the ombudsman that they will take longer to deal with the complaints which obviously has a negative knock on to the prisoner. With reduced budgets, as there was last year, pressure could be made to view more cases as ineligible. Last year 10% more cases were deemed eligible. 4% more cases were started but 5% less completed. 53% were finished within their target 12 weeks compared to 63% the previous year. Last year there was no increase in complaints whereas the year before there was a 14% increase. The year before that there was an increase of 8%, when the budget was over £6 million.

[23] **The Bradley report 2009** http://www.rcpsych.ac.uk/pdf/Bradley%20Report11.pdf and *No one knows: Offenders with learning difficulties and learning disabilities*, Loucks N (2007)).

marked disparity in the availability of prison service guidance within the prison estate and its libraries. This often has a significant impact on the ability of a prisoner to know what rule and regulations do and do not apply to him/her and their situation.

We receive thousands of letters from prisoners every year, the majority of whom have tried to pursue the matter without success through the complaints system. We also receive frequent letters from prisoners across the estate complaining that complaint boxes on the wings are often not refilled with complaint forms for weeks and sometimes months. This is not simply anecdotal and reflects what other organisations such as the HMCIP believe (and which we understand will form part of their response), which is that the complaints systems within prison are often wholly inadequate, lack independence, and that prisoners' have little or no faith in the complaints system to adequately resolve their concerns. PAS notes that the MOJ offers no statistics or evidence to suggest the contrary.

Chapter Four: Introducing Competition in the Criminal Legal Aid Market

Scope of the new contract

Q7. Do you agree with the proposed scope of criminal legal aid services to be competed? Please give reasons.

No

It is proposed that criminal work will be delivered through 400 contracts with providers who bid under a competitive tendering model. Prison law will fall within the scope of the proposed competitively tendered crime contracts (paragraph 4.29), although other areas of criminal work will be excluded[24]. This is reiterated at para 4.31 which states "Only providers awarded a new crime contract following the

[24] Paragraph 4.34 states "We propose to exclude the following three areas of criminal legal aid from the scope of the new contract entirely" (these refer to Crown Court advocacy, VHCCs and Defence Solicitor Call Centre and Criminal Defence Direct).

competitive tendering process would be eligible to undertake this work and to deliver these services across all procurement areas"[25].

Paragraph 4.31 makes it clear that whilst prison law would be within scope of the new contract it would not be subject to the price competition. Rather, the cost for these cases would be administratively set at a reduced price.

Those who bid for criminal work will presumably have to establish that they will be able to provide prison law (and appeals/reviews) work in respect of any client requesting a service for which he or she is eligible. This is a significant change as currently prison law may only be offered by firms with a prison law schedule who meet 'supervisor standards' (Annex 3). There seems no rationale to this in terms of providing a quality service.

Those bidding for the new proposed criminal contracts will need to be aware that:

- The legal aid repayment rate for prison law work will be administratively set at 17.5% less than its current fixed fee rates and so will for most advice and assistance cases be subject to a standard fee of £180;
- Providers will not be able to refuse any individual who seeks representation in relation to a prison law issue if s/he otherwise meets the criteria for legal aid, even if that provider is at full capacity or that individual was represented for linked proceedings by a different provider (i.e. has not been a previous client of the firm);
- Clients seeking representation will not be restricted by geography and will have free choice as to who they instruct. However, travel time is only claimable if the case is 'exceptional' (three times the fixed fee) and then only for one hour each way;

[25] In a meeting with the Howard League on 3.5.13 the Ministry of Justice confirmed that providers will be required to provide prison law and criminal appeal services if the client requests work that meets the criteria for legal aid.

- The work may be carried out by agents or sub-contractors but these agents/sub-contractors must be identified at the time of the ITT stage of the bid;
- Providers will be responsible and remain liable for quality assurance of their agents or subcontractors. These areas of work have rigorous supervisor standards (see Annex 3).
- There are currently 353 providers that do prison law work;
- This work is classed as specialist but 'low volume'.

It is not clear why prison law is to be subsumed into the criminal law budget given that the profession has repeatedly been told of the need to specialise.

The last consultation in 2009 was premised on the need for prison law to be a separate specialism. As a group prison lawyers have been at the forefront of changes to how the Parole Board operates, supervisor standards, and how the Legal Services Commission delivers on quality work in this area. All of this work, which has helped for instance to reduce delays and therefore save significant costs in parole hearings, will be lost if the specialism and niche practices responsible for this engagement are lost.

In 2010 the MOJ said that the changes then being made were necessary to maintain the quality of the service, along with an attendant desire to control costs. Guidance for practitioners was considered in order to supplement the 2010 contract. Such guidance was finally published by the LAA as a separate section of the Crime Bills Assessment Manual in April 2013. The purpose of this guidance is obvious. It will ensure that prison law is provided by expert solicitors and counsel, who work together to ensure the efficiency of the prison law system. The primary focus for legal representatives is to work effectively with prisoners and the agencies of the state towards rehabilitation so that prisoners can be released into their communities without risking the protection of the public. This, in turn, reduces public expenditure on the costs of detention.

As to public expenditure in this area of law, the prison law budget as we understand it increased slightly after the 2010 changes but has now levelled out suggesting that practitioners are self-regulating what cases they take on and that the standard fees do not need to be cut further. In respect of the former, for those areas of prison law that do remain, there are concerns that criminal law firms who bid will simply, because of the very low rates on offer, use very inexperienced people to do prison law cases including Parole Boards. Prison law will no longer be possible as a discrete service and all crime providers will be required to take on any work that comes their way, thereby reducing the likelihood that specialist providers will be able to continue to practice and provide quality representation to prisoners.

It is of the utmost concern that the consultation document does not contain any recognition, let alone analysis or consideration, of the importance of prison law.

Prison law practitioners have served to (a) protect an often marginalised and misrepresented group of people, (b) provide an important level of protection in very serious cases, such as those involving discriminatory treatment, and (c) set important precedents in the common law more widely.

All relevant expert authorities agree that prisoners are particularly vulnerable and require particular protection. Within prisons, there are disproportionately high numbers of ethnic minorities and of individuals with mental health problems.[26] As the United Nations special rapporteur on torture, Mr Manfred Nowak has commented, "*persons deprived of liberty are among the most vulnerable and forgotten human beings in our society*".[27] The European Court of Human Rights held in *Campbell and Fell v. United Kingdom* [1984] 7 E.H.H.R. 165 that "*justice cannot stop at the prison gates"*.

These principled positions are consistent with the views of the domestic judiciary:

[26] More than 70% of the prison population has two or more mental health disorders. (Social Exclusion Unit, 2004, quoting Psychiatric Morbidity Among Prisoners In England And Wales, 1998).
[27] http://www.ohchr.org/EN/NewsEvents/Pages/ConditionsInDetention.aspx

In his report entitled Prison Disturbances: April 1990 (Cm 1456, 1991), Lord Woolf recognized, at paragraph 14.293 that, "*a prisoner, as a result of being in prison, is particularly vulnerable to arbitrary and unlawful action*".

In *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, Lord Bingham held, at paragraph 5, that it was important that a prisoner retained the right of access to the law.

PAS would therefore strongly argue that prison law should be removed from crime, that it should be separately considered in terms of scope and budgets and that the MOJ should set a fresh timetable for any proposals to be properly considered.

Q8. Do you agree that, given the need to deliver further savings, a 17.5% reduction in the rates payable for those classes of work not determined by the price competition is reasonable? Please give reasons.

No, standard fees were only introduced 3 years ago and so their longer term effect on the prison law spend cannot yet be ascertained but the evidence is that these changes have reduced the budget spend in this area of work.

Paragraph 3.12 of the consultation document notes that spending on prison law has "*increased markedly over time"*; from £1m (0.06% of the total legal aid budget) in 2001/2 to £23m (1.12% of the total) in 2011/12. The increase in costs over this period is not, however, put into context.

For instance the figures already show a reduction of £3m in prison law spend in 2011/12 from the previous year, a reduction of some 11.5%. This reduction shows that the changes brought into effect by the introduction of the 2010 Standard Crime Contract have resulted in a significant reduction.

The MOJ figures also do not take into account the external levers most relevant to the rise in the prison law budget and referred to elsewhere within this response,

namely the significant rise in the number of indeterminate sentenced prisoners arising from IPP sentences.

Questions 9 to 22 and 25-31

PAS would submit a general view about these proposals which all contribute to its conclusion that the model as proposed is unworkable.

The model as proposed

- Fails to deliver a model of competition that is either good for the consumer or for public finances given it is a monopoly provider simply setting an artificially low maximum price and which has its only outcome, a race to the bottom by any providers still willing to engage with the process. This will have serious implications for both the quality of service delivered, and attendant costs implications for the overall Criminal Justice spend which appear to have simply not been considered by the MOJ

- The bids are for fixed fractions of work. This offers consumers no opportunity for growth, 3 years of uncertainty pending the next round of contracting, and in which reputation and experience counts for nothing.

- Even on the MOJ's own figures, it seems that firms will have to grow by some 250%. Given the timescales involved, three years, these seem impossible to achieve.

- The pricing makes the project unviable given the margins are set so across the whole range of criminal work including complex trials.

- The geographical implications of the model seem ill conceived, the scattering of work being through allocation not area for instance, despite London being a huge area, with significant transport structure issues.

- There seems to be a clear conflict of interest in terms of differential payments which depend on whether a case ends up as a guilty plea or goes

to trial.

- Finally the government, which seems so keen on choice in other areas such as health and education, effectively removes choice in the criminal justice system, most markedly in the idea of people detained in police stations no longer having a choice as to representation.

Procurement process

Q23. Are there any other factors to be taken into consideration in designing the technical criteria for the Pre-Qualification Questionnaire stage of the tendering process under the competition model? Please give reasons.

The proposals in the consultation are too vague and unclear to constitute a proper consultation process as to what factors should be considered at this stage. However, PAS would strongly argue that an ability to comply with quality standards for prison law should be required from the outset.

Q24. Are there any other factors to be taken into consideration in designing the criteria against which to test the Delivery Plan submitted by applicants in response to the Invitation to Tender under the competition model? Please give reasons.

Q33. Do you agree with the proposal that fees paid to experts should be reduced by 20%? Please give reasons.

There is a fundamental issue around equality of arms in cases involving the liberty of a subject. The expert fees are already limited to £90 per hour in all but the most exceptional cases. In PAS' experience the number of leading experts willing to undertake reports at this rate is dwindling and a further reduction is likely to deplete the pool of available experts even further. In contrast the state has near unlimited resources to instruct experts, leading to obvious disparity and potential unfairness.

Judicial Review

The MoJ in 2011 in the consultation document, "Proposals for the reform of legal aid in England and Wales" stated,

"4.16 In our view, proceedings where the litigant is seeking to hold the state to account by judicial review are important, because these cases are the means by which individual citizens can seek to check the exercise of executive power by appeal to the judiciary. These proceedings therefore represent a crucial way of ensuring that state power is exercised responsibly."

Regretfully, it would appear that two years later the MoJ no longer see judicial review proceedings in the same light.

Under this proposal, lawyers committed to challenging abuse of state power and to securing justice for their clients will face the difficult, if not impossible, choice of undertaking work which may not be paid thereby putting the viability of their firm at risk, or, in effect, acting for the state in denying such rights to clients without private means.

Introducing a residence test

Q4. Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK? Please give reasons.

<u>Residence Test</u>

PAS strongly disagrees with this proposal. Please find attached Counsels opinion on the legality of this test.

Our objections are:

a) Limiting legal aid in this way undermines the rule of law a fundamental feature of which is that everyone is equal before the law and is unjust;
b) The proposal would be administratively unworkable and expensive

c) Would leave people open to abuses of power and arbitrary decision making because they are excluded from the protection of the law;
d) Would mean that individuals, groups and public bodies can act with impunity as there will be little risk of legal sanction for unlawful action;

These proposals appear unworkable and expensive.

- They are likely to lead to significant additional litigation about whether or not a person is or has been lawfully resident in the UK;
- They will lead to a significant increase in litigants in person who, without legal aid, will have no option but to bring the cases themselves without legal assistance, **this will be more time-consuming for the courts and consequently more expensive;**
- They will result in insurmountable evidential hurdles as they require solicitors in all areas to essentially investigate and provide evidence around lawful residence which is a complex legal issue in itself. An example of this can be seen in the area of lawful residence granted by operation of law. Under section 3(c) of the Immigration Act 1971 or as a result of the *Zambrano* litigation residence rights can vest automatically and are not based on documentary evidence. How are solicitors expected to identify these types of cases?
- In many cases legal aid will be required to litigate whether a person is lawfully resident in the UK. Where there is a risk that the UK Border Agency and/or another public body (for example a local authority or an NHS Trust) has wrongly determined that someone is not lawfully resident, and the individual's claim against them is meritorious as a result, preventing that person from accessing public funds to challenge the determination is unjust and may have the effect of incentivising unlawful decision making around issues of residence.

An obvious example of the potentially absurd and presumably unforeseen outcomes that the residence test as it is defined would bring can be seen in the limiting of legal aid to "those who have a strong connection to the UK". It would enable civil legal aid to be granted to people who have lived their entire lives in Bermuda, Gibraltar, the Cayman Islands, the Pitcairn Islands and other quite remote British Overseas Territories, whose personal connection to the UK may not be particularly strong. Conversely, the residence test would exclude persons who are likely to have a strong connection with the UK, for example:-

- people in Britain who have lived most of their lives in Britain but were not aware of the need to apply for British citizenship after the Commonwealth country in which they were born gained independence;
- non-UK nationals with British spouses or British children;
- migrants who have entered lawfully but have not been resident for 12 months;
- people granted refugee status less than 12 months previously

The residential test also seems to ignore the need for there to be equality before the law. It is a constitutional principle, observed by the courts, that there must be access to the courts to secure the rule of law[28]. Lord Bingham wrote in *The Rule of Law*[29]

> …*means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide disputes which the parties are unable themselves to resolve' and p 88 'denial of legal protection to the poor litigant who cannot afford to pay is one enemy of the rule of law' . Given that we have an adversarial legal system there must be equality of arms.*

There is a particular iniquity in denying such persons legal aid for their immigration cases when a wrongful assessment of that status will cut them out of defending or asserting all other rights and entitlements.

[28] See for example *R v Secretary of State for the Home Department, ex parte Leech* [1994] QB 198 per Lord Steyn.
[29] Allen Lane, 2010, p 85.

It is also said, at [3.42], that the Government is "concerned that individuals with little or no connection to this country are currently able to claim legal aid to bring civil actions at UK taxpayers' expense" and therefore are "able to benefit financially from the civil legal aid scheme". Another stated concern is that the availability of legal aid for cases brought in the UK, irrespective of a person's connection, "may encourage people to bring disputes here".[30]

These concerns are misconceived. Legal aid is not a financial benefit. It is there to ensure that those who cannot afford to pay for their own legal representation are not denied access to justice.

The stated concerns are also inconsistent with the Government's stated approach to the reforms to civil legal aid which led to Parliament passing into law the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The rationale for the changes in scope brought about by this Act, and for the areas of work left in scope, was that only the most serious cases, for example involving life, liberty, homelessness and abuse of power by the state, would be eligible for legal aid.[31] It was stated, for example, that cases in which an individual was primarily seeking monetary compensation would not generally be of sufficient importance to justify public funding.[32] It was also stated that cases resulting from an individual's "own choices in their personal life" would not receive public funding.[33] Therefore, the Government sought, and Parliament ultimately agreed, that matters should be removed from scope if a financial benefit was the main objective of the case or that the case was only being brought due an individual's personal choices.

Much of what was left in scope post-Legal Aid, Sentencing and Punishment of Offenders Act 2012 was litigation where there will be good prospects of recovery of

[30] Consultation, [3.44]
[31] Ministry of Justice Consultation, "Proposals for the Reform of Legal Aid in England and Wales", November 2010 ("the 2010 consultation"), at paragraphs 4.7-4.29.
[32] Paragraph 4.17.
[33] Paragraph 4.18.

inter partes costs from an opponent. If the merits criteria are properly applied, in many cases *inter partes* costs will be recovered and legal aid repaid in full. One of the fundamental flaws with the proposals is that the Government has not set out what it expects to **save** by making this change[34]. It has therefore not factored in what proportion of cases funded by legal aid are likely to be successful, with significant benefit to the individual, recovery of *inter partes* costs and legal aid repaid in full. Many litigation cases take lengthy periods of time to resolve. For example, it is not uncommon for police actions to take two to three years from start to finish. It is proposed that asylum seekers should be eligible for all civil legal aid but will cease to be eligible in the event that their cases fail. In those circumstances, substantial legal aid funds may have been invested in a case and the result of legal aid being withdrawn is likely to be that a case will be discontinued with the costs met by legal aid rather than the opponent. The Government has not sought to factor in the additional costs to the legal aid of cases being discontinued in this way.

In terms of the proposal's **lawfulness** we also draw to the Ministry's attention the European Legal Aid Directive 2002/8/ESC of 27 January 2003. As set out in Article 1(2), the Directive applies to civil and commercial matters and does not, in particular, apply to revenue, customs or administrative matters.

PAS recalls the statement in the sixth Preamble to the Directive that:

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> *(6) Neither the lack of resources of a litigant, whether acting as claimant or as defendant, nor the difficulties flowing from a dispute's cross-border dimension should be allowed to hamper effective access to justice.*

As set out in the eighth preamble, the purpose of the Directive is to establish minimum standards and that Member States are free to adopt higher standards.

[34] See Impact Assessment, p2 and p8, "The LAA do not currently record the residency status of a client and therefore data is not available to estimate the impact on the volume of cases this policy affects"

Lord Chancellor's Direction on Cross Border Disputes' (Implementation of Council Directive 2003/8/EC), 27 January 2008. Article Six of the Directive sets out that only legal aid applications for actions that appear 'manifestly unfounded' can be rejected, unless pre-litigation advice on legal aid is offered (see also Article 13(3) which provides for refusal only where applications are unfounded or outside the scope of the Directive). The Directive specifies in Article 5(1) that member States shall grant legal aid to persons who are 'partly or totally unable to meet the costs of proceedings'. It further states at Article 5(5) that

> *'Thresholds defined according to paragraph 3 of this article may not prevent legal aid applicants who are above the thresholds from being granted legal aid if they prove that they are unable to pay the cost of proceedings referred to Article 3(2) as a result of differences in the cost of living between the Member States of domicile or habitual residence and of the forum.*

At the moment a legal aid merits test operates. Cases with poor prospects of success are not funded by the State. The legal aid means test may involve checks and lead to refusal of help, but a person who is identified as having funds can be directed toward help for which s/he can (in theory) pay. The impecunious person failing the residence test would simply be turned away. The lawyer would be telling a client that their case has excellent prospects of success, that they have been wronged, including, by the State, but that because of their poverty they must suffer that wrong without redress.

It is stated in the consultation paper that exceptional funding will still be available to those who fail the residence test.[35] This does not appear to be accurate as a matter of law. There would be no exceptional funding in cases excluded by the proposed residence test. Section 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 makes provision for exceptional funding, so that an application can be made for funding of a case not within the scope of legal aid.

[35] Paragraph 3.54.

Section 10 begins:

> 10 Exceptional cases.
>
> (1) Civil legal services other than services described in Part 1 of Schedule 1 are to be available to an individual under this Part if subsection (2) or (4) is satisfied.
>
> …

Thus it will be seen that exceptional funding is available only for matters not included within the scope of legal aid in Part 1 of Schedule 1 of the Act. If the proposed residence test were implemented a person denied legal aid for a matter within scope solely because they have not been lawfully resident in the UK for 12 months, would not be able to make an application for exceptional funding. The case is excluded from legal aid *rationae personae*, but not *rationae materiae* and it is with the latter that section 10(1) is concerned.

We would remind the MOJ of the free movement provisions in EU law and their applicability to EU nationals, EEA nationals and Third Country nationals.

We would also seek to remind the MOJ of its obligations under Article 16 of the Refugee Convention: Article 16. - Access to courts

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.

2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*.

3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

PAS submits that this proposal is **unlawfully discriminatory** and contrary to Articles 2 (no discrimination in application of articles), 7 (equality of protection before the law), 10 (fair hearing) and 12 (legal protection against interference with home) of the Universal Declaration of Human Rights.

In support of this view PAS notes that the attempt to restrict the payment of income support, housing benefit and council tax benefit to in-country asylum-seekers by The Social Security (Persons from Abroad) Miscellaneous Amendment Regulations 1996 were struck down by the Court of Appeal as *ultra vires* in *R v Secretary of State of Social Security Ex p Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275.

In terms of the client group that PAS works with, the following are likely now to be excluded from legal aid under these proposals:

- Any person who is unable to provide evidence that they have in the past lived in the UK (lawfully) for a period of at least 12 months, including people of British nationality.
- Foreign national prisoners, including those with serious mental health problems such as post-traumatic stress disorder, who have not been lawfully in the UK for 12 months or who are subject to TERS or deportation proceedings or deportation proceedings

The following cases would not be eligible for legal aid:

- Where a member of a protected group for the purposes of equality law (such as a disabled person) is discriminated against by a public authority, such as the Prison Service, that person will be unable to vindicate their right to equal treatment under the Equality Act 2010 if they have not been in the UK lawfully

for 12 months, even though the Equality Act 2010 is there to prevent discrimination.

- Where a person suffers mistreatment at the hands of the Prison Service or police, such as false imprisonment, assault or malicious prosecution, they will be unable to get public funding to bring a claim if they have not been in the UK lawfully for 12 months and the Prison Service and police will therefore face no sanction for their unlawful behaviour.
- Where local authorities or the Prison Service unlawfully refuse to provide support under the community care legislation, such as the NHS Community Care Act 1990 and National Assistance Act 1948 or s17 of the Children Act 1989 to a child in prison, he or she will be unable to challenge that decision unless he or she has been lawfully in the UK for 12 months. This proposal will frustrate the statutory purpose of, for instance, the Children Act 1989 to safeguard and promote the welfare of children and could leave children in prison particularly vulnerable in terms of the services they can access within prison and/or on release. Similarly in regards to the community care provision for disabled and vulnerable adults in prison.
- In the last two years there have been four cases against the UK Border Agency finding that detainees with a mental illness had been subject to inhuman treatment in immigration detention, in breach of Article 3 ECHR. None of these cases would have been funded under this proposal, leaving the most serious human rights abuses unchallenged.
- A person with priority need for housing assistance, as arguably a prisoner is on release under the homelessness guidance, would not be able to challenge an unlawful refusal to provide housing if they had not been in the UK for 12 months, even though they may be qualified persons under the housing legislation.

Paying for permission work in judicial review cases

Q5. Do you agree with the proposal that providers should only be paid for work carried out on an application for judicial review, including a request for reconsideration of the application at a hearing, the renewal hearing, or an onward

permission appeal to the Court of Appeal, if permission is granted by the Court (but that reasonable disbursements should be payable in any event)? Please give reasons.

Civil merits test – removing legal aid for borderline cases

Q6. Do you agree with the proposal that legal aid should be removed for all cases assessed as having "borderline" prospects of success? Please give reasons.

Paying for Permission

The MOJ has expressed concern at the number of cases which are argued successfully within judicial review proceedings. However, as the research by the PLP and Professor Maurice Sunkin from Essex University has highlighted, these concerns are based around presumptions and an inaccurate analysis of the existing data.

http://www.publiclawproject.org.uk/documents/UnpackingJRStatistics.pdf

In short:

- According to the official figures there is a very significant difference between the number of applications for judicial review and the numbers of case that are dealt with at the permission stage.
- A substantial proportion of cases are withdrawn, because they are settled, almost invariably in the claimant's favour before they reach the permission stage.
- That some 56% of cases are withdrawn after permission, again invariably because they are settled in the claimant's favour following a judge indicating there is an arguable cases (often in quite strong terms in our experience)
- And that when you include the above with the success at final hearings, the claimant success rate is closer to 45%

This analysis and in terms of how the MOJ statistics simply do not reflect the reality of JR outcomes would certainly tally with a snapshot of the judicial reviews that PAS has undertaken over the last six years:

Case CO/1524/2009 – permission granted in respect of a refusal to allow a prisoner access to an Open University course because he maintained his innocence. The decision was held to be arguably in breach of the 1999 Prison Rules, the Prison Service's own guidance in PSO 4201 and Article 10 of the ECHR. The Treasury Solicitors settled soon after permission was granted, paying the legal costs and with the claimant being allowed onto the course. This case could not be taken under the proposed changes to prison law

Case CO/9183/2011 – permission granted in respect of the refusal by the Prison Service to allow a Category A prisoner visits from his nephew who was on licence. The decision was held to be potentially in breach of the Prison Service guidance in PSI 16/2011 and Article 8 of the ECHR. Soon after permission was granted the case was settled with a consent order, legal costs being paid, with a reconsideration of the nephew being allowed to visit which was granted. This case could not be taken under the proposed changes to prison law

Case CO/10589/2008 – this case involved a challenge to a six-month visiting ban imposed on the partner (a former prison officer) and young daughter of a foreign national prisoner. In granting permission the judge said "I have no doubt that the sanctions imposed are arguably grossly excessive and it is impossible to believe that the circumstances in which the relationship commenced had nothing to do with the decision reached". After permission and the forced disclosure of CCTV evidence, the ban was quashed, visits recommenced and the claimant's legal costs were paid by the Treasury Solicitor. This case could not be taken under the proposed changes to prison law.

CO/7684/2010 – this case concerned periods of Release on Temporary Licence (ROTL) and how they were to be calculated and assessed in light of confiscation order proceedings. A final hearing was due to take place in January 2011 but two

weeks prior to this the Treasury Solicitor acting on behalf of the Secretary of State and HMP Spring Hill announced a revised policy change to PSO 6300 in line with what we had argued throughout the proceedings. This change led to hundreds of ROTL eligibility dates being recalculated and in practice brought forward in all cases. It also led to a change in the criteria to be used, the new policy requiring that where ROTL was being considered for prisoners facing confiscation proceedings or whose sentences contain a confiscation order the usual risk assessment must be undertaken, including the risk of abscond in light of impending confiscation proceedings or the presence of an unpaid confiscation order but also taking into account the **individual circumstances of each case.** Where a confiscation order has been made but not paid, or the prisoner is actually in default then the agency responsible for the confiscation order must be contacted and their views sought prior to a decision being made about ROTL. This case could not be taken under the proposed changes to prison law. The **savings to the Prison Service** through the enforced change of policy meant hundreds of prisoners were then eligible for ROTL, able to work either paid or on a voluntary basis on temporary release, able to maintain family ties and prepare for eventual release.

CO/9941/2008 – after no response had been received after the issuing of a letter before claim, proceedings were issued in respect of the time set for the claimant's next parole review. The Treasury Solicitor, on receipt of the papers and having considered the arguments, brought forward the review period by six months, in addition to paying our legal costs. This had a knock on effect of the parole hearing being brought forward by the same time period and when she was released 6 months earlier than if the decision had remained unchallenged **saving** the MOJ some £20,000.

CO/2118/2011 - the prison had miscalculated a sentence and had treated a period where the prisoner was in the community and on a licence with strict conditions as being 'unlawfully at large'. After we had successfully argued for permission, the Secretary of State reviewed the case and conceded. It also led to a change in policy

as a result from the arguments which we advanced. This **saved** the MOJ some £30,000 by not keeping someone in prison beyond their sentence dates.

CO/3253/2013 – a prisoner who sought a transfer of prison in order to be closer to his children was repeatedly refused on the basis of inaccurate information including the prison's insistence that he had several adjudications against him, despite their having all been quashed. After the Treasury Solicitor indicated that they intended to defend the action, a few weeks later they conceded the case prior to permission, and agreed to pay costs.

None of the above cases, save for one, could be taken under the current proposals as all fall outside of the scope of prison law funding. Instead they would have to be taken, if at all, under a public law contract, which is limited in all instances to 15 matter starts per organisation/firm.

Of the 30 or so Judicial Reviews undertaken by PAS during this period only 7 have resulted in no action having to be taken by the State and/or costs paid to us (and the LSC) and one of those was because the matter had become academic due to the delays in the Administrative Court.

<u>Borderline cases</u>

By their very nature borderline cases will often involve highly complex arguments and novel points of law. This seems to be accepted in paragraph 3.87 of the consultation document, "*the cases to which the "borderline" exception applies are high priority cases, for example cases which concern holding the State to account, public interest cases, or cases concerning housing*". It is then perversely ignored when proposing to remove such cases from the scope of public funding.

The "*borderline"* provisions form part of the Legal Aid Agency's carefully drafted merits criteria. Advisers can only place a case in this category if it is impossible to

assert that the prospects of success are less than 50%, because of uncertainty over the law, fact or expert evidence. The funding of such cases will then only be justified if the Legal Aid Agency is persuaded that the case justifies funding, by reason of its fundamental importance to the lay client or the wider public interest of the case. This careful assessment ensures that only the most important cases are funded. There is no evidence that the LAA is incapable of assessing such cases or that it is granting funding to unmeritorious claims. On the contrary these cases include precisely the kinds of matters that need to come before our courts so that we know what the law says.

So in the area of prison law in *Ezeh and Connors v UK*[36] permission was refused by the High Court around a challenge that prison disciplinary charges were criminal within the meaning of Article 6 whenever additional days were given as a punishment by a prison governor.. The judge said *"This case is completely unarguable"*. Several years later the Grand Chamber disagreed[37]. This case led to a sea change in the administration of prison adjudications.

Again in *Middleton* (Article 2, prison death inquests) permission was refused, it was obtained at a renewed oral hearing and the House of Lords completely changed the law.

In a case that PAS took and won in the Supreme Court two years ago[38] regarding the inter-relationship between the sentencing provisions of the Criminal Justice Act 1991 and the Criminal Justice Act 2003, the case was described at the outset as a borderline one given the complexity of the legislation. The case was lost in the High Court, won in part in the Court of Appeal yet the Supreme Court were unanimous; Lord Judge indicating paragraph 86-7;

[36] 2002 35 EHRR 28
[37] 2004 39 EHRR 3
[38] R (on the application of Noone) v The Governor of HMP Drake Hall and another [2010] UKSC 30

"I have studied the judgments of Lord Phillips and Lord Mance. Their judgments tell the lamentable story of how elementary principles of justice have come, in this case, to be buried in the legislative morass. They have achieved a construction of the relevant legislation which produces both justice and common sense. I should have been inclined to reject the Secretary of State's contention on the grounds of absurdity – absurd because it contravened elementary principles of justice in the sentencing process - but Lord Phillips and Lord Mance have provided more respectable solutions, either or both of which I gratefully adopt . Nevertheless the element of absurdity remains. It is outrageous that so much intellectual effort, as well as public time and resources, have had to be expended in order to discover a route through the legislative morass to what should be, both for the prisoner herself, and for those responsible for her custody, the prison authorities, the simplest and most certain of questions – the prisoner's release date."

This would also again be a case that would not be funded under the current proposals on the scope of prison law, leading to the legislative morass described above simply continuing indefinitely.

Moreover, the criteria for 'Borderline' cases were originally laid before Parliament as secondary legislation and approved. There is no meaningful analysis to question either these types of case and their continued importance nor that such important test cases as above have damaged the credibility of the overall legal aid system. As a result of this wholesale lack of analysis, the proposed change is not justified and is obviously unnecessary.

<u>The consequences of these proposals in terms of increased costs</u>

The concerns about how cuts in legal aid will increase the number of cases taken by litigants in person and the attendant difficulties this can create for the courts and judiciary were highlighted recently by Sir Alan Ward in *Wright v Michael Wright Supplies Ltd* [2013] ECA Civ 213. The now retired Court of Appeal judge set out two problems which the case revealed. The first concerned the task encountered by

judges in trying to deal with the difficulties which litigants in person can, understandably, create when putting forward their claims and defences. In this regards, judges he said should not have to 'micro-manage cases, coax and cajole the parties to focus on the issues that need to be resolved'. This can be disproportionately time consuming. Sir Alan Ward argued that this also meant that although the cost to the legal fund was reduced in cases which were no longer eligible for legal aid funding, the obvious result was that costs are increased in the courts instead. In Sir Alan Ward's opinion the case of *Wright* was a prime example of the adverse effects of reforms (civil) which were beginning to bite. The appeal would never have occurred if the litigants in person had been represented and that justice '*will be ill served indeed by the emasculation of legal aid*'

Chapter Six: Reforming Fees in Civil Legal Aid

3) Removing the uplift in the rate paid for immigration and asylum Upper Tribunal cases

Q32. Do you agree with the proposal that the higher legal aid civil fee rate, incorporating a 35% uplift payable in immigration and asylum Upper Tribunal appeals, should be abolished? Please give reasons.

It is correct that the uplift was originally intended to be compensation for work being at risk and that now only the permission stage is all that is at risk. However, it is arguable that over time the uplift has been factored in each time legal aid rates have not been increased. Underlying rates in immigration and asylum cases are essentially unchanged, save for a 10% cut in 2012, for over 10 years.

The proposed rates can be compared with the Guideline Hourly Rates used by the High Court in assessing costs. They fall far short. Currently the rates for travel time are, at least nominally, between £26.51 and £36.82, preparation and attendance at between £47.30 and £74.36, for self-employed professionals who must meet tax, national insurance and overheads. The highest rate in each case being the current uplifted rate paid in only some of the Upper Tribunal cases. The risk is of losing

specialist advocates because they will have to leaven legal aid work with private work (or work in other fields). The risk is all the more pronounced now that (non-asylum) immigration has been taken out of legal aid, meaning that different knowledge and skills are needed for work that can be done on legal aid mainly asylum and private work, where there is much less asylum work.

The suggestion that the rate incentivises appealing in weak cases is backed by no evidence. If the cases have got permission, then they cannot be weak as not only does there have to be an error of law to get permission, but it must also be a material error, one that would have made a difference to the outcome.

Chapter Eight: Equalities Impact

Q34. Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper? Please give reasons.

PAS does not agree that you have correctly identified the range of impacts under the proposals.

PAS notes repeated references in the impact assessments (as well as elsewhere in the Consultation paper) to a lack in public confidence in legal aid. PAS is not aware that there is any problem with a lack of public confidence and notes the Government has supplied no evidence of this beyond vague and anecdotal reference to e-mails and letters received from the public by the Justice Secretary. In fact of course recent opinion polls suggest that public confidence in the legal system is high. Similarly, surveys, contrary to what we are told show in fact overwhelming support for the rights in the HRA. A Liberty poll in December 2009 found that 96% of people polled believed it is important that there is a law that protects rights and freedoms in Britain.

PAS notes that the policy objective in the proposed changes to scope, eligibility and merits are to target limited public resources to cases which justify it and people who need it. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 has already substantially reduced the scope of legal aid and targeted legal aid to the areas the Government considered key. PAS is concerned about any proposals to further limit the availability of legal aid.

Virtually no substantive consideration is given to the duty on the MoJ to have due regard to the need to advance equality of opportunity (Section 149 Equality Act 2010). In the context of legal aid, this requires a very different analysis from whether groups currently benefiting from legal aid may be indirectly discriminated against under the current proposals – the approach in Annex K. What Annex K omits is careful scrutiny by the MoJ of the current proposals to identify for protected characteristics such as race (including colour, ethnic or national origins and nationality) or disability, what steps it should take to remove or minimise disadvantages or improve access to legal aid or to meet different needs in respect of legal representation in the areas affected by the current proposals. We can see no evidence in Annex K that with regard to this package of major proposals the MoJ has heeded the obligations of public authorities under s.149 of the EA, as defined by the courts, to give rigorous objective proportionate consideration to all of the elements of the duty before policy decisions are made; the courts have made clear that avoiding discrimination is not enough.

Q35. Do you agree that we have correctly identified the extent of impacts under these proposals Please give reasons.

PAS does not agree that you have correctly identified the extent of impacts under these proposals.

In addition to the arguments and concerns identified in Question 34, PAS notes that Legal Aid Agency client data has been considered inaccurate as it is recorded by providers, not clients, when billing claims. PAS does not accept this point. Client

data recorded by providers is based on information supplied by the client when completing initial funding forms. For example, when completing a Crim 1 or CW1 Legal Help form clients are asked to confirm their ethnic background, sex, and disability status. This is not usually completed by the provider but by the client themselves.

PAS also notes that the Government accepts that it does not currently have sufficient data as the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 will alter baseline assessments.

PAS submits that the extent of the impact of the proposals has not been thoroughly considered, particularly given the lack of available information and data.

In respect of these proposals, the Government states that clients no longer eligible for legal aid may choose to represent themselves in Court, seek to resolve the issues themselves, pay for services which support self-resolution, pay for private representation or decide not to tackle the issue at all.

Litigants in person cause delays in Court proceedings and cost the Court time and money to deal with. Any potential savings to legal aid spending will be incurred in court time and expense. Further, these are often highly complex cases and claimants need specialist representation.

Legal aid in any event is only available to applicants on an extremely low income. These applicants would not have the funds to pay for services or private representation.

With regard to the proposed changes to judicial review costs, PAS notes the Government accepts there is a risk that providers may refuse to take on judicial review cases because the financial risk of the permission application may rest with them. The Government argues that these are likely to be cases that would not be considered arguable in any event. We have highlighted above the situations with

regard to prison law where extremely arguable cases are resolved prior to the issuing of proceedings or the permission stage and so are not pursued. Therefore, the extent of the impact of this proposal has not been given due consideration.

The Government has noted that the Courts system could face an increase in requests for reconsideration of the permission hearing or appeals of refusals. PAS submits that the Court will also face an increase in requests for the Courts to consider the issue of costs where cases are resolved prior to the permission hearing. The potential costs in Court time and expense could end up exceeding the proposed savings of £1m per annum in legal aid expenditure.

Q36. Are there forms of mitigation in relation to impacts that we have not considered?

The "do nothing" option as set out in the Impact Assessments should be adopted.

If the Government does propose to make further changes to legal aid then more research into and consideration of the full extent of the impact is vital.

The MOJ should have the courage of their convictions and if these changes are to be pursued that they seek to do so through **primary legislation**, subject to parliamentary scrutiny and debate, rather than through Statutory Instruments and the back door.

In the interim some simple measures that could be taken to mitigate the impact of these proposals in relation to prison law include:

- Prison law could be dealt with outside of the competitively tendered contract

- Quality assurance requirements that guarantee at least the level of expertise and experience under the current supervisor standards would ensure that the credibility of the system is not undermined.

Other proposals

Q2. Do you agree with the proposal to introduce a financial eligibility threshold on applications for legal aid in the Crown Court? Please give reasons.

No. We are concerned about the impact of these proposals on access to justice.

Q3. Do you agree that the proposed threshold is set an appropriate level? Please give reasons.

No. We are concerned about the impact of these proposals on access to justice.

Conclusion

The premise for the consultation document is set out in the "*Ministerial Foreword"*, at p.3. It appears to be asserted that the proposals in the consultation document are necessary because the system of legal aid has "*lost much of its credibility with the public"*, because "*[t]axpayers' money has been used to pay for frivolous claims"*, and because the "*cost of the system [has] spiralled out of control"*. These assertions are unacceptably vague, not evidenced and, as argued in this response, in fact the opposite is true.

Although evidence in support of these claims has been sought repeatedly,[39] it is disappointing to note that the Ministry of Justice has failed to provide any.

[39] Including at the Ministry of Justice "*roadshows"* (see press coverage of the comments of Dr Elizabeth Gibby here: http://www.guardian.co.uk/law/2013/may/08/legal-aid-tendering-moj) and by the Public Law Project, by way of a letter dated 22nd May 2013 (http://www.publiclawproject.org.uk/documents/PLP_Letter_to_MoJ_22_May_2013.pdf).

The absence of evidence is material. Firstly, it undermines the credibility of the consultation document as a whole. Secondly, it undermines the ability of consultees to engage with the proposals. It is settled law that, in order for a consultation to be meaningful, "*sufficient reasons for particular proposals"* must be provided, *"to allow those consulted to give intelligent consideration and an intelligent response*" (*R v North and East Devon Health Authority, ex p. Coughlan* [2001] QB 213, per Lord Woolf MR, as he then was, at paragraph 108).

The absence of any evidential basis for these proposals is all the more striking because the impact of these proposals to legal aid in general, and prison law in particular, are so severe and disproportionate. Even if we are to accept that the overall level of the proposed saving is £4 million (as set out in footnote 17, page 21 of the consultation document) this is tiny within the overall legal aid budget and criminal justice spend in totality when compared to the cost implications if these proposals go through and the complete undermining of the rule of law within the prison estate.

PAS remains deeply concerned that the detrimental impact of the proposed changes in terms of the impact on specialist practitioners and on vulnerable prisoners far out-weighs the relative size of any proposed saving.