Response of the Association of Prison Lawyers to the LASPO PIR

Executive summary

- Cuts to legal aid imposed in 2013 have had a huge impact on prisoners
- Prisoners are a particularly vulnerable group. Prisoners require additional support to access justice both as a matter of principle and because of the practical restrictions on their ability to help themselves.
- The consequences of not providing prisoners with adequate access to justice are grave and costly.
- As a result of the Court of Appeal's decision in *R (Howard League and the Prisoners' Advice Service) v The Lord Chancellor* [2017] EWCA Civ 244 some areas of prison law have been brought back into scope but other areas remain either out of scope or inaccessible.
- Areas of prison law connected to liberty such as applications to the Secretary of State for Justice for progression to open conditions or matters concerning early release ought to be brought back into the scope of legal aid.
- Disciplinary proceedings before the governor should be brought back into legal aid to ensure procedural fairness.
- The areas of prison law that have been brought within the Exceptional Funding Scheme ought to fall under the criminal advice and assistance scheme given the failure of the exceptional scheme to date to provide effective access to justice and the importance of the issues at stake.

About the Association of Prison Lawyers

1. The Association of Prison Lawyers (APL) was formed by a group of specialist prison lawyers in 2008 to represent the interests and views of practitioners in prison law.

Impact legal aid cuts on prisoners

2. The impact of the cuts to legal aid in 2013 on prisoners has been well documented. In *R (Howard League and the Prisoners' Advice Service) v The Lord Chancellor* [2017] EWCA Civ 244, the Court of Appeal considered hundreds of pages of evidence from the Ministry of Justice, the Parole Board and practitioners about the impact of cuts to legal aid for prisoners in order for the Court to consider whether prisoners in five categories of prison law faced systemic unfairness that meant they could not effectively participate in decisions affecting them.[1] The statements outlined how, in the absence of legal aid for prisoners following the 2013 cuts, the two charities that brought the claim faced an increase in calls for support of over 50 per cent and many practitioners in private practice undertook work for free.

Why legal aid matters for prisoners

3. Prisoners are a particularly vulnerable group. Prisoners require additional support to access justice both as a matter of principle and because of the practical restrictions on their ability to help themselves.

4. It has been accepted by the Secretary of State that "the prison population includes a disproportionately high number of prisoners with mental health problems" (*The Howard League and PAS case,* §56). This has been borne out by countless reports describing the fragility of people in prison. Vulnerable prisoners are expected to function in increasingly difficult conditions in prison. The latest annual report by Her Majesty's Inspection of Prisons states "The year 2017–18 was a dramatic period in which HM Inspectorate of Prisons documented

[1] See Appendix to the judgment for an itemised list of evidence considered by the Court

some of the most disturbing prison conditions we have ever seen – conditions which have no place in an advanced nation in the 21st century."[2]

5. It has long been accepted that prisoners require additional support to access justice as a matter of principle due to the uniquely coercive environment and the fundamental power imbalance between the prisoner and the state:

> "A prisoner, as a result of being in prison, is peculiarly vulnerable to arbitrary and unlawful action." (Woolf Report, Prison Disturbances: April 1990 (CM 1456 1991), para 14.293)

> "..prisoners, as members of a closed community uniquely' subject to the exercise of highly coercive powers, far from having fewer rights of recourse to independent courts than most of us, should, rather, have at the very least equal access to justice." (Lord Brown of Eaton Underwood, HL Deb 29 January 2014, vol 751, col 1279 [4/834-835])

6. Prisoners are also physically restricted from accessing justice by virtue of their environment. Because prisoners live behind the locked doors of the prison, they are unable freely to access the outside world to contact such sources of free advice as may be available to other citizens. They cannot use the internet. As legal information becomes increasingly digitised, the utility of the prison library for those who are able to read will reduce. The programme of deregulation of prison service instructions ("PSIs") will also mean that prisoners are likely to have even less information available as to their rights and entitlements and the limited generic advice services that exist will become less able to assist them. People in prison cannot visit advice centres like the Citizens Advice Bureaux and even if they could access such services, their imprisonment means that they require specialist advice that factors in their situation. They are also unable to earn the money needed to pay for legal advice or assistance: prison wages are generally less than £5 per week and at most £15-20 per week for those with a job in a prison industry.

[2] https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2018/07/6.4472_HMI-Prisons_AR-2017-18_Content_A4_Final_WEB.pdf

The consequences of limited legal aid for prisoners are grave and costly

7. Where liberty is at stake, the absence of free and timely advice is clearly a matter of grave concern – the deprivation of liberty is the most severe punishment available in this jurisdiction and a serious matter (*Saadi v United Kingdom* (Application no. 13229/03, para. 70). It is also costly. The Ministry of Justice's average annual cost of a prison place in 2016/7 was £38,042, which equates to £3,170 per prisoner per month.[3] By contrast the average standard fee for legal advice under the criminal legal aid scheme is just £200. Even where liberty is not directly at stake, it is important that prisoners are treated fairly. In the words of Russ Trent, Governor of HMP Berwyn, "There is good research evidence to show that when people in prison experience procedural justice in the way they are treated, they show better adjustment during their sentences as well as better outcomes after release."[4] At a time when the prison system is in crisis, the costs of not applying the highest standards of fairness in prison are too great to be justified.

Despite the Court of Appeal Judgment, key areas of legal advice remain out of reach

8. As a result of the Court of Appeal decision, some areas of legal aid were brought directly back into scope. However, there remain a number of areas of law that affect prisoners that are still either outside the scope of legal aid or were not challenged on the basis that in the course of the litigation it was confirmed they could fall under the umbrella of exceptional case funding (ECF).

9. This response focuses on the areas of law within those categories where APL believes people in prison are at a serious disadvantage as a result of the lack of legal aid. They fall into three categories:

    (1) Issues affecting liberty

    (2) Disciplinary proceedings before governors

[3] Source: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/653972/costs-per-place-per-prisoner-2016-2017-summary.pdf

[4] Russ Trent Governor, HMP Berwyn, *Reducing the need for segregation*, Prison Service Journal, issue 236, March 2018

(3) Areas deemed to fall under the ECF umbrella

Cases that have a nexus to liberty

10. **Guittard cases**: These are cases where a prisoner may need advice and assistance in relation to whether or not an indeterminate prisoner should be placed in open or closed conditions but the matter does not necessarily need to go before the Parole Board. This is where the Secretary of State may be invited to make the pre-tariff decision as to whether a person should move to open conditions without the expense of a parole board hearing. These can be important cases that also save significant time and money by reducing the time that a person spends in closed conditions (which are more expensive than open conditions), increasing the person's chances of release from prison and avoid the need for the expense of a parole board hearing. Once again the fee for such cases is modest, generally at around £200.

11. **Early release cases**: children serving Detention and Training Orders of eight months or more and people serving determinate sentences under 4 years are eligible for early release on Home Detention Curfew. In most cases there is a presumption that early release should be granted, and in January 2018, the Ministry of Justice issued a new instruction that "refusal of HDC for those eligible and not presumed unsuitable for release should be the exception. It should be reserved for those cases where early release would undermine risk management planning to protect the public." Yet, there are a number of problems with securing early release that may require legal advice and support. In such cases, securing early release will result in significant cost savings to the state. A modest amount of legal aid funding to ensure compliance with this policy and ensure that all those who can be released are released on time is clearly in everyone's interests. APL is aware of examples of cases where applications have simply been missed or rejected because accommodation cannot be found, even where there is a statutory right to such accommodation.

Disciplinary cases

12. Prisoners may be formally disciplined in prison and can receive punishments from governors that include loss of privileges and cellular confinement. Legal aid

remains available to prisoners who face the imposition of additional days and to those facing internal disciplinary proceedings who meet the Tarrant criteria. These criteria derive from *R (Tarrant) v SSHD and others* [1985] QB 251 where the Divisional Court held that fairness can require prisoners to be permitted to be legally represented at prison disciplinary proceedings. The Prison Discipline Manual at para 210 sets out the "Tarrant Principles" which a governor is required to apply in order to determine whether a prisoner should be legally represented even though the proceedings will not give rise to an award of additional days. The determination as to whether a prisoner meets the Tarrant criteria is therefore a decision of the utmost importance both for vulnerable prisoners incapable of effectively representing themselves and to those prisoners may be capable of representing themselves but who face an allegation which if proven is liable to be seen as evidencing ongoing dangerousness e.g. a charge of assault. While a finding of guilt will not result in additional days, it could, where the prisoner is serving an indeterminate sentence, set the prisoner back years in securing his release.

13. However, Governors very rarely grant representation under the Tarrant criteria and legal advice and assistance is no longer available for prisoners to make representations that the Tarrant criteria apply and so require legal representation for the disciplinary hearing itself. This can result in prisoners who require assistance to effectively participate being denied it.

14. Advice may also be necessary where a prisoner feels that he or she has an unfair conviction or punishment. For example, a young person with mental illness who has been awarded cellular confinement may require assistance to appeal it. There is an unacceptable risk of unfairness in that vulnerable prisoners, or prisoners who face potentially very serious consequences following an adjudication will not secure legal assistance when fairness requires it.

ECF cases

15. Areas of prison law such as the entitlements of prisoners to support on release, licence conditions and segregation, as well as mother and baby cases currently fall within the exceptional case funding scheme (ECF). The data released by the

LAA on the scheme does not include a specific category for prison law and we presume that these cases fall under the "other" category. We are not aware of any cases where legal aid has been fully granted under the scheme.

16. APL is concerned that this scheme is not effective to ensure access to justice in these areas. There are considerable problems for prisoners who might want to access the scheme. There is no guidance for ECF applications for this category of law either for providers or prisoners.

17. Although the form is much shorter than it was, it still requires the provider to set out how the applicant meets the criteria decided in *Gudanaviciene*. This may be fairly straightforward where a client obviously does not have the ability to conduct the case themselves (e.g. because of severe disability), but it may take much longer for clients where there is no *obvious* barrier (other than the obvious barrier of being a prisoner). It is well established that many prisoners suffer from undiagnosed problems. It will also be necessary to set out the complexity of the matter, and all the steps the client will be required to take. This can amount to a considerable amount of unremunerated work for providers.

18. The difficulties outlined above for providers are magnified for direct applicant prisoners. First, it is unclear how prisoners will even know of the right to seek ECF funding. While the ECF website says that direct applicants do not have to use the prescribed forms, prisoners still have to sign the application and ensure that they provide the information prompted by the form. It is unclear how, without access to the internet, prisoners will access the form or any guidance. The application can be sent to the LAA by post or email. Prisoners cannot access email and it is unclear whether a free post address is available for prisoners with no funds. In *IS,* the LAA relied on the fact that they have a dedicated telephone line to assist members of the public. That line has now been merged with the general LAA line, and it can take some time to get through. Not all operators are aware of ECF or used to dealing with the public, and will often request an electronic case management reference number. Obviously prisoners won't be

able to access the telephone line – they have limited funds and often limited access to telephones.

19. The LAA has no effective procedures for dealing with urgent ECF applications. Most of the issues that were conceded in the course of the judicial review as falling within the possibility of ECF are time sensitive. For example, resettlement issues will need to be dealt with before release (and sometimes before discretionary release where liberty is at stake); segregation cases are almost always urgent as it is established by international standards that irreversible damage can set in after 14 days and there are reviews within this period that may require representations; mother and baby cases are also intensely time pressured as the longer mother and child are separated the weaker the bond is said to become and for that reason representations are required within 14 days. The provider pack states that it if it accepts that a case is urgent, the LAA will decide it in five working days. In practice, this target is rarely met. We understand that the LAA is also not currently meeting its 20 day target for non-urgent cases. The LAA's reason for the lack of an urgency procedure is that providers can carry out work at risk pending the application. In an untested area like prison law, it will not be appropriate for providers to carry out work with no idea of whether ECF will be granted. There is no way to enforce the urgency procedure other than Judicial Review.

20. Not only is there no guidance in relation to this untested area but the only right of review against a refusal to grant ECF is on the grounds that the applicant does not meet the ECF criteria. This must be made within 14 days of the refusal, during which time it may be impossible to obtain instructions from a prisoner on relevant issues. There is no further right of appeal from the refusal of a review other than judicial review.

21. According to the latest version of CBAM, prison law ECF cases are funded under the "misc" category which attracts a fee of just £79 per case. Given the complex and sensitive issues that will be involved and the work required to simply submit

the application for funding, the time cost of pursuing an application is likely to be disproportionate for providers.

22. APL does not consider that ECF is suitable for these cases and we strongly urge the Agency and the Ministry to consider bringing these important cases back into the usual funding scheme.

Concluding observations

23. For the reasons set out above, APL considers that serious consideration should be given to ensuring legal aid is available, subject to the usual means and merits tests, in cases concerning liberty, disciplinary matters before governors and areas currently deemed to fall within the ambit of ECF funding. The current system is not adequate and places people in prison at risk of not getting legal help when they need it. The costs of bringing additional areas back into the scope of advice and assistance is modest.

24. APL would be happy to meet with the team to discuss this further.

2 October 2018