

## **Transforming legal aid consultation**

### **Legal aid for prison law matters**

The Prison Reform Trust, established in 1981, is a registered charity that works to create a just, humane and effective prison system. The Prison Reform Trust aims to improve prison regimes and conditions, defend and promote prisoners' human rights, address the needs of prisoners' families, and promote alternatives to custody. The Prison Reform Trust's activities include applied research, advice and information for people in prison, education, parliamentary lobbying and the provision of the secretariat to the all-party parliamentary penal affairs group.

The Prison Reform Trust is pleased to have a chance to respond to the consultation paper. We have serious concerns about the proposals as they stand and hope they will be modified. We are not solicitors but we come into contact with prisoners because we run the only generic advice service dealing with prison matters. We respond to around 5,500 queries from people in prison and their families a year. This leaves us uniquely placed to comment on the current system. We do not receive any funding from legal aid but we understand the matters that are brought to solicitors and the need for legal aid that covers prison matters. We believe that, despite some improvements over recent years, the current prison complaints system is inadequate.

We have not responded to all the questions on the consultation, as they are outside our area of expertise.

### **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. We are extremely concerned that the changes to the scope of prison law cases under criminal legal aid will severely cut the type of assistance prisoners can receive from lawyers.

PRT believes that these proposals have extremely concerning implications for the

prison system. In recent years legal action has led to systematic improvements in prison regime and treatment. Many legal cases have resulted in improved practices and better treatment for prisoners, particularly vulnerable groups. We note that against the context of overcrowding and huge budget costs the temptation for prisons to cut corners on conditions is immense. Legal accountability is a deterrent to prisons when considering changes that lower standards. Accountability through the courts has had a considerable impact on prisoner welfare and improving conditions. Access to legal advice and assistance can act as a safeguard against frustrations and abuses of power that can make prison disturbances more likely. The consequences for prisoner welfare and safety both in the context of self-harm and in assaults have to be considered. There is a wider understanding of prisoners' rights than there used to be and withdrawing the main way of accessing and securing their rights is not only unjust but potentially dangerous

### **Service provision concerns**

We are concerned that the changes to the structure for funding legal aid will mean a reduction in the quality of service and mean that fewer lawyers with specialist knowledge will be available. The proposals that only firms with a new crime contract will be eligible to practice prison law under legal aid mean that some current specialist firms providing prison law will be unable to practice. We are concerned that prison law – usually low volume but highly specialist work – will be subsumed into larger firms criminal defence contracts leading to a detriment in the services provided. The current system that means that only firms with supervise standards can practicing legal aid. Prison law is a very specialist area and currently few criminal firms practice in this area. Many prison cases need additional time and resources because of the difficulties dealing with communicating with people in prison alongside the particular needs of the client group.

We are not clear how the proposals will work in practice. We understand that providers will not be able to refuse someone representation if they meet the criteria for legal aid. We are also concerned about how many firms will be able to provide prison law and what geographical area they will be covering. We understand that clients will have free choice who they instruct and will be able to instruct anyone nationally. However, travel time and waiting time will only be claimable if the case is exceptional and even then only for one hour each way. The location of prisons, the turnover of prisoners and unexpected transfers make the proposed arrangement problematic. We would like to see these proposals modified so that appropriately experienced solicitors are paid a reasonable price for all the work they do.

## **Necessary safeguards and difficulties with the current complaints process**

It can be very difficult for a prisoner to take a complaint forward. Many prisoners and their families are extremely concerned about the consequences of complaining about a prison when the staff have almost complete control over prisoners' lives. Often the person who is being complained about or a very close colleague will deal with the complaint and there are many concerns about impartiality. The system is not yet transparent and accountable enough to guarantee that there will not be repercussions for those that complain. In addition, prisoners that complain may be treated differently by staff and may be pressurised to withdraw their complaint.

There is general cynicism about the complaints process in prisons. We note that in a recent report from the Inspectorate 17% of BME respondents, 13% of white respondents and 19% of prisoners with a disability told the Inspectorate that they had been 'encouraged or made' to withdraw a complaint in their current prison. Many prisoners instruct a solicitor because they feel that they need this additional protection to be able to take concerns forward with immunity. Without this protection many prisoners will feel intimidated or concerned about taking a complaint against their prison.

In the latest annual report from the Prisons Inspectorate, twelve percent of BME prisoners and 10% of white prisoners felt that a staff member had made insulting remarks to them. 14% of BME prisoners felt they had been victimised because of their race and/or ethnic origin (compared to 2% of white prisoners). 14% of those reporting having a disability felt that a staff member had made insulting remarks. 31% of this group felt threatened or intimidated by staff. One of five people under 21 said that they had felt threatened or intimidated by a member of staff.

We recognise that the Prison Service has made considerable efforts to ensure that the complaints system is clearer and more credible. The complaints policy has been reduced from 163 pages to 45 pages. However, although easy read complaint forms are supposed to be available they are not available systematically across the estate. In addition, many people need support completing a form and may need even more support understanding the answer.

The response to applications in prisons is getting better. However PRT are often contacted by prisoners who have put in an application form and received no reply. This is echoed by our own experience of writing letters to prisons on behalf of prisoners. We still often experience late responses, no response at all or responses that do not answer the queries raised.

Many prisoners are serving short sentences of under a year. The prison complaints system can take a long time to be exhausted. After going through the stage internal process, the average time for a complaint to be completed by the Ombudsman was

16 weeks. Only 47% of complaints were dealt with by the PPO's office in 12 weeks. This long drawn out procedure is not suitable for short sentenced prisoners some of whom will rightly feel that a solicitor's letter will be quicker, easier and more effective.

## **Areas that will be out of scope – specific concerns**

### **Adjudications**

We are extremely concerned that people in prison will (in most cases) be unable to access any legal support when facing adjudication. A negative disciplinary record in prison can have a huge impact on sentence progression, opportunities for work and activities and even release. The adjudication process is legalistic, complex, and technical and has such significant implications for people that not to provide representation will have hugely negative consequences, particularly for vulnerable prisoners.

We note that 21% of newly sentenced people in prison reported needing help with reading and writing. Many people in prison are not able to make written representation against adjudications without assistance from a solicitor. There is no assistance available from prison staff for this area of work (and of course, in many situations this would amount to a conflict of interests). The prison disciplinary system is already seen as discretionary and discriminatory.

The outcomes of adjudications directly impact on the punishments people receive in prison. This can include cellular confinement (segregation) and loss of visits. These punishments are too extreme to be given out without accountability and representation. We are particularly concerned that removing representation in these circumstances will impact on people with a learning disability or learning difficulties. Our research Prisoners Voices demonstrates that prisoners with learning disabilities or difficulties are more likely than other prisoners to have broken a prison rule, five times as likely to have been subject to control and restraint and over three times as likely to report having spent time in seclusion.

### **Treatment cases**

We understand that **11 cases** have received legal aid for treatment matters since July 2010. We note that a significant proportion of these involved prisoners with learning difficulties and /or mental health issues. Therefore this proposal cannot fail to have a directly discriminatory impact on this group. We believe that the current system, where permission has to be granted before the case can be funded gives sufficient safeguards in terms of cost. This ensures that vulnerable prisoners are able to access the legal advice they need in the more extreme treatment conditions cases where external scrutiny and action is necessary.

### **Sentence cases**

Sentence cases can currently include many aspects related to sentence progression, including categorisation, access to interventions, sentence progression, OaSYS (risk assessment), resettlement support and release on temporary licence. Solicitors

providing advice and assistance on accessing these processes enable the prisoner to make better use of their time in prison and impact on release decisions. Access to legal advice has enabled indeterminate prisoners to access rehabilitative courses so that they can reduce their risk and progress to release. Decisions on recategorisation and transfer often have a direct impact on liberty because they can impede someone's progress to release. The current legal aid provision has enabled many to access rehabilitative opportunities sooner and be released either earlier or better prepared for life outside. This is likely to have saved considerable financial and other costs in the longer term.

### **Cost of providing legal aid for prison law matters.**

We believe that in contrast to the stated aim of decreasing costs, the proposals, if implemented are likely to lead to increased costs for the criminal justice system. This is for the following reasons:

#### **1) Cost of Prison and Probation Ombudsman's (PPO) complaints and cost of legal work**

We understand that a PPO complaint costs an average of £1,000, in relation to the current legal aid payable for a sentence case of £220. A letter from a solicitor can often create the necessary pressure or impetus for a speedy resolution. Many prisoners are serving short sentences of under a year. The prison complaints system can take a long time to be exhausted. After going through the two stage internal process, the average time for a complaint to be completed by the Ombudsman was 14 weeks. This long drawn out procedure is not suitable for short sentenced prisoners some of whom will rightly feel that a solicitor's letter will be quicker, easier and more effective.

There remains confusion about the PPO's remit amongst prisoners. Their latest annual report explains that around half the complaints received in their office were eligible for them to investigate (around 2,700). The rest were ineligible, mainly because the prisoners had not completed the complaints process first. Furthermore we note that in the latest PPO annual report this year timeliness in dealing with complaints deteriorated due to staff shortages. 40% of cases were assessed for eligibility within their 10-day target compared to 94% last year. 53% of complaints completed were within their 12-week target compared to 63% last year. There was no change in the average time to complete a case, which was 14 weeks. It is clear that the PPO does not have capacity to deal with an additional influx of complaints.

#### **2) Increase in Litigants in person**

Reducing access to legal aid will of course, deter some prisoners from taking forward cases that they would have otherwise. However, our experience suggests that many

people in prison will still take a case forward as a litigant in person. It is likely that the people that do not take cases will be the most vulnerable and the least likely to represent themselves – people with a learning disability, serious mental health conditions or people who are unable to read or write English very well.

There is a significant number of prisoners that have the ability, resources and of course, the time to take up their own cases. Our experience of working with prisoners informs us that people who are able to take up their cases will continue to do so. We understand that the number of litigants in person taking person law cases has increased over the last few years. We believe that this can impact on the progress of cases through court, as treasury solicitors and judges have a duty to ensure that the proceedings are understood and people have every opportunity to represent themselves.

### **3) Increased time in prison for people on the Indeterminate sentence for Public Protection (IPPs and lifers**

The government has stated their aim to enable IPP prisoners to make progress in their sentence and be released, in situations where this is safer and appropriate. To be eligible for release, IPP and life sentenced prisoners have to demonstrate to the parole board that they have reduced their risk, through a combination of offending behaviour programmes, resettlement work, (usually) time in an open prison or on temporary release and robust plans for release into the community. We understand that the new proposals will ensure that prisoners can still be represented at the actual parole hearing. However, many people in prison experience difficulties accessing the services and intervention that assist in making them ready for parole and release. Solicitors do a huge amount of work supporting people with the different aspects of their sentence plan. Assisting people so they can access interventions in prison and move towards release and into the community saves the public money. The numbers of IPP and life sentenced prisoners make up 19% of the sentenced population in prisons (approx. 13,500 people). It is imperative that this group of prisoners receive the legal assistance that they need because keeping people in prison unnecessarily is a huge burden on the public purse.

### **Chapter eight- equality impact assessment. Do you agree that we have correctly identified the range of impacts set out in this consultation paper?**

No. We have serious concerns about the equality impact assessment which appears to be perfunctory, poorly evidenced and demonstrates little or no awareness of the characteristics of protected groups of people within prison.

#### **1) Race**

We note that section 3.10 suggests that claims are capable of efficient and effective resolution through the internal prisoners complaint system and prisoners discipline procedures. However, we believe that this places BME prisoners at a further

disadvantage. Evidence shows that BME prisoners are not as willing to use the prison complaints system as white inmates. In stark contrast with the assumptions in the Equality Impact Assessment we would contend that the prison complaints system has little or no credibility with many BME prisoners. This view is supported by evidence from other bodies: “In terms of the complaints system, the CRE has serious concerns about how this system is operating in practice. During focus groups with ethnic minority prisoners in all the establishments we have visited, many prisoners have stated that they have no confidence in the complaints system and therefore do not think there is any point in using it.” (Commission for Racial Equality, 2005: Submission to Phase II of the Zahid Mubarek Inquiry, para 5.5).

The report from HM Inspectorate of Prisons (2005) *Parallel Worlds: A thematic review of race relations in prisons* “Prisoners from visible minorities do not have sufficient confidence in the racist incidents complaints system, and the handling and investigation of complaints needs improvement.” (page 51). The Inspectorate thematic report also provided evidence that the problems which prisoners pursue through official complaints system are rarely resolved for the complainant: “From our sample of completed racist incident complaints, the highest proportion was prisoner on prisoner, followed by complaints about discriminatory regime decisions, and the two most common outcomes were that no action was taken or that the prisoner was advised or disciplined.” (page 9). Finally, echoing the CRE’s findings, the Inspectorate highlighted ethnic differences in the levels of confidence in the complaints process: ‘Overall, visible minority prisoners are less likely than white prisoners to believe that complaints are sorted out fairly. Adults in all racial groups are less content than young men or women with the fairness of the process, and black prisoners, across all establishments, are less happy than any other racial group.’ (page 43)

Recent evidence in the latest HMIP report (2011-2012) shows that little has changed. Fewer BME prisoners have confidence in the complaints system. 24% of BME prisoners (compared to 30% of white prisoners) felt that their complaint was dealt with fairly. The fact that black and other minority ethnic prisoners are much less likely to make use of the official complaints system creates an obligation to ensure that their grievances can be resolved by other avenues. This suggests that unless the MoJ can provide evidence contrary to that currently available and demonstrate that BME prisoners now have much greater confidence in the complaints process, the application of the proposed change in the scope of legal aid will further discriminate against the interests of prisoners from BME groups, and may therefore be in breach of the Equality Act.

## **2) Learning disability and learning difficulties**

Research shows that 20-30% of all prisoners have learning difficulties or disabilities that interfere with their ability to cope with the criminal justice system, PRT’s research (Prisoners Voices 2008, part of our No One Knows programme) clearly

demonstrates that fewer than half of prisoners interviewed from this group were aware of the complaints form and process. This compares to 3/4s of people in the comparison group. In addition 'No One Knows' 1 in 5 prisoners with identified learning disability or difficulties said they **would not** make a complaint and 1 in 10 prisoners with learning disabilities /difficulties said there was no point making a complaint.

We are extremely concerned that the Legal Aid Agency's statistics show 6% of prisoners accessing legal aid having declared a disability. We know that there is considerable under reporting of the extent of disabilities. Many prisoners and officers do not know what can be identified as a disability particularly relating to mental health, learning disability and long term health conditions. An estimate of 36% of prisoners interviewed in a Ministry of Justice study were considered to have a disability when survey answers about disability and health – including mental health were screened. 18% of prisoners interviewed were considered to have a physical disability.

Clearly, prisoners with disabilities (particularly learning difficulties or disabilities) are much less likely to make use of the official complaints system and much less likely to be able to navigate the system. We have already commented on how removing treatment from the scope of legal aid would be particularly problematic for this group. In addition, we are in contact with a number of people who are having difficulties making progress in their sentence because of learning disability, learning difficulties or health conditions. This creates a clear Equality Act obligation to ensure that their grievances can be resolved by other avenues., unless the MoJ can provide evidence that prisoners with disabilities can access the current complaints process, receive appropriate treatment and are enabled to progress in the sentences, the application of the proposed change in the scope of legal aid will further discriminate against the interests of prisoners from these groups, and may therefore be in breach of the Equality Act.

### **3) Gender**

Women in prison are often particularly vulnerable, as evidenced by their high rates of self harm and high levels of mental illness. Their ability to access and benefit from their legal rights is dependent on their ability to access legal information. The statistics given in the E.I.A assume that women and men in prison are equally likely to make complaints. This is in direct contrast to the Ombudsman's data. Also, women are disproportionately likely to receive a short custodial sentence so the points made above about the effect of short sentences have particular application to women. Foreign national women, who comprise 15% of women in prison, may have particular needs for specialist advice and representation. Many of them are likely to have been trafficked or coerced into offending and without access to both expert legal advice and interpreters their disadvantage will be compounded.



Last year, women made up 3% of the complainants to the PPO. They are very under represented at this level of the complaints system. We are particularly concerned about the impact that these proposals will have on mothers wishing to challenge decisions about childcare resettlement leave and also mothers hoping to stay with their babies in the specialist mother and baby units will have no recourse to legal aid. The UN Rules for the Treatment of Women Prisoners (the Bangkok Rules) specifically require prison authorities to provide access to legal assistance for women who have experienced 'sexual abuse or other forms of violence before or during detention' (Rule 7; Rule 25).

#### **4) Young people**

Young people are another under represented group when it comes to making complaints through the internal prison system and up to the PPO. Although young people make up 11% of the total prison population they make up 2% of complaints to the PPO. Young people are less likely to assert their rights than any other groups of prisoners but they are more likely to assert their rights through solicitors. The Inspectorate Annual Report shows that around a third of the young people that had made a complaint felt that it was addressed promptly.

In conclusion, we are extremely concerned about the proposals in the consultation. We believe that if implemented they will severely impede access to justice. We believe that there are already sufficient financial safeguards built into the legal aid system to ensure efficiency and value for money. We also believe that public confidence in the system would be increased if the government could demonstrate leadership and maintaining legal aid help to ensure public accountability