The Law Society's Response to Prison Law Funding Consultation - Draft 1

Introduction

This is the Law Society's response to the LSC's consultation on the funding of prison law work. The reason for the issue of the consultation is the significant increase in the cost of legal aid for prison law. Consequently the main consultation proposals are ones that seek to control costs. LSC's proposals are estimated to generate a costs saving of £5 - £6 million per annum[1] but this will also be dependant upon reduction in case volumes, the pursuit of which, is the other main strand of the consultation.

Whilst the Law Society appreciates the LSC's concern about the increasing cost of prison law funding, we question the LSC's thinking about how these increases are to be managed. Our main concern is that whilst there is no evidence presented to suggest that solicitors are driving up prison law costs, the main thrust of the LSC's proposals is to cut fees paid to solicitors. The LSC themselves say that 75% of costs increases since 2001 are generated by increases in volume with only 25% due to increase in costs. Yet there is no further explanation of the costs increases and nothing to indicate that solicitors have been inflating costs. It should also be pointed out that LSC payment rates for prison law work have not increased since 2001 so that practitioners have been working for eight years without any inflation increase.

The Law Society would like to see the LSC carry out some proper research into how and where increased costs are generated. This would need to look at the whole system and identify all areas that impact on the cost of prison law legal advice. We believe it is likely that costs increases have been generated by policies and circumstances outside of solicitors' control such as policy changes leading to more complex cases. We also believe that wasted costs are created by other parties when Board hearings become ineffective due to lack of readiness on the part of the prison service, probation service or parole board.

Costs must also be considered in the context of the total costs of imprisonment. The prison service costs the taxpayer around £2 billion per year. The cost of prison law funding at less than £20 million is a tiny fraction of that sum yet we can hypothesise that the cost of this advice could in effect pay for itself by lowering the prison population as prisoners obtain early release, prevent sentences being increased and avoid recall as a consequence of receiving legally aided representation. Any cuts to legal aid funding may well be reflected in increased costs to the Prison Service.

There also needs to be a proper research into the increase in volume of prison law matters. This would require a more detailed analysis of volume increase to date and projected increase going forward. There appears to be inconsistencies in the LSC's current projections which require further explanation. On one hand the LSC state that volume increase to date is 'almost entirely caused by additional recall cases that are now being referred to the Board' but, on the other hand it is also stated that '2007/8 is likely to represent the high watermark for the overall number of cases handled by the Board'. If the latter statement is correct, it is not clear what the LSC's projected increases are based on. Projected growth in representation at disciplinary hearings is based on assumptions that may not necessarily be correct. The Society accepts that an increase in volume seems likely but not necessarily at the rate of

[1] Paragraph 8.1 of consultation paper

growth suggested by the LSC. Growth is likely to be generated by increasing prison populations. Home Office policies that lead to an increase in the prison population should be subject to a legal aid impact assessment and the Home Office should pay for any resulting increase to the prison law legal aid spend.

Question 1
Do you agree with the proposal to introduce matter starts in prison law?

Much prison law work relates either directly or indirectly the deprivation of liberty and thus engages with ECHR issues, namely Article 5 'liberty and security' and Article 6, 'right to a fair trial'. As with representation in criminal matters, there is a human rights obligation to provide representation where liberty is at stake and it is therefore inappropriate to limit matter starts in these cases.

In principle it may be appropriate to introduce matters starts for advice and assistance matters which do not involve human rights issues. However there is a practical problem of determining in advance of obtaining the client's instructions, what the nature of the case is as many cases involving human rights issues begin as advice and assistance matters. Although the consultation provides figures for the number of advice and assistance cases, without a proper breakdown of matter types we cannot say what proportion of these cases can be limited by way of matter starts.

Question 2
Do you agree with the proposals to set the number of matter starts at the volumes claimed in the 2008/09 financial year?

We would not be in favour of setting the number of matter starts as proposed, as this is premised on the assumption that the introduction of matter starts for advice and assistance is feasible, and we question this assumption in our response to question 1 above. Also, if the LSCs projections are correct (we have questioned them at paragraph *(to be inserted)* above, the demand for prison law advice will increase going forward. We have not been given any details as to what proportion of this increase is likely to consist of advice and assistance matters. The LSC states that that the purpose of the consultation is to ensure the sustainability of prison law advice in anticipation of increased demand but, limiting matter starts in the manner suggested would on the face of it appear to contradict that objective.

We also have some concerns about the proposed system for allocating matter starts that will 'not guarantee volumes at firm level'. Without some indication of volume, the bid process involves a high level of risk for providers in that they could end up with insufficient matter starts to make the contract viable. This risk could act as a disincentive for firms to invest in staff to meet the proposed supervisor standard, which in turn could mean there are insufficient providers to meet demand.

Question 3
Are there other ways to contain volume increases?

We believe that volume increases could be contained by a more rigorous application of the sufficient benefit test and through the introduction of a supervisor standard. These issues will be discussed in further detail below.

Question 4

Do you agree with the proposals for amending the sufficient benefit test as described?

One of the problems with the proposed test is defining what constitutes a 'positive outcome.' For example a first parole application may have little chance of success but it could address a number of issues that lay the basis for a successful second application. If the proposed test were to be implemented, there is a risk that cases involving a prisoner's prospects of liberty that have little immediate prospect of success but could lead to later success will not be taken. However a parole application involves human rights issues and, paragraph 2.15 states that "we would not expect to fund an advice and assistance case regarding a matter that did not raise a legal or human rights issue", i.e. cases that do raise human rights issues will be funded. There is thus potentially a tension between the proposed revised sufficient benefit test and the assumption that a matter engaging human rights issues should be funded. This could put practitioners in a difficult position in deciding whether the sufficient benefit test is satisfied.

We suggest an alternative approach that leaves the sufficient benefit test as it is but with detailed guidance as to the application of the test, such as that provided in Volume 3 of the LSC Manual for assessing the merits for Controlled Legal Representation in immigration appeal cases.

Question 5
Are there types of cases that should be within scope and cases that should be outside of scope?

We believe that all parole and disciplinary hearings should automatically be within scope. It is difficult to identify matters that should be outside of scope other than the obvious matters that do not concern matters of English law. Trivial matters should not have the benefit of public funding, but we suggest that the most appropriate way of dealing with these is a rigorous application of the sufficient benefit test. This is preferable to removal from scope as it permits matters that would generally not satisfy the sufficient benefits test to be eligible in exceptional circumstances.

Question 6
What is your view of the current payment scheme for prison law?

The Society believes that on the whole, practitioners are reasonably satisfied with the current arrangements although there some disappointment that payment rates have not increased since 2001 and that prison law payments were excluded from the fee increases paid to other categories in July 2008. We have also been informed by practitioners that whatever fee scheme prevails, it is essential to have a procedure for claiming disbursements on account as and when they are incurred. Disbursements for expert reports for parole and other hearings are substantial and waiting until the end of the case for payment can creates flow problems for firms, particularly during in the current economic crisis which has made overdraft funding difficult to obtain.

Question 7
Could costs be better controlled within an hourly rate payment scheme?

We make the same point as that made in response to question 2. We believe that the introduction of a supervisor standard should lead to cases being carried out more efficiently by experienced practitioners.

Question 8
Do you agree with the proposal to introduce standard fees in prison law? and
Question 9
Do you agree with the levels of payment in the proposed standard fees?

This question is problematic because we do not have the data used by the LSC to set the proposed standard fee levels and we have not been informed of the methodology upon which the standard fees are based. We have no objection in principle to standard fees set at a realistic level, but we do not accept the proposed fees, which by the LSC's own calculations show that the majority of prison law practitioners will be worse off under the proposed fees, many of them quite significantly.

We should also state that irrespective the level of the standard fee or fixed fee, it is inappropriate for travel and waiting time to be rolled up into the fee. Travel is an inherent and unavoidable feature of prison law work. Where possible practitioners may take instructions by letter, as this is more cost effective than travelling even under the current fees scheme. However it must also be remembered that significant numbers of prisoners have limited literacy skills and may suffer from other problems such as mental health problems and, in these circumstances there is no alternative to face to face advice. Further, where representation at disciplinary and parole hearings is required there is no alternative but to travel. As travel is essential we cannot see the justification for a notional allowance within the standard fee and we believe that actual travel time should continue to be remunerated.

Question 10
What is your view of prior authorisation of disbursements?

We are prepared to accept prior authorisation of disbursements provided that applications are processed quickly and that prior authorisation ensures that the disbursement is paid in full on final assessment.

Given the reduction on fees envisaged by these proposals, and that disbursements can be substantial in some cases, it is probably that those providers continuing to do prison law work post 2010 are going to experience cash flow difficulties. Prior authorisation of disbursements should enable the LSC to issue payments on account for disbursements as and when they are incurred.

Question 11
Do you agree with the proposal to introduce fixed fees in advice and assistance and disciplinary hearings but retain a standard fee for parole hearings?

The Society is opposed to the introduction of the proposed fixed fees for advice and assistance and disciplinary hearings. The standard fee scheme described in option 2 is preferable as this does provide some mechanism for fees to vary according to the complexity of the case. This element is absent from the fixed fee proposal save for exceptional cases that escape the fixed fee. We also repeat the argument made in response to question 9 regarding payment for travelling time.

If against our recommendation, the LSC were to introduce the fixed fee, the Society believes that the proposed fee levels are likely to be unsustainable as for advice and assistance and, disciplinary hearings and in relation to London and non – London suppliers, the fixed fees are very much substantially lower than current average cost per case. Given that the LSC accepts that the increase in prison law costs

predominantly reflect increased volume rather than increased costs per case, and the LSC have produced no data which suggests that current average costs are excessive, the Society believes that the introduction of fixed fees is likely to threaten the sustainability of future service provision.

Question 12
Are there any alternative fees to standard or fixed fees that could be introduced that would have the same effect of controlling case cost?

The Society remains to be convinced that case cost is the main issue here as the main cost driver has been the increase in volume. We have previously stated that matter starts and a revised sufficient benefit test may control volume but there is also an issue as to how far volume can be reduced in a category of law which deals predominantly with issues of deprivation of liberty.

Question 13
Do you agree with the idea to introduce supervisor standards to prison law work and, in particular, the proposed supervisor standard of 350 hours?

We agree in principle with the introduction of a supervisor standard for prison law work. This will have the likely effect of restricting prison law work to specialist providers and, could potentially (all other things being equal) have a positive effect on the overall quality of prison law work. It is also possible that limiting work in this manner will mean that cases are dealt with more efficiently and cost-effectively. The LSC's figures show that about 15% of firms currently meet the 350 hours requirement. This calls into question the viability of the 350 hours requirement and whether the leap from no supervisor standard to 350 hours is a viable proposition if adequate service provision is to be maintained We question the LSC's 'key assumption' that qualifying firms will 'be spread nationally and national coverage will continue to be maintained' as there is nothing in the data provided by the LSC to indicate where the qualifying firms are located. The other 'key assumption' that firms will be able to recruit staff that meet the supervisor standard is also deeply flawed. If only a minority of suppliers currently meet the standard, where will the suitably qualified personnel come from? This assumption only works if there were a supply of fee earners meeting the supervisor standard outside of the legal aid system. But as the vast majority of prison law work is legally aided, all of the fee earners meeting the supervisor standard are already in the legal aid system.

As the supervisor standard will be a new requirement for prison law the LSC should consider a reduced hours requirement *(say 200 hrs?)* with a view to increasing it to 350 hours in line with other categories in the following contract bid round.

Question 14
Are there any additional quality standards that could be introduced to maintain quality of provision of prison law services to clients?

It would be appropriate to introduce a requirement for case workers to undergo six hours CPD on prison law matters.

Question 15
Do you agree that the introduction of different methods of delivery could improve efficiency and manage costs effectively?

We would not disagree with this in principle but there is insufficient detail in the proposals outlined to offer any informed comment in relation to efficiency and cost effectiveness.

Question 16
What are your views of the suitability of telephone advice services for certain advice and assistance matters?

It is difficult to see how telephone advice can be effective for anything but the most basic and straightforward advice matters. There would have to be a detailed set of criteria to enable advisors to determine if telephone advice is appropriate or whether face to face advice should be provided. Many prison law issues involve a substantial amount of paper work which has to be considered by the advisor before advice can be given. This would require prisoners to have access to photocopiers and adequate postage facilities. It would not be appropriate for prisoners with literacy or mental health issues. Perhaps a more fundamental problem is the lack of suitable telephone facilities within the prison estate. Prisons would have to provide free and confidential telephone facilities and, given the pressures on the prison service we doubt this would be considered to be a priority for the foreseeable future.

The Society would also need to see a proper costing of telephone advice before commenting in more detail.

Question 17
What are your views of the suitability of a duty solicitor scheme for cases requiring attendance at the prison?

This is problematic because of the lack of suitable and confidential interview facilities within the prison estate. Whilst it is possible to deal an individual client in these circumstances it is not feasible to spend a day or half a day providing a professional duty service to several clients in such conditions without putting the quality of advice at risk.

The LSC should also be aware that the existence of a duty solicitor service could create additional demand which would contradict the LSC's aim to control volume.

Question 18
What are your views on the suitability of tendering or block contracting for all prison law services.

It is difficult to comment without having further details of what may be intended. With regard to tendering we would want to know what the tender criteria are.

Block contracting presents a number of difficulties mainly in relation to client choice particularly where the client wants to instruct their own solicitor. Block contracting would be inefficient where prisoners are moved to different prisons mid-case. There would be duplication as the contracting solicitor at the new prison would have to spend time going through the file in order to take over the case.

Question 19
Do you think any of these proposals would make for good prison law funding policy? If so, which option and what changes could be made to improve it.

As stated in previously we do not see any obvious way of capping volume as prison law issues in the main involve human rights issues. We agree in principle with the introduction of a supervisor standard although we have concerns that moving from no prison law specific standard to a 350 hours requirement may be too much in one single step.

Question 20
Do you have any other views about prison law funding or options you would like us to consider.

Given that much of the increased demand stems from Home Office policy we believe that the LSC should be seeking additional funding from the Home Office to cover the costs.

Question 21
Do you agree with the assessment of impact outlined in Annex 6? Do you have any evidence of impact that we have not yet considered?

We have no alternative evidence to question the figures presented in the impact assessment. However whilst assessments of impact in terms of gender, ethnicity, disability etc are useful, the main omission is an assessment of the cumulative impact of matter starts, revised sufficient benefits test, fixed fees and supervisor standard on the overall viability of the prison law supply base. In the Society's view such an assessment is essential in order to determine whether the proposals will enable sustainable prison law provision to continue for the foreseeable future.

Question 22
Do you have another comments on the consultation?

We have no further comments.