

PRISONERS ADVICE SERVICE

SUBMISSIONS ON THE LSC PRISON LAW FUNDING CONSULTATION DOCUMENT

Introduction

The Prisoners Advice Service (PAS), launched as an independent charity in 1991, is the only charitable organization in the UK with a specific remit to provide free legal advice and information to adult prisoners in England and Wales. It provides advice and assistance in particular on the application of the Prison Rules and conditions of imprisonment. Most of our work is done through an advice line (some 15000 calls were received last year) and by letter. We respond to every letter (some 8000 last year) received from prisoners across the country. We take up individual cases where appropriate and through our LSC contract. We also run the Prisoners Legal Rights Group which produces quarterly bulletins entitled 'Prisoners Rights' membership of the group includes prisoners, solicitors, barristers, academics and non government organizations. We do not accept Home Office or Prison Service money as this may affect our independence. We receive most funding from charitable trusts and foundations.

This submission is based on our particular experience of providing specialist representation to prisoners.

General View of the Need for Reform and the Proposals

It is welcomed that the Consultation Document makes a clear statement that Legal Aid remains fundamental to the maintenance of a fair, humane and decent society. Access to justice and the provision of legal services to ensure equality of arms are vitally important, in particular to those elements of society most vulnerable to abuse and disadvantage, such as prisoners.

PAS accepts the need for reform in relation to publicly funded legal support in prison law given the 600% increase in LSC spend in this area over the last 5 years. The reasons for the increase in spend are complex but have undoubtedly been largely driven by the Governments introduction of over 3000 pieces of Criminal Justice legislation in the last 13 years and their seemingly inexorable willingness to incarcerate ever increasing numbers of the population which has seen the numbers of people imprisoned rise from 48,000 in 1997 to 81,000 by 2009, with an expected increase to 96,000 by 2014¹. This reflects the LSC own figures which suggest that 75% of the increase in the prison law spend come from volume rather than cost increases.

¹ See Home Office Research Statistic Directorate; Prison Population in 1987 A Statistical Review, No 76. NOMS population in Custody Survey monthly tables 2007 and the figures mooted under Lord Carter's Titan Prison review December 2007. This rise is not inevitable for as Lord Carter himself found Canada's prison population over the same period showed an 11% reduction and France had only a 1% increase.

PAS welcomes the introduction of a supervisor standard which is likely to both reduce the number of firms applying for contracts in the future and it is hoped the number who currently 'dabble' in this area. It will also importantly introduce some degree of quality assurance into what at the moment is an unregulated market. PAS would expect to see further consultation on this issue however as other areas of legal aid have varying supervisor requirements and panel membership schemes which may or may not be suitable for this area of law.

Although 3 case cost control options are set out, PAS does not feel that the LSC have any intention, no matter what practitioners argue, of continuing with hourly rates and that they have in essence 'set their face' to either standard or fixed fees. PAS will therefore confine themselves to addressing these options.

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

PAS understands the LSC desire to forecast volumes and spend and that putting a cap on matter starts is a means to do this. However PAS is also concerned that the LSC will underestimate the number of matters starts needed overall and that this has the potential to undermine what they themselves set out as a fundamental tenet of Legal Aid and a just society which is access to justice. There are also other methods of limiting the number of cases funded which could be considered such as the 'suitable benefit test' and as stated above the supervisor standard which is likely by the LSC own calculations to reduce the number of firms doing this type of work by nearly 500% (from nearly 1000 to 200). PAS would argue that these proposals should be tried and tested prior to a re-consideration of matter starts.

Question 2: Do you agree with the proposals to set the number of matter starts at the volumes claimed in the 2008/9 financial year?

The number of 'matter starts' appears to refer to the sum of starts for all practitioners and the LSC expressly offers no guarantees that an individual firm or organisations 2008/9 volumes will be offered. In the same way that the LSC has a natural desire to forecast volumes and spends so have firms and organisations and without at least a guarantee of matter starts equivalent to their 2008/9 figures they will not be in a position to budget but will be left with the uncertainty of a lottery as far as allocation of starts is concerned. PAS would also argue that any linkage with the 2008/09 figures should be reflective of a likely % increase in the prison population in any event.

There also needs to be a clear pathway and commitment by the LSC to ensure that where firms and organisations seek extra matter starts especially in urgent cases that the process is transparent and guidelines issued about when such an increase will be agreed (i.e. for instance will it be linked to an LSC firm rating or overall priority rating) and the timeframe involved so firms and organisations can plan ahead.

There is also the separate issue that for an organisation like PAS (and also possibly others like the Howard League) we currently take on far fewer cases than we get requests for help. It seems universally accepted by everyone including the LSC that PAS provides a unique and significant pro bono service. We would therefore argue that this contribution should be acknowledged and that if matters are allocated on the basis of 2008/9 that PAS should not be disadvantaged and that the allocation for charitable organisations like PAS should be looked at separately.

Question 3: Are there any other ways to contain volume increases?

Although practitioners can commit to things like the 'sufficient benefit' test and supervisor standard to contain volume increases, the LSC must accept that practitioners cannot control external factors such as the Government introducing measures like indeterminate sentences which were pushed through Parliament on the understanding that they would be 'resource neutral' when they were anything but. PAS makes a suggestion below (Question 5) that resettlement work should be considered within the scope of prison law work and that this may have an affect long term on volume through lowering reconviction and recall rates.

Question 4: Do you agree with the proposals for amending the sufficient benefit test as described?

The current test is adequate and should not be changed. The proposed test is aimed at eliminating spurious cases, which the current test, properly applied, already achieves. PAS is concerned that 'positive outcome' is something which is open to much interpretation. As an example, a prisoner may seek to challenge a decision not to categorise him/her to a lower security level. These challenges are often very difficult and rely very much on the discretion of the relevant Governor. However there is also often a concession on the part of the prison service whereby they will uphold the decision but bring forward the prisoners next review in light of representations made. Would this be deemed a 'positive outcome'? There are a number of other examples where in PAS experience 'positive outcome' is not as clear cut as in some areas of law.

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

PAS agrees that only matters which engage a genuine legal or human rights issue should be funded. However it is difficult to be prescriptive about this given the wide range of issues prisoners face and we remain unconvinced about the LSC being able to 'set out the circumstances' of when they would expect to fund such a range of matters. For example there has been some suggestion that Request/Complaints should no longer fall within prison law but these types of cases often raise fundamental questions about the interpretation and implementation of guidance issued by the prison service in the form of standing orders, Prison Service Orders and Prison Service Index's and which have potentially far reaching consequences for hundreds of prisoners. A cursory

perusal of any yearly Ombudsman report will confirm this and the importance for not just prisoners but their families in pursuing these issues.

PAS would also argue that a number of post-release issues should remain or be included within the scope of prison law. For instance resettlement matters around vulnerable prisoners community care needs should be included. The vulnerability and difficulties that prisoners, especially women, face on release is incontrovertible and has been highlighted in a number of recent reports². The obtaining of assessments and services from the Prison and Probation service as well as Local Authority's on things like drug and alcohol rehabilitation funding, specialist housing and health care provision would appear to be something which raises clear legal and human rights issues. It seems sensible for prison law practitioners to deal with these matters as they already know the client, their history and particular problems, as well as having access to paperwork. If it is left to another practitioner (with a housing or community care contract) to pick up these matters it would have clear cost transference implications for other parts of the LSC budget. Importantly this type of work is also likely to impact longer term on the volume of cases. The number of prisoners recalled rose from 330 in January 1995 to 6,500 in August 2007³ and although the reasons for recall are diverse it is likely that if vulnerable prisoners received appropriate levels of support and services on release that these recall figures would decline over time and reduce both the prison population and the need for legal services (the number of recall cases having to be dealt with by the Parole Board for instance has risen dramatically)⁴. A similar argument can be made in respect of reducing the disproportionately high levels of re-offending and incarceration rates amongst prisoners which range in the 60% with children reaching into the 70%.

Other post release work like advice and challenges to licence conditions, sex offender registration should also be included within the area of prison law.

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

The current payment scheme offers one of the lowest remuneration rates in publicly funded practice. This rate has not changed over the last 8 years.

It is averred by the Commission that the increase in provision of prison law advice is a result of the Carter reforms and introduction of fixed fees in general crime work. However, much of the increase in prison law case load is as we have stated above a direct result of the sheer number of new Government criminal justice policies and the increased use of short term incarceration⁵

² Report of Baroness Corsten on vulnerable women in prison published 13th March 2007. See also the Revolving Door Agency, Improving Health; Supporting Justice Consultation Response in March 2008.

³ Esmee Fairbairn Foundation – Rethinking Crime and Punishment Manifesto July 2008.

⁴ The Parole Board annual report 2009 shows 1200 determinate sentence recalls ended in oral hearings

⁵ Op Cit n3, Prisoners serving less than 12 months accounted for 12.6% of the sentenced prison population

The inability of obtain a payment on account of disbursements can cause financial hardship and cash flow problems to practices if payment of the disbursement is required before conclusion of the case.

Under the current payment scheme when the money received by a firm/organisation from the LSC under the contract exceeds the costs submitted by a % overall this then leads to an automatic reduction in payments with seemingly no notice required and no discussion. This can lead to firms/organisations being left in financial difficulties. Rather than monthly payments perhaps the LSC could consider paying firms/organisations for the work they actually bill on a month by month basis.

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

As stated above PAS does not believe that the continuation of hourly rates is likely to be given any serious consideration by the LSC. However PAS believes that hourly rates properly controlled with an initial ceiling limit and robust management of requests for extensions do offer the best control over costs and budgets. The likely reduction in firms operating in this area of law and matter starts being introduced would allow the LSC and practitioners to be as clear as they can be about forecasting costs for the following year and years ahead.

Question 8: Do you agree with the proposal to introduce standard fees in prison law?

PAS would not oppose a standard fee scheme. However the key in both the acceptance of and an ability to continue practising in this area for practitioners is that the scheme needs to offer a reasonable fee structure, which at the moment it does not.

The proposal fixes payment for advice and assistance in particular at £42.55 for all work up to £212.76 and £340.42 for all work up to £595.73 at present rates are simply set too low. They amount to less than an hours work at the lowest level. PAS would make a similar observation about the lower rate for parole hearings which given their nature often take months to come to a conclusion⁶, produce a significant paper trail and require a great deal of preparation even in seemingly less complex cases. If the LSC does not get these figures right it is likely to lead to (as happened in immigration law with Winstanley Burgess to name just the most high profile casualty) a number of excellent legal providers simply giving up on this area of law as being not only unprofitable but unsustainable.

PAS would accept that in respect of disciplinary matters there is an argument that such cases usually do not by their nature require a significant amount of preparation and are usually time limited in terms of their conclusion. The rates

⁶ The costs of these cases are severely exacerbated by the delays to almost every area of the parole process which has led to most of the cases taken by PAS going on average 3-6 months beyond their initial review date.

therefore do not seem particularly low but PAS would like to see the LSC hard data on how these (and the Parole Board hearing figures) were arrived at.

Question 9: Do you agree with the levels of payment in the proposed standard fees?

Please see the response to Question 8 but for the avoidance of doubt in respect of advice and assistance the level is simply too low to be sustainable and we remain to be convinced about the lower rate for Parole Hearings. However we accept there is an argument for the rates set in disciplinary hearings subject to some hard data about how these figures were arrived at.

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

Disbursement expenditure current falls within the authority of firms under the current contract and it is submitted that proper application of the sufficient benefit test may negate the need for prior authority.

In so far as prior authority is deemed necessary, we would seek further clarification as to what is going to be deemed to require prior authorisation in terms of disbursement, is it counsel's advice, mileage, is there a level at which firms can still exercise professional judgement without the need to seek prior authority (£300 or under for instance), will there be a system like the Claim 4 system where firms/organisations can make a claim on account?

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?

PAS believes the introduction of fixed fees is likely to be seriously detrimental to the provision of advice and assistance in this area of law, given

- The variation in case lengths/costs that exists within these categories
- The likely effects on suppliers
- The likely effects on the cases that suppliers take on
- The likely effect on quality
- The likely effect on overall provision of services to clients in prisons

The proposal to implement fixed fees in social welfare law was severely criticised by the House of Commons Constitutional Affairs Committee (CAC)⁷ precisely because of the above concerns and is likely to hit London suppliers the most where average case costs are generally much higher.

PAS would argue that further research needs to be carried out into the types of cases undertaken in prison law; the types of clients helped; the case mix of different providers and the factors that are linked to different case lengths.

⁷ House of Commons Constitutional Affairs Committee, Implementation of the Carter Review of Legal Aid, Third Report of Sessions 2006, 7 May 2007.

PAS would suggest that alternative proposals should be considered, including: an extension of tailored fixed fees; higher fee levels; more categories of fees; graduated fees; more sophisticated escape mechanisms; and special provision for niche organisations.

In terms of case mix where suppliers have average case lengths/costs that are higher than the value of the fixed fee, the incentive will be to reduce their average case lengths/costs. This is likely to involve

- Looking for the easy/short cases and the easy clients and/or
- Avoiding long, difficult and complex cases and clients.

Where suppliers have average case lengths/costs that are equivalent to or lower than the value of the fixed fee, the incentive will be to maintain their previous case mix. There will be no incentive to widen their case mix to take on a significant number of cases that exceed the value of the fixed fee.

There is also the issue of whether the introduction of fixed fees will have a discriminatory effect on the representation of foreign national prisoners (PAS currently deals with a number of such cases) or BME cases where the issue of language difficulties, difficulties in understanding UK institutions, bureaucracies and procedures may all play a part in their cases taking longer than others.

In terms of quality there is clearly a potential conflict between fixed fee and quality. This was demonstrated by research carried out for the LSC reported in 2001⁸. This research found that solicitors funded to provide a fixed number of matter starts for a fixed fee performed worse than other suppliers in the three areas of quality (as measured by peer review), client satisfaction and outcomes. Where suppliers have case lengths/costs which are higher than the value represented by fixed fee there is likely to be a direct relationship between fixed fees and quality. It seems to us inevitable that economic pressures will cause standards to fluctuate considerably. In some cases work might be done well up to a certain point and then stopped. Other cases might be taken to their conclusion but the work done in a more cursory manner. There is likely to be a general trend towards routinising cases, with the result that individual cases do not receive the attention that their particular characteristics deserve.

There is also a real risk that the introduction of fixed fees will drive out some good suppliers, who feel unable to deliver quality services within the fixed fees proposed, while retaining some high volume suppliers who may not be providing quality services. This would run counter to the LSC commitment to maintaining of quality.

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?

⁸ Moorhead et al, Quality and Cost. Final Report of the Contracting of Civil, Non Family Advice and Assistance Pilot (2001).

As already stated PAS believes the LSC have already 'set their face' to standard or fixed fees and therefore confines its comments to these options.

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?

PAS agrees that the introduction of a supervisor standard and a regulatory framework is long overdue. It is concerned about a prescriptive standard of 350 hours. At the moment the LSC is indicating that this will reduce the number of firms doing this type of work from nearly 1000 to 200 or less. On a simple mathematical model this reduction will clearly have an impact on the availability of local legal advice across the prison estate. However it is also likely to lead to a number of firms (especially small or sole practitioners) who currently combine a number of areas including prison law not being able to continue with this work irrespective of the quality of their advice and representation. PAS is aware that when a similar system was introduced in mental health a number of very committed sole practitioners had to abandon this area of work because they could not meet the 'quota of hours' needed to be devoted to it. Representation in this area should be based on an objective valuation of the quality advice and representation given rather than a 'clocking in system'.

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

Ongoing training and self regulation through joining membership schemes such as the Prisoner Legal Right Group and Association of Prison Lawyers should be sufficient. If one takes as an example housing lawyers, then their organisation HALPA provides a variety of training, formal and informal meetings and updates all of which are designed to ensure that the members are updated on new issues/legislation and have a forum for debate. This ensures a degree of quality provision beyond simply the number of hours one devotes to a particular area of law.

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

PAS agrees that changes in service delivery need to be made in order to improve efficiency and manage costs. PAS would argue for instance that the wider availability and roll out across the prison estate of video conferencing would reduce in many cases the need to travel to see the client (obviously in certain matters and cases such 1:1 contact would still need to be undertaken). Such facilities are of course expensive to set up and require the co-operation

and commitment of the prison service to ensure that they are successful in allowing proper access to prisoners and confidentiality.

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

In principle this is something that may be beneficial and suitable but the consultation document is short on detail.

The service would obviously need to be open to tender but PAS already operates a dedicated advice line for prisoners across England and Wales on Monday, Wednesday and Friday from 9.30 to 5.30 pm and takes some 15000 calls a year.

There would need to be clear signposting so that callers could be directed to alternative sources of advice and information, including local legal aid practitioners and alternative information resources where necessary. It would have to be complementary to local legal aid practitioners rather than in place of them.

A number of practical issues arise:

It is not clear what the LSC expectations are in terms of numbers calling?

The cost of the calls? Would the helpline be a free phone or reduced cost number? How could this be organised given the fact that prisoners currently operate on a pinphone system.

The Pinphone system itself is configured in a way that enables Governors to restrict: the maximum length of one call, the time between successive calls, the maximum calls that can be made in one day and the maximum total call time in one day. These controls can be applied to individual prisoners or to all prisoners in a prison. These controls are also linked with the Incentives and Earned Privileges system. Phones can be scheduled to come on and off according to the prison's working day. Different schedules can be applied to different days, or the phones can be left switched on all the time. There is therefore an issue that a number of prisoners (often the most vulnerable ones) may not have proper access to any phone advice service set up and also how quickly prisoners are likely to be able to be connected with a specialist advisor. The Prison Service's total commitment to an advice line would therefore have to be secured and specific guidance issued on how the advice line should be operated across the male and female estate.

Prisons operate a call enabling and barring system so certain categories of prisoners, such as Category A prisoners, are only allowed to call specified and allowed numbers. The benefits of a telephone advice service would as suggested above be severely compromised if the advice line was not accessible to all prisoners. There is also the issue of telephone monitoring and the recording of prisoner phone calls which raises concerns about confidentiality.

In terms of accessibility, prisoners are supposed to be allowed to call when reasonably practicable but this is often only during times of association, such as after the evening meal and after 5.30pm. The advice line would therefore have to be to 6.30pm at least.

The service provider would be a need to be able to bring together a range of information 'under one roof' as prisoners will have a wide range of inquiries and matters relating to aspects of their conditions and detention.

There is a need to identify the kind of quality assurance that would be appropriate, are the LSC for instance proposing a peer review rating of competence?

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

The LSC are presumably referring to the possibility of a duty scheme for disciplinary and adjudication offences. Parole Boards are clearly unsuitable for any such scheme.

The problem with a duty scheme is that it has to run in conjunction with client choice as it does within police stations. Therefore the benefits in terms of costs are unclear and may in fact be prohibitive given that a large % of prisoners are unrepresented in both advice and assistance and representation in disciplinary offences and this would presumably change if a duty scheme were introduced. Although PAS is not aware of the figures it would presuppose that the numbers of people who choose within police stations say to remain unrepresented through the process is minimal. PAS would expect a similar culture to develop within disciplinary hearings with much more demand from prisoners to be represented if a duty scheme was available but to then exercise choice and ask for their own representative at a later stage of the proceedings.

Question 18: What are your views of the suitability of tendering or block contracting for all prison law cases?

A fundamental problem with this proposal is that unlike people in the community, prisoners have no control over their own location and access to legal services, and can be moved anywhere in the country at the discretion of the Secretary of State⁹. It is very rare for prisoners to serve their sentences in one prison establishment and for prisoners serving long or life sentences there is an expectation that they will progress through a number of different prisons before achieving release. Similarly prisoners serving shorter sentences will normally be allocated from a local or remand prison onto a category C or open prison to serve their sentences and prisoners can also face moves for disciplinary reasons and being 'decanted' around establishments because of overcrowding to make the best use of the space available.

⁹ Section 12 Prison Act 1952

The result of this is that if block contracting and tendering were introduced any reduction in travelling/waiting costs envisaged by the LSC in respect of the proposals either as a result of the successful firm being located closer to the prison or by subsuming any costs into general overheads would be lost because whenever a prisoner were transferred another firm or organisation would take over their case, duplicating work and increasing costs.

The most effective and economical method of dealing with a case will very often be for one firm/lawyer to deal with a prisoner's case throughout the sentence, or at the very least through to the conclusion of a particular issue (such as a transfer for disciplinary reasons).

The proposal also fails to consider the difficulties that will arise where there are conflicts of interests between different prisoners in the same establishment (these can be easily envisaged for instance in disciplinary matters where two prisoners are accused of fighting) and which would make it necessary to have more than one provider negating any reduction in costs and making tendering pointless.

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?

PAS welcomes investigations into alternative methods of service delivery but for the reasons set out above, does not think that any of the proposals in the consultation paper are viable or sensible at the present time:

Duty Solicitor: for the reasons set out in response to question 17 above, PAS cannot see any circumstances where this would be viable [save for in the context of prison disciplinary hearings before Independent Adjudicators].

Block Contracting: for the reasons set out in response to question 18 above, PAS cannot see any circumstances where this proposal would assist in meeting the dual aims of providing high quality legal services and controlling costs.

Telephone Advice: PAS can see some merit in further investigating a dedicated telephone advice line for prisoners. However as noted in response to question 16 above, there are currently insuperable practical difficulties to this proposal as it would require some form of unmonitored and unfettered freephone number being available to all prisoners in all prisons.

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

No

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

The LSC have not provided any analysis of the figures presented in the impact assessment and therefore it is difficult to make any considered assessment.

Although the LSC have identified the problem under consideration as rapid increase on prison law expenditure this fails to acknowledge the driving external factors behind this increase and over which practitioners have no control, such as the unprecedented numbers of legislature in the last 10 years combined with a doubling of the prison population over the same period. Nor the effect that the impact of fixed fees for general criminal contracts has had and its role in making prison law more attractive to dabble in for those firms currently struggling.

The LSC must in first instance try and get an understanding of what prison law is and encompasses, talking to practitioners and clients, if it is to then prescribe what might be good practice from a quality standard assessment perspective. Prison law will not fit into a Criminal contract model and that model cannot simply be transported 'lock stock and barrel'. If it is then this will simply confirm the cynical view that this consultation exercise is solely a cost cutting exercise without any role on ensuring that access to justice and equality of arms for individuals against the state are maintained

Standardising fees will not control costs as costs on the LSC own analysis have been driven by volume growth. This is linked to the rise in prison population and the increase of recall and indeterminate sentences which have required oral hearings. The impact study has not for instance considered the Parole Board's view that 2007/8 represents the high-water mark for the overall number of cases handled by the board and that changes in the circumstances of when oral hearings will be granted means that this particular cost is likely to reduce. Some of the other things discussed in respect of regulation (such as the supervisor standard and stand alone prison law contracts rather than prison law being simply a potential 'add on' to a criminal contract) should be tried and tested before re-looking at a change in fee structure.

The LSC are proposing a national fee without explaining or understanding why there is a difference for London fees. The cost of living in London is reflected in London weighting which is accepted for all disciplines including the LSC. There is also the issue that most London prisons are remand or short terms facilities after sentence and that client's will normally be held in such establishments only for a short period of time. Practitioners in London, having built up such relationships, are then frequently forced to travel further than other practitioners who have more local practices in order to ensure continuity and the expected level of service expected by both client and LSC.

Question 22 - Do you have any additional comments on the consultation?

No

Prisoners Advice Service

5th May 2009