LSC/MoJ CONSULTATION

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.

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

PAS welcomes the opportunity to comment on these proposals and this submission is based on our particular experience of providing specialist representation to prisoners and challenging the actions of the State by way of Judicial Review and County Court discrimination actions.

PART ONE: LSC PROPOSALS

1. **Public Interest and other Borderline Cases**

The Access to Justice Act 1999 introduced public interest considerations into legal aid decision making. As the paper states, 'Public interest considerations allow important cases to be funded even where the benefits to the individual litigant alone would not justify the likely costs.'

1.1 Wider public interest

Proposal: to 'refine' the "wider public interest" test so that LSC must be satisfied that the individual case, on its particular facts, is a suitable vehicle to establish the point and realise the expected public benefits.

Comment:

We would question both the definition and determination of what are 'good facts'.

There appears to be some confusion in the consultation paper between the 'public interest' and 'public benefit'. The public interest may be to resolve and/or determine a point of law. The case facts are looked at in terms of whether they raise the point of public interest and allow the courts to adjudicate on this particular point. This balancing exercise is already achieved through the PIAP which advises the LSC on these issues.

Public interest litigation is often brought in relation to individuals whose circumstances and personal facts are not particularly sympathetic. This is especially so in the case of prisoners. PAS believes that the assertion by individuals of their legitimate rights should not be dependant on a shoehorned notion of 'wider public benefit' as proposed in this consultation document. In for instance analysing the case law on human dignity, the principle of human dignity frequently manifests itself in a demand not necessarily for a substantive improvement in the situation of the claimant, but rather in a requirement that his or her wishes and the principle involved

be more carefully heard by the authorities. A decision like that in *P and Q*[1], involving the removal of babies from imprisoned mothers is an example of such a ruling. The Court of Appeal in that case insisted on the right of a mother to be heard, rather than on her entitlement to keep her baby with her.

Proposal: that LSC would take account of whether or not a different section of the public would have a disadvantage or would not support the outcome being sought.

Comment:

We are unsure as to the basis for the LSC placing itself in such a 'judicial' role.

The European Convention and Human Rights Act 1998 provides a legislative reminder that even where a case contains neither definitional uncertainties nor any conflict of rights it is still by no means guaranteed that a law will give priority to the particular right in issue in untrammelled terms. The majority of articles contain limitations and exceptions to the freedoms they purport to guarantee. Article 8 (on privacy), 9 (on thought and conscience and religion, 10 (on freedom of expression) and 11 (on freedom of assembly and association) outline a large number of purposes in pursuit of which the right in question can be limited. These 'legitimate aims' are open ended and include such matters as 'interest of national security', 'public safety', 'prevention of crime and disorder' 'protection of health and morals' etc. It is the Courts in these cases that then decide whether these restrictions are 'necessary in a democratic society'. Other rights in the Convention are also qualified even where they appear unequivocal. So Article 14 and discrimination has been read as permitting discrimination as long as it is in

[1] R (P and Q) v Secretary of State for the Home Department [2001] EWCA Cic 1151

the eyes of the Court serving a legitimate aim and is proportionate in all the circumstances[2].

The classic summary of this principle can be found in the European Court's decision in *Soering*[3] where the it was stated that: "in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental human rights". We therefore believe that these 'checks and balances' are already inherent in the way the Courts consider cases that come before them and in the legislation itself[4]. There appears to be no need to add another otiose layer to this process.

PAS would also resist allowing 'public opinion' however formed to dictate whose rights are important and whose are not. There are any number of cases which if public support for action had been considered would have meant important legal principles being lost or denied. An example of this is the case of *McCann v United Kingdom*[5] where the Court ruled that the planning of a counter-terrorism operation by UK authorities which led to the shooting dead of three unarmed IRA members in Gibraltar had been so conducted that the killings could not be said to have been 'absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2(2)(a) of the European Convention.

Finally and in particular to sentencing and release decisions there is extensive legal authority that public opinion is an erroneous consideration[6]

1.2 Handling of Public Interest and Other Borderline Cases

[2] See for e.g Abdulaziz, Cabales and Balkandali v United Kingdom (1985) 7 EHRR 471
[3] Soering v UK (1989) 11 EHRR 439
[4] An example being the power to store DNA samples form arrested people, Marper v United Kingdom 4 December 2008
[5] (1995) 21 EHRR 97
[6] V & T v United Kingdom (2000) 30 EHRR 121

Proposal: Special controls including the setting of an annual budget for cases that would only be funded because they have wider public interest (as opposed to following the usual assessment of the likely prospect of success and the likely cost).

Comment:

This would seem to limit access to justice and potentially the bringing of important public interest cases on the basis of whether the annual budget has been spent. Are important public interest cases going to be refused funding simply because the budget set has been spent?

The Council of Europe has made it clear that "access to justice should not be impaired by high legal costs" and has adopted many internationally agreed legal texts to ensure that persons have an effective access to justice. A number of countries responded to a questionnaire about the provision of public funding in their respective legal systems legal and no country (with responses received from Azerbaijan through to Turkey) appears to limit or tie in the availability of legal aid to budget in the way the MoJ/LSC appears to be proposing. A link to the Council of Europe position on this and the responses received can be found at http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Operation_of_justice/Access_to_justice_and_legal_aid/

In PAS's view the proposals also potentially contravene Article 6 which is an absolute right and guarantees the right to a fair hearing in both criminal and civil proceedings. It sets standards for the way proceedings are run and may also give a right to legal aid where the proceedings are particularly complicated and the litigant is at a disadvantage because (as will be the case for almost all prisoners) they cannot afford a lawyer. On a wider issue Article 6 may also be breached as the Minister of Justice will often be a Defendant or Interested party in public interest cases and so should not be allowed to influence the availability of funding outside of very wide parameters.

Proposal: establishing a new LSC committee with responsibility for final funding decisions in these cases. The current independent adjudicator role would be subsumed into this committee.

Comment:

PAS is unsure as to why the Public Interest Advisory panel could not have their remit extended to look at these particular cases. In PAS's experience the panel have direct experience of the legal points raised and are well versed in the issues that arise in these types of cases. It would seem more sensible to utilise their expertise rather than create another committee.

2. Legal Aid for Damages Claims

2.1 Low Value Damages Claims

Section 8 of the Funding Code sets out the criteria for granting civil legal aid for damages claims against public authorities. This includes claims against local authorities, the police, the prison service or CPS. It covers claims for misfeasance in a public office and claims against local authorities for damages for abuse suffered while in care.

The costs/benefit test, applied to all applications for legal aid, is more generous under Section 8 than the usual test. This is presumably to reflect the importance of litigation in holding public bodies to account.

The consultation paper states: "while successful claimants may be awarded their costs, these are not automatically deducted from their liability to the LSC unless they are actually paid."

Comment:

Claims which fall within Section 8 should in our view continue to benefit from special provision: they are by definition, claims where the alleged wrongdoer is an agent of the state, and they are generally claims which allege breaches of human rights by those bodies. Given the definition of the state in polity, namely as a set of institutions that posses the authority to make rules (which should be fair and transparent) that govern people in society any breaches of that power must be at the most egregious end of the scale.

The paper suggests that it is common for unsuccessful opponents not to pay the legal costs of the successful party so that the statutory charge will apply and the claimant will recover little, if any, damages. No evidence is referred to.

In our experience and in the experience of other members of the Public Lawyers In Non Government Organisations it is rare for public bodies, such as those referred to above, not to pay the costs that the court has ordered them to pay. PAS has in the last 2 years settled over 6 damages claims and over 12 JR claims against the state/prison service at no cost to the LSC. On the one occasion that a privately run prison did not pay the costs of litigation a claim issued in the county court was enough to ensure compliance with the signed consent order.

The LSC should produce its statistics regarding the numbers of such claims in which cost orders have not been complied with by the public body defendants. The LSC should also produce figures about whether the Commission's fund has effectively been increased by the level of costs recovered at inter parties rates from section 8 defendants against whom successful claims have been brought.

PAS's policy is to write off our own costs in cases where the statutory charge would lead to a claimant not recovering any damages. PAS is aware that this type of policy is regularly applied by other organisations. We would

therefore be interested again in the data that leads the LSC to believe that the issue of the statutory charge and claimants in low value claims not recovering any damages is a widespread problem.

Proposal: to amend the costs/benefit test so that any claim primarily for damages against a public body, where the damages are unlikely to exceed £5,000 will not be funded at all, even where the claim would have significant wider public interest.

It is stated that many people who have been poorly treated by a public body simply want an investigation, explanation and apology rather than compensation. Further, that it may be more appropriate for complainants to use the public authority's complaints and ombudsman schemes. Alternatively, that they should make a claim for judicial review or declaratory judgments as an alternative and more cost effective way of resolving disputes.

Comment:

As we have already said there are important points of principle and 'equality of arms' issues that merit section 8 claims being considered differently.

Also assessing the 'value' of a claim by the measure of damages, seems both crude and a particularly peculiar notion of what 'value' should mean. Claims for things like assault by a police officer, false imprisonment or disability discrimination claims do not attract significant awards without there being some aggravated and/or exemplary damages. However no one would seriously question the value of bringing such claims or that they serve a wider purpose to society beyond individual compensation, such as subjecting authorities to legal/public scrutiny. It raises the worrying prospect that state bodies will be left unaccountable to individuals for breaches of fundamental rights, even where the merits of the case are very strong. So

for example, in the case of *Evans*[7] the court awarded damages of £5000 for a period of 59 days false imprisonment by the prison authorities. The suggestion would mean that public funding would no longer be available for periods of false imprisonment of less than 2 months essentially leaving the state unaccountable for actions that breach domestic and convention law, have a profound effect on the individual concerned, and where there is no alternative remedy and/or an apology is manifestly not sufficient. It effectively provides a 'tariff of abuse' by state authorities which as long as it is not met will allow an abuse of power to go. Another example of the importance of potentially 'low value' claims in a different context was recognised recently in a disability claim by Mrs Lunt against Liverpool City Council's discriminatory licensing policy which means that only London-style taxis are licensed in Liverpool, so those who use larger wheelchairs cannot be strapped in safely for travel.

Regarding the alternative legal remedies, PAS and surely most practitioners would, where possible bring a claim for judicial review to include a claim for damages in preference to a stand-alone claim for damages of less then £5,000. In most of these cases, surely the point is that there is no live issue that would justify judicial review proceedings or an application for a declaratory judgment. Rather, these claims are likely to be for an historic wrong where the only possible redress through the courts is a claim for damages or alternatively where the Courts themselves have intimated that judicial review is not the appropriate legal remedy. An example of the latter can be found in the recent delay and Parole Board cases that have come before the Administrative Court[8]. These cases all suggest that claims for delay should no longer be pursued by way of Judicial Review except in the most extreme circumstances and that a damages claim is the more appropriate remedy. This is in line with the general view expressed by the

[7] Evans (2001) 2 AC 19

[8] R (James, Lee, Wells) v Secretary of State for Justice [2009] UKHL 22 R (Faulkner) v (1) Secretary of State for Justice (2) Parole Board [2009] EWHC 1507 R (Betteridge) v Parole Board [2009] EWHC [2009] EWHC 1609

Administrative Court that relief is likely to be refused to a claimant where there is a visible alternative remedy such as a private law claim. In any event we would question how the alternative litigation proposed will save legal aid funds given funding public law claims is probably more costly to the Commission than funding private law ones.

2.2 Low Value Out of Scope Damages Claims

This is mainly about Multi-Party Actions (MPAs) and we leave this for others to comment at present.

2.3 Using Complaints Procedures before Litigation

Proposal: to amend Part 8 of the Funding Code to make specific reference to the need to use the prison and probation complaints procedures and Ombudsmen schemes.

Comment:

Prisoners already use the complaints system in large numbers but the requirement of having in all circumstances to use it prior to litigation is debatable. The effectiveness of complaints systems and how they are operated, managed and resources certainly within prison is an issue. It is only viable for prisoners to make use of complaints processes if they have free and ready access to the relevant policies and law they are seeking to challenge/clarify. In the case of prisoners there are issues over the availability of resources such as PSOs etc. Prisoners have very limited at best access to court judgements and ombudsman decisions, almost no access to computers/intranet and there is also importantly the widespread problem of literacy levels amongst prisoners[9]. The overwhelming impression that PAS receives from prisoners (and our experience of looking at

[9] A recent National Probation Conference suggested that 1/3rd of prisoners had sufficient literacy problems to require some help in reading and understanding documents.

complaint response backs this up) is that system as it currently operates is perceived as little more that a 'tick boxing' exercise on behalf of the prison service. PAS receives a huge number of enquiries where the prisoner has already gone through the initial compliant system without any success or explanation as to the reasons for the decision taken. There is very rarely any written evidence that the original decision has been reviewed thoroughly or afresh and very often the replies to complaints are perfunctory at best. The complaints system in prisons is no longer subject to oversight from outside Area Managers and PAS would be interested in any figures produced by the prison service for instance as to how many complaints are satisfactorily resolved internally as the Prison and Probation Ombudsman (PPO) office has year on year since 1999 received an increase in the number of requests for investigation.

The concept of prior ventilation whereby prisoners were required to utilise the complaints procedure has been held to breach the Convention by the ECtHR[10].

Having to use the complaints procedure may also fail to allow emergency matters to be addressed with sufficient speed. PAS recently dealt with a woman prisoner who had given birth two weeks prior to sentencing on a criminal matter. The Judge was told that she would be considered for a place on a mother and baby unit within 2 weeks of sentence and informed her of this in open court. However the prison authorities failed to assess her in this time. She developed problems with breastfeeding whilst on normal location and became visibly distressed. An emergency injunction was obtained successfully to challenge the failure to assess, after correspondence seeking clarification and a letter before action had gone unanswered. It would have been clearly inappropriate in this case for her to have to have gone through the complaints process given her circumstances

[10] Silver v UK (1983) 5 EHRR 347

and the potential harm to her and her baby by any undue delay in getting the issue dealt with.

As for PPO, in his forward to the 2008-2009 annual report Stephen Shaw the Prison and Probation Ombudsman made explicit reference to the difficulties that his office faced in terms of dealing satisfactorily with the numbers and complexities of some of the issues that come before them for investigation. As he says;

"Progress on the new Terms of Reference was even more disappointing. Although we ourselves submitted a draft in the early autumn, we learned in March that a further consultation might take months to complete. In fact, the new Terms of Reference are largely a tidying up and amalgamation of those terms that had developed since the office was founded in 1994. The new responsibilities we have sought – a light-touch 'guardianship' role in respect of the complaints system as a whole, a limited 'own volition' power, and a responsibility for the complaints of offenders' relatives as well as the offenders themselves – did little more than regularise arrangements that were already in place informally. (Indeed, I do not have the resources to extend these roles.) I have found the labyrinthine procedures deemed necessary to deliver modestly updated Terms of Reference extremely frustrating. However, this was all of a piece with other difficulties we have faced in our relationship with the Ministry of Justice – in particular with regard to the provision of adequate accommodation"

The Ombudsman received 3,818 complaints from prisoners, 388 probation and 99 immigration complaints in 2008/9. Of these he was able to investigate 1,828 (an increase in 10% from the previous year). This left for various reasons nearly 2000 complaints that the Ombudsman was not able to deal with. The lack of resources has led to endemic and significant delays in investigations being dealt with. PAS is aware from the cases it has brought to the PPO of investigations routinely taking in excess of 3 months to

complete and that this delay can result in issues becoming academic. The possibility of this resulting in extreme unfairness can be illustrated by the example of prison visits. Prisons will unilaterally take a decision to ban or impose closed visits because of allegations or security considerations. The ban or closed visits will be imposed usually for 3 months and then subject to review. If a prisoner is expected to take this through to the Ombudsman after exhausting the internal complaints system then on the current delays (and if the PPO is also now going to be expected to deal with 'treatment issues' as well these delays will only get worse) the issue, though not the punishment or the right to challenge it, is likely to have become academic by the time the PPO looks at it. The need to use this procedure will also entail more cases being challenged by the State and its delegated authorities on the basis of delay in bringing proceedings. There is, as the LSC and MoJ will be aware, a need in judicial review cases to bring a claim promptly and in any event within 3 months of the decision being challenged. PAS can perceive that government lawyers and private firms employed by private sector prisons will routinely raise objections on delay especially if they are permitted to do so directly to the LSC when the granting of a certificate is being considered.

As well as resources the PPO is also hampered by a lack of regulatory and enforcement powers:

- It relies on recommendation, persuasion and publicity to effect change. It has no power to enforce these recommendations.
- It only deals with a 1/3 of the requests for investigation it receives presently
- It is not able to reach determinations on the law only to resolve factual disputes and advice on whether a policy has been correctly applied.
- A number of prison law matters are outside of its remit and/or not appropriate for it to deal with. These include clinical judgements of doctors, policy decisions taken by ministers and official advice to

ministers upon which such decisions are taken, the merits of decisions taken by ministers and matters falling outside of the jurisdiction of the prison and probation service such as immigration status and decisions of the Parole Board/police/judiciary.

2.4 Considering Inter Partes costs against the LSC in Assessing Cost Benefit

This refers to funding 'appeals' under section 8 of the Funding Code. PAS would seek confirmation that it is intended to apply only to appeals against adverse judgments rather than all claims funded under section 8.

In considering the overall likely costs of a case at present, the LSC only consider the likely costs of the funded person's legal team. It is proposed that the Funding Code be amended so that the potential inter parties costs that the LSC may be ordered to pay are also taken into account.

Comment:

The LSC estimate that this may affect between 10-20 cases a year. PAS does not believe that any of its cases are likely to be affected by this proposed change but in our experience government legal costs are always far in excess of claimant costs and we can see a situation in which points of legal principle are 'held hostage' to the other side racking up their costs and then using this to intimidate claimants from appealing adverse decisions and the LSC from funding them

3. Legal Aid for Judicial Review

3.1 Presumption of Funding for JR Cases Where Permission is Granted

Currently, if the court has given permission for a claim for judicial review there is a presumption that legal aid will be granted to the claimant.

Proposal: to remove the presumption of funding post-permission cases and have a single test. However, it is stated that judicial decisions will be given considerable weight by the LSC.

Comment:

This is unlikely to mean that many cases currently funded will not be in the future, provided considerable weight is given to judicial decisions. But this depends of course on the quality of initial LSC decision-making. If the LSC commonly make initial negative decisions which then have to be appealed, this will cause significant delays to the court system and may necessitate multiple adjournments and solicitors undertaking yet more unfunded work. We are also unsure as to why the LSC feels it is likely to be in a better position to assess the merits of a challenge that a Judge with likely considerable experience of the area of law involved and with all the paperwork before him/her.

3.2 Personal Benefit from the Proceedings

It is stated that 'it is not appropriate for purely representative actions to receive limited legal aid funds'. Reference is made to the need to ensure that proceedings cannot be brought about matters to which the applicant has no connection or direct interest.

Proposal: to tighten the tests for funding for judicial review so that funding can only be granted to an individual who will gain a personal benefit from the outcome of the proceedings, either for themselves or for their family.

Comment:

This would seem to mean that where on challenge a decision is reversed in relation to the particular individual that they will not be able to pursue the wider challenge to the policy in question. This would allow unfair or unlawful national or local policies to remain in place and to affect others in the future with attendant increases in legal costs when they seek to challenge the same said policy.

3.3 Reconsidering Merits when Acknowledgment of Service Received.

Proposal: in future legal aid would only be extended after the acknowledgment of service and response is received and considered.

Comment:

The main problem will be delay by LSC with the result that the claimant's solicitors have to do yet more unfunded work. In any event, the solicitor always has an obligation to reconsider merits on receipt of the AoS as does Counsel.

In PAS's experience the Treasury Solicitors and private firms employed by the state or private prisons will often be very slow in serving an Acknowledgement of Service. We have had experience of it either not being served at all or well after permission has been grated and a case has been listed for hearing. How will the LSC deal with these instances? As Claimant's the courts expectation is that we will be ready for any listing but if the LSC will not grant or even look at extensions to final hearings until the Defendant has submitted a defence this could cause difficulties.

4. **Changes to LSC Processes [these proposals relate to all civil legal aid]**

4.1 SCU Management

The main proposal is to widen criteria for referral to LSC Special Cases Unit (SCU) so that more cases would be subject to the requirement to provide a case plan.

Comment:

PAS assumes that there will be public funding available for the provision of these case plans?

4.2 Inviting Representations before Funding is Granted

Currently, once a legal aid certificate is issued notice must be given to the opponent. The opponent may then make representations to the LSC as to why funding should not continue. This may be because it is alleged that the funded person has undisclosed assets or because of the merits of the claim.

Proposal: in future, before funding is granted, the other side and any relevant third parties will be notified and invited to make representations as to why funding should not be granted. Exceptions to this rule would include: Mental Health Act detention cases; parents and guardians in childcare or supervision proceedings; Children Act 1989 cases; child abduction; domestic violence; asylum; housing proceedings where the client is at risk of losing their home.

Alternatively, that the LSC propose a discretion to invite pre-grant representations when they consider it appropriate.

Comment:

It is to be expected that almost all opponents would make representations as to the merits of the case which the LSC would have to consider. If representations/allegations are made, would the claimant be entitled to be notified and respond? If not, there would be obvious unfairness. There is also the potential for endless delay.

It is already the case that the solicitor making the application has a duty to disclose all relevant information to the LSC and to report on any change of circumstance or issue that affects his/her assessment of merits.

There is no evidence provided that solicitors are not adequately considering these issues or are not disclosing both the 'good' and 'bad' points of there cases. The merits are also then considered by Counsel. As PAS understands it the LSC keeps figures in respect of Counsel and whether they advise cases to proceed on the merits. Is there any reason to question their consideration of these issues?

4.3 Independent Funding Adjudicator Decisions and the SCU

Currently, refusals of funding can be referred to the Independent Funding Adjudicator (IFA), who is an independent lawyer, for consideration of the merits of the case.

Proposal: that for cases referred to the SCU the decision of the LSC Case Manager be final so that there will be no appeal to the IFA.

Comment: this would remove an element of independent scrutiny of LSC decision making.

4.4 Community Contributions towards Legal Action

It is stated “The LSC’s experience is that in some cases there is an active interest group that seeks out an individual eligible for legal aid to bring the action.”

In community actions the LSC usually expect some contribution to be made to the legal costs by the community likely to benefit.

Proposal: to increase the proportion of costs the community should contribute by taking as the starting point the proportion of the community eligible for civil legal aid.

Comment:

PAS does not feel able to comment on this proposal as it is outside its experience and expertise.

PART TWO: MOJ PROPOSALS

Stated that proposals developed by MoJ to respond to:

1. rising costs of legal advice in prison law cases, and
2. “the significant increase in the number of failed judicial review applications, many of which are funded by legal aid.”

Currently prison law cases can be taken on by solicitors holding a criminal contract under the Criminal Defence Service (CDS) as well as those solicitors who have a separate prison law contract. Changes to the way prison law is funded will be implemented in July 2010 following an earlier consultation. The changes include a “strengthened sufficient benefit test’ to be applied by solicitors in deciding whether the case justifies public funding. This consultation proposes further changes which will reduce the rights of

prisoners to be advised and assisted by solicitors under the legal aid scheme.

"Treatment matters" refers to complaints about the way a prisoner is treated by the Prison Service and, as the consultation states, may include complaints about such matters as "mail, visits, food, property, healthcare and telephones."

The paper suggests that many of the complaints concern "relatively trivial complaints" that do not justify assistance from a solicitor and that these are distinct from cases where the prisoner has a "legitimate and serious grievance" where "it is appropriate that a prisoner can seek redress in order to put the matter right and to try to prevent such a failing recurring in the future". In respect of the latter class of cases it is stated that "These are the kinds of matters for which civil legal aid is available for advice and representation to bring a judicial review challenge, or a civil damages claim". (It should be noted that such civil damages claims are likely to fall with section 8 of the Funding Code, and the LSC proposal is to remove funding from all such claims where damages are unlikely to exceed £5,000, see above).

Treatment cases are stated to be distinct from discipline and sentencing cases for which legal aid would continue to be available.

5 Prison Law: Advice and Assistance on Treatment Matters

PAS would seek assurances that issues around sentence such as categorisation, HDC, referrals to the DSPD and CSC schemes, disciplinary and race relations complaints will all remain matters that can be advised and assisted on within the current CDS scheme?

The consultation paper gives no evidence either qualitative or quantative to support the contention that public funding is being used inappropriately.

The LSC has already made clear its intention to introduce an amended sufficient benefit test. This is designed to eliminate 'spurious' cases. It also has a peer review and audit system that is designed to ensure cases that are taken have a legal issue that justifies public funding. It is therefore difficult to see the justification for removing 'treatment' cases without first seeing the effect of the strengthened 'sufficient benefit' test.

PAS is also uncertain as to why so soon after the prison law consultation this area is being looked at again. The prison law consultation was about costs and bringing down/controlling a spiralling budget. The LSC themselves said they expected their proposal to reduce the number of firms dealing with prison law cases from around 900 to probably less than 100. PAS cannot therefore see the reasoning behind removing 'treatment cases' from prison law. However as with section 2 above [claims worth less than £5,000 against public bodies], it is difficult to avoid the conclusion that the removal of access to legal advice and assistance for prisoners who wish to challenge their treatment by a government department is politically motivated and driven by prison governors and the state authorities who resent 'troublesome' legal challenges to their authority.

PAS understands that these 'treatment issues' will now be dealt with under a civil contract. There are a number of issues with this:

- Any attempt to define 'treatment issues' will inevitable be arbitrary as the boundaries will be blurred.
- There is no evidence to suggest that civil practitioners will have any knowledge or expertise in the area of prison law. This has already been highlighted as a problem in respect of criminal practitioners taking on these cases and was a driver behind the prison law consultation and reducing the number of firms taking on these types of cases to ensure prisoners received good quality advice.
- Any shift to a civil law contract is likely to see an increase in costs and multiplication of work with lawyers dealing with separate but

> closely related issues. So a prisoner placed on disciplinary charge following sanctions related to closed visits will in all likelihood have one lawyer dealing with the disciplinary matter (to do with his sentence) and one to deal with his closed visits (treatment) even though both are linked.

The idea of 'treatment' issues either being 'trivial' or susceptible to proper scrutiny and relief through the complaints system, IMB and PPO does not take into account the seriousness of a number of 'treatment issues', the complexity they entail and the important legal principles that can often be established from these cases.

All prison systems, in all countries, are expected to treat detained people with humanity. Much of the activity of prisons is now subject to measurement. For example figures are collected conscientiously and assiduously about how many cells are searched each month, how long prisoners spend in education etc. However this does not tell the whole story of what prisons are like. Knowing for example that the number of prisoners sharing cells built for one is restricted to 18% of all prisoners gives us little information on how these 18% or the other 82% are being treated in other respects. Are they being spoken to respectfully by staff or are they being subjected to insult because of their ethnic origin? Are they receiving their proper entitlement to family visits?

In common with all prison services the Prison Service of England and Wales has international and regional human rights obligations. The Standard Minimum Rules for the Treatment of Prisoners give considerable detail on how prisoners should be treated. The UK is also a signatory to the European Convention on Human Rights and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Under the latter convention an inspection mechanism has been set up, known as the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). The CPT is entitled

to visit places of detention in the UK at any time and subsequently report to the Government its findings. The CPT made its first visit to the UK in 1990[11] and has made over a dozen since. One major area of emphasis that runs as a constant theme through CPT visits is that of 'degrading treatment', where personal bodily privacy is invaded, sanitation issues, pregnant women handcuffed, health care confidentiality etc. All of these would be classed under the LSC/MoJ proposal as 'treatment issues'

The Chief Inspector reports have frequently made reference to the need for institutional and individual respect for prisoners[12] and documented the frequent failings of the prison service to uphold these principles. For example, a shortage of female staff at Brockhilll prison for women meant male staff were required to carry out duties that were inappropriate in a women's prison. At Brockhill the inspectors observed male staff shouting "Decent?" before waiting for a response, "Stripping", from reception staff when strip-searching of women prisoners was taking place. This they noted was the 'procedure to prevent male staff entering at that time"[13]. The Chief Inspector also criticised Hull prison for neglecting cleanliness and personal hygiene with prisoners only being able to shower every three days and too infrequent changes of bed linen and underwear[14].

The report 'Women with particular vulnerabilities in the criminal justice system' by Labour peer Baroness Jean Corston in March 2007[15] made 43 recommendations including improvements to sanitation and hygiene in existing prisons and a reduction in strip-searching.

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[11] Council of Europe *Report to the United Kingdom Government on the visit to the United Kingdom carried out by the CPT from July 1990 to 10 August 1990*. CPT/Inf (91) 15 [EN].
[12] HM Inspectorate of Prisons *Annual Report of HM Chief Inspector of Prisons for England asnd Wales 1999-2000*. Page 4. The Stationary Office: London
[13] HM Inspectorate of Prisons *Report on an Unannounced Inspection of HM Prison and YOI Brockhill 12-15 November 2001 by HM Chief Inspector of Prisons*. 2002. Paragraph 12. Home Office. London
[14] HM Inspectorate of Prisons *Report on an Unannounced Inspection of HM Prison and YOI Hull 2-4 July 2005 by HM Chief Inspector of Prisons.* 2002. Paragraph 14. Home Office. London

[15] Baroness Corston report "A Review of Women with Particular Vulnerabilities in the Criminal Justice System.

There are numerous examples of prison 'treatment issues' that raise fundamental issues and engage liberty of the subject. One of the most important article 8 cases is *R (Daly) v Secretary of State for the Home Department*[16] in which the courts held that standard cell searching procedure to which the claimant and all prisoners were subject infringed the right of privacy because it invariably involved the scrutiny in the absence of the prisoner of privileged legal correspondence. Similarly the policy of only permitting prisoners to phone representatives of the media was successfully challenged in *R (Hirst) v Secretary of State for the Home Department*[17] and that prohibiting visits from journalists potentially engaged Article 6[18]. Arrangements for providing food to prisoners protesting about prison conditions where Article 2 and the right to life is involved was in danger of being breached[19].

PAS's own recent experience of treatment issues includes;

- A successful challenge to intimidatory treatment of a high security prisoner who formed a relationship and had a child with a female prison officer. This culminated in allegations by the prison of inappropriate behaviour at a family visit and led to all visitors being banned for 6 months. This was challenged by way of judicial review and led to the Treasury Solicitor paying inter-parties costs.
- A high security prisoner was taken off an open university course because he denied his index offence and refused to engage in offending behaviour courses that required him to admit guilt. The prison involved had a local policy to this effect which again has been successfully challenged by way of judicial review with an inter parties costs order.

[16] [2001] UKHL 26
[17] [2002] EWHC 602 (Admin)
[18] Golder v UK (1975) 1 EHRR 524
[19] R (Russell and Wharrie) v Governor of HMP Frankland (2000) EWHC Admin 365)

- A refusal by a number of prisons to accept mail sent by PAS as being legally privileged under PSO 4400 was successfully challenged and led to an amendment to the organisations listed to include PAS.
- A severely disabled prisoner who had suffered multiple strokes that left him with dysarthia. PAS became involved in requesting an assessment of him under the NHS and the Community Care Act 1990 after it became clear that prison health care were not able to meet his needs. This led to a revision of health care input being provided to the prisoner whilst in prison and the prison service agreeing to liaise with the relevant local authority to produce a care plan around the level of services he might require if released on compassionate grounds or on parole.

The removal of access to legal advice will also mean that the legality of policy documents themselves will not be subject to scrutiny or challenge even though a number of such polices have been found not to comply with the law (a recent example being PSO 6300[20]).

There is no provision for dealing with urgent treatment matters that might engage Article 2 and 3. To require a suicidal prisoner who is at serious risk of self harm to go through the complaint procedure if for instance he/she is put into segregation is a breach of Convention duties[21].

The above background is given because PAS does not believe that these issues are 'trivial', they are important in terms of individual and institutional respect but also can have much wider implications in terms of the concept of dignity, policy and legal precedent.

The issue is then whether the prison service, IMB and Ombudsman are able to deal and scrutinise these matters to the same degree as the courts. The

[20] Adelana (2008) EWHC 2621)
[21] Keenan v UK (2001) 31 EHRR 38

continued issues raised by the Chief Inspectorate, voluntary organisations and international bodies like the CPT would suggest that the prison service and IMB have not been able to address these problems adequately. The IMB's first annual report indicates that property issues are the biggest single issue raised with them[22] reflecting that more formal complaints procedures are well utilised by prisoners in things such as disciplinary and treatment matters. PAS has spoken to the IMB who have confirmed that their members do not deal with issues around the interpretation and implementation of policy (such as PSOs and PSIs, and the Prison Rules 1999) but would instead urge the prisoner concerned to contact a solicitor or seek other legal advice. They say they neither have the expertise or resources to deal with these matters and this suggests that prisoners concerns about how particular prison service policy is applied to them will go unchallenegd. We have already made reference to the limitations of the PPO role and of the long delays in their investigations. However there is an additional concern at the cost of expanding the PPO role. The PPO office currently costs £7.8 million to run. The attendant increase in the PPO budget is likely to offset fairly limited savings form the LSC budget.

6. Delegated Powers to Self-Grant Judicial Review Funding

It is stated that "figures from HMCS show that over the last 15 years the number of applications for permission to bring judicial review has more than doubled, from approximately 3000 to 7000 per year. Over the same period, the proportion of applications where permission was granted has decreased from over 40% to just over 20%."

Although not explicitly stated, the implication is that the number of unmeritorious judicial review claims has increased and that a way of addressing this is to remove the powers delegated to LSC contract holders in urgent cases.

[22] *Behind Closed Doors*, Independent Monitoring Boards Annual Report 2008

Proposal: to remove delegated powers in respect of all judicial review claims except for housing judicial reviews. It is stated that 'For other judicial reviews, where a decision on an emergency application was required, this would be referred to the LSC on an urgent basis.'

Comment: PAS would dispute the implication that the increased number of claims and the increased proportion of claims that do not result in permission being granted is because unmeritorious claims are being brought. As we understand that a paper to be produced by the Public Law Project in December 2009 explains that the reasons are much more complex.

We are unsure why housing cases are ring fenced or perceived as raising more urgent issues. There is any number of examples in prison cases where urgency might require delegated powers to be used. The transfer or lack of transfer of prisoners by the prison service may require very urgent action to try and prevent transfer in certain circumstances, such as where an urgent community care assessment has been agreed and is due to be carried out by the local authority nearest the prison. Another example might be where a prisoner complains that his life is in danger from other inmates of if he were transferred to a particular prison that his life would be in danger. In these cases Article 2 and the needs of the state to actively prevent harm are engaged[23]. Another example in prison law would be where a mother is at risk of losing her baby to the local authority if she is not assessed before a mother and baby unit (MBU) board. PAS recently used devolved powers to challenge the decision by a prison governor not to exercise their emergency powers to place a mother on such a panel which risked the local authority intervening. An emergency application was made to the High Court and an interim order made to assess her suitability. She was admitted to the MBU after this assessment. It was clear that there had been a misinterpretation of the policy on this issue by the governor (PSO 4801) and that the detrimental consequences of not getting into court at the earliest

[23] Osman v United Kingdom (1998) 29 EHRR 245

opportunity necessitated the use of devolved powers in this case. PAS has only used devolved powers on two or three occasions in the last 5 years but we would submit that on both these occasions the availability of the power was of vital importance, necessary and beneficial to ensure a miscarriage of justice was avoided.

If firms are routinely granting themselves devolved powers where it is not necessary or justified then obviously the LSC when it considers the full application can refuse the application when it assesses costs can give them a nil assessment. PAS would expect that these powers were sufficient if rigorously enforced to ensure that this power was not 'abused'. In the alternative the power to grant devolved powers could be limited to firms or organisations who on the LSC own assessment criteria based (around an assessment of previous claims and % reduction of costs claimed) are considered be low risk (green status and/or P4 etc)

7. Restricting Civil Legal Aid for Non-Residents

Proposal: legal aid would not normally be available for those who did not reside in the UK. Funding would continue to be available for British citizens (whether they were resident in the UK or not), and for citizens of some Commonwealth countries who have a right to settle her.

Comment:

It is important to note that, to be eligible for legal aid, the courts would only have jurisdiction to hear the case if the proposed defendant is within England and Wales, effectively, including the UK government.

This proposal would seem to exclude claims brought against the British Government under UK legislation, including the HRA and claims brought by non-residents against UK individuals or companies.

The MoJ does not spell out what it means by referring to people who do not reside in the UK.

The exceptions to these proposals would be:

1. Some cross-border disputes, under EU law.

2. Where the issue was whether client should be entitled to enter the UK, including asylum claims.

3. Where the civil proceedings concern the life or liberty of the client or where the penalties are so severe that funding should remain available (e.g. detention under the MHA 1983, childcare or supervision proceedings under the CA 1989, children abduction, domestic violence and housing proceeding where the client is at risk of homelessness.

Comment:

This would mean that asylum seekers and others awaiting Home Office decisions could not get civil legal aid to bring or defend civil claims. This seems to be in line with the policy of trying to ensure that foreign nationals, who are often amongst the most vulnerable groups in society are excluded from the protections afforded in a civilised society.

We understand that it is the intention to adopt the wording of the European Legal Aid Directive (2002/8/ESC of 27 January 2003). The directive was implemented to improve access to justice in cross border disputes and establish minimum common rules as regards legal aid in such disputes, not to restrict legal aid as the LSC and MoJ would seem to like to use it. The Directive also talks about being legal aid being available to Third Country Nationals who are 'domiciled or habitually resident' in the member state. 'Habitual Residence' is of itself often difficult to define and determine.

However it is also unclear as to why people detained under the MHA 1983 are ‘ring fenced’ in terms of funding but not people who are otherwise incarcerated. We would argue that foreign nationals incarcerated in prison, immigration detention centres etc should also be classed by the LSC as habitually resident for the purposes of legal aid where it is the intention of the foreign national to reside in the UK on release?