

Law Commission
Adult Social Care 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 15,000 calls were received last year) and by letter. We respond to every letter (some 8,000 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'. Members of the group include 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 has three caseworkers who are each dedicated to dealing with specific problem areas, being Race Discrimination, Women Prisoners and - from June 2009 - Community Care issues. The role of Community Care Caseworker was created as a result of PAS' concerns, shared by other lawyers within the Community Care and Prison Law fields, that Community Care legislation is currently severely underutilised in the custodial and resettlement context despite evident need amongst the prisoner population.

PAS welcomes the opportunity to comment on these proposals and this submission is based on our particular experience of providing specialist

representation to prisoners with regard to community care issues. Given our specific area of experience and expertise, these submissions focus on the sections of Part 11 'Joint Working', of the consultation paper which deal with Prisons (paragraphs 11.39 to 11.54), and Question 11-2, as to whether prisons should be included or excluded from adult social care.

THE LEGAL FRAMEWORK FOR ADULT SOCIAL CARE IN PRISONS

1. It is our view that serving prisoners are currently covered by community care legislation, as supported by the analogous case of *R (Howard League for Penal Reform) v The Secretary of State for the Home Department* regarding the equivalent care assessment provisions for children under the Children Act 1989. We believe that prisoners should remain included in adult social care and that this position should be made explicit in future legislation.
2. Whilst it is our view that under the current legislative regime there is a concomitant duty on the Prison Service to provide reasonable adjustments and care services to prisoners who need assistance with the day to day aspects of life primarily under s21B-E and s49A of the Disability Discrimination Act 1995 (DDA)¹, the DDA does not place a sufficiently explicit and effective positive obligation upon prisons to assess and provide for prisoners care needs. If prisoners are excluded in future adult social care legislation, leaving social care responsibility solely in the domain of the Prison Service, prisoners would be highly unlikely to receive the same level of social care support as people living in the community: the Prison Service is currently failing to provide the care services required by many prisoners under their DDA duties; it does not have the expertise in social care required to conduct care assessments for prisoners or to plan for the provision of services to those in need; furthermore, it

¹ Articles 5 and 8 ECHR also apply

operates under very different imperatives to those of local authority social services departments.

3. A decision to place the responsibility for assessing and providing social care to prisoners with the Prison Service would also run counter to the decision made in 2002, to transfer responsibility for the provision of prison healthcare services from the Prison Service to the NHS, a process which was completed in April 2006. Underlying the transfer of responsibility for prison healthcare to the NHS was the principle that prisoners are entitled to have access to health services of the same range and quality as the general public receives in the community, a principle that can equally be applied to prisoners in need of social care services. A decision to transfer responsibility for social care from local authorities to the Prison Service would be to ignore the lessons learnt by the experience of trying to provide a Prison Service ran healthcare system.
4. Furthermore, the purpose of the s.47 NHSCCA assessment is to ensure that there is a single gateway assessment process for access to care services. An arrangement that imposed a duty upon the Prison Service to conduct prisoner care assessments would undermine the purpose of s.47 NHSCCA, add unnecessary complexity to the adult social care system, and deny prisoners the benefit of the extensive caselaw in the community care field.
5. Clarity is needed as to whether the Prison Service or the local authority should pay for the provision of social care services, and we recognise that this is a political decision. Given the apparent overlap between Prison Service and local authority duties under the DDA and community care legislation respectively, new legislation and associated guidance arising from these reforms should make it apparent who holds the primary duty to provide services, and the extent of that duty.

6. If Parliament determines that there is a dual responsibility to provide services, then there is a need for a dispute resolution procedure comparable to the referral of ordinary disputes between local authorities to the Secretary of State for determination.² This is required to ensure that potential delays in service provision are prevented, and time and cost is not wasted on unnecessary legal disputes regarding responsibility on a case by case basis. As with local authority ordinary residence disputes, it should be made clear that where a determination is sought, the provision of services to the person at the centre of a dispute should not be delayed as a result.

ORDINARY RESIDENCE / THE RESPONSIBLE LOCAL AUTHORITY

7. As noted in the Consultation Document, the new 2010 guidance on ordinary residence (OR)³, fails to address the issue of ordinary residence for prisoners during their term of imprisonment. Our key concerns regarding the transfer of the current OR guidance for prisoners due to be released, to prisoners serving sentences, are (i) the 'rebuttable presumption' of ordinary residence and (ii) the position of those prisoners who cannot establish ordinary residence prior to prison, and who fall into the category where the responsible local authority has a power, but not a duty to provide social services.
8. Prisoners face additional difficulties to people living in the community in seeking to establish ordinary residence status: finding appropriate legal representation can be very difficult, particularly for vulnerable and disabled prisoners; a high proportion of prisoners have learning disabilities and/or poor literacy; prisoners often have little if

² Eg determinations under section 32(3) of the National Assistance Act 1948, section 8 of the Community Care (Delayed Discharges etc.) Act 2003 (in relation to England only) and paragraph 183(3) of Schedule A1 to the Mental Capacity Act 2005 (the Deprivation of Liberty Safeguards)

³ Ordinary Residence: Guidance on the identification of the ordinary residence of people in need of community care services, England March 2010 (Department of Health)

any domestic documentation upon them within prison to help to establish their former ordinary residence status; they may have little or no support on the outside, particularly if they are a long term prisoner. Authorities can, and in our experience often will, seek to dispute pre-custody ordinary residence status, relying on the grounds to rebut ordinary residence where evidence of prior ordinary residence exists. This can cause delay in the provision of services, and the risk of complete evasion of responsibility in the case of prisoners who are unable to find the legal assistance they require to challenge local authority decisions.

9. It is therefore our view that the first proposition contained in paragraph 11.46 of the Consultation Document should form the basis of any future guidance for prisoners who are in custody, i.e. that where ordinary residence cannot be established in the pre-custody home area, the prisoner should be found to be ordinarily resident in the local authority in which the prison is located and, therefore, entitled to services from that authority on the same basis as non-prisoner residents.
10. If the decision is made to retain only discretionary entitlement to community care services for those categories of prisoners who cannot establish ordinary residence, it should be made clear in guidance that the local authority in which a prisoner is located remains under a duty to conduct a s.47 NHSCCA assessment, whether or not that local authority is willing to exercise their discretion to provide community care services to the prisoner in question.⁴
11. Paragraph 111 OR addresses the problem of prisoners who were not ordinarily resident in any area prior to custody and do not have a place to live upon release, as follows:

⁴ R v Berkshire CC ex p P (1998) 1 CCLR 141

If a person due for release from prison was not ordinarily resident in any area prior to being sentenced and does not have a permanent place to live on release, they may fall within the provisions of section 24(3) of the 1948 Act and be found to be of "no settled residence" and/or in "urgent need"...

12. The consequence of this guidance is where a local authorities decides that a prisoner is of 'no settled residence' but not of 'urgent need', there is a power, but not a duty to provide accommodation services under s.21 NAA 1948,⁵ and in either case merely a power to provide welfare care services under s.29 NAA 1948. Given the vulnerability of prisoners in need of social care services leaving prison, and the public interest in prisoners having a home and appropriate care support services upon release due to the evidence that this reduces their risk of reoffending, it is our view that the responsible local authority should have a duty to provide services to all prisoners who fall within the circumstances outlined within paragraph 111 OR. This would not be unduly onerous upon local authorities in respect of accommodation, since arguably any prisoner facing homelessness upon release from custody would be in 'urgent need' in any event, and would avoid potential disputes in this area.
13. Likewise, where prisoners are moving to a new authority area on release under the supervision of probation, the local authority for the probation area in which they will be living on release should be under a clearly specified duty to provide social care services for that prisoner.

⁵ Paragraphs 2(1)(a) & (b), LAC(93)10

ELIGIBILITY CRITERIA

14. We share the Law Commission's concern that local authority eligibility criteria may be framed inappropriately for the purpose of assessing prisoners in custody, particularly for prisoners at the lower end of the spectrum of need. Aside from the introduction of specific eligibility criteria for prisoners, which may not be practicable (and may indeed create its own problems regarding equality of access), there is no obvious solution. Eligibility concerns could, however, be mitigated by the DDA which, in our view, would place a duty on the Prison Service to provide for needs identified during a s.47 NHSCCA assessment, which do not meet a local authority eligibility threshold. Indeed, this is another reason why it is essential that the s.47 NHSCCA duty continues to apply to prisoners in custody.

DIRECT PAYMENTS & SELF ASSESSMENT

15. As acknowledged at paragraph 11.42 of the Consultation Document, it is impracticable for most prisoners to manage direct payments. This is due to factors including: Prison Service control over service provision arrangements; restrictions in the management of prisoners' personal finances; barriers to researching service provision options; and the problems faced by vulnerable, disabled and potentially illiterate prisoners in exercising informed choice over service provision.
16. For similar reasons, we do not consider it appropriate for prisoners to be required to self assess in the prison context, where they face additional difficulties to the general public in obtaining the advice and assistance they may need to complete questionnaires.

DUTY TO ASSESS PRISONER-CARERS

17. Your consultation paper rightly notes at paragraph 11.40 that there is nothing in carers' legislation that excludes carer-prisoners from a local authority's duty to carry out a carer's assessment and power to provide services to carers. Akin to our general position on community care legislation set out at paragraph 1 above, we believe that there is a need for explicit recognition in statutory guidance that prisoners retain the full rights of carers in the community, to the extent that they are relevant in the prison context.
18. We are concerned, however, that many prisoners find themselves in the position of caring for fellow prisoners, such as cell mates, that they may barely know as a result of a compassionate response to their fellow prisoner's otherwise neglected need for assistance, rather than by true choice. Whilst in some prisons such 'carer' relationships may be formalised through training and even payment, often carer prisoners receive no training, support or even formal recognition. The duty to conduct a carers assessment for prisoners should be explicitly linked to an associated duty upon local authorities to conduct a s.47 NHSCCA assessment of the prisoner in need of services where a carer-prisoner comes to their attention, and a duty to ensure that prisoner-carers only provide services which would otherwise be provided by local authorities under community care legislation or the prison under the DDA, where they have provided their express consent to do so.
19. We also believe that the prisoner who is being cared for should have the right to choose that care professionals should provide for their care needs rather than a fellow prisoner; carer-prisoners are part of their enforced and confined community, and - in addition to issues regarding training and risk of harm to both parties - obvious concerns regarding confidentiality and dignity may arise.

SERVICE PROVISION BY PRISON AND HEALTH AUTHORITIES

20. Whilst some prisons may be providing some social care services such as reasonable adjustments under their DDA duties and healthcare staff may 'by default' perform some social care roles such as washing, we reiterate our view that this informal system is inadequate to meet the care needs of prisoners for the reasons set out at paragraph 2 above, and that prisoners should be included in social care legislation. We refer you to the case examples at the end of this document, which demonstrate the practical difficulties of the current situation.

DUTY TO REFER

21. At present, guidance on the duty of prison, probation and healthcare workers to refer prisoners for a s.47 NHSCCA assessments is scant, vague, and makes no reference to the duty to refer prisoners for a s.47 NHSCCA assessment, who are in need of care services during their custodial sentence.⁶ To lay officers who can generally be assumed to have no knowledge of the operation of s.47 NHSCCA assessments, there is no clear guidance or training regarding the need to refer and the current failure to ensure many prisoners' care needs are provided for is an inevitable consequence of this omission.
22. Whilst we recognise that such decisions lie outside the remit of this consultation process, we suggest that clearly identified role holders should take responsibility for making referrals, such as seconded and home probation officers, prison Disability Liaison Officers (which each prison should have), and prison Healthcare Managers for the prison

⁶ Para 3.24 Prison Service Order 2300 'Resettlement', Paragraph 7.4 PSO 3050 'Continuity of Healthcare for Prisoners', Para 110, Department of Health, ORDINARY RESIDENCE: Guidance on the identification of the ordinary residence of people in need of community care services, England 2010

and NHS respectively and that these responsibilities should be outlined in policy guidance. Training should also be required to be provided to prison and prison healthcare staff to raise awareness of the existence and purpose of s.47 community care assessments, and the need to promptly inform the DLO or Healthcare Manager, or other such named responsible officers, as soon as they have reason to believe that a prisoner may be in need of social care services.

In conclusion, we concur with the Law Commission's assessment of the need for clarity with regard to the entitlement of prisoners to adult social care services. Our view is that they are currently entitled to adult social care services and should remain so. Social care services are not a privilege but engage fundamental rights which are not circumscribed by the fact of a custodial sentence. We submit that it would be a regressive step to place responsibility for the assessment and planning for social care services in the hands of the Prison Service, who do not have the relevant expertise in this area.

Do not hesitate to contact the undersigned if we may be of any further assistance in relation to the consultation process and questions arising from this submission.

30 June 2010

Prisoners' Advice Service

Case Example: Prisoner A

PAS was approached by a prisoner who was caring for a fellow life sentence Prisoner A, who was unable to speak intelligibly or write and had extensive mobility problems as the result of a severe stroke. The disabled prisoner needed help with washing, eating, dressing, taking his medication, getting around the prison and responding to communications. At the time PAS was instructed, two prisoners on the wing had voluntarily assumed responsibility for providing these caring roles, although the burden of doing so was becoming unsustainable. Prison records disclosed to PAS documented the concerns of prison and healthcare staff regarding the suitability of relying on the voluntary care of untrained prisoners to provide for Prisoner A's needs, and detailed unsuccessful enquiries made by both the prison and healthcare departments to try to ascertain who should take responsibility for providing the required care services. PAS wrote to the responsible local authority and the Prison Service asking them to provide care services under the relevant community care legislation and Disability Discrimination Act duties respectively. The Prison Service then agreed to arrange and pay for a carer to come into the prison twice a day to provide for Prisoner A's care needs, but made it clear that they made no admission of liability for doing so.

Case Example: Prisoners B & C

Prisoner B developed mobility problems as the result of a stroke. On his return from hospital he was located in the prison healthcare unit because there was no care support available within the prison. He had no ongoing clinical needs. The restricted and isolated regime within the healthcare unit deepened the depression he was experiencing following the stroke. His former cellmate, Prisoner C, was so concerned about Prisoner B that he asked the prison to defer his own categorisation review, so that he could remain at the prison to care for Prisoner B on normal location. The prison agreed to defer Prisoner C's categorisation review for this purpose, despite the fact that Prisoner C was expected to gain a transfer to open conditions as a result of the review, and deferral would therefore be detrimental to his preparations for release.