PRISONERS' RIGHTS

Prisoners' Legal Rights Group Bulletin No 58

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PRISONERS' ADVICE SERVICE

The Prisoners' Advice Service (PAS) is a charity that provides free legal advice and information to people in prison in England and Wales. We produce this bulletin, setting out case law, Ombudsman's decisions and legislative and policy changes relevant to people in prison. The PLRG is free to serving prisoners.

On the 15th April Daniel Holmes ran the Brighton Marathon in a time of three hours and 44 minutes, raising a fantastic total of nearly £1000 for the Prisoners' Advice Service in the process.

All at PAS would like to extend our congratulations to Daniel for both the race and his fundraising effort. We would also like to thank all those who generously sponsored him.

Part of the funds raised by Daniel's efforts have been dedicated towards the cost of this Prisoners' Legal Rights Group Bulletin.

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CASE REPORTS

CATEGORY A & ORAL HEARINGS

R (on the application Longmire) v Secretary of State for Justice [2011] EHWC Civ 1488 (Admin)

This case is in a long line of challenges by Category A prisoners in respect of a refusal to allow an oral hearing in respect of a categorisation review. The Claimant also argued the decision not to re-categorise in this case was irrational. The Claimant was a tariff expired life sentenced prisoner held at a DSPD (Dangerous and Severe Personality Disorder) unit at HMP Whitemoor. He had had several Parole Boards which, whilst declining release or a move to open conditions, had acknowledged 'considerable progress' having been made. In 2010 his Local Advisory Panel (LAP) considered his case, and recommended he should be downgraded to Category B which was endorsed by the Governor of HMP Whitemoor. This was the fourth occasion the LAP had recommended the claimant be downgraded. Just prior to the LAP the Claimant had been charged and convicted of a further serious sexual assault committed some 20 years ago and had received a further life sentence with a two year tariff to run concurrent to his existing sentence. The LAP in considering the further charge noted that he had pleaded guilty, accepted responsibility, and did not increase his risk rather it demonstrated he had an "increased understanding in his risks and behaviours associated with his offending".

The Director of High Security reviewed the case on 23rd August 2010 and said he should remain as a Category A prisoner. He noted that the claimant had only admitted the recent charge after the case was brought to trial with concrete DNA evidence adduced rather than he himself disclosing it voluntarily or as part of therapy, and that this may have invalidated the progress noted by others, further work such as SOTP was also still outstanding. In respect of an oral hearing, the Director did not accept that the expiry of tariff or a LAP recommendation as to a downgrade were by themselves sufficient to warrant an oral hearing and that the evidence considered had been substantial and comprehensive including the submission of written representations. A minute of the meeting of 23rd August, only disclosed to the Claimant and his representatives during the initial actual JR hearing itself, also suggested that the Director had felt the psychologist report used in the LAP was biased, that the LAP and clinicians may have been deceived by the Claimant using his 'psychopathic charm' and that the claimant had purposefully concealed the offence undermining the recommendation made by the LAP.

The Court said the issue was about process rather than substantive outcome, did fairness require the Claimant to be given an oral hearing before a final view was taken as to whether he should be re-categorised or not;

- the clear and repeated recommendations of the LAP were of significance and this was reflected in PSI 03/2010;
- it was also clear that the Director had taken a view that the newly admitted offence undermined the clinicians and LAP recommendation though this was not the only view that could be taken and indeed the clinicians and the LAP had indeed taken a different view about this;
- an oral hearing would also allow an exploration of whether the non disclosure of the additional offence was genuinely down to forgetfulness as the Claimant claimed, and in the context of offences some 20-30 years

drugs and alcohol or was, as the Director thought, an attempt to hoodwink the LAP and clinicians;

- finally the accusation that a professional psychologist was biased and she and her colleagues had been deceived by the Claimant pulling the 'wool over their eyes' was a serious matter which fairness required should be explored at an oral hearing.

The Court concluded that for all these reasons, fairness required an oral hearing and the Directors decision to refuse one was quashed. What the court was not prepared to do however was to say the decision not to re-categorise by the Director was irrational. The Director had all the relevant material before him, and once this evidence is properly in it is for the Director to weigh all the different views, attribute the weight he considers appropriate to the various factors to come to a decision. Irrationality, the Court reminded itself, was a high hurdle to cross and the granting of an oral hearing in this case rendered the argument moot.

R (on the application of Michael Downs) v Secretary of State for Justice [2011] EHWC Civ 1422 (Admin)

This case again concerned another Category A prisoner seeking an oral hearing although in this case no challenge was made as to the decision of the Category A Review Team (CART) not to downgrade to Category B. The arguments for an oral hearing centred on the Claimant's age (65) and physical state and the fact that there was a difference of professional opinion between the psychologist instructed by the Claimant and the prison service psychologist at HMP Wakefield where the Claimant was detained. This difference of opinion was around both whether the Claimant was sexually motivated to commit the crimes and his need for further SOTP courses. The Claimant argued that an oral hearing was necessary to resolve these issues.

The Court referred to *Donald Mackay v Secretary of State for Justice* [2011] EWCA Civ 522 which emphasised that in respect of oral hearings and CART: (i) common law standards of procedural fairness affecting an oral hearing are flexible and may change over time; (ii) oral hearings are not required in all or most cases and will be rare; (iii) whether one is needed depends on al the circumstances of the case; (iv) the interests at stake and issues of cost and efficiency must be considered; (v) so too must the question of the extent to which an oral hearing will guarantee better decision making in terms of uncovering of facts, resolution of issues and the concerns of the decision make; (vi) there is no test of "exceptionality". Examples of cases where an oral hearing may be required (though certainly not always) was where an impasse around progress had been created through a prisoner's continued denial of the offences for which he had been convicted and inconsistency between a Parole Board, LAP or CART.

The Court rejected the need for an oral hearing in this case; all of the evidence including the independent psychology report was before the LAP and CART who made the decision on categorisation; there was a dispute around motivation and Sex Offender Treatment Programme (SOTP) but this dispute could not be resolved with any degree of certainty by an oral hearing; the two conflicting reports had been read and understood and CART's task was to decide which view it accepted and this was what they had done; nor was an oral hearing likely to assist in assessing the Claimant's physical state and any diminished risk if unlawfully at large

given the independent psychologist was not a Doctor and there was no medical report in respect of this issue.

R (on the application of Lawrence Willoughby) v Secretary of State for Justice [2011] EHWC Civ 3483 (Admin)

This final case around Category A prisoners and oral hearings, reviewed the relevant case law including *Downs* and *Donald Mackay*. It made clear that CART's decision as to whether or not to hold an oral hearing is one that must be made in light of the information available to it at the time when the decision is taken rather than any points raised subsequently.

The Claimant had served 14 years against a tariff of 6 ½ years. He disagreed with a prison service psychologist and her opinion as to risk. The Court made clear however that it was for the experts to express opinions not for the prisoner or other lay individuals to do so. Therefore an oral hearing was not necessary simply because of a disagreement between the prisoner and the prison psychologist, as the Claimant's evidence did not go the resolution of disputed questions of fact (as in the case of *Longmire* above) but simply to matters of opinion. The Court therefore rejected the need for an oral hearing and dismissed the application.

However in an after note the court made clear that, given the significant time over tariff in this case, there could well become a time when the length of detention could of itself be a compelling reason for an oral hearing even in the absence of any other reasons for holding such a hearing *"It can .. be said with some force that a person who faces the prospect of what looks like indefinite detention as a Category A prisoner should at some point have the opportunity of a face to face encounter with the relevant decision makers so that he can at least feel that everything that could be said on his behalf not only has been said, but also has been seen to have been considered. I think that the reasonable man would expect fairness to require no less".*

COMMUNITY CARE

R (on the application of NM) v Islington LBC 2012 WL 608471

This was an application for judicial review of the Social Services department of Islington Council's refusal to conduct an assessment of the Claimant's needs under Section 47 of the NHS and Community Care Act 1990 (NHSCCA 1990). The assessment was requested with a view to providing accommodation and support services to the Claimant if he was released from prison at his forthcoming parole hearing.

Under Section 47, local authorities have a duty to assess the needs of any person who 'may be in need' of such services for whom the authority may provide or arrange community care services. The question the court sought to determine was whether the duty of assessment of the community care needs of the Claimant had arisen under Section 47 in the circumstances of his case (where he had been out of the local authority area for several years). Islington argued that for a legal duty to assess to arise in this case there would have to be a very clear and definite expectation that they would have responsibility for meeting the relevant needs of the person in the future therefore the legal duty to assess arose. They contended that nothing short of a Parole Board recommendation that it would release the Claimant if adequate community care services were provided would suffice.

The court said that parliament could not have intended to create an obligation of assessment in relation to a very wide class of future provision of services, since doing so would create a serious risk of scarce resources being wasted and diverted from the most vulnerable through an assessment carried out for no ultimate purpose. The Claimant had also sought to rely on obligations contained within the UN Convention on Rights of Persons with Disabilities (CPRD). But the court did not accept that individuals could rely directly on CPRD under the guise of relying on the European Convention of Human Rights (ECHR). Application for judicial review was therefore refused, though the judge suggested that in the circumstances it was appropriate for a MAPPA (Multi-Agency Public Protection Arrangements) meeting to go ahead, Islington to provide general information on what community care services were available, and then the Parole Board could take this into account in making any decision on release.

This seems a surprising decision given the very low threshold as regards local authorities and their duty to assess individuals for such services by local authorities and permission to appeal has been granted.

SENTENCING

R (Minter) v (1) Chief Constable of the Hampshire Constabulary (2) Secretary of State for the Home Department [2011] EWHC 1610 (Admin)

The Claimant was convicted of sexual offences and granted an extended sentence of 4 ½ years including a custodial term of 18 months. Under Section 80(1) of the Sexual Offences Act 2003, the Claimant was required to notify police for inclusion in the sex offenders register. The period for which such notice is required depends on the length of the sentence. A person who is sentenced to a term of imprisonment of more than 6 months but less than 30 months is subject to the notification requirement for 10 years. Those who receive a longer sentence are required to give notice indefinitely. The Claimant argued that the phrase ‘term of imprisonment’ referred only to the 18 month custodial sentence and did not include the extension period. If this were the case, the Claimant would be subject to a 10 year notification period.

The Court considered the nature of extended sentences in the Powers of Criminal Courts (Sentencing) Act 2000 under which the Claimant was sentenced. In light of the wording of the legislation, the Court held that the term of imprisonment is the sum of the custodial term and the extension period. As a result, the Claimant was subject to an indefinite notice requirement.

R (Modhej and Smith) v Secretary of State for Justice [2011] EWHC 2267 (Admin)

The two claimants had been convicted of serious offences and in 2008 at sentencing were found to be dangerous within the meaning of Sections 224-229 of the Criminal Justice Act 2003 (CJA 2003). Subsequently each was sentenced to detention for public protection with a minimum term of four years. Both appealed their sentences. On 14 January 2010 the Court of Appeal Criminal Division upheld the finding of dangerousness but quashed the sentences imposed at Crown Court and substituted them with an extended sentence of 12 years comprising a total custodial term of eight years’ detention in a Young Offender Institution with an extended licence period of four years.

Under the provisions of Section 247(2) of the CJA 2003 as originally enacted the claimants would only be entitled to release if the Parole Board directed their release after the halfway point in the custodial term has been reached. Section 247 was amended by Section 25 of the Criminal Justice and Immigration Act 2008, so that a prisoner to whom this section applies is entitled to release automatically at the halfway point without reference to the Parole Board. The coming into force of the relevant sections did not affect those sentenced before 14 July 2008. The claimants contended that the substitution of extended sentences by the Court of Appeal had the effect that they were therefore entitled to release at the halfway point without reference to the Parole Board as per the amended Section 247(2).

The court in looking at this issue said the Court of Appeal Criminal Division is not a sentencing court but a court of review. Although the Criminal Appeal Act 1968 Section 11(3) refers to the Court of Appeal passing a sentence, the actual effect of this is to quash and substitute the original sentence. Section 29(4) of the 1968 Act states that the new sentence shall run from the time of the original sentence unless the court directs otherwise. In this case the claimants' date of sentence was the date of the sentence in the Crown Court (11 January 2008) and not the Court of Appeal (2010) therefore the claimants' were only eligible to apply for parole at the half point of their sentence, and their automatic release on licence would take place at the two-third point.

R v Gill, Eccles, Abu Neigh (formally Wallace) [2011] EWCA Crim 2795

These cases concerned applications for an out of time leave to appeal by three defendants (G, E and A) against the minimum term set following their convictions for murder and the imposition of a life sentence. The appeals were based around 'exceptional progress' within prison.

Prior to the decision in *Anderson [2003] 1AC837* the Secretary of State set the minimum term of life sentenced (not discretionary) prisoners under powers contained in section 29 of the Crime (Sentences) Act 1997. After the repeal of section 29 of the 1997 Act by the 2003 Criminal Justice Act, two classes of lifers existed and the transition arrangements for these lifers were set out in Schedule 22 of the 2003 CJA. Existing prisoners who **had** been notified by the Secretary of State of their minimum term (Paragraph 3 Schedule 22) could now apply to the High Court for their term to be fixed, whilst for those prisoners who **had not** been informed of a minimum term (Paragraph 6 Schedule 22) the Secretary of State was obliged to refer their cases to the High Court.

Consideration was given to the jurisdiction of the Court of Appeal to conduct a 'review of sentence' on the basis of exceptional progress. The issues which fell to be determined were, among other things: (i) when the Court of Appeal was reviewing a mandatory life sentence on grounds of exceptional progress, whether there was a distinction between cases under paragraph 3 and paragraph 6 of schedule 22 to the 2003 Act; (ii) whether the same applied to a 'modern', post-December 2003, minimum term passed by a trial judge following a murder trial as part of the first instance sentencing process; and (iii) whether it would be open to the Criminal Cases Review Commission to refer the matter back to the Court of Appeal if the full court were to refuse to grant an extension of time for the application to be renewed, or whether a defendant who made an application too soon was

to be denied a further application. Consideration was given to *R v Bieber* [2009] 1 All ER 295 and *R v Barker* All ER (D) 246 (Oct).

The appeal in the case of G would be allowed. The appeals in respect of E and A would be dismissed.

(1) It has been established that the interests of justice require that for cases falling within schedule 21 to the 2003 act, the High Court or the Court of Appeal should consider and reflect on evidence of exceptional progress in prison and, where it is established, make due, but 'modest', allowance for it against the minimum term.

(2) In accordance with the reasoning in *Bieber* and the observations of the court in *Barker*, the repeal of section 29 of the 1997 act, and the absence of any corresponding provision in the 2003 act, led to the conclusion that the exercise of the review jurisdiction of tariff on the basis of exceptional progress has no application to cases governed by what is sometimes described as the 'modern', that is post-December 2003 legislative structure. In effect, therefore, no residual discretion in the court to reduce the minimum term on the basis of 'exceptional progress' survives. It was a temporary measure which applied to a formidable but 'transitional' problem.

(3) When considering the issue of exceptional progress, the court is not considering the correctness or otherwise of the sentences imposed at trial, or the tariff periods fixed by the relevant judge in the light of all the aggravating and mitigating circumstances of the individual offence. In short, the court is not revisiting the punitive and deterrent elements of the sentence nor indeed the element of public protection, which is addressed by the sentence of life imprisonment. Equally, it is not addressing the issues which will fall to be resolved by the Parole Board at the end of the minimum term (whether it is reduced on the grounds of exceptional progress or not), nor is it intended that the court should express any opinion about the exercise by the Parole Board of its separate responsibilities. This is a fact-specific decision.

(4) A potential area of difficulty is that there will inevitably be cases where the defendant appealed against the minimum term, shortly after the sentence was imposed, on the basis that it was manifestly excessive, and without reference to any progress in prison. Whether successful or not, the conclusion of the appeal disposes of any further right to appeal against sentence. If there is a case where exceptional progress genuinely arises for consideration neither the High Court nor the Court of Appeal can create a further right of appeal against sentence which was not created by statute. Where the question of exceptional progress genuinely arises in the context of schedule 22 to the 2003 Act, but the normal appeal process has been exhausted, the case should be referred to the Criminal Cases Review Commission, which will decide whether or not to refer the case to the Criminal Court of Appeal. If so, then it would proceed as an appeal without further reference to the High Court.

(5) In cases where the statutory appeal process on grounds independent of exceptional progress has not yet been exhausted, any application for a reduction in the minimum term on the basis of exceptional progress should be adjourned, with an indication about when it would be sensible for the court to reconsider it.

(6) The brief answers to the issues raised are: (i) for the purposes of the review, of a mandatory life sentence on the grounds of exceptional progress,

there is no effective distinction between cases under paragraph 3 and paragraph 6 of schedule 22 to the 2003 act; (ii) possible reductions for exceptional progress in prison do not form part of any appeal process for sentences imposed after 18 December 2003; and (iii) the jurisdiction of the Criminal Cases Review Commission will continue to be exercised in accordance with its statutory functions

The minimum term in the case of G would be reduced from 15 years to 14 years.

TREATMENT

R (NM) v Secretary of State for Justice [2011] EWHC 1816 (Admin)

In this case the Claimant prisoner had been the victim of sexual assault while in prison and sought to challenge the decision of the prison not to investigate the assault. He also argued that the prison had failed to prevent discrimination against him based on his significant learning difficulties. The prisoner said the assault required formal investigation under PSO 1300, particularly as he was disabled and had suffered sexual assaults in the past within prison. A formal investigation would he argued have revealed significant elements of the assault which were not initially apparent, such as the presence of drugs and the absence of consent. He further submitted that the assault amounted to inhumane and degrading treatment under Article 3 of the ECHR, given that Article 3 imposes a positive obligation on the prison to investigate allegations of such ill-treatment.

The Court agreed that an investigation under PSO 1300 is one of a range of methods of enquiry available to the prison. They also said that whilst a decision to adopt a different method was not unlawful there may be circumstances in which the absence of additional assistance to those with disabilities could lead to injustice. However in the circumstances before it the court felt that there was no real prospect of that in this case. In coming to its conclusion the Court referred to the fact that there was no bodily injury, the circumstances of the incident were not in dispute and the perpetrator had admitted guilt. In reference to Article 3, the Court distinguished this case from those involving serious injury, multiple potential victims or direct infringement by the State. As a result, the Court refused the Claimant's application.

COMPENSATION

R (on the application of Hester) v Secretary of State for Justice [20 Dec 2011] Unreported

This case involved a determinate sentence prisoner who had absconded from prison before completing his sentence; he was later recaptured and served part of his sentence before being released on licence. Whilst on licence he was recalled to prison for breaches of his licence conditions such as not residing in approved premises or keeping in contact. The Parole Board approved his recall but later directed his immediate release as they determined that he posed a low risk of re-offending.

The Secretary of State admitted that in breach of Article 5 (4) of the Convention he had not referred the Claimant's case as timeously as he should have but did not admit that the breach attracted any damages though he offered £6000 which was rejected. The Claimant's one time legal advisor had advised him to accept the amount.

It was clear that the Claimant had been unlawfully detained for 12 weeks and that his detention passed the threshold for an award of damages. Having regard to the authorities and the fact that the Claimant had not shown that his unlawful detention had caused him any distress or medical problems; that as a long term prisoner custody contained nothing untoward; and that he had been living in a caravan when recalled to prison, the appropriate award of damages was £500 per week. Therefore the Secretary of State's offer of £6000 was the correct award, and he was entitled to his costs of the proceedings from the date of his offer.

Chester v Ministry of Justice Worcester County Court, 6 January 2012 (unreported)

Two photographs of adults were confiscated from Mr Chester though it was never alleged that the photographs were ever subject to Public Protection measures. Mr Chester applied for compensation on the basis of a breach of his rights under Article 1 of the First protocol of the European Convention on Human Rights, which states that 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.' Mr Chester successfully argued the confiscation of the photographs breached his convention rights and was awarded £400 in damages.

SEGREGATION

Malcolm v Secretary of State for Justice [2011] EWCA Civ 1538

A life sentenced prisoner detained in HMP Frankland's segregation unit, at his own insistence, brought a claim under article 8 of The European Convention over only being provided with an average of around 30 minutes in the open air each day whereas PSO 4275 provides for a minimum of an hour each day. His original complaint had been upheld by the Prisons and Probation Ombudsman however he was transferred 5 days after the Acting Deputy Ombudsman wrote to the prison recommending a change in regime.

The court found that there had been no interference with the prisoner's rights under Article 8 (1) of the ECHR. The prisoner had himself given no reasons as to why he continued to refuse to locate to a normal wing where he could have accessed more time in the open air. In addition he had not produced any evidence that as a result of the restrictions he had suffered any detrimental effect to either his health or well being. It was difficult to derive from article 8 a requirement or need for prisoners to have 60 as opposed to 30 minutes in the fresh air daily, and on the particular facts of this case the impact of any breach did not attain the necessary level of seriousness to amount to an interference. Even if Article 8 (1) was engaged there was proportionate justification for that interference as it met the legitimate aims of public safety, prevention of crime or disorder, the protection of health of morals and/or the protection of the rights and freedoms of others. Even if there was a breach just satisfaction had already been achieved by the finding of the Acting Deputy Ombudsman and being moved to another establishment.

RELEASE ON TEMPORARY LICENCE

R (on the application of MP and P) v Secretary of State for Justice [2012] EWHC 214

Judicial Review cases were brought by two women prisoners challenging a refusal to grant them Childcare Resettlement Leave (CRL). Both claimants in this case had sole caring responsibility for children under 16 but were refused CRL by the prison service predominantly due to their sentence length and their categorisation. The Court found that the decisions to refuse the women CRL were unlawful.

CRL is a form of temporary release on licence (ROTL) and eligibility is set out in PSO 6300. To be eligible for CRL a prisoner must show s/he has sole caring responsibility for a child under 16 and:

- was resident in open or semi-open conditions; or
- Is categorised as suitable for such conditions; or
- was resident in a mother and baby unit and had other children being cared for outside the prison.

There was no minimum eligibility date for Childcare Resettlement Leave. In 2009 the only two semi-open female prisons were re-designated as closed prisons. PSO 6300 has never been amended to reflect this change in the female prison and a prison service review in 2009/2010 concluded that there was no need to add a minimum eligibility date for CRL.

The Court found that when considering an application for CRL, the Secretary of State must consider the prisoners' Article 8 Right to Family Life of the European Convention on Human Rights, and Article 3(1) of the UN Convention on the Rights of the Child; and the individual circumstances of a prisoner and his or her children. Primary consideration must be given to the *best interests* of the child when deciding whether to grant CRL to prisoners, and the views of the child should, where appropriate, be ascertained.

The case is likely to have a wider application to other cases where the children of prisoners (both male and female) are concerned. The expectation is that, within any decision making that has a potential effect on the rights of the child, the decision maker will have a duty to consider the child or children's best interests and, where appropriate, ascertain and take their views into account. A new PSI on CRL should be issued in May 2012.

UPDATES ON PRISON SERVICE INSTRUCTIONS AND ORDERS

PSI 51/2011 Faith and Pastoral Care for Prisoners replaces PSO 4550 The Religion Manual.

PSI 52/2011 Immigration , Repatriation And Removal Services, PSI 59/2011 The Early Removal Scheme and Release of Foreign National Prisoners and **PSI 65/2011 Foreign National prisoners liable to deportation** cover all aspects of the specific management of foreign national prisoners within the prison system and cancel PSO 4630, chapter 9 of PSO 6000 and all related PSIs.

PSI 58/2011 Physical education (PE) for prisoners replaces PSO 4250. It states that prisoners must have access to the approved and published minimum number of PE hours per week, which is one hour for adults and two for young

offenders; that the PE programme most promote participation, complement the prison regime and take into account the diverse needs of the population. Prisoners must complete a physical assessment prior to undertaking any PE activity and there must be induction arrangements in place.

PSI 67/2011 Searching of the Person introduces amendments to the National Security Framework Function 3 (Searching) and updates and replaces PSI 48/2010 with the following changes to policy:

Prisons outside of the High Security Estate are no longer required to conduct routine searches of stored property on reception-in on transfer from another prison. They must instead undertake a risk assessment to determine local arrangements. This change was initially set out in PSI 19/2011.

High Security prisons are no longer required to conduct a full search of all Category B prisoners following social visits and are instead required to risk-assess the numbers of such searches required in these circumstances. This change was initially set out in PSI 31/2011.

PAS has been contacted by prisoners from one high security establishment, who state that the second of these requirements is being over-ridden by the governor. We have written challenging this.

PSI 71/2011 Parole Hub Pilot sets out the arrangements for a six-month pilot programme for the central hearing of Parole Board panels for prisoners from a number of different prisons. HMP Bristol has been designated as the 'parole hub' for this exercise, and the Board will sit there. Prisoners located at Bristol will give their evidence in person, as will those from nearby Leyhill and Gloucester, who will travel to Bristol for this purpose. Three other prisons, Erlestoke, Exeter and Garth, have been designated as 'satellite prisons' and are equipped with video-link suites, from where prisoners from those establishments, and from other nearby prisons, will give their evidence to the Board at Bristol. Probation staff will also give video evidence, from their offices and witnesses who are family members etc, will usually be asked to give their evidence from there as well. Legal representatives will attend wherever their client is giving evidence from and address the panel from that location. The pilot will last for six months and then be assessed.

PSI 72/2011 – Discharge
This PSI replaces PSI 25/2011, thereby making changes to the procedures regarding the discharge of prisoners. PSI 72/2011 covers the discharge of prisoners at the end of their sentence, discharge to court, transfers, release on temporary licence, discharge of foreign nationals, and other forms of discharges. The PSI includes procedures that must be followed to ensure that a prisoner is discharged correctly. It also requires certain information and provisions to be made available to discharged prisoners discharged to enable them to keep to the conditions of their discharge from prison.

PSI 73/2011 – Prison NOMIS (Prison National Offender Management Information System)
This Instruction introduces the Prison NOMIS, which is a centralised IT system that replaced the Local Inmate Database System (LIDS). The Prison NOMIS allows information on prisoners to be shared nationally or within an establishment. PSI 73/2011 sets out mandatory guidelines that cover all users of the Prison NOMIS database, including a

requirement that any information downloaded from Prison-NOMIS must be authorised by the governor and in accordance with PSI 2/2008. Given the nature of the Prison NOMIS, the Data Protection Act 1998 is relevant and all users must handle data in accordance with the Act.

PSI 74/2011 – Early days in custody – Reception in, first night in custody, and induction to custody

PSI 52/2010 and PSO 2605 are replaced by this instruction. PSI 74/2011 removes the mandatory requirement for each prison to have a designated Legal Services Officer, except in contracted prisons where legal officers are required by the contract. This instruction provides that prison governors may now decide, on a local basis, how best to meet the requirement to provide prisoners with information on accessing legal services. PSI 74/2011 applies only to prisoners aged 18 and over – the procedures for prisoners under 18 are managed by NOMS Young People's Team. The introduction of this PSI should not affect the legal rights prisoners have with regards to access to legal services.

PSI 75/2011 – Residential Services

This PSI replaces PSI 10/2011 and deals with the delivery of daytime residential services to all prisons irrespective of type, age, size or role. The instruction also deals with prisoners' time in the open air, requiring establishments to provide prisoners with a daily minimum of 30 minutes in the open air. It also cancels the mandatory requirement for accommodation fabric checks except in the high security estate and sets out that personal officer schemes are not mandatory in adult and young adult prisons. The PSI also states that prisoners must have a means of summoning assistance from inside their cells when locked inside (which is in keeping with the requirement of the Prison Act). The PSI says that in closed establishments this will normally take the form of an in cell call system, that staff must acknowledge all requests for assistance by personal contact with the prisoner and that appropriate action must be taken in response to abuse of the call system.

PSI 76/2011 – Prisoners' Earnings Act 1996

This PSI replaces PSI 48/2011 and updates the framework by which prison governors can exercise discretion under the Prisons' Earnings Act 1996 to impose a levy of no more than 40% on a prisoner's earnings. Under this instruction, the earnings of prisoners who undertake paid work in the community (outside the prison) and earn in excess of £20 a week could be subject to a levy of no more than 40% of their remaining income after £20. The £20 will not be affected, but any sum over the £20 a week could be subject to the levy. This PSI applies only to prisoners working outside the prison for external employers. Where the levy is imposed under this instruction, the monies are to be paid to the charity Victim Support.

OMBUDSMAN CASES

CONDITIONS

Mr A complained about being removed from the Vulnerable Prisoners Unit (VPU) following an allegation that he had sexually assaulted another prisoner and a subsequent police investigation. He claimed that this resulted in him being locked up for 24 hours a day without exercise, association, library, telephone calls or showers. The Ombudsman found no evidence to support the claims of being locked up 24 hours a day without exercise, association, telephone calls or showers. However the investigation in upholding the complaint did find that; the assault allegations were

not put to Mr A until 3 days after he had been moved; there was no reasonable cause for the delay; there was no evidence that the prison service has chased up the police investigation and instead adopted a passive approach even though this was the sole reason Mr A could not be returned to the VPU; there was no attempt to improve the regime as promised; there was no written evidence of allowing access to the library; finally P-Nomis case notes should have been completed on a daily basis given the sensitive and unusual nature of the regime.

RELIGION

Mr B complained about not receiving a book from HMP Pentonville following his transfer to HMP Albany and that HMP Albany had themselves not allowed him to have in-possession a further two books that had been sent in. The book Mr B had been expecting from HMP Pentonville was a copy of the Bible which he said he needed for his religious studies. The book was eventually found but was ripped and damaged. In respect of the in-possession books Mr B had asked for two books which a Reverend from a Church outside the prison had supplied to him, both were religious Christian texts. These were retained in his stored property by HMP Albany under the IEP system as they had not been purchased locally.

The prison argued that Mr B was conducting religious studies as a form of self study rather than it being a recognized course through either the prison chaplaincy or Education department. The prison offered to allow Mr B to have an authorized additional spend from his private cash account to facilitate his purchase of the books locally and via approved suppliers. Mr B counter offered, saying he would donate the books to the prison chaplaincy as long as he was allowed to study them. This was rejected by the Governor.

Mr B said being denied the books were contrary to PSO 4550 Religion Manual, which states “The Prison Service recognizes and respects the right of prisoners to practice their religion”. The Ombudsman considered PSI 12/2011 which provides current guidance on handling prisoners’ property. They also obtained advice from NOMS who said

“Prison Rule 44(4) which applies to convicted prisoners only gives Governors the discretion as to whether articles sent in by post or courier shall be given to convicted prisoners for retention in-possession, placed in storage or returned to the sender (PSI 12/2011 para 2.65)”

The PPO in its investigation referred to the fact that the rules on the handling or sending in of items are not centrally prescribed, and every prison operates an IEP scheme which allows prisoners to earn privileges through ‘purposeful activity’. The handing or sending in of property is closely tied to the rules of the IEP scheme. Governors also retain a discretion to determine the local rules in their respective establishments and may restrict the handing or sending in of items if they feel it might undermine the IEP scheme; have implications for the management of resources; or be detrimental to the secure running of the establishment. HMP Albany claimed their policy of not allowing prisoners to have items posted or handed in was mainly due to security issues, as items from approved suppliers would not have anything secreted in them and it also allowed the prison to keep an eye on spends and watch out for things like bullying and money laundering.

In respect of the damaged book, no damage was recorded on Mr B’s prop-

erty card and the chaplaincy had not raised it as an issue. Therefore this complaint was not upheld. The Ombudsman also said that HMP Albany's policy was clearly one they were allowed to have and maintain under Prison Rule 44(4) and PSI 12/2011. Nor did the PPO think the reasons given by HMP Albany as to the why this policy needed to be maintained were so unreasonable as to render it unfair. The Ombudsman did however feel that the mediated settlement around the donation of the books to the prison in return for being able to use them was a reasonable resolution to the complaint.

DISCRIMINATION

Mr C complained that he had suffered homophobic abuse at his previous prison. Following interviews with Mr C and staff, the PPO concluded it was probable he had indeed been subjected to homophobic abuse by other prisoners; she was concerned that the culture at the prison was not supportive to gay prisoners. She noted that HM Chief Inspector of Prisons had reported that the prisoner diversity representatives were hostile to openly gay prisoners. The Chief Inspector said there was 'tacit acceptance' by many managers and staff that the prison was not a suitable environment for gay men. The PPO was also concerned that some staff emphasised the need to respect cultural and religious objections to homosexuality in discussing whether being 'out' at the prison was safe. Religious beliefs should be respected but this did not mean that discriminatory or antagonistic language or behaviour should be tolerated. This could suggest gay prisoners keep quiet about their sexuality and are 'asking for trouble' if they are open about it. This was not acceptable. Gay prisoners must have the right to be open about their sexuality, even if this 'offends' other prisoners.

PROPERTY

Mr D complained that when he transferred from prison A, via prison B, to prison C, a ring went missing from his valuable property bag. Prison A said that the bag had been intact when it left them and they could not be responsible for what happened in other prisons. Prison B said that the bag was not opened while it was with them. At Mr D's request prison C referred the loss of the ring to the prison's police liaison officer who declined to investigate on the grounds that they thought the ring had been lost rather than stolen. Mr D asked the Ombudsman to investigate what had happened to the ring.
The PPO investigation established that the ring had been listed as being in Mr D's valuable property bag at prison A. There was therefore no doubt that the ring had existed and had been in the care of the Prison Service. The PPO also established that the bag had been sealed at prison A and sent first to prison B (where records showed that it had not been opened) and then to prison C where it was noted that the ring was missing when the bag was opened. Mr D had no access to the bag during this period and it was therefore clear that the ring had disappeared while in the care of the Prison Service.

The Prison Service Order on prisoners' property says that, when two or more prisons cannot agree which is responsible for lost or damaged property, the complaint should be referred to NOMS to resolve. None of the three prisons had done this in Mr D's case, and none had made any attempt to resolve his complaint. The PPO investigator asked the Governor of prison A to consider compensating Mr O for the ring (as it seemed most likely that it had gone missing there), but he declined. The PPO therefore issued a formal report recommending the Prison Service com-

pensate Mr D for the loss of the ring. The PPO also drew attention to the fact that the Prison Service could and should have resolved this complaint. The Prison Service accepted the recommendation and agreed that Mr D's complaint should have been resolved without need for this intervention.

PAY

Mr E, who is over 70, complained about the rate of 'pension' he received - £3.75 a week - which he said was not enough to live on. He felt he was being penalised for being 'too old' to work. The PPO established that the Prison Service sets a mandatory minimum rate for retirement pay at £3.25 a week. They also established that retired prisoners at Mr E's prison receive a full rebate on their TV rental of 50 pence a week and the retirement pay at his prison would shortly be increased to £4.50 a week. This effectively meant that Mr E would soon be receiving £5 a week. The investigation also found that the prison offered a number of 'environmental jobs' to elderly or disabled prisoners that involve very little physical work (for example, ensuring that all the lights are switched off) and the rate of pay for these jobs was between £7.50 and £9 a week. Therefore although sympathetic with prisoners in Mr E's situation who have no income other than their retirement pay, the PPO did not uphold the complaint because Mr E was already receiving above the minimum rate of retirement pay and also had the opportunity to apply for an environmental job.

INCENTIVES AND EARNED PRIVILEGE SCHEME (IEPS)

Mr F was adjudicated on and given an IEP warning for the same incident (failing a mandatory drug test). He felt that this was unfair and amounted to 'double jeopardy'. The IEP scheme is designed to encourage prisoners to reach and maintain proper standards of behaviour. It is distinct from the formal disciplinary system which deals with offences under prison rules. The IEP system can take account of other matters such as a prisoner's attitude or a refusal to undertake offending behaviour programmes that do not give rise to formal charges. However, when an incident occurs that is serious enough to warrant a formal charge, it would, the PPO said, be irrational if this did not also have the potential to affect the prisoner's IEP status. The PPO did not therefore think that it was unreasonable that failing a drug test resulted in both a formal disciplinary charge and an IEP warning, and did not uphold Mr F's complaint.

ADJUDICATIONS

Mr G was charged with disobeying a lawful order to move from the care and separation unit to normal location. At the first hearing Mr G asked for a week's adjournment to obtain legal advice. The adjudicator offered him a telephone call to his solicitors which Mr G declined. The adjudicator then proceeded with the adjudication and found the charge proved. Mr G complained to me that the offer of a telephone call to his solicitors was not an adequate response to his request for legal advice. The Ombudsman agreed. It was not reasonable to expect solicitors to be able to provide advice in a brief telephone call, with no notice and without funding or access to the records. In the Ombudsman's view the request for a week's adjournment to obtain legal advice was reasonable and should have been granted. He therefore recommended that the finding of guilt be quashed which was accepted by the Governor responsible for that establishment.

PRISONERS' LEGAL RIGHTS GROUP MEMBERSHIP APPLICATION FORM

Please complete this form in block capitals and send it to PAS at the address below:

PAS PRISONERS' ADVICE SERVICE

Name: _____

Company: _____

Address: _____

_____ Postcode: _____

Telephone: _____ Fax: _____

Email: _____ Website: _____

IS THIS A RENEWAL? (Please circle) Yes / No

PLEASE TICK THE TYPE OF MEMBERSHIP REQUIRED:

( )	Prisoners	Free	
( )	Professionals/Other	£50pa	(please make cheques payable to
( )	Voluntary Organisations	£30pa	'Prisoners' Advice Service')
( )	Academic Institutions	£50pa	
( )	Prison Libraries	£30pa	
( )	Solicitors and Barristers	£50pa	
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( ) I would like to sponsor a prisoner PLRG member for one year £10

What issues/themes would you like to see covered in future issues?:

_____

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