PRISONERS' RIGHTS

Prisoners' Legal Rights Bulletin No 71

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PRISONERS' ADVICE SERVICE
JUSTICE BEHIND BARS

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 PLRB is free to serving prisoners.

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HERBERT SMITH FREEHILLS

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CASE REPORTS

PAS JR

R (The Howard League for Penal Reform and Prisoners' Advice Service) v the Lord Chancellor [2015] EWCA Civ 819

There were two grounds of challenge by the Howard League and PAS before the Court of Appeal, following the Divisional Court's dismissal of the application for judicial review in March ([2015] EWHC 709 (Admin)).

The first ground concerned legal aid funding for Parole Board hearings for pre-tariff reviews where prisoners have been recommended for a move to open conditions prior to expiry of their tariff and where prisoners have been removed from open conditions and seek to be returned there. The appellants argued that the proposed changes to legal aid, set out in the consultation 'Transforming Legal Aid' in April 2013, clearly indicated that funding for pre-tariff reviews would not be affected. Accordingly, the organisations did not submit representations to the Lord Chancellor on the issue, nor did any other consultee give the matter detailed consideration. It was argued this lack of consultation rendered the cuts unlawful.

The Court of Appeal rejected this argument as it was clear from notices, including the Ministry of Justice's 'Transforming Legal Aid: Next Steps' in September 2013, that the Government had amended its proposals for cuts to legal aid and it was sufficiently understood that funding for Parole Board hearings for pre-tariff reviews and return to open conditions had been removed.

The second ground concerned the removal of legal aid funding in seven principal areas of prison law: Parole Board hearings for pre-tariff reviews and return to open conditions; prisoner eligibility for a place in mother and baby units; prisoner segregation and placement in Close Supervision Centres; Cat A reviews; access to offender behaviour courses; resettlement and licence conditions; disciplinary proceedings where no additional days may be awarded. The Howard League and PAS argued that removing legal aid for these seven categories of case rendered the system inherently unfair, as prisoners affected by these types of decisions are only able to participate effectively in the decision-making process if they are legally represented. This is due to the nature of prison population, which includes some of the most vulnerable members of society and where those with mental health and learning difficulties are significantly over-represented, combined with the fact that prisoners live in a closed environment where their ability to access outside sources of free advice is greatly inhibited.

It was further argued that unlike other cuts to legal aid where a safety net was introduced to allow individuals to apply for funding in exceptional circumstances, cuts in prison law were absolute: the current system under LASPO 2012 does not have the required flexibility to accommodate the cases in which fairness demands legal representation, nor can the internal complaints procedure or the Prison and Probation Ombudsman remedy the unfairness.

The Court of Appeal accepted that there could be a significant number of individuals subject to the above decisions for whom it may be very difficult to participate effectively without legal support, and therefore "without the potential for access to assistance the system could carry an unacceptable risk of unfair, and therefore unlawful, decision making". The Court granted leave to apply for

judicial review on this second ground of challenge.

SEGREGATION

Bourgass and Hussain v Secretary of State for Justice [2015] UKSC 54

The key question in this case was whether decisions to keep the appellant prisoners in segregation for substantial periods were taken lawfully.

In April 2010 the first appellant, Mr Bourgass, was serving a life sentence in HMP Whitemoor when he was segregated under Rule 45(1) of the Prison Rules 1999 pending investigation into the serous assault of another prisoner. Mr Bourgass's segregation was reviewed after 72 hours and its continuation purportedly authorised under Rule 45(2) by various prison officers chairing the Segregation Review Board (SRB). Rule 45(2) provides that a prisoner shall not be segregated for more than 72 hours 'without the authority of… the Secretary of State'. Mr Bourgass remained in segregation for seven months, over which period various reasons for segregating him were provided. Notably the statement that Mr Bourgass remained in segregation 'pending an investigation into a serious assault' was repeated even after the police indicated they did not consider Mr Bourgass a suspect in May 2010. Mr Bourgass's representatives initiated judicial review proceedings. In the detailed grounds of defence filed by the Secretary of State for Justice (SSJ) in August 2010 it was disclosed that the principle reason Mr Bourgass was suspected of involvement in the assault was that on the previous morning he had been seen on CCTV speaking to the perpetrator. This had not been previously disclosed.

The second appellant, Mr Hussain, was serving a life sentence in HMP Frankland when, in April 2010, he was placed in segregation under rule 45(1) on the orders of the 'residential governor', following an incident in which another prisoner was seriously injured. He remained in segregation for six months. His continued segregation after 72 hours was purportedly authorised under Rule 45(2), by various prison officers chairing the SRB. The reasons given were the assault, police and prison investigations into it, and, later, the risk of reprisals from other prisoners. In July 2010, after judicial review proceedings were initiated, the SSJ submitted detailed grounds of defence and a witness statement of the residential governor stating that the reasons for Mr Hussain's segregation included intelligence linking him with converting other prisoners in segregation to his interpretation of Islam (an allegation which the prison subsequently withdrew).

HELD: The Supreme Court unanimously allowed the appeals, agreeing in each case that the appellants' segregation beyond the initial period of 72 hours was not authorised, and so unlawful.

The first issue considered was that decisions taken under Rule 45(2) were not taken by the SSJ, but by the senior prison officer or 'operational manager' chairing the SRB, as was purportedly permitted by Prison Service Order 1700. The court found that the *Carltona* principle – under which a decision of a departmental official is constitutionally the decision of the minister himself – could not apply to the relationship between the SSJ and prison governors or other prison officers. In particular it found that Rule 45(2) is intended to provide a safeguard for the prisoner against excessively prolonged segregation by the local prison management and it can only do so if it ensures that

segregation does not continue for a prolonged period without being considered by officials independent of the prison. Accordingly the SSJ's purported delegation of his function under Rule 45(2) to the chairman of the SRB was unlawful and the decisions to continue segregation of the two appellants beyond the initial 72 hours were taken without lawful authority.

It was also held that common law fairness requires that a prisoner should normally have a reasonable opportunity to make representations before a decision is taken to authorise continued segregation. He must therefore normally be informed of the substance of the matters on the basis of which the authority of the SSJ to continue segregation is sought. In the present cases more information should have been provided, although it was held that fairness does not require the disclosure of information which could compromise the safety of an informant, prison security or other overriding interests.

ABSCONDER POLICY

R (on the application of Gilbert) v SSJ [2015] EWCA Civ 802

The Respondent was convicted on 25 April 2008 of wounding with intent to cause grievous bodily harm and sentenced to an IPP with a minimum term of 4 years and 6 months. He was transferred to open conditions a few months after expiry of his tariff. Whilst in open, he complied with his sentence plan and had several ROTLs. In June 2013, he missed the last train which could return him to prison in time to comply with his ROTL. He called the prison on the number provided to him several times but they went unanswered, and he also unsuccessfully tried the number provided in his licence booklet. He surrendered to the closest police station the next morning and was returned to closed conditions a few days later.

The Respondent's release was considered by the Parole Board in July 2014. At this time, the Progression Regime under the absconder policy had been introduced by the Defendant but not available for consideration by the Board. The Board decided not to direct the Respondent's release but recommended his transfer to open conditions. The Board referred to the recent failure to comply with ROTL as a "minor error of judgement which [did] not raise [a] risk of future absconding and that previous poor compliance" was influenced by his past substance abuse.

The Defendant disagreed with the recommendation and refused the transfer, justifying the refusal as compliance with the new absconder policy. The decision letter referred to alternative ways of avoiding the failure to comply with ROTL and suggested that release would equally be possible from closed conditions and under the Progression Regime.

The Respondent made representations that the policy should not apply to him and in the alternative that there were exceptional circumstances disapplying the policy in the present case. He issued a claim for judicial review after the Secretary of State failed to make a decision. He was subsequently transferred into the Progression Regime in closed conditions.

The High Court held that the absconder policy was unlawful as it was inconsistent with the Directions issued by the Secretary of State. It fails to have regard to the views expressed by the Parole Board in assessing the risk posed by a prisoner and was in breach of Article 5 ECHR as it denies a reasonable

opportunity for the prisoner to demonstrate to the Parole Board that he no longer presents an unacceptable danger to the public. On appeal by the Secretary of State, the Respondent relied on the High Court's decision and further submitted that (i) the Secretary of State acted irrationally and improperly undermined the intended role of the Parole Board by introducing a policy which would disable it from assessing risk in relation to prisoners, (ii) the absconder policy is an impermissibly rigid blanket policy in practice and (iii) the absconder policy is inconsistent with PSI 36/2012.

HELD: 1) The absconder policy is not inconsistent with the Directions issued by the Secretary of State, specifically paragraph 1 which reads that "[In most (but not all) … cases, a phased release from closed to open prison is necessary …". This does not limit eligibility for release to prisoners who have served part of their sentence in open conditions. The Secretary of State remains under the general public law obligation to act rationally but the Directions do not create a legitimate expectation as to how this discretion will be exercised. There was no irrationality or unfairness in the Secretary of State's decision.

2) The advice of the Board did not consider the absconder policy and the Secretary of State lawfully used his discretion to consider the recommendation in light of the absconder policy. The role of the Board was not improperly undermined.

3) Little evidence was provided to suggest that the absconder policy was a blanket policy in practice and its text expressly indicates that it is not. To the contrary, there is evidence that some prisoners have been transferred to open conditions under the absconder policy.

4) The obligation under Article 5 ECHR is merely to provide the prisoner with "a reasonable opportunity" to demonstrate his safety. The Progression Regime does provide this opportunity and the absconder policy provides a reasonable opportunity to be placed in open conditions in cases where such placement is "absolutely necessary" to demonstrate his safety.

5) The absconder policy has the same status as PSI 36/2012 and it is clear that it was intended to modify the latter in relation to those prisoners affected by the absconder policy. No relevant inconsistency between the two policies renders the absconder policy unlawful. It was also noted that the Board's Guidance, which suggests that most prisoners will need to spend some time in open conditions, is subordinate to the Board's obligation to consider release and the absconder policy is therefore not rendered unlawful by the Board's Guidance.

6) The Secretary of State considered both the Board's recommendation and the Respondent's representations regarding exceptional circumstances before he decided to refuse the transfer to open conditions. The approach was not unfair.

7) The Progression Regime would provide the Respondent with reasonable opportunity to demonstrate that he has done sufficient work to support a future application for release. Therefore transfer to open conditions was not necessary in his case. Although it might be difficult to depart from the Board's recommendation and justify doing so as being a rational view, the Board here did not consider the absconder policy. The Secretary of State's decision was not irrational.

LEGAL AID FOR PRE-TARIFF REVIEWS

R (Ryder) v Lord Chancellor [2015] EWHC 1857 (Admin)

This case concerned the denial of legal aid to a life-sentence prisoner for advocacy assistance at an oral pre-tariff review hearing as a result of provisions introduced by the Criminal Legal Aid (General) (Amendment) Regulations 2013 SI 2013/2790 ('the Amending Regulations').

The claimant received a life sentence for murder in 2001, with the minimum term of 16 years rendering him eligible for release in 2017. In 2013, following good conduct in prison, he was referred to the Parole Board for a pre-tariff review to consider a transfer to an open prison as a potential precursor to eventual release. Subsequently, although the claimant was granted an oral hearing before the Parole Board, he was deemed not to qualify for legal aid to cover advocacy assistance during the hearing. This was because the Amending Regulations had taken pre-tariff reviews outside of the scope of legal aid, which is only available where the Parole Board has the power to direct release. The claimant argued the Amending Regulations were invalid on the grounds that: they breached Article 14 of the European Convention on Human Rights which prohibits discrimination; they breached common law principles of consistency; and that their creation was not authorised by the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO).

With regard to the submission that the Amendment Regulations were discriminatory, the claimant argued there was not justification for treating him differently from other indeterminate sentence prisoners (ISPs), such as those who were post-tariff or subject to recall and who would be eligible for legal aid at Parole Board hearings.

HELD: In assessing this submission the court applied a five-stage approach derived from *R (S) v Chief Constable for South Yorkshire*. It concluded that the treatment was not discriminatory, finding that the claimant's position was distinct from other ISPs where the Parole Board could direct release and therefore that the difference in treatment was rational and relevant. It noted that the differentiation was not related to unchangeable personal characteristics such as sex or race, and considered the Lord Chancellor's factoring in of policy considerations such as the burden on the taxpayer and need for maintaining public confidence while identifying those most in need of legal aid to be legitimate aims which had been addressed proportionately.

The court found that the Amending Regulations did not violate the principles of common law consistency because the distinction drawn between prisoners in regard to their eligibility for legal aid when appearing before the Parole Board was not arbitrary or irrational. The court further found that the Amending Regulations were authorised by LASPO. The claim for judicial review was dismissed.

TRANSGENDER STATUS - ACCESS TO COURSES

R (H) v Secretary of State for Justice [2015] EWHC 1550 (Admin)

This case concerned access to rehabilitative work to address sexual offending for a transgender prisoner subject to an indeterminate sentence of Imprisonment for Public Protection (IPP).

The claimant, who was born a man but expressed the wish to change to a female gender while in prison, was convicted of sexual offences in 2009, receiving a minimum term of four years which expired in 2013. A 2012 Parole Board report had concluded that a high risk of the claimant committing similar offences would remain until she had completed work specifically linked to sexual offending.

A 2013 assessment of H's suitability for a Sex Offender Treatment Programme (SOTP) by a forensic psychologist recommended against H undertaking the SOTP at that stage. It highlighted obstacles to her engagement with the programme, including her distrust of men and potential vulnerability in her role as a female which could make the group work difficult, and concluded her complex treatment needs would at first be best addressed in a therapeutic community, rather than through SOTP. The report noted an absence of research into whether SOTP reduced the risk of sexual offending in transgender prisoners and that the programme was designed for men.

The claimant submitted that completion of accredited SOTPs was a prerequisite for release of ISPs convicted of serious sexual offences, and that in failing to provide access to such work the defendant had breached five duties: firstly the public law duty (*R (Wells) v Secretary of State for Justice*) that the Secretary of State would make provision allowing relevant prisoners a reasonable opportunity to demonstrate to the Parole Board that they should be released; secondly the duty under Article 5 of the European Convention on Human Rights (ECHR) (*R (Kaiyam) v Secretary of State for Justice*) that the state will provide a reasonable opportunity for relevant prisoners to rehabilitate themselves and demonstrate they no longer present an unacceptable danger to the public; thirdly the duty under Article 14 of the ECHR not to discriminate; fourthly the duty under sections 19 and 29 of the Equality Act 2010 not to discriminate, including indirectly; and fifthly the duty under section 149 of the Equality Act to have due regard to the need to eliminate discrimination and other prohibited conduct and to advance equality of opportunity. In regard to the allegation of discrimination, the claimant submitted that the abovementioned difficulties associated with group work with men were directly linked to her transgender status and disproportionately affected transgender prisoners.

HELD: The court found none of these breaches had occurred, emphasising the complexity of the claimant's circumstances and that other interventions had been assessed as more appropriate than the SOTP in the first instance. In regard to the alleged breach of public law duty, it found that completion of the SOTP was not necessarily a prerequisite for release and that there could be other means of demonstrating the necessary reduction in risk, that the defendant had acted reasonably in exploring other non-SOTP treatment areas, and that the policy which provides for 'managed and sequenced' sentence plans had been complied with. With regard to Article 5 ECHR, it distinguished the case from *James, Wells and Lee v UK* where prison locations had deprived prisoners of offending behaviour programmes, by saying that in this case the prison location was immaterial and the same course of action would have been followed even if H had remained in a specialist site for sex offenders. In regard to the allegations of discrimination, it found that the claimant had not been denied access to offending behaviour work on the basis of her transgender status, but rather because

other non-SOTP treatment areas had been identified as the first appropriate stage of work. The application for judicial review was dismissed.

LIFER RELEASE

Haddock v Parole Board & SSJ [2014] EWHC 4433 (Admin)

Mr Haddock applied for judicial review of the Parole Board's decision on 3 June 2014 in which his release was refused, and in the alternative for judicial review of the decision dated 25 July 2014 whereby the Secretary of State refused to reduce the claimant's review period from 12 months to 8 months.

The applicant was sentenced for offences of robbery and assault occasioning actual bodily harm, had made notable progress in custody despite a difficult start. This led to him being transferred to open conditions to progress with his sentence plan and rehabilitation, with the aim of being released on license. He eventually lost his job after he was relocated, and had some trivial negative entries against him. However, it generally remained that he was making good progress due to his adherence to behavioural programmes, refraining from violence and abstinence from drug and alcohol abuse. The Board acknowledged his progress in custody, but ultimately decided he posed more than a minimal risk to life and limb if released.

HELD: The court determined that the Board was entitled to reach the conclusion that it had and it had not been unfair. It emphasised that it was for the Parole Board and not for the court to weigh the various considerations that had to be taken into account, and that the hurdle to show irrationality was high. Both applications were dismissed.

ACCESS TO COURSES

HILL v UK, no. 22853/09, §4, ECHR 2015

The applicant was convicted in 2006 of GBH and received an ISP with a tariff of 14 months and 12 days. The pre-sentence and post-sentence reports indicated that the ETS and CALM courses could be appropriate for the applicant and that they should take approximately two years to complete. The Healthy Relationships Programme was later also identified as a potential course.

The applicant was unwilling to undertake courses as he was afraid of participating in group activities. In February 2009, he however indicated that he was willing to participate in the ETS course on a one-to-one basis. He completed the course in June 2009. Regarding the CALM course, he was then informed that there was a two-year wait for its access. In January 2010, an independent psychologist’s report was commissioned, which explained that the applicant’s fear of group settings combined with his low IQ made it difficult for him to meet his treatment goals. It recommended urgent counselling. The applicant was granted his judicial review application in January 2012 on the basis that the Parole Board panel had failed to carry out the correct balancing exercise when considering the applicant’s request for transfer to open conditions. He then completed the CALM course in October 2011 and was released in May 2012.

The applicant argued that his right to liberty under Article 5 § 1 had been violated because there had been an unreasonable delay in the provision of necessary risk-reduction work despite some being provided. Furthermore, the Government failed to take into consideration

his learning disabilities both in providing him a psychological assessment and providing courses suitable for him in the manner in which reasonable adjustments are made for disabled prisoners. The Government argued that he had progressed normally, taking into account the normal prison delays and the applicant's reluctance to participate in group work.

The applicant also argued a violation of Article 5 § 4 for the delay in holding the Parole Board review hearing originally scheduled for August 2009. He argued that the lawfulness of his detention was not reviewed speedily. The Government offered to make a unilateral declaration that they accepted that the 'speediness' requirement was not met between August 2009 and the date scheduled for the deferred hearing (February 2010). They offered to pay the applicant €400 in damages, costs and expenses. The applicant argued that the delay was until May 2012 when the lawful review was held and that he should therefore be entitled to £50,000. In the event of the court finding that he would not have been released earlier, an award of £3,000 would be appropriate.

HELD: 1. The delay of 15 months following expiry of his tariff for access to a second rehabilitative course was found in the circumstances of his case not to be unreasonable. Therefore there was no violation of Article 5 § 1. He had earlier resisted participation in group work and to discuss his sentence plan. He later engaged with his sentence plan, but then refused a transfer which would have allowed him to be assessed for the CALM course. He was also prioritising his work over addressing his areas of risk. He was therefore afforded regular access to relevant coursework and assessment.

2. The judicial review proceedings were limited to the decision not to transfer the applicant to open conditions but did not challenge the decision to refuse release. The April 2011 Parole Board decision therefore constituted a lawful review of the applicant's lawful detention. The Government accepts responsibility for the six month delay between August 2009 and February 2010. It was however the applicant's request for a psychologist's report which led to the further seven month delay. There was then an unexplained further four monthdelay when the review was deferred until January 2011 which was the Government's fault. The hearing was again deferred because the applicant's offender supervisor was unable to attend. In light of the existing 17 month delay, this did not justify a deferral for a further three months. The State was therefore responsible for a total of 13 months and this was a violation of Article 5 § 4. Damages in the case of Betteridge v UK, no. 1497/10, 29 January 2013 were awarded in the sum of €750 for the same 13 month delay. The applicant was awarded €750.

R (Thomas) v SSJ [2014] EWHC 3569 (Admin)

The claimant, a vicar, was sentenced in July 2006 to life imprisonment in respect of 35 counts of sexual offences against children. The minimum tariff was set at 8 years and the tariff expiry date was 14 February 2014. The claimant completed various programmes and maintained a good prison record. In May 2013 the defendant referred his case to the Parole Board for consideration of whether or not it would be appropriate to direct his release or advise whether he was suitable for open conditions.

An oral hearing took place on 10 January 2014 in front of a Parole Board panel which included a psychologist. The

panel decided that its assessment of the claimant's risk would heavily depend on its view of the evidence of the two psychologists, one of whom was privately instructed by the claimant, dismissing the Offender Manager and Supervisor's evidence on the ground that they had spent very little time with the Claimant and had simply adopted the view of the prison psychologist. The panel concluded that the claimant was not yet ready for release but, balancing his interest in sentence progression against the interests of public protection, they considered there was sufficient evidence that his risk of sexual offending had been reduced to a level such that he could safely be transferred to open conditions.
The defendant considered the recommendation and exercised his discretion to reject the recommendation, concluding that the panel failed to give sufficient weight to the concerns of the report writers about the claimant's risk of reoffending.

The claimant relied on two of the five principles identified in *R (Banfield) v SSJ* in arguing that the defendant's decision was unlawful namely that there was a full and detailed exploration by the Parole Board of the contradictory evidence and the defendant provided no basis for their refusal to accept the recommendation.

HELD: The court dismissed the claim. Indeed, although the panel had heard oral evidence, the court considered the defendant had good reason to question and not accept the extent to which they found the evidence put forward by the Independent Psychologist to be persuasive. The court further contended that the risk of the claimant being in open conditions is primarily an assessment to be made by probation officers. In this regard, the court noted the panel had confirmed that it agreed with the most recent OASYs which, amongst other things, assessed the claimant as being at high risk of serious harm to children in the community.

To summarise, ultimately, the defendant's task is to assess the risk in circumstances where there cannot be certainty and where the professional opinions were conflicting. Given the view of the professionals working at the prison was that it was not safe to transfer the claimant to open conditions, and given the concerns properly expressed by the defendant as to the Parole Board's decision making, it was open to him after taking reasonable account of the recommendation and following a proper and careful process, to reject the recommendation.

PRISON SERVICE INSTRUCTIONS

PSI 15/2015 Adult Social Care
Local authorities have a duty to provide assessments, care and support services for adults in prisons and approved premises that is equivalent to that received in the community. This is the result of the Care Act 2014 which came into force in England in April 2015. Similar provisions in Wales come into force in 2016. Any local authority in England with a prison or approved premises within its geographical area will be responsible for assessing and meeting the eligible social care and support needs of adults with disabilities or long term health conditions. This includes someone in a Young Offenders Institution who is over 18. Just like people living in the community, prisoners and people living in approved premises or in bail accommodation will have to contribute to the cost of their care, if they can afford to do so.

It is intended that the new provisions will encourage prisons, local authorities and other agencies responsible for the assessment and care of prisoners to work in partnership. It is also proposed that prisoners are aware of their entitlements and that continuity is achieved through information exchange after transfer or release.
The Care Act 2014 ensures the following mandatory actions:

- There must be communication, identification and referral of relevant prisoners.
- Authorities and prisons must ensure that assessments take place.
- There must be a care and support plan available to all agencies.
- Timing and Information about discharge must be shared.
- Advocacy on behalf of the prisoner must be available where needed.
- A complaints system must be available.
- The prison or approved premises must make reasonable adjustments according to the specific need of the individual.

PSI 16/2015 Adult safeguarding in prison
The aim of this policy is to ensure that all adult prisoners (aged 18 or over) are protected from abuse and neglect. This instruction does not introduce new methods of achieving these outcomes, but describes the way in which existing instructions and systems combine to do so. Examples of existing systems include: prison disciplinary procedures, the IEP system, safer custody including ACCT procedures.

There are six key principles which exist to ensure the safeguarding of adults in prison. These principles are listed in Annex A and include:

- Empowerment – Presumption of person led decisions and informed consent
- Prevention – It is better to take action before harm occurs.
- Proportionality – Proportionate and least intrusive response appropriate to the risk presented.
- Protection – Support and representation for those in greatest need.
- Partnership – Local solutions through services working with their communities. Communities have a part to play in preventing, detecting and reporting neglect and abuse.
- Accountability – Accountability and transparency in delivering adult safeguarding.

The PSI identifies the different types of abuse as physical, emotional or psychological abuse, financial or material abuse, discriminatory abuse, institutional abuse and sexual abuse.

A head of safeguarding must be appointed by the governor to oversee the protection against abuse and there must be systems in place to help staff identify report and respond accordingly. This includes on reception and throughout the custodial period.
Systems must be in place to protect against abuse or neglect by staff. These include recruitment vetting using the Disclosure and Barring System and the existence of a code of conduct outlining professional standards. Professional standards mentioned within the PSI include appropriate relationships and the use of force.

Further guidance is given on responding to abuse. This includes support and protection for victims, the need for witnesses, investigations and sanctions and information sharing.

PSI 17/2015 Prisoners assisting other prisoners

This policy describes the formal arrangements that allow prisoners to provide assistance to other prisoners for care and support. It requires every prison to have the ability to make use of other prisoners should it be needed for a prisoner who has a care and support plan or is awaiting a care and support needs assessment.

Examples of existing support include the Listeners scheme and Toe by Toe mentors. Also with the population of elderly prisoners growing, there are other challenges that accompany this.

The PSI sets out the contribution that prisoners may appropriately make when meeting the care and support needs of other prisoners. This includes what is not appropriate for them to do and outlines clear and appropriate boundaries.

The policy runs in conjunction with PSI 15/2015 and the dual responsibility of the prison and local authority to prisoners with specific needs. If a prisoner does not meet the criteria for support under the Care Act 2014, written advice will be sent to the prison explaining what actions should follow. These actions will be the responsibility of the prison and/or relevant partner agencies, and other prisoners may be involved in delivering them.

Prisoners should not provide intimate care for other prisoners; this includes close bodily contact such as washing areas usually clothed for privacy. Personal care however is permitted. This includes:

- Dressing and undressing that does not involve body areas that are usually clothed for reasons of privacy and decency, for example helping to put on a pair of socks, or a jacket over a shirt;
- Maintaining hygiene for bodily areas that are normally exposed;
- Providing mental stimulus support for adults that have permanent or temporary mental impairment or diminished mental capacity;
- Support with movement or transportation, including moving an appropriately dressed prisoner to the shower or bathroom;
- Support with nutritional requirements which do not reach the level of regular assistance with eating and drinking;
- Applying make-up;
- Maintaining personal appearance;
- Skin care (of non-intimate areas);
- Providing reminders for essential activities like taking medication/ going to the toilet.

PSI 21/2015 Unauthorised possession within prison of knives and other offensive weapons

The aim of this instruction is to provide guidance on a new criminal offence for a person to possess a bladed or pointed article or other offensive weapon without authorisation in prison. The instruction amends PSI 10/2012 which formed part 6.3 of the National Security Framework.

Section 78 of the Serious Crime Act came into force on 1 June 2015. This introduced section 40CA into the Prison Act 1952 which made it an offence for a person to possess a bladed or pointed article or any other offensive weapon within a prison establishment. There is a distinction between the previous position and the current definition. While it has always been an offence to carry a knife into a prison it wasn't an offence to possess such an item. Although possession of a knife is an offence in a public place, prisons are not considered

public places.

It is up to prison management to assess whether to use the criminal offence or internal disciplinary proceedings in individual cases. This is based on an assessment of the particular circumstances.

The offence carries a four year maximum prison sentence on conviction on indictment in Crown Court or a fine or both. Alternatively, on summary conviction in the Magistrates' Court it carries a maximum six month prison sentence or a fine or both.

Circumstances where bladed instruments are not considered unlawful are outlined in section five. They include: Work equipment, religious items such as the Kirpan and items used in the course of every day duties such as cut down knives and batons.

PSI 26/2015 Security of prisoners at court
The aim of this policy is to provide instruction and guidance to prisons in identifying and managing risks relating to prisoners attending court, and in particular to guard against the increased risk of escape when a prisoner is presented at court.

Prisons must maintain records about the risk level of prisoners with regards to escape and threats of violence. The court list officer will be advised by the establishment of those prisoners who have been identified as Cat A/RS, E List or as presenting significant risk of harm, i.e. potential violence or disorder in the court setting.

ICO CASES

Legally Privileged Mail
Mr Z raised concerns with the Information Commissioner (ICO) that on a number of occasions the MoJ has opened legal post covered by Rule 39. The MoJ admitted in letters to Mr Z that they had done so in error as the particular letter was not marked as legal. The MoJ also admitted to opening post on other occasions from the Prisoners Advice Service and post marked 'confidential access'.

The ICO found that it is unlikely that the MoJ complied with its Data Protection Act requirements. The opening of legal post covered by Rule 39 would be a breach of reasonable expectations and so is not fair processing of personal data as required by the first principle of data protection.

As a result, the ICO has required the MoJ to ensure all staff members are adequately trained and aware of their obligations under the first principle when opening post covered by Rule 39, and recommended the MoJ views the ICO's website for more information on the first data protection principle and information security.

Mr Z also raised concerns with the ICO about the MoJ sending out post that is still open however the ICO did not find sufficient evidence of this practice. On balance of probabilities, the ICO therefore found the MoJ has complied with its Data Protection Act obligations on this particular issue.

OMBUDSMAN CASES

Governor Adjudication Appeal
At the time of this decision, Mr X was serving 14 days cellular confinement following an adjudication. Mr X complained about the delay in processing his adjudication appeal forms. The adjudication appeals process was repeated to him in response to both stages of the complaint, despite him providing the dates he had submitted the appeal forms. The prison provided Mr Macpherson with serial numbers confirming that the appeals had been forwarded to the Prisoner Casework Unit at NOMS, 5 weeks after being submitted. There is no evidence that Mr X received a copy of the outcome letter from the PCU, which should have been passed on to him by the prison.

The PPO decided to uphold Mr X's complaint. The PPO referred to PSI 47/2011 on prisoners' discipline which refers to the review of adjudications and says that if the prisoner is currently serving a punishment of cellular confinement, the Governor has to fast track the request for review by faxing it for urgent consideration to the PCU. The prison agreed that their system for fast track adjudication appeals was unsatisfactory and non-compliant with PSI 47/2011, and the PPO proposed actions for review of their internal process. Amongst other things, the actions proposed included reviewing the current adjudication appeal process for fast track cases, remind relevant staff of the fast track procedure, train staff and managers in the segregation unit on how to appropriately chase up and respond to complaints about adjudication appeals emphasising the urgency of fast track appeal forms, and issue a letter of apology to MR X for the failure to adequately process his adjudication appeals.

The prison is now in the process of implementing the PPO's proposed actions.

DEAF PRISONER RECEIVES SUBSTANTIAL COMPENSATION FOR DISCRIMINATION SUFFERED

Article by Benjamin Burrows - Solicitor -Leigh Day

A deaf prisoner has received substantial compensation following the settlement of his claim for the discrimination he has suffered whilst in prison.

The serving prisoner, known as "Mr N", became deaf whilst in prison. Even with the help of hearing aids for both ears, he still had difficulties in participating in almost all aspects of prison life. These difficulties included being able to communicate properly with other prisoners, prison staff and family and friends.

Mr N raised the difficulties he was experiencing repeatedly with the various prisons where he has been an inmate. He did not know what could be done to help him overcome these difficulties, so he asked for his needs to be assessed by a deaf specialist and for any appropriate aids or services to then be provided.

However, in response, Mr N's requests were either ignored by the prison or the prison said that it was not their responsibility. On the few occasions that they did respond to his request, he was transferred to another prison before anything was done. The result of which was that the whole process of raising his difficulties started all over again.

This was not only frustrating and isolating, but it also threatened to impede Mr

N's sentence progression. To be able to show a reduction in his risk, he needed to complete an offending behaviour course. However, the course was a group course and involved group discussions and role play. Neither of which he could do without help.

Faced with the prison's seeming indifference to his difficulties, Mr N instructed Benjamin Burrows, a solicitor in the prison law team at Leigh Day, to bring a claim for discrimination. The claim, which was brought under the Equality Act 2010 against the Ministry of Justice, argued that the failure to adequately assess and provide for his needs amounted to unlawful disability discrimination.

Happily, shortly after the claim was brought, the Ministry of Justice facilitated the assessment of Mr N's needs and the provision of a number of aids and services. This included a personal listener, which is worn around the neck and works with a hearing aid to amplify speech. In addition, the Ministry of Justice agreed to pay him substantial compensation in recognition of their failures. In commenting on the settlement, Benjamin said:
"Mr N had a clearly recognisable disability and had easily recognisable difficulties as a result. These difficulties were all-pervasive. Yet, when he raised them, they were trivialised or he was made out to be needy.
Mr N's case showed a complete lack of understanding by the prisons and their staff of their
obligations under the Equality Act 2010. These obligations are pro-active. As such, they should recognise difficulties a prisoner is having, and do something about them.
They cannot do what they did in Mr N's case which is to simply bury their heads in the sand or to
blame someone else."

Mr N's claim was funded by the Legal Aid Agency, and he was represented by Nick Armstrong, a barrister at Matrix Chambers.

Please contact Benjamin Burrows for further details.

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