PRISONERS' RIGHTS

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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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LEGAL AID FOR PRISONERS—UPDATE

What the changes to legal aid following the Howard League and Prisoners' Advice Service Judicial review mean for prisoners

From 21 February 2018 legal aid will be available for three key areas of prison law identified by Court of Appeal back in April 2017 (*R (Howard League for Penal Reform and the Prisoners' Advice Service) v the Lord* Chancellor).

The Court found that the cuts to legal aid for prisoners facing a pre-tariff review, a Category A review or a decision regarding placement in a close supervision centre were unlawful because they were inherently unfair.

What are the changes to legal aid from 21 February 2018?
As of 21 February 2018 the Criminal Legal Aid (Amendment) Regulations 2017 will come into force putting into effect the judgment of the Court of Appeal. This means that legal aid will become available for people affected by these issues provided that they meet the usual legal aid means and merits test.

Pre-tariff reviews before the Parole Board are a critical stage of the release journey. We understand that legal aid will be available for the whole of this process, including challenging decisions to "sift" people out of the process and not refer them to the Parole Board.

Category A reviews will also come back into scope. This means that prisoners will once again be able to obtain appropriate legal representation to challenge Category A decisions, including being represented at oral hearings if these are convened.

Decisions to place a person in a close supervision centre or a separation unit can also be challenged with the benefit of legal aid from 21 February 2018.

Legal aid providers will be able to work under the legal aid scheme for these areas of law in the same way that parole and adjudication cases work now.

What other legal aid is available for prisoners?
Prior to the Court of Appeal hearing, the government had agreed that legal aid could be available for certain other types of cases upon application to the Legal Aid Agency. These are cases concerning mother and baby units, resettlement, licence conditions and segregation. Legal aid might be required to assist prisoners in making representations on these important issues, which can have a huge impact on progress through the system and family contact.

Legal aid providers and prisoners can apply for funding for work on these issues through the exceptional case funding scheme. We believe that there has been only a few successful applications for these cases so far.

Unfortunately, there is no guidance available as to how the scheme will apply to these cases. The scheme has been used for other areas of law, such as immigration. It has been heavily criticised as too slow and too complicated. The Howard League and the Prisoners' Advice Service have written to the government raising these concerns.

We have been told that the scheme is going to be reviewed as part of a wider legal aid review this summer and we will be strongly arguing that it is not suitable for people in prison.

Why are the changes happening?

These changes are the result of a four year legal battle by the Howard League for Penal Reform and the Prisoners' Advice Service, represented by prison and public law specialist solicitors Bhatt Murphy. We took the exceptional step of bringing the case in our own names, putting our front line work at risk, because of the detrimental effect the cuts were having on prisoners' lives. We are delighted that around 85 per cent of the original cuts imposed on prisoners in 2013 are now either back within the scope of prison law legal aid or can be applied for. We hope that it will make a positive difference.

The authors
Deborah Russo is Joint Managing Solicitor of the Prisoners' Advice Service.

Laura Janes is Legal Director of the Howard League for Penal Reform, a national charity working for less crime, safer communities and fewer people in prison.

Simon Creighton is a founding partner at Bhatt Murphy Solicitors. He specialises in prison law. He was one of the first lawyers to work exclusively in this area and as well as conducting his own cases, through writing and education he has helped ensure that prison law is now seen as a distinct area of practice in its own right.

CASE REPORTS

PAROLE BOARD – RISK ASSESSMENT

Wright v Parole Board [2017] EWHC 3007 (Admin)

The Claimant, serving an extended sentence for rape and robbery, was refused parole three times. The first time, although his risk was assessed as low by the OASys Violence Predictor, the Spousal Assault Risk Assessment ("SARA") and Risk Matrix 2000 ("RM") indicated a high risk of sexual reoffending. The second time, the Parole Board again refused to direct the Claimant's release, noting, amongst other factors, that he had had an adjudication for threatening behaviour on the phone to his wife. In preparation for the third parole hearing, the Parole Board requested two psychologists' reports to consider the risk posed by the Claimant, and in particular to assess whether he had a personality disorder or another psychological condition indicating risk. The first psychologist emphasised in his report the importance of an assessment, which was supposed to be undertaken by the second psychologist. However, the second psychologist stated she had **not** performed an assessment, as the Claimant's agitation, low IQ and depression made him unsuitable for it. The Parole Board requested that a third psychologist revisit this, but her report simply echoed the difficulties expressed in the second report of making this assessment.

All three psychologists attended the third parole hearing, following which the Parole Board again refused to direct the Claimant's release, noting that one of the psychologists gave evidence that the Claimant exhibited traits in keeping with high levels of psychopathy. It also cited the high risk indicated by the RM and SARA, but acknowledged the "*three psychology reports [provided] no overall conclusion of risk*".

The Claimant was granted permission for judicial review. At the hearing, the Claimant cited the case of *Mierek Weszka v The Parole Board* [2012] in which the Court held that the Claimant does not have to show that, where relevant evidence has not been considered,

the decision-maker would have made a different decision if it had considered that evidence. The Claimant simply has to exclude the contention that the decision-maker would necessarily have still made the same decision.

The Claimant also relied on the evidence of another psychologist stating that "*a different decision could have been reached*" if the hearing had been adjourned pending receipt of a full assessment.

The Parole Board argued that in light of the psychologists' oral evidence, and with one of the members of the panel being a psychologist themselves, they considered that they had sufficient evidence to make a decision even without a full assessment.

HELD: The Claimant's application was refused. The Court acknowledged the Parole Board's panel included a psychologist, concluding that with all 3 expert psychologists attending the hearing, it was reasonable for the Parole Board not to adjourn it. The Court noted that the final decision was founded upon the identification of several personality traits by the psychologists, the Claimant's custodial history and evidence from the index offences. Such evidence was sufficient for the Parole Board to make its decision, even in the absence of a full risk assessment.

PAROLE BOARD- OPEN CONDITIONS

R (Vigrass) v Parole Board [2017] EWHC 3022 (Admin)

The Claimant prisoner was serving an indeterminate sentence, which commenced in September 2002 for wounding with intent. The minimum term was set at 4 years. The Claimant was released on licence in March 2016 but was recalled and his licence revoked in May 2016 when he was arrested for assault. He pleaded guilty to the offence of assault in July 2016.

The Secretary of State referred the Claimant's case to the Parole Board pursuant to s.32 Crime (Sentences) Act 1997. In its referral, the Secretary of State asked the Parole Board to consider whether the Claimant should be released, and if not, whether he could be moved to open prison conditions. If the Parole Board considered he could be moved to open conditions, the Secretary of State asked that the Parole Board comment on the degree of risk involved in such a move. The Board was also asked to give full reasons for its decision, which would be provided to the Claimant.

The Parole Board decided against the Claimant's release for reasons set out in a letter, and this was not challenged by the Claimant. However the letter did not address whether the Claimant was ready to be moved to open prison conditions. The Claimant applied for judicial review, and specifically sought a quashing order.

The Parole Board adopted a "neutral" position in response to the claim and did not file a formal Defence, nor did it appear at the hearing and did not submit any material in support of any Defence.

HELD: Application granted. The Parole Board clearly should have addressed the question of whether the Claimant was suitable for a move to open conditions, as explicitly requested by the Secretary of State. However, the Court did not consider that a quashing order was appropriate, as the decision letter did address the question of whether the Claimant should be released on licence.

As there was no challenge to this decision, there was no reason to quash the entire decision contained within the letter.

Instead, the Court made a mandatory order requiring the Parole Board to produce a further decision letter addressing whether the Claimant should be moved to open prison conditions, and to comment on the degree of risk involved if it did recommend a move to open conditions.

The Court left it to the Parole Board to decide how exactly to comply with the mandatory order, and whether any further representations should be sought from the Claimant.

Green v PB & SSJ [2017] EWHC 2612 (Admin)

After his first parole hearing, the Claimant, an indeterminate sentence prisoner (ISP) was informed in writing by the Parole Board, the first Defendant, that they would not direct his release or move him to open conditions. The Claimant was also informed by the Secretary of State for Justice that his review period had been set at 18 months.

The Claimant sought judicial review of the first Defendant's decision not to recommend him for a transfer to open conditions, and of the decision of the Secretary of State for Justice, to set a period of 18 months before his next parole review.

The first Defendant's decision had been made pursuant to directions issued by the Secretary of State for Justice, which stated that a decision as to whether to transfer an ISP to open conditions must be based on an assessment of risk and benefits. Previous case law had established that the Parole Board must undertake a balancing exercise between risk and benefit to make this decision. Failure to do so is an error rendering the decision unlawful.

In the index case, the Claimant argued that the Parole Board had failed to undertake this balancing exercise. Three experts had all recommended the Claimant be transferred to open conditions. While the Parole Board was not obliged to follow their recommendations, it must still undertake the balancing exercise; its letter setting out the reasons for refusing a transfer to open conditions only referred to risks and did not address the benefits.

With regards to the second Defendant's decision, the Claimant cited the ECtHR case of *Betteridge v United Kingdom* [2013] ECHR 1497. In *Betteridge,* it was held that a failure to regularly review the continued detention of ISPs was a breach of Article 5(4) of the ECHR. In the case of *R (Loch) v Secretary of State for Justice* [2008] EWCH 2485 (Admin), the Court held that a gap of more than a year between parole reviews should compel "*the decision-maker to show by reference to the particular facts of the case that it is reasonable and thus compliant with Art. 5(4)".*

HELD: Both applications were granted. The Court held that the first Defendant's decision letter did not demonstrate that the requisite balancing exercise had been undertaken. There was no discussion of the benefits of the transfer to open conditions, only the risk.

The Court held that the second Defendant's decision to set the review period at 18 months was not supported by reference to the facts of the case that it was reasonable and thus compliant with Article 5(4).

The Court quashed the Parole Board's decision refusing to transfer the Claim-

ant to open conditions. It was ordered to reconsider the request for transfer. This necessarily meant the second Defendant's decision was no longer relevant, but in any case, the Court held that the review period was unreasonable in this case.

PAROLE BOARD DELAY

Bowen & Stanton v Secretary of State for Justice [2017] EWCA Civ 2181

The Appellant prisoners appealed the High Court's dismissal of their claims for judicial review to the Court of Appeal. The first Appellant, Mr Bowen had been sentenced to life imprisonment and the second Appellant Mr Stanton, had been sentenced to imprisonment for public protection. Both Appellants had been directed to be released by the Parole Board following their parole reviews, subject to conditions including a period of residence at specified Approved Premises, Mandeville House ('MH').

Mr Bowen had to wait for 69 days for a place at MH to become available, and Mr Stanton had to wait 118 days. Each Appellant argued that the time spent by them in custody after the Parole Board's decisions and before the placement at MH became available constituted a breach of s.28 Crime (Sentences) Act 1997 ("CSA 1997"). They also argued that the detention breached Article 5 ECHR and the public law duty to protect liberty by ensuring a sufficient system of rehabilitation and progression to release.

The Appellants were given permission to appeal solely on the grounds of construction of s.28 CSA 1997 which stated that it was "*the duty of the Secretary of State to release him on licence… as soon as"* the Parole Board issued a direction for release. The Appellants argued that the Secretary of State was obliged to release them "as soon as" the Parole Board had directed their release, regardless of whether the Approved Premises were available. Alternatively, even if the obligation were not to release "as soon as" the direction was made, the delay in both Appellants' cases were plainly excessive or unreasonable.

The Defendant referred to the case of *R (Elson) v Greater Manchester Probation Trust* [2011] EWHC 3692 (Admin), where it was held that s.28 CSA 1997 could not "*sensibly be interpreted"* to mean that once a prisoner was directed to be released, the release had to be effected immediately. This was impractical and would force Approved Premises to hold places for prisoners "*just in case*" the Parole Board decided to direct their release.

HELD: The appeals were dismissed. The first instance Judge had not found that the period of time was unreasonable in the case of either Appellant, noting that they both knew before their parole reviews how long it would be before a placement became available. Acknowledging that the first instance Judge had had more evidence placed in front of her, the Court of Appeal considered that she was far better placed than them to assess whether the period was reasonable or not. The Court of Appeal could only overturn her decision if it was wrong, and in this case, could not find anything "*obviously wrong*" with the Judge's finding.

SMOKING IN PRISON

Black v SSJ [2017] UKSC 81

This was an appeal by the Claimant against the Court of Appeal's decision

that the smoking ban brought into force by the Health Act 2006 did not bind the Crown, and therefore HMPS did not have to abide by it.

In 2013, the Claimant requested access to a free phoneline enabling individuals to report breaches of the smoking ban to relevant authorities. The Secretary of State wrote to the Claimant stating that the smoking ban did not apply to the Crown, therefore the local authorities had no power to enforce it in a prison and thus there was no requirement to provide the Claimant with access to the phoneline.

Case law had established the principle that the Crown is not bound by any statute unless a contrary intention is expressed in the statute, or necessarily implied. The Court sought to clarify the principle, holding that it is not enough to find necessary implication if it would simply be more beneficial for the public interest if the Crown were bound by the statute. However, it would be going too far to only find necessary implication where the purpose of the legislation would be "*wholly frustrated*" if the Crown were not bound.

The task of the Court was to assess whether Parliament must have meant the Crown to be bound. The Court noted that there was no hint in the government publications leading up to the adoption of the policy that the Crown would not be bound by the ban. Indeed, in 2007 HMPS drafted a Prison Service Instruction setting out how prisons would comply with the ban. Prisons were also expressly mentioned in s.3 (2) of the 2006 Act.

Set against this, however, was the fact that the 2006 Act did not say that the Crown would be bound by the ban. The Court noted that the Health and Safety at Work etc Act 1974 and the Food Safety Act 1990, both statutes which, like the 2006 Act, functioned to protect the health of the public, expressly stated which parts of their provisions applied to the Crown.

Crucially, s.23 of the 2006 Act itself, which dealt with the Use of Controlled Drugs, stated that this part of the Act would bind the Crown. The Scottish statutory equivalent to the smoking ban also stated that the ban would bind the Crown.

HELD: The Court held that although it may be thought desirable for the Crown to be bound by the smoking ban, the legislation was still "quite workable" if it were not, and therefore "not without considerable reluctance", the Claimant's appeal was dismissed. The conclusive factor was that Parliament had expressly set out the application of one part of the 2006 Act to the Crown. This suggested that had it intended the smoking ban to apply to the Crown, the statute would have stated this explicitly.

Comment: HMPS acted in response to the 2006 Act by banning smoking in most communal places except cells and exercise yards. Paul Black's challenge pertained to accessing the free phoneline to report breaches of the smoking ban. HMPS argued that the free phoneline did not have to be made available in prison on the basis that the Crown was not bound by the ban (hence the smoking ban in prisons being regarded as 'voluntary'). He lost his case as the Supreme Court ruled that prisons were not bound by the 2006 legislation as Crown property is not mentioned in the Act.

This specific case does not have anything to do with the government implementing a total ban on smoking in all prisons. HMPS is entitled to ban smoking throughout the estate if it chooses.

There is no legal right to smoke or not smoke. This 'voluntary' ban is currently being phased in across the prison estate and causing much discontent.

Our understanding is that the only effect of this Supreme Court case on the rolling out of the 'voluntary ban' is that it confirms it would not be possible to make breaching the ban a criminal, as opposed to disciplinary offence. It also means that, if in the highly unlikely event that the Prison Service changed its mind and decided not to go ahead with the current rolling out of the ban across the prison estate, there would be no legal sanction for this, and that indeed it is not legally obliged to have implemented the earlier restrictions.

DAMAGES FOR ASSAULT

Michael v SSJ [2017] (unreported)

Mr Michael is serving a life sentence for murder with a minimum tariff of 19 years and is a Rule 46 (Close Supervision Centre) prisoner. On five separate dates he was subject to seven instances of double handcuffing in ratchet handcuffs while being moved between his cell and the Healthcare Unit at HMP Full Sutton. On three of those occasions, the double handcuffing was maintained during his healthcare consultation. Mr Michael felt anxiety, embarrassment and humiliation on each occasion. No physical injury was suffered.

Mr Michael claimed damages for trespass to the person, aggravated and exemplary damages and damages for just satisfaction. He also claimed compensation under Articles 3 and 8 of the Human Rights Act 1998.

DAMAGES

The County Court awarded Mr Michael £1850 in total basic damages for trespass to the person arising from the seven assaults.

Mr Michael's claims for additional aggravated damages and exemplary damages were refused. Aggravated damages are intended to be compensatory and not punitive in nature. The Court found that Mr Michael's claim for aggravated damages was intended to be punitive. The Court found that exemplary damages should not be awarded because there was no finding that the Defendant had acted pursuant to an unlawful or discriminatory blanket policy; Mr Michael's claims regarding exemplary damages were not tested; the Court had struck out the Defence; the compensation in the basic award in damages was not an inadequate punishment for the Defendant.

Mr Michael's claims for compensation under the Human Rights Act were also refused because Mr Michael had already received just satisfaction for the wrong in the basic award of damages.

COSTS

Mr Michael was awarded £1965 in costs for the work he carried out as a litigant in person but these were set off against sums of money already owed by Mr Michael to the Defendant under an order of February 2015. This means that the Defendant did not have to pay the costs ordered here to Mr Michael. However, the Defendant was ordered to pay costs assessed for work carried out by Mr Michael's solicitor.

Judgments of the County Court are not binding on other courts.

DISCLOSURE OF PREVIOUS CONVICTIONS AND CAUTIONS

R (P) v The Secretary of State for the Home Department [2017] EWCA Civ 321

A series of linked appeals concerned whether the revised scheme mandating the disclosure of spent convictions and cautions on criminal record certificates (CRC) and enhanced criminal record certificates (ECRC) violates Article 8 of the ECHR (respect for private and family life).

The scheme, established under the Police Act 1997, originally required disclosure of all convictions and cautions, whether current or spent, regardless of the nature of the offence. In *R (T) v Chief Constable of Greater Manchester Police* [2014] UKSC 35 (*T v CCGMP*), the Supreme Court held that the original scheme was incompatible with Article 8 on the basis that, among other things, no distinction was made based on the seriousness or circumstances of the offence, the time which had elapsed since the offence was committed or whether the conviction was spent, nor was there scope for the exercise of any discretion.

The scheme was revised and, from 29 May 2013, requires disclosure of spent convictions or cautions only where:

the conviction or caution was in respect of certain specified offences (including offences specified in Schedule 15 of the Criminal Justice Act 2003 such as ABH and most sexual offences) (the 'serious offence rule');

a custodial sentence or sentence of service detention was imposed (the 'custodial sentence rule'); or

the person has more than one conviction (the 'multiple conviction rule').

In each of the appeals, the claimants argued that the disclosure of a spent conviction or caution violated their Article 8 rights (for example, where a person had received a reprimand as a child, or had been convicted of ABH 31 years ago). The government argued that it was entitled to implement 'bright line' rules, notwithstanding the fact that some marginal cases might be adversely affected, and that the current rules were within the margin of appreciation which the courts should afford to legislation.

HELD: The revised disclosure regime resulted in arbitrary interferences with the claimants' Article 8 rights and so was not 'in accordance with the law'. In particular, the Court of Appeal held that:

the multiple conviction rule is indiscriminate in that it applies without consideration of any of the features identified in *T v CCGMP*; and

the serious offence rule, while not totally indiscriminate, does not allow distinctions to be made based on the disposal of the case, the amount of time elapsed or the relevance of the offence to the purpose of requesting a CRC or ECRC.

The custodial sentence rule was not considered.

The court also indicated *obiter* that the revised scheme was unlikely to be necessary and proportionate given that a system that allowed marginal cases to be reviewed could be equally practicable and not unduly demanding (although the court rejected the argument that a review mechanism was necessarily required).

While the court found in favour of the claimants in relation to the facts of each

case, it did not hold the disclosure provisions to be *ultra vires*, meaning that individuals will need to apply for judicial review where they believe the disclosure of a spent conviction or caution on a CRC or ECRC violates their Article 8 rights.

OMBUDSMAN CASES

Cancelled Sentence Planning Review Meetings

Mr. A brought a complaint to the PPO after he felt he was incorrectly reprimanded for not attending his SPRMs, after they were cancelled on a number of occasions. His first SPRM was cancelled after a clash with a legal visit. His second SPRM was cancelled due to a clash with attending a video link with Court, after which he received a negative behaviour entry that he had refused to attend this and his first SPRM as a result of clashed bookings. He was further told he had not attended a third SPRM as listed on the Activities Hub board. Mr. A argued that the third SPRM was in fact scheduled to be a phone call and had been incorrectly listed on the board, and he was locked in his cell during this time.

Mr. A felt that the clashes had been intentionally scheduled on the same days to impact his SPRMs, and when he was believed to have missed a third SPRM he was not released from his cell. Mr. A disputed he had chosen not to attend any SPRMs, and therefore should in fact be regarded as sentence plan compliant.

The PPO found that it was unreasonable and incorrect to record that Mr. A had refused to attend his first two SPRMs, therefore his targets should not be set without Mr. A's input. Furthermore, the third SPRM was not missed, as this was in fact scheduled to be a phone call and Mr. Adid not choose to miss the phone call.

It was concluded that the negative behaviour entry should be amended to reflect these findings, as Mr. A attended the clashing appointments as instructed by the Activities Hub, and these other appointments were rightly prioritised. Although Mr. A had some responsibility for alerting staff to the clashes with the advance knowledge of the schedules, it was for the Activities Hub to manage Mr. A's activities on a daily basis and the issue should be taken up there and not with the prisoner.

Finally, recommendations were made for better communication between the Activities Hub and staff regarding appointments.

Use of cell bells

Mr B. had made internal complaints about IEP warnings being issued at HMP Rye Hill, for the use of cell bells outside of emergency situations. He felt that this contravened the Prison Act 1952 s14 - a cell 'allows the prisoner to communicate at any time with a prison officer'.

The initial response to his complaint explained that the prison regime allowed for alternative communication methods, and that the cell bells were reserved for emergencies. Mr. B was informed that if he acted contrary to this, IEP warnings would be imposed.

Mr. B subsequently appealed, detailing that this was not a satisfactory response, as no specific legislative guidance had been highlighted, and no ex-

planation of how the staff were to assist prisoners' needs was given.

The response to this appeal included an explanation that no guidance suggested staff were able to assist 24 hours a day, and this was accompanied by a copy of PSI 17/2012 – Certified Prisoner Accommodation.

The PPO reviewed these complaints, however found that no complaint had been made about a specific incident where Mr B. was unreasonably warned about the use of the cell bell. Instead the PPO saw the complaints as a general request for staff to answer queries at any time, and this was not specific enough for a PPO investigation. The PPO also found there was no evidence that staff had acted in a non-policy compliant way, or were so unreasonable in their actions that they were not fair. Finally, the PPO referred to PSI 75/2011 paragraph 3.2:

3.2 Means of Summoning Assistance

Governors must ensure that prisoner accommodation has a means whereby the occupant can summon assistance when locked inside. […] Alternative procedures may exist according to local circumstances.

Staff must acknowledge all requests for assistance by personal contact with the prisoner and appropriate action must be taken in response to abuse of the call system.

The PPO found that this did not mean the cell bells could be used to contact staff at any time. Consequently he did not uphold Mr. B's complaint.

Confidential Correspondence

Mr. C wanted to send a letter to Greater Manchester Police under Rule 39 or Confidential Access, however was concerned when HMP Wakefield refused to post the letter.

After complaints and appeals, explaining that the correspondence related to legal proceedings and so expecting them to be confidential, the prison consistently maintained that the police did not come under either Rule 39 or Confidential Access, as set out in PSI 49/2011. Mr C therefore wrote to the PPO seeking a recommendation on three points:

Firstly that the police should be listed as a body for the purposes of Confidential Access under PSI 49/2011;

Secondly that although PSI 49/2011 did not explicitly cover all correspondence relating to legal proceedings, Confidential Access should be granted to all correspondence related to legal proceedings where no security concerns arose;

Thirdly that a six month decision period for the prison to decide if he could communicate confidentially with the police was too long.

On the first matter, the Ombudsman's investigator reviewed PSI 49/2011, confirming that the police are not listed at paragraph 14.1 under Rule 39 or Confidential Access. They also added that Prison Rules 38 and 39, and YOI Rules 16 and 17, also do not include the police as a listed body. Therefore he could not confidentially correspond with the police under either method.

In response to the second matter, the investigator confirmed that the PSI does not explicitly cover all communication relating to legal proceedings. He concluded that applying confidential access

to all correspondence concerning legal proceedings would be too complex to manage, and did not recommend this.

On the third complaint, the investigator commented that the six month period is satisfactory to consult with interested parties.

The investigator therefore found that HMP Wakefield had acted appropriately in not posting out the letter, and did not uphold Mr. C's complaint but made two significant recommendations.

The first recommendation is that by 27 April 2018, instructions should be issued to Governors and Directors that prisoners should be allowed confidential communication with the police. The investigator suggested the possibility of adding the police to the list of bodies covered by Confidential Access in PSI 49/2011.

Secondly, the investigator recommended changes to reflect current needs for expansion of the list of organisations covered by Confidential Access. This is after considerable cuts to legal aid for prisoners resulting in a substantial increase in approaching other bodies and persons for support with litigation in person, beyond the provision for solicitors under Rule 39.

Delay in accepting request to be identified as a transgender prisoner and live in role as a female

Ms D wrote to the PPO to investigate that whilst at HMP Whatton she had (1) her request to be identified as transgender significantly delayed and contrary to PSI 07/2011; (2) that staff continued to use male pronouns and her male name; (3) that she had to share a cell with a non-transgender prisoner and staff failed to carry out a risk assessment; and (4) how staff handled her Discrimination Incident Reporting Form (DIRF) complaint.

The PPO investigated the incidents and concluded:

(1) Upheld that HMP Whatton did not comply with PSI 07/2011. The PPO found that the PSI clearly identified a transgender prisoner and process. This included recognising the protected characteristic of gender reassignment; the timelines with which any internal transgender process should be handled; and the requirements which a prisoner should meet in order to be recognised as transgender within the prison namely someone who lives, or proposes to live, in a gender different to the gender they were assigned at birth; may or may not have been diagnosed with gender dysphoria; and may or may not have a Gender Recognition Certificate.

The PPO found that the prison's local transgender policy was similar to the PSI but contradicted itself on a number of occasions and there was a concerning level of uncertainty about the policy by its own staff. The implemented an unacceptable additional medical requirement (hormone treatment) on prisoners before they could be recognised as transgender. Ms D waited eight months before her transgender status was accepted, which was unacceptably long.

A prisoner's transgender status should travel with them when they transfer. Ms D had already had her transgender status accepted (and signed a voluntary compact at Leeds), it was inappropriate for HMP Whatton to remove that status when transferred back to them. The PSI did not provide for any occasion when establishments could delay or refuse to

accept a prisoner's transgender status if over the age of 18.

(2) Did not uphold the complaint concerning behaviour of individual staff. The wing staff acted on the direction that they were given and was part of a wider failing by the Governor and Equalities staff.

Ms D's complaint about transphobic behaviours from staff was not investigated. The prison should have spoken with Ms D about her complaint in line with PSI 02/2012.

(3) Did not uphold Ms D's complaint that she should have been held in a single cell. PSI 07/2011 does not provide specific policy advice on transgender prisoners sharing cells with other prisoners. However, section 3 provides appropriate assessments should be carried out to identify any risks to and from a transsexual prisoner and put in measures to manage the risk of transphobic harassment and transphobic hate crime. The PPO upheld Ms D's complaint that any potential risks in relation to cell sharing arising from her disclosure were not assessed.

(4) Upheld Ms D's complaint concerning how HMP Whatton dealt with her DIRF. Ms D had the protected characteristic of gender reassignment as identified in the PSI. The Equalities Department's initial response to Ms D's DIRF incorrectly stated that she did not have any of the protected characteristics under the Equality Act 2010 and that she should submit a Comp1 instead. This was subsequently corrected upon review.

The PPO recommended that HMP Whatton provide an apology to Ms D for the delay in allowing her to live in her acquired gender; recommended that the prison review and update the local policy for transgender prisoners ensuring that it is in line with PSI 17/2016 (the PSI that replaced PSI 07/2011 on 1 January 2017) and that the governor reminds all appropriate staff of Lesson 3 and 5 of PPO's Learning Lessons for transgender prisoners.

Assault in cell and reporting to police

Mr. E wrote to the PPO to investigate a complaint that whilst at HMP Thameside he had 1) been assaulted in his cell with a blow to the face by a Prison Custody Officer X of which he had asked photographs to be taken of and 2) not been able to report such alleged assault to the police.

HMP Thameside carried out an internal investigation of the alleged assault and concluded there was insufficient evidence that PCO X had assaulted Mr. E inside his cell and no further action was taken against the PCO.

The PPO investigated the incident and concluded:

1) Not to uphold the complaint that Mr. E was assaulted by officers. Although there is evidence that Mr. E sustained an injury to his face, his account of how it was sustained was inconsistent and there is not sufficient independent evidence to determine he was struck by PCO X.

2) To uphold the complaint that the prison did not take sufficient steps to enable Mr. E to report the alleged assault to the police. Although Mr. E could have asked his solicitor, a friend or a member of his family to report the alleged assault to the police on his behalf, staff should have enabled Mr. E to report the incident directly or via the Police Liaison Officer after repeated requests. The

PPO recommend that HMP Thameside ensure a process is in place which provides a quick simple method prisoners can report an alleged crime to the police either directly, via a PLO or some other means and to issue an instruction to staff and prisoners outlining this process.

3) Although Mr. E's requests for photos to be taken of the injury after the alleged assault were denied as there is no requirement in prison policy to do this, the PPO think it is best practice to take photos on request and recommend the prison issue an instruction to staff requiring them to take photos of injuries following the use of force if the prisoner requests.

4) PCO X did not complete Annex A of the Use of Force forms on the incorrect basis only personal protection had been used rather than full use of force. The PPO note it is mandatory for Annex A to be completed whenever any force is used including personal protection. The PPO recommend the prison issue a reminder to staff about the requirement to complete Annex A of the Use of Force forms whenever force is used including personal protection.

5) HMP Thameside only interviewed the officers directly involved in the alleged assault on Mr. E whereas the PPO consider that they should have interviewed all the staff present at the incident. The PPO recommend HMP Thameside issue an instruction to staff who conduct internal investigation requiring them to interview all relevant witnesses in full as part of their investigation and retain records of the interviews.

6) Although HMP Thameside state they interviewed Mr. E in full regarding the alleged assault, they have provided no evidence of this to the PPO when repeatedly requested. The only evidence of an interview relates to a transcript where Mr. E confirms his name, prison number and whether he is happy for his original complaint to be attached. The PPO recommend HMP Thameside issue an instruction to appropriate staff requiring them to provide information as requested by the PPO.

7) The original CCTV footage surrounding the alleged assault provided to the PPO was either damaged or not compatible with the PPO's IT system and so could not be played. The PPO would have been able to watch the footage at HMP Thameside if the original copy had been retained there. The PPO recommend the prison issue an instruction to appropriate staff advising them that only *copies* of CCTV footage should be sent out of the establishment and the originals should be retained.

Addressing Comp 2 forms

Mr. F complained that the complaints clerk at HMP Rye Hill, where Mr. F was being held, refused to send Comp 2 forms directly to the Governor of HMP Garth or to the Governor of HMP Full Sutton.

The PPO did not uphold Mr. F's complaints. Prisoners can only make confidential access complaints to: (1) the governing Governor of the prison where a prisoner is held; (2) the Deputy Director of Custody (DDC); or (3) the Chairman of the local IMB.

Mr. F's Comp 2 forms should have been addressed to the DDC. The PPO found that Mr. F "would not be significantly disadvantaged" by asking the DDC to pass the Comp 2 form to the Director at HMP Garth.

Mr. F had also asked why two sections of the Prison Service Instruction 02/2012 on Prisoner Complaints had been ignored. Mr. F had not explained why these sections that relate only to complaints of prisoner's property either supported his argument or undermined the decision, so the PPO did not consider this.

Incorrect entry on NOMIS report

Mr G complained to the PPO about Mr O, a member of waste management staff at HMP Whatton, for making an incorrect and potentially damaging entry on his NOMIS report, which read that Mr G "put in a complaint about a member of staff". He said that Mr O was discriminating against him because of his deafness.

To uphold Mr G's complaint, the Ombudsman needed to see that staff behaved in a non policy compliant way, or were unreasonable in their actions. Mr G stated that, contrary to Mr O's entry on his NOMIS report of 6 January 2016, he has never made a complaint about staff. The Ombudsman contacted the prison twice to ask them about Mr G's statement, but they did not respond. The Ombudsman stated that in the absence of evidence to the contrary, and on the balance of probabilities, it is not unreasonable to accept Mr G's statement at face value; that he has never made a complaint against staff. The Ombudsman stated that whilst it is a requirement for prison staff to make NOMIS entries, PSI 73/2011 is clear that only "accurate" information should be entered. Therefore, if the Ombudsman accepted that Mr G's statement was correct, then it followed that Mr O's statement was incorrect. The Ombudsman recommended that the Governor of HMP Whatton update Mr G's NOMIS report to reflect that the entry by Mr O on 6 January 2016 stating that Mr G put in a complaint about a member of staff was factually inaccurate and should not have been entered. The Ombudsman also recommended that the Governor communicate to relevant staff the need to make accurate entries on NOMIS, which are compliant with the PSI.

However, the Ombudsmen did not uphold Mr G's claim that the negative NOMIS entry amounted to bullying and discrimination. In order for discrimination to have taken place, Mr G needed to provide evidence that Mr O was treating him less favourably "because of something arising in consequence of (his) disability" (PSI 32/2011), which he failed to do. There was nothing in the case note itself which suggested that Mr O was motivated by discrimination.

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