the Howard League for Penal Reform

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The Howard League response to Transforming Legal Aid
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The Howard League welcomes the opportunity to respond to Transforming Legal Aid.

About us

Founded in 1866, the Howard League is the oldest penal reform charity in the UK. The Howard League has over 5,500 members, including prisoners and their families, lawyers, criminal justice professionals and academics. The Howard League has consultative status with both the United Nations and the Council of Europe. It is an independent charity and accepts no grant funding from the UK government.

The Howard League campaigns for less crime, safer communities and fewer people in prison. We aim to achieve these objectives through conducting and commissioning research and investigations aimed at revealing underlying problems and discovering new solutions to issues of public concern. The Howard League's objectives and principles underlie and inform the charity's parliamentary work, research, legal and participation work as well as its projects.

Since 2002 the Howard League for Penal Reform has provided the only legal service dedicated to representing children in custody. We also provide a dedicated legal service for young adults in prison (under 21) and, where appropriate, comment on the particular considerations that are required to ensure that this age group is dealt with fairly and appropriately. We have therefore drawn upon our lawyers' experience in practice as well as our expertise in this policy area in responding to this consultation.

Our response and summary of concerns

This response does not reply to each question posed in the consultation, although answers to specific questions relevant to our work are appended at Annex 1. We are members of the Association of Prison Lawyers and endorse their response.

We are concerned that the detail of the proposals is not immediately apparent from the consultation paper in that the arrangements for prison law and criminal appeals are not made clear. We therefore have had to spend a significant amount of time

getting to grips with the nature of the proposals and their implications for our work and their impact on people in the criminal justice system. It is disappointing that the consultation period was just eight weeks, encompassing two bank holidays.

We are concerned that:

- The proposed model for criminal legal aid is not viable leading to the irreversible destruction of current providers to be replaced by an inadequate system for representing people whose liberty is at risk;

- The removal of client choice, the financial incentives for guilty pleas and the accepted reduction in quality will risk increased miscarriages of justice and will ultimately cost more;

- The removal of standalone prison law and criminal appeal contracts will mean that specialist good quality niche providers will no longer be able to assist clients under the legal aid scheme;

- The requirement for all criminal contract holders to do prison law and criminal appeals will reduce quality;

- Cutting down the scope of prison law to parole reviews and disciplinary matters will be counter productive and contrary to the Ministry's commitment to rehabilitation;

- It is wrong in principle to place a blanket ban on legal aid for children and vulnerable prisoners suffering abuse while detained by the state or children and vulnerable prisoners who require assistance to get a roof over their head;

- Changes to prison disciplinary work are contrary to case law and children's rights;

- The complaints system is inadequate as a substitute for legal advice and representation;

- Changes to judicial review work, including the residence test, changes to payment arrangements and so called borderline cases, will impede access to justice and prevent wider change.

We are willing to meet with the Ministry of Justice to discuss our concerns.

Our legal work: legal aid, rehabilitation, justice and cost

We believe that good quality lawyers, using legal aid where appropriate, can transform young people's lives. They can give the law meaning. Research shows that young people, especially children from disadvantaged backgrounds, are often

the most likely to need help – and the least likely to ask for it or even know it exists. They see the law as something that punishes them and see themselves as powerless in the process.

Our legal team frequently represents children who believe that nothing will happen if they complain or that they simply have to put up with unfair treatment. A deaf child who cannot access offending behavior work, a foreign national child unable to even understand what he is going to be able to eat for dinner let alone participate in education, a child with learning disabilities restrained until his arm is broken for not going to bed and a child unable to use his early release because he has nowhere safe to go to. These are the kinds of cases we work on, mainly under criminal legal aid for fixed fees that do not even cover the cost of the work. When the authorities do not listen we may be forced to issue judicial review proceedings.

The Howard League's legal team has learned that representing children and young people to ensure their legal rights are respected and protected has become an essential check on a broken system.

Resettlement case study

A, 15 years old, contacted the Howard League through a children's advocate. He had behaved well in custody and was told he could be released early from his secure children's home in two days time provided he has somewhere suitable to live. He could not go home to his dad as the local authority had obtained an ASBO restricting his movements on the estate where his dad lived. In fact, he was in prison in part for breaching the ASBO after his foster care placement had broken down and the local authority had advised him to return to his dad's. We were able to write an urgent letter to the local authority reminding them of their duties. As a result he was released to a children's home.

Local authorities know that our lawyers have the ability to bring a suit and therefore our involvement encourages them to bring their actions into compliance with the law. Without the financial protection that legal aid provides, the Howard league's threat of legal action would become toothless and would be far less likely to succeed. In effect the prison legal aid budget stretches out a great deal further as its threat guarantees the liberty of many children and young people who do not have to bring a legal case.

Cost effective

LASPO 2012 recognised that local authorities should foot the bill for children on remand. There is no reason why they should not also be made to comply with their statutory duties to accommodate and protect children due to be released from prison under the early release schemes or on parole. These failings are expensive: A child place in a secure children's home costs the government £215,000 per year, a place in a secure training centre costs the government £160,000 and a place in a young offender's institution costs the government £60,000 per year.

Changing the law to improve it and working together

Over the last decade, the Howard League's team has used judicial review where all else has failed to change the law. From our Children Act case in 2002 which introduced the rights available to children in the community to those in prison to the House of Lord's judgment in M v Hammersmith and Fulham which resulted in a raft of statutory guidance setting out children's rights on release from prison to accommodation and support. As a result of the Hammersmith case, we have managed to persuade hundreds of local authorities to do the right thing by sending a simple letter. As a campaigning organization we also work collaboratively to try to minimize the need for us to bring legal challenges. Our public legal education work is an excellent example of our work explaining children and young people's resettlement rights to practitioners from a huge range of backgrounds and disciplines.

What the proposals will mean for the Howard League and access to justice for prisoners

If the proposals in Transforming Legal Aid go ahead, we will not be in a position to provide legal aid work. The model of delivery is not viable for a charitable organisation and there appears to be no exemptions built into the proposals to fit our model or provide dispensation to children and young people. Further, we are concerned that there is a more widespread risk to prisoners and those entering the justice system for the first time based on the inability of other providers to fill the gaps.

Viability: The proposals for criminal work are not viable

The Howard League does not have experience of providing general criminal work. However, we are acutely aware of the concerns voiced by the Law Society and the Bar Council as to the lack of viability of the proposed method. It is clear that reducing a supplier base from 1600 to 400 providers will lead to the irreversible destruction of current providers. At present, there appears to be a real risk that the current market will be replaced by an inadequate profit driven system for representing people whose liberty is at risk.

Risk of increased miscarriage of justice

We are concerned that the removal of client choice, the financial incentives for guilty please and the accepted reduction in quality will risk increased miscarriages of justice.

Choice of solicitor

We consider that choice of solicitor is critical in criminal work because:

- A choice of solicitor enables a client to choose a solicitor that he or she knows and trusts: this is important for access to justice and confidence in the system. It is our experience that young and vulnerable clients need to have developed a trusting relationship with their lawyer before effective representation is possible. It is well recognised that detained young people are at an immediate disadvantage due to the inherent power imbalance in the system and require legal the support of a person they trust to compensate for this. These issues were explored as part of our intervention in the in recent case

about appropriate adults brought by Just for Kids Law, a charity specialising in the representation of children in criminal matters.

- A choice of solicitor allows clients to return to good quality solicitors and avoid poor quality solicitors: this leads to natural quality assurance based on the experience of the client. In our experience, good quality legal advice is essential to make sure that important points are not missed and vulnerable clients in particular are able to participate effectively in the justice system.

- A choice of solicitor saves costs as solicitors that have a good knowledge of existing clients do not need to gather new information or spend time getting to understand their clients' needs and background. This in turn avoids unnecessary duplication of work: it is our experience that clients have clusters of legal problems that require assistance to ensure all their needs are met.

- While client choice will remain for prison law and criminal appeals and review work in theory, the pool from which clients can choose on will be vastly reduced. We also anticipate that there will be an increase in demand in these areas from clients who have not had a proper service first time round.

Quality

The removal of standalone prison law and criminal appeal contracts will mean that specialist good quality niche providers can no longer assist clients. This will be a great loss to the field. The Howard League runs an access to justice service for young people who can contact us through our advice line. We cannot take on every case but at present we can conduct a legal diagnosis and try to ensure that young people who need help get the right kind of legal assistance. At present we often struggle to find good quality specialist solicitors who will be able to meet our clients' needs. This is especially difficult for prison law work and criminal appeals for young people. We often find that young people have not had positive experiences of advice on appeal or parole from their criminal solicitors. This is because these areas are specialist. The supervisor standards are rightly rigorous to reflect this. We fear that many of the specialist providers we currently refer children and young people to will simply no longer be in business if these proposals come into force.

Conversely, even if some of the organisations that currently specialise in prison law or criminal appeal work do survive or their lawyers agree to work for larger firms, it is entirely possible that they will be forced out of the market. The main providers will be those who have won contracts and have a strong business sense. The proposals will require all criminal contract holders to do prison law and criminal appeals and it is likely that providers will aggressively pursue this work as one of the only uncapped areas of the market.

The proposals will fundamentally change the nature of prison law provision with an inevitable impact on quality. Prison law functions quite differently from the criminal law. Most prison law cases are about securing the means to rehabilitate a prisoner effectively or teasing out the evidence as to whether or not the prisoner is safe for release. Public protection is at the heart of what we do on a daily basis and the work that enables this is more akin to civil or inquisitorial work, with the exception of

disciplinary work. However, even disciplinary matters need to be seen in the context of a prisoner's overall progress and development through the system.

Access to justice – concerns about scope cuts to prison law

The Howard League believes that cutting down the scope of prison law to parole reviews and disciplinary matters will be counter productive and contrary to the Ministry's commitment to rehabilitation. As illustrated above, many of the sentence cases that will be removed entirely from scope concern access to offending courses so that prisoners and young people can ensure they will not commit crime in the future or resettlement so that they have somewhere safe and suitable to live. It is well known that the suitability of the resettlement package is one of the critical factors that impacts on reoffending. This is particularly the case for children and young people. The link between reoffending and lack of safe and suitable accommodation and support has been well documented. According to the Social Exclusion Unit (2002), stable accommodation can result in a reduction of more than a fifth in reoffending rates. Research by the YJB (2007) found that 40 per cent of children in custody have previously been homeless or have sought formal housing support.[1]

Given that the whole aim of the youth justice system is to prevent reoffending (section 37 of the Crime and Disorder Act 1998), suitable accommodation and support at every stage (pre-sentence, in custody and post-custody) is critical.

It is not surprising that resettlement is one of the main tests against which Her Majesty's Inspectorate of Prisons judges the health of a prison. It is recognised that living in unstable accommodation is a major risk factor in offending behaviour (Cripps and Summerfield, 2012).

It is wrong in principle to place a blanket ban on legal aid for children and vulnerable prisoners suffering abuse while detained by the state or children and vulnerable prisoners who require assistance to get a roof over their head.

"I got in touch with a solicitor because I need help with finding somewhere to live and support from social services on release." My solicitor "*helped me with sorting out the problems for me and getting onto the right people about what I need to do"*

Children and young people in custody are insulated from the outside world and there is no way that they can simply find alternative ways to deal with their problems as suggested in the impact assessment for prisoners as a group.

I got in touch with a solicitor because "*I needed help with parole, sentence calculation, my transfer to hospital and help to liaise with social services about having accommodation prior to release… if I didn't have a solicitor I would struggle with problems I have in prison and parole… if I didn't have a solicitor I wouldn't know what to do."*

[1] Definition includes those who are 'street' homeless, those in temporary accommodation and those living independently.

Changes to sentence cases would mean that a young person serving an HMP detention sentence could have his or her term reduced but would not be able to build on the progress recognised by the High Court by seeking assistance with an early move to open conditions.

"*I got in touch with a solicitor because I needed help with, moving to open conditions and tariff assessment review. My solicitor helped me to get my D Cat and a year of my sentence. Without my solicitor I would probably have still been in closed conditions, with a longer sentence".* Young person in a YOI

The changes to prison disciplinary work are contrary to case law and children's rights. This aspect of the proposals will disproportionally affect young and vulnerable prisoners who tend to struggle to be assertive about accessing legal advice. Moreover, young people are more likely to have serious matters heard by internal adjudicators because they tend to be on sentences where additional days cannot be added[2]. Although there is limited provision for representation for children who fulfil the Tarrant criteria, in our eight years of providing legal advice to children we have only once been invited to represent a child at a hearing under the criteria. In that case, we had to make written representations to be allowed to appear and when our lawyer tried to make a preliminary point that the charge should not proceed because our client was self-harming at the time, the reporting officer stormed out of the room stating that she could not be doing with this. The child concerned was subsequently transferred to hospital under the Mental Health Act. Under the new proposals, it would not even be possible to make representations to be allowed to appear under the Tarrant criteria. The proposals will encourage an approach that contrasts entirely to settled jurisprudence requiring a proactive approach to children facing adjudications in prison. In our case, M v the Chief Magistrate [2010' EWHC 433, Mr Justice Collins reiterated the importance of the welfare principle in this context and highlighted that our argument that "*that a young offender is told that he ought to be represented and that only if he knows that it is there for the taking, that he ought to take it and that it is in his interest to take it"* had formidable force.

"The solicitor gave me advise (sic) and write (sic) to the govoner (sic) explaining what happened and helped put my side across….. without my solicitor I would of got found guilty and put on losses for something I didn't do" - Young person in a YOI

The paper proposes that the cases due to be removed from scope can be dealt with by way of the complaints system. The complaints system is inadequate as a substitute for legal advice and representation in relation to serious issues such as violence or humiliation and legal issues such as appeals against decisions concerning release on temporary licence or suitability for a parole review. This is especially the case where a child or young person is concerned.

[2] This is notwithstanding the decision in *R (Smith) v Governor of HMP Belmarsh* [2009] EWHC 109 (Admin) as the prison disciplinary manual states that such referrals should only be made in exceptional circumstances.

In a report published by the Ministry of Justice and Department for Children, Schools and Families[3], it was observed that:

"*Many young people are not used to making complaints and fear reprisals if they do. Even where the young person made a complaint, we found that resolution of the incident often*
took so long that the young person no longer cared about the outcome. It was not uncommon for young people never to learn the outcome of their complaint. This is unacceptable."

In CRAE v SSJ and others [2012] EWHC 8 Mr Justice Foskett observed that children subject to unlawful restraint *'would simply have accepted it as part and parcel of the routine'* and noted a channel for complaints is important *'but if, in reality, it leads nowhere, then there is no effective access to what is at the end of the channel' (para 85)*.

" Without my solicitor I would be up the creek without a paddle. I wouldn't know anything about what I am entitled to or things my solicitor could help me with….without there (sic) help my life would be more ruined than it already is" - young *person in YOI aged, 19*

Access to justice – judicial review work
Changes to judicial review work, including the residence test, changes to payment arrangements and so-called borderline cases, will impede access to justice.

As noted above, where necessary, judicial reviews have been brought by the Howard League to bring about effective and positive change. A list of our judgments is available on-line[4].

The proposed residence test is discriminatory. It would result in some people being completely prohibited from challenging unlawful action by the state. For instance, a child who is not lawfully resident but is subject to an unlawful decision by the parole board would be unable to appeal this as the only avenue of appeal is by way of judicial review; similarly a child leaving custody who is not lawfully resident and to whom a duty is owed under the Children Act 1989 would not be able to enforce that duty in the courts.

G was a 16 year old boy serving a sentence of detention for a crime committed in his early teens. He had come to this country as a young child and never claimed asylum or had his immigration status confirmed. His sentence was manifestly excessive and reduced by the Court of Appeal. However, he had nowhere safe to live on licence in

[3] *The Independent Review of Restraint in Juvenile Secure Settings* (Ministry of Justice and Department for Children, Schools and Families, 2008), page 93, available at: http://webarchive.nationalarchives.gov.uk/20130401151715/https://www.education.gov.uk/publications/eOrderingDownload/Review%20of%20restraint.pdf

[4] http://www.howardleague.org/judgments/

the community. Judicial review proceedings were eventually issued following extensive representations to the local authority about its duties under the Children Act and following an interim Order, he was accommodated as a looked after child. As consequence he was eventually provided with safe and suitable accommodation, along with long term leaving care rights to assist with his safe rehabilitation into the community. G would not have been eligible for such assistance under the new residence test. As the defendant conceded, permission was never granted in this case and the Howard League would have been exposed to considerable costs risks.

The paper proposes to cut funding for judicial reviews that are described as 'borderline'. These are not just cases that have less than a 50 per cent chance of success but more than a poor chance of success. They also include cases where it is just not possible to work out the prospects of success – often because there are two conflicting cases or a factual issue is in dispute but the matter is of overwhelming importance to the client or of wider public interest. The ability for our courts to decide on these kinds of issues is one of the factors that make England the legal capital of the world.

At present any case that has 'borderline' prospects of success is carefully scrutinized by the Legal Aid Agency: they are only granted at present where there are compelling reasons to do so.

This proposal would risk impeding access to justice in important cases challenging decisions by the state.

One example concerns the case of a young boy who called our help line one night, explaining that he was sleeping in a car as he had nowhere to go. We referred his case to a leading public law firm and the case eventually found its way to the House of Lords[5] where Lady Hale gave a judgment following on from her judgment in M. The Southwark case as it became known has resulted in a sea-change in the way that local authorities are expected to operate in relation to children leaving custody with nowhere to live. Since this judgment was handed down we have rarely had to issue judicial review proceedings to ensure local authorities comply with their legal duties as a letter setting out the key passages will usually suffice to ensure a child is provided with what he or she is entitled to. But that case would not have been funded under the new arrangements. In fact, permission was refused and only granted by the Court of Appeal who went on to dismiss the claim (2:1). It is unlikely that it would ever have made its way to the House of Lords. This is because the solicitors would not have been paid for any of their work prior to the matter reaching the Lords and it would have been too difficult for a provider to absorb the risk of doing this work without the guarantee of payment. The result would have been devastating for rehabilitation of children and young people leaving custody.

Conclusion

We urge the Ministry to reconsider these proposals and confirm that we would be keen to engage further consultation.

As they stand, the proposals are likely to result in consequences that undermine the Ministry's commitment to rehabilitation and progression for prisoners. They are likely

[5] *R (G) v London Borough of Southwark [2009] UKHL 26*

to disadvantage children and young people and will act as an effective impediment to access to justice for prisoners. Unless amended, it will be impossible for the Howard League to continue its legal work under the legal aid scheme.

We believe that the Ministry should rethink these proposals and should ensure that:

(i) prison law and appeals and reviews work can continue as a standalone contract
(ii) quality should come first: 'good enough' is not sufficient to protect vulnerable young people and the public
(iii) at the very least special arrangements should be made to safeguard children and young people
(iv) judicial review work should remain available to ensure that state abuse of power does not go unchecked and to enable wider change and progress where necessary

Please contact Laura Janes, Consultant Solicitor, for further information.

References

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