

Howard League for Penal Reform's submission to the Justice Committee's Call for Evidence on the Future of Legal Aid

November 2020

Summary

1. The Howard League for Penal Reform welcomes the opportunity to provide evidence to the Justice Committee's Call for Evidence on the Future of Legal Aid.
2. Access to justice is a fundamental pinnacle of a just and fair society. Recognition of the right of all people, including people in prison, to legal advice and representation is essential to the rule of law and is the true test of a society's humanity and commitment to justice.
3. This submission draws on our experience as a specialist legal service provider for children and young people aged 21 and under in prison, as well as our wider work to support access to justice for people in prison.
4. People in prison are highly vulnerable, disproportionately from minority communities and have an extensive unmet legal need. This need transcends beyond traditional prison law matters to include community care and social welfare needs. The legal problems faced by people in prison are increasingly complex and cut across a range of disciplines. The pandemic has exacerbated the problems people in prison face.
5. Prisoners have been disproportionately affected by the cuts to the scope of legal aid. In 2013, the scope of issues covered by legal aid for prisoners was cut. Following judicial review by the Howard League and the Prisoners' Advice Service, legal aid was reinstated for three areas of prison law. There is a strong case for prisoners to be provided with legal advice and representation in a range of areas that would assist with their progress through the system.
6. Legal aid practitioners are insufficiently remunerated for prison law work and the current fixed fee structure financially penalises practitioners who invest time in providing their clients with this best possible representation. Legal practitioners should be funded in a way that allows them to advise and represent their clients to the highest possible standard.
7. The means threshold for legal aid is too low. This has resulted in an increased demand on the legal services provided by charities such as the Howard League. The means review should prioritise increasing the threshold.

1. About the Howard League for Penal Reform

- 1.1 Founded in 1866, the Howard League is the oldest penal reform charity in the world. The Howard League has some 13,000 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.
- 1.2 The Howard League works for less crime, safer communities and fewer people in prison. We 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.
- 1.3 The Howard League legal team works directly with children and young adults in prison and this submission draws on the legal work of the charity.

2. The importance of access to justice

- 2.1 Ensuring that individuals have the ability to obtain legal advice and assistance is fundamental in a fair and just society. The availability of legal aid is vital to ensuring access to justice for all.
- 2.2 Equal access to justice for everyone, including people in prison is essential to maintain the rule of law, and the true test of a society's humanity and commitment to justice. In the words of the former chief inspector of prisons, Nick Hardwick people in prison are uniquely vulnerable because *"there is a power imbalance between the prisoner and the jailer. If I am a warder and you are a prisoner I can use physical force on you. But also you are dependent on me for absolutely every aspect of your life"* (Hardwick, 2014). Without access to justice, abuses of power go unchallenged and prisoners are pushed further away from justice system. There is an obvious benefit to society in encouraging people to know, respect and enforce the law. This was recognised by the Supreme Court in *R (on the application of UNISON) (Appellant) v Lord Chancellor, 2017*:

"People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations. That is so, notwithstanding that judicial enforcement of the law is not usually necessary, and notwithstanding that the resolution of disputes by other methods is often desirable."

- 2.3 The only way to engender personal responsibility in people in contact with the criminal justice system and thereby ensure less crime and fewer victims of crime, is to honour their rights. This means creating a culture in which they themselves are respected and able to access appropriate remedies.

2.4 Legal advice and representation must be available to everyone involved in the criminal justice system to ensure that the system functions properly.

3 Vulnerable clients and complex cases, exacerbated by Covid

3.1 Prisoners are among the most vulnerable in our society. They tend to be in poorer health than the general population and have a greater need for health and care (Heath and social care committee, 2018).¹ For many people detained in prison, their poor health status arises from, and/or has been exacerbated by, early childhood experiences (abuse, neglect and trauma) social circumstances (problems with housing and employment) and higher rates of smoking, alcohol and substance misuse (Home Office, Public Health England and Revolving Doors Agency (2017)).²

3.2 A disproportionate number of the prison population is from minority communities. The issues faced by these individuals have been well documented by many reports, such as the Lammy Review (2017).

3.3 The issues affecting people in custody are complex and extend far beyond purely prison law matters. For example, many prisoners also require help with community care and social welfare issues. The Howard League is currently representing a young adult with foetal alcohol syndrome who has been recalled to prison for breaking the rules of residence at his approved premises at the start of the coronavirus crisis. He is in his late teens but has the reading age of an eight year old. There is an absence of risk reduction work he can do in prison due to his disability and he is considered too vulnerable to have a remote parole hearing. Given the continuing impact of coronavirus, there is no indication that he will be able to have a hearing in person. As such, there is no coherent plan for his release. He has been self-harming prolifically and has been hospitalised as a result. His case is not a straightforward exercise in advocacy. Extensive client care is required to get the most basic instructions. An application for release on parole needs to be accompanied by intensive community care work to ensure that he secures appropriate social care and mental health services.

3.4 Since the John Worboys Case, many parole hearings have come to resemble trials in miniature, where there are unadjudicated allegations that need to be considered. Prison law practitioners now have to contend with the new reconsideration system and summaries of decisions.

3.5 Coronavirus has had a major impact on the prison regime and has exacerbated the problems faced by people in prison (Howard League, 2020).³ There are currently significant restrictions in prisons which include lack of family contact, reduced activities and education and severely restricted time out of cell. Many people in prison have been kept in conditions amounting to solitary confinement for over seven months. Not only has this had a significant impact on the mental health of wellbeing of prisoners themselves, but it has also created more hurdles for prison law practitioners to overcome and has contributed to the vast unmet legal need within the prison population.

¹ <https://publications.parliament.uk/pa/cm201719/cmselect/cmhealth/963/963.pdf>

² <http://www.revolving-doors.org.uk/blog/rebalancing-act>

³ <https://howardleague.org/our-response-to-covid-19-and-prisons/>

- 3.6 Precautions taken in light of Coronavirus have added additional and significant delays to legal proceedings. Parole hearings, which were formerly held in person, are now conducted via video link or telephone conferences and prison law practitioners have been unable to visit their clients in jail for most of lockdown. Moreover, in some prisons, it has been extremely difficult for lawyers to obtain video link meetings with clients. These changes have made it more difficult for prison law practitioners to communicate with their clients. Post has been painfully slow.
- 3.7 Considering the additional challenges brought by the coronavirus crisis and the incredibly vulnerable nature of some clients, the need for a robust legal aid system ensuring access to justice for all those who need it has never been more acute.

4. Prisoners have been disproportionately affected by cuts to the scope of legal aid

- 4.1 In 2010, the scope of legal aid was reduced to exclude treatment cases. This meant that legal aid was no longer available for complaints about treatment and prisoners were instead expected to rely on prison complaints procedures. In addition to this, fixed fees were introduced which financially penalise legal aid providers for doing the work required to give their clients high quality representation. The issues with fixed fees will be covered in section five of this submission.
- 4.2 Following the 2013 consultation on Transforming Legal Aid, the then Lord Chancellor, Chris Grayling, made further cuts to legal aid. Virtually all legal aid for prisoners was cut, with the exception of direct release parole hearings and prison discipline hearings where extra days could be added. These cuts coincided with record high prison numbers, self-injury and suicide rates⁴.
- 4.3 In 2013, the Howard League and the Prisoners' Advice Service launched a judicial review to challenge the cuts to legal aid (R (Howard League for Penal Reform and The Prisoners' Advice Service) v The Lord Chancellor). Following this judicial review, certain key areas of prison law were brought back within the scope of legal aid. These areas include pre-tariff reviews by the Parole Board, Category A reviews, and decisions to place people in deep custody (special units within prisons). The court found that the cuts to legal aid for prisoners in these areas were unlawful because they were inherently unfair.
- 4.4 Although this judicial review improved the scope of legal aid, further action is needed to ensure that people in prison are not denied access to justice. Changes to enable prisoners to access legal advice and representation in a much wider range of areas would be in the best interests of the prisoners and would aid their progression through the system.

5. Fees

- 5.1 The current legal aid scheme does not adequately remunerate legal aid practitioners for the increasingly complicated legal work they undertake.
- 5.2 At parole hearings, prison law practitioners are expected to advocate for their clients, to challenge client care and to deal with ancillary matters such as community care support for release. Moreover, parole hearings explore the inner psyche of a prisoner to test and

⁴ <https://howardleague.org/legal-work/legal-aid-cuts-for-prisoners/>

challenge their commitment to being a safe citizen. This is incredibly intense, skilled and time-consuming work for the prison law practitioner.

- 5.3 The current system for legal aid remuneration is based on fixed fees. The fixed fee system is an inappropriate way of funding legal professionals as fixed fees financially penalise legal aid practitioners for taking sufficient time to fully prepare for hearings. Prison law has increased in complexity but the fees have remained the same.
- 5.4 The fixed fee for a written case is £200.75. A practitioner can only be paid “as they go” if they do three times the work, and the rate for this is £42.80 per hour.
- 5.5 An oral case is paid through standard fees. A practitioner will receive £437.21 if they do the minimum amount of work required, however once this fee at the hourly rate of £51 is exceeded, the legal practitioner will not be paid again until they have completed twice the amount of work (i.e. £933.33), at which point they will be paid £1,454.44. After this, the legal practitioner will not be paid for any additional work they do until they have done £4362.54 worth of work. This is very rare.
- 5.6 Fresh criminal appeal cases are paid as you go but at a very low level (£45.35) and all work completed above £273.75 is subject to prior authority which is very closely scrutinised.
- 5.7 The quality control of legal aid work is through a system of ‘supervisor standards’. It is bureaucratic and inadequate. It is a box ticking exercise which provides no meaningful assurance of quality.
- 5.8 Legal aid practitioners working with prisoners are assisting extremely vulnerable people to navigate the complexities of the criminal justice system. As such, they should be remunerated fairly for the highly complex work that they do and funded in a way which financially incentivises them to provide their clients with the best possible service rather than penalising them for doing so.
- 5.10 As a result of the changes to legal aid, there has been a significant drop in the number of firms offering prison law legal aid work. The latest Legal Aid Agency data shows that there has been a decrease in the number of providers who are actively doing prison law work in the last decade from 485 in 2011-12 to 146 in 2019-20 (Legal Aid Agency, 2020).⁵ Prisoners' access to legal advice and assistance has been significantly reduced and the Howard League has experienced a rise in demand for the services we provide to children and young people in prison.

6. Means

- 6.1 The means threshold for legal aid is far too low. For example, to be eligible for legal aid for a written parole case both the legal aid applicant and their partner need have a combined income of less than £99 per week and less than £1,000 in savings. This is an incredibly low bar.

⁵ Legal aid statistics England and Wales tables April to June 2020, Table 9.1
<https://www.gov.uk/government/statistics/legal-aid-statistics-quarterly-april-to-june-2020>

6.2 This low threshold means that many prisoners in open conditions who manage to obtain employment, as they are encouraged to do, would be ineligible for legal aid to support them at a parole hearing to move from open conditions to the community. These individuals are highly likely to be required to provide a significant proportion of their earnings to victim support. As a result, they may be unable to afford the legal fees for representation at their final parole review to assist them with the final vital step of being released on parole into the community.

6.3 Legal aid was introduced to help everyone access justice. Currently, far too many people who are unable to afford legal fees are denied legal aid.

7. Concluding observations

7.1 The wider policy landscape suggests that in the future, there will be more people in prison, more prisons and that those in prison will be staying there for longer. This review is an opportune time for the Justice Committee to encourage the government to ensure that people in prison can access the legal support they need to move on with their lives.

**The Howard League for Penal Reform
November 2020**