

Howard League for Penal Reform's response to the Independent Review of Criminal Legal Aid's Call for Evidence

May 2021

Summary

1. The Howard League welcomes the opportunity to provide evidence to the Independent Review of Criminal Legal Aid's Call for Evidence. This submission is focused on our legal expertise which includes prison law and criminal appeal work for children and young adults.
2. The prison population is projected to increase significantly over the next five years. People in prison are extremely vulnerable to abuses of power and few can afford to pay for representation: publicly funded legal advice and representation act as essential safeguards.
3. The current rigid system of fixed and standard fees encourages unsustainable working practices at the expense of quality and practitioner wellbeing. It has led to a dramatic fall in the number of firms willing to do prison law and fresh appeal work.
4. The very low levels of legal aid funding for fresh criminal appeals further undermine fairness and trust in the criminal justice system. The recent Post Office cases illustrate that the remedial power of the Court of Appeal to correct injustice is as essential as ever. As more people receive custodial sentences, it is essential that they are supported to challenge excessive sentences and miscarriages of justice.
5. The current criminal legal aid system does not meet the needs of people in prison, victims, or the public. The Government should ensure that professionals and people in prison are working towards rehabilitation from day one by bringing sentence planning and access to Offending Behaviour Courses back into the scope of legal aid. This would improve the support available to people in prison, provide more certainty for victims and the public, and save taxpayers' money by ensuring that more people could be safely released at their parole eligibility date.
6. The pandemic has resulted in changes to the way the criminal justice system operates, such as remote hearings, severe delays and restrictions on access to clients, which have created new challenges for legal aid practitioners. Criminal legal aid needs to take these into account and build in ways to ensure that practitioners are appropriately resourced to counter these challenges and ensure the system remains efficient and fair.

1. About the Howard League for Penal Reform and summary of response

- 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's legal team works directly with children and young adults in prison. We have drawn on our legal work in responding to this consultation.
- 1.4 The current criminal legal aid system is harmful and unsustainable: it does a disservice to both practitioners and people in prison by disincentivising high-quality representation in prison law and fresh criminal appeal cases. As the prison population rises over the next five years, it is essential that people in prison have access to high-quality legal advice and assistance. It is also essential that people are supported to work towards risk reduction and reintegration into the community from the beginning of a prison sentence. The Howard League believes this would be best achieved by bringing sentence planning back into the scope of legal aid.
- 1.5 The Howard League would welcome the opportunity to provide further information about any of the points below.

2. Publicly funded legal advice and representation are a vital safeguard for people in prison

- 2.1 A growing number of people will be sentenced to prison over the next five years: it is essential that they have access to publicly funded legal advice and representation. The prison population is projected to increase by more than 14,000 between 2020 and 2026, due to the recruitment of 20,000 additional police officers (Ministry of Justice, 2020a).¹ The impact assessment for the Police, Crime, Sentencing and Courts Bill predicts a further expansion of the prison population. The sentencing provisions in the Bill would lead to an increase in the number of children in prison by 30–50 at any one time (Ministry of Justice, 2020b).²
- 2.2 People in prison are extremely vulnerable to abuses of power. As Lord Brown of Eaton-under-Heywood stated in a House of Lords Debate about the impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012:

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/938571/Prison_Population_Projections_2020_to_2026.pdf

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/967780/MOJ_Sentencing_IA_-_DTO__002_.pdf

[P]risoners, as members of a closed community uniquely subject to the exercise of highly coercive powers, far from having fewer rights of recourse to independent courts than most of us, should, rather, have at the very least equal access to justice. Just yesterday, the *Independent* newspaper contained an article headed: “Medomsley young offenders centre: over 140 alleged victims of abuse have come forward” ... [T]he article highlights—if, indeed, highlighting is required—just how vulnerable prisoners are, particularly young prisoners, and therefore how essential it is that they should have full and proper access to justice rather than be discriminated against as prisoners under the legal aid scheme (Hansard HL Deb., 29 January 2014).³

- 2.3 Young people have remained particularly vulnerable in custody, as shown by the appalling abuse exposed at Medway Secure Training Centre in 2016 (Howard League, 2016).⁴ In the most recent survey of children in custody carried out by Her Majesty’s Inspectorate of Prisons, 36 per cent of young people surveyed reported that they had been verbally abused by staff, 14 per cent that they had been physically assaulted and two per cent that they had been sexually abused (Her Majesty’s Inspectorate of Prisons, 2021).⁵
- 2.4 When the cuts to legal aid came into force, the then-Lord Chancellor suggested that people in prison could rely on the internal complaints procedure and the Prison and Probation Ombudsman. At the time, the Joint Committee on Human Rights expressed serious doubts that people with mental health problems or young people would be able to effectively use the prison complaints system (Joint Committee on Human Rights, 2013).⁶ There are significant barriers to effective participation for children in particular. Seventy-two per cent of children in custody were assessed as having mental health concerns in 2019/20, while seventy-one per cent struggled with speech, language and communication (Youth Justice Board, 2021).⁷
- 2.5 In 2015, the Prison and Probation Ombudsman carried out research to try to understand the extremely low numbers of complaints from young people. Their statistics showed that although young people aged 18 and under made up one per cent of the prison population, they accounted for only 0.1 per cent of complaints to the Ombudsman. Participants explained that they did not make complaints because they did not trust the system, feared reprisals and did not believe that they would be listened to. Some participants did not understand the eligibility criteria or process for making a complaint (Prison and Probation Ombudsman, 2015).⁸ These factors affect both young people’s willingness to make complaints in the first place and their willingness to escalate complaints to the Ombudsman.
- 2.6 Howard League lawyers often support young people to make complaints in prison and to escalate these complaints to the Prison and Probation Ombudsman. The Howard League also frequently makes safeguarding referrals to prisons on behalf of young people and offers legal advice to young people who are facing disciplinary hearings before a prison governor. This work is done for free as part of the Howard League’s

³ <https://publications.parliament.uk/pa/ld201314/ldhansrd/text/140129-0002.htm>

⁴ <https://howardleague.org/news/medwaystc/>

⁵ <https://www.justiceinspectorates.gov.uk/hmiprison/inspections/children-in-custody-2019-20/>

⁶ <https://publications.parliament.uk/pa/jt201314/jtselect/jtrights/100/100.pdf>

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/968700/experimental-statistics-assessing-needs-sentenced-children-youth-justice-system-2019-20.pdf

⁸ https://s3-eu-west-2.amazonaws.com/ppo-prod-storage-1g9rkjhkjmjgw/uploads/2015/03/Why-do-women-and-young-people-in-custody-not-make-formal-complaints_final.pdf

confidential legal advice line, which is the only dedicated legal service for children and young adults in custody. The call statistics show that demand for legal advice has soared over the past decade, despite the number of children and young adults in prison halving since 2012 (Ministry of Justice, 2021, Table 11.8).⁹

2.7 Young people from Black and minority ethnic backgrounds are significantly overrepresented in prison. In 2019/20, more than half of children in custody were from Black and minority ethnic backgrounds (Youth Justice Board, 2021).¹⁰ In a thematic report on young adult outcomes published in January 2021, Her Majesty's Inspectorate of Prisons noted that 59 per cent of survey respondents aged 18 to 21 and 40 per cent of respondents aged 21 to 25 were from an ethnic minority group (Her Majesty's Inspectorate of Prisons, 2021).¹¹ Given the widely acknowledged discrimination that persists throughout the criminal justice system, there is a significant risk of injustice if young people from ethnic minority backgrounds cannot access high-quality legal assistance and advice. The Howard League is only able to provide this support by working for free through its advice line: in the year to 31 March 2021, nearly a third of callers were Black and six in ten were from ethnic minority backgrounds. No doubt there are many more young people who do not get any help at all.

3. The current rigid system of fixed and standard fees in prison law encourages harmful and unsustainable working practices

3.1 The current fee system forces prison law practitioners to choose between doing the bare minimum for their clients and doing additional work for free. Unless practitioners are likely to do so much work that they would reach the higher thresholds, they are disincentivised to go beyond the minimum amount of work required. This is bad for people in prison and bad for prison lawyers.

3.2 For example, prison lawyers are financially penalised if they spend more than five hours but less than 14 hours on written parole representations. This is counterproductive given the drive by the Parole Board to increase the number of people who can be released on the papers safely and the financial and human cost of unnecessarily prolonged detention. Similar concerns apply to oral hearing cases which can result in prison lawyers doing thousands of pounds of work for no payment. Ironically, the more vulnerable and complex the case, the less remuneration the provider will ultimately receive. This creates a disincentive for lawyers to specialise in particular types of cases, such as cases for people with mental health problems or young people. These cases require additional expertise and input but will be more poorly paid. Specialist representation is clearly what is best for the client, the system and the wider community.

3.3 The fee system disincentivises thorough preparation in parole cases, even though it can make a material difference to not only the outcome of a hearing but also a client's prospects on release. In the months leading up to a parole hearing, Howard League lawyers work with the client, prison staff, independent experts (usually psychiatrists) and statutory services to ensure that there is a robust and realistic release plan in place. Weak release planning has been identified as one of the main reasons for people being

⁹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/956044/youth-justice-statistics-2019-20-supplementary-tables.zip

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/968700/experimental-statistics-assessing-needs-sentenced-children-youth-justice-system-2019-20.pdf

¹¹ <https://www.justiceinspectorates.gov.uk/hmiprison/wp-content/uploads/sites/4/2021/01/Young-adults-thematic-final-web-2021.pdf>

denied parole (Padfield, 2018).¹² The Howard League's legal team often provide this more comprehensive support by working for free: Howard League lawyers are also likely to be familiar with clients' circumstances in advance through the legal advice line.

- 3.4 The pressure to rush parole cases and the low level of remuneration is especially damaging in a sector where practitioners are continually exposed to vicarious trauma. This includes clients' experiences of trauma in childhood or adulthood, the traumatic circumstances of offences and the additional harms which clients experience in custody. As Fleck and Francis (2021) explain in their work on vicarious trauma in the legal profession, the pressures caused by inadequate funding and high caseloads make it harder for legal aid practitioners to cope with the emotional demands of their work.¹³ In a 2019 survey, more than half of junior lawyers working with vulnerable clients reported that they had experienced mental ill-health over the past month and more than a fifth reported that they often felt unable to cope (Law Society, 2019).¹⁴ The current legal aid system encourages unsustainable and psychologically harmful working practices among legal aid lawyers, driving junior lawyers out of the profession and casting doubt on the future of criminal legal aid.
- 3.5 The current fee structure has dramatically reduced legal aid provision for prison law. Legal Aid Agency statistics show that the number of providers who are actively doing prison law work dropped by 70 per cent between 2012/13 and 2019/20 (Legal Aid Agency, 2020, Table 9.1).¹⁵

4. The very low level of funding for fresh criminal appeals undermines fairness and trust in the system

- 4.1 The increase in the number of police officers and the provisions of the Police, Crime, Sentencing and Courts Bill mean that more people will be sentenced to prison over the next five years and that they will stay there for longer. In this context, it is essential that people are supported to challenge excessive sentences and miscarriages of justice. The remedial power of the Court of Appeal is illustrated by the recent case of *Hamilton & Ors v Post Office Ltd*, which overturned the wrongful convictions of thirty-nine Post Office employees for crimes of dishonesty.¹⁶
- 4.2 The current level of funding for fresh criminal appeals has significantly limited access to legal representation for applicants. Fresh criminal appeals are paid at a very low level (£45.35) with an upper limit of £273.75. It is not possible to extend the upper limit without an extremely detailed and time-consuming application to the Legal Aid Agency for a costs extension.
- 4.3 The Criminal Cases Review Commission has noted a sharp decline in the proportion of applicants with legal representation: almost 93 per cent of applicants did not have support from a legal representative in 2019/20, down from a historical average of around 70 per cent (Criminal Cases Review Commission, 2020).¹⁷ Research suggests that

¹² <https://howardleague.org/wp-content/uploads/2018/05/Parole-reflections-and-possibilities.pdf>

¹³ Fleck, J. and Francis, R. (2021). *Vicarious Trauma in the Legal Profession: a practical guide to trauma, burnout and collective care*. London: Legal Action Group.

¹⁴ <https://communities.lawsociety.org.uk/Uploads/b/y/k/resilience-wellbeing-survey-report-2019.pdf>

¹⁵ <https://www.gov.uk/government/statistics/legal-aid-statistics-quarterly-october-to-december-2020>

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¹⁷ https://s3-eu-west-2.amazonaws.com/ccrc-prod-storage-1jdn5d1f6iq1l/uploads/2020/07/CCRC-2329571-v1-CCRC_Annual_Report_and_Accounts_2019-20_Final_for_web.pdf

legally represented applicants are nearly four times as likely to have their cases referred to the Court of Appeal by the Commission (Hodgson and Horne, 2009).¹⁸

5. Criminal legal aid is currently failing to meet the needs of people in prison, victims and the public

- 5.1 The current criminal legal aid system does not meet the needs of people in prison, victims, or the public. Cuts to legal aid have left practitioners unable to support people in prison to make meaningful progress towards risk reduction from the beginning of their sentence. By restoring legal aid for sentence planning, the Government could ensure that people in prison can work towards rehabilitation from day one.
- 5.2 Before the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the Howard League's legal team (and other publicly funded prison lawyers) could provide advice and assistance in respect of sentence planning and access to offending behaviour programmes. These matters are now out of scope.
- 5.3 Professionals often realise that there has been insufficient resettlement planning, rehabilitative work and/or psychiatric assessment only during the parole process. Howard League lawyers have supported many young people who receive a psychiatric assessment which helps to explain their past behaviour only in the run-up to a parole hearing, sometimes after they have spent years in prison. For this reason, the parole process can be transformative: it galvanises professionals and prompts practitioners and young people to plan for a young person's future life in the community. Yet young people are frequently denied parole or have their release delayed because this planning did not happen soon enough.
- 5.4 Inadequate sentence planning does a disservice to victims and the public, as well as to people in prison. It means that people are more likely to leave prison without having fully understood and addressed their own behaviour and without secure housing and meaningful employment opportunities, which are crucial to desistance from offending, in place (Her Majesty's Inspection of Probation, 2020; Oswald, 2020; Ramakers et al, 2016).¹⁹
- 5.5 Restoring legal aid for sentence planning and access to behaviour programmes would save taxpayers' money by ensuring that more people were able to leave prison at their parole eligibility date. In 2019/20, the average overall cost of a prison place was £44,640 and the average overall cost of a place in a Young Offender Institution was £101,562 (Ministry of Justice, 2020c). The least expensive prison places were for men in open conditions.²⁰ In contrast, bringing sentence planning back into scope would cost a modest fixed fee of around £200 per case.

6. The pandemic has created new challenges for practitioners

- 6.1 The Covid-19 pandemic has significantly changed the way that the criminal justice system operates. Some of these changes have been helpful. For example, the rollout of video link facilities across the secure estate has allowed lawyers to meet with their

¹⁸ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1483721

¹⁹ <https://www.justiceinspectrates.gov.uk/hmiprobation/wp-content/uploads/sites/5/2020/07/FINAL-Accommodation-Thematic-inspection-report-v1.0.pdf>;
http://nrl.northumbria.ac.uk/id/eprint/45849/1/oswald.rebecca_phd_13040411.pdf;
<https://journals.sagepub.com/doi/full/10.1177/0306624X16636141>

²⁰ <https://www.gov.uk/government/statistics/prison-performance-statistics-2019-to-2020>

clients without travelling across the country. However, the pandemic has also created challenges for prison lawyers, including delays, restrictions on access to clients and the impact of remote hearings. Criminal legal aid should properly remunerate practitioners for the additional work which they have done to overcome these challenges.

- 6.2 The pandemic has pushed the pre-existing backlog in the court system to record levels. In the week ending 21 March 2021, the number of outstanding cases was 17 per cent higher than the pre-Covid baseline in the magistrates' courts and 46 per cent higher than the pre-Covid baseline in the Crown Court. In total, there were 534,000 outstanding criminal cases (Her Majesty's Courts & Tribunal Service, 2021).²¹
- 6.3 As parole hearings for people with outstanding criminal matters are often delayed until the outcome of the criminal case is known, the court backlog has led to long delays for people who are going through the parole process while awaiting a criminal trial (for example, because they were recalled to custody for an alleged further offence). The Howard League's legal team has worked with young people whose hearings have been delayed for months, at a time when conditions in custody are especially dire (Howard League, 2020a; Howard League, 2020b).²² Delays in the parole process also create financial uncertainty for prison lawyers.
- 6.4 At a research seminar in April 2021, the Parole Board presented internal data showing that there had been 6,203 telephone parole hearings and 3,208 video hearings since the start of lockdown restrictions (Parole Board, 2021).²³ This is 14 per cent higher than the number of oral hearings in 2019/20 (Parole Board, 2020).²⁴ The increase in parole hearings has come at a price: Howard League lawyers have found that hearings are listed for shorter timeslots and that proceedings are often more rushed. This has repercussions for legal aid: though practitioners may need to work harder than ever to prepare their clients to give their best evidence in a remote hearing, they may be paid less if it has been listed for a shorter period.
- 6.5 Remote hearings create additional challenges for both lawyers and clients. As a Panel member acknowledged at the research seminar, there are outstanding issues with "the solicitor-client interaction ... the ability to have a private discussion part way through a hearing is less well supported" (Parole Board, 2021).²⁵ This issue has also been raised in respect of other courts and tribunals (Nuffield Family Justice Observatory, 2020a; Nuffield Family Justice Observatory, 2020b; Renton, 2021).²⁶ Howard League lawyers have found that they are expected to justify taking private instructions from their clients during remote hearings, even in circumstances where this is clearly necessary.
- 6.6 The Howard League's legal director and Marie Franklin, a trainee solicitor in the legal team, recently recorded an audio contribution about their experience of remote parole hearings for the Howard League's Early Career Academic Network Bulletin. In the contribution, they expressed their concerns about the lack of legal, emotional and

²¹ <https://www.gov.uk/government/statistical-data-sets/hmcts-weekly-management-information-during-coronavirus-march-2020-to-march-2021>

²² <https://howardleague.org/wp-content/uploads/2020/06/YA-Covid-19-Briefing-FINAL.pdf>;

<https://howardleague.org/wp-content/uploads/2020/11/Children-in-prison-during-covid-19.pdf>

²³ https://www.youtube.com/watch?v=N5_bW_4OqSQ

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/902631/Parole_Board_Annual_Report__Accounts_-_19-20.pdf

²⁵ https://www.youtube.com/watch?v=N5_bW_4OqSQ

²⁶ [https://www.nuffieldfjo.org.uk/app/nuffield/files-](https://www.nuffieldfjo.org.uk/app/nuffield/files-module/local/documents/nfjo_remote_hearings_vulnerable%20groups_rapid%20review_20200506.pdf)

[module/local/documents/nfjo_remote_hearings_vulnerable%20groups_rapid%20review_20200506.pdf](https://www.nuffieldfjo.org.uk/app/nuffield/files-module/local/documents/nfjo_remote_hearings_20200507-2-.pdf);

https://www.nuffieldfjo.org.uk/app/nuffield/files-module/local/documents/nfjo_remote_hearings_20200507-2-.pdf;

Renton, D. (2021). *Jobs and Homes: Stories of the Law in Lockdown*. London: Legal Action Group.

practical support provided to young people in remote parole hearings – even though they are being interrogated about their innermost psyche and past trauma (Howard League, 2021).²⁷

- 6.7 People must not be trapped in prison because their parole hearing cannot go ahead and remote hearings are clearly necessary for this reason. However, the Parole Board and Her Majesty's Prison and Probation Service should carefully consider how they can promote effective participation and improve the opportunities for private discussion between solicitors and clients. In cases involving children, the best interests of the child must be a primary consideration.
- 6.8 As the Lord Chief Justice recognised in the case of *R v Manning*, the Covid-19 pandemic has significantly changed the context in which decisions about custody are made.²⁸ Practitioners have had to work rapidly to consider the impact of Covid-19 and account for it in their legal arguments. For example, the pandemic has significantly restricted young people's access to education, behavioural courses, and release on temporary licence (including for employment): this has made advocacy in parole cases more challenging. The Howard League's legal team has altered its approach to parole representations and letters of mitigation for sentencing to take the impact of the pandemic into account.

7. Conclusion

- 7.1 The Howard League believes that the structure of criminal legal aid is unsustainable and that it must be reformed. This applies to criminal legal aid across the board. However, this consultation response has focused on how the current criminal legal aid system negatively impacts publicly funded prison and criminal appeal lawyers and their clients.
- 7.2 The fee structure should be amended to properly remunerate prison lawyers for the work which they have done and allow practitioners to sufficiently prepare for parole cases without working for free. The Government should also bring sentence planning back into the scope of legal aid, to ensure that the criminal legal aid system meets the needs of people in prison, victims and the public.
- 7.3 The Covid-19 pandemic has created significant new challenges for prison lawyers, as well as some helpful developments which should be retained. Criminal legal aid should recognise the additional work which practitioners have been doing during the pandemic and should properly resource practitioners who represent clients at remote hearings in future.

**Howard League for Penal Reform
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²⁷ <https://www.mixcloud.com/HowardLeague/ecan-themed-issue-laura-janes-and-marie-franklin/>

²⁸ <https://www.baillii.org/ew/cases/EWCA/Crim/2020/592.html>