

Briefing on the Prisons and Courts Bill: New Clause 10 “Prisons: purpose and the role of legal assistance”

New Clause 10

To move the following clause —

“Prisons: purpose and the role of legal assistance

- (1) The Secretary of State must bring forward regulations under section 15(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.
- (2) The regulations brought forward under subsection (1) must specify that the conditions set out in subsection (3) are prescribed conditions.
- (3) The conditions are that an individual must-
- (a) require advice and assistance regarding a sentence;
 - (b) require advice and assistance regarding the individual’s treatment or discipline in a prison (other than in regard of actual or contemplated proceedings regarding personal injury, death or damage to property);
 - (c) be the subject of proceedings before the Parole Board; or
 - (d) require advice and assistance regarding representation in relation to a mandatory life sentence or other parole board review.
- (3) For the purposes of this section:
- “*treatment*” includes, but is not limited to:
 - (a) eligibility for placement in a mother and baby unit; and
 - (b) segregation and placement in a Close Supervision Centre.
 - “*discipline*” includes, but is not limited to, disciplinary proceedings where no additional days may be awarded.
 - “*sentence*” includes, but is not limited to:
 - (a) categorisation;

- (b) resettlement and licence conditions;
- (c) sentence calculation and sentence progression; and
- (d) access to offending behaviour work.”

- “*prescribed conditions*” are conditions prescribed for the purposes of section 15(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

- “*prison*” includes a young offender institution, secure training centre or any place designated by the Secretary of State as a place for a person to be detained.

Effect

The Criminal Legal Aid (General) (Amendment) Regulations 2013 (“the 2013 Regulations”) removed from the scope of legal aid all matters relating to a person’s treatment in prison, leaving in place provision for a restricted range of issues relating to sentence calculations, disciplinary hearings, and reviews by the Parole Board where it has the power to order a prisoner’s release.¹ As Liberty stated at the time, plans to remove prison law from the scope of legal aid undermine rehabilitation and allow the abuse of vulnerable prisoners, including those with serious disabilities, to go unchecked.² New clause 10 would require the Secretary of State to bring forward regulations re-introducing legal aid in areas of prison law where it has been excluded. The amendment details some of the specific areas where provision for advice and assistance must be made, such as for those refused placement in a mother and baby unit and those requiring legal assistance to progress through their sentence.

In accordance with the provisions of section 15(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2015 (LASPOA), the Secretary of State could stipulate that the Director of Legal Aid Casework must make a grant of legal aid subject to an assessment of financial resources and other criteria set out in the Regulations. The Regulations could also prescribe the form, time-limit and other procedural requirements for applications and determinations.

¹ The Regulations are currently under challenge in judicial review proceedings brought by the Howard League for Penal Reform and the Prisoners’ Advice Service, after the Court of Appeal gave them leave to do so in 2015. See *R (on the application of the Howard League for Penal Reform, Prisoners’ Advice Service) v The Lord Chancellor* [2015] EWCA Civ 819. The case was heard in late January 2017.

² Liberty, ‘Liberty’s Response to the Ministry of Justice Consultation ‘Transforming Legal Aid: Next Steps’’, November 2013, available here: https://www.liberty-human-rights.org.uk/sites/default/files/Liberty-s-Response-to-the-Legal-Aid-Next-Steps-Consultation-Nov-2013_0.pdf.

Briefing

In granting permission to appeal in a case brought by the Howard League for Penal Reform and the Prisoners' Advice Service, the Court of Appeal accepted that it was arguable that the restrictions introduced by the 2013 Regulations "*could carry an unacceptable risk of unfair, and therefore unlawful, decision making*".³ Over and above the question of whether these provisions risk such unfairness as to be unlawful, is the broader question of securing the purposes endorsed by the Government in this Bill, namely rehabilitation, preparation for life outside prison and maintenance of a safe and secure environment. Legal aid helps to ensure proper treatment of prisoners, improved conditions in prisons, and better prospects for reform.

The Government itself acknowledged that legal aid cuts may have a negative impact, but asserted that the screening carried out by the National Offender Management Service (NOMS) will be sufficient to ensure that reasonable adjustments are made. However, even if screening of prisoners is carried out, removal of legal aid leaves individuals unable to properly challenge that assessment, or the treatment that is actually provided to them as a result. Rehabilitation is profoundly threatened if prisoners are not treated properly. Many prison law cases will involve issues crucial for a person's successful rehabilitation – such as resettlement licence conditions – and the changes have left individuals unable to properly challenge faulty decision-making in respect of these matters. Moreover, a failure to make appropriate adjustments for prisoners with learning difficulties or other disabilities, or mental health issues, for example, risks breaching human rights protections and puts lives at risk.

The need for real legal accountability has become particularly serious in recent years. There is compelling evidence to suggest that England and Wales' prisons are unsafe for prisoners and staff – much less for individuals made seriously vulnerable by mental illness or disabilities. Between 2005 and 2015, the proportion of prisoners who have suffered an assault, for example, has more than doubled. Just last year, there were over 20,500 incidents of assault in prisons in England and Wales. The Justice Committee in 2015 published its report into prison planning and policies and found that levels of safety in prisons have significantly diminished when measured against all criteria.⁴ Prison violence overall has recently been found by the Prisons and Probation Ombudsman to be at a "wholly

³ R (Howard League for Penal Reform, Prisoners' Advice Service) v The Lord Chancellor [2015] EWCA Civ 819, para 25.

⁴ House of Commons, Justice Committee, 'Prisons: planning and policies', HC 309 2014-15, 4 March 2015, available here: <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/309/309.pdf>.

unacceptable level”.⁵ Across the same period, the proportion of prisoners self-harming has increased by 25% since 2014 – with the proportion of male prisoners harming themselves almost doubling. Overall, the number of individual prisoners self-harming has increased by 62% since 2005.⁶

An internal, administrative complaints system is not an adequate substitute for judicial due process. A complaints system and the Ombudsman cannot properly adjudicate on the rights of individuals, nor on the lawfulness of state action. Their recommendations are not binding on parties as a legal judgment, nor do they have the same powers to award damages. Most importantly, the Ombudsman can only review decisions that have already been made and so cannot prevent unlawful decision making or actions. The Ombudsman is not required to have legal training nor expertise in dealing with cases involving vulnerable prisoners, who may have mental health problems or learning difficulties requiring special assistance.

Moreover, the Prisons Ombudsman was already subject to systemic delays before the legal aid changes were made.⁷ In the year following the cuts to prison legal aid, experts in prison law attest to the dire conditions for those seeking to complain about their treatment in prisons or ensure accountability for decisions made by prison authorities. The Howard League saw a 45 per cent increase in calls to its advice line, with its legal team *“overwhelmed with requests from young people with nowhere else to turn”*.⁸ The Prisoners’ Advice Service also saw an increase in calls to their advice line from 14,000 to 25,000 in the last year. This is just as predicted before the Regulations came into force by, for example, the Joint Committee on Human Rights.⁹

Liberty urges Parliamentarians to support New Clause 10 and use the crucial opportunity presented by the Prisons and Courts Bill to address the parlous state of access to justice for prisoners, and the dire need for a restoration of legal aid.

⁵ *The Guardian*, ‘Prison violence at ‘wholly unacceptable’ level, ombudsman finds’, 21 September 2016, available here: <https://www.theguardian.com/society/2016/sep/21/prison-violence-at-wholly-unacceptable-level-ombudsman-finds>.

⁶ House of Commons Library, Briefing Paper, ‘Prison Population Statistics’, 4 July 2016, p. 16, available here: <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN04334>.

⁷ The Prisons Advisory Service reporting that non-urgent cases were not being allocated for 10 to 12 weeks and decisions not made for up to 8 months.

⁸ Howard League for Penal Reform, ‘Court of Appeal allows charities to challenge legal aid cuts for prisoners’, 28 July 2015, available here: <http://howardleague.org/news/legalaidchallenge/>.

⁹ House of Commons, Joint Committee on Human Rights, ‘The implications for access to justice of the Government’s proposals to reform legal aid’, HC766 2013-14, 11 December 2013, paragraph 168, available here: <http://www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/100/100.pdf>.

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