

Submission to the Joint Committee on Human Rights - The implications for access to justice of the Government's proposed legal aid reforms

by HM Chief Inspector of Prisons

Summary

- HMI Prisons is an independent inspectorate. This submission is based on HM Inspectorate of Prisons' experience of both adult prisons and immigration removal centres (IRCs).
- We are concerned by the proposal that criminal legal aid for prison law matters should be restricted to the criteria set out in the government's consultation paper 'Transforming Legal Aid', and that it is reliant on both an effective complaints system and on reasonable adjustments being made to ensure prisoners with learning difficulties and/or mental health problems can use the complaint system. Our inspection evidence suggests a distinct lack of confidence in the prisoner complaints system, particularly amongst those prisoners reporting as having a disability or a mental health issue. It is our view that prisoners with identified communication, mental health problems and learning difficulties should be able to obtain legal aid on the current basis.
- We are also concerned that some important sentence issues such as parole related sentence planning and the use of segregation and 'deep' custody will not be eligible for legal aid. Given the very severe consequences of these matters for the individuals concerned, we do not think it is consistent with even the Government's other proposed legal aid reforms to exclude these matters from legal aid.
- We do not agree that the residence test should be introduced in civil legal aid cases. While the test would apply to UK residents, its impact would disproportionately affect foreign nationals and therefore be discriminatory.
- We would welcome the opportunity to discuss our findings further.

Introduction

1. We welcome the opportunity to submit evidence to the Joint Committee on Human Rights' inquiry into the implications for access to justice of the Government's proposed legal aid reforms.
2. Her Majesty's Inspectorate of Prisons (HMI Prisons) is an independent inspectorate whose duties are primarily set out in section 5A of the Prison Act 1952. HMI Prisons has a statutory duty to report on conditions for and treatment of those in prisons, young offender institutions (YOIs) and immigration detention facilities. HMI Prisons also inspects court custody, police custody and customs custody (jointly with HM Inspectorate of Constabulary), and secure training centres (with Ofsted).

3. HMI Prisons is one of the organisations that deliver the UK government's obligations arising from its status as a party to the UN Optional Protocol to the Convention Against Torture (OPCAT). OPCAT requires state parties to establish an independent National Preventative Mechanism (NPM) to inspect of all place of detention. Article 19 (c) of the Protocol sets out the NPM's powers to submit proposals concerning existing or draft legislation.
4. We inspect adult male prisons at least once every five years and immigration removal centres (IRCs) at least once every three years. All inspections are full and almost all are unannounced. Inspections are conducted jointly with Ofsted, Care Quality Commission (CQC) and specialist pharmacy inspectors. In addition to individual inspections, we periodically carry out cross-cutting thematic reviews.
5. All inspections are carried out against our *Expectations* - independent criteria based on relevant international human rights standards and norms. Expectations are brigaded under four healthy prison tests: safety, respect, purposeful activity and resettlement. HMIP has separate sets of expectations for prison and for IRCs.¹ All our expectations are supported by a series of 'indicators' which we would expect to see in place if the expectation is met although these do not preclude an establishment demonstrating to us that the expectation is met in other ways.
6. On each inspection we carry out a survey of a randomly selected sample of prisoners to obtain their views and perceptions on all aspects of their life in the prison. These surveys have now been undertaken for many years and provide an opportunity for us to compare prisoners' views in each establishment with both the previous inspection and comparable establishments.

The prisoner complaints system and other routes to resolution

7. This government's proposal '*places a restriction on the scope of advice and assistance, including advocacy assistance, in criminal legal aid for prison law*' to particular cases. The consultation paper suggests that these cases alone are of sufficient priority to justify the use of public money, and that the internal prisoner complaints system and Prisons and Probation Ombudsman, Independent Monitoring Boards and in some cases, the Parole Board and Prison Service HQ are adequate mechanisms to resolve prisoner complaints about their treatment and some important sentencing matters.
8. The importance of legitimate mechanisms, in which prisoners have confidence, to resolve their complaints and concerns is crucial to the overall safety of a prison. One of Lord Woolf's recommendations in his 1991 report into the Strangeways prison riots concerned a series of measures to improve standards of justice within prisons and ensure a prisoner is given reasons for any decision which materially and adversely affects him or her. The vast majority of these matters can be sorted out simply and quickly without resource to formal procedures let alone the law. Nevertheless, our inspection evidence is that the prison complaints system cannot be completely relied on to resolve all such matters and this is a particular concern for prisoners who lack the competence to advocate on their own behalf or for where the treatment of excluded sentencing matter is particularly serious.

¹ *Expectations. Criteria for assessing the treatment of prisoners and conditions in prison, version 4, 2012.*

<http://www.justice.gov.uk/downloads/about/hmipris/adult-expectations-2012.pdf>

Expectations. Criteria for assessing the conditions for and treatment of immigration detainees, version 3, 2012.

<http://www.justice.gov.uk/downloads/about/hmipris/immigration-expectations.pdf>

9. The Francis Report of the Mid-Staffs enquiry pointed to the concern that patients and their families have that making a complaint would lead to victimisation. If that was a concern in a hospital, it is likely to be much more of a concern in a prison and, whether justified or not, many prisoners tell us they do not use the complaints system for fear of reprisals.
10. Our specific expectation and indicators that relates to complaints can be found in the safety section of our *Expectations* and states:

Prisoners have confidence in complaints procedures, which are effective, timely and well understood:

- *Prisoners are encouraged, where appropriate, to solve areas of dispute informally, before making official complaints.*
 - *All complaints, whether formal or informal, are dealt with fairly and responded to promptly, with either a resolution or comprehensive explanation of future action.*
 - *Prisoners receive responses to their complaints that are respectful, easy to understand and address the issues raised.*
 - *Complaints are signed and dated by the respondent.*
 - *Responses are evidence-based, factual and fair and address the issues raised in the complaint.*
 - *Prisoners feel and are able to ask for help in completing their complaint and in copying relevant documentation.*
 - *Complaints deemed urgent by prisoners are fully assessed and responded to.*
 - *An effective monitoring system is in place to analyse complaints (both upheld and refused) each month, by all protected characteristics and more widely (by location, prisoner type, etc) to identify patterns and make any appropriate changes.*
 - *Prisoners are consulted regularly about the internal complaints system to monitor and maintain confidence in the system.*
 - *Information about complaints, including how to access the Independent Monitoring Board (IMB) and the Prisons and Probation Ombudsman (PPO), is reinforced through notices and posters displayed prominently across the prison in a range of formats and languages.*
 - *All prisoners know how to contact members of the IMB and the PPO, and can do so in confidence.*
 - *There is an effective and thorough quality assurance system in place and the complaints procedure has been impact assessed.²*
11. HMI Prisons frequently reports that prison complaints systems are not working. Survey findings from the 2012-13 reporting period show that:
 - 13% of prisoners said that it was not easy to make a complaint.
 - of those prisoners who reported that they had made a complaint, nearly two-thirds (62%) felt that it had not been sorted out fairly
 - the highest percentage of prisoners who felt their complaint had not been sorted out fairly was found in high security prisons
 - of those prisoners who had made a complaint, over half (59%) felt their complaints were not dealt with promptly (within seven days).
 - overall, 17% of prisoners said that they had been prevented from making a complaint when they wanted to; the highest proportion (27%) of prisoners reporting this was found in high security prisons
 - when asked how easy it was to see the Independent Monitoring Board (IMB), 17% of all prisoners said that it was 'difficult' or 'very difficult' to see the IMB. Overall, 34% of prisoners said that they did not know who the IMB were.

² *Expectations. Criteria for assessing the treatment of prisoners and conditions in prison, version 4, 2012, op.cit.*

12. Examples of establishments where inspections have identified problems with the complaints process include:

- Wakefield³ – serious allegations against staff were not adequately investigated
- Ranby⁴ – the complaints processes were weak. Many complaints related to matters that could have been dealt with more quickly by application, and some did not address the issues raised
- The Verne⁵ – prisoners lacked confidence in the complaints process and outcomes were insufficiently analysed. Prisoners expressed concerns that if they complained too often they would be transferred out
- Bullingdon⁶ – many prisoners were not confident that complaints about staff would be properly investigated. In some cases, staff at too low a grade replied to complaints dismissively, showing disregard for the issues raised. In others, the officer who was the subject of the complaint responded, which was inappropriate. A number of complaints about alleged physical assault by staff received unacceptable cursory replies with no evidence that there had been an investigation; these included responses from governor grade staff.
- Canterbury⁷ – prisoners had poor access to the complaints procedure. Although complaint forms were available on the residential wings, in our survey fewer prisoners than the comparator (44% against 64%) said that it was easy to make a complaint, and 23% (against 16%), said they had been prevented from making a complaint. Complaint forms in languages other than English were only available on request from wing officers, which might have inhibited some prisoners from complaining. A complaints information leaflet written in plain English and containing diagrams was available on the wings. Replies to complaints were generally on time. Many of the complaints we examined could have been dealt with as applications. Some staff made good efforts to resolve issues but many were dismissive and unhelpful. For example, a Chinese prisoner who was reprimanded for not following an officer's instructions complained that his poor English prevented him from understanding the officer and that he had been discriminated against. The reply told him he should have spoken to the staff as 'this would save a lot of work'.
- Channings Wood⁸ – some prisoners told us that they were not confident that complaints about staff would be properly investigated. Those submitted concerned mainly low level issues and were overseen by a residential governor and most were properly investigated. However, one complaint alleging staff intimidation, to which a senior officer had initially responded, remained unresolved three months after the initial complaint.

³ *Report on an unannounced full follow-up inspection of HMP Wakefield, May 2012. London: HMIP* (<http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/prison-and-yoi-inspections/wakefield/wakefield-2012.pdf>)

⁴ *Report on announced inspection of HMP Ranby, March 2012. London: HMIP* (<http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/prison-and-yoi-inspections/ranby/ranby-2012.pdf>)

⁵ *Report on an unannounced inspection of HMP The Verne, October 2012. London: HMIP* (<http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/prison-and-yoi-inspections/verne/the-verne-2012.pdf>)

⁶ *Report on an unannounced inspection of HMP Bullingdon, July 2012. London: HMIP* (<http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/prison-and-yoi-inspections/bullingdon/bullingdon-2012.pdf>)

⁷ *Report on an announced inspection of HMP Canterbury, July 2012. London: HMIP* (<http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/prison-and-yoi-inspections/canterbury/canterbury-2012.pdf>)

⁸ *Report on an announced inspection of HMP Channings Wood, September 2012. London: HMIP* (<http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/prison-and-yoi-inspections/channings-wood/channings-wood-2012.pdf>)

- Frankland⁹ - a policy that complaints should be answered at the lowest possible level meant that they were often inappropriately answered by the subject of the complaint. Appeals were dealt with by first line managers, which meant senior managers rarely saw complaints. A monthly quality assurance system, which assessed 10% of prisoner complaints, was insufficiently rigorous to identify poor practice. Complaints that alleged problems relating to diversity were not routinely converted into discrimination incidents, and the prison failed to identify and investigate the over-representation of black and minority ethnic prisoners among complainants
13. Our inspection evidence is that the internal prisoner complaints system cannot be entirely relied on to consistently resolve prisoner complaints and concerns in a fair way. We recognise that the Prisons and Probation Ombudsman (PPO) does provide one level of safeguard for prisoners whose complaint has not been dealt with fairly by the internal system. However, we note the already high demand for the Ombudsman's services and that concerns about victimisation or lack of knowledge about this service are likely to restrict access.
 14. We echo concerns raised by the PPO in their response to the legal aid consultation that non-legal aid funded complaint resolution mechanisms, such as the PPO, may face an increase in demand if the proposals go ahead. If this is to be the case we think it is essential that the PPO has the resources required to deal with an increase in demand. In our view, the Ombudsman's powers should be placed on a statutory footing
 15. The government's proposals will have a particular impact on prisoners who have mental health/learning difficulties, as well as those held within the most restricted custody. As stated in the consultation document, the proposal is likely to result in:
 - the removal of criminal legal aid advice and assistance for all treatment matters, including for those with learning difficulties and/or mental health issues; and
 - lack of entitlement to criminal legal aid for sentencing matters for prisoners held in the most restricted custody – such as segregation, close supervision centres and dangerous and severe personality disorder referral units – as they do not engage in any of the proposed scope criteria.
 16. There is a wealth of evidence that prisons do not consistently make adequate provision for prisoners with learning difficulties and/or mental health issues – most recently in much of the evidence given to the Justice Committee's current enquiry into older prisoners. Lord Bradley's report identified a number of concerns, including the lack of training for prison staff in mental health awareness. Our inspections still find this to be a common problem. Our most recent annual report identified that the training of prison staff to recognise prisoners with mental health issues was inadequate.¹⁰ We have also found that prisons often do not make 'reasonable adjustments' for these groups to ensure they can adequately access the 'normal' means of making complaints.
 17. In our 2012-13 reporting period, prisoners who considered themselves to have a disability were significantly less likely to report that they felt that their complaints were dealt with fairly than those who did not consider themselves to have a disability (32% compared with

⁹ *Report on an unannounced inspection of HMP Frankland, December 2012. London: HMIP* (<http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/prison-and-yoi-inspections/frankland/frankland-2012.pdf>)

¹⁰ *Her Majesty's Chief Inspector of Prisons England and Wales Annual Report 2011-12. London HMIP* (<http://www.justice.gov.uk/downloads/publications/corporate-reports/hmi-prisons/hm-inspectorate-prisons-annual-report-2011-12.pdf>)

40%), or that complaints were dealt with promptly (38% compared with 42%). Prisoners who considered themselves to have a disability were significantly more likely to say that they had been prevented from making a complaint when they wanted to, compared with prisoners who did not consider themselves to have a disability (21% and 15% respectively). Responses to the above questions are filtered to only include prisoners who have made a complaint. Other groups of prisoners with communication difficulties, such as prisoners with speech and communication problems and foreign national prisoners whose first language is not English, may also have difficulty using the complaints system.

18. Prisoners who considered themselves to have a mental health problem were significantly less likely than those who did not to feel that their complaints were dealt with fairly (31% compared with 41%), or that complaints were dealt with promptly (36% compared with 44%). Prisoners who considered themselves to have a mental health problem were also significantly more likely than those who did not to say that they had been prevented from making a complaint (23% compared with 14%), and were significantly less likely to say that it was easy or very easy to see the IMB (24% compared with 30%). Responses to the above questions are filtered to only include prisoners who have made a complaint.
19. In our view, at the very least, prisoners with identified communication, mental health problems and learning difficulties should be able to obtain legal aid on the current basis. This view is supported by the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, which call for special measures to be taken to ensure “meaningful access to legal aid” for, inter alia, persons with disabilities and persons with mental illnesses, taking into account their special needs.¹¹
20. We are also concerned that, once implemented, prisoners with important sentence issues such as parole-related sentence planning and the use of segregation and ‘deep’ custody, will be unable to get legal aid about these matters. Given the very severe consequences of these matters for the individual concerned, we do not think it is consistent with even the other proposals in this consultation paper to exclude these matters from legal aid.
21. Furthermore, these restrictions on legal aid fall below the threshold established in the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, which specify that imprisoned persons must have access to legal aid for the purpose of: “submitting appeals and filing requests related to their treatment and the conditions of their imprisonment, including when facing serious disciplinary charges...as well as for applications for parole and representation at parole hearings.”¹²
22. A recent inspection of a Bronzefield women’s prison identified a restricted status woman prisoner who had been held in segregation for more than five years. In our view, her treatment was cruel and degrading and we believed it was likely to be adversely affecting her mental health. It would not be acceptable to deny a woman in this situation access to legal aid, which would be essential if she wanted to challenge her status and the treatment that resulted. There are relatively few prisoners in this situation, and we hope the Minister will reconsider the proposals for this group.
23. Our inspections repeatedly identify indeterminate sentence prisoners who are unable to progress their sentence plan because they cannot access appropriate courses. This has very severe consequences for the individual and, in our view, this is an issue about sentence

¹¹ Principle 10. : United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems. A/RES67/187. 28 March 2013.

¹² Guideline 6. : United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems. A/RES67/187. 28 March 2013.

length that ought to be suitable for legal aid in accordance with the principles set out in the consultation paper.

Introducing a residence test

24. We do not agree with the introduction of a residence test for foreign national prisoners or immigration detainees. Immigration detainees should be funded to challenge the lawfulness of their detention regardless of their ties to the UK. In our immigration removal centre (IRC) inspections we repeatedly find detainees held for years at a time. Several have successfully challenged the lawfulness of their detention using legal aid. Removing the right to legal aid for such individuals may increase the likelihood that these cases will remain unresolved.
25. The 2011 Independent Monitoring Board annual report of Harmondsworth¹³ raised significant concerns relating to the treatment of detainees suffering from mental health issues. Since 2011, the High Court has found in favour of four individuals who have brought cases against the UK Border Agency. The court found *inter alia* that the defendants had been falsely imprisoned and subject to inhuman and degrading treatment in violation of their Article 3 rights under the European Convention on Human Rights. The introduction of a residency test makes it less likely that this type of ill-treatment will come to the attention of the courts.
26. Taking all this evidence into consideration, we consider that the residence test should not be introduced in civil legal aid cases to individuals who are detained. While the test would apply to UK residents, its impact would disproportionately affect foreign nationals and therefore be discriminatory. In this way, the proposals undermine the principle of equity in access to legal aid, which requires special measures to be taken to ensure meaningful access to legal aid for “stateless persons, asylum seekers, foreign citizens, migrants and migrant workers, refugees and internally displaced persons”.¹⁴ We are concerned at the proposed changes which will: restrict access to justice for vulnerable immigration detainees; remove funds for mentally ill detainees to challenge the lawfulness of their detention; and not assist failed asylum seekers with further representations.

The Government’s response

27. In its reply to our response the government argued that:

‘HMIP’s annual report contains a comparison of survey scores of prisoners who consider themselves to have a disability and those who do not; these data include prisoners with a physical disability as well as those with mental health issues and/or learning disabilities. HMIP’s 2011-12 Annual Report (latest available) indicates the following:

Q. Is it easy to get a complaints form?

Disabled – 82% Yes

Non-disabled – 83% Yes

Q. Have you made a complaint?

Disabled – 55% Yes

Non-disabled – 46% Yes

¹³ <http://www.justice.gov.uk/downloads/publications/corporate-reports/imb/annual-reports-2011/harmondsworth-2011.pdf>

¹⁴ Principle 10. : United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems. A/RES67/187. 28 March 2013.

Q. Is there a member of staff in this prison that you can turn to for help if you have a problem?

Disabled – 76% Yes

Non-disabled – 75% Yes

We acknowledge that HMIP's response to the consultation contained data indicating that prisoners with mental health issues and/or learning disabilities (as well as prisoners generally) did not have confidence in the complaints system and that outcomes were poor. However, the information from the 2011-12 Annual Report referred to above suggests a different picture in terms of accessibility, willingness to use the system and the potential for reasonable adjustments to be made when comparing disabled and non-disabled prisoners. Although respondents had concerns around potential impacts on these prisoners we consider the processes set out in PSI 02/2012 (Prisoner complaints), PSI 32/2011 (Ensuring equality) and 75/2011 (Residential services) are sufficient to ensure they are able to make effective use of the complaints system and access the other alternative means of redress.'

28. The figures quoted by the Government are incorrect. The actual figures used in the 2011/12 annual report can be found below:

Q. Is it easy to get a complaints form?

Disabled – 79% Yes

Non-disabled – 81% Yes

Q. Have you made a complaint?

Disabled – 54% Yes

Non-disabled – 46% Yes

Q. Is there a member of staff in this prison that you can turn to for help if you have a problem?

Disabled – 71% Yes

Non-disabled – 72% Yes

29. In the first and second questions those who consider themselves as disabled found it significantly¹⁵ more difficult to get a complaints form and make a complaint, than prisoners who do not consider themselves disabled. The third question shows that there is no significant difference between those that consider themselves to have a disability and those that do not.

30. Our inspection evidence continually indicates that these groups of prisoners (as well as prisoners more generally) do not have confidence in the complaints system. Data in our 13/14 annual report, which is unpublished, found that responses from prisoners that considered themselves to have a disability were significantly worse than responses from their non-disabled counterparts. .

. Q. For those who have made a complaint, do you feel complaints are dealt with fairly?

Disabled – 32% Yes

Non-disabled – 40% Yes

Q. For those who have made a complaint, do you feel complaints are dealt with promptly?

Disabled – 38% Yes

¹⁵ Statistical significance is a way of estimating the likelihood that a difference between two samples indicates a real difference between populations from which the samples are taken, rather than being due to chance. The significance level is set at 0.05, which means that there is only a 5% chance that the difference in results is due to chance.

Non-disabled – 42% Yes

Q. Have you ever been prevented from making a complaint when you wanted to?

Disabled – 21% Yes

Non-disabled – 15% Yes

31. The government's reply also raised the possibility of this inspectorate conducting a thematic inspection of the prison complaints system. We would be open to discussing whether and how this should be progressed.

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