Annette Cowell  
Ministry of Justice  
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30 May 2013  

Dear Ms Cowell  

Response of the Prisons and Probation Ombudsman to the Ministry of Justice consultation paper CP14/2013 (Transforming legal aid: delivering a more credible and efficient system)  

The Prisons and Probation Ombudsman independently investigates complaints from prisoners, those on probation and those held in immigration removal centres who have exhausted the internal service complaint system and meet certain other eligibility criteria (I also investigate all deaths that occur among prisoners, immigration detainees and residents of probation approved premises). The particular focus of this response is the suggested change set out in Chapter 3 of the consultation document to prison law in so far as this impacts on the prisoner complaints system.  

Two substantive risks to the effective functioning of my office have been identified in the proposals at 3.14 to restrict legally aided advice and assistance, including advocacy assistance in criminal law, to cases that involve the determination of a criminal charge for the purpose of the right to a fair trial under article 6 of the European Convention of Human Rights (ECHR); or engage article 5.4 of the ECHR (right to have ongoing detention reviewed); or require legal representation as a result of successful application of the “Tarrant” criteria in a prison disciplinary hearing.  

The two risks that I appear to face are:  

- An un-funded and, therefore, unmanageable increase in demand  
- Further exposure of the limitations inherent in my office’s lack of a statutory footing  

An unfunded increase in demand  

It is probable that non-legal aid funded complaint resolution mechanisms, such as my office, will face an increase in demand if these proposals are enacted.  

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Yet my office is already required to deliver more with diminishing resources. In 2012-13, my office received a 2% overall increase in complaints but also an 8% increase in eligible complaints (from 51% to 59%). This was a substantial increase in investigative workload.

At the same time, resources for my office fell by 7% in 2012-13 and will have reduced by over 14% between 2010 and 2015. A major focus of my office has, therefore, been to reorganise and rationalise to survive. An organisational restructure is currently in train to deliver the necessary savings by 2015, together with the introduction of greater proportionality and process reengineering.

Proportionality is key to doing more for less. Scarce resources are being targeted at the most serious complaints, for example of assault by staff or other prisoners, bullying or racism. These can be complex cases in which we have to interview the complainant, other detainees and staff. We need to get these cases right, as detainee safety as well as staff careers, may be a stake. It is, after all, a key part of my function to ensure that independent investigation helps eradicate abuse in custody (as required by article 3 of the ECHR).

However, a proper focus on serious cases in straightened times means I have less resource for other cases. Accordingly, I have increasingly declined to investigate cases where there is likely to be no worthwhile outcome or where circumstances change and the case can be withdrawn. I am also being more robust about unreasonable behaviour, for example limiting access by inappropriately prolific complainants.

There is, therefore, no slack whatsoever. Indeed, there is increasing challenge from complainants about the introduction of greater proportionality and my inability to investigate as comprehensively as was once possible.

Worse, while some aspects of my office’s performance have improved dramatically (in 2012-13, fatal incident investigations timeliness rose from 21% to 55% and the timeliness of assessment of complaint eligibility rose from 40% to 65%) other areas, specifically the timeliness of complaint investigations, slipped badly (from 53% to 33%) and a significant backlog is emerging. Unfunded new demand will, therefore, be hugely detrimental to what is already a significantly challenging agenda.

It should also be remembered that this office was created after a sequence of severe prison disturbances which Lord Justice Wolfe considered might have been at least in part avoided if legitimate prisoner frustrations had had an adequately funded, independent complaint body available to allow ventilation and resolution of complaints. Today’s much larger prison population has no less need for such a mechanism, particularly if there is less recourse to publicly funded legal advice.

Unfortunately, it is not possible to be clear about the scale and nature of the prospective increase to my office’s workload from the proposals. Thus while an increase appears to be recognised by the impact assessment for the proposals (IA No:MoJ195), this merely states at paragraph 24, under the heading “Prisons and Probation Ombudsman”: Cont/d....
"The total cost is unquantifiable as the volume of cases that will pursue their case (sic) through these routes is uncertain".

This brief, confusing and peremptory analysis is unsatisfactory. An increase in demand on my office is expected but no quantification has been attempted and no commensurate increase in funding has been discussed with me.

It is, however, possible to envisage a number of specific areas of work which currently attract legal aid and are likely to be redirected to me if this aid is removed. These include complaints about non-Tarrant aspects of adjudications, categorisation, temporary release on licence, home detention curfew and pre-tariff sifts for indeterminate sentence prisoners undertaken by Prison Service staff. It may also be that lawyers currently act as a brake on certain complaints where they feel that there is no case for investigation (or that we are the wrong body to contact) and legally aided lawyers may also support prisoners to meet our eligibility criteria. The changes could, therefore, result in my office receiving more ineligible complaints.

In summary, under the proposals my office may be left to absorb the costs of efficiencies elsewhere in the criminal justice system (as also appears to have happened with the streamlining of the internal Prison Service complaint system, an issue already lodged with senior officials in the Ministry of Justice).

In conclusion, I must ask that Ministers and officials in the Ministry of Justice assure me that increases in demand arising from the prison law legal aid changes will result in commensurate increases in resources to my office.

Exposure of the limitations of my lack of a statutory footing

A second issue that I draw to Ministers’ attention is that the proposed changes may further expose the limitations of my office’s lack of a statutory footing and increase the risk of legal challenge.

Ministers in this and previous Governments have made commitments to place my appointment and authority on a statutory footing, but I remain an appointment of the Secretary of State, albeit one subject to confirmation by the Justice Select Committee of the House of Commons.

Similarly, my operational independence is not enshrined in law but in terms of reference and a framework document agreed with Ministers. This means that I have no statutory right or duty of investigation, I have no legally protected right of unfettered access or publication, and I have only the ability to make non-binding recommendations where I identify failings – the contrast with definitive complaint resolution through the courts is one which lawyers have been keen to point out and one which may ultimately be challenged in the courts.

Despite my unwavering commitment to exercise independence of mind and decision-making – and, to date, complete support for my operational independence from both Ministers and the services in remit - the damage to perceived and actual independence of not having a legal underpinning is inescapable.

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It is also detrimental to my role in supporting the United Kingdom to comply with its obligations under article 2 of the ECHR regarding the need for independent investigation of deaths in custody, and article 3 regarding independent investigation of allegations of inhumane or degrading treatment. Inevitably, this weakness has been the subject of much comment from lawyers during the consultation.

In conclusion, increased focus on my office as a consequence of these proposals risks emphasising my lack of a statutory footing - and makes its resolution all the more pressing.

Yours sincerely

Nigel Newcomen CBE
Prisons and Probation Ombudsman

cc Jeremy Wright MP, Parliamentary Under-Secretary of State for Justice
Michael Spurr
Antonia Romeo
Helen Judge
Daniel Webb