Transforming legal aid: delivering a more credible and efficient system

Response from NAT (National AIDS Trust)

NAT (National AIDS Trust) welcomes the opportunity to respond to this consultation on transforming legal aid. NAT is the UK's HIV policy charity. We are very concerned about the impact the proposals in this consultation will have on people living with HIV in the UK.

As people living with HIV are disproportionately affected by poverty, they are more likely to need to rely on legal aid in order to get legal advice on civil and criminal matters. HIV is a complex condition which is not well understood by non specialists, and for this reason people with HIV may also need to rely on judicial review in order to get fair access to social care, housing and benefits.

In addition, people living with HIV in the UK are more likely than the general population to be found in two of the groups most affected by these proposals: migrants and prisoners.

Finally, some people living with HIV face prosecution for 'reckless' or 'intentional' transmission of HIV to others. These cases are rare and not always well investigated/handled. Poor investigation of such cases poses a real risk to the rights and dignity of people living with HIV, and expert legal advice is essential to prevent this. The proposals around case allocation at police stations will undermine this.

We have chosen to focus our response on the proposals outlines in *Chapter 3: Eligibility, Scope and Merits* and *Chapter 4: Introducing Competition in the Criminal Legal Aid Market (viii- case allocation).*

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Chapter 3: Eligibility, Scope and Merits

1) Restricting the scope of legal aid for prison law

Q1. Do you agree with the proposal that criminal legal aid for prison law matters should be restricted to the proposed criteria? Please give reasons.

NAT does not agree with this proposal.

Prisoners should continue to have access to legal aid for advice and representation on questions related to their treatment while in prison. Internal prisons complaints procedures are not always adequate to deal with all of the issues which may arise around treatment in prisons, especially those which deal with sensitive issues around health. In particular, prisoners who have been denied access to appropriate HIV prevention and care services may need additional advocacy and support from a lawyer. Without trusted legal advice many prisoners may be unwilling to take further action on complaints about these issues, given the stigmatised nature of both blood borne viruses and sexual activity within prisons.

NAT has been aware for some years that prisoners living with and at risk of HIV do not consistently have their healthcare and prevention needs met while in prison.[1] This has been highlighted again recently by the Commission on Sex in Prisons, which has heard of case studies of prisoners who have not been able to access condoms and lubricant to prevent onwards transmission of HIV – despite prisons in England and Wales committing to provide these where needed.

In addition, the prison setting presents challenges for maintaining the same quality of HIV treatment and care which is provided by the NHS to the general public. HIV treatment must be taken at the same time each day with at least 95% adherence to be effective. Prisoners must also attend regular appointments with a specialist clinician. Any interruption in treatment can have extremely serious for the health of the individual (including the potential development of drug resistance) and also greatly increases the risk of onwards transmission of HIV.

Prisoners can of course use the internal complaints procedure as a first step, but given the seriousness of these issues, it is vital that they additionally have access to legal advice when needed, in case an adequate solution is not forthcoming.

Legal aid for prison law matters should not be limited as proposed. It is vital that prisoners continue to get legal advice on issues of treatment in prisons when needed, particular those to do with accessing health services.

[1] NAT and Prison Reform Trust. 2005. HIV and Hepatitis in prisons: Addressing prisoners' healthcare needs. http://www.nat.org.uk/Media%20library/Files/PDF%20documents/prisonsreport.pdf; Positively UK. 2013. HIV behind bars. http://www.positivelyuk.org/docs/HIV%20Behind%20Bars%20-%20Pos%20UK%20Prison%20Report.pdf

3) Introducing a residence test

Q4. Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK? Please give reasons.

NAT does not agree with the proposals to limit legal aid to those who have been lawfully resident in the UK for at least 12 months. This will leave the most vulnerable people living with HIV without the advice they need to access healthcare, housing and social care.

Around a third of people living with HIV in the UK were born in Africa. Many have been lawful residents in the UK for over 12 months but others have not, including those who came to the UK seeking asylum from countries which have elevated HIV prevalence. Under the proposals outlined in Chapter 3, both those who are *successful* in their asylum claim and those who are *not* will be left without access to free legal advice at a time when they are most vulnerable and least able to assert their rights to healthcare and basic services.

<u>NHS charging policies and access to treatment</u>

Migrants who have been living in the UK for less than 12 months are subject to NHS charging regulations when accessing secondary care. There are many exemptions to these charges, but those most likely to be affected include refused asylum seekers and others who do not have regularised immigration status.

Anyone living in England is able to access HIV treatment without charge, regardless of residency status or how long they have been in the UK. In Wales, refused asylum seekers are not charged for accessing NHS services, including HIV treatment. However, there are migrants living with HIV who chargeable for essential treatment for other health problems which may be related to their HIV (e.g. cancers) and where healthcare access is vital to prevent onwards transmission of HIV (i.e. maternity care).

Chargeable patients should never been denied access to treatment which is considered 'immediately necessary' or 'urgent'. This includes, for example, maternity care. However, there may be instances where treatment is not provided either because the hospital misinterprets the rules, or there is dispute about whether a particular treatment fits either description.

To deny a patient immediately necessary or urgent treatment would be a breach of their human rights. To ensure that this does not happen, the assistance of a lawyer is often required, especially given the complexity of charging rules. In this situation, the patient should be able to access legal aid funded advice.

<u>People living with HIV in immigration detention</u>

People living with HIV who are in immigration detention are especially vulnerable to interruptions of treatment and care. NAT has recently surveyed HIV healthcare teams in immigration removal centres, following on from an earlier survey we conducted in conjunction with the Prison Reform Trust in 2005. Both surveys highlighted occasions where patients have missed doses of their HIV medication (which must be taken at the correct time every day without fail) while in detention,

and examples of clinic appointments being missed due to competing priorities within the immigration removal centre (e.g. transport which was booked for a hospital appointment being diverted to another purpose). These failures seriously undermine detainees' rights to an equivalent range and quality of care services as provided by NHS to the general community.

Detainees who do not receive the standard of healthcare to which they are entitled should be able to access legal advice to assist them in challenging this substandard care. People who are in immigration detention should continue to be eligible for legal aid.

Refugee integration and access to services

The consultation document states that those with an open asylum claim will be able to access legal aid – even though they are not lawfully *resident* – in recognition of their particularly vulnerable position. This logic should be extended to those who have been successful in their asylum claim, as the months after receiving refugee status and/or leave to remain are some of the most precarious for people living with HIV.

When leave to remain is granted, refugees have 28 days to exit asylum accommodation and find housing independently. Voluntary sector organisations who support refugees living with HIV have told NAT that this is very challenging for their service users and many are left without access to income or housing. This in turn leads to deterioration of their health. The rules around benefits and housing are complex and refugees must learn to navigate a completely different support system from that which they have just exited.

On housing, for example, a refugee may have a strong case for priority on the basis of HIV-related health complications, but this might initially be refused. A legal-aid-funded lawyer may be the only way that this refugee is able to access their entitlement to housing.

It makes no sense to cut off asylum seeker's access to legal aid once they gain refugee status and leave to remain. All refugees should be considered to pass the residency test for legal aid access from the moment they get their status.

4) Paying for permission work in judicial review cases

Q5. Do you agree with the proposal that providers should only be paid for work carried out on an application for judicial review, including a request for reconsideration of the application at a hearing, the renewal hearing, or an onward permission appeal to the Court of Appeal, if permission is granted by the Court (but that reasonable disbursements should be payable in any event)? Please give reasons.

NAT disagrees with the proposal to only pay legal aid providers for judicial review work which passes the permission stage.

HIV is still comparatively rare in the UK and is a complex and fluctuating condition which is not always well understood. For this reason, people with HIV may be found ineligible when being assessed for services such as social care, benefits and

housing, even when further scrutiny shows they have a strong case for entitlement on the basis of their health. For this reason, judicial review can be an important tool in holding local authorities and central government to account for inaccurate assessments.

The proposals will make it more difficult for people living with HIV to get this assistance, as the restrictions on funding will mean fewer legal aid providers will be able to offer help with judicial review cases. It is not reasonable to expect individuals to initiate a judicial review action without legal advice, but that will be the only option for some under these proposals.

Cases which challenge poor assessments of people living with HIV for may be settled before the permission stage, but this would not necessarily be an indication of a weak case. Indeed, due to the complexity of HIV and lack of understanding by many service providers, it may be that once further evidence is submitted (with the help of a legal aid provider) the strength of the case becomes clear, allowing a quick settlement. These proposals will act as a disincentive to early resolution or settlement of cases, which may be to the benefit of both the person living with HIV and the local authority or government department.

Legal aid providers should be paid for judicial review cases from the point that the case opens. The proposed changes to payments will make it harder for people living with HIV to get the help they need to challenge poor decision making.

Chapter 4: Introducing Competition in the Criminal Legal Aid Market

viii) Case allocation

Q18. Which of the following police station case allocation methods should feature in the competition model? Please give reasons.

Option 1(a) – cases allocated on a case by case basis
Option 1(b) – cases allocated based on the client's day of month of birth
Option 1(c) – cases allocated based on the client's surname initial
Option 2 – cases allocated to the provider on duty
Other

NAT disagrees with the proposed models, for the reasons outlined in our response to questions 19 and 20, below.

Q19. Do you agree with the proposal under the competition model that for clients who cannot be represented by one of the contracted providers in the procurement area (for a reason agreed by the Legal Aid Agency or the Court), the client should be allocated to the next available nearest provider in a different procurement area? Please give reasons.

Q20. Do you agree with the proposal under the competition model that clients would be required to stay with their allocated provider for the duration of the case, subject to exceptional circumstances? Please give reasons.

NAT disagrees with the proposed case allocation model and with the proposed requirement for clients to stay with their allocated provided for the duration of the case.

NAT is very concerned about how a lack of choice of legal aid lawyer will impact on people living with HIV who are accused of 'recklessly' or 'intentionally' transmitting HIV to sexual partners. Despite working with the Association of Chief Police Officers to develop guidelines on how such cases should be investigated, people accused of reckless or intentional transmission are still subjected to unnecessarily intrusive investigations. Such cases are rare and the law is not always well understood by investigating officers. A lawyer who understands what is and is not appropriate in such an investigation is vital to ensure that the accused person does not suffer breaches of confidentiality or other intrusions in the course of the investigation. As people living with HIV are disproportionately affected by poverty, it is quite likely that they will need legal aid to access such a lawyer.

For the same reasons, if someone living with HIV started with an allocated provider, but then learnt of a provider who was expert in these prosecutions, there should be no barrier to moving to this other provider part-way through the case. If these proposals are implemented, the need for people accused of reckless or intentional transmission to have expert and experienced legal advice must be captured by whatever 'exceptional circumstances' rules are introduced.

Someone living with HIV facing a prosecution for reckless transmission should be able to ask for the lawyer of their choice, even when relying on legal aid.

NAT
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