Introduction

This Order is to be welcomed in general terms on the grounds that it gives statutory authority for the continuance of independent monitoring of prisons. It is also likely to ensure that the Scottish Government meets its obligations under the Optional Protocol to the United Nations Convention Against Torture “to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty”.¹

2. In September 2012 I was asked by the Scottish Government to review its proposals to improve arrangements for independent monitoring of prisons. My review was published by the Government in February 2013² and the Government published its response to my review in April 2013³. In his foreword to the response the Cabinet Secretary for Justice indicated that he would “move to implement 17 of the 21 recommendations in Professor Coyle’s report immediately” and would refer the remaining four to an Implementation Group which was to be set up. The Order as drafted demonstrates that in fact the Government’s acceptance of my recommendations has been less than complete.

Prison Monitors and Lay Monitors

3. In my review I recommended a system of regular monitoring of prisons by independent volunteers (Recommendation 1). I also underlined the advantages of independent monitors being appointed to individual prisons as a means of recognising the value of local community involvement. I recommended that the number of independent monitors appointed to each prison should be sufficient to enable them to carry out their statutory duties (Recommendation 10). I further concluded that if this model were to be adopted there would be no need for the four salaried monitors which were at that time envisaged in the Government’s proposals (paragraph 74).

4. The Order introduces a distinction between “Prison Monitors”, who will be paid and of whom there must be at least three in total for the whole country, and “Lay Monitors”. This is a novel distinction which is not to be found in my review. When he spoke in Parliament on 24 May 2012 the Cabinet Secretary announced his intention to set up a statutory monitoring service consisting in total of three monitors “split on a geographical basis”. He expressed the view that this arrangement would

“be proportionate to facilitate regular monitoring in Scotland’s prisons”. It would appear that the current draft Order retains the arrangements which were announced on 24 May 2012 but, following my review, adds new arrangements for volunteer monitors, now to be described as “Lay Monitors” who will be subservient to the “Prison Monitors”. The former are to “assist” the latter in their monitoring functions and are to “comply with any instructions issued by (them)”.

5. In terms of their monitoring duties as described in the amended sections 7A and 7B of the 1989 Act it would appear that there is little substantive difference between the two types of monitor, other than as regards some of their reporting channels and, crucially, the provision that lay monitors alone will investigate any complaint which a prisoner makes to them. This latter power is complicated in that Paragraph 4 of the Order proposes to amend the Prisons and Young Offender Rules 2011 by giving a prisoner the right to speak to either a prison monitor or a lay monitor but to make a complaint only to a lay monitor. Such a distinction is likely to cause confusion to both prisoners and staff.

6. There is also potential for confusion in other areas. For example, it is proposed to amend the Prisons Act so as that in the event of the death of prisoner the governor will have a duty to give immediate notice to “a prison monitor or a lay monitor assigned to the prison”. In situations such as this there should be a single identified point of contact.

7. The Order provides that Prison Monitors must “visit the prison at least once a month or more frequently as instructed by the Chief Inspector”. The Order is silent as to the required frequency of visits by Lay Monitors. The relevant current Prison Rule (160) provides that “Not fewer than 2 members of a visiting committee shall visit the prison at least fortnightly”. The Order therefore implies a significant reduction in the frequency of monitoring.

8. In my review I recommended that the independent monitors for each prison should submit an annual report to Scottish Ministers and should publish these reports (Recommendation 5). The Scottish Government accepted this recommendation. The Order is silent on this matter. It provides merely that Prison Monitors, but not Lay Monitors, only should “provide such reports to the Chief Inspector as the Chief Inspector may instruct”.

9. I also recommended that if independent monitors brought any matter of concern to the attention of the prison governor and this was not resolved the independent monitors should then bring it to the attention of Scottish Ministers (Recommendation 6). The Scottish Government accepted this recommendation. The Order is silent on this matter, making provision only that Prison Monitors should inform the Chief Inspector of any such matters of concern. A further implication is that Lay Monitors will report such matters only to a Prison Monitor.

4 http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=7604
10. In the course of my review several of the groups and individuals whom I consulted referred to the important additional role of independent monitors in assisting prisons to be, in the term frequently used by the Scottish Government, “community facing”. It was suggested that this was more likely to happen if independent monitors were drawn whenever possible from the local community in which the prison was situated.

11. The Justice Committee may wish to consider whether the proposal to have two layers consisting of salaried Prison Monitors and volunteer Lay Monitors would create unnecessary and expensive duplication and whether it has the potential for creating confusion among prisoners and prison staff; and whether such an arrangement might also weaken links between prisons and the communities in which they are situated.

The need for inspection and monitoring of prisons to be complementary but distinct

12. In my review I pointed out the need for appropriate oversight and support of independent prison monitors and identified a number of options as to how this might be provided, one of which was by HM Chief Inspector of Prisons (HMIPS). This model has the benefit of strengthening the complementary relationship between the work of the Chief Inspector and that of the independent monitors. In my review I recommended that a formal protocol should be agreed between HMIPS and the independent monitors (Recommendation 20). The Government indicated its acceptance of this recommendation and its intention that a working protocol would be drawn up on this basis. The Order is silent on this.

13. However, I also cautioned that if this model were to be the one adopted care would have to be taken not to elide the important distinction between inspection, which is carried out by on a cyclical basis by professional experts (typically in Scotland every three or four years), and frequent monitoring carried out on a regular basis by trained volunteers drawn from civil society. OPCAT recommends this “layered” approach in national preventive mechanism activities under the Convention and in a letter to the Cabinet Secretary the UK National Preventive Mechanism urged that this distinction should be maintained, as it is in the other two jurisdictions in the United Kingdom.5

14. The Committee may wish to consider whether the provisions in this Order, specifically in terms of Paragraph 2(3), go too far in eliding the important distinction between the role of HMIPS and that of the independent monitors, particularly in respect of the powers which are given to the Chief Inspector to instruct monitors and, by extension, Prison Monitors to instruct Lay Monitors.

5 Letter dated 9 March 2012 from Nick Hardwick CBE on behalf of the UK’s National Preventive Mechanism to the Cabinet Secretary for Justice.
15. When in the course of my review I consulted the previous Chief Inspector he was at pains to point out to me that HMIPS did not currently have the resources to oversee an independent monitoring system. I agreed with his assessment and in my review, while concluding that there was no need for four salaried monitors, I pointed out that HMIPS would require an increase in staffing if it were to take on the oversight of the independent monitoring system. That remains the case. It is not for me to indicate the likely extent or nature of any additional resources for HMIPS but there is no reason to think that they would cost more than the proposed salaried monitors and indeed they might well cost less.

Professor Andrew Coyle
3 November 2013