Justice Committee

Police and Fire Reform (Scotland) Bill

Written submission from Robert Wyllie

Summary

1. This submission will cover the provisions of the Bill which cover independent custody visiting and police complaints management.

The custody visiting provisions

2. Chapter 16 of the Bill provides for a custody visiting scheme to be maintained. I understand the custody visitors shall form a national preventive mechanism for the purposes of Article 3 of the Optional Protocol to the UN Convention Against Torture (OPCAT).

3. Part IV of OPCAT provides minimum standards against which national preventive mechanisms must comply. The UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) published further standards in November 2010, which will be referred to in this submission as “the Guidelines”.

4. In my view, Chapter 16 falls short of the requirements of OPCAT and the Guidelines in several respects. I outline my main concerns below.

5. The first and main problem is that the Bill does not provide for a comprehensive visiting scheme. It allows for access to be denied to custody visitors. This is inconsistent with Articles 19(a), 20(c) and 20(e) of OPCAT together with paragraphs 24 and 25 of the Guidelines.

6. The justification for this is unclear, especially given the unlimited powers of access which are given to other bodies. If the supposed justification for the provisions is that access to detainees could prejudice security, this is inconsistent with practice elsewhere. For example, the Mayor’s Office for Policing and Crime in London have a cadre of suitably vetted custody visitors who are allowed to access high-security custody suites where terrorism suspects are detained.

7. If the supposed justification is that access should not be given in circumstances where a serious incident is taking place, this too is inconsistent with practice elsewhere. For example, Independent Monitoring Boards in England and Wales must have an emergency plan so that they may safely exercise their powers to observe how the prison service deals with emergencies including concerted indiscipline or hostage taking. Indeed, it can be argued that it is precisely when serious incidents take place that custody visiting is most required.

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2 e.g. the Scottish Commission for Human Rights Act in section 11 and Schedule 3 of the Scottish Commission for Human Rights Act 2006 (asp 16)
8. The next problem is that the relationship between custody visitors, the Scottish Police Authority and Scottish Ministers is unclear. Whether the custody visitors form a part of the Authority is unclear. Precisely to whom the custody visitors are accountable is unclear. The extent of control both the Authority and Scottish Ministers have over visitors is unclear.

9. The danger with this lack of clarity is that the arrangements which emerge could be inconsistent with Article 18(1) OPCAT and paragraph 12 of the Guidelines which require that the NPM should enjoy independence when carrying out its functions. The Committee should guard against this by appropriate amendments to the Bill.

10. As an illustration of the problems which arise from the excessive discretion which is given to others by the Bill, paragraph 9 of the Guidelines say that the relevant legislation should specify the period of office of a member of a NPM and any grounds for their dismissal. But such provision is not made in the Bill.

11. In a similar vein, Article 18 OPCAT states a NPM must be granted the power to undertake visits and make recommendations. Paragraph 7 of the Guidelines makes clear that these powers should be granted in a constitutional or legislative text. But the proposed scheme by which powers will be granted to custody visitors is neither and is therefore inconsistent with the requirements of OPCAT.

The SPT and CPT

12. Although the bill recognises the role of the SPT, it fails to acknowledge that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) performs a similar role under Article 7 of the relevant international law.4

13. The Committee should consider whether the rights given to the SPT in the Bill should also be given to the CPT.

The relationship between the Complaints and Review Commissioner and prosecutors

14. The response of the Police Complaints Commissioner for Scotland to the Committee is excellent and covers many of the points I wanted to make. But two structural points remain.

15. The Bill gives extensive powers to the Lord Advocate to determine the course of investigations against the police. In many ways, this is a continuation of the present situation. I believe the Committee should consider whether this is an appropriate separation of powers, and whether this gives the Commissioner true independence.

16. In doing so, the Committee should be mindful of international opinion. The Council of Europe Commissioner for Human Rights gave a formal opinion about how police complaints should be handled5. He referred to the potential for an impression

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4 contained in the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, ETS No. 126
5 Council of Europe. 12 March 2009. Opinion of the Commissioner for Human Rights concerning
of bias to be given from how complaints systems organise prosecutions against police officers and presented a solution:

85. In some member states there is concern that the close working relationship between the police and prosecution authority in standard criminal proceedings may undermine independence and impartiality in prosecution practice. A major cause of concern is that co-operation between police investigators and prosecution lawyers may tarnish the independence of prosecutors when working on cases against police officers. In an attempt to deal with this problem specialist criminal prosecution authorities with their own investigators have been established in some jurisdictions to investigate complaints against police officers and conduct criminal proceedings.

86. This type of independent police prosecution system could be adapted to a police complaints system which functions under the auspices of an Independent police Complaints Body or IPCB. Following the example of certain European ombudsman institutions which possess powers to bring charges before the court on their own authority, the IPCB could be granted similar powers to press criminal charges after completion of its complaints investigations. Naturally, the constitutional and legal system prevailing in each member state would play an important part in gauging the feasibility of such an arrangement. Particular consideration would also need to be given to the availability of safeguards and protecting the rights of police officers as defendants in criminal proceedings.

17. In my submission, the constitutional and legal system in Scotland is amenable to the PCRC having prosecution powers which means the solution the Commissioner suggests could be pursued. This is because prosecutions not involving the Crown Office or Procurator Fiscal Service have been possible for some time, so the principle has been conceded.

18. In particular, section 43(2) of the Education (Scotland) Act 1980 provides that prosecutions for contraventions of that Act may be brought by a local education authority without reference to a Procurator Fiscal. That no attempt has been made to repeal this provision illustrates how innocuous it is. More recently, in the context of reserved matters, section 28(1) of the Counter-Terrorism Act 2008 provides that offences connected to terrorism committed in Scotland may be tried in any jurisdiction in the United Kingdom. So again, prosecutions can be brought without reference to a Procurator Fiscal.

19. My second concern relates to the independence of the Commissioner himself. The Bill proposes no significant changes to Schedule 4 of the Police, Public Order and Criminal Justice (Scotland) Act 2006, which deals with the Commissioner’s appointment, dismissal, status and funding. This is a missed opportunity to change the legislation to enhance the independence of the Commissioner and increase Parliament’s role.

Independent and Effective Determination of Complaints against the Police. CommDH(2009)4. It should be noted this is an extremely useful yardstick by which to judge the police complaints proposals in the Bill as a whole, and should be carefully considered by the Committee.
20. For example, given the Government considered moving functions of police complaint management to the Scottish Public Services Ombudsman, it plainly thought it was feasible to move to a legislative structure similar to that which governs the SPSO. To do so would bring several benefits in providing the protection of Parliamentary control over decisions which at present can be done by Ministerial fiat. Such a relationship has been considered to be a powerful tool to ensure the independence of agencies monitoring integrity of public officials, and I see no reason why this cannot apply in the policing context.

Robert Wyllie
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