Justice Committee

Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014

Written submission from the Scottish Human Rights Commission

Introduction

1. The Scottish Human Rights Commission (the Commission) welcomes the opportunity to submit comments to the Justice Committee on the Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014. The Commission considers that the proposed draft Order could be improved in order to provide a clear and comprehensive legal framework that enables monitors to conduct their function in accordance with OPCAT.

2. The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) is an international human rights treaty designed to strengthen the protection of people deprived of their liberty by international and national monitoring. States which ratify the OPCAT are obliged to designate a ‘national preventive mechanism’ (NPM), a body or group of bodies which regularly examine the treatment of people deprived of their liberty, make recommendations and comment on existing or draft legislation, all with the aim of improving the treatment and conditions of detainees. The UK ratified OPCAT in December 2003 and designated its NPM in March 2009.

3. The UK’s NPM is currently made up of 18 visiting or inspecting bodies who visit places of detention. The Commission is part of the UK NPM. The Independent Monitoring Boards in England and Wales and the Independent Monitoring Boards in Northern Ireland are members of the NPM. Scotland is the only part if the UK to be combining the inspectorate and monitoring functions within one body.

4. The Commission considers that the Order which creates prison monitors and a new oversight mechanism should explicitly articulate OPCAT\(^1\) and other human rights obligations.\(^2\)

5. In line with our general duty, the Commission highlights examples of best practice and provides recommendations for strengthening the proposed draft order in order to guarantee the effective and independent functioning of the new structure.

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\(^1\) UN Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment adopted on 18 December 2002. OPCAT establishes the obligation for States Parties to allow visits by the SPT and NPMs to all places where people are, or may be, deprived of their liberty.

\(^2\) The Commission has previously expressed this principles in relation to Chapter 16 of the Police and Fire Reform (Scotland) Act 2012.\(^2\)

SHRC response to the Scottish Parliament Consultation on the Police and Fire Reform (Scotland) Bill, March 2102 available at www.scottishhumanrights.com/
The Order

6. It is fundamental that the role of the Her Majesty's Chief Inspector of Prisons for Scotland in relation to monitoring is exercised within the OPCAT framework. The Order should be explicit about this prerequisite. This is particularly important as in Scotland the HM Inspectorate of Prisons carries out an inspection role of prisons by statutory duty. It is important that the monitoring function does not get lost or subsumed within the inspection work.

7. OPCAT requires preventive visits to places of detention. The aim is to identify aspects of detention which could lead to violations of human rights. Preventive monitoring visits are:
   - Proactive rather than reactive: Preventive visits can take place at any time, even when there is no apparent problem or specific complaints from detainees.
   - Regular rather than one-off: Preventive detention monitoring is a systematic and ongoing process, which means that visits should occur on a regular basis.
   - Global rather than individual: Preventive visits focus on analysing the place of detention as a system and assessing all aspects related to the deprivation of liberty, to identify problems which could lead to torture or ill-treatment.
   - Cooperation rather than denunciation: Preventive visits are part of an ongoing and constructive dialogue with relevant authorities, providing concrete recommendations to improve the detention system over the long term.

8. The central importance of both inspection and independent monitoring to the oversight of practice in prisons is also highlighted in the European Prison Rules 2006 - All prisons shall be subject to regular government inspection and independent monitoring. Taken together these two separate mechanisms - inspection and monitoring - provide an effective means of preserving and promoting human rights and of preventing abuse in prisons.

9. Best practice suggests that the legislation establishing the new structure should be both comprehensive and clear enough to enable both the Chief Inspector for Prisons and new monitors to conduct their statutory function. A clear legal framework would also guarantee the independence of the new structure. The Commission recommends that the following OPCAT requirements are added to the Order:

10. Roles and responsibilities: It is vital that the legislation clearly specifies the roles and responsibilities of monitors (prison and lay). The number of independent monitors should be sufficient to carry out their duties according to The Prisons (Scotland) Act 1989 and The Prison Rules. By setting out a minimum number of lay monitors, the order would provide greater certainty and ensure that both the workload and the available resources have been carefully considered. The proposed draft Order does not mention either the number of lay monitors to be appointed or the frequency of their visits.

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3 The key, objective of OPCAT was to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

4 Rule 9. All prisons shall be subject to regular government inspection and independent monitoring.
11. **Duration of office and appointment for members.** To ensure independence, among other issues, best practice legislation would include; transparent selection procedures for all members; clarify the members' personal and institutional independence from state authorities and operational autonomy in the appointment of staff; ensure non-interference from the executive. It is also important for monitors to have sufficient security of tenure for the duration of their terms of office. The proposed draft Order is silent about most of these issues.

12. **Membership and composition:** Specific provisions regarding the composition of the body, including the need for multidisciplinary expertise relevant to torture prevention and adequate representation of the country’s key ethnic and minority groups are of particular importance as the members will be responsible for establishing the legitimacy, credibility and independence of the new body. OPCAT is clear that particular attention should be given to achieving “a gender balance and the adequate representation of ethnic and minority groups in the country” as well as the Principles relating to the status of national institutions for the promotion and protection of human rights. The proposed draft Order is inexplicit about this element.

13. **Funding:** Independent and sufficient financing is vital to ensure both operational autonomy and independent decision-making. Best practice legislation should specify the source and nature of funding, public reporting and audit procedures, and independence from executive control. The order should provide funding at a level which will enable all monitors to carry out their statutory role. It is fundamental that the new structure is properly funded and resourced. Lay monitors should receive reimbursement for expenses incurred in the performance of their duties, including loss of earnings, accommodation and child care. The proposed draft Order only refers to travel and subsistence expenses for lay monitors.

14. **Immunities and privileges:** It is crucial that the members’ of the new structure are provided with privileges and immunities necessary for the independent exercise of their functions. These may include; immunity from personal arrest or detention, and from seizure or surveillance of papers and documents; non-interference with communications; and protection from legal action in respect of words spoken or written, or acts carried out in the course of the performance of their duties. It is also fundamental to protect the (confidential) information collected. The proposed draft Order is silent about this.

15. **Some other relevant human rights standards** that the Scottish Government should consider in developing this legislation, and future implementation are: UN Convention against Torture (CAT); Optional Protocol to the UN Convention Against Torture (OPCAT); European Convention on Human Rights (ECHR); European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; European Prison Rules 2006; UN Standard Minimum Rules for the Treatment of Prisoners and UN Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment.

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5 Article 18 of OPCAT
7 Article 18 of OPCAT
8 Articles 21 and 35 of OPCAT
The Commission would be pleased to answer any queries that the Committee may have in relation to this submission and welcomes the opportunity to discuss this further.

Scottish Human Rights Commission
11 November 2013