Justice Committee

2nd Report, 2015 (Session 4)

Public Services Reform (Inspection and Monitoring of Prisons) (Scotland) Order 2014

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Justice Committee

Remit and membership

Remit:

To consider and report on:

a) the administration of criminal and civil justice, community safety and other matters falling within the responsibility of the Cabinet Secretary for Justice; and

b) the functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

Membership:

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Roderick Campbell
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Christine Grahame (Convener)
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Margaret Mitchell
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Gil Paterson
John Pentland

Committee Clerking Team:

Joanne Clinton
Neil Stewart
Christine Lambourne
Justice Committee

2nd Report, 2015 (Session 4)

Public Services Reform (Inspection and Monitoring of Prisons) (Scotland) Order 2014

The Committee reports to the Parliament as follows—

BACKGROUND

1. At its meeting on 16 December 2014 the Committee formally considered the following affirmative instrument—

   • Public Services Reform (Inspection and Monitoring of Prisons) (Scotland) Order 2014 [draft].¹

2. The Cabinet Secretary for Justice, Michael Matheson, gave evidence on the Order and then moved the relevant motion recommending its approval.

3. To inform that session the Committee took evidence on 2 December from the following witnesses—

   • the Scottish Human Rights Commission (“SHRC”);
   • the Association of Visiting Committees for Scottish Penal Establishments (“AVC”);
   • Howard League Scotland;
   • Positive Prison? Positive Futures…;
   • Professor Andrew Coyle, Emeritus Professor of Prison Studies, Kings’ College London;
   • Dr James McManus, Member of the European Committee for the Prevention of Torture; and
   • HM Chief Inspector of Prisons for Scotland (“the Chief Inspector”).

4. The draft Order is being made in exercise of the powers conferred by sections 14 and 15 of the Public Services Reform (Scotland) Act 2010. In broad terms the draft Order—

The proposals follow Professor Andrew Coyle’s Review of Proposals to Improve Arrangements for Independent Monitoring of Prisons (the Coyle Review)\(^2\), published in January 2013, and further consultation by the Scottish Government.

The Scottish Government has stated that it is committed to taking forward reform of the system for independent monitoring of prisons, to meet its obligations under the UN’s Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). The objective of the Protocol is 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.

OPCAT requires states to designate a National Preventative Mechanism (NPM). The UK’s NPM is a body with 18 members, including the Chief Inspector of Prisons in Scotland and the SHRC, and is co-ordinated through HM Inspectorate of Prisons for England and Wales. Current visiting committees in Scotland are not currently members of the NPM because they are not OPCAT compliant (as they receive their funding from the Scottish Prison Service). The revised draft Order does not provide for visiting committees to become members of the NPM, as they will be represented by the Chief Inspector.

Professor Coyle was therefore tasked with reviewing the Scottish Government’s proposals to improve arrangements for the independent monitoring of prisons and to consider specifically the extent to which the proposals meet the Scottish Government’s obligations under OPCAT, responses of prisoners, prison

staff and stakeholders to the new proposals and independent monitoring of legalised police cells.\(^3\)

**Consideration of the super-affirmative Order**

9. The Committee previously considered the Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014 under the super-affirmative procedure. The Committee’s report on the super-affirmative Order welcomed the Scottish Government’s proposal to remove the funding and support of independent monitoring of prisons from the SPS, to ensure that prison monitoring in Scotland becomes OPCAT compliant, but highlighted a number of areas where the Order could be improved\(^4\). In its response, the Scottish Government agreed to amend the Order to take account of the report’s recommendations\(^5\).

**Revised draft Order**

10. The Scottish Government subsequently amended (and renamed) the draft Order and issued a consultation on it on 19 September, which closed on 13 October.\(^6\) The draft Public Services Reform (Inspection and Monitoring of Prisons) (Scotland) Order 2014 was laid on 7 November, before being withdrawn and re-laid to correct a technical error on 19 November.

**General views on the Order**

11. In general, some witnesses had remaining reservations about the revised draft Order. Equally there was a desire from others for an OPCAT-compliant system to be up and running as soon as possible.

12. For example, the AVC argued that there were “significant deficiencies” in the Order\(^7\), whilst Professor Coyle stated with “considerable regret” that it seemed to him that “the Order needs further amendment”\(^8\). He went on to state—

> “I say that with great reluctance; fortunately, I do not have to make the decision. Either we sign off something now that, although it has failings, we hope will work, or, given that my understanding is that if it is signed off now it will be well into 2015 before changes happen, we consign it to even further in the future. My fear is that we will sign off something for which we will say later, “Well, we missed an opportunity there.””\(^9\)

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\(^3\) Coyle Review, p2.
\(^7\) Association of Visiting Committees (AVC), replacement written submission, p1. Available at: [http://www.scottish.parliament.uk/S4_JusticeCommittee/Replacement_submission_from_AVC.pdf](http://www.scottish.parliament.uk/S4_JusticeCommittee/Replacement_submission_from_AVC.pdf).
13. However, the Chief Inspector described the Order as being “in a fit state” and argued that it would “provide a robust system for independent prison monitoring”\textsuperscript{10}. 

14. When asked whether the Order as drafted should be passed, Dr James McManus indicated that he was “tempted towards the Chief Inspector’s position to say “Let’s get this going””\textsuperscript{11}. In reaching this view, he made clear that he also appreciated Professor Coyle’s view that the Order should be correct prior to implementation\textsuperscript{12}.

15. In summing up during the Committee debate on the Order, the Cabinet Secretary acknowledged that some witnesses felt the Order did not go far enough, but said he considered that the process will “help to improve our prison estate and ensure robust and independent monitoring”\textsuperscript{13}. He also confirmed that the new system will be OPCAT compliant whilst the existing system is not\textsuperscript{14}.

16. In response to Committee members queries about whether the Order provides the best model for prison monitoring, the Cabinet Secretary stated—

“…I believe that we have in place the right safeguards to enable us to monitor effectiveness and, if necessary, to make further changes, should any be required in the future. The model is certainly better than what we have at present, and it is worthy of the committee’s support.”\textsuperscript{15}

17. The Committee notes the views expressed by Professor Coyle and the Association of Visiting Committees that parts of this Order could be problematic and may require further amendment.

18. Whilst some Committee members still have reservations about specific aspects of the Order discussed below, the Committee acknowledges the Cabinet Secretary’s comments that the model is better than the existing system. The Committee also notes the Cabinet Secretary’s assurance that the new model will, unlike the current system, be OPCAT compliant.

19. The Committee also welcomes the Cabinet Secretary’s willingness to address any deficiencies in the new model should they arise in the future and calls on him to bring forward another Order in the event of such deficiencies being identified.

Specific issues considered by the Committee

20. The Committee considered a number of specific issues during its scrutiny of the revised draft Order. These included:

- the independence of prison monitors;
- the formal complaints system;

• the number of independent prison monitors (IPMs) and visits;
• the constitution of the Prison Monitoring Advisory Group;
• temporary release of prisoners; and
• timescales.

The independence of prison monitors

21. Despite the change of their official title in the revised draft Order from "lay monitors" to independent prison monitors (IPMs), the perceived lack of independence for IPMs was still a source of considerable concern for some witnesses.

*Article 18 of OPCAT*

22. The SHRC argued that independence is central to monitoring effectiveness and that Article 18(1) of OPCAT clearly provides for independence of NPM members. Article 18(1) states that—

“The States Parties shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel”.

23. When asked whether the Order ensures the independence of the monitors, Bruce Adamson from the SHRC argued that “best practice regarding independence dictates a different model, which would be accountable to and appointed by the Parliament”. He did, however, note that “independence is not just a matter of legislation but a matter of policy and practice, and other safeguards could be put in place around the order to guarantee independence”. He indicated that the SHRC welcomed, “as a starting point”, the Order’s reference to OPCAT and the Scottish Government’s commitment to it.

24. The AVC argued that it is “questionable” whether the proposed system is sufficiently independent to comply with OPCAT as the monitors will be “appointed, managed, evaluated and instructed by the co-ordinator”.

25. The Chief Inspector of Prisons argued that—

“The independence of the monitors rests on the independence of my office. As Her Majesty’s chief inspector of prisons for Scotland, I am independent of the Scottish Prison Service and of the Scottish Government ... If I have a criticism of, or praise for, the SPS, I include it in my report. Similarly, I am

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17 Article 18(1) of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Available at: [http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx](http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx).


21 AVC, replacement written submission, p 1.

not constrained from commenting on Government policy. Part of the duty of a state that signs up to OPCAT and the NPM is the funding of independent monitoring and inspecting. We have an arrangement by which the scrutiny and oversight of prisons, including inspection and monitoring, is funded by the Government. There is no conflict in having the state provide funds to enable independent inspection and monitoring to take place. That is an important principle: I do not feel that my independence is compromised by the fact that I am not doing that work voluntarily in my own time”.23

**Prison monitoring co-ordinators**

26. Professor Coyle indicated that the proposed system for independent monitoring of salaried PMCs, supported by an unspecified number of IPMs to be overseen by HM Inspectorate of Prisons for Scotland, was not an arrangement that he had recommended24, adding that—

“It seems to me that much of the remaining confusion relates to both the appointment and the role of those prison monitoring co-ordinators. The four salaried monitors have metamorphosed into prison monitoring co-ordinators, but the order as I read it gives them more than a co-ordinating role; it also gives them the right to go into prisons to monitor.”25

27. The Cabinet Secretary argued that PMCs have a role to play in shaping the work programme for monitoring visits to ensure that all aspects of the prison are considered26, and added that “we have a much more comprehensive way of looking at the issue, which I believe to be much more helpful”.27

28. **The Committee notes the view of Professor Coyle about the role of PMCs and calls on the Scottish Government to monitor carefully how this role evolves.**

**Relationship between inspection and monitoring**

29. There were concerns regarding how the inspection and monitoring functions of the Chief Inspector would interact. Professor Coyle highlighted that there had been difficulty in the past finding a sponsoring or supporting group for visiting committees. In offering the office of chief inspector of prisons as an option in his report, Professor Coyle indicated that he was “at pains to point out that, in placing it there, which I did not oppose, that great care would need to be taken not to elide the distinction between inspection and monitoring”.28

30. The Chief Inspector said that he believed there to be real benefits from inspection and monitoring coming under the same organisation. He also said that he was “very clear that inspection and monitoring are separate functions”29 but were complementary as—

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“One is professional inspection, which is done infrequently and in great depth. Monitoring involves regular visiting and scrutiny, and is done by local people who are familiar with the prison. There are real benefits from co-ordination so that the findings from monitors, for instance, can be fed into the inspection programme. I think that we will have a better sense of the monitoring and inspecting of prisons across Scotland as a result”.30

31. The Chief Inspector added that he believed that the current system has led to isolation for visiting committees and a frustration among members that their voices are not heard.31

32. The Cabinet Secretary advised that there will be three aspects to the role of the IPMs—

“The first is the inspections that they can undertake. The second is the programme of monitoring visits that they can undertake in agreement with governors and the programme that they can agree with the prison monitoring co-ordinators, who have an important role in ensuring that we examine all our establishments and all aspects of our establishments. The third is their discretion to decide to undertake monitoring visits themselves. That gives them the flexibility and the independence to undertake a role that will be an important part of the overall way in which we run our prison system”.32

33. He stated that the proposed system “allows us to ensure that we have a much more comprehensive view of that process, so that all aspects of our establishments are being effectively monitored”.33

34. The Committee notes the comments of Professor Coyle regarding maintaining the distinction between inspection and monitoring, but also notes the view of the Chief Inspector that there are benefits of greater co-ordination between inspection and monitoring and also the commitment to discretionary visits.

National preventative mechanisms
35. With regard to national preventative mechanisms (NPMs) Dr James McManus stated that, in his experience through his work with the Council of Europe’s Committee for the Prevention of Torture, the NPMs differ widely from country to country. Most are run by the ombudsman’s office but their structures vary. Dr McManus argued that the old-style visiting committee becoming the NPM would be a model that would “mostly comply with what is going on in other countries in Europe”.34

36. However, the Chief Inspector stated that the chair of the UK NPM had expressed a view that the new arrangements for independent prison monitors will be OPCAT compliant35, adding that “in a sense, visiting committees will have a

voice at the national preventive mechanism, because as chief inspector of prisons for Scotland I will have responsibility not only for inspecting prisons, but for ensuring that they are effectively monitored”.36

37. In general, the Committee notes the differing views in respect of the independence of prison monitors under the proposed arrangements. Whilst the Committee notes the assurances that the new arrangements will ensure OPCAT compliance, it further notes that the model chosen may not demonstrate best practice in relation to the independence of monitors. Once again, the Committee welcomes the Cabinet Secretary’s willingness to consider any issues that arise when the Order is in force.

IPMs and the complaints system

The formal complaints system

38. A number of witnesses welcomed changes that had been made to the Order from the previous draft regarding the ability of IPMs to investigate matters brought to them by prisoners.37 Article 4 of the revised draft Order allows for IPMs to provide such assistance to the prisoner as they consider appropriate. This is in addition to the requirement to investigate specific matters referred by the PMC.

39. Remaining concerns were expressed by the AVC that, under the terms of the Order, IPMs have a new role to assist prisoners to use the SPS formal complaints process.38 Joan Fraser from the AVC warned that “prisoners might begin to view independent monitors as being somehow part of the SPS system” and argued that this “would undermine the monitors’ independence”.39

40. In his written submission, the Chief Inspector argued that “it is imperative that the IPM seeks information as to whether the prisoner has made a complaint as per the prison rules [and that] this will ensure that an alternative complaints route is not enabled to circumvent the current system”. He confirmed that IPMs have discretion to support a prisoner on any complaint or issue but that this should be “on an exceptional basis, and for soundly judged reasons”. The Chief Inspector also argued that having two separate complaints systems did not support a “transparent picture around prisoner complaints”.40

41. Dr McManus supported this argument, stating that—

“We have to be extremely careful not to subvert the SPS complaints procedure by allowing dual tracks. Jumping the queue by going through an IPM straight to the governor would not be effective in improving the prison

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37 AVC, replacement written submission, p3. Available at: [http://www.scottish.parliament.uk/S4_JusticeCommittee/Replacement_submission_from_AVC.pdf](http://www.scottish.parliament.uk/S4_JusticeCommittee/Replacement_submission_from_AVC.pdf).
38 AVC, replacement written submission, p3.
complaints process. We have to bolster the SPS process rather than subvert it”.41

42. Professor Coyle indicated that the term “complaint” is “a simple word for what can be quite a complex process”42 and that one of the main objectives of both the SPS and the monitors is to reduce the prevalence of issues that can give rise to complaint—

“A prisoner might come to raise an issue and might not define it as a complaint because they have raised it with an independent monitor. Indeed, if it is properly dealt with, it will not become a complaint. It becomes a complaint only if it is not properly dealt with according to the prisoner’s perception ... Much of the current work of visiting committees, in talking and listening to prisoners, lies in eliminating or preventing complaints. I suspect that what the draft order defines as a complaint encapsulates that wider idea, in addition to specific instances when a prisoner says, “I want to make a complaint about something””.43

43. Scottish Government official, Kerry Morgan, offered clarification about the role of IPMs in the formal complaints process—

“We are talking about assisting prisoners who might have literacy issues and who might not understand the system. It is all about assisting a prisoner who has decided to go through the formal process; it is not about the independent prison monitor being seen as part of the system that is dealing with the complaint”.44

44. The Cabinet Secretary indicated that he was “not entirely clear how those who have expressed such concerns have arrived at that view”45, and stressed that the Order provided flexibility to allow IPMs to raise issues directly with the Governor rather than going through the formal complaints process46.

45. The Committee notes the concerns raised that IPMs having the role of assisting prisoners in using the formal SPS complaints system could undermine their independence and could potentially lead to more issues becoming formal complaints. The Committee also notes, however, the views of the Chief Inspector and Dr McManus that, to ensure transparency, there should not be two separate complaints systems. The Committee further notes the clarification provided by the Cabinet Secretary that the purpose of IPMs having a role in the formal complaints system is to assist prisoners who may not understand the system and that IPMs will still be able to raise issues informally.

Confidentiality

46. Witnesses stressed the importance of ensuring prisoners’ right to confidentiality when raising issues. The AVC expressed concern that requests by prisoners to speak or write to IPMs will still have to be routed through the SPS. Joan Fraser advised the Committee that the AVC knew of prisoners who occasionally suffered the consequences of making a complaint or asking to see a member of the visiting committee.

47. However, Pete White from Positive Prison? Positive Futures, argued that “the way in which the SPS deals with complaints has improved a great deal”. He added that—

“the conduct of the independent monitors will determine how they are viewed by prisoners. They will have to develop a way of working that builds trust, but it sometimes takes a personality, rather than an order, to make that happen. ... The word “may” ... can be seen in a positive way that suggests that someone can help, not that they must help. Prisoners will voice their concerns in different, sometimes slightly mischievous, ways, but in general they just want clarification on a point ... some of the concerns that Joan Fraser mentioned might not be as severe as she suggests”.

48. Professor Coyle argued that it was important for a prisoner to “retain the right to approach the [IPM] in a confidential manner, without having to go through a third party”.

49. A number of witnesses highlighted the approach used at HMP Polmont, whereby a sealed envelope with the prisoner’s request is put into a locked box and the envelope comes directly to the visiting committee. Bruce Adamson advised the Committee that this system is used in many parts of the world and is good practice. Joan Fraser said she believed that “the order ought to make provision for such a system”.

50. The Chief Inspector indicated that guidance will be established before the new system of independent prison monitoring begins and that confidentiality will be part of this new system. When asked whether the right to a confidential investigation should be made explicit in the Order, the Chief Inspector responded—

“That is a technical legal matter. There has been discussion about whether lots of things should or should not be in the order. When we implement the order, we will ensure that prisoners are confident that their referrals are confidential. The situation is the same when a prisoner wants a referral to

47 AVC, replacement written submission, p3.
see a medical practitioner, such as a nurse or a doctor. A prison officer should not know why the prisoner wants to go to the health centre”.

51. The Committee believes as a matter of principle that a prisoner should have the right to approach an IPM in a confidential manner. The Committee notes the comments of witnesses about the approach developed in HMP Polmont ensuring confidentiality. The Committee calls on the Scottish Government to provide guidance to IPMs on dealing with issues of confidentiality prior to the Order coming into force.

The number and nature of IPMs and visits

Number of IPMs

52. The Committee heard concerns that the Order does not provide a mechanism for establishing a minimum number of IPMs. Both Howard League Scotland and the AVC argued in favour of a formula for the number of IPMs based on prison populations. Lisa MacKenzie from Howard League Scotland indicated that this issue had arisen during the implementation group’s discussions but that there was “resistance to putting it in the Order.” Pete White indicated that a formula was a “good idea” but one which he did not believe would work “given that the number of prisons and the number of people inside them are changing”. However, Joan Fraser argued that the formulas that had been considered were “flexible enough to allow for that”.

53. When asked to respond to calls for a minimum number of IPMs to be specified, the Cabinet Secretary said “that will be taken forward by the chief inspector of prisons, who will determine with the advisory group how many monitors are needed to meet the requirement that is set in the order for weekly monitoring visits to be undertaken.” He advised that—

“Under the order, establishments will require to be monitored weekly, and there will have to be enough independent monitors to allow that to happen. The important aspect is the frequency rather than the global numbers that are brought on board to act as independent prison monitors. That will be determined on the basis of the need to carry out the frequent monitoring visits, as the inspectorate will need a cohort of staff that can undertake that workload”.

54. The Committee appreciates the concerns expressed by some witnesses that the Order does not specify a minimum number of IPMs or a formula for IPMs across Scotland. The Committee also notes the comments of the Cabinet Secretary that decisions on numbers will be taken by the Chief Inspector and the Advisory Group.

Number and nature of visits

55. The Order provides for an IPM to visit each prison in accordance with a rota of visits prepared by the PMC which is agreed between the PMC, the IPMs assigned to the prison, and the Governor. The Order also provides that the rota must provide for at least one IPM to visit the prison at least once every week.61

56. Concerns were expressed by the AVC about the requirement for IPMs to monitor in accordance with a rota agreed with the PMC and the relevant prison Governor.62 Currently, prison visiting committees decide on a rota in accordance with the legislative requirements, wholly independently of the Governor of the prison or any other individual. The AVC argued that the requirement to seek the agreement of the organisation which is subject to scrutiny will undermine the independence of the entire system.63 The Howard League Scotland64 and the SHRC expressed concerns about the rota being agreed with the Governor.65

57. The Order also provides that IPMs may, with the agreement of PMCs, undertake additional visits without seeking the agreement of the Governor of a prison and that IPMs may also visit a prison without prior notice. The AVC argued that three different types of visit are unnecessary and highlighted that, at present, all prison visiting committee visits are unannounced. The AVC argued that this existing arrangement is more rigorous and consistent with OPCAT and that all IPM monitoring visits should be unannounced as is the case at present.66

58. Whilst accepting the usefulness of other types of visits, the SHRC expressed the view that resources should not be taken away from unannounced visits in order that rota visits and other visits can be carried out.67

59. In his evidence the Chief Inspector made clear that—

“The reality is that a prison does not suddenly change how it does something when people know that the monitor is coming in on Wednesday afternoon. The regular independent monitoring means that the monitors notice change over time. They speak to prisoners and they can speak to staff. A prisoner will soon tell them if something is not right—if the prisoner has been mistreated or the food is poor. The monitor’s objective is not to catch red-handed the Prison Service doing something that it should not do; it is about regularly being aware of what is happening in a prison, what the facilities are like, how many prisoners are attending education, what the healthcare provision is and what the waiting time for the dentist is. The monitoring is more about that. A person cannot enter a prison completely unannounced, because they must be let in at the front door”.68

62 AVC, replacement written submission, p 1.
63 AVC, replacement written submission p 1.
66 AVC, replacement written submission, p 1.
60. When asked about the perception that rota-ed visits could be seen to have an element of control that spontaneous visits do not, the Cabinet Secretary stressed that there were three different types of visits and that IPMs could undertake additional visits without notification. The Cabinet Secretary added that the Order was simply creating the ground rules and stating “what is expected and the visits that are required”.

61. The Committee notes the concerns that have been expressed about the number and nature of visits. It also notes the reassurances of the Cabinet Secretary that the Order still allows for unannounced visits to take place.

62. The Committee calls on the Chief Inspector and the Advisory Group to monitor the deployment of resources for visits, to ensure that resources are not inappropriately removed from unannounced visits as a result of the requirement for IPMs to visit prisons on a rota-ed basis.

Membership of IPMs and time off from employment

63. The extent to which IPMs are representative of society at large arose in evidence. The AVC raised concerns that the Order “abolishes the statutory requirement in the Employment Rights Act 1996 for monitors (currently prison visiting committees) to be given time off by their employer to undertake their role”. In oral evidence, Joan Fraser noted that members of independent monitoring boards in the rest of the UK, and members of the General Teaching Council for Scotland, the Scottish Environment Protection Agency or a local authority, were entitled to time off from employment. The SHRC agreed that “providing at least the minimum support in relation to loss of income is an important safeguard”.

64. The Cabinet Secretary stated that “The intention is to recruit as widely as possible for individuals who would be attracted to taking on the role of independent prison monitor. We encourage as wide a range of individuals as possible to apply.” He did, however, indicate that there are some technical issues around aspects of payment and legislation in that area. Scottish Government official, Craig McGuffie, advised that—

“The difficulty is that we consider the issue to be outwith the Parliament’s legislative competence ... The subject matter of the Employment Rights Act 1996 is reserved, although we can make consequential changes.”

65. He added that “it is possible that an LCM could be agreed” and the Cabinet Secretary agreed to give the matter further consideration.

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71 AVC, replacement written submission, p 2.
66. The Committee believes that, in principle, potential loss of earnings and time off work should not be barriers to individuals becoming IPMs. The Committee therefore welcomes the further consideration being given by the Scottish Government to the technical issues around payment and legislation in this area. The Committee calls on the Scottish Government and the Chief Inspector to take steps to ensure that IPMs are representative of society at large.

The constitution of the Prison Monitoring Advisory Group

67. Issues around the constitution of the Prison Monitoring Advisory Group and the process for appointments arose in evidence. Whilst acknowledging that the proposed group has merits, the AVC expressed concern about the independence of the Group. Joan Fraser stated—

“It is good to assemble a group of independent experts—if that is what they will be, but the order does not necessarily say that. It says they will be appointed at the chief inspector’s discretion for as long as he decides and will be reappointed if he so decides. The former Cabinet Secretary for Justice said that that body would person proof and future proof the structure of independent monitoring and replace the legislative rigour that we have at the moment. In fact, it seems to be unlikely that a group of individuals who owe their appointment to the chief inspector would always feel able to perform the necessary challenge function”. 78

68. In written evidence, Professor Coyle noted that the Order does not specify whether appointments to the Advisory Group are to be made through the public appointment procedure or at the invitation of the Chief Inspector. 79

69. Howard League Scotland expressed “concern and disappointment” that the Order does not specify that appointments to the Advisory Group must be made as open and transparent public appointments. 80 Lisa MacKenzie added that, to avoid a conflict of interests, PMCs and IPMs on the Advisory Group should perhaps have observer status, and the remainder of the Group be appointed through open competition. The SHRC agreed with this position, but suggested that the process for appointments to the Group was more an issue of “different hats” and “multiple roles” than a fundamental issue of OPCAT-compliance. 81

70. Responding to these issues, the Cabinet Secretary restated that the Chief Inspector’s view is that the Advisory Group should have an independent chair and a range of individuals and organisations among its membership, including the SHRC. 82 The Cabinet Secretary stated that the Group will be responsible for monitoring and evaluating how the system is operating. 83 He also indicated that, where the Group highlights that an issue needs to be addressed, for example the

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79 Professor Andrew Coyle, written submission, p23. Available at: [http://www.scottish.parliament.uk/S4_J usticeCommittee/Paper_by_the_clerk_-_prison_visiting_committees.pdf](http://www.scottish.parliament.uk/S4_J usticeCommittee/Paper_by_the_clerk_-_prison_visiting_committees.pdf).
need for a greater number of IPMs, he would expect the Chief Inspector to respond.  

71. The Committee notes the concerns that have been raised about the constitution of, and appointments process to, the Advisory Group. The Committee welcomes the reassurances of the Cabinet Secretary that the Group will have an independent chair and representation from a wide range of groups, including the SHRC. The Committee calls on the Chief Inspector to take cognisance of the concerns raised and for all appointments to the Group to be made in an open and transparent manner.

Temporary release of prisoners

72. The Order provides for IPMs to monitor the arrangements operated by the prison for the temporary release of prisoners. The AVC expressed concern about the resource and capacity implications for IPMs of this additional requirement. The AVC was also concerned that this provision had been added to the Order at a late stage and with a lack of clarity as to the reasoning behind it. Joan Fraser added that, as the Scottish Government had not yet published its response to the consultation, she had “no idea why the provision on temporary release is in the order”. Pete White said he believed that it was due to the fact that, while on temporary release, individuals were still prisoners and that ensuring continuity was important.

73. The Committee pursued this issue with the Cabinet Secretary and his officials. Responding, Craig McGuffie explained that this was a drafting issue and that the Scottish Government was “concerned that the words “within prisons” might create a loophole that would prevent the chief inspector from inspecting the arrangements for temporary release and, similarly, prevent prison monitors from monitoring those arrangements”.

74. He added that consideration had been given to removing the words “within prisons” but that parliamentary counsel did not believe this would close the loophole. As a result the paragraph was added. He made clear that the intention was to close the loophole and not to place a significant extra burden on IPMs. The Cabinet Secretary added that “additional guidance will go alongside the work, and it will include aspects of how the order will operate”.

75. The Committee understands the concerns expressed by witnesses about the possible additional burdens of the reference in the Order to temporary release. The Committee therefore welcomes the Scottish Government’s reassurance that the reference is simply to close a potential loophole, along with the assurance that they will provide additional guidance.
with the Cabinet Secretary’s commitment to including this issue in guidance for IPMs.

Timescales

Consultation timescales
76. As noted above, the Committee has already considered a previous version of the order under the super-affirmative procedure and, as the Cabinet Secretary indicated, “it has been a long journey to get to where we are today”\(^\text{92}\).

77. Concerns were expressed by the AVC and the Howard League Scotland over the timescales for considering the revised draft Order, with both noting that the consultation period had only lasted for three weeks, a timescale described by Joan Fraser as “wholly unreasonable”\(^\text{93}\). As referred to earlier, Joan Fraser also noted that the Scottish Government had not yet published its response to the consultation\(^\text{94}\) whilst Howard League Scotland drew attention to the fact that the revised draft Order was withdrawn and re-laid on 19 November due to a drafting error\(^\text{95}\). This point was picked up by Professor Coyle in oral evidence, who believed that this contributed to a “sense of drift” in the process\(^\text{96}\). However, Pete White indicated that—

“The consultation period could have been longer, but I think that sufficient notice was given. Given the importance of the process, I am satisfied that people were able to get on and make responses. I have no argument with the time”\(^\text{97}\).

78. The Committee notes witnesses’ concerns about the timescales for consultation on the revised draft Order, and that the Scottish Government has not yet published its response to that consultation. The Committee recognises that there is a desire for the prison monitoring system to be OPCAT compliant sooner rather than later.

Transition period
79. In respect of the proposed transition period of three months, the AVC, Positive Prison? Positive Futures\(^\text{98}\) and the Chief Inspector\(^\text{99}\) were content that this was a sufficient and sensible timescale.

80. The Committee notes witnesses’ views that three months is a sufficient and sensible transition period.

DELEGATED POWERS AND LAW REFORM COMMITTEE CONSIDERATION

81. The Delegated Powers and Law Reform Committee considered the instrument at its meeting on 2 December 2014 and agreed that it did not need to draw the attention of the Parliament to it on any grounds within its remit.100

FORMAL CONSIDERATION OF THE ORDER

82. After taking evidence from the Cabinet Secretary and a Scottish Government official, the Committee formally considered the Order on 16 December 2014. The Official Report of that meeting is available here:

83. The Cabinet Secretary moved the motion lodged in his name: S4M-11850—That the Justice Committee recommends that the draft Public Services Reform (Inspection and Monitoring of Prisons) (Scotland) Order 2014 be approved.

84. After debate, the motion was agreed to (by division: For 7, Against 1, Abstentions 0).

85. The Justice Committee therefore recommends to the Parliament that it approves the draft instrument.

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