Justice Committee

31st Meeting, 2014 (Session 4), Tuesday 2 December 2014

Subordinate legislation: Public Services Reform (Inspection and Monitoring of Prisons) (Scotland) Order 2014 [draft]

Note by the clerk

Introduction

1. The Justice Committee will take evidence from two panels of witnesses on the Public Services Reform (Inspection and Monitoring of Prisons) (Scotland) Order 2014 at its meeting on 2 December, before hearing from the Scottish Government on 16 December.

Purpose of the Order

2. A hard copy of the Order is included with the papers. It can also be accessed at the following link: http://www.legislation.gov.uk/sdsi/2014/9780111024928.


4. In broad terms, the Order—
   - amends the Prisons (Scotland) Act 1989 and the Prisons and Young Offenders Institutions (Scotland) Rules 2011;
   - clarifies the functions of Her Majesty’s Chief Inspector of Prisons and confers further functions on that office;
   - creates the roles of prison monitoring co-ordinator and independent prison monitor, transfers the functions of prison visiting committees to those roles and confers further functions on them;
   - abolishes prison visiting committees (the functions of prison visiting committees having been transferred to prison monitoring co-ordinators and independent prison monitors); and
   - abolishes visiting committees for legalised police cells, as their functions are now exercised by independent custody visitors under section 94 of the Police and Fire Reform (Scotland) Act 2012.

5. These changes follow Professor Andrew Coyle’s Review of Proposals to Improve Arrangements for Independent Monitoring of Prisons, published in January 2013, and further consultation by the Scottish Government.

6. The Order is subject to the draft affirmative procedure and the Committee is required to report on it to the Parliament by 12 January 2015.

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1 Hard copies of the Explanatory Document are available on request from the clerks.
2 The review can be accessed at the following link—
Previous scrutiny by the Committee

7. Members will recall that the Committee considered the Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014 under the super-affirmative procedure. The Committee’s report\(^3\) on the super-affirmative Order highlighted a number of areas where the Order could be improved. In its response\(^4\), the Scottish Government agreed to amend the Order to take account of the report’s recommendations.

Consultation on revised Order

8. The Scottish Government subsequently amended (and renamed) the Order and issued a consultation on it on 19 September, which closed on 13 October. Copies of responses received on the consultation can be accessed at the following link: http://www.scotland.gov.uk/Publications/2014/11/1102/0. An analysis of responses to the consultation can be accessed at the following link: http://www.scotland.gov.uk/Resource/0046/00462793.pdf.

Parliamentary consideration of the revised Order

9. The draft Public Services Reform (Inspection and Monitoring of Prisons) (Scotland) Order 2014 was laid on 7 November, before being withdrawn and re-laid on 19 November.\(^5\)

10. The Committee has agreed to take evidence on the Order from two panels, before hearing from the Scottish Government and considering a motion to approve the Order on 16 December. The Committee has received a number of written submissions from witnesses in advance of the session. These are annexed to this paper.

Recommendation

11. The Committee is invited to note the contents of this paper.

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\(^3\) A copy of the Committee’s report on the super-affirmative Order can be accessed at the following link: http://www.scottish.parliament.uk/S4_J usticeCommittee/Reports/juR-14-01w.pdf.

\(^4\) The Scottish Government’s response can be accessed at the following link: http://www.scottish.parliament.uk/S4_J usticeCommittee/20140312_KM_to_CG_SG_response.pdf.

\(^5\) The Order was re-laid to correct a drafting error.
WRITTEN SUBMISSION FROM THE SCOTTISH HUMAN RIGHTS COMMISSION

Introduction

1. The Scottish Human Rights Commission (the Commission) welcomes the opportunity to submit written comments in advance of the evidence session on the Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014. This Order is the result of a long period of policy development on the issue of the future of independent prison monitoring. The Commission reiterates the points made previously to the Scottish Government and Scottish Parliament in relation to: monitoring vs inspection, mandate, powers, funding, immunities and privileges, appointment of members, and composition. The Commission refers to its previous submissions to the Scottish Government in January and October 2014 which are attached. A significant number of previous recommendations made by the Commission and by civil society organisations have now been incorporated into the Order. There are also some outstanding issues which need to be addressed.

2. The Commission welcomes the express inclusion of the statement that the purpose of independent prison monitoring is in pursuance of the objective of the UN Optional Protocol to the Convention Against Torture (OPCAT). The purpose of the OPCAT is to establish a system of unannounced and unrestricted visits to all places where persons are deprived of their liberty by independent international and national monitoring bodies.

3. Article 18 of the OPCAT requires that States Parties guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel. When establishing national preventive mechanisms, States Parties must give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles). When the Scottish Parliament established the Scottish Human Rights Commission, it followed best practice in relation to the Paris Principles in terms of providing independence by linking the funding and accountability of the Commission to the legislature rather than the executive.

4. The draft Order provides that some monitoring by Independent Prison Monitors (IPM) should be in accordance with a rota which has been agreed with the Prison Monitoring Co-ordinator (PMC) and the Prison Governor. Given the importance of independence the perception of independence, and noting purpose of the OPCAT being to establish a system of unannounced and unrestricted visits to all places where persons are deprived of their liberty, the Commission questions the role of Prison Governors in the development of rotas.

5. The new system must be provided with sufficient human, material and financial resources to discharge the prevention mandate independently and effectively. It is also important to ensure the composition of the monitors represents the multidisciplinary expertise relevant to torture prevention, members of both sexes, and adequate representation of the country’s key ethnic and minority groups required by OPCAT. In order to reduce barriers and promote plurality, IPMs should be able to recover all expanses they incur while performing this public function such as child care or loss of
earnings. This should be clearly specified in the Order or policy guidance. The current Order only provides for travel and subsistence expenses (7D(8)).

6. The Commission notes the new draft includes an additional responsibility for the independent prison monitors and inspector, which is ‘monitoring the arrangements for temporary release of prisoners (7D(c)) includes home leave, unescorted day release (for family, educational, work, education and compassionate reasons), temporary release for work and unescorted release for health reasons. The Commissions suggests that if the Order intends to add more responsibilities for the monitors these should be clearly set out and the capacity implications adequately assessed.

6. The Commission welcomes the new draft power of independent monitors to investigate any matter referred by a prisoner (7D(3) and 7D(6). The previous proposal that independent prison monitors provide only assistance in relation to existing internal complaints process is a significant weakening of the role. It is essential that those deprived of liberty have access to an external and independent mechanism for dealing with complaints.

Scottish Human Rights Commission
27 November 2014

SHRC previous consultation submissions to the Scottish Government

October 2014

Introduction

1. The Scottish Human Rights Commission (the Commission) welcomes the opportunity to submit comments to the Scottish Government on the Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014. The Commission considers that there are still a number of outstanding issues which need to be addressed.

2. The Commission welcomes the express inclusion of the statement that the purpose of independent prison monitoring is in pursuance of the objective of the UN Optional Protocol to the Convention Against Torture (OPCAT). The Commission reiterates the points made previously in relation to: mandate and powers, roles and responsibilities, duration of office and appointment for members, composition, funding and immunities and privileges. The Commission refers to its previous submission of January 2014 which is attached for reference.

3. The independence of the monitors is central to their effectiveness. The OPCAT clearly provides for independence of NPM members:

“The States Parties shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel” (Art. 18 (1) of the OPCAT).

4. Specific attention should be paid to the new system’s membership, where professional occupations or pre-established relations could lead to potential conflicts of interests or perceived lack of independence. The SPT Guidelines on appointment provide that NPM members be selected through an open, transparent and inclusive process, with public criteria for appointment. In its report on the visit to the Senegalese
NPM, the SPT expressed its concerns regarding the appointment procedure of the NPM mandate-holder, who was appointed by the government, as challenging the independence of the institution. The SPT has also raised concern in relation to the practice of seconding individuals working in places of deprivation of liberty to NPM bodies. It recommends that **NPMs are provided with sufficient human, material and financial resources to discharge their prevention mandate independently and effectively.**

5. There remains a lack of clarity as to the profile and role of **independent prison monitors.** For an independent monitoring of prisons to be truly effective, it is not enough that its members and staff are independent: they should be knowledgeable and have the relevant professional expertise. The NPM should take a multidisciplinary approach, bringing together the required variety of different fields of professional knowledge relevant to deprivation of liberty. It should also be representative of the wider society, ensuring gender balance and representation of ethnic and minority groups. **Annual Reporting** on individual prisons is also highly desirable.

6. The Commission remains concerned that the Order does not provide for a mechanism for establishing a **minimum number of Independent Prison Monitors, or a minimum number of visits** to ensure that proper functioning of the monitoring system.

7. The Commission **notes the importance of the monitors being able to access all places of detention, and all facilities within those places at any time.** Article 14(2) of OPCAT sets out exceptional and limited grounds upon which a visit to a particular place of detention may be temporarily postponed. Such action can only be taken when there is urgent and compelling grounds of national defence, public safety, natural disaster, or serious disorder in the place to be visited. If it is intended that limitations will be set on monitors visiting prisons, these limitations should be clearly set out.

8. The proposal that independent prison monitors provide **assistance in relation to existing internal complaints process is a significant weakening of the role.** It is essential that those deprived of liberty have **access to an external and independent mechanism for dealing with complaints.** While the Scottish Public Services Ombudsman plays an important role, the need to exhaust internal complaints mechanisms can discourage complaints through lack of faith in the system or fear of recrimination, it can also lead to significant delays.

9. The Commission notes that a number of the recommendations from Professor Coyle’s report have not been accepted, nor specifically disregarded for clear reasons. The Commission considers that it would be useful for a clear explanation in relation to recommendations which have not been followed.

January 2014

**Introduction**

1. The Scottish Human Rights Commission (the Commission) welcomes the opportunity to submit comments to the Scottish Government on the Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014. The Commission considers that the present draft proposed Order could be improved in order to provide a clear and comprehensive legal framework that enables both the Chief Inspector for
Prisons’ and new monitor’s to conduct their statutory function as well as providing public confidence in the new system.

2. The Commission considers that a good starting point for the Order which creates prison monitors and new oversight mechanism is to ensure that human rights and OPCAT are explicitly articulated in this legislation. There is a striking lack of reference to either OPCAT or any other relevant human rights standards required to establish an effective system that prevents human rights violations in the prison system.

3. The UK ratified OPCAT in December 2003 and designated its NPM in March 2009. 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 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.

4. The UK’s NPM is currently made up of 18 visiting or inspecting bodies who visit places of detention. SHRC is part of the UK NPM.

5. In line with our general duty, the Commission highlights examples of best practice and provide recommendations for strengthening the draft proposed Order.

6. Monitoring vs. Inspection:

The functions of monitoring and inspection are distinct and complementary. 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.

It is important that each function is preserved within the new system. Professor Coyle in his Report clarifies the value of differentiating between inspection and monitoring functions and the potential risks of a model that sits under HMIP:

“The main criticism of a model under the auspices of HM Inspectorate of Prisons is that it would elide the important distinction between inspection and monitoring. OPCAT recommends a “layered” approach to national preventive mechanism activities and this would arguably be weakened under this model. It would also weaken the local features of monitoring since the independent monitors might be subject to influence in their work by HM Inspectorate of Prisons.”

6 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.

7 The Commission has previously expressed this principles in relation to Chapter 16 of the Police and Fire Reform (Scotland) Act 2012. SHRC response to the Scottish Parliament Consultation on the Police and Fire Reform (Scotland) Bill, March 2102 available at www.scottishhumanrights.com/  

At present, Her Majesty's Chief Inspector of Prisons for Scotland is required to inspect the 16 prison establishments in Scotland and to report to the Scottish Ministers. The intensity of regular monitoring to a prison is of a different quality from that involved in inspections which take place every three or four years by the Inspectorate. 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.

It is therefore essential that the Order provides greater clarity about how these two accountability mechanisms are considered and preserved, particularly as in Scotland HM Inspectorate of Prison undertakes a role of inspections by statutory duty.⁹

7 Key elements to consider:

While OPCAT does not prescribe the format of the structures monitoring places of detention, the legislation establishing the new structure should encompass the key elements set out by the OPCAT. These are:

- **Mandate and powers:** The independence of the new structure will be undermined if the executive government has the legal authority to alter its mandate, composition and powers, or to dissolve or replace it, at will. This also includes wide powers of investigation, functional independence and the authority to publish their findings. Functional and financial independence are key elements, but it is also crucial to consider the external perception of independence.

- **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. The proposed draft Order does not mention either the number of lay monitors to be appointed or the frequency of their visits. 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.

- **Duration of office and appointment for members:**¹⁰ To ensure independence among other issues, legislation should include: selection procedures for all members; members' personal and institutional independence from state authorities; methods to resolve incompatibilities of functions and to ensure non-interference from the executive; and operational autonomy in the appointment of staff. It is also important for monitors to have sufficient security of tenure for the duration of their terms of office.¹¹ The proposed order is silent about most of these issues.

- **Composition:** Specific provisions regarding the composition of the body, including the need for multidisciplinary expertise relevant to torture prevention, members of both sexes, and adequate representation of the country’s key ethnic and minority groups. OPCAT is clear that particular attention should be given to achieve “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

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⁹ See Articles 19(a).
¹⁰ Article 18 of OPCAT
promotion and protection of human rights. The proposed order is inexplicit about this element.

- **Funding:** Independent and sufficient financing is vital to ensure both operational autonomy and independent decision-making. The 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.\(^{12}\) It is fundamental that the new structure is properly funded and resourced. It is important that lay monitors receive reimbursement for expenses incurred in the performance of their duties, including loss of earnings, accommodation and child care. This is important if the new structure is to be diversified, have the proper expertise and be truly representative of Scottish society. The proposed Order only refers to travel and subsistence expenses for lay monitors.

- **Immunities and privileges:** The members’ of the new structure should be provided with privileges and immunities as are 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.\(^{13}\) The proposed Order is silent about this.

8. **Other Relevant Human Rights Standards that the Scottish Government should consider in developing legislation in this area 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
  UN Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment

**WRITTEN SUBMISSION FROM THE ASSOCIATION OF VISITING COMMITTEES**

The Scottish Government consultation seeks to gather views on revised proposals by comparing them with the previous draft Order which was roundly criticised by many who commented and in addition, strong reservations were expressed by the Justice Committee of the Scottish Parliament.

However, the questions asked in this this consultation appear to have been carefully constructed to achieve support for the latest proposals and ignores many of the previous criticisms. This consultation is fatally flawed because: it does not address the right questions, it does not make it clear what the main changes are from the current arrangements; and, only 3 weeks have been allowed for the consultation even

\(^{12}\) Article 18 of OPCAT
\(^{13}\) Articles 21 and 35 of OPCAT
although the Government’s own Good Practice Guidance states that consultations must allow 12 weeks for responses.

Against this background, it is very difficult for any meaningful consultation to take place.

Nevertheless, we have attempted to answer the questions asked but our replies in each case are accompanied by a large number of concerns.

Q1) Do you support the change of the role titles from ‘Lay Monitor’ to ‘Independent Prison Monitor’ (IPM) and from ‘Prison Monitor’ to ‘Prison Monitoring Co-ordinator’ (PMC)?

Yes.

- This is a better terminology but it is very misleading. It is the roles and functions that are important and they are not reflected in the titles. In particular:
  - The title of Prison Monitoring Co-ordinator
    - obscures the fact that the powers of the Co-ordinators to undertake monitoring functions remain in the Order, even though this was a major criticism of the previous proposals
    - is misleading because the primary functions of the PMC are to appoint, manage and instruct the Monitors
  - The title of Independent Prison Monitor
    - is wholly misleading. IPMs will be significantly less independent than PVCs are at present.
    - seems to be an attempt to obscure the fact that IPMs will subject to detailed management and control by PMCs; will visit prisons in accordance with a rota agreed by the Co-ordinator and the Governor; and, must comply with any instructions issued by the Co-ordinator.
  - The duties of PVCs to hear and investigate complaints are to be abolished. Prisoners’ access to IPMs is to rely on the co-operation of the Prison Service
  - That is not independent monitoring

Q2) Does the revised draft Order provide greater detail on the functions to be carried out by the IPM?

No.

- Compared to the existing statutory protection, the Order provides very little information on the functions. It does state that IPMs must visit the prison (but rarely unannounced it seems), monitor conditions and the treatment of prisoners and investigate matters referred to them by the PMCs.
- However, there are numerous aspects of the role which are no longer included in the legislation. For example:
  - The frequency of monitoring is unspecified (despite the fact that the Justice Secretary gave an undertaking to the Justice Committee that the frequency would be included in the Order
  - The number of monitors is unspecified
  - The duty to hear and investigate complaints has been abolished
  - The requirement to produce an annual report on the prison is gone (even though this is a Coyle recommendation that the Government previously accepted)
The ability to call the Governor to account is so weakened as to be ineffective. There is no longer any right for monitors to refer upwards to Ministers (or anyone else) if a Governor fails to take account of concerns raised by IPMs. (This is another Coyle recommendation previously accepted by the Government)

There is no provision for the monitors of a prison to meet as a group to share information and knowledge or to form a committee.

There is no description of the appointments criteria or the circumstances in which an individual may be or may become ineligible.

• The repeated comments of the Scottish Human Rights Commission about the need for much of these arrangements to be included in legislation have been ignored.

• There is heavy reliance on the use of Guidance in place of legislation. Guidance can be written and altered without any Parliamentary scrutiny.

Q3) Do you support the clarifications that have been made to the role of the PMC which seek to explain their administrative role, in relation to prison monitoring?

No.

• Very little of the role of the paid PMC is administrative. On the contrary, the role of the PMC is to appoint, instruct, control and performance manage the IPMs and to operate as the conduit for communication between the Chief Inspector and the IPMs. The main functions of the PMC identified in the Order are:

  o Appoint IPMs
  o Assign IPMs to a prison
  o Evaluate the performance of IPMs
  o Arrange for IPMs to visit the prison in accordance with a rota which has been agreed with the prison governor
  o Agree (approve) other visits to the prison by the IPM
  o Require IPMs to investigate matters specified by the Chief Inspector
  o Give instructions to IPMs
  o Meet IPMs twice a year (this appears to be a meeting of the IPMs in the region in an individual prison)
  o Arrange such training for IPMs as the PMC considers appropriate
  o Provide such support (unspecified) as the PMC considers appropriate
  o Comply with any instructions issued by the Chief Inspector
  o Visit prisons as instructed by the Chief Inspector
  o Report to the Chief Inspector on investigations referred to the IPM
  o Report to the Chief Inspector on any other matter as required
  o Make an annual report on the monitoring to the Chief Inspector (this appears to be a report on the monitoring not on the conditions in the prison or the treatment of prisoners)
  o Undertake visits to prisons and speak to prisoners and staff on exactly the same basis as the IPM.

• In the light of these functions it is hard to see how the role of the PMC can be described as an administrative one. Rather they will be the agents of the Chief Inspector and managers of the IPMs, instructing them about what to do and when and how to do it.

• The emphasis on following instructions from the Chief Inspector suggests that a major part of the role of PMCs may be to ensure that IPMs follow up on inspection
findings, reducing the time available for independent monitoring and blurring the lines between inspection and monitoring

Q4) Do you support the inclusion of provisions in the draft Order whereby the PMC is required to provide support, and arrange for the training, of IPMs?

Yes, but very little of the PMC’s role is about training and support and both of these functions are to be exercised at the discretion of the PMC.

- The provision of sufficient training is long overdue and is one aspect of the current arrangements which has been sadly neglected by Scottish Government for many years.
- The training should meet the needs of IPMs and should cover appropriate topics such as international requirements, human rights legislation, necessary personal safety and familiarisation with the role of the IPM.
- However, the Order allows PMCs to decide what training is appropriate so there is no guarantee that the training will cover all the important topics or even that it will be consistent across Scotland
- The requirement for IPMs to “attend all training arranged by the PMC” means that an IPM could be in breach of the Order if for some reason they were unable to attend on a particular date
- Support to IPMs is also needed but it should be further specified. As drafted, the Order leaves it to the discretion of the PMCs to decide what is appropriate. Leaving it up to individual PMCs will lead to inconsistency across Scotland and increases the possibility that the support will not be appropriate to the needs of IPMs.

Q5) Do you welcome the inclusion of a provision that places a duty on the prison governor to ensure that the Chief Inspector, IPMs and PMCs are provided with such assistance as is necessary to allow them to exercise their statutory functions?

Yes

- But the nature of such assistance is unspecified and there is no sanction to be applied if a Governor does not comply with that duty. The lack of co-operation by some Governors has been a recurrent problem, even to the level of failing to provide basic facilities such as a desk or telephone. The wording in the draft Order is insufficiently robust to effect change where a Governor is set on non-cooperation or refuses to act on concerns raised by IPMs

Q6) The draft Order contains provisions for IPMs to support prisoners in raising a complaint through the existing complaints process while retaining a discretion for them to resolve personally any particular matter which it is assessed cannot be dealt with through this route. Do you consider that this provides the basis for a clearer and more consistent complaint-handling process for prisoners?

No. This radical change is one of the most worrying aspects of the latest proposals

- The presentation of this proposal is very misleading. There is at present a statutory duty on PVCs to hear and investigate complaints. **None of the existing duty, or any discretion to take up concerns which cannot be addressed through the SPS process, is retained as a function of IPMs.**
• It is said that IPMs will be able to investigate where matters are urgent or where SPS system would not work. But without a system of confidential requests to the IPMs and some statutory protection this means little.

• The abolition of the statutory duty on PVCs to hear and investigate complaints from prisoners is justified by the Government on the grounds that the current arrangements are confusing and complex. This could not be further from the truth. There is no existing confusion about the means by which prisoners can raise a complaint and concern.

• Prisoners value the PVC route as they often do not trust the SPS internal complaints system which is not confidential and is found to be significantly ineffective.

• The SPS process requires a reasonable level of literacy and is not confidential or independent. Prisoners often say they do not trust it and fear retribution if they use it. Prisoners often report that when they attempt to use the SPS system they are told by staff that their complaints will go in the bin. Prisoners often report that when they do submit a complaint to SPS, they get no response and no action is taken.

• Prisoners with low levels of literacy (about 80% of prisoners) and often limited comprehension are not well equipped to challenge a monolithic bureaucracy through a paper based system such as provided by SPS.

• SPS do not publish statistics about prisoner complaints through the SPS process so there is little available information about the number or type of complaints or their outcomes. However, the BBC has obtained statistics using FOI legislation. This shows almost 9,000 complaints in 18 months, equating to 6,000 a year. This suggests that prisoners have a high level of dissatisfaction with their conditions and treatment.

• Prisoners can complain to the Scottish Public Services Ombudsman about a failure of process by the SPS in dealing with their complaint but they cannot complain about the outcome. And they cannot complain to the SPSO until they have exhausted the SPS internal processes.

• In 2013-14 the SPSO dealt with 306 complaints from prisoners (of which only 33 were partly or fully upheld).

• The PVC complaints process on the other hand is confidential and, most importantly, independent. It does not require literacy skills, is rapid and responsive and is trusted by prisoners. But this system is to be abolished, resulting in a significant loss of protection for prisoners. PVCs respond to around 1400 complaints and requests a year – the equivalent of almost two per prison per week. This clearly demonstrates the need for an independent and confidential process.

• In response to the last consultation on independent monitoring, the Law Society of Scotland emphasised the importance of prisoners having access to independent monitors who could investigate complaints and report them to Scottish Ministers. This view is to be ignored.

• IPMs will no longer have a duty to investigate complaints but instead will be expected to direct prisoners to the slow, ineffective and mistrusted SPS system.

• It will be almost impossible for IPMs to follow up on the progress of individual SPS complaints without a high level of information and co-operation from Governors. The decision to abolish this protection for prisoners, which is a significant change from the last draft Order, represents a serious reduction in the safeguards provided to prisoners.

• Prisoners who wish to raise any matter with PVCs will now have to do so by routing their request through the SPS. That would not be an independent or confidential process.
• The proposed system for prisoners in Scotland to raise concerns compares very unfavourably with the arrangements which operate elsewhere in the UK. In England, for example, there is a formal, confidential and independent process managed by independent monitors. They deal with over 23,000 applications a year.
• Finally, the removal of this statutory protection is justified by the Government on the grounds that at present PVCs don’t in practice investigate complaints but instead assist prisoners to use the SPS complaints process. This is completely untrue, as officials are well aware.

Q7) Do you support the inclusion of provisions in relation to the establishment and composition of a Prison Monitoring Advisory Group in the draft Order?

No.
• The revised Order now contains powers to establish a Prison Monitoring Advisory Group. This was the body which the Justice Secretary said would ensure that the new system is “future proofed and person proofed” so that it remains robust despite the lack of statutory protection.
• However, the membership of the Group is to include the Chief Inspector himself, each of the PMCs who work for him and such persons as he decides to appoint for any period of appointment or re-appointment that the Chief Inspector decides. Such a body can in no way provide the kind of challenge function that is required or was promised since many of the appointments would be in the gift of the Chief Inspector. The inclusion of 3 IPMs amounts to just window dressing and any concerns expressed by them could simply be over-ridden.
• The proposed Prison Monitoring Advisory Group will be, in short, a toothless body.

Q8) Do you support the inclusion of a provision in the revised draft Order explaining that the purpose of inspection and monitoring is in pursuance of the objective of the UN Optional Protocol to the Convention Against Torture (OPCAT), and a section which outlines Scottish Ministers’ duties in relation to the Subcommittee on the Prevention of Torture (SPT) visits?

Yes but words are not enough. It is demonstrable commitment to the protection of human rights that is needed.
• There is considerable doubt about whether the proposals are in fact OPCAT compliant. They certainly do not meet the “gold standard” which the Government stated was its aim.
• The inclusion of a reference to OPCAT which is in any case binding on the Government creates an illusion of a commitment to protection of human rights which is not borne out by the provisions in the draft Order.

Q9) Do you support the inclusion in the Order of a transitional period of 3 months to allow any work undertaken by the Prison Visiting Committees, at the time the new system comes into force, to be completed?

Yes
• A three month period is likely to be sufficient to enable PVCs to conclude any ongoing matters and ensure that actions in respect of prisoners concerns are concluded.
• However, it is interesting that the Government is so keen to ensure the completion of Annual Reports when it has shown no interest in them in the past and has ignored the concerns they raise. (Often not even an acknowledgement is sent by
the Minister in response to receipt of an Annual Report which PVCs send him in accordance with their statutory duties).

- It is also interesting that the Government is so keen to receive Annual Reports when it has dismissed the need for them in the proposed new system on the grounds that they are “unnecessary”

Q10) Do you have any further comments on the draft Order or Explanatory Document?

Yes. Our comments are as follows:

**Overall comments**
- The justification for the changes in the Order are founded on the consultation responses from the last consultation which was concluded in January 2014. However, the Government did not publish its Consultation report until September 19th and did so at the same time as it published the revised Order and the further consultation on the amended Order. The last consultations exercise is claimed as the underpinning for many of the changes being proposed now but:
  - The Government’s Consultation Report on its last consultation is misleading, tendentious and dishonest
  - The number of critical responses was far higher than number of positive comments but this is downplayed in the Report. The numbers for and against the proposals are dismissed as unimportant, no doubt because the majority are critical of the proposals. Even on the most generous interpretation, only a quarter of the 36 organisations who commented were supportive of the proposals.
  - There is significant misrepresentation of the Justice Committee’s comments. In particular, the Justice Committee are portrayed as supporting the merging of inspection and monitoring when in fact they expressed concerns about the independence of monitoring being compromised
  - Where consultees expressed a strong view about a particular issue or aspect of the proposals that the Government did not like, the Government’s Report simply states that they didn’t share that view and dismissed it
  - It is clear that a number of the recommendations of the Coyle Report, which the Government previously accepted, are now to be ignored or reversed.
  - In addition, Professor Coyle’s recommendations are misrepresented at various points
  - Some of the statements and assertions made in the Government’s response are simply untrue.

**Specific comments**
- There is heavy reliance on the role of the Implementation Group in developing guidance which will supplement and replace legislative provisions. However, Government representatives (SG, Chief Inspector of Prisons and SPS) have the majority and views expressed by the other members (AVC, HLS, SHRC and Positive Prisons) are given very little weight. In addition, the work is being led by a Deputy Prison Governor seconded to the Inspectorate. That is inappropriate.
- There are repeated references to the current system not being OPCAT compliant, presumably in an attempt to convey an impression of wholesale deficiencies. However, the only aspect of the current system which is not
OPCAT compliant is the arrangement whereby SPS hold the budget for monitoring. This is an administrative arrangement which the Government has known about for at least 9 years but has made no effort to change.

- For the first time it is explicitly acknowledged that monitors will be used to chase up inspection findings.
- There are repeated references to inconsistencies in monitoring under the existing system and an assertion that there can be no certainty that all aspects of prisons are monitored on a regular basis. This is simply untrue. The current system of monitoring is laid down in statute which stipulates the frequency of monitoring and the requirement to do this in accordance with a rota. The legislation also requires that the particulars of each visit and any deficiencies are recorded. All PVCs are required to work in accordance with a National Guidance document. While there are some historic minor differences in the way in which individual PVCs’ monitoring is carried out and in the paperwork used for recording, Scottish Government have never shown the slightest interest in addressing this or in supporting the system in any way.
- The Government dismisses concerns that prisoners will not trust a system where so-called independent monitors are directly managed by staff paid by the Justice Department and answerable to the Chief Inspector of Prisons. The Government says there is no evidence to support these concerns (despite being aware of the experience of PVC members who know from comments made to them by prisoners that prisoners mistrust paid officials, including the Chief Inspector).
- The Government has no evidence to support its assertion that prisoners will have confidence in the proposed system. They assert that prisoner confidence in the new system will be achieved by better communication on the part of SPS.
- The significant additional cost of the new system (likely to be more than a fourfold increase on the current £75k) is justified repeatedly on the grounds that it will produce better (unspecified) results and therefore will provide “better value for money” and be “more economical”. The Government has declined to say how much they expect their proposals will cost.
- The Government’s repeated criticisms of the current system ignore the fact that the Review of 2007 (supported by the AVC and a significant number of other organisations) made wide-ranging recommendations for modernising, most of which were accepted by the current Administration. However, despite urging by PVCs, almost no action has been taken by the Government to implement those recommendations.
- The Government’s response to the last consultation states that Annual Reports from Monitors on individual prisons (which are a statutory requirement at present) are “unnecessary” even though they previously accepted a Coyle recommendation that such reports should be a feature of the new system. The annual reporting on each prison is to be replaced with a single annual report on monitoring produced by the Chief Inspector. It should be noted that the intention is to report on monitoring not, as at present, on conditions and treatment of prisoners.
- This single annual report is to be considered first by the proposed Advisory Group (and it is unclear whether they might be able to amend it). The Government asserts that the current annual reports issued by VCs vary in terms of quality and depth. However, this ignores the fact that most Annual Reports are prepared in accordance with a template agreed with Scottish Government.
- The Government’s response repeatedly rejects the views of consultees and the Justice Committee that more of the structure of the new system should be
enshrined in legislation. Instead, the Government says that guidance (which can be changed at any point and without recourse to Parliamentary approval) is preferred by them to legislative rigour.

- There is now no intention that the frequency of monitoring will be enshrined in legislation. This is all to be covered in guidance which of course will not be subject to Parliamentary scrutiny. This is despite the fact that the Justice Secretary gave an undertaking to the Justice Committee that the frequency of monitoring would be included in the Order.
- Nor is the number of monitors to be included in the Order. This again is to be left to guidance.
- The Government asserts that the proposed system will involve “no reduction in rights for prisoners under the new system”. Certainly the Government have no powers to reduce prisoners’ rights under OPCAT but the proposed system will make it harder for prisoners to exercise those rights.
- The Government’s assertion that all of the functions of PVCs are being replicated is also completely untrue. Not least of the deficiencies in the proposals is the intention to abolish the duty of PVCs to hear and investigate complaints.
- The Explanatory Memorandum to the draft Order sets out the Government’s views that it has met the pre-conditions required by the legislative process. It is our belief that it has not. In particular, we do not think it has met the following pre-conditions:
  - The provision is proportionate to the policy objective
  - The provision does not remove any necessary protection
  - The provisions will improve the exercise of public functions having regard to efficiency, effectiveness and economy.

Association of Visiting Committees
12 October 2014

ADDITIONAL WRITTEN SUBMISSION FROM THE ASSOCIATION OF VISITING COMMITTEES

Although it is not a popular view, it has to be recognised that many of the prison population are very vulnerable. Each year there around 37,000 or so admissions to prison, around one third of them on remand.

Compared to the general population, prisoners are 13 times more likely to have been in care as a child and 13 times more likely to be unemployed. Seventy per cent have suffered from at least two mental disorders, 20% of male prisoners and 37% of female prisoners have attempted suicide, 80% have limited or no literacy skills and 65% have limited numeracy skills. For younger prisoners aged 18-20 these problems are even more intense; their basic skills, rates of unemployment and levels of school exclusion are a third worse even than those of older prisoners. (Source: Report of Scottish Prisons Commission).

Given these characteristics it is important to have effective and independent monitoring of prisons to ensure that prisoners in Scotland are treated fairly and to fulfil international obligations (principally laid out in OPCAT) to protect the human rights of persons deprived of their liberty and held in a closed society. The system of independent monitoring in Scotland has been under review for the last four years.
There have been several sets of proposals and consultations, all of which gave rise to serious concerns from a wide range of respondents and attracted cross-party criticism.

As a result of opposition to the earlier proposals, the former Justice Secretary commissioned an international expert, Professor Andrew Coyle, to advise on a system of independent monitoring in Scotland. His report set out an excellent and robust model which would have modernised the existing system whilst retaining the important aspects of independence and accountability.

However, despite an initial welcome by Government and apparent acceptance of most of his recommendations, many of his key recommendations have now been ignored or rejected.

The former Justice Secretary's most recent proposals, which have been laid in the draft Order for Parliamentary approval, have also given rise to significant concerns, not just from Prison Visiting Committees (who are responsible for independent monitoring at present) but also, for example, from the Howard League, the Scottish Human Rights Commission and COSLA. There are a number of very serious concerns including:

**The proposed merging of inspection and monitoring**
- The important distinction between inspection and monitoring would be lost, contrary to OPCAT which recommends a “layered” approach to National Preventative Mechanisms.
- Professor Coyle made it clear that he did not favour this model precisely because it would elide the distinction between inspection and monitoring and might in addition weaken local monitoring.

**The lack of independence of the proposed system.**
- Monitoring visits will mostly be undertaken in accordance with a rota which must be agreed with the prison governor. Even the Scottish Prison Service regard this as completely inappropriate. At present all monitoring visits are unannounced in accordance with a rota decided by the monitors alone.
- Monitors will be directly appointed, managed, evaluated and instructed by Prison Monitoring Coordinators who will be appointed and paid by Scottish Government. This is inconsistent with OPCAT which stipulates that monitors must be functionally independent of government.
- We welcome the re-instatement (in the latest version of the Order) of the Independent Prison Monitors (IPM) role in relation to investigating matters brought to them by prisoners. However it is disappointing that requests by prisoners to speak or write to IPMs will still have to be routed through the SPS. Prisoners tell us of instances where such requests are not passed on by SPS staff or prisoners are asked for the reason for the request. In some cases, prisoners fear or experience retribution from SPS staff. The requests process should provide for independent and confidential access by prisoners to IPMs.

**The lack of accountability to Parliament**
- The current legal framework is set out in detail in subordinate legislation which ensures that the system of independent monitoring, the role of monitors and any changes thereof are subject to Parliamentary scrutiny. However, the draft Order is silent on many key issues leaving them to be determined in guidance, which of course will not require Parliamentary approval.
Concerns about the lack of accountability and independence of the proposals were expressed by the Justice Committee in its report in January. The SHRC has also expressed concerns about this aspect of the proposals. In response, the former Justice Secretary offered re-assurance that a Prison Monitoring Advisory Group would ensure independence of the monitoring system. However, it is now clear that most of the PMAG members will be appointed at the personal discretion of the Chief Inspector of Prisons who will also be able to decide the duration of appointments and whether any individual is to be re-appointed. The PMAG will have an advisory and review role but no powers. It will therefore be unable to provide the necessary safeguards or challenge function.

The removal of legislative protection means that the role of the Parliament to scrutinise the Government’s exercise of its duty to ensure prisoners are treated with fairness and dignity and have their human rights protected is to be passed to an advisory body which has no powers, statutory or otherwise, and whose members are appointees of the very office they are supposed to be holding to account.

Capacity
- despite requests to do so, the number of independent monitors or even a formula for ensuring a minimum number of monitors is not to be included in legislation. The number of monitors is to be at the sole discretion of the Chief Inspector of Prisons. But the role of the Independent Monitor is to be extended to include a number of new duties including assisting prisoners with the mistrusted SPS internal complaints process; investigating matters referred by the Chief Inspector; and monitoring the arrangements for temporary release of prisoners (this last duty has never previously been suggested or consulted upon and the purpose and workload is entirely unclear). But, perversely, the statutory entitlement of monitors to time off from employment is to be abolished.

The increased duties, the lack of a legislative commitment to the numbers of IPMs required and the loss of a right to time off from employment for monitors together raise significant concerns about the capacity of the proposed system to provide the necessary safeguards.

Cost
- The cost of the current system is around £75,000 to cover administration, training and re-imbursement of travel expenses for around 240 unpaid independent monitors. The Government has given no indication of the cost of the new system expect to say that it will be more than at present. A previous Government estimate which included 4 part-time paid monitors was £255,000. The current proposals are for 4 full time co-ordinators with travelling expenses, office accommodation and perhaps staff. The cost of the new system is unclear but seems bound to be considerably in excess of the previous estimate. In the absence of any information about costs, Parliament is being asked to sign a blank cheque.

In short, the proposed system would be less independent, less accountable and considerably more expensive than at present. It would also be less robust and less effective than is the case in the rest of the UK. In the light of the First Minister’s recent commitment to social equality and a just society, it cannot be right that Scottish citizens held in prison in England, Wales and Northern Ireland, will have more protection of their human rights there than they will if imprisoned in their own country.
The Order currently before Parliament is due to be submitted for Parliamentary approval shortly after Christmas recess. Time is therefore very short to avert a serious reversal of the progress of penal policy in Scotland. We think the current Order should be withdrawn to allow a pause in the entire process. This would provide time for an objective look at some of the deficiencies in the proposals with the aim of designing a system which is effective and independent, which would attract widespread consensus and which would be trusted by prisoners. After 4 years deliberation, a few more weeks to get it right would be time well spent.

To illustrate the many aspects of the current system which will be lost or consigned to guidance, I attach a summary comparing the current legislation with the provisions in the draft Order.

The independence of monitoring is paramount and achieving the confidence of the prison population is vital to the success of any new system. If a gold standard of monitoring is to be achieved (and this was a commitment given by the former Justice Secretary), then changes must be made to the proposals.

### Comparison of existing duties of lay monitors in the Prison Rules 2011 with the Draft Order laid on 19 November 2014

<table>
<thead>
<tr>
<th>Statutory Provision</th>
<th>In Prison Rules 2011</th>
<th>In Draft Order</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Constitution</strong></td>
<td>√</td>
<td>No</td>
<td>IPMs will be appointed by PMCs And assigned to a prison by PMCs</td>
</tr>
<tr>
<td>A committee must be constituted for each prison</td>
<td>√</td>
<td>No</td>
<td>Chief Inspector to decide on the number</td>
</tr>
<tr>
<td>Committee members must be appointed (by public appointment)</td>
<td>By local authorities for adult prisons and Scottish Ministers for YOIs</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Number of members is specified</td>
<td>√</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Requirement to fill vacancies</td>
<td>√</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Eligibility criteria for appointment</td>
<td>√</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Duration of appointment</td>
<td>√</td>
<td>√</td>
<td>nine years maximum</td>
</tr>
<tr>
<td>Termination of appointment due to resignation, performance, conviction or financial interest</td>
<td>√</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Duty of Committee Chair to report grounds for termination to appointing Council</td>
<td>√</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Minimum number of women members (YOI)</td>
<td>√</td>
<td>No</td>
<td></td>
</tr>
</tbody>
</table>
### Proceedings of Committees

<table>
<thead>
<tr>
<th>Requirement</th>
<th>√</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>Requirement to elect a chair and deputy chair</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Requirement to appoint a clerk</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Requirement to meet in the prison at least 4 times a year</td>
<td>√</td>
<td>No</td>
</tr>
<tr>
<td>Meet the PMC twice a year (not necessarily in the prison)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Power to appoint a sub – committee</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Quorum specified</td>
<td>√</td>
<td>No</td>
</tr>
<tr>
<td>Requirement to keep minutes and copy them to the Governor and Scottish Ministers</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### General Duties of Committees

- They must:
  - Co-operate with Scottish Ministers and the Governor in promoting the efficiency of the prison | √ | No |
  - inquiring into and report on any matter as requested by Scottish Ministers | √ | No |
    - But IPMs must investigate matters referred by the PMC
  - Immediately bring to the attention of the Governor any matter relating to the administration of the prison or the condition of any prisoner which they feel appropriate | √ | √ |
    - Notify the Governor and the PMC
  - Notify Scottish Ministers if the Governor has not such remedied the matter within a reasonable period | √ | No |
    - Notify the Governor and the PMC
  - inquiring into the state of the prison premises | √ | √ |
    - Monitor the conditions in the prison and the treatment of prisoners
  - inspect the food and drink provided to prisoners | √ | No |
  - record the particulars of every visit and deficiencies found | √ | √ |
    - Record date and time of visit and matters considered
  - promptly send a copy of such particulars to Scottish Ministers and the Governor | √ | No |
  - discharge such other | √ | No |
<table>
<thead>
<tr>
<th>Duties as assigned by Scottish Ministers</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>- keep confidentiality of information</td>
<td>√</td>
<td>No</td>
</tr>
<tr>
<td>- make an annual report to Scottish Ministers</td>
<td>√</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td></td>
<td>PMCs to make an annual report(probably covering several prisons) to Chief Inspector who must lay before Parliament</td>
</tr>
</tbody>
</table>

### Investigation of Complaints by Committees

| Must hear and investigate any complaint from a prisoner | √ | No |
| Governor must provide confidential setting for Committee member to see a prisoner in connection with a complaint | √ | No |
| The committee must - record its findings in relation to a complaint | √ | No |
| - send a copy of its findings to Scottish Ministers and the Governor | √ | No |
| - inform the prisoner concerned of its findings | √ | No |

### Visits to Prisons

| At least 2 committee members per fortnight | √ | √ |
| Committee must arrange a rota of visits | √ | No |
| All visits are unannounced | √ | No |

### Inspection of Prison Records

<table>
<thead>
<tr>
<th>Committee members may inspect records other than personnel and prisoner records security manuals or other papers which have implications for personnel records or any documents which in the opinion of the Governor would have implications for the security of</th>
<th></th>
<th></th>
</tr>
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<p>| | | |</p>
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21
Association of Visiting Committees  
26 November 2014

**WRITTEN SUBMISSION FROM PROFESSOR ANDREW COYLE**

I have been asked to express a view on the extent to which the revised draft Order addresses the recommendations of the Justice Committee’s *1st Report, 2014 (Session 4): Proposed draft Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014*.

**Independence of prison monitoring**

33. However, the Committee believes that the operational independence of prison monitors is essential and this may be perceived to be compromised if HMIPS instructs and also pays them.

34. The Committee requires clarification from the Scottish Government on how it now envisages the distinctiveness of monitoring to be “future proofed and person proofed”; and how the draft Order will achieve the independence and representativeness of monitoring. The Committee would welcome more information on how the proposed advisory group will be constituted, whether it will have responsibility for monitoring and appointments and, if so, that these duties should be explicit in the draft Order.

The new draft Order alleviates many of the concerns which were raised in respect of the earlier draft about the elision of the important distinction between inspection and monitoring and the proposed Explanatory Document is at pains to draw attention to this, pointing out that “inspection and monitoring functions will operate separately” (Explanatory document 2.13). However, in a number of important respects the distinction has not been “future proofed and person proofed”.

The continuing uncertainty lies primarily in the relationships between what are now to be called Prison Monitoring Coordinators (PMCs) and the Independent Prison Monitors (IPMs). The PMCs, of whom there are to be three or more, will be appointed by Scottish Ministers in consultation with the Chief Inspector (section 7.A) and in accordance with such regulations as Scottish Ministers may prescribe. Each prison will have an assigned PMC and he or she will be responsible for appointing IPMs to that prison “in such numbers as the Chief Inspector considers appropriate” (S.7B(2)(a)).

**Given that the Order specifies a minimum number of PMCs, one might have expected that it would similarly stipulate a minimum number of IPMs for each prison. The Order does not specify what procedures PMCs are to follow in appointing IPMs.**

The Justice Committee indicated that it would welcome explicit information in the draft Order about the proposed advisory group and this is now provided. In addition to the Chief Inspector, the group is to consist of all the PMCs, at least three IPMs and “such
other persons as the Chief Inspector considers appropriate” (S.7F(2)). The Order does not specify whether appointments to the advisory group will be made by a public appointment procedure or will be at the invitation of the Chief Inspector. The Justice Committee asked whether the advisory group would have responsibility for appointments (of PMCs and IPMs). It would appear that this will not be the case. The other responsibilities of the advisory group specified in S.7F(4) are to be welcomed.

Scottish Ministers will be responsible for paying the salaries and allowances of the PMCs (S.7B(7)) and the travel and subsistence expenses of the IPMs (S.7D(7)). This is to be welcomed, particularly since the current arrangement in this regard for Visiting Committees was the stumbling block which prevented their membership of the UK National Preventive Mechanism.

Prison monitors and lay monitors

43. The Committee welcomes the commitment to provide administrative and secretariat support to independent prison monitors. The Committee has heard evidence of significant opposition to the creation of paid monitors additionally of their managerial role over volunteer monitors. The Committee questions the need for paid monitors and indeed their managerial role and requires more details from the Scottish Government on the benefits of both.

44. The Committee asks the Scottish Government to respond to the views expressed that having two layers of monitors could adversely affect the trust prisoners have for monitors and the willingness of people to volunteer to be lay monitors.

45. The Committee would also welcome clarification from the Scottish Government of why there is a difference in the powers of prison monitors and lay monitors to hear complaints from prisoners, which would seem to cause unnecessary confusion and complexity.

The revised draft Order clarifies to a significant degree the distinction between the roles of the PMCs and the IPMs but areas of potential confusion remain. At first glance it would appear that the IPMs are to be directly responsible for the actual monitoring and the role of the PMCs is to coordinate and facilitate that monitoring (Explanatory document, paragraph 3.20). However, the PMCs are also required to visit each prison to which they are assigned “as instructed by the Chief Inspector” (S.7B(2)(i)) and to carry out what appears to be an additional monitoring role (S.7B(4)). The Justice Committee may wish to consider whether this arrangement answers the concern which it raised in paragraph 44 of its report.

The PMCs are to arrange a meeting of the IPMs for each prison “at least once every six months” (S.7B(2)(g)). This frequency is significantly less than that in the current regulations for Visiting Committees.

Detail in the order

49. The Committee agrees that more detail in legislation would provide clarity and security of independence. The Committee recommends that the Scottish
Government considers incorporating more detail into the Order in all or any of the areas suggested by the SHRC.

55. The Committee is sympathetic to the view that independent prison monitors should complement the existing complaints process. The Committee asks the Scottish Government to take account of the concerns raised by the SPSO and to consider adding more detail about the role of monitors in the Order in relation to complaints.

59. The Committee recommends that the Scottish Government considers specifying a minimum requirement for the frequency of prison visits by lay monitors in the draft Order.

I have no comment to make with regard to paragraph 49 of the Committee’s report nor of paragraph 55 in respect of the concerns raised by the SPSO. In terms of the ability of IPMs to hear and pursue complaints or other issues raised with them by any prisoner, the draft Order is weaker than the current legislation and is not specific as to the right of an IPM to raise issues with the governor or other members of staff and to be given a reply. The Government may take the view that this ability is implicit in the new section which places a duty on the governor to assist with inspection and monitoring (S.7E). The Committee may wish to consider whether it is satisfied with this.

Membership of the United Kingdom National Preventive Mechanism

When the UK NPM was established in 2009 it was decided that Visiting Committees in Scotland were not entitled to membership because the fact that they received their funding directly from the Scottish Prison Service might be seen as compromising their independence. The corresponding prison monitors in England and Wales and in Northern Ireland were and still are members of the NPM. The early annual reports of the NPM anticipated that visiting committees in Scotland would be designated as part of the UK NPM once the funding anomaly was resolved. The Committee may wish to note that when this new Order is made Scotland will remain the only jurisdiction in the United Kingdom in which prison monitors will not have direct membership of the NPM but will be represented by the Chief Inspector of Prisons.

Professor Andrew Coyle CMG
International Centre for Prison Studies
University of Essex
6 November 2014

WRITTEN SUBMISSION FROM DR JIM McM ANUS

I have few problems with the draft Order and am happy that these be shared with whomsoever you want.

The first is with 7D (4)(a) requiring IPMs "to comply with instructions" issued by salaried PMCs. This has to be softened, to preserve the "independent" tag, to "have regard to any advice issued by ..."
The second is in respect of 7G(4) (a). SPT members will decide, under the advice of the governor, when it is safe to talk to individuals. Under the Convention it is their decision - and their responsibility - to make that call.

Similarly, 7G(4)(b) gives the governor a discretion which, under the Convention, belongs to the SPT and is a much stronger test than that proposed.

Finally, the Order does not deal with medical matters and, in particular, access to medical files. It has never been a problem in Scotland, but it has been in many European countries, notably France. An NPM might well need access to such file, to check on injuries on arrival or after an incident. This could be granted by the prisoner, but would still require a medically qualified person to interpret. Should we give the IPM's, with the approval of the PMC's, authority to ask for medical (and other) expertise?

Jim McManus
6 November 2014

WRITTEN SUBMISSION FROM HER MAJESTY’S CHIEF INSPECTOR OF PRISONS FOR SCOTLAND

1. I am grateful for the opportunity to provide the Justice Committee my views on the revised draft order and the extent to which it addresses the recommendations included the Justice Committee’s first Report.

2. I am personally encouraged at the distance travelled since the Justice Committee’s reporting date of 13 January 2014 and the subsequent improvements in the revised order. The further period of consultation has also been greatly appreciated. Specifically, I am supportive of the change in title of the order to ‘Inspection and Monitoring of Prisons’.

3. HMIPS regards Independent Monitoring as extremely important and remains positive about the proposed changes and particularly the;
   a) promotion of consistency of process;
   b) compliance with OPCAT; and
   c) potential effectiveness of the new approach.

4. It is my strongly held view that the new structure will achieve significant benefits in relation to providing consistency regarding a layered approach to monitoring and support for prisoners across Scotland. It has the potential to drive continuous improvement by way of coordinated prison monitoring, communications, training and data capture.

5. The changes made to the role titles as described in the revised order are most welcome. The term ‘lay monitor’ did not give the appropriate weight to the role given that the function has considerable legislative remit and the name ‘Independent Prison Monitor’ (IPM) is much more fit for purpose. The revised order also provides greater detail in regard to the role of IPM, clarifying the role of the IPM as ‘to monitor the prison conditions and treatment of prisoners within the prison’. I am further encouraged that the word ‘independent’ is included in the new role title for monitors,
and consider that this provides a clear statement to all stakeholders in regard to the independence of the role.

6. The new role title, ‘Prison Monitoring Coordinator’ (PMC) is a much more robust description of the role and provides a clear distinction between the IPM and the PMC. This was not entirely clear in the previous version of the order. HMIPS consider that this clarification of the two roles eliminates any potential confusion around the primary functions of the IPM and the PMC.

7. I am pleased that the committee agreed in its Report on the benefits of the functions of monitoring and inspection working together (PARA 32) within the same organisation. HMIPS will monitor and inspect the treatment and conditions for prisoners in Scotland. By employing this layered approach HMIPS will take immediate action as necessary through monitoring, and make recommendations for action via monitoring data and trend analysis, in addition to the detailed scrutiny of prisons by inspections. Together these functions will complement an evidence led practice for thematic reviews and support the continuous improvement of conditions in Scotland’s prisons.

8. The revised order (Section 7G) makes provisions for the Subcommittee on Prevention of Torture (SPT), established under article 2 of OPCAT to visit Scottish Prisons. It is my view that the inclusion of Section 7G in the revised order helps provide context to the role of independent monitoring in relation to its position within international law. It also provides further explanation around the aims and objectives of the order.

9. There is one omission from the revised order that I have recommended be rectified as part of my response to the recent consultation. This was also highlighted in the Justice Committee Report (PARA 59) that the order should **specify a minimum requirement for the frequency of prison visits by lay monitors in the draft order.** This should be included in the order and I have so recommended to the Scottish Government.

10. Overall, it is my considered view that the revised order provides for a more robust system of monitoring prisons in Scotland. The introduction of Independent Prisons Monitors as representatives of civil society, supported by Prison Monitoring Co-ordinators, will ensure that the conditions in prisons and the treatment of prisoners will be regularly monitored. Monitors will be recruited, trained and supported to provide an improved and more consistent level of monitoring across all prisons in Scotland.

The extent to which the revised order addresses the recommendations in the Justice Committee’s First Report 2014 (Session 4)

**PARA 33 – The operational independence of prison monitors is essential and this may be perceived to be compromised if HMCIPS instructs and also pays them.**

11. HMIPS strongly agrees that the operational independence of prison monitors is essential, however would counter that by stating that independence does not mean autonomy. The Independent Prison Monitors will be recruited as representative members of civil society and ‘may speak in private with any prisoner, visitor, prison officer or other person working at the prison’ (revised order para 7D 5b). They will work to an expected code of conduct, they will need to have integrity and understanding of both prison service procedures and the expected standards, much of which will be
described in the Prison Monitoring Guidance Document. Professor Andrew Coyle stated in his report that ‘it is important that persons who are carrying out independent monitoring of prisons should always bear in mind that their task is not merely to scrutinise Scottish Prison Service procedures to ensure that they are being implemented. Certainly, they must do that but more fundamentally they have to monitor the validity of the procedures in order to be satisfied that the conditions in which prisoners are being held and the treatment which they are receiving are decent and proper.’ (Coyle 2013:16 para 30).

12. Professor Andrew Coyle also stated that ‘Scottish Ministers should make arrangements for the oversight and support of the Independent Prison Monitors’. (Coyle 2013:6 para 3). This role will be fulfilled by the Prison Monitoring Coordinator (PMC) in the revised order. In the original draft order this role (previously prison monitor) was given an operational role in the monitoring of prisons. In the revised draft order, the PMC is able to visit and access the prison should the need arise, however the emphasis of the role of the PMC has moved towards one of co-ordination, administration and support. The role and function of the PMC and the Independent Prison Monitors (IPM) are both clear and well defined in the revised order. This is an improvement.

13. In relation to the ‘perception of compromise’, it is difficult to evidence perceptions and the way in which the future of prison monitoring will be regarded, understood or interpreted. HMIPS will take positive action to promote positive perceptions through an effective communications plan with prisoners, SPS staff and SPS administration. It is important to note the current position that Professor Andrew Coyle stated in his report as ‘there is evidence from prisoners themselves and from others, such as those associated with charitable groups working in prisons, that in some prisons at least a significant proportion of prisoners currently have little awareness of Visiting Committees and their role’. (Coyle 2013:32 Para 77). HMIPS sees this as an excellent opportunity to increase the awareness of prison monitoring in Scotland.

PARA 34 – The Committee would welcome more information on how the proposed advisory group will be constituted, whether it will have responsibility for monitoring and appointments and, if so, that these duties should be explicit in the draft order.

14. The revised order has made provision for the inclusion of an Advisory Group and its functions are explicitly defined (Revised order para 7F). This group is not responsible for the appointment of the coordinators or the monitors, they are however, responsible for keeping the effectiveness of prison monitoring under review.

15. This group will regularly review the continued validity and effectiveness of the Independent Prison Monitoring Guidance Document. Additionally, they will regularly review the continued validity and effectiveness of the training requirements for the Prison Monitoring Coordinators and the Independent Prison Monitors.

16. This group will support understanding and identification of areas of good practice and provide expert opinion on the continued overall effectiveness and impact of Independent Prison Monitoring in Scotland. They will also provide expert advice on the emergence of key legislative direction at both a national and international level, evidence based research, and other relevant issues.
17. Furthermore they will review and initiate actions for discussion based on the emerging themes from the supporting data provided by the Independent Prison Monitors. They will also discuss, agree and advise on the content, consistency and relevance of the annual report of Independent Prison Monitoring in Scotland prior to submission to Scottish Ministers.

**PARA 43 - The committee welcomes the commitment to provide administrative and secretariat support to independent prison monitors. The committee has heard evidence of significant opposition to the creation of paid monitors additionally of their managerial role over volunteer monitors. The committee questions the need for paid monitors and indeed their managerial role and requires more details from the Scottish Government on the benefits of both.**

18. Administrative and secretariat support to Independent Prison Monitors will be provided by the Prison Monitoring Coordinators (PMC). The role of such has been clarified in the revised order (Section 7B) and the role of the PMC has changed to become one of co-ordination, administration and support. The provision is retained for the PMC to visit the prison and speak to any prisoner, visitor, staff or any other person working in the prison.

19. It is well documented that the current system of independent monitoring is not as efficient or coordinated as it could be. As stated in the response to the Justice Committee from Scottish Government, ‘there is no national approach to monitoring and the service is inconsistent throughout the country. The current structure does not allow for the assessing of performance of Prison Visiting Committees or individual Prison Visiting Committee members. Due to the lack of formal structure and accountability, it is not possible to ensure that all aspects of prisons are monitored on a regular basis.’

20. As previously stated Professor Andrew Coyle recognised the need for oversight and support (Coyle 2013:6 para 3) and it is my view that the Prison Monitoring Coordinators would provide this.

**PARA 44 - Respond to the views expressed that having two layers of monitors could adversely affect the trust prisoners have for monitors and the willingness of people to volunteer to be lay monitors.**

21. This are no longer two layers of monitors in the revised order, as this has been rectified. The PMC role no longer has monitoring as a primary function and has been clarified as co-ordination, administration and support role.

22. In regard to the future IPMs, I am pleased that I have already had some positive communications from existing VC members in terms of continuing to volunteer as part of the new proposition.

**PARA 45 - Why there is a difference in the powers of prison monitors and lay monitors to hear complaints from prisoners, which would seem to cause unnecessary confusion and complexity.**

23. I agree that this provided a confusing picture and this has been now been removed in the revised order, thus eliminating any unnecessary confusion and anxiety.
24. Section 7B (revised order) explains the functions of Prison Monitoring Coordinators and Section 7D (revised order) the functions of the Independent Prison Monitors.

**PARA 49 - The committee agrees that more detail in legislation would provide clarity and security of independence. The Committee recommends that the Scottish Government considers incorporating more detail into the order in all or any of the areas suggested by the SHRC.**

25. The revised order has improved the level of detail and I consider it comprehensive and clear enough to enable both Her Majesty’s Chief Inspector of Prisons and new Monitors to carry out their statutory function. In particular more detail has been included regarding: the roles and responsibilities of monitors and the duration of office and appointment process.

26. As previously acknowledged many facets of the new system, which are not detailed in the legislation, will be covered in guidance. The drafting of this guidance is being taken forward by an Implementation Group made up of various stakeholders comprising the Scottish Government, HM Inspectorate of Prisons for Scotland, Association of Visiting Committees, Positive Prisons Positive Futures, Howard League for Penal Reform, Scottish Human Rights Commission and Scottish Prison Service.

**PARA 55 - The committee is sympathetic to the view that independent prison monitors should complement the existing complaints process. The committee asks the Scottish Government to take account of the concerns raised by the SPSO and to consider adding more detail about the role of monitors in the order in relation to complaints.**

27. I wholly agree that Independent Prison Monitors should complement the existing complaints process as there have been numerous changes over the last few years. The Prisons and Young Offenders Institutions (Scotland) Rules were revised in 2011 and Part 12 introduced the new SPS complaints processes. In October 2010 SPSO absorbed the function of the Scottish Prison Complaints Commission. Furthermore, medical complaints were transferred directly to the NHS after they took responsibility for healthcare in prisons in November 2011.

28. Those parts of the Prisons and Young Offenders Institutions (Scotland) Rules 2011 relating to Visiting Committees were not changed during the 2011 revision due to the ‘pending’ review of Visiting Committees in Scotland. In fact, part 17 of the prison rules ‘Investigation of complaints’ Para 150 (3b) states that ‘the visiting committee must promptly send a copy of such findings to the Scottish Ministers’, but this has not been carried out according to the current requirements. Professor Andrew Coyle in his review (para 34) also noted the variability of VC’s record keeping of complaints and this was also noted by the SPSO.

29. In April 2014 a representative from HMIPS met with SPSO to discuss their views on the issues of complaints and shared the feedback with the Implementation Group. During that meeting and in accordance with their consultation response the lack of consistent definition of what constitutes a complaint was discussed.

30. It is imperative that the IPM seeks information as to whether the prisoner has made a complaint as per the prison rules. This will ensure that an alternative complaints route is not enabled to circumvent the current system. That said, it is
incumbent on the IPM to understand if there are reasons why the process has not been followed, e.g. literacy issues; the immediacy of the action required; fear of reprisal, lack of trust in the process or previous bad experience; lack of belief that it would change anything and or personal issues that the prisoners is cautious about going into writing about. The IPM has full discretionary power to support a prisoner with any complaint or inquiry as they see fit. The Visiting Committees deal with many complaints orally, however it is important that we glean improved information on the types of issues and complaints dealt with from the IPMs to support continuous improvement.

31. The SPSO identified two areas of concern in their first annual prison complaints report (2012/13). Specifically, the low level of complaints from women in prison (p10) and barriers to accessing the NHS complaints process (p15). Interestingly, an analysis was completed by HMIPS of 11 annual VC reports (2012-2013) with 8 containing pertinent complaints data. The overall top complaint / concern related to medical treatment/ health and the top overall complainants (various issues) were women. This indicated that the separate systems, and lack of consistency was not supporting a transparent picture around prisoner complaints.

32. In summary, any prisoner can speak to an IPM on any issue. Where the issue is deemed to be a complaint the IPM will seek to support the prisoner to utilize the existing processes where possible. The IPM has discretion to support a prisoner on any complaint or issue, however this should be on an exceptional basis, and for soundly judged reasons. Complaints and requests should be noted and support data gathering and trend analysis and in turn overall improvement of all or any prison in Scotland.

Conclusion

33. I hope this is both a comprehensive and sufficient response to the Justice Committee’s inquiry. Please do not hesitate to contact me if anything requires clarification or further information.

David Strang QPM
Her Majesty’s Chief Inspector of Prisons for Scotland
7 November 2014