The Public Service Reform (inspection and Monitoring of Prisons) (Scotland) Order 2014

1. This short note is intended to assist the Committee in considering its approach to scrutiny of the Order. I regret we have been unable to provide earlier comments as we were not able to obtain a copy of the revised Order until late on Monday 10th November.

2. We are pleased to see that the Order has been adjusted in some respects to take account of some of the concerns expressed during the consultation. However, we believe that there are still significant deficiencies in the proposed system of prison monitoring as set out in the Revised Order.

3. Our comments below are a summary of our main concerns but do not include all of the aspects of the proposed system which we believe could be strengthened. Our summary comments are as follows:

a. Independence of the proposed system
   - The Order requires that Independent Prison Monitors (IPM) should monitor in accordance with a rota which has been agreed with the Prison Monitoring Co-ordinator (PMC) and the Prison Governor. At the moment Prison Visiting Committees (PVCs) decide the rota, in accordance with the legislative requirements, wholly independently of the Governor or any other individual. **The requirement to seek the agreement of the very organisation which is subject to scrutiny undermines the independence of the entire system.**
   - The Order provides that IPMs, may in addition, with the agreement of the PMCs, undertake additional visits without seeking agreement of the Governor. Thirdly, an IPM may visit also visit without prior notice. We see no need for three types of visit. At present, all PVC visits are unannounced and this is more rigorous and consistent with OPCAT.
   - We question whether in reality many IPMs will have the capacity to undertake additional visits in addition to those required by the rota (as well as all of the other duties that are to be added to the IPM role – see comments on capacity below). This means that in practice very few unannounced visits may take place, calling into question the extent to which the system will be compliant with OPCAT. **All IPM monitoring visits should be unannounced as is the case at present.**
   - It is questionable whether the proposed system is sufficiently independent to comply with Article 18(1) of OPCAT that requires that the National Preventative Mechanisms (NPMs) for the prevention of torture must be functionally independent of government and their personnel must be independent of government. But the IPMs are required in the Order to comply with any instructions issued by the PMC and will be managed by them. PMCs are to be appointed and paid by Scottish Ministers so it is...
hard to see how the PMCS or the IPMs will be functionally independent. Significant concern about the lack of independence has been raised in both of the consultations on the draft Order but these have not resulted in any changes.

- **Overall, the proposed system would be less independent than at present**

b. Capacity of IPMs

- It is proposed that in addition to undertaking monitoring visits (three types) and investigating issues raised with them by prisoners - as well as an increased training requirement (which is welcome)- IPMs should also undertake a number of additional duties not currently required of PVCs. These are:
  
  o Assisting prisoners with complaining through the SPS complaints system. Prisoners make about 6,000 such complaints a year (these statistics are not published but were obtained by the BBC under an FOI request). Even if only a proportion of these prisoners seek assistance from IPMs, the work involved in providing assistance in lodging and following up the complaint would be very significant.
  
  o Investigating matters referred to IPMs by the PMC including those on behalf of the Chief Inspector.
  
  o Monitoring the arrangements for temporary release of prisoners (Includes home leave, unescorted day release (for family, educational, work, education and compassionate reasons), temporary release for work and unescorted release for health reasons). We have not been able to find any published information about the number of cases of temporary release there are a year or what Scottish Government have in mind regarding this late and unexpected addition to the duties of IPMs so we are unable to quantify the likely time commitment. It may be considerable.
  
  - Taken together, these duties will require a very significant time commitment so it is all the more surprising that the Order abolishes the statutory requirement in the Employment Rights Act 1996 for monitors (currently PVCs) to be given time off by their employer to undertake their role. (no mention of the change to the Employment Rights Act is made in the Explanatory Document). Furthermore, despite many organisations urging them to do so, Scottish Government have refused to say what they believe an appropriate number of monitors might be or to include in the Order any of several possible formulas (discussed by the Implementation Group) for calculating the number. This is to be left to the discretion of the Chief Inspector.
  
  - **The increased duties, lack of a legislative commitment to the numbers of IPMs required and the loss of a right to time off for monitors raise significant concerns about the capacity of the proposed system to provide the necessary safeguards**
c. Requests and Complaints process
   - We welcome the re-instatement of the IPMs 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**
   - IPMs are to be given a new role to assist prisoners to use the SPS complaints process. Quite apart from the capacity implications (referred to above) this intention risks undermining the perceived independence of monitors. The SPS system is not trusted by prisoners who tell us that sometimes complaints are thrown in the bin or do not get answered and/or they experience retribution as a result of submitting a complaint. **The involvement of IPMs in such a flawed system will erode the trust of prisoners in the independence of IPMs**

d. Role of Prison Monitoring Advisory Group
   - A Prison Monitoring Advisory Group (PMAG) is to be established to review the training for IPMs, the effectiveness of monitoring, the monitoring guidance and to make recommendations for improvement. However, it has no powers to require that its recommendations are taken account of and the Chief Inspector is under no duty to take account of the PMAG
   - The membership of the PMAG is to include the Chief Inspector, each of the PMCs (of which there are expected to be 4 in number) at least 3 IPMs and such other persons as the Chief Inspector considers appropriate. The Chief Inspector will also decide the duration of appointments and whether any individual should be re-appointed
   - This is the body that the Cabinet Secretary said would ensure that the arrangements for independent prison monitoring would be “future proofed”. The establishment of an advisory body whose members are appointed at the discretion of the Chief Inspector is offered as a substitute for including more detail in the legislation, as requested by the Justice Committee and the Scottish Human Rights Commission. This in effect means that much of the protection of the human rights of prisoners, currently specified in legislation, will be dependent on unaccountable personal appointees and that changes can be made without recourse to Parliament. **The shift from legislative protection means that the powers of the Parliament to scrutinise the compliance of the Government with the requirements to ensure prisoners are treated with fairness and dignity and have their human rights protected are to be passed to an advisory body which has no powers, statutory or otherwise.**

e. Cost of proposed system
   - The current system of monitoring costs around £75,000 for administration costs, training and re-imbursement of travel and subsistence expenses
The Government has given no indication of the costs of the new system other than to say it will be more than at present. (Were these legislative changes being made by primary legislation, a Financial Memorandum would be required). In 2012 the Government estimated that the cost of a system with four part-time monitors working 3 days a week would be £255,000 but it was unclear whether this included other expenses such as travel and overnight accommodation, office accommodation and support staff. What is intended now is 4 full time co-ordinators each with office accommodation and travel and subsistence and, possibly, support staff. The cost of the new system is unclear but is likely 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.

f. Does it pass the tests required by the Public Services Reform (Scotland) Act 2010?
- The legislative process for making the Order requires (section 14) that the provisions will improve the exercise of public functions with regard to efficiency, effectiveness and economy. Given the concerns expressed above, we do not believe that these proposals for a complex and hierarchical structure, which provides less protection and Parliamentary scrutiny and will be vastly more expensive, pass any of these tests.

Association of Visiting Committees
16 November 2014