

Review of Proposals to Improve Arrangements for Independent Monitoring of Prisons

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Terms of reference

To review the Scottish Government's proposals to improve arrangements for the independent monitoring of prisons.

To consider specifically:

- the extent to which the proposals meet the Government's obligations under the Optional Protocol to the UN Convention Against Torture (OPCAT)
- responses of prisoners, prison staff and stakeholders to the new proposals
- independent monitoring of legalised police cells.

To produce a report with recommendations by 31 January 2013.

Foreword

Deprivation of personal liberty by means of imprisonment is the most severe disposal which a judicial authority can impose on a person in Scotland and the way in which this is administered should be a matter of great public concern. We are fortunate in Scotland that prisons are managed in a generally transparent manner and with a high degree of professionalism. However, even in the best managed prisons questions will be asked from time to time about what happens and complaints will be made. Since ordinary members of civil society cannot easily discover for themselves what goes on behind the high walls and fences of a prison, there has to be a system of independent inspection and monitoring which checks that everything is as it should be.

An important method of inspection is one which is carried out by a body which is independent both of individual prisons and of the prison system. In Scotland HM Inspectorate of Prisons carries out that role by undertaking a regular programme of inspections. The Chief Inspector of Prisons and his staff inspect each prison in depth every three or four years.

In a number of countries members of local communities also have a role to play through systems of independent lay monitoring. These local monitoring bodies take on responsibility for continuous scrutiny of the work of the prison and often report back to parliament or government ministers and through them to the public. In Scotland this role is currently undertaken by members of Visiting Committees.

Taken together these separate systems of inspection and monitoring provide an effective means of preserving and promoting human rights and of preventing abuse in prisons. The need for a comprehensive and complementary system of inspection and monitoring has been recognised by the international community and is now enshrined in the Optional Protocol to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, known by its acronym OPCAT. The United Kingdom was at the forefront of efforts to ensure that this Protocol was adopted by member states of the United Nations and was one of the first countries to ratify it, thereby committing itself to establishing what is known as a national preventive mechanism to ensure that all places where people are detained are managed decently and humanely. It is essential that all mechanisms in Scotland for monitoring prisons are in conformity with the country's obligations under the Optional Protocol. The Scottish Government asked me to review its proposals to improve arrangements for the independent monitoring of prisons and to ensure that they were in conformity with its obligations under OPCAT. This is what I have attempted to do in this report.



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Executive summary

The Scottish Government has signalled its intention to ensure that its proposals to improve arrangements for independent monitoring of prisons will meet its obligations under the Optional Protocol to the UN Convention against Torture (OPCAT). The objective of OPCAT is “to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty.” The Police and Fire Reform (Scotland) Act 2012 includes provision for independent custody visitors to visit persons in police detention in accordance with OPCAT requirements. That legislation can provide a model for similar provision in respect of persons in prison custody.

Regular monitoring of conditions in prison and the treatment of prisoners is currently undertaken by Visiting Committees which are appointed for each prison. These arrangements date from 1878 and have been little changed since then. Members of Visiting Committees carry out important public work on a voluntary basis but in a number of respects they do not have the necessary level of independence and a different structure for independent monitoring of prisons is now required.

This review describes current arrangements for prison monitoring and identifies the specific areas where changes are required in order to ensure that future monitoring arrangements will be independent. **The review recommends that Visiting Committees should be replaced by a new system of voluntary independent prison monitors** to be appointed through a transparent process for specified periods and with a clearly defined role. They should be provided with appropriate training, resources and support from sources other than the Scottish Prison Service. The monitors for each prison should submit an annual report to Scottish Ministers which should be published. Prison governors should ensure that prisoners are aware of the existence of independent prison monitors and of their role and ensure that staff are supportive of their activities. There should be a Council of Independent Prison Monitors composed of a monitor from each prison. Scottish Ministers should make arrangements for the oversight and support of the independent prison monitors. The review provides various options as to how this might be provided. Finally, the review recommends that Visiting Committees for the nine sets of legalised police cells should be abolished and their functions transferred to independent custody visitors.

If the recommendations in this report are accepted Visiting Committees in their present form will no longer exist. However, much of the work which they have done until now will form the basis of a new locally based system of independent prison monitoring. It is to be hoped that a number of current members of Visiting Committees will offer themselves for appointment as independent prison monitors.

At the moment arrangements for prison monitoring in Scotland do not meet the standards required by the Optional Protocol to the UN Convention Against Torture. If the recommendations in this report are implemented Scotland will in future have a robust system for independent prison monitoring which, taken along with the new provision for independent police custody visiting, will place Scotland in the front rank of jurisdictions which have made provision for independent monitoring of places of detention.

History of independent prison monitoring in Scotland

1. The prison system in Scotland in its current form dates from 1878 when the Prisons (Scotland) Act 1877 came into force and the administration of prisons became the responsibility of central government. A Prison Commission was set up to administer prisons in Scotland on behalf of the Secretary of State and a Visiting Committee, consisting of commissioners of supply, justices of the peace and magistrates, was appointed for each prison. The Secretary of State regulated the number of members of each Visiting Committee and the commissioners of supply and the magistrates appointed individual members on an annual basis. Members of the committees were required to visit the prison frequently and to hear any complaints made to them by prisoners. There was to be no restriction on any committee member from visiting any part of the prison or any prisoner at any time.
2. In their first annual report (1879) the Prison Commissioners for Scotland described the new arrangements:

... under the previous legislation the local authorities were the executive, administering the prisons, while the Government watched and inspected their administration; now the Government administers, while the local authorities in Scotland, in the shape of visiting committees, watch and inspect...¹
3. When Polmont Borstal was opened in 1911 the Secretary of State used his powers under the Prevention of Crimes Act 1908 to appoint a visiting committee. He did the same in 1920 when a Borstal for young women was established in Greenock Prison and these arrangements continued when women prisoners were moved to Cornton Vale in 1975.
4. The statutory arrangements for visiting committees have changed little since their enactment other than to take account of local government changes in terms of the appointment of members.

Recent consultations and advice relating to independent prison monitoring

Review of Prison Visiting Committees 2005

5. In 2005 the Scottish Executive set up a review of the role and remit of prison Visiting Committees. The review group was chaired by an official from the Scottish Executive and included three members of the Association of Prison Visiting Committees, a representative of the Convention of Scottish Local Authorities, the chief executive of the charity Families Outside and an official

¹ *Annual Reports of the Prison Commissioners for Scotland, 1879-1929*. London: HMSO.

of the Scottish Prison Service. The report of the review group was published in 2007.

6. As part of its executive summary the report drew the following conclusions:

At the outset, the group tackled in depth the fundamental question of whether there was still a need for VCs paying particular attention to the existence of the Prisons Inspectorate and the Scottish Prisons Complaints Commissioner (SPCC). The group noted the existence of similar bodies in the other UK jurisdictions and in the Republic of Ireland and the move in recent years to introduce a visiting system to police custody cells. Discussions took place with the Chief Inspector of Prisons and the Complaints Commissioner who agreed that there was a distinctive and important albeit complementary role for visiting committees. **Principally, the distinctiveness arose from VCs being representative of local communities, being independent of the prison service and in the sustaining of a continuing regular relationship with a particular prison.** (*Emphasis in the original*) The group agreed that VCs should be retained but that there was a need to re-examine the ways in which they were currently functioning.

7. The report went on to make 39 recommendations covering the role and function of committees; the appointment process; induction, training and development; visibility; performance management and accountability; finance and administration. Ministers accepted 32 of the recommendations with the reservation that some of the longer term proposals would have to be reviewed in the light of the pending Crerar review. The report was welcomed generally and progress was made on implementing its immediate recommendations.

Crerar Review² and Sinclair Report³

8. In 2007 Professor Lorne Crerar was asked by the Scottish Government to review the regulation, audit, inspection and complaints handling of public services in Scotland. His report on these matters was published in September 2007. In his report Professor Crerar made only two references to prisons. He noted that the growth in “more integrated models of service provision” had resulted in changes in scrutiny focus but that these changes had not “replaced existing external scrutiny of professions such as social work or police, or of single services such as prisons or schools” (paragraph 6.4). He recommended that existing inspection programmes should be reviewed immediately and that

² Crerar, L. (2007). *The Crerar Review: Report of the independent review of regulation, audit, inspection and complaints handling of public services in Scotland*. Edinburgh: Scottish Government.

³ Fit for purpose complaints system action group (2008). *Report to Ministers*. Edinburgh: Scottish Government.

there should be a reduction in cyclical inspection programmes, with a corresponding increase in emphasis on self-assessment and performance reporting by providers (paragraph 9.6). Among other examples, he recommended that “service based inspections” of prisons “should be subject to immediate review, with a clear evaluation of benefits delivered”.

9. As part of its response to the Crerar Review the Scottish Government set up an Action Group chaired by Douglas Sinclair to provide proposals “for simplifying public service complaints handling processes and streamlining the complaints handling landscape.” The Action Group reported in May 2008 and recommended that the “number of stand-alone complaints handling bodies should be reduced, and functions should be transferred, where appropriate, to simplify the process and landscape for consumers” (paragraph 5(d)). Specifically, the Group invited the Government to consider transferring the functions of the Prison Complaints Commissioner to the Scottish Public Service Ombudsman and the transfer of ‘clinical’ complaints to the Scottish Public Service Ombudsman or NHS Scotland.
10. On 6 November 2008 the Cabinet Secretary for Finance and Sustainable Growth reported to Parliament that he intended to place the functions of the Scottish Prison Complaints Commissioner on a statutory footing and to make them part of the Scottish Public Service Ombudsman’s revised functions. He also indicated that the Government intended to develop “a more integrated role for the prison visiting committees that better reflects modern offender management structures and we are exploring the prospect of linking their functions with those of Her Majesty’s prisons inspectorate for Scotland”.⁴ Neither Crerar nor Sinclair had made any reference to visiting committees.
11. It should be noted that the Crerar report recommended a reduction in “cyclical inspection programmes”. It made no distinction between inspection and monitoring, nor did it make any recommendation about the latter. The importance of this distinction is discussed later in this report, particularly in respect of conditions of detention and treatment of prisoners.

2011 Consultation

12. The Scottish Government opened a consultation on independent monitoring of prisons in January 2011.⁵ The purpose of the consultation was “to seek views on the system for monitoring the quality and safety of prisons and the treatment of prisoners in Scotland and, in particular, look at the roles of HM

⁴ Scottish Parliament Official Record 6 November 2008

⁵ Scottish Government (2011). *Consultation on Independent Monitoring of Prisons*. Edinburgh: Scottish Government.

Chief Inspector of Prisons and the Prison Visiting Committees”. The Government’s explanatory introduction to the consultation went on to note:

The Scottish Government’s scrutiny priorities policy suggests the need for additional *external* scrutiny of services, where those services are focused on “adults in need of support and protection – including all adults in the care of the state”. This means that there is a strategic requirement for external, independent scrutiny of prisons to be in place.

13. In December 2011 the Government published an analysis of the responses received to its consultation.⁶ It reported that 60 responses had been received from Visiting Committees and their members, local authorities, Community Justice Authorities and other organisations.⁷ The consultation had asked three questions which were answered as follows:

- 98% of respondents were of the opinion that the monitoring role of Visiting Committees was required to complement the scrutiny role of HM Inspectorate of Prisons.
- 97% of respondents were of the opinion that Visiting Committees should be developed as envisaged by the 2005 Review of Visiting Committees, and re-established as independent monitoring boards.
- 96% of respondents were of the opinion that the Government should not integrate the monitoring functions of Visiting Committees into HM Inspectorate of Prisons and remove Visiting Committees as separate public bodies.

14. A detailed analysis of the responses shows that only the Scottish Prison Service responded in the negative to all three questions although its conclusions were nuanced.

OPCAT and the National Preventive Mechanism

15. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by the United Nations General Assembly on 10 December 1984 and came into force on 26 June 1987. The Optional Protocol to the Convention, usually referred to by its acronym OPCAT, was adopted by the General Assembly in 2002 and came into force in 2006.⁸ Article 1 of the Protocol describes its objective:

⁶ Scottish Government (2011). *Consultation on Independent Monitoring of Prisons – Analysis Report*. Edinburgh: Scottish Government.

⁷ It later clarified that four of these responses had been duplicates, meaning that the number of respondents had been 56.

⁸ Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199.

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

16. All countries which ratify OPCAT legally bind themselves to allowing visits by the UN Subcommittee for the Prevention of Torture to all places where people are deprived of their liberty and also to establishing “one or several independent national preventive mechanisms for the prevention of torture at the domestic level” (Article 17). The Subcommittee for the Prevention of Torture has published a set of guidelines on national preventive mechanisms, setting out a series of basic principles and basic issues for the establishment of a national preventive mechanism and its operation.⁹ OPCAT does not prescribe any specific structure or model for a national preventive mechanism, leaving each state to decide which model best suits national requirements.
17. The United Kingdom was among the first states to ratify OPCAT and it established its national preventive mechanism in 2009. Rather than create any new bodies the UK decided to identify a number of existing bodies which were already involved in inspecting or monitoring places of detention as its collective national preventive mechanism. This was in accordance with the basic principles published by the Subcommittee for the Prevention of Torture. In determining which bodies were to be included in its national preventive mechanism the UK Government’s over-riding criteria was that the bodies should meet the requirements of OPCAT particularly in respect of independence.
18. The UK Government identified 18 bodies which were collectively to constitute the National Preventive Mechanism, including five in Scotland. HM Inspectorate of Prisons for England and Wales was nominated as the lead body in coordinating the work of the National Preventive Mechanism and liaising with the Subcommittee for the Prevention of Torture. Independent Monitoring Boards for prisons in England and Wales were included as bodies in the National Preventive Mechanism as were Independent Monitoring Boards in Northern Ireland. Visiting Committees in Scotland were not included although their functions are broadly comparable to the two sets of Independent Monitoring Boards. The reason for this was that at the time the National Preventive Mechanism was established the arrangements for Visiting Committees were under review and it was anticipated that once the review was finalised Visiting Committees would be considered for designation as an

⁹ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2010). *Guidelines on national preventive mechanisms*. Geneva: United Nations.

additional member.¹⁰ One of the main issues of concern was that the independence of Visiting Committees did not reach the standard required by OPCAT since budgetary and administrative arrangements were managed by the Scottish Prison Service.

19. The Scottish Government has committed itself to introducing new arrangements for the independent monitoring of prisons and it wishes to ensure that any changes which it makes will conform with its obligations under the Optional Protocol. One likely consequence of such a development is that those involved in the new monitoring structure will be eligible to become part of the UK National Preventive Mechanism.

Independent prison monitoring is distinct from other forms of scrutiny of public bodies

20. There has been a growing acknowledgment in recent years that public services exist, by definition, to serve the public and that they should be held accountable for what they do and how they do it. This has resulted in the development of a range of bodies which scrutinise the performance of public services, some of which appear to overlap each other in their scrutiny and some of which in a perverse way may inhibit the performance of the bodies which they are scrutinising because of the demands which they place on them. This was the background to Professor Crerar's review in 2007.
21. The Scottish Prison Service and the 16 prisons for which it is responsible, quite rightly, have not been immune from this increased accountability. The Scottish Prison Service has its own rigorous internal performance auditing process. In addition, prisons are now subject to an extensive range of external regulatory bodies which scrutinise such matters as health and safety, hygiene and fire prevention. External contractors deliver a wide spectrum of services to prisoners, including health, education and social work, and these services are subject to external scrutiny. Prisons are also now more transparent than they were in the past and many voluntary and other organisations go into and come out of prisons on a daily basis.
22. The unique feature which sets places of detention apart from all other bodies and institutions is that on the order of a court of law they hold men and women against their will. Deprivation of personal liberty by means of imprisonment while awaiting trial or following conviction is the most severe disposal which a judicial authority can impose on a person in Scotland and in this respect prison is ultimately a place of coercion. This means that specific safeguards have to be put in place to ensure that, in addition to being

¹⁰ UK National Preventive Mechanism (2011). *Monitoring places of detention: First Annual Report of the UK National Preventive Mechanism 2009-10*. London: HMSO.

managed efficiently and effectively, prisons are places of decency and humanity. These requirements extend to the conditions in which prisoners are detained and to the treatment which is meted out to them. For these reasons prisons are subject to two specific types of external scrutiny: inspection and monitoring.

23. It is the statutory duty of HM Chief Inspector of Prisons to inspect prisons and to report to the Scottish Ministers who are ultimately accountable for the treatment of prisoners and conditions in prisons. The Chief Inspector fulfils his duties by carrying out a planned series of inspections of individual prisons, each of which lasts about one week. On average he carries out three or four full inspections a year and inspects each prison fully every three or four years. He may also carry out follow-up inspections. He publishes an annual report and occasionally reports on thematic issues. It would be unfair to describe the inspection report as a “snapshot in time” as the inspection team will consult bodies which visit the prison more regularly, including Visiting Committees, and will also examine records as well as checking progress since previous inspections. At the same time it would be hard to argue that the frequency of inspections on their own meet the OPCAT requirement of “regular visits.”
24. For that reason the inspections carried out by HM Inspectorate of Prisons are complemented by the regular monitoring which is carried out by Visiting Committees, who have a statutory obligation to make “frequent visits to the prison.” Prison Rule 160 defines what is meant by frequent visits: “Not fewer than two members of a visiting committee shall visit the prison at least fortnightly.” There is also an obligation for the committee as a whole to meet in the prison at least every three months. The intensity of regular monitoring involved in visits of such frequency, if they are carried out properly, is of a different quality from that involved in inspections which take place every three or four years. Taken together the two distinct functions of inspection and monitoring constitute the preferred OPCAT model of layered monitoring (see paragraph 85).
25. Regular independent monitoring of places where people are deprived of their liberty is an essential safeguard to which the Scottish Government is committed. That is why it has recently enacted legislation in the Police and Fire Reform (Scotland) Act 2012 to establish a system of regular visits to people held in police detention. These visits are to be carried out by independent custody visitors. The legislation makes specific reference to the fact that these arrangements are in pursuance of the objectives of OPCAT. It is to the Government’s credit that it now wishes to ensure that similar provision should exist in respect of monitoring those who are detained in prisons.

Recommendations

- 1. Arrangements should be put in place for each prison to be monitored on a regular basis by independent volunteers appointed on a statutory basis, to be known as independent prison monitors.**
- 2. The role of these monitors should be defined to ensure that they are OPCAT compliant.**

Current arrangements for independent prison monitoring and ensuring that the new arrangements fulfil the Scottish Government's obligations under OPCAT

26. The main statutory functions of Visiting Committees are "to pay frequent visits to the prison and hear any complaints which may be made by the prisoners and report to the Secretary of State any matter which they consider it expedient to report."¹¹

Visiting

27. In all prisons two members of the Visiting Committee visit the prison at least once a fortnight, sometimes in pairs and sometimes at different times. Visits typically last a minimum of two hours, although they may take considerably longer, and will include visits to most of the main areas of activity in the prison. In some committees individual members take responsibility for visiting specific areas; in others there is a rota to ensure that all areas are covered on a regular basis; in others members will simply check where previous members have visited to ensure that areas are not missed. Some committees invariably visit the areas of the prison in which prisoners are liable to be particularly vulnerable, such as the reception area and the punishment/segregation unit. Some committees, although apparently not all, make a habit of observing disciplinary proceedings in orderly rooms.

28. In some prisons committee members carry their own security keys after they have been given the appropriate training by prison staff. This allows them to go round the prison at will, without staff supervision or escort. Other committees take the view that it is inappropriate to carry security keys on the grounds that prisoners may then question their independence and may regard them as surrogate members of staff. When members do not carry keys they are dependent on staff either to escort them around the prison or, more likely, to pass them from one security area to another.

¹¹ Prisons (Scotland) Act 1989. S.8(2)

29. Members of the Visiting Committee have a responsibility to bring to the notice of the Governor immediately any issue relating to the administration of the prison or the condition of any prisoner which concerns them. If the Governor does not resolve the matter appropriately the committee is required to bring the matter to the attention of Scottish Ministers. An extensive reading of reports completed after committee visits in a number of prisons indicates considerable inconsistency in approach. It appears that some committee members are thorough in their monitoring activity but in other cases visits are superficial with little in depth monitoring. It is clear that not all committee members fully understand the nature of their role in terms of national legislation and of what is required if they are to meet obligations under international treaties such as the Optional Protocol to the UN Convention Against Torture.
30. 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. In negative terms they must ensure that, as a minimum, prisoners are not being subjected to inhuman and degrading treatment. In positive terms this means that they have to monitor the conditions in which prisoners are living, their access to nutritious food and adequate drinking water, to fresh air and exercise, to work and education and their contact with families to ensure that they all conform to national and international standards. In order to do this, committee members need to know what these standards are. They need to ensure that there is constant and consistent monitoring of all of these matters and that any failings which are observed are reported to the authorities at the appropriate level and that subsequent action is followed up. They need to be particularly alert to the need to monitor areas where prisoners are likely to be especially vulnerable. These will be, for example, at the first point of admission when prisoners are received into the prison late in the evening, often confused and bewildered, and when there is pressure on staff to complete procedures quickly. Other areas requiring close monitoring are the orderly room where disciplinary cases are heard and the punishment unit, where prisoners may be detained in close conditions. A further issue for special attention is health care, especially in respect of provision for men and women who have mental health problems.

Recommendation

- 3. There needs to be a clear definition of the role of independent monitors to ensure that they are OPCAT compliant and of the competences which monitors need to possess to enable them fulfil their role.**

Complaints

31. Committee members have a statutory duty to hear any complaints which may be made to them by prisoners. The current arrangement in most prisons is that if a prisoner wishes to make a formal request to speak to a member of the Visiting Committee, he or she will ask a member of staff to forward this request. In some instances the officer may ask the prisoner about the reason for the request with a view to resolving the matter. In others the fact of the request is recorded in a hall book and the request is then passed to the prison administration staff who record this in the Visiting Committee request book, which is kept either in the administration unit or in the gatehouse. In some prisons a form is given to the prisoner in which he or she records the complaint before putting it in a sealed envelope for onward transmission to the committee. Usually the first thing that a committee member does on visiting the prison is to check the request book to find out whether there are any requests to be seen. If there are, the member will usually deal with these at the outset of the visit. In Edinburgh Prison these requests are recorded and passed to the committee electronically. In some prisons visits to deal with complaints are separated from those which focus on monitoring conditions in the prison.
32. Many of the issues which prisoners raise with committee members through this process are complaints about their conditions or treatment. It may also transpire that the prisoner does not have a complaint in the strict meaning of that word but wishes to seek the assistance of the Visiting Committee to resolve a personal problem or merely to seek information. The committee member will listen to what the prisoner has to say and may well then have to seek further information or clarification from a member of staff. This will often be done orally and may well be a time consuming process. The member will then report back to the prisoner and the fact that the issue has been resolved, or not as the case may be, will be recorded in the Visiting Committee request book.
33. Committee members also deal with many matters on behalf of prisoners outwith this formal process. In the course of a visit round the prison he or she may be approached by any number of prisoners seeking advice or information on a wide variety of matters. On occasions the prisoner will simply be seeking the opportunity for a conversation with a person who is independent of the

prison management. Visiting Committee members report that this is most likely to happen in situations where prisoners are held in separate accommodation, such as the punishment or segregation cells, or when they are confined to their cells on their own for long periods. In their annual reports most committees record the categories of complaints or requests to be seen which have been recorded in the course of the year.

34. There is a wide variation in the volume of complaints recorded by different committees, with some prisons recording numbers in low double figures for a whole year in contrast to others which are well into the hundreds. There can also be significant discrepancies between prisons which are broadly similar in terms of the number and categories of prisoners which they hold. It is impossible to draw firm and rigorous conclusions from the raw figures for a number of reasons. The relevant statute refers to the duty of committees to hear any “complaints” which are made by prisoners. This is a specific term, which can be interpreted narrowly or widely. The narrow interpretation will include only applications which are made through a formal process. Such a record takes no account of informal approaches made to Visiting Committee members in the course of their visits, nor of other applications which are not complaints in the narrow sense of the term. There would also appear to be variations between prisons which hold long term prisoners for extended periods of time and those prisons where many prisoners are held for relatively short periods of time. It would be wrong to assume that the recorded figures represent anything approaching the total number of contacts between prisoners and Visiting Committee members in a particular prison. That said, the figures should not be completely ignored as in some prisons they are the only available record of direct one to one contact between Visiting Committee members and prisoners.
35. Both Visiting Committees and prisoner groups referred to problems in some prisons in the way that some prison staff handled requests for access to committee members. Several Visiting Committees reported the removal of publicity material from notice boards. Some prisoners reported fear of victimisation if they asked to see a Visiting Committee member without explaining the subject matter to staff. This was a particular problem if the complaint referred to treatment by staff. There were some suggestions that on occasion requests were not passed on as they should have been. Any such actions by staff would be in breach of Article 21 of OPCAT.
36. Several discussants made reference to specific problems relating to the recent transfer of responsibility for prisoner health to the National Health Service. The Scottish Public Service Ombudsman recommended that this was a matter to which Visiting Committees should pay particular attention,

especially since prisoners do not have access to the patient advice and support service provided for in the Patients' Rights (Scotland) Act 2011.

37. The Scottish Prison Service has made considerable effort in developing its internal prisoner complaint system and is to be commended for that. However, this does not remove the right of prisoners to have access to an independent complaint mechanism. The Scottish Public Service Ombudsman has an important role to play in this regard. He estimates that some 20 per cent of all complaints made to him come from prisoners and that he receives 20 to 30 calls each month on prison matters via his free telephone line. However, an important feature of a prisoner's right to raise matters with Visiting Committee members is that this is one of the few external avenues which includes the ability to speak face to face with an independent person.
38. OPCAT requires that independent prison monitors shall have the opportunity to have private interviews with prisoners. Prison staff should not restrict prisoners' access to the monitors in any way, nor should they discriminate against a prisoner who requests to see an independent monitor.

Recommendation

4. The Scottish Prison Service should ensure that all staff understand their obligation to enable prisoners to have confidential personal access to independent prison monitors on request without fear of reprimand or disadvantage. The fact that prisoners have such a right of access should be publicised widely throughout each prison.

Annual reports and other reports to Scottish Ministers

39. Visiting Committees have an obligation to make an annual report to Scottish Ministers. Such reports should comment on the state of the prison and its administration and may also include advice and suggestions. Following publication of the 2007 report on Visiting Committees the Association of Visiting Committees produced a template for annual reports and most committees now follow this in preparing their reports. Annual reports covering the last two financial years for almost all committees can be accessed on the website of the Association.¹²
40. The contents of recent annual reports are of varying quality. All of them fulfil the general terms of the statutory obligation to "comment on the state of the prison and its administration". However, several do so from a management perspective and give the appearance of being extracts from reports prepared by the Governor of the prison or other managers. Many of them include a

¹² <http://www.avc.org.uk/>

series of general statistics which have clearly been supplied from prison sources but the reports do not comment on their implications and the information which they contain as it relates to the treatment of prisoners. These reports fail to meet the OPCAT objective of “improving the treatment and the conditions of the persons deprived of their liberty”. Reports from other committees are of a higher quality. One such example is the report of the Visiting Committee for adult women prisoners in Cornton Vale. In each of its main themes this report lists matters that it commends and issues with which it is concerned. This annual report is printed by a local authority on behalf of the committee and 200 copies are sent to the Cabinet Secretary, the Scottish Prison Service, all Members of the Scottish Parliament, relevant local authorities, health boards and others.

41. Information from Visiting Committees indicates that annual reports are sent to the Cabinet Secretary for Justice and also to a number of other relevant bodies and individuals, including the Scottish Prison Service and the Governor of the prison.¹³ There appear to be no formal arrangements within the Justice Directorate for dealing with or responding to Visiting Committee annual reports. Several Visiting Committees report that in recent years they have received neither acknowledgement nor comment from the Cabinet Secretary after reports are submitted. Within the Justice Directorate there appears to be uncertainty as to what happens when reports are received. In the Scottish Prison Service an identified official receives the annual reports copied to it by Visiting Committees and makes arrangements to distribute sections which are thought to require attention to other officials within the Scottish Prison Service. A reading of all Visiting Committee annual reports for 2011/12 indicates two recurring areas of concern raised by committees about the treatment of prisoners: issues arising from the transfer of health matters to NHS Scotland and the implementation of the new Scottish Prison Service complaints system. These are important matters which well might have been worthy of further investigation by Scottish Ministers. It does not appear to be common for Visiting Committees to raise specific matters with the Cabinet Secretary as they are entitled to do although some specific examples of this happening were provided. The committees concerned aver they received no replies.

42. If a system of independent prison monitoring in compliance with OPCAT is introduced there will be an obligation on Scottish Ministers to respond to

¹³ For example, the Visiting Committee for Edinburgh Prison sent copies of its annual report for 2011/12 to the Cabinet Secretary for Justice, 5 local authorities, 6 Members of the Scottish Parliament, HM Inspectorate of Prisons, the Governor, the Chief Executive of the Scottish Prison Service, Lothian and Borders Community Justice Authority and the Association of Visiting Committees.

reports such as these and to “enter into a dialogue (with the monitors) on possible implementation measures” in conformity with Article 22 of OPCAT.

43. It has long been the accepted practice in England and Wales that Independent Monitoring Boards publish their annual reports as a means of drawing conditions in prisons to the attention of local communities and media and of encouraging public interest at a local level. This is now regarded as good practice. This is a practice which should be followed in the future by independent prison monitors.

Recommendations

- 5. The independent monitors for each prison should submit an annual report to Scottish Ministers and should publish these reports.**
- 6. Monitors should bring to the attention of the Governor any matter which is of concern to them. If the matter is not resolved monitors should bring it to the attention of Scottish Ministers.**

Appointment of independent monitors

44. Members of Visiting Committees for all adult prisons in Scotland are appointed by specified local authorities as determined by statute.¹⁴ Historically virtually all persons appointed to Visiting Committees were elected members of that authority. The current statute stipulates a minimum number of members who shall not be councillors. Increasingly in recent years local authorities have tended to appoint non-elected members of their local communities.
45. Following publication in 2007 of the report of the 2005 review, the Association of Visiting Committees produced a set of guidelines to assist local authorities in the recruitment and selection of non-elected members of Visiting Committees. The guidelines include information on the role and statutory responsibilities of Visiting Committees as well as templates for recruitment and selection processes, which were developed in consultation with individual Visiting Committees and representatives of local authorities with the objective of improving consistency, openness and transparency in these processes. These guidelines are available on the website of the Association of Visiting Committees. A number of authorities now advertise vacancies for membership of the Visiting Committees for which they are responsible, either in the local press or on their websites. The appointment process typically consists of a preliminary visit to the relevant prison, usually escorted by an existing committee member. The applicant will then be interviewed by a panel

¹⁴ Scottish Statutory Instrument 2006 No. 94. *The Prisons and Young Offenders Institutions (Scotland) Rules 2006*. Rule 155.

made up of the chairperson or a member of the committee and one or more representatives of the relevant local authority. Elected local authority members are generally appointed after each local council election.

46. As a consequence of current uncertainty over the future of Visiting Committees, a number of local authorities did not appoint elected members to fill vacancies on committees after the local elections in May 2012, while some have not filled vacancies for non-elected members, with the result that several committees have been under strength for several months. From the available data it is not entirely clear what is the exact total complement of Visiting Committee members but it appears to be just over 190 for adult prisons, with a further 27 for the two young offender institutions. Of the 190 or so to be appointed by local authorities, some 53 are elected councillors according to the latest figures available in Visiting Committee annual reports. Elected members are in the majority on only two Visiting Committees and two of the largest committees have only one elected member each.
47. In the time available it was not possible to consult individual local authorities on their views about their role in appointing members of Visiting Committees, other than through some individual elected committee members. Representatives of the Convention of Scottish Local Authorities expressed the view that its members would be unlikely to object in principle to a change in these arrangements provided there was a continuing recognition of the value for prisons in having links with their local communities, particularly in activities to resettle prisoners on release.
48. Scottish Ministers have statutory responsibility for appointments to the Visiting Committees for the two Young Offender Institutions which hold young persons under the age of 21 years, Polmont and Cornton Vale. (This leads to the anomaly that there are two separate Visiting Committees for Cornton Vale Prison and Young Offender Institution. This matter is referred to in paragraph 89.) In practice Scottish Ministers have delegated responsibility for appointments to these two committees to the Scottish Prison Service which advertises vacancies as they occur. Respondents submit their applications to the Scottish Prison Service, which draws up a shortlist for interview by the chairperson of the Visiting Committee, a member of the Scottish Prison Service and the Governor of the Young Offender Institution. Members are usually appointed for a period of three years. The involvement of the Scottish Prison Service in this process undermines the independence of the Visiting Committee.
49. There is currently no statutory limit to the length of time that a Visiting Committee member can serve. Most public appointments are now limited to three or four years, often with the possibility of limited extensions thereafter

subject to satisfactory performance in office. The 2007 review of Visiting Committees recommended that all new appointments should be subject to a period of six months probation and that appointments should be for fixed terms, with the possibility of two renewals. It is important that there should be continuity in the role of prison monitoring and that monitors should hold office for periods sufficient to enable them to gain experience and make use of it. Adopting the practice which is common for other public appointments, it would be appropriate for monitors to be appointed for periods of four years, with the possibility of two re-appointments for similar periods.

50. In order to comply with OPCAT guidelines¹⁵ there should be an open appointment process for all monitors, to be organised by the body which is to oversee the work of the monitors on behalf of Scottish Ministers (see paragraphs 69 - 76). The same body should make arrangements for annual appraisal of monitors and any period of re-appointment should be subject to satisfactory appraisal. In making appointments attention should be paid to the recommendation in OPCAT Article 18(2) to achieve “a gender balance and the adequate representation of ethnic and minority groups in the country”.

Recommendations

- 7. Monitors should be appointed under an open public appointments system for specified periods.**
- 8. There should be a system of annual appraisal and re-appointment should be subject to satisfactory appraisal.**

Training of independent monitors

51. Training for newly appointed Visiting Committee members varies from committee to committee. At its most basic it consists of carrying out duties alongside experienced members for an initial period, although several committees have appointed one or more of their experienced members as a voluntary training officer. Subsequent to the 2005 review of Visiting Committees, the Association of Visiting Committees drafted a training programme for members using the model developed for training members of Independent Monitoring Boards in England and Wales. The Scottish Prison Service reported that it had been unable to provide funds for this proposed training programme as costs would have been “prohibitive”. The Association then developed a one day training course for new members and a similar course for experienced members. Each is hosted once a year at the Scottish Prison Service College, as is an annual meeting for local Visiting Committee training coordinators. The Scottish Prison Service provides training for Visiting

¹⁵ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2010). *Guidelines on national preventive mechanisms*. Geneva: United Nations. Paragraph 16

Committee members on issues such as security, personal safety and prison operational practices. It does not provide training on any monitoring related issues.

52. If independent monitors are to carry out their role in conformity with OPCAT they need to be given a clear understanding of that role and trained to a high level. This is not the case with Visiting Committee members at present. Through their Association Visiting Committee members have attempted to develop training courses but their ability to do so has been hampered by its lack of access to necessary resources. Sufficient funding should be made available to enable independent prison monitors to be properly trained.

Recommendation

- 9. Independent monitors should be required to undertake appropriate training on appointment and throughout their period of office. Sufficient resources should be provided to enable this training to be provided.**

Number of independent monitors for each prison

53. The number of members of each Visiting Committee varies between eight and 25. This variation is partly a reflection of the number of prisoners held in any one prison and the size of the prison and in some instances is also influenced by the number of appointing local authorities. The annual reports of each committee provide a variety of statistics on the activities of individual members, often including the number of meetings attended, the number of visits made and the training undertaken. The data shows that some members are more assiduous than others in carrying out their duties. Analysis undertaken by the Scottish Prison Service suggests that about 30 per cent of members visit their prison twice a year or less.
54. The number of independent monitors should be sufficient to carry out their duties. OPCAT refers to "regular visits." The Prisons (Scotland) Act 1989 requires "frequent visits to the prison." The Prison Rules stipulate that at least two members shall visit the prison at least fortnightly. In some prisons the members who visit on a rota basis also deal with any complaints from prisoners. In others complaints are dealt with on separate visits. This can be a sensible arrangement in prisons where there is a high level of requests from prisoners as it does not divert the other members from visiting duties.
55. It would not be unreasonable to expect independent monitors to devote the equivalent of 25 days a year to their duties. If that were to be the case, a minimum of six monitors for most prisons should be sufficient to carry out the

tasks listed above and any others which required their attention. This number would have to be increased for larger or more complex prisons, where a maximum of ten monitors would appear to be a sufficient number to guarantee an appropriate level of monitoring.

56. Visiting Committees have a statutory obligation to “meet at the prison at least once in every period of 3 months.” In practice most committees meet more frequently, typically every six weeks or two months. Monitors should be appointed on a personal basis but they will need to support each other in their work and to ensure that they carry out their duties to a consistent standard. This indicates that they should meet together as a group on a regular basis. In order to guarantee consistency in their duties independent monitors should meet as a group at least every two months. They should also appoint a chairperson for a specified period to chair their meetings and to act as a contact person with the prison Governor and other parties when necessary.

Recommendations

10. The number of independent monitors appointed to each prison should be sufficient to enable them to carry out their statutory duties.

11. The monitors for each prison should elect a chairperson and meet as a group in the prison at least every two months.

Funding for independent monitors

57. Members of Visiting Committees receive no payment for the work which they do. They are reimbursed for travelling expenses, loss of earnings or other expenses necessarily incurred in the performance of their duties.
58. Funding for the work of Visiting Committees comes from the Scottish Prison Service budget. The Scottish Prison Service estimates that the total involved is approximately £75,000 per year. Of this sum, £27,000 is allocated to the Association of Visiting Committees for its activities. Funding for individual committees is in the gift of each prison governor and there appears to be inconsistency in local decision making. Some members report occasional difficulties over payment of expenses and some committees are told by governors that there are no funds to allow members to attend training events or the annual conference or be involved in other activities.
59. The Scottish Prison Service estimates that local authorities pay around £15,000 for expense claims to elected members for their work on Visiting Committees. On this basis it would appear that the total cost from the public purse for prison and young offender institution Visiting Committees is

approximately £90,000 per year. All of these figures have remained static for several years.

60. The arrangement whereby the government agency responsible for the management of prisons controls funding for the committees which have the duty to monitor prison conditions has been subject to criticism for many years on the grounds that it undermines the independence of the committees. The Scottish Prison Service points out that this is an historical anachronism which *has continued mainly because no one within Scottish Government has direct responsibility for these matters*. Those immediately involved, the Scottish Prison Service and the Visiting Committees, have expressed dissatisfaction with this arrangement for many years and the 2007 review recommended that this practice should cease.
61. The new structure for independent prison monitoring will have to be properly funded and resourced as required by OPCAT. The Justice Directorate did not carry out detailed costings for the proposals which were on the table in mid 2012. It was suggested that salary costs for the four part-time monitors attached to HM Inspectorate of Prisons might be in the region of £125,000. This funding will not be required if the proposals in the present review are accepted. Independent prison monitors, like the members of Visiting Committees, will not receive any payment for their work but will be reimbursed for expenses incurred in the performance of their duties. In broad terms the total number of monitors is likely to be in the region of one third less than the current number of Visiting Committee members so there will be a reduction on current travel and other costs. It may be that the Scottish Prison Service will not feel able to release the relevant staffing costs for those members of its staff who currently administer the budget for Visiting Committees. The minimum staffing cost for resourcing whichever of the support bodies listed in paragraphs 70 - 76 is chosen may be estimated at the equivalent of two persons and the cost of some of the options will be higher than that. There may also be costs for accommodation and other facilities.

Recommendations

- 12. Scottish Ministers should provide funding at a level which will enable independent monitors to carry out their role in a manner which conforms to OPCAT. This funding should not be administered by the Scottish Prison Service.**
- 13. Monitors should be reimbursed for expenses incurred in the performance of their duties.**

Administrative support for independent monitors

62. Administrative support for Visiting Committees is minimal, consisting at most of a part-time clerk or secretary who takes minutes of meetings. For most committees linked to adult prisons secretarial support is provided in one form or another by the appointing local authorities. Some local authorities invoice prison governors for the cost of this service; others apparently do not. In at least one prison a member of the committee acts as secretary. The two committees attached to young offender institutions have to find their own clerk, who is then reimbursed by the Governor.
63. Few if any Visiting Committees have private office space. In some prisons committees have dedicated desk space and a computer in the prison administration area; in others they use empty space when available. In some prisons they have a private locked filing cabinet for records. In other prisons Visiting Committee's files appear to be kept by a member of the prison administrative staff who will provide them to members on request. In some prisons requests by prisoners to see a member of the Visiting Committee are channelled through a member of the administrative staff such as the Governor's secretary.
64. These minimal arrangements for administrative support, especially in so far as they depend on the good will of prison staff, further undermine the independence of Visiting Committees, as does the fact that in some prisons staff act as a conduit between prisoners and committee members in some matters. In each prison the independent monitors should have the services of a clerk as well as appropriate accommodation and other facilities to enable to carry out their duties.

Recommendation

- 14. Arrangements should be made for appointing a paid clerk to take the minutes of each meeting of the independent prison monitors and to assist in administrative matters including preparing the annual report and any other reports as necessary. Monitors should have appropriate accommodation and other facilities**

Council of Independent Prison Monitors

65. In 1988 a number of members of Visiting Committees formed the Association of Visiting Committees with the aim of promoting the effective operation of Visiting Committees. According to its website¹⁶ the key objectives of the Association are:

¹⁶ <http://avc.bpweb.net/>

- to provide a forum for committees to discuss and exchange information
- to recommend standard practices by which committees should operate
- to discuss penal affairs and make recommendations to relevant parties
- to run training programmes for members
- to produce training literature for members
- to clarify prison rules for members
- to set standards for members' attendances and visit to establishments
- to publicise the role of Visiting Committees for the benefit of the public

66. Membership of the Association is open to all Visiting Committees. In recent years the Association of Visiting Committees has taken the lead in developing a variety of standards and other documents dealing with such matters as the appointment and training of committee members and attempting to improve consistency in the way that members fulfil their roles. It also organises an annual conference. It has occasional meetings with the Cabinet Secretary for Justice, with the Scottish Prison Service and with other bodies. Some of the documents it has produced are to be found on its website, which also includes copies of annual reports from the Association and individual committees. The Association has no formal status.

67. Notwithstanding its informal status the Association of Visiting Committees is the only body which has been active in recent years in providing assistance and encouragement to Visiting Committees in the development of standards and consistency of monitoring. It has provided a forum for individual committees to share experiences and to learn from each other. It has also acted as liaison between Visiting Committees and their counterparts in other jurisdictions.

68. Just as independent monitors in each prison will benefit from meeting regularly to ensure consistency in their practices and in responding to issues which arise in the prison, so they will benefit from sharing experiences between prisons. One way of enabling them to do so would be by establishing a Council of Independent Prison Monitors consisting of one monitor nominated from each prison. This Council could ensure consistency and improve professionalism by publishing standards for such matters as recruitment, appointment and training of independent monitors and annual reports. It could also act as a point of contact between monitors and the UK National Preventive Mechanism.

Recommendation

15. Provision should be made for a Council of Independent Prison Monitors to include one monitor from each prison. The Council

should agree protocols for, among other matters, recruitment, appointment and training of independent monitors as well as a format for annual reports.

Options for support of independent prison monitors

69. If a new structure of independent prison monitors is to be introduced there will have to be arrangements for their oversight and support. These arrangements should conform with the OPCAT requirement that the monitors shall have functional independence (Article 18 (1)). There are a number of options as to how this support might be provided.

Council of Independent Prison Monitors

70. This would meet the requirements of independence. Such an arrangement would be not dissimilar to that for Independent Monitoring Boards in England and Wales. The National Council of Independent Monitoring Boards has 10 members elected on a regional basis by IMB members and is chaired by a non-executive President appointed by the Secretary of State. The National Council is serviced by a secretariat of 17 persons who are employed by the Ministry of Justice. In addition to the duties referred to in paragraph 68 a Council of Independent Prison Monitors could take on responsibility for administering and distributing the budget for independent prison monitors. To do so it would be likely to need administrative support from two persons.

A unit within the Justice Directorate

71. This arrangement would probably give a sufficient degree of independence from the Scottish Prison Service to make the monitors OPCAT compliant. It would not be possible for the additional work involved to be subsumed within the portfolio of an existing unit without additional resources, including extra staff. In practice, this might be a variation on the previous option, with the two administrative persons working with the Justice Directorate. In that case the relationship between the administrative unit and the Council would have to be structured in such a way as to ensure that the independence of the prison monitors was not weakened.

Community Justice Authorities

72. The 2007 review of Visiting Committees recommended that Community Justice Authorities should be responsible for the appointment of members of Visiting Committees within their area. In December 2012 the Scottish Government announced a consultation on “Redesigning the Community Justice System” in Scotland. Until there is clarity about the Government’s intentions on the future of Community Justice Authorities no decision can be made as to possible oversight of independent prison monitoring by Community Justice Authorities.

Incorporation into the new structure for support of independent police custody visitors

73. Under the Police and Fire Reform (Scotland) Act 2012 a new system of independent custody visitors is to be established to monitor conditions for those detained in police cells. It is proposed that the new independent custody visitors will come under the auspices of the Scottish Police Authority. If this is confirmed it would not be appropriate for the support structure for independent prison visitors to be incorporated into the supporting mechanism for independent custody visitors.

HM Inspector of Prisons for Scotland

74. There have been ongoing discussions between the Justice Directorate and HM Inspectorate of Prisons as to how a prison monitoring system might be placed within the inspectorate. The latest model proposed a structure with four part-time salaried monitors operating on a regional basis, with four unpaid monitors for each prison reporting to them. The argument presented for this model was that it would create a synergy between local monitoring and the national inspectorate. There has been no detailed costing of this option and HM Chief Inspector of Prisons in Scotland is uncertain about his capacity to oversee these arrangements with his existing staff. This review recommends that a sufficient number of volunteer monitors should be appointed to carry out ongoing monitoring in each prison. In this model, there would be no need for the four salaried monitors but HM Chief Inspector would undoubtedly require an increase in his staffing if he were to take on the direct supervision of the number of monitors proposed in this report. 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. Consideration would also have to be given to the matter of direct access by independent monitors to Scottish Ministers.

Scottish Public Services Ombudsman

75. The Scottish Public Services Ombudsman currently receives complaints from prisoners. He estimates that these complaints make up about 20 per cent of the total he receives. In a number of other countries OPCAT compliant prison monitoring is undertaken or supervised by national Ombudsmen. On the other hand, the Scottish Public Services Ombudsman has no experience of monitoring prison conditions in general terms, nor does he have the remit to do so. The Scottish Public Services Ombudsman has indicated that he does not consider this to be an appropriate arrangement given his other statutory duties.

Scottish Human Rights Commission

76. National Human Rights Institutions have been identified as National Preventive Mechanisms under OPCAT in 23 ratifying states. The Scottish Human Rights Commission is one of the 18 bodies which make up the UK National Preventive Mechanism, as is HM Inspectorate of Prisons. The Human Rights Commission has the power to enter prisons as part of any inquiry which it is undertaking. Location of support for the independent prison monitors within the Scottish Human Rights Commission would underline the fact that this monitoring is primarily a human rights obligation and is not a matter merely of approving processes and management initiatives. An arrangement such as this would arguably move Scotland from the current situation in which its arrangements for monitoring prisons do not comply with OPCAT to one which would put it at the forefront of international good practice in this matter. In response to preliminary soundings the Scottish Human Rights Commission has indicated that it is open to exploring this matter in principle but that it would have to consider the nature of its obligations as a supporting body and would require clear assurances from Government about the provision of appropriate resources and that its independence would not be compromised.

Recommendation

16. There should be a structure for the appropriate oversight and support of independent prison monitors

Relationships of monitors with prisoners

77. If monitors are to fulfil their statutory duties they will need to have a positive relationship with prisoners, both in order to assess accurately conditions in the prison and the way in which prisoners are treated and also to ensure that prisoners feel confident in approaching them when they wish to make a complaint or to seek advice. 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.
78. In 2012 Scottish Government officials held a number of meetings with groups of prisoners. In three of the four prisons visited a majority of prisoners said that they were aware of the Visiting Committee and its role although the majority had never made use of it. Overall there was a lack of understanding of the function of Visiting Committees and how to access them. Prisoners complained of a lack of publicity about the committees and others of a lack of action when they had raised issues with committee members. Some prisoners welcomed the opportunity to talk to Visiting Committee members as people who were independent of the system to whom they could talk directly. This was particularly welcomed by prisoners who had reading or writing difficulties. Some prisoners said that they were inhibited by the need to channel requests to speak to a Visiting Committee member via staff and feared recrimination as a result of doing so.
79. Information about Visiting Committees is not generally disseminated as widely as it should be. Several reasons are offered for this. In a number of prisons Visiting Committee members say that they regularly place leaflets and other information on hall notice boards but that this is subsequently removed by staff on the grounds that space is needed for other more immediate information. Prisoners tend to report that they are not aware of this information. On the other hand staff assert that information about Visiting Committees is extensively available. In some prisons Visiting Committee members take part in the induction process for new prisoners to explain their role. This is good practice. It is important that prisoners should be aware of and have confidence in independent prison monitors. As a first step prisoners should be fully informed about the existence of the monitors and their role.
80. Prison Rules state that Visiting Committee members should be able to talk to prisoners outwith the sight and hearing of staff. There is no evidence that this is problematic in Scottish prisons. However, in many prisons prisoners have to approach staff in order to gain access to Visiting Committee members and this leads to a concern on the part of some prisoners that they may be

penalised, at least informally, for doing so. OPCAT specifies the need for monitors to have private interview with prisoners (Article 20(d)) and that there should be no sanction against them for doing so (Article 21 (1)).

Recommendations

- 17. In all prisons there should be clear arrangements to ensure that prisoners are aware of the existence and the role of independent monitors and how to make contact with them.**
- 18. No member of staff shall “order, apply, permit or tolerate any sanction” against a prisoner who contacts an independent monitor.**

Relationships of monitors with Scottish Prison Service, Governors and prison staff

81. The Scottish Prison Service has been placed in a somewhat invidious position in that it is required to operate as de facto agent for Scottish Ministers in respect of Visiting Committees. It manages their funding and in practice is the main respondent to issues which committees raise with Scottish Ministers, whether through annual reports or on an ad hoc basis. The Scottish Prison Service has publicly recognised the inappropriate nature of this arrangement and has sought to be relieved of it, for example, through the recommendations of the 2007 review to which it was a major contributor. More generally, the attitude of the Scottish Prison Service to Visiting Committees has been ambivalent. As an instance, the Scottish Government’s 2011 consultation on the future of Visiting Committees attracted 56 responses from a wide range of bodies and individuals. Of all of these the Scottish Prison Service was the only one which did not consider that there was a need for the monitoring role of Visiting Committees to complement the scrutiny role of HM Inspectorate of Prisons. In reaching this conclusion it argued that:

The modern (prison) service has well defined administrative inspections and audits to provide internal assurance on performance and improvement, is subject to external and independent inspections through HMCIP and increasingly through other inspection agencies appointed by the Scottish Government, and has a well defined complaint and grievance process for prisoners including recourse to independent adjudication through the Scottish Public Services Ombudsman (SPSO).¹⁷

¹⁷ Scottish Prison Service response to the Scottish Government ‘Consultation on independent monitoring of prisons’, paragraph 6

82. The Scottish Prison Service response went on to note that Scotland was represented on the UK National Preventive Mechanism by the Chief Inspector of Prisons and questioned the added value of an “additional tier of ‘monitoring.’” This response would seem to misunderstand the distinctions between internal audit processes, external inspections and a system of continuous monitoring. In further discussions as part of this review the Scottish Prison Service nuanced its position by explaining that its main criticism was that the bulk of the work undertaken by Visiting Committees was not in fact monitoring. There is some validity to this criticism in terms of the way that some committees currently operate.
83. It is important that independent monitors should have positive relationships with prison Governors and staff. In fulfilling their role in a professional manner monitors will not undermine the authority of prison staff. On the contrary they will be an assistance and provide an independent assurance that prisons are being managed and ordered in conformity with national and international standards. This means that there should be an ongoing dialogue between monitors and staff to ensure that staff are aware of the monitors’ independent role and do not inhibit it any way. At the same time, monitors are likely to be more effective in their work if they have a good understanding of the challenges which face Governors and staff in their daily work. This is a two way process and if a new structure of independent prison monitors is to be introduced as recommended in this report, it will be essential that the Scottish Prison Service should welcome this and should ensure that prison staff fully understand the role which monitors will have.

Recommendation

- 19. The Scottish Prison Service should ensure that all prison staff understand the role to be carried out by independent monitors and are supportive of their activities.**

Relationships of monitors with HM Inspectorate of Prisons for Scotland

84. In its 2011 consultation the Government asked whether the monitoring role of Visiting Committees was required to complement the scrutiny role of HM Inspectorate of Prisons for Scotland. The Chief Inspector responded that “HM Inspectorate of Prisons recognises the importance of local and regular monitoring of individual prisons. The individual Visiting Committees carry out this role, which also includes dealing with complaints. HMIP does not deal with prisoners’ complaints.”
85. The distinction between inspection and monitoring of prisons has been explored earlier in this report. It is important that these two activities should be

complementary. The crucial nature of this relationship in respect of the National Preventive Mechanism was explained by Nick Hardwick, HM Chief Inspector of Prisons for England and Wales and lead of the UK National Preventive Mechanism, when he wrote in his latter capacity to the Cabinet Secretary on 9 March 2012:

In relation to both prisons and police custody in England and Wales and Northern Ireland, the National Preventive Mechanism role is performed at two levels – by a professional inspectorate and by volunteers from the local community. There are advantages to this layered monitoring. The professional inspectorate provides cyclical, in-depth professional inspection against published criteria and which includes the use of, for example, health care experts as recommended by the UN's Subcommittee for the Prevention of Torture (SPT). The lay monitoring body provides a frequency of visiting that cannot be achieved by a professional inspectorate. The *regular* monitoring of detention is a key requirement of OPCAT (Article 19(a)). Moreover, monitoring by lay bodies helps to address general recommendations from the SPT that civil society be involved in the work of the National Preventive Mechanism. The lay body publishes an annual report which, rather than being a snapshot of the prison at the time of an inspection, paints a picture of an establishment over the course of a year. The monitoring of the lay body complements the monitoring of the inspectorate and vice versa. In our view, it is these layers of monitoring that, in total, meet the OPCAT requirements.

86. HM Chief Inspector of Prisons acknowledges the distinction between his role and that of independent monitors, while recognising the need for a complementary approach to the respective roles. In the course of discussion he explained that while he has few formal links with Visiting Committees he usually makes a point of seeing the relevant committee before inspecting a prison. He is also in receipt of annual reports from each Visiting Committee. There is room to develop understanding between HM Inspectorate of Prisons and independent monitors. This could be assisted by the adoption of a protocol between the two.

Recommendation

20. A protocol should be agreed between HM Inspectorate of Prisons and the independent monitors to ensure that they benefit from each other's activities.

Prisoner support

87. In the normal course of their duties Visiting Committee members may well be asked by prisoners for advice or assistance in resolving a wide variety of issues. They will frequently be asked about matters to do with life in prison, particularly if the prisoner wishes the Visiting Committee member to speak on their behalf to a member of staff. This may be because the prisoner does not feel confident enough to deal with the latter him or herself, or thinks that staff will be too busy to listen. There may be added complications if the prisoner has a mental illness or other disability or if he or she has difficulty with English. The prisoner may also be seeking assistance on something to do with life outside the prison when there is a need to involve external agencies. Requests such as these touch on the two main responsibilities of Visiting Committee members, to monitor the treatment of prisoners and to hear complaints from prisoners, and it is quite appropriate that members should be involved with prisoners in this way. It is likely that independent monitors will be involved in such matters in the future.

88. However, involvement of monitors in assistance of this nature to prisoners should not be interpreted as being equivalent to the type of support which might be offered by others who have specific training in advocacy work. Nor is it to be equated with specialised mediation work. The Scottish Government and the Scottish Prison Service have indicated that there may be a need for such services for prisoners. This issue goes beyond the terms of reference for the current review and, therefore, I merely point out that such services are distinct from the task of independent prison monitoring.

Cornton Vale

89. There are two Visiting Committees for Cornton Vale, one for the adult prison and one for the young offender institution. The members of the former committee are appointed by local authorities and those of the latter by Scottish Ministers. The two committees carry out their duties separately although there is limited coordination between them. In practice Cornton Vale is managed as a single prison, with one Governor, one set of staff, one set of all facilities and services. Young offenders and adults share accommodation and access to facilities. Given all of these factors, it would seem reasonable that there should be a single set of independent monitors for Cornton Vale Prison and Young Offender Institution.

Visiting Committees for legalised police cells

90. Historically certain police stations in locations far removed from prisons have had cells in which prisoners can legally be held for up to 30 days. These prisoners are subject to the Prison Rules and a Visiting Committee is appointed by the relevant local authorities to carry out all duties in terms of the Prisons and Young Offenders Institutions (Scotland) Rules 2006, Rule 164 in respect of the cells in which such prisoners are held and the treatment of prisoners. In December 2011 HM Inspectorate of Prisons published a report on Legalised Police Cells¹⁸ in which he recommended that five of the current nine should be closed, leaving cells only in Hawick, Kirkwall, Lerwick and Stornoway. In none of these police stations are specific cells identified for use by prisoners.
91. The Police and Fire Reform (Scotland) Act 2012 provides for the appointment of independent custody visitors to visit persons detained in police custody. The Act makes specific reference to the obligation of these visitors to be appointed and to be able to carry out their duties in conformity with OPCAT.¹⁹ It would seem logical that the independent custody visitors should also take over responsibility for monitoring the conditions of detention and the treatment of any prisoners held there and to hear any complaints which they might wish to make to them. In this case the training given to custody visitors would need to cover the fact that these prisoners are subject to the Prison Rules and make visitors aware that the prisoners are to be treated in accordance with these Rules. There should also be an obligation on the police to advise custody visitors immediately of the fact that a person is being held in the cells as a prisoner.

Recommendation

- 21. The Visiting Committees for legalised police cells should be abolished and their functions transferred to independent custody visitors.**

Concluding remarks

92. This review notes that structural arrangements for Visiting Committees have changed little over the last 130 years. In recent years the need for change has been universally acknowledged, not least by Visiting Committee members themselves and by their Association, as was demonstrated by the 2007 review report and by responses to the Government's consultation in 2011.

¹⁸ HM Inspectorate of Prisons (2011). *Report on Legalised Police Cells*. Edinburgh: Scottish Government.

¹⁹ Police and Fire Reform (Scotland) Act 2012. C16.

What has also been recognised by almost all commentators is the need for a robust system of independent prison monitoring in Scotland, equivalent at least to that provided in other jurisdictions in the United Kingdom. The uncertainty which has been created over the last 14 or so months about the future of independent prison monitoring and in particular of Visiting Committees has been very destabilising and has undoubtedly had the unwelcome consequence of weakening the present arrangements.

93. In the course of this review I have been very impressed by the dedication shown by many members of Visiting Committees. They have continued to carry out their voluntary duties to the best of their abilities with great commitment. It is likely that there will be a, hopefully short, period of continuing uncertainty while decisions are made about how to move forward in the light of this review. The Cabinet Secretary for Justice is on record as expressing gratitude for the work which members currently do.²⁰ It would be helpful and most appreciated if Scottish Ministers could formally invite current members of Visiting Committees to continue to exercise their important public service until new arrangements are introduced.

²⁰ Scottish Parliament Official Report 2 February 2012

Recommendations

- 1. Arrangements should be put in place for each prison to be monitored on a regular basis by independent volunteers appointed on a statutory basis, to be known as independent prison monitors.**
- 2. The role of these monitors should be defined to ensure that they are OPCAT compliant.**
- 3. There needs to be a clear definition of the role of independent monitors to ensure that they are OPCAT compliant and of the competences which monitors need to possess to enable them fulfil their role.**
- 4. The Scottish Prison Service should ensure that all staff understand their obligation to enable prisoners to have confidential personal access to independent prison monitors on request without fear of recrimination or disadvantage. The fact that prisoners have such a right of access should be publicised widely throughout each prison.**
- 5. The independent monitors for each prison should submit an annual report to Scottish Ministers and should publish these reports.**
- 6. Monitors should bring to the attention of the Governor any matter which is of concern to them. If the matter is not resolved monitors should bring it to the attention of Scottish Ministers.**
- 7. Monitors should be appointed under an open public appointments system for specified periods.**
- 8. There should be a system of annual appraisal and re-appointment should be subject to satisfactory appraisal.**
- 9. Independent monitors should be required to undertake appropriate training on appointment and throughout their period of office. Sufficient resources should be provided to enable this training to be provided.**
- 10. The number of independent monitors appointed to each prison should be sufficient to enable them to carry out their statutory duties.**
- 11. Scottish Ministers should provide funding at a level which will enable independent monitors to carry out their role in a manner which conforms to OPCAT. This funding should not be administered by the Scottish Prison Service.**

- 12. Monitors should be reimbursed for expenses incurred in the performance of their duties.**
- 13. The monitors for each prison should elect a chairperson and to meet as a group in the prison at least every two months.**
- 14. Arrangements should be made for appointing a paid clerk to take the minutes of each meeting of the independent prison monitors and to assist in administrative matters including preparing the annual report and any other reports as necessary. Monitors should have appropriate accommodation and other facilities.**
- 15. Provision should be made for a Council of Independent Prison Monitors to include one monitor from each prison. The Council should agree protocols for, among other matters, recruitment, appointment and training of independent monitors as well as a format for annual reports.**
- 16. There should be a structure for the appropriate oversight and support of independent prison monitors**
- 17. In all prisons there should be clear arrangements to ensure that prisoners are aware of the existence and the role of independent monitors and how to make contact with them.**
- 18. No member of staff shall “order, apply, permit or tolerate any sanction” against a prisoner who contacts an independent monitor.**
- 19. The Scottish Prison Service should ensure that all prison staff understand the role to be carried out by independent monitors and are supportive of their activities.**
- 20. A protocol should be agreed between HM Inspectorate of Prisons for Scotland and the independent monitors to ensure that they benefit from each other’s activities.**
- 21. The Visiting Committees for legalised police cells should be abolished and their functions transferred to independent custody visitors.**

ANNEX 1

Acknowledgements

I have been most impressed by the positive attitude adopted by all the people with whom I have come into contact throughout the course of my review. Everyone without exception made clear that they wished to see a set of recommendations which would result in a rigorous form of independent prison monitoring in Scotland. I should mention in particular the members of Visiting Committees who all stressed that their priority was not to preserve or defend the current structure but to ensure that what succeeded it would deliver a robust monitoring system which would be compliant with national and international standards. The nature of these responses meant that all my meetings and discussions were conducted in an amenable atmosphere and that I was offered a wealth of sound advice, often based on extensive experience.

In the relatively short time available to me it was not possible to meet everyone who has an interest in these matters. For example, I did not consult directly with prisoners or with prison staff. I made that decision on the grounds that the Justice Directorate had carried out a series of focus groups with staff and prisoners in several prisons in the course of 2012 and it made available the notes of these meetings. It also provided me with a wide range of papers from the 2011 consultation. The Scottish Prison Service supplied documents and HM Inspectorate of Prisons was generous in providing me with its background material. The Association of Visiting Committees supplied me with large amounts of material, as did a number of Visiting Committees. The Howard League for Scotland, which had acted as a liaison point for Scottish voluntary groups in earlier consultations, also provided me with a number of documents. Several individuals provided me with additional information and advice, for which I am very grateful.

I am also grateful to the representatives of the following bodies and organisations with whom I had discussions:

- Association of Prison Visiting Committees
- Convention of Scottish Local Authorities
- HM Inspectorate of Prisons
- Howard League Scotland
- National Council of Independent Monitoring Boards
- National Preventive Mechanism
- Parliamentary Justice spokespersons for the Conservative, Labour and Liberal Democrat parties
- Positive Prisons
- SACRO

Scottish Commission for Human Rights
Scottish Government Justice Directorate
Scottish Prison Service
Scottish Public Service Ombudsman
Visiting Committees of Barlinnie Prison, Cornton Vale Prison, Cornton Vale
Young Offenders Institution, Edinburgh Prison, Perth Prison and Polmont
Young Offenders Institution

I owe special thanks to Hannah Keates who was my contact person in the Justice Directorate and who responded cheerfully and efficiently to all my queries.

Finally, I wish to thank Helen Fair of the International Centre for Prison Studies, who once again provided me with extensive administrative and research support.

ANNEX 2

Extract from the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

**Adopted on 18 December 2002 at the fifty-seventh session of the General
Assembly of the United Nations by resolution A/RES/57/199.**

Entered into force on 22 June 2006

PART I

General principles

Article 1

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

Article 2

1. A Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture (hereinafter referred to as the Subcommittee on Prevention) shall be established and shall carry out the functions laid down in the present Protocol.
2. The Subcommittee on Prevention shall carry out its work within the framework of the Charter of the United Nations and shall be guided by the purposes and principles thereof, as well as the norms of the United Nations concerning the treatment of people deprived of their liberty.
3. Equally, the Subcommittee on Prevention shall be guided by the principles of confidentiality, impartiality, non-selectivity, universality and objectivity.
4. The Subcommittee on Prevention and the States Parties shall cooperate in the implementation of the present Protocol.

Article 3

Each State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or

degrading treatment or punishment (hereinafter referred to as the national preventive mechanism).

Article 4

1. Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention). These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.

2. For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.

PART IV

National preventive mechanisms

Article 17

Each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level. Mechanisms established by decentralized units may be designated as national preventive mechanisms for the purposes of the present Protocol if they are in conformity with its provisions.

Article 18

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

2. The States Parties shall take the necessary measures to ensure that the experts of the national preventive mechanism have the required capabilities and professional knowledge. They shall strive for a gender balance and the adequate representation of ethnic and minority groups in the country.

3. The States Parties undertake to make available the necessary resources for the functioning of the national preventive mechanisms.

4. When establishing national preventive mechanisms, States Parties shall give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights.

Article 19

The national preventive mechanisms shall be granted at a minimum the power:

(a) To regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in article 4, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment;

(b) To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;

(c) To submit proposals and observations concerning existing or draft legislation.

Article 20

In order to enable the national preventive mechanisms to fulfil their mandate, the States Parties to the present Protocol undertake to grant them:

(a) Access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;

(b) Access to all information referring to the treatment of those persons as well as their conditions of detention;

(c) Access to all places of detention and their installations and facilities;

(d) The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the national preventive mechanism believes may supply relevant information;

(e) The liberty to choose the places they want to visit and the persons they want to interview;

(f) The right to have contacts with the Subcommittee on Prevention, to send it information and to meet with it.

Article 21

1. No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the national preventive mechanism any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.

2. Confidential information collected by the national preventive mechanism shall be privileged. No personal data shall be published without the express consent of the person concerned.

Article 22

The competent authorities of the State Party concerned shall examine the recommendations of the national preventive mechanism and enter into a dialogue with it on possible implementation measures.

Article 23

The States Parties to the present Protocol undertake to publish and disseminate the annual reports of the national preventive mechanisms.



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