

Ministry of Justice consultation: Strengthening the Independent Scrutiny Bodies through Legislation

Response from INQUEST, 30 September 2020

1. INQUEST is the only charity providing expertise on state related deaths and their investigation to bereaved people, lawyers, advice and support agencies, the media and parliamentarians. INQUEST's specialist casework focuses on deaths in prison and other forms of detention, and mental health settings, as well as deaths where wider issues of state and corporate accountability are in question, such as Hillsborough and Grenfell Tower. Our policy, parliamentary, campaigning and media work is grounded in the day to day experience of working with bereaved people. Our Executive Director, Deborah Coles, sits on the Ministerial Board on Deaths in Custody and is a member of the Independent Advisory Panel on Deaths in Custody.
2. We welcome the opportunity to respond to this consultation and our response focuses on the proposals relating to the Prisons and Probation Ombudsman (PPO), Her Majesty's Inspectorate of Prisons (HMI Prisons), the Independent Monitoring Boards (IMBs), the Lay Observers (LOs), the Independent Advisory Panel on Deaths in Custody (IAP) and the National Preventive Mechanism (NPM). We support the premise of the consultation which is to strengthen the ability of these bodies to scrutinise and improve accountability. Many of the recommendations made by the scrutiny bodies concern the health and safety of people in detention and in particular the prevention of deaths and serious harms.
3. We have worked extensively with the scrutiny bodies through our casework and wider policy and campaigning work. We believe that there is indeed scope to strengthen their roles and the proposals in this consultation would help achieve this. There is, however, a wider need to consider the extent to which the scrutiny bodies individually and collectively safeguard the rights of people in detention, prevent abuse and mistreatment, learn from systemic failures (whether in individual cases or relating to wider policy) and hold government and detention authorities to account.
4. INQUEST has long campaigned for a more rigorous approach to learning from individual cases, and better systems for accountability. This is particularly important in regard to the human rights of people in situations where they are dependent on or subject to the control of the state, which engage Article 2 (the right to life) and/or Article 3 (inhuman and degrading treatment). We hope that this consultation will open the way for further discussion of the extent to which these scrutiny bodies are able to hold the state to account, and how to ensure a more coordinated and rigorous approach to the oversight, monitoring and follow up of recommendations and tracking progress.
5. We respond below to the specific areas outlined in the consultation document.

Prisons and Probation Ombudsman

6. INQUEST agrees with the proposal to put the PPO on a statutory footing which is long overdue despite many authoritative recommendations to this effect. The statutory framework should indeed include the power for the PPO and staff to access places, people and documents, and should also give them the power to compel witnesses where necessary.
7. The statutory framework for the PPO should formalise the PPO's responsibility to write an annual report, to be laid in Parliament to enable proper scrutiny and debate. It should also include a duty on relevant ministers (primarily the Secretary of State for Justice, but also the Home Secretary in relation to immigration detention cases) to respond to recommendations. It should also enable the PPO to exercise discretion in taking on cases outside its remit where needed, and without the need for specific direction by the Secretary of State. This is particularly important in regard to the deaths of prisoners post release.
8. We think establishing the PPO as an NDPB would be desirable as a means to strengthen its independence as well as the perception of its independence, which is crucial to its credibility among those it is there to serve – prisoners and bereaved families. It would enable the PPO to hire its own staff directly, which would strengthen its ability to recruit from diverse fields and backgrounds.

HM Inspectorate of Prisons

9. We agree that the inspectorate should be recognised in statute, and that having NDPB status would be desirable. The informality of the current arrangement – where HMI Prisons staff are seconded from HMPPS and the MOJ – has been subject to international criticism, and undermines its independence in fact and in perception.¹
10. We agree that an explicit power to access places, people and documents is desirable, but this must include all areas currently subject to inspection which include immigration detention and court custody.² This is an important and overdue opportunity to introduce HMI Prisons' responsibilities to inspect military detention into its legislation.
11. HMI Prisons plays a key role in the UK National Preventive Mechanism, as a member and in hosting its secretariat. It is therefore essential that for the credibility of both the NPM and HMI Prisons, the core purpose of preventing ill treatment in detention be introduced into its statutory framework. The failure to do this has been criticised by international human rights bodies.³

¹ United Nations Committee against Torture, Concluding Observations on the fifth periodic report of the UK (CAT/C/GBR/CO/5), paragraph 14

² <https://www.justiceinspectorates.gov.uk/hmiprison/about-hmi-prisons/>

³ United Nations Committee against Torture, Concluding Observations on the sixth periodic report of the UK (CAT/C/GBR/CO/6), paragraphs 16-17; Council of Europe, Report on the visit to the UK by the European Committee for the Prevention of Torture, 13-23 May 2019, CPT/Inf(2020)18, paragraph 8

12. We propose that the duty on relevant ministers (primarily the Secretary of State for Justice, but also the Home Secretary) to respond to HMI Prisons recommendations be introduced into the legislation.

Independent Monitoring Boards and Lay Observers

13. We agree with the proposal to merge the IMB and the Lay Observers. The roles of these two bodies are consistent and could benefit from shared experience and learning. The fact that they already share a secretariat also presents practical advantages. On this basis, our recommendations about the statutory framework relate to these two bodies once merged.
14. The Chair of the IMBs (and Lay Observers) should be placed in statute which would allow the role the benefits of greater visibility and status. Currently, the formal status of the Chair and National Management Board vis a vis the individual monitoring boards is unclear, and creating this central body as an NDPB would allow this a stronger structure and governance. We have noted recent improvements in the quality of IMB reporting as a result of the strengthened central structure, and consider that this could be all the more effective and enjoy better credibility with prisoners and detainees as well as wider stakeholders if central IMB governance was clarified further. The legislation should include the responsibility to write an annual report, to be laid in Parliament, and a duty on relevant ministers (primarily the Secretary of State for Justice but also the Home Secretary) to respond to recommendations.
15. As with HMI Prisons, the IMBs and Lay Observers are members of the UK NPM, and as such, in line with international recommendations, their core purpose of preventing ill treatment in detention should be introduced into statute.

Independent Advisory Panel on Deaths in Custody

16. We agree with the proposal to put the IAP on a statutory footing which would help increase its independence, credibility and influence. We suggest this include a responsibility on all relevant ministers to respond to their reports. On the basis of its independent statutory footing, the IAP should be supported by a separate Secretariat rather than the current arrangement where it shares a Secretariat with the Ministerial Board on Deaths in Custody which creates a conflict of interest. A separate secretariat would also strengthen the IAP's ability to issue independent, expert guidance.

'The Scottish Model'

17. Although in some ways a merger of HMI Prisons and the IMBs appears an attractive model, it would require considerable investment and long-term thinking to get off the ground. The Scottish model operates on a much smaller scale, does not relate to other areas of detention (immigration detention) and there has yet to be any independent evaluation of its effectiveness. A merger of HMI Prisons and the IMBs would need significant additional resourcing to set up and manage and would therefore be unlikely to present any cost savings without also reducing the level of scrutiny. There is also a risk that the benefits of the current dual layers of scrutiny could be undermined. We

believe that any move towards the Scottish model should be subject to independent review. In the meantime, there are other more practicable ways to strengthen the cooperation between scrutiny bodies and their individual effectiveness, and suggest these below.

National Preventive Mechanism

18. We welcome the consideration given to putting the NPM on a statutory footing which we consider long overdue given the level of international criticism of its informal status.⁴ We understand that the UK NPM is one of the only, if not the only, NPM around the world to exist without a formal statutory framework, which severely undermines its credibility and ability to perform its preventive mandate.
19. Given the complexity of the arrangement the UK government chose when establishing its NPM – also unparalleled internationally – we suggest that its statutory footing allow also for its central functions to be established as an entity separate from HMI Prisons. This would allow it to focus more effectively across all types of detention and the four nations.
20. The NPM's statutory framework must allow it to comply with international standards for independence, and so we recommend that the NPM be established to report directly to Parliament. As above, in addition to statutory recognition of the NPM, the core principle of preventing ill treatment must be included in the legislation of its designated member bodies for its purpose to be fully realised.

General points

21. We believe that any efforts to strengthen the independence of scrutiny bodies as in this consultation, must reconsider the way in which the heads of these bodies are appointed. As indicated by HM Chief Inspector of Prisons in 2014 in evidence to parliament: "A system whereby the Chief Inspector of Prisons is appointed by and reports directly to the ministry that holds operational responsibility for the institutions subject to his or her inspection is by its nature incompatible with full independence."⁵
22. There are concerns – as expressed in this consultation – that the different bodies within the oversight regime overlap and that there is insufficient clarity in their respective responsibilities. We believe that their roles are quite distinct – inspecting, investigating and monitoring require different skills and achieve different outcomes – but that there *is* a greater need for strengthening the common sense of purpose between these bodies. To achieve this, we would recommend a statutory duty to cooperate between these bodies, similar to that between the various criminal justice inspectorates.⁶ In addition, the Justice Committee (with input from other committees to reflect wider remits for

⁴ We note, in particular, the published correspondence between the UN Subcommittee against Torture and the NPM Chair and the MOJ, which states that "the situation of an NPM remains precarious without its being underpinned by a clear legislative basis". See: <https://s3-eu-west-2.amazonaws.com/npm-prod-storage-19n0nag2nk8xk/uploads/2019/01/2.-2018.01.29-reply-to-the-NPM-of-UK-copy-002.pdf>

⁵ https://www.justiceinspectors.gov.uk/hmiprisoners/wp-content/uploads/sites/4/2014/02/HMIP-response_PASC-committee-quangos-FINAL.pdf

⁶ Police and Justice Act 2006 28(4)

immigration and other types of detention, and human rights) should hold an annual session with the relevant oversight bodies to explore their joint and individual efforts to safeguard the rights of people in detention, prevent abuse and mistreatment, and learn from failures. This should be followed by a session with respective government ministers and officials, to account for their efforts in implementing the recommendations of the oversight bodies.

23. Finally, we welcome the proposal to lengthen the tenure of post holders, which would allow greater political independence by ensuring the same government cannot appoint to one post twice.

INQUEST, September 2020

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