

Submission to the Ministry of Justice’s consultation, Strengthening the Independent Scrutiny Bodies through Legislation

By HM Inspectorate of Prisons

Introduction

1. This document sets out the response of Her Majesty’s Inspectorate of Prisons (‘HMI Prisons’ or the ‘Inspectorate’) to the questions directly relating to it in the Ministry of Justice’s consultation on ‘Strengthening the Independent Scrutiny Bodies through Legislation’. The response is based on our own appraisal of our functions and operations as well as the comments of external stakeholders provided in our annual stakeholder survey, the reports of parliamentary committees and other assessments of Arm’s Lengths Bodies. We have also been assisted in formulating our response by the extensive discussions and oral and written evidence about the Prisons and Courts Bill 2016-17, which considered legislation for HMI Prisons.
2. We believe that the opportunity for legislative change should be used to make important changes to strengthen and formalise the existing arrangements relating to HMI Prisons, including, most importantly, by placing the Inspectorate on a statutory footing and recognising our powers of entry and access in legislation, and by strengthening the impact that our recommendations can have on improving treatment of and conditions for detainees. We do not believe that re-classifying the Inspectorate or merging it with other bodies would have significant benefits; rather it would be a costly and time-consuming exercise that would inevitably detract from the central focus of the Inspectorate to provide a regular programme of independent inspection.

e. Do you agree that the ‘Inspectorate’ should be recognised in statute?

3. The Prison Act 1952 recognises the position of Her Majesty’s Chief Inspector of Prisons (HMCIP) and requires HMCIP to inspect prisons and report on the treatment of prisoners and conditions in prisons (and other specified places of detention). HMCIP is aided in carrying out his/her work by a team of inspectors, researchers and secretariat staff, who together form HMI Prisons/the Inspectorate. The Inspectorate should be recognised in statute to reflect its work in ensuring HMCIP is able to meet his/her statutory duty to deliver a programme of inspections. Such recognition would formalise the current understanding of the Inspectorate as an entity and provide clarity, in the event of doubt, that inspectors are able to exercise the same powers as HMCIP (as set out in our response to question f).
4. Recognition in statute would also bring the formal status of the Inspectorate into line with other inspectorates, such as Her Majesty’s Inspectorate of Probation, which are recognised in legislation. In addition, it would ensure that only Parliament would be able to amend the role of the Inspectorate and further recognise the importance of the Inspectorate’s role. For these reasons, our view is that recognising the Inspectorate in statute would strengthen the perceived objectivity of its inspections and strengthen its independence, in turn enhancing its credibility and authority.
5. Legislation should provide that the Inspectorate is able to carry out all of the functions of HMCIP, save for the exceptions noted in our response to questions f and h.

f. Do you agree that HMI Prisons should be given a statutory power to access places, people and documents which reflects the power they already have?

6. HMI Prisons should have statutory powers to access places and documents and to speak to people in confidence in the course of its work. This would provide formal recognition of the powers HMI Prisons already exercises through established practice and which have been recognised in protocols and memoranda of understanding with relevant authorities. These powers also derive from the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), which provides that a National Preventive Mechanism (NPM), of which HMI Prisons is part in the UK, must have certain minimum powers to be able to fulfil its mandate.
7. Although inspectors enjoy good cooperation with those managing and working in places of detention and rarely encounter difficulties in accessing places of detention and documentation or speaking with individuals on a confidential basis, their ability to do so is crucial to being able to carry out independent inspections. Formal recognition of these powers therefore puts this beyond doubt and further ensures our independence. Our view is that it will also provide further assurance to individuals who wish to provide information to HMI Prisons that they are able to do so in confidence.
8. In addition, recognising these powers in statute will ensure consistency and clarity for places of detention so that they know what to expect and what is expected of them during inspection. Finally, formal recognition of powers would bring HMI Prisons into line with other inspectorates which have such powers in statute.
9. Legislation should make it clear that HMCIP and HMI Prisons have the minimum powers:
 - of entry at any time and of free access to all parts of a place of detention and those detained;
 - to conduct private interviews with any person detained or anyone else who may be able to assist an inspection; and
 - to require persons to provide, and allow access to, information relevant to places of detention, detainees or which otherwise may assist an inspection, including documents and recordings of images or sounds.
10. Legislation should make it clear that these powers apply to all places of detention within HMCIP's/HMI Prisons' remit. We recognise that this is likely to require close consultation with the judiciary in relation to the power to enter and the power to require information in court settings.
11. To ensure the effectiveness of these powers, legislation should set out the process to be followed, and possible consequences, in the event of an obstruction. Recognising the significance of alleging an obstruction, our view is that the ability to do so should be reserved to HMCIP other than in circumstances where he/she is absent (for example, due to annual leave or illness) and has formally delegated the ability to do so.
12. Legislation should also make it clear that the Governor of a prison (or other person responsible for a place of detention) must ensure that HMI Prisons is provided with such assistance as is necessary to carry out its inspection functions.

h. Are there any further legislative provisions you'd like to see for HMI Prisons?

13. We would like to see legislation include a number of additional provisions which would: further strengthen our independence; further clarify our remit and powers; make reference to OPCAT; and encourage improvements in outcomes for those detained by requiring a response to our recommendations, particularly when we have significant concerns.

Response to recommendations and significant concerns (Urgent Notification process)

14. The Prisons and Courts Bill 2016-17 recognised the need for a process for HMCIP to publicly escalate significant concerns arising from an inspection to the Secretary of State. It was welcome that although the Bill fell, the need for this process continued to be recognised and the Urgent Notification process was developed and is now reflected in the Protocol between the Ministry of Justice and HMCIP.
15. Given that significant concerns about treatment and conditions have continued to arise since the introduction of the Urgent Notification process, leading HMCIP to trigger the process on six occasions, the process should now be recognised in legislation. Recognition in legislation would ensure ongoing transparency; providing assurance to all stakeholders that significant concerns will be escalated on an urgent basis and made public by HMCIP, and that the Secretary of State will ensure actions taken in response are also made public. Our view is that this will assist to ensure accountability and drive improvements in outcomes for those detained, both in the immediate term for those prisons which are the subject of an Urgent Notification, and in the longer term across the estate by highlighting what led to such poor conditions and treatment.
16. Legislation should set out the two key aspects of the process as follows: that when HMCIP has significant concerns about treatment and conditions following an inspection which he/she considers need to be notified to and addressed by the Secretary of State urgently, he/she must provide and publish an urgent notification describing those concerns to the Secretary of State within seven days of the inspection; and within 28 days of receiving that notice, the Secretary of State must publish a response setting out the actions that the Secretary of State has taken or will take to address the concerns in the notification. The process should apply in prisons, young offender institutions and other places of detention holding children (within the remit of HMI Prisons).
17. In recognition of the significance of triggering the Urgent Notification process, our view is that the ability to do so should be reserved to HMCIP other than in circumstances where he/she is absent (for example, due to annual leave or illness) and has formally delegated the ability to trigger the process.
18. In addition to the Urgent Notification process, legislation should also require a reasoned response to all recommendations made in inspection reports be published within no more than 60 days. This would formalise existing arrangements; ensuring a response to inspection recommendations which will improve accountability and transparency and assist in improving outcomes for those detained. Although responses to inspection reports are usually provided within agreed timeframes, provision in legislation would make this a clear requirement and, in our view, improve the quality of responses to inspection recommendations, which currently vary, by ensuring they receive adequate attention and focus. Legislative provisions would also allow HMI Prisons and other stakeholders to take a more active role in pressing for the implementation of inspection recommendations if necessary. We recognise that there was discussion of who should be responsible for responding to recommendations when a similar

provision was included in the draft Prison and Courts Bill, and we would welcome discussion on this with interested stakeholders.

19. We would also welcome discussion with interested stakeholders about legislative provisions requiring inspected bodies/relevant agencies and departments to provide the Secretary of State with, and publish, an assessment of their progress in achieving recommendations following an inspection (for example, 12 months post inspection). Our view is that such a provision would lead to greater focus on the achievement of inspection recommendations and therefore lead to improvements in the treatment of and conditions for those detained. It would also improve transparency around measures that have been taken following an inspection and help to ensure accountability.

Recognition of OPCAT

20. Legislation about HMI Prisons should refer to OPCAT in recognition of the UK's obligations under OPCAT and the role of, and powers provided to, a National Preventive Mechanism established under OPCAT, of which HMI Prisons is one part in the UK. Legislative recognition of OPCAT would emphasise the independence of HMI Prisons and its authority and ability to speak on issues relating to places of detention (within its remit). Wording such as "the provisions in this legislation which relate to HMCIP and HMI Prisons are designed to be in accordance with the objectives of OPCAT" would recognise the importance of meeting obligations under OPCAT while ensuring it is clear that the responsibility for complying with OPCAT remains with the State Party.

Additional provisions relating to remit, powers and independence

21. In addition to the statutory powers to access places and documents and speak to people in private discussed in our response to question f, legislation should include a requirement for HMCIP/HMI Prisons to be informed of the number of persons held in detention and the location of places of detention. This information is crucial to our ability to carry out a programme of inspections, and while we are usually currently provided with this information, legislation would ensure that this remains the case and that the relevant authorities are aware of the requirement upon them to provide such information.
22. Legislation should provide that HMCIP selects his/her own staff. This would reflect current practice and further ensure the independence of inspectors and other staff. Legislation should also provide that HMI Prisons be provided with sufficient funds to carry out its inspection function.
23. Finally, we would like to use the opportunity of legislation to clarify the statutory remit of HMCIP/HMI Prisons in relation to the detention settings we inspect. We suggest that legislation includes within our remit: secure schools; the custody suites of the Royal Courts of Justice; and the Military Corrective Training Centre and Service Custody Facilities which are currently inspected by invitation only. We would welcome discussion on this issue with the relevant stakeholders.

g. Do you think that HMI Prisons should be reclassified as a Non-Departmental Public Body?

24. HMI Prisons should not be reclassified as a Non-Departmental Public Body (NDPB). Instead we believe that the opportunity of legislation should be used to strengthen and formalise our

existing arrangements. The small size of the Inspectorate does not warrant the governance structures and self-contained support functions that would come with being an NDPB. In addition, the benefits that might derive from re-classification to an NDPB in terms of accountability and transparency of governance and financial arrangements may be, or are already being achieved through other changes incurring fewer administrative and financial costs.

25. HMCIP is currently supported by a staff of 70, including a Deputy Chief Inspector (DCI) who oversees seven inspection team leaders, who in turn manage 25 inspectors and 11 associate inspectors (who join inspections when additional specialist skills or resource is required). In addition to the inspection team, our Head of Research, Development and Thematics oversees a team of 11 researchers and our Head of Secretariat oversees our team of 13 secretariat staff, which includes policy and communications staff, editorial staff and inspection support staff. The MoJ provides additional 'back office' support, including in relation to office space, IT support and some human resources and finance functions, and the Permanent Secretary acts as our Principal Accounting Officer. However, HMCIP recruits his/her own staff and HMI Prisons maintains its own accounts and determines how to spend its budget allocation. This ensures the independence of the Inspectorate while allowing it to benefit from back office support from the MoJ. If the Inspectorate were to become an NDPB, it would need to take on a number of these back-office functions, which would require additional secretariat staff. The result would be a significant number of secretariat staff to support a relatively small number of inspectors. The costs of establishing the Inspectorate as an NDPB would also be significant.
26. We also believe that the governance structure of an NDPB would make the Inspectorate 'top-heavy'. The governance structure of an NDPB involves a Board of non-executive directors, including a Chair, usually appointed by the relevant Minister as public appointees, and a Chief Executive Officer (CEO), appointed by the Board following consultation with the relevant Minister. This Board would need to be supported by sub-committees such as an audit and risk committee, operations committee and human resources committee. This level of oversight would both be costly and add an administrative burden. The salary and related costs associated with appointing a CEO and remunerated non-executive directors and meeting their expenses would be significant; we estimate that this would cost the Inspectorate around £325,000 per year (not including the significant costs of establishing the Inspectorate as an NDPB or other staffing changes). In addition, there would be the administrative burden and associated costs of the public appointments process. We are also concerned that the appointment of a CEO and Chair would detract from the well-established role of HMCIP, which has long established co-operative relationships with key stakeholders and an authoritative voice on prisons, and also from the role of the Deputy Chief Inspector, whom HMCIP relies upon to share the role of attending inspections and providing expert advice, and which is also a well-recognised position amongst key stakeholders.
27. We recognise the benefits of having a range of independent voices to provide challenge to the Inspectorate and that a non-executive board may provide us with this. However, we already have in place measures that aim to provide this challenge. We regularly seek external advice from a range of stakeholders on the development of our Expectations (the criteria by which we inspect places of detention) and when carrying out thematic work. We also ensure that our Expectations are the subject of public consultation. In addition to benefiting from this expertise on substantive issues, we also consult on how we carry out our work and what improvements we should make, including consulting with key stakeholders in the development of our business plan each year and when developing our inspection programme and inspection framework. We also carry out an annual survey, open to anyone who wishes to respond, to understand how stakeholders perceive our work and where they think we can make improvements. We are

currently working to improve our consultation process to ensure it is line with best practice guidance and considering improvements to how we work together with stakeholders.

28. We recognise the importance of good governance and transparency. As reported in our Annual Report for the 2018/19 year, it is for this reason that we reviewed our internal governance arrangements and determined that we needed a clearer delineation between strategic management and operational delivery. As a result, we now have a Corporate Governance Board with the responsibility for ensuring that we consistently adhere to the highest standards of public sector governance. This Board is complemented by an Operational Delivery Board that has the task of ensuring our inspection programme is delivered to time and to quality. Although these are internal arrangements, they have been important in ensuring that HMI Prisons carries out its responsibilities efficiently and effectively. In addition, we seek to publish a range of documents explaining how we carry out our work, including our inspection methodology and our business plan, and which detail our spending, including publishing our income and expenditure each year in our Annual Report.

v. Do you think that HMI Prisons, the IMBs, and the Lay Observers should all be merged under HMI Prisons (the Scottish model) reflecting what HMI Prisons Scotland have where HM’s Chief Inspector of Prisons for Scotland (HMCIPS) has the responsibility for prison inspections, prison monitoring and prisoner escorts?

29. We do not think that HMI Prisons should be merged with the Independent Monitoring Boards (IMBs) or the Lay Observers (LOs) (referred to in the consultation document as the ‘Scottish model’). While we recognise the benefits of ensuring good cooperation and coordination between all three organisations, we have significant concerns about merging the bodies given the high cost and inevitable diversion of resources involved in such a merger, together with the obvious risk of eroding the distinction between the functions of the three organisations and losing the focus on inspection. Improvements can be made to the way in which the organisations work together without the costs and risks associated with a merger.

Scale, cost, time and staff resources

30. The scale of a merge between HMI Prisons, IMBs and LOs is far greater than the scale of the merger which took place in Scotland. Her Majesty’s Inspectorate of Prisons for Scotland (HMIPS) inspects 15 prisons and court custody in Scotland. HMIPS merged with 130 volunteers, known as Independent Prison Monitors (IPMs). In England and Wales, HMI Prisons inspects the following settings where IMBs also carry out monitoring: 118 prisons and young offender institutions, 7 immigration removal centres (IRCs), short-term holding facilities, overseas escorts and, by invitation, the Military Corrective Training Centre. We also inspect court custody facilities and escorts where the LOs carry out visits. HMI Prisons has 70 staff, there are 130 IMBs with approximately 1,300 volunteer members, around 55 volunteer LOs and an IMB and LO joint secretariat of 18 staff.
31. Given the number of places of detention involved in a merger and the number of staff and volunteers across the three organisations, the cost of merging would be high and require a significant investment of staff resource over a long period of time. We have carried out an initial costing of replicating the Scottish model in England and Wales and estimate that this would cost approximately £3,975,000 in additional staff and travel costs alone each year. This figure is based on the structure that was considered necessary in Scotland in order to adequately manage and support IPMs, which involves paid regional Prison Monitoring Co-ordinators (PMCs) and associated support officers. Replicating this structure in England and Wales would require

61 additional staff, including additional senior staff to assist the Deputy Chief Inspector in meeting the additional line management responsibilities that the number of new staff would create. This figure would be over and above the existing HMI Prisons', IMB and LO budgets and represents an increase of around 76% on HMI Prisons' existing budget of approximately £5,200,000 for inspection each year. In our view, this money would be more effectively spent on meeting the priorities of each organisation in terms of strengthening their existing work practices.

32. We expect a merger would be a lengthy, time consuming process creating a significant amount of work for all involved. It would also require improvements to existing IT systems to ensure a merged body would work together effectively. In addition to the cost and time implications, we are concerned that the size of the IMB and the additional staff needed to support it would dwarf the Inspectorate and its staff and lead to a loss of focus on inspection. There is also a considerable difference between a professional workplace and a volunteer workforce culture. We recognise that cost and resource implications alone should not necessarily prevent a merger if it were to have significant benefits for inspection and monitoring. However, we think there are significant risks in terms of effectiveness, the balance between volunteer and professional commentary, reputation and therefore the impact of independent scrutiny.

Preservation and separation of inspection and monitoring functions

33. Inspection and monitoring are both valuable ways to provide independent scrutiny, but they offer different insights. Inspection provides a professional, in-depth and comprehensive view across all aspects of outcomes in a place of detention at a particular time, and benefits from the experience of inspectors with specific professional backgrounds and skills who operate on a national basis, able to compare and contrast both good and poor operational delivery. Monitoring offers regular insight by volunteers into the day-to-day experience of those detained, at an individual establishment. Each can reinforce the other but also provides a critical and distinct function. They can be complementary but are in no way alternatives or interchangeable. We are concerned that a merger would not of itself enhance the delivery of either of these functions and would result in the essential and beneficial distinction between them being lost over time.
34. HMI Prisons is an independent inspectorate of places of detention that publicly reports on conditions and treatment for those detained. We inspect different settings on a timeframe ranging from annually to at least once every six years, taking into account a dynamic risk assessment. Inspections span a period of two-weeks, in which time a detainee survey is conducted by a team of HMI Prisons' researchers and a specialist team of inspectors are on site. Inspectors will, wherever possible, base all inspection findings on the triangulation of multiple evidence sources. Inspections assess outcomes against our healthy prison assessments as set out in our Expectations, and make recommendations to the relevant authorities with the aim of improving the treatment of and conditions for detainees. An action plan is produced by the relevant authority in response to recommendations, which sets out whether recommendations are agreed or otherwise and what action has been taken or is planned by an establishment to meet agreed recommendations. Action plans are published on HMI Prisons' website.
35. IMBs and LOs are monitoring bodies. IMBs monitor the day-to-day life in their local prison or immigration removal centre and ensure that prisoners and detainees are treated fairly and humanely. LOs monitor the welfare and access to justice of people being brought to court and held in court custody. The monitoring boards and observers are unpaid public appointees who conduct thousands of visits to places of detention each year. In 2019-20, the IMBs carried out

49,469 visits to prisons. The IMBs are also responsible for handling 'applications' (requests and complaints) from prisoners and responding appropriately. Prison boards dealt with 33,177 individual applications from prisoners in 2019-20. Both the frequency and regularity of visits, and the handling of applications, are unique to bodies who monitor.

36. We would have significant additional concerns if any merger involved replacing HMCIP, the National Chair of the IMBs and the National Chair of the LOs with a single Chief Inspector. This would lead to the loss of three independent and authoritative voices, all of whom bring considerable expertise about places of detention and the functions of each of their organisations. The size of a merged body would also detract from the impact of inspection as it would be difficult for one Chief Inspector to maintain a clear understanding of the inspectors' and monitors' ongoing work and for the Chief Inspector and the Deputy Chief Inspector to prioritise their attendance at inspections, which is vital to ensuring their credibility and therefore the impact of the Inspectorate.

Alternative ways of providing more effective scrutiny

37. HMI Prisons welcomes the concept of more collaborative working with IMBs and LOs to improve the effectiveness of scrutiny of places of detention. However, this can be achieved without merging the bodies. The way in which HMI Prisons currently works together and shares information with IMBs and LOs is set out in memoranda of understanding (both of which are available on HMI Prisons' website). The three organisations currently share intelligence and information about places of detention on an ongoing basis and meet regularly both during and outside of inspections. Legislation could reflect and expand on these arrangements by enabling the organisations to share information and requiring cooperation between them in the exercise of their functions. In addition, rather than embarking on an expensive merger, we would welcome the provision of a comparatively modest amount of additional resource that would allow the organisations to carry out joint training and development, which would help to ensure consistency where this would be beneficial, while still recognising the distinct approaches of each organisation.
38. We note that a merger of the bodies would not enable HMI Prisons to focus more on thematic issues as our existing inspections of prisons and other places of detention would need to continue. Increasing our existing programme of thematic work (carried out alongside regular inspections) would require significant additional resources.
39. Finally, we note that some concerns have been expressed about the bodies making similar recommendations. We believe that this is a key strength of having distinct bodies as it assists to identify ongoing and key concerns between inspections. Concerns about bodies making similar recommendations are best addressed through the achievement of those recommendations, rather than the amalgamation of the bodies who make them.

x. Do you think we should extend the tenure of our senior public appointees heading up the organisations we sponsor from 3 years to 5 years through non-legislative processes?

40. We support the extension of HM Chief Inspector of Prisons' tenure from three to five years. This extension would allow the Chief Inspector more time to develop an understanding of the process of inspection and the issues within places of detention, and to consider and implement any changes to further strengthen the inspection methodology. It would also help to ensure certainty and continuity of leadership of the Inspectorate.

We would welcome your views on giving the NPM a possible statutory basis and how this might be done in light of the particular nature of the NPM.

41. HMI Prisons is one of the 21 members of the National Preventative Mechanism (NPM). The Inspectorate is designated as the co-ordinating member of the NPM and hosts the NPM Secretariat. HMI Prisons supports the recognition of OPCAT in legislation and also the recognition of the NPM in legislation. Recognition of the NPM in legislation should reflect the existing arrangements for the NPM, taking into account the nature of the NPM as consisting of multiple bodies with different statutory remits and authorities, organisational structures and funding arrangements. Legislation for the NPM should provide additional powers for NPM members where needed in line with the OPCAT mandate, rather than detract from any existing powers that members have. HMI Prisons continues to work with its NPM colleagues to consider how the NPM can best be recognised in legislation.