

## **STRENGTHENING THE INDEPENDENT SCRUTINY BODIES THROUGH LEGISLATION**

### **Submission to Ministry of Justice consultation from the National Chair and Management Board of the Independent Monitoring Boards (IMBs)**

1. This response, from the National Chair and Management Board of the IMBs, is informed by discussions with regional representatives and with some board chairs and members. It has also been discussed with the head of the IMB secretariat. Our response focuses, as does the consultation paper, on structure. However, this should not be the outcome of any statutory change: it is simply the means to ensure that there is effective and independent oversight of places of detention, to ensure fair, safe and humane treatment of prisoners and detainees. We therefore examine the proposals in that light.
2. The IMBs have statutory responsibility for monitoring prisons and young offender institutions in England and Wales, and immigration detention facilities throughout the UK. They are part of the UK's National Preventive Mechanism (NPM), under its treaty obligations under the UN Optional Protocol against Torture and Inhuman and Degrading Treatment (Opcat).
3. We very much welcome the proposal to put the current national governance structure for IMBs on a statutory footing. The governance structure (the national chair, management board and regional representatives) was agreed by ministers around five years ago, and on that basis the national chair was appointed in November 2017. The management board has been operative since October 2018. As has been pointed out to the Justice Committee, this structure currently has no statutory basis, unlike the individual IMBs themselves, and no additional resource was provided for its operation. This means that there is no legislative basis for the role that ministers have assigned to the national chair and management board, and which is described in the Protocol with the Ministry of Justice. This statutory underpinning is needed to define the role of the national structure and its relationship with individual boards, in order to enhance the independence of the IMB structure as a whole and boards' ability to monitor conditions and treatment of those in detention.
4. The lack of statutory underpinning means that there is no independent national IMB structure to carry out the many tasks needed to support and facilitate the work of individual IMBs and implement nationally agreed policies and strategies, such as: assistance with recruitment; budgeting and expenditure; providing training, information and guidance; liaising with departments, monitored services and ministers. Some of this work is carried out by IMB members themselves, but much of the operationalising of policies and strategies, to ensure that boards can

carry out their monitoring activities effectively, is necessarily carried out by the secretariat. Yet secretariat staff do not 'belong' to the IMB; they are Ministry of Justice civil servants.

5. It is a fundamental requirement of the NPM that its members are functionally independent of the bodies that are responsible for running the places of detention being monitored, and moreover that they are perceived to be independent. As stated above, at national level this is clearly not the case, and has been the subject of criticism by international bodies, including the Sub-Committee for the Prevention of Torture (the oversight body for Opcat), as well as domestic organisations. This can be achieved if those working within the IMB organisation are classified as 'public servants' rather than 'civil servants': the distinction being that civil servants work to a Minister, whereas public servants work for the organisation. To be clear: this does not mean changing the staff, or their terms and conditions, but changing their status and accountability while they are working for the IMB. They would continue to be a mixture of those seconded from government departments, including the Ministry of Justice, and those recruited externally.
6. The IMBs also need to have a relationship, at national level, with the departments and monitored services to ensure that they can carry out their statutory role. There are protocols or memoranda of understanding (MOUs) with the Ministry of Justice, the Home Office (for immigration detention) and Her Majesty's Prison and Probation Service. Both the national chair and the head of secretariat liaise regularly with ministers and departmental officials on behalf of the IMBs as a whole. However, without a statutory basis, it is far from clear where accountability lies in relation to these arrangements and liaisons. For example, if there was a failure to abide by the protocol or an MOU, the national body has no status to require either the department or service, or indeed an individual IMB, to abide by the agreement. Nor does the management board or national chair have any locus in relation to discussions and interactions with the sponsor department. For the head of secretariat, this makes for very unclear and sometimes conflicting lines of responsibility.
7. The current arrangement therefore means that some of the support that boards and chairs need, and are entitled to expect, in order to carry out their demanding role, cannot effectively be provided without compromising independence from the department. This was pointed out in the externally commissioned organisational development work carried out in 2018. In addition, freedom of information requests, judicial review challenges, responses to statutory inquiries and press enquiries all require a considerable amount of specialised knowledge and support, yet at present each board and chair is individually responsible and accountable. Clearly, the secretariat, national chair and management board can and do provide support, but it is the individual board, not the national structure,

that is legally accountable for these and other technical and legal issues. This is a considerable burden on members who in addition to their unpaid monitoring work undertake official board roles, as chairs or other board officers.

### ***Proposals***

8. We therefore believe that statutory underpinning for the national organisation is essential in order to provide the necessary independence from the responsible departments and the services that IMBs monitor and to allow the coordination and support that those carrying out a statutory national role at local level need. We believe that the independence of boards from the establishments they monitor, and the services that run them, is enhanced if they are part of a larger independent organisation. This can ensure the necessary consistency of approach and standards, tailored to the specific environment being monitored. However, the form and structure of this has to reflect the unique role and constitution of IMBs and members: enabling and supporting unpaid members of the community with rights and responsibilities for monitoring a specific establishment. The objective and outcome of any change must be to enhance IMBs' ability to report on the outcomes for prisoners and detainees, rather than to create structures that do not fit the functions or add to bureaucracy.

### ***Option A***

9. Under Option A, this could be achieved either through the creation of a statutory office-holder or a non-departmental public body (NDPB). There are arguments in favour of both options. An NDPB provides a clearer independent structure; however, it also requires significant resource to support the financial and administrative requirements for such a body. On the other hand, if the option of a statutory office-holder were pursued, there would be a need to clarify that person's relationship with individual boards, the secretariat and the department, to ensure that this provided functional independence.
10. We believe that there needs to be more examination of the relative advantages of each of the options, which are not set out in any detail in the consultation paper. It is important, however, to be clear what the legislation needs to achieve, so that form follows function. It must:
  - set out the role and responsibilities of the ministerially agreed governance structure and its relationship with departments and monitored services
  - provide functional independence from the department, including the ability to have its own staff who are accountable to the organisation (whether seconded from the civil service or externally appointed)
  - clarify the relationship between the national structure and individual IMBs, taking account of the specific role and responsibilities of members and boards

- be accompanied by parallel Home Office legislation for immigration detention
- specifically recognise the IMBs as part of the National Preventive Mechanism
- be properly resourced

**We therefore support legislative change and would want to discuss with the MOJ and with our boards and members the most effective and appropriate independent national structure.**

*Option B*

11. Currently, the national secretariat supports the work of both IMBs and lay observers (LOs). They have separate governance structures, recruitment processes and budgets. We believe that a single national statutory body, incorporating both IMBs and LOs would be beneficial.
12. From the perspective of outcomes for prisoners, this would provide end-to-end oversight of their detention experience from court cell, through escorts and in to and out of prisons and YOIs. This is a perspective that can currently be provided by HMI Prisons, which inspects the whole of a prisoner's journey, and also by IMBs in the immigration detention estate, which monitor short-term holding facilities, escorts and removals. The prior detention experience of prisoners has a direct impact on their safe and humane treatment within a prison or YOI: for example, the extremely lengthy journeys and late arrivals of some children and young people, or the failure properly to document and exchange information about risk.
13. Amalgamation would also mean that the secretariat, instead of having to provide support to two separate structures (often requiring the same process to be done twice) would be able to provide more effective support for the substantive monitoring role of IMBs and LOs. Two statutory national organisations would exacerbate these problems: it would inevitably require more structured support, whichever option was decided upon.
14. We understand the concern of the 55 LOs that they would lose their identity by being merged with 1300 IMB members. It would be important that the statutory structure recognised the different roles of the two monitoring bodies, just as the support for immigration detention provides for the separate roles and functions of boards monitoring immigration removal centres and those monitoring more transitory short-term holding facilities and escorts (similar to the current role of LOs). Those functions have separate regional representatives, training and organisation, as well as separate statutory provision.

**We therefore support Option B and would want to discuss with LOs how their specific role and responsibility could be protected within a single organisation.**

*Option C*

15. On paper, the amalgamation of the inspectorate (HMIP) and the two monitoring bodies, on the Scottish model, looks attractive. It provides for a single independent oversight body, with a consistency of approach and the ability to provide regular intelligence on establishments and track progress against recommendations.
16. However, such a merger raises both practical and fundamental questions. The Scottish model is responsible for oversight only of prisons, and only of 15 establishments. A similar organisation for HMIP and IMBs would need to cover not only 116 prisons in England and Wales but also immigration detention throughout the UK. Our understanding is that coordinating the work of IPMs (the equivalent of IMBs and LOs) in Scotland requires a paid coordinator, at Grade B level, for every four establishments. An equivalent resource for the work of IMBs and LOs would scale up to around 35 people, which would also require a considerably increased senior management structure. This would not only have significant resource implications (we estimate that a minimum of £6 million would be required) but would also create a very large central bureaucracy, with the risk of resources being used to support the structure, and not the substantive work of monitoring the treatment of prisoners and detainees. On the other hand, not to resource such a structure properly would lose any benefits of merger and could undermine the effectiveness of all three existing organisations.
17. There is also a more fundamental issue. Our understanding is that in Scotland, in the model described above, a great deal of the work currently undertaken by chairs and members is necessarily carried out by directly employed paid coordinators. Yet the work of IMBs and LOs gives civil society – unpaid members of the local community – a key role in oversight of what happens in closed environments and in ensuring human rights compliance. It allows the different skill sets and experience of members to be deployed in examining the conditions and treatment of prisoners and detainees. This complements the professional and paid work of prison inspectors. What is lost in terms of a single approach is gained in terms of the ability to approach a very similar task from a different perspective.
18. The aim of greater coordination and information exchange can be achieved without this expensive and top-heavy option. There is considerable advantage in close liaison not only between HMIP and the IMBs/LOs, but also with the Prison and Probation Ombudsman (PPO). Independent inspection, monitoring and investigation complement each other and can inform and strengthen each other's

impact and effectiveness in promoting safe and humane conditions and treatment in detention. During the current Covid pandemic, for example, we have worked closely together, both at national and establishment level, to provide a holistic picture of the impact on prisoners and detainees. Legislation could mandate cooperation (as is the case, for example, with the criminal justice inspectorates) and clarify the ability to share information for our statutory purposes.

**We do not support Option C, for the reasons stated. However, we believe that liaison and cooperation between HMIP, the IMBs and LOs, and the PPO is highly beneficial in improving the conditions and treatment of prisoners and detainees and this can be reflected in the statutory provisions.**

### ***Other issues***

#### *Prison Rules*

The Prison Rules that cover the work of IMBs are significantly out of date and are in need of urgent revision, irrespective of whether there is wider statutory change. They do not reflect current practice, as agreed with Ministers. Moreover, in response to the Lloyd Review In 2004, Ministers undertook to Parliament that they would amend the Prison Rules to update the statutory purpose of IMB monitoring in line with the review's recommendations. This was clearly assumed to have been done, as it is reflected in the National Monitoring Framework for the IMBs signed by Ministers in 2012, and the current Protocol agreed between the MOJ and the IMBs. However, it did not happen. Amendment of the Rules would also provide an opportunity to include the Opcat responsibilities of IMBs.

**We would urge amendment to the Prison Rules as soon as reasonably possible, in line with wider statutory change if that is agreed.**

#### *National Preventive Mechanism*

As members of the NPM, we support the proposal that this should have a statutory basis, and that member organisations' statutory bases should also include reference to their Opcat responsibilities.

**We support a clear statutory basis for the NPM, and for Opcat responsibilities to be reflected in the governing legislation of its constituent bodies.**