Consultation on the Draft Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014

Analysis of Written Responses

The Scottish Government
Riaghaltas na h-Alba

Crime and Justice

r social research

CONSULTATION ON THE DRAFT PUBLIC SERVICES REFORM (PRISON VISITING COMMITTEES) (SCOTLAND) ORDER 2014

ANALYSIS OF WRITTEN RESPONSES

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EXECUTIVE SUMMARY

This report presents the findings of the analysis of written responses to a Scottish Government consultation on the Draft Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014. The consultation took place between 4th October 2013 and 31st January 2014.

A total of 36 written submissions were received. The most common category of respondent was "Visiting Committees" (VCs), from which 39% of all responses were received. Just over a fifth (22%) of responses were from "local authorities" and just under a fifth (17%) from "criminal justice organisations". Other respondents included: inspection, monitoring or complaints organisations (8%); human rights organisations (6%); individuals (6%); and professional or representative organisations (3%).

Overall pattern of views

In terms of the general pattern of views, the main focus of comments overall was upon the identification of issues or concerns, and / or the identification of suggestions for further consideration in taking forward the draft Order.

Although the consultation did not ask specific questions about whether or not respondents supported the proposals overall and the proposed structure, it was clear that there was some variation by type of respondent. VCs and individual respondents generally expressed disagreement or highlighted substantial concerns with the proposed changes and / or overall structure. There were more mixed views among other types of respondent, with evidence in most other categories of both support and concerns. There were some respondents whose overall views were unclear.

Within this broad overall pattern, respondents made a wide range of additional comments on the draft Order. These included comments on:

- The general structure and proposals for oversight of monitoring to become part of the function of Her Majesty's Chief Inspector of Prisons for Scotland (HMCIPS).
- The proposed nature and roles of Monitors.
- Other aspects of the draft Order and related issues.

Structure and proposals for oversight by HMCIPS

A number of themes were identified in relation to the general structure, and in relation to the proposals for oversight of monitoring to become part of the function of HMCIPS.

Among the common themes, most respondents made comments on **the current situation**. Those identified most frequently were:

- The need for reform (or some changes) or for review.
- Positive aspects of the current system (e.g. general positive working; clarity; independence; transparency; local links; prisoner confidence;

support and training provided by the Association of Visiting Committees (AVC).

- The overall importance of independent monitoring.

In terms of other themes, most of the respondents, whatever their overall view of the proposals and structure overall, expressed their support for, or **agreement with particular aspects of developments** to the system of independent monitoring of prisons. Examples included: the continuation of independent prison monitoring; the need for reform; the purpose, aims or nature of proposed changes (or aspects of these); compliance with the Optional Protocol to the UN Convention Against Torture (OPCAT); and the independent review by Professor Coyle.

A further theme was the provision of **positive views of the effects of the proposed changes**. Although fewer respondents commented on benefits than raised issues or concerns, several expressed such views. At a general level, several (although none of the VCs or individuals) expressed their overall support for the proposals. The most common perceived benefits related to: the promotion of consistency; compliance with OPCAT; and the nature and effectiveness of the approach.

The identification of **issues or concerns, and / or suggestions**, however, was the main focus of comments. Several respondents made general comments indicating their overall disagreement or expressing substantial concerns with the proposed changes. In relation to the proposed oversight of monitoring by HMCIPS, or the perceived impact of the structural proposals generally, the overall areas in which issues or concerns were identified, or in which suggestions were made, related to the following themes:

- The distinction between inspection and monitoring (and concerns about the lack of clarity of this).
- The impact of the proposals on the independence of Monitors and monitoring (with concerns about a perceived negative impact of the proposals on this).
- Costs and the use of resources (e.g. the proposals being more expensive than the current system; a lack of clarity of costs; and a perceived lack of value for money).
- The nature and effectiveness of the approach (e.g. a perceived hierarchical structure; less robust arrangements or statutory protection; a negative impact on complaints handling; lack of clarity of arrangements; and lack of links to local communities; and reduced efficiency and effectiveness).

The proposed nature and roles of Monitors

Many respondents also raised issues or concerns, or made suggestions relating specifically to the nature or proposed roles of Monitors. A small number of respondents also made specific comments in support of aspects of these proposals.

The most common issue or concern raised related to the inclusion of **two types of Monitors with different roles, with one role involving paid Monitors**. Concerns included: a general negative impact; creation of a hierarchy; potential confusion; and

reduced trust. Concerns about the paid role included: a perceived lack of need for Prison Monitors; cost; and perceived lack of added value.

Comments on **reporting and communication issues** were also very common. The two issues or concerns raised most frequently in relation to these issues were: the lack of inclusion in the draft Order of direct access to the Scottish Ministers; and the lack of inclusion of a requirement for an annual report to be submitted to Scottish Ministers and published. Other issues raised included a lack of provision for: Monitors to meet regularly to hear reports by the prison Governor and discuss relevant issues; setting up a Committee for each establishment; or for Lay Monitors to produce a written report and inform a prisoner of their findings.

A further common theme on which comments were made was **recruitment and appointment**. Issues raised included the potential difficulty in recruiting suitable Monitors (particularly Lay Monitors) and the potential loss of existing volunteers. Comments were also made about the appointments process, and it was argued, for example, that the current proposals lacked detail about the appointments process and the requirements for Prison Monitors and Lay Monitors.

The perceived **loss of independence of Monitors** was a concern for many, and the issue raised most frequently related to the proposal that Lay Monitors would report to, and take instruction from Prison Monitors. It was argued, for example, that it would compromise the independence of both types of Monitor, and the monitoring process and may undermine confidence in the Monitors and the system.

A number of other themes were identified. For example, it was argued that there was a perceived lack of detail and specification of the following:

- **The number and composition of Monitors appointed** (e.g. the minimum number of Lay Monitors, and the composition of Monitors).
- **Training and support provision** (including administrative support).
- **Frequency and regularity of monitoring visits**.

A further common theme related to **prisoner complaints**, including: a perceived lack of clarity of the role of Monitors; a concern that they would not be able to support prisoners with the prison complaints process; and potential for overlapping roles and processes in handling complaints.

Several respondents raised issues or concerns about Lay Monitors being able to be **assigned to any or all prisons in Scotland** (e.g. in terms of loss of local knowledge, and lack of representation of the local community).

A number of comments focused on a perceived **general lack of detail** in specifying the role of Monitors, and / or the omission of functions currently undertaken by VCs.

Other aspects of the draft Order and related issues

Comments were also made on other aspects of the draft Order and related issues, and the overall themes included:

- Other aspects of the draft Order and proposed Explanatory Document.
- Additional requirements for the proposals or their implementation.
- The consultation itself.

Issues or concerns on other aspects of the draft Order included comments on **the Order overall**. The most common was that the proposals were not seen to reflect fully the recommendations of the Coyle review. There were also some general criticisms, as well as concerns expressed about the overall lack of detail in the Order.

Several respondents raised concerns relating to the **potential for amendment of the system** without reference to the Scottish Parliament or the public. It was also argued that the management and functions would be open to interpretation by HMCIPS.

Several respondents made comments on the establishment of an **Advisory Board or Group**. These included concerns that that this had been omitted from the draft Order, and additional comments that there was no detail of the membership or function of such a Board or Group, and that Lay Monitors may have no dialogue with the Board or Group. One respondent questioned the need for such a Group.

Comments were also made relating broadly to **access issues.** These included concerns about the lack of a duty for the prisoner Governor to provide a confidential setting for lay members to hear complaints. There were also concerns about the discretion of Governors to withhold documents from Lay Monitors if, in their opinion, disclosure would have implications for the security of the prison.

A few additional issues or concerns were raised and / or suggestions made about **rights and protection** (for prisoners and Monitors) and the level of **scrutiny and accountability** in the system. A small number of VC respondents argued specifically that they did not believe that the tests in the Public Services Reform Act had been met. Some specific comments were also made on aspects of the Explanatory Note and proposed Explanatory Document.

In terms of the identification of additional requirements for the proposals or their implementation, suggestions related to:

- **The roles of other stakeholders** (e.g. solicitors; the Scottish Public Services Ombudsman [SPSO]; a "prisoner monitor"; community services; the Scottish Human Rights Commission; an advocacy service; and a national "council" with functions similar to the AVC.
- **Funding** (e.g. specification of the nature and source of this, and provision at a level to enable Monitors to carry out their statutory role).
- **Guidance and standards** (e.g. need for clarity; and views of a perceived lack of, and need for a "gold standard").
- **Transition** (e.g. the need for a transitional period for changeover)
- **The wider context** (e.g. specific issues in remote areas; awareness and communication; adapting current systems; the need to take account of wider developments and requirements; the need for review; and the need to take account of views expressed in the consultation).

Comments were also made on the consultation itself focusing on: **the nature of the respondent and / or their response**; and views of the **consultation process**.

SECTION 1: INTRODUCTION

1.1   This report presents the findings of the analysis of written responses to a Scottish Government consultation on the Draft Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014[1]. The consultation took place between 4th October 2013 and 31st January 2014.

> **Summary of Section 1**
>
> The Scottish Government carried out a consultation on the Draft Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014 between 4th October 2013 and 31st January 2014.
>
> A total of 36 written submissions were received. The most common category of respondent was "Visiting Committees" (VCs), from which 39% of all responses were received. Just over a fifth (22%) of responses were from "local authorities" and just under a fifth (17%) from "criminal justice organisations". Other respondents included: inspection, monitoring or complaints organisations (8%); human rights organisations (6%); individuals (6%); and professional or representative organisations (3%).
>
> The analysis and presentation of the material was qualitative, reflecting the nature of the consultation process and the material received. The methodology involved: identifying overall areas on which comments were made; creating an analysis document with the verbatim material for each area; and carrying out detailed analysis of the material to a series of themes and sub-themes, generated from the data.
>
> This report presents the themes and sub-themes which emerged and the range and depth of views expressed. The full responses are available for inspection on the Scottish Government website[1].

Background

1.2   The Scottish Government is committed to taking forward reform of the system for independent monitoring of prisons to meet its obligations under the Optional Protocol to the UN Convention Against Torture (OPCAT). In 2012, following prior consultation, the Government commissioned a review of its proposals to improve arrangements for the independent monitoring of prisons, and this was carried out by Professor Andrew Coyle. A report detailing his findings and recommendations was published in January 2013[2].

1.3   Professor Coyle recommended that Visiting Committees (VCs) 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.

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[1] The draft Order
[2] Coyle, A (2013) *Review of Proposals to Improve Arrangements for Independent Monitoring of Prisons* Edinburgh: Scottish Government

He made a number of related recommendations, and outlined a number of options for structuring a new system, but did not specify a preferred option. He stated that the implementation of his recommendations would mean that Scotland would have a robust system for independent prison monitoring.

1.4   Following the review, the Scottish Government's proposals to abolish prison VCs and introduce a new system of independent monitoring were published in April 2013. The Government accepted most of Professor Coyle's recommendations, but remitted four of them to an Implementation Group. The group is made up of Scottish Government officials and stakeholders (including the Scottish Prison Service, Association of Visiting Committees [AVC] and Her Majesty's Chief Inspector of Prisons for Scotland [HMCIPS]) and is responsible for developing, guiding and implementing the new arrangements.

1.5   A proposed draft Public Services Reform (Prison Visiting Committees) (Scotland) Order was laid before the Scottish Parliament on 4 October 2013, and a revised Explanatory Document was laid in November 2013. The draft Order abolishes prison VCs and creates new roles of Prison Monitors and Lay Monitors. It also changes the statutory role of HMCIPS to bring monitoring of prisons under his oversight (while retaining the HMCIPS inspection functions).

1.6   Under the terms of the draft Order, Prison Monitors and Lay Monitors would be appointed by HMCIPS, who would oversee the independent monitoring of prisons. Prison Monitors would visit prisons at least once a month, and monitor and report on prison conditions and the treatment of prisoners[3]. They would report to HMCIPS and Lay Monitors would assist them in their role.

1.7   The changes would be made by amending the Prisons (Scotland) Act 1989 and revoking those parts of the Prisons and Young Offenders Institutions (Scotland) Rules 2011 which related to VCs, and making other consequential amendments.

1.8   The relevant Order-making power in the Public Services Reform (Scotland) Act 2010 is subject to the super-affirmative procedure. This includes a formal consultation process.

1.9   The Justice Committee of the Scottish Parliament considered its approach to the draft Order at its meeting on 8th October 2013. It issued a Call for Evidence, to which it received 29 responses. It also took oral evidence from a number of stakeholders in November 2013. A report was published in January 2014[4] which the Scottish Government responded to on 13 March 2014.

1.10   The Scottish Government issued a written consultation on 4th October 2013 to provide stakeholders with an opportunity to comment on the proposed draft Order. The consultation ran until the end of January 2014, and this report presents the findings.

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[3] These were sometimes referred to in responses as "paid" Monitors, and this term is also used at some points in the report, but these Monitors are generally referred to in the report as "Prison Monitors".

[4] Scottish Parliament (2014) *Justice Committee 1st Report, 2014 (Session 4)* Proposed Draft Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014 Edinburgh: Scottish Parliament

1.11   Once the responses to the consultation have been taken into account, the finalised Order will be laid for approval by resolution of the Scottish Parliament.

The consultation

1.12   The Scottish Government issued a consultation document in October 2013 inviting comments on the draft Order. The document provided an introduction to the process; an explanation of the key provisions of the draft Order; and information about how to respond. Annexes contained the draft Order, an Explanatory Note and a proposed Explanatory Document. No specific questions were posed, with respondents invited to comment on any aspect of the draft Order or proposed Explanatory Document.

Submissions and respondents

1.13   A total of 36 written submissions were received, all of which took the form of general narrative. Respondents have been categorised according to the general type of their organisation, or as individuals. It is recognised that there are overlaps between the organisational categories, and that some subjective judgement was required. It was considered important, however, to provide an indication of the respondent types for the analysis, and the specific perspective of VCs made it important to provide a specific category for them. The table below provides an indication of the general pattern of responses. A full list of respondents is given at Annex 1.

Table 1. Respondents by category

Category	No.	%[5]
Visiting Committees	14	39
Local authorities	8	22
Criminal justice organisations	6	17
Inspection, monitoring or complaints organisations	3	8
Human rights organisations	2	6
Individuals	2	6
Professional or representative organisations	1	3
	36	

1.14   The most common respondent category was "Visiting Committees", from which 39% of all responses were received. Respondents in this category included individual VCs in Scotland and the Association of Visiting Committees (AVC).

1.15   Just over a fifth (22%) of responses were in the "local authorities" category, and these included responses from local authorities as a whole, as well as from specific local authority services and partnerships. Just under a fifth (17%) of responses were from "criminal justice organisations". These respondents included organisations with a clear focus on criminal justice issues, as well as some with a specific focus on prisons.

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[5] Table does not sum to 100% due to rounding

1.16   Other categories included three responses from "inspection, monitoring or complaints organisations" (IMCOs)[6], which included national organisations (in Scotland and England and Wales) whose primary function relates to inspection, monitoring or dealing with complaints. All of these were respondents with a role in relation to prisons or prisoners. There were two responses from "human rights organisations" (HROs)[7] and both were Scottish organisations with a focus on human rights issues. There were also two responses from individuals, both of whom identified that they had personal experience of prison monitoring. Finally, there was one response from a "professional or representative organisation", within the legal profession.

Analysis of the data and presentation of the information

1.17   The analysis of the material was qualitative, reflecting the nature of the information (i.e. it was entirely in the form of narrative, as no specific questions were asked).

1.18   The analysis involved a number of stages, as follows:

- Assigning an identifier code and number to each response.
- Reading all of the responses, to identify the specific aspects of the draft Order on which comments were being made in each response (i.e. the overall "areas").
- Creation of a series of analysis documents, with one for each comment "area", comprising a two column table with the respondent identifier and their verbatim comments.
- Detailed analysis of the material to a series of themes and sub-themes, generated from the data.
- Summary of the findings and preparation of a report.

1.19   The presentation of the material reflects the qualitative nature of the analysis, and focuses on highlighting the themes, sub-themes and the range and depth of views expressed within each. A broad indication of the overall pattern of views (in terms of general views of the proposals) by type of respondent is given as far as this could be ascertained. The only quantitative information, however, relates to the overall number and types of respondents (provided in Table 1 above).

1.20   The report uses qualitative terms for the presentation of the information, such as, for example: "a small number / a few"; "several"; "many"; and "most" to describe the views expressed on particular themes and sub-themes. It would be inappropriate to attempt to quantify respondents' detailed views further for a number of reasons. These include that:

- The responses were all provided as narrative (and comprised varying levels of detail).
- Respondents were not asked for their views of specific questions, nor to express agreement or disagreement with specific issues or aspects of the draft Order. This makes it inappropriate to provide a

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[6] Abbreviated to IMCOs for the purposes of this report, for ease of reading.
[7] Abbreviated to HROs for the purposes of this report, for ease of reading.

"number" expressing such views, as there is no basis for grouping them to "count" responses, and without a "closed" question, there is a need for subjective interpretation.
- Some points overlapped more than one comment area or theme.
- Subjective judgement was required in some cases to allocate points to particular issues.
- Some responses represented the views of a number of individuals or organisations.
- The focus of the consultation was on the identification of a range of views to inform the way forward, rather than a "weighing" of responses.
- The consultation was not a plebiscite or a referendum.

1.21   The respondents to the consultation were self-selecting on the basis of an invitation rather than responses being solicited. This also means that the findings cannot be generalised to the wider population.

1.22   Overall, therefore, although common themes can be highlighted, any attempt to quantify views to specific numbers or proportions would not be robust.

1.23   It should also be recognised, given the number of respondents overall, the range of issues and the nature of the material, that some of the specific points were made by very small numbers (or sometimes single) respondents. Given the purpose of the consultation, however, it is important to reflect these in the analysis, whatever the number of respondents expressing them.

1.24   The report does not identify the type of respondent(s) at every issue, as the number of separate points would compromise the readability of the report. Some examples are given, however, of the patterns of respondents raising overall themes.

1.25   Where the term "respondent" is used, this refers to one response, even where that response may represent the views of more than one contributor.

1.26   In presenting the qualitative data, the wording used to make a point sometimes follows the wording of the response closely or is repeated largely verbatim. This helps to ensure that respondents' intended messages are reflected (even though it is not presented as a "quote"). Quotations have not, however, been used to illustrate key points, as this might imply that a particular view was being given more weight than another.

1.27   It should be noted that some respondents, in making suggestions, referred specifically to the Order itself, while others referred to amended legislation. For the purposes of this report, these are discussed interchangeably, as the practical effect of the suggestions would be the same (i.e. the Order would amend other pieces of legislation).

1.28   This report cannot provide a compendium of the material submitted, nor can it present every individual point made (particularly given the level of detail in some of the responses). It summarises, however, the overall themes, sub-themes and issues raised.

1.29   The full texts of responses can be viewed on the Scottish Government website.

1.30   The remainder of the report presents the findings, as follows:

- Section 2 covers the findings about the proposed structure overall.
- Section 3 covers the findings on the proposed nature and proposed roles of Monitors.
- Section 4 covers the findings about other aspects of the draft Order and related issues.

SECTION 2: THE STRUCTURE OVERALL

2.1 This section presents the findings relating to overall views of the proposed changes and the structure.

Summary of Section 2

The main focus of the comments on the proposed changes was upon the identification of issues or concerns with the proposals, and / or the identification of suggestions for further consideration in taking forward the draft Order.

In terms of overall views, although respondents were not asked to indicate their support or otherwise for the proposals, it was clear that there was some variation by type of respondent. VCs and individual respondents generally expressed disagreement or highlighted substantial concerns with these. There were more mixed views among other types of respondent, with evidence of both support and concerns.

In terms of specific themes, most of the respondents made some comments on the current situation. Those identified most frequently were: the need for reform; positive aspects of the current system; and the overall importance of independent monitoring.

Most of the respondents, whatever their view of the proposals and structure overall, expressed their support for, or positive views of some aspect of developments to the system of independent monitoring of prisons.

Additionally, several expressed positive views of the effects of the proposed changes. The most common related to: the promotion of consistency; compliance with OPCAT; and the nature and effectiveness of the approach.

The identification of issues or concerns and / or suggestions, however, was very common. Many comments focused on the proposed oversight by HMCIPS and the perceived impact of the structural proposals generally. Concerns related to: the distinction between inspection and monitoring and the lack of clarity of this); a perceived negative impact of the proposals on the independence of Monitors and monitoring; the level of costs and use of resources; and concerns about the nature and effectiveness of the proposed structure overall.

Many respondents also raised issues or concerns, or made suggestions about the nature or proposed roles of Monitors (Section 3). Other issues were also raised relating to the draft Order overall and related issues (Section 4).

Overall pattern of views

2.2   In terms of the general pattern of views, the main focus of respondents' comments overall was upon the identification of issues or concerns with the proposals, and / or the identification of suggestions for further consideration in taking forward the draft Order.

2.3   Although, as noted, the consultation did not ask specific questions about whether or not respondents supported the proposals overall and the proposed structure, it was clear that there was some variation by type of respondent. It was found that VCs and individual respondents generally expressed disagreement or highlighted substantial concerns with the proposed changes and / or overall structure. There were more mixed views among other types of respondent, with evidence in most other categories of both support and concerns. There were some respondents, given that no specific questions were asked, whose overall views were unclear.

2.4   Within this broad overall pattern, respondents made a wide range of additional comments on the draft Order. These included comments on the general structure and proposals for oversight of monitoring to become part of the function of HMCIPS; comments on the proposed nature and roles of Monitors; and comments on other aspects of the draft Order and related issues.

2.5   The findings relating to the general structure, and the proposals for oversight of monitoring to become part of the function of HMCIPS are presented in the remainder of this section. (Issues raised relating specifically to the proposed nature and role of Monitors are presented in Section 3, and those relating to other aspects of the draft Order in Section 4.)

2.6   In relation to the general structural arrangements (including the proposals for oversight by HMCIPS), a number of common themes emerged. These related to:

- The current situation.
- Support for particular developments.
- Perceived benefits of the proposed structure.
- Issues or concerns with the proposed structure.
- Suggested developments.

2.7   Each of these is discussed in detail below.

The current situation

2.8   Most of the respondents made some comments on the current situation. The most common issues raised were: the need for reform; positive aspects of the current system; and the overall importance of independent monitoring.

The need for reform

2.9   The most common theme relating to the current system was the overall perceived need for reform (or some changes) or for review. Most of the local authority respondents, for example, made comments on this issue, as did most of

the IMCOs and both individual respondents. Some (although a smaller proportion) of the VC respondents also raised this issue.

2.10　Comments made included views of a perceived need to:

- Update current arrangements and improve specific aspects or perceived weaknesses of these (e.g. consistency and standardisation; independence; funding; accountability; recruitment; and aspects of practice).
- Ensure compliance with OPCAT.
- Improve training and support to those undertaking monitoring.
- Modernise and streamline processes.
- Provide a service "fit for purpose".
- Review and evaluate the work of VCs.

Positive aspects of the current system

2.11　A further theme was the identification of perceived positive aspects of the current system. Many respondents made reference to such issues, and specific points identified included:

- General positive working (e.g. clarity of monitoring and reporting; a good appointments process for VC members; informality of VCs; training; and dealing with prisoner complaints).
- Clarity of existing legislation and Prison Rules.
- Independence.
- Transparency.
- Local links (e.g. the involvement of lay people from the community in which the prison operates; inclusion of local elected members).
- Prisoner confidence.
- The support and training provided by the Association of Visiting Committees (AVC).

The importance of independent monitoring

2.12　Many respondents also made general comments about the importance of independent monitoring. Perceived reasons for this which were identified included, for example:

- The general need for independent monitoring and scrutiny of prisons.
- Safeguarding prisoners' rights and preventing human rights violations.
- Public accountability and reassurance, and transparency in the justice system.
- Compliance with Article 3 of the European Convention on Human Rights (ECHR) and OPCAT obligations.
- Involvement of community interests.

Other aspects of the current situation

2.13 Among the other comments made on the current situation, a few respondents reiterated details of the current situation (e.g. providing details in their response of the draft Order, or detailing the legislative basis of VCs). Comments were also made about the history of reform.

2.14 One respondent provided details of arrangements for independent monitoring in England and Wales.

Support for particular developments

2.15 Most of the respondents, whatever their overall view of the proposals and structure overall, expressed their support for, or agreement with some aspect of developments to the system of independent monitoring of prisons.

2.16 Several VCs and a few other respondents, for example, welcomed the confirmation of the continuation of independent prison monitoring. One VC also welcomed the decision to make available to those undertaking independent prison monitoring the rights of access currently available to VC members.

2.17 Other issues for which support or agreement was identified by some respondents included:

- The general requirement for reform or the need for improvement (discussed at para 2.9 above).
- The general purpose of the Order.
- The aims to increase transparency, consistency or quality in monitoring and to provide a "gold standard" system.
- The development of compliance with the requirements of OPCAT and the proposal to remove funding from the Scottish Prison Service (SPS).
- The proposals for consistent national recruitment, improved training and stronger support (including administrative and secretarial support) for independent monitoring.
- The independent review by Professor Coyle and / or its recommendations.
- The clarity in the draft Order.
- The change of name to an Independent Monitoring Service.

Perceived benefits of the changes overall

2.18 A further broad theme was the identification of perceived benefits of the proposed changes overall. Although fewer respondents commented on benefits than raised issues or concerns (which are discussed in detail below), several respondents expressed positive views of the effects of the changes.

2.19 At a general level, several respondents (although none of the VCs or individuals) expressed their overall support for the proposals. Where such general comments were made, these included, for example, that respondents welcomed the proposed changes, or endorsed the approach being taken by the Government. One

local authority described the changes as being constructive and positive, while a criminal justice organisation stated that they were in broad agreement with the proposals.

2.20   Several of the respondents who expressed overall support expressed the specific view that they agreed with the oversight of monitoring becoming part of the role of HMCIPS. Comments included general agreement or welcoming the suggestions, as well as more specific comments such as for example, that: the overall link to the inspection process would be valuable; or that HMCIPS had the necessary skills and awareness, or would be the appropriate organisation for this.

2.21   Several respondents identified particular benefits of the proposals. Most (although not all) of these were again respondents who also expressed general support for the proposals. As such, they reflected the pattern identified previously and did not include comments from VCs or individuals.

2.22   Within those who expressed positive views and perceived benefits, however, some also raised specific issues or made additional suggestions about the structure or other aspects of the draft Order. These have been included in the relevant sections.

2.23   In terms of perceived benefits of the changes, those which were identified related to:

- The promotion of consistency.
- Compliance with OPCAT.
- The nature and effectiveness of the approach.

Consistency

2.24   Several respondents identified benefits of the proposals in terms of the promotion of consistency. It was argued, for example, that there would be greater coherence to reporting systems, and greater co-ordination of monitoring across Scotland. Related to this, it was suggested that the changes would enable a joined-up approach to the oversight of prisons.

2.25   One respondent suggested that the proposals would provide a common point of reference, and enable training and guidance to encourage consistency. One local authority respondent stated that the structure would enable the more consistent implementation of inspection recommendations.

OPCAT compliance

2.26   As noted previously, the lack of compliance with OPCAT was highlighted as being among the reasons for the perceived need for reform. The achievement of such compliance was also identified as being among the benefits of the proposals, as a result of the changes to the budgetary and administrative arrangements (which are currently dependent on the SPS [i.e. the organisation being monitored]).

The nature and effectiveness of the approach

2.27   Several respondents identified perceived benefits relating to the nature and effectiveness of the approach. For example, one local authority respondent stated that Monitors reporting to HMCIPS should ensure that performance and accountability are embedded in the new structure. It was also suggested that the changes would help to clarify processes.

2.28   One of the IMCOs stated that the new structure would enable the functions of inspection and monitoring to complement the work of each other, with a two-way information flow. It was also argued that it should ensure that the findings from the activity of Monitors would inform inspection programmes, leading to more effective scrutiny of prisons overall.

2.29   Linked to this, one local authority respondent stated that the progress of resolution of issues raised by Monitors could be more effectively followed, and included in any inspection reports. Another local authority respondent argued that, by enabling a more robust process of monitoring, HMCIPS would be better informed, alongside Scottish Ministers, regarding operational procedures and the findings of Monitors.

2.30   One respondent stated that the proposals provided a greater degree of independence from the SPS. Another suggested that the proposals offered an opportunity to modernise the process of prisoner visiting while appearing to retain the key objectives and benefits of the VC system.

2.31   One respondent stated that, as the monitoring body must stand under the umbrella of another organisation, the most appropriate would be HMCIPS.

Issues or concerns, and / or suggestions made

2.32   As noted in para 2.2, the main focus of respondents' comments overall was upon the identification of issues or concerns with the proposals, and / or the identification of suggestions for further consideration in taking forward the draft Order. This was reflected in the detailed comments.

2.33   While some respondents made general comments, many identified specific issues or concerns, or made particular suggestions. As noted at para 2.22, some of those who expressed their overall support for the proposals also identified issues and / or suggestions, as did some whose overall views could not be ascertained clearly. These are included in the following sections.

2.34   Several respondents made general comments indicating their overall disagreement, or expressing substantial concerns with the proposed changes. Such comments included, for example, expressions of general disappointment with the proposals, or views that the new format: would not be an improvement; would not achieve the aims; would not provide the best model for Scotland; or may not be workable.

2.35   Many of the more specific comments raised issues or concerns (and some expressed explicit disagreement) with the integration of monitoring and inspection

functions and the proposed oversight by HMCIPS. Issues or concerns were also raised with the perceived impact of the structural proposals generally. Many respondents also raised issues or concerns about the proposed nature and roles of Monitors and, as noted, these will be detailed in Section 3. Additional issues or concerns were also raised about other aspects of the draft Order overall which are detailed in Section 4.

2.36   In relation to the proposed oversight of monitoring by HMCIPS, or the perceived impact of the structural proposals generally, the overall areas in which issues or concerns were identified, or in which suggestions were made (discussed in detail below), related to the following themes:

- The distinction between inspection and monitoring.
- The impact of the proposals upon the independence of Monitors and monitoring.
- Costs and the use of resources.
- The nature and effectiveness of the approach.

2.37   It is recognised, in presenting the findings relating to these issues, that it is inevitable that there are overlaps between most of the themes raised in the different sections of the report. This reflects the nature of the consultation and the material provided by respondents, and should be borne in mind.

The distinction between inspection and monitoring

2.38   Many respondents raised issues or concerns about a perceived lack of a clear distinction between inspection and monitoring in the proposals, and / or made suggestions about these issues.

Issues or concerns

2.39   In terms of the nature of issues or concerns, some respondents focused on the distinct and complementary nature of the two functions of inspection and monitoring, or expressed concern about the extent to which the distinction would remain the case under the proposals.

2.40   Many respondents (particularly, but not only, VCs, individuals and HROs) expressed concern that the distinctions may be blurred or unclear. Some questioned the assurance provided by the Scottish Government in the consultation paper (Chapter 2 para 2) that they were clear about the distinction between the functions of inspection and monitoring. Some made reference to issues raised in the Coyle report relating to the value of differentiating between the two, or the potential risks of a model that would sit under HMCIPS. There was also concern expressed about the perceived risks of an unclear distinction, and some respondents raised a specific concern that monitoring would become "ongoing inspection".

2.41   A few respondents provided particular examples of such concerns by making reference to:

- The proposed Explanatory Document (para 1-2), suggesting that the Monitors would "take instructions" from HMCIPS. It was argued that

it was difficult to see how the functions would be managed separately.

- The proposed Explanatory Document (para 3-18), suggesting the opportunity to integrate scrutiny and monitoring. It was argued that HMCIPS did not have a responsibility for scrutiny; and that the opportunity to integrate contrasted with the philosophy that inspection and monitoring should be separate, but related.
- The draft Order Section 7A(4)(g) containing reference to the need for Prison Monitors to maintain records about matters "inspected" by them.
- The proposed representation of Scottish interests on the National Preventive Mechanism only by HMCIPS.
- The envisaged development of "inspection and monitoring standards".

2.42   Many respondents (most of which were VCs) expressed a concern that the proposals did not reflect the "layered" approach recommended by OPCAT. A few respondents argued that others had raised these concerns previously.

2.43   Additional issues or concerns raised relating to the distinction between inspection and monitoring functions focused on:

- Issues raised in a previous consultation in 2011 about the implications of integration, and a high level of opposition to this.
- Lack of experience of monitoring by HMCIPs and a potential lack of awareness of the distinction.
- Separation of inspection and monitoring in other UK jurisdictions.

Suggestions

2.44   A large number of respondents made specific suggestions about how to address the issues or concerns about the distinction between inspection and monitoring. These included:

- Separation of the structures for inspection and monitoring.
- Promotion of the independence of the two functions.
- Provision of greater clarity of the relationship between the two distinct functions and how they are considered and preserved.
- Replacing the requirement for Monitors to comply with instructions from HMCIPS with a requirement for them to co-operate instead.

2.45   Several VCs argued specifically that the role of HMCIPS should be rigorously detailed in the legislation, so that it fulfilled a support and administrative role in relation to monitoring, but was not permitted to influence the work and priorities of independent monitors or to "instruct" them. A few stated that their concerns would then be reduced, or that there would be potential for an "amicable" or "workable" solution. A few stated that this should be underpinned by the protocol recommended in the Coyle report.

2.46   One VC respondent suggested that, should responsibility for independent monitoring become part of the duties of HMCIPS, there should be a single paid member of staff responsible for managing prison monitoring, preferably collaborating with, rather than reporting to HMCIPS.

The impact of the proposals on the independence of Monitors and monitoring

2.47   A further issue which was raised as a concern by a large number of respondents, and on which suggestions were made was the perceived negative impact of the proposed changes on the independence of Monitors and monitoring.

Issues or concerns

2.48   Many respondents (including most of the VCs) expressed concerns that the proposals would lead to a general loss of independence. While some expressed general concerns, some provided further details of these issues.

2.49   For example, arguments included that:

- Overall, the proposed hierarchical structure and the erosion of the distinction between the functions of inspection and monitoring could compromise independence.
- The independence of the Prison and Lay Monitors may be compromised by the requirement that Prison Monitors take instruction (and be paid by) HMCIPS and Lay Monitors must comply with instructions from Prison Monitors.
- The capacity of one service to criticise another which was managed by the same individual would be questionable, raising the issue of what would happen if a prison which had had a very recent positive inspection was monitored and found to have issues.
- Prisoners did not see HMCIPS as totally independent, and the proposals would erode their confidence in raising complaints.
- Prison staff may have less trust in the Monitors, given the role of HMCIPS in inspecting their establishments, and this may threaten close working relationships.
- Prison Monitors may be seen as the "eyes and ears" of the Inspectorate.
- Public confidence in the system may be damaged, undermining the process of independent monitoring on behalf of the public and Government.

2.50   Some respondents raised specific concerns that the proposed title of the Monitors did not make reference to their being independent, or stated that the word "independent" was not included in the draft Order. A few respondents also made reference to others' expressed concerns about the potential for Monitors to be influenced by HMCIPS.

Suggestions

2.51   As noted above (para 2.12) many respondents stressed the general importance of independent monitoring.

2.52   The suggestions made at para 2.44 also link to this issue, and several respondents made additional suggestions about the way forward in relation to concerns about independence. These included:

- Overall maintenance of independence and objectivity.
- Protection of independence in legislation, and "future-proofing".
- Protection of prisoner confidence.
- Clarity of separation between the functions of inspection and monitoring (discussed above).

2.53   Many specific additional suggestions were made which were seen to be linked to the issue of independence. These related to particular aspects of the nature and roles of Monitors, and are presented in detail in Section 3, to avoid repetition.

Costs and use of resources

2.54   Many respondents raised issues or concerns, or made specific suggestions about costs or the use of resources.

<u>Issues or concerns</u>

2.55   The most common issue raised, or concern expressed, in terms of costs or use of resources (raised largely, but not only, by VCs) related to the proposals being more expensive than the current system. Some respondents, for example, provided details of the estimated cost or the current annual cost of VCs, while some made specific reference to the new system appearing to cost around four times that of the present system (while relying on unpaid volunteers to carry out most of the work). Links were also made between the increased costs and the proposal to have paid Monitors, as well as the expansion of the role of HMCIPS.

2.56   A few VCs stated that it was unclear whether the estimated costs would include other expenses such as travel and overnight accommodation, office accommodation, support staff, training, and administrative costs. One VC stated that there was no evidence of any funding being laid aside for recruitment, training, support or evaluation. One local authority respondent argued that the financial assumptions underpinning the proposals were unclear, including the level of payment being proposed for the Prison Monitors.

2.57   A few VCs made specific reference to a perceived lack of value for money. One, for example, stated that the majority of expenditure would be directed to the salaries and expenses of a small number of possibly part-time staff. One of the individual respondents specifically questioned the concept of improved economy in para 3-30 of the proposed Explanatory Document.

<u>Suggestions</u>

2.58   Many respondents made specific suggestions about costs and use of resources. The most common suggestion was to use the resources available (e.g. for the use of paid Monitors) for other purposes. Suggestions included to use the resources for:

- Upgrading the existing system.
- Improving recruitment.
- Improving training.
- Co-ordination and liaison with the SPS.
- Evaluation.
- Support to a body similar to the AVC.
- Administration and support (e.g. for meetings, reporting and annual reporting).

2.59   In relation to administration and support, one criminal justice organisation suggested the use of resources to employ one or two members of staff to co-ordinate and support the work of Lay Monitors, rather than direct them. They suggested that the mechanism recently put in place to oversee the work of independent custody visitors could provide a useful model.

2.60   Other suggestions relating to costs and the use of resources included to:

- Clarify whether the estimated cost of the new system is the total cost per annum.
- Ensure that the new structure is properly funded and resourced, with the provision of extra resource to HMCIPS to carry out the oversight function.
- Consider value for money in considering efficiency (e.g. including ensuring that any increased expenditure is specific, justified and contributes directly to improved outcomes for offenders and the prison estate, as well as better informing HMCIPS and Scottish Ministers).

The nature and effectiveness of the approach

2.61   Many respondents raised issues or concerns about the impact of the proposals on the overall nature and effectiveness of the approach. Many also made suggestions (again linked to some highlighted at other points in the report).

Issues or concerns

2.62   Several respondents argued that the proposed structure would be complex and hierarchical (e.g. with three layers) or stated that it would be "top-down" or involve a "command and control" system. A few respondents stated that the structure would involve "micro-management" by HMCIPS. One of the individual respondents argued that effective monitoring would depend on the efforts of a large number of lay monitors, making the proposed structure inappropriate. A few respondents stated that the language used was also negative and hierarchical. It was further suggested that the complexity of the structure could, in turn, lead to confusion.

2.63   Additional issues or concerns raised about the nature and effectiveness of the approach included views that there would be:

- Less robust arrangements, with less rigorous scrutiny and a less exacting approach (e.g. in the absence of some existing safeguarding requirements in the draft Order).

- Less statutory protection for the system or the role of Lay Monitors.
- A potential negative impact on the simplicity and speed of complaints handling.
- A lack of clarity of monitoring and reporting arrangements.
- A lack of links between Monitors and local communities, and the end of direct engagement by local government with prisons.

2.64   A few respondents argued that the structure would not lead to improved efficiency, or that it would reduce effectiveness (e.g. due to the complexity of the system; the lack of specification of clarity of roles; and the increased area of responsibility of HMCIPS).

2.65   A small number of respondents made specific reference to para 1-6 of the proposed Explanatory Document (which stated that the overarching purpose of the Order was to improve the efficiency of public functions in the inspection and monitoring of prisons in Scotland) and disagreed that this would be the outcome. One respondent stated that there was no proof for the assertion in para 3-19 of the proposed Explanatory Document about the HMCIPS responsibility providing the best potential for "impact".

Suggestions

2.66   Some of the suggestions to address these issues have been mentioned previously in relation to the distinction between functions, the need for independence and the cost or use of resources. Additional suggestions included:

- Provision of an overall environment in which volunteers are supported and nurtured (rather than their having no opportunities to influence the process or support each other).
- Provision of certainty in statute or guidance that Monitors will establish and maintain close community relations.
- Recognition of Community Planning and local government boundaries.

2.67   As with the other broad issues discussed in this section, however, many of the suggestions related to detailed aspects of the nature and roles of Monitors, or other aspects of the draft Order, and these are discussed fully in the following sections of the report.

SECTION 3: MONITORS

3.1   This section presents the findings relating to the proposed nature and roles of Monitors.

Summary of Section 3

Most of the comments about the proposed nature and roles of Monitors focused on raising issues or concerns and / or making suggestions, although a small number of respondents made specific comments in support of aspects of these proposals.

The most common issue or concern raised related to the inclusion of two types of Monitors with different roles, with one of the roles involving paid Monitors.

Comments on reporting and communication issues were also very common, such as the lack of inclusion in the draft Order of direct access to the Scottish Ministers or of a requirement for an annual report to be submitted and published. Comments on recruitment and appointment were also common (e.g. perceived difficulties in recruiting or retaining Monitors; and a lack of detail of the appointments process).

The perceived loss of independence of Monitors was a concern for many, particularly the proposal that Lay Monitors would report to, and take instruction from Prison Monitors.

Other themes on which issues or concerns were raised and suggestions made included: the number and composition of Monitors appointed; training and support; and frequency and regularity of monitoring visits (with a perceived lack of detail and specification of these issues).

A further common theme related to prisoner complaints, including: a perceived lack of clarity and definition of the role of Monitors; a concern that they would not be able to support prisoners with the prison complaints process; and potential for overlapping roles and processes in handling complaints.

Several respondents raised issues or concerns about Lay Monitors being able to be assigned to any or all prisons in Scotland (e.g. in terms of loss of local knowledge, and lack of representation of the local community).

A number of comments focused on a perceived general lack of detail in specifying the role of Monitors, and / or the omission of functions currently undertaken by VCs.

Overall pattern of views

3.2   The majority of respondents made particular comments on the proposals in relation to the nature and roles of the Monitors, some of which link closely to issues raised in the previous section.

3.3   In terms of the overall pattern of views about the proposed nature and roles of Monitors, most of the comments (as in the previous section) focused on raising issues or concerns and / or making suggestions. A small number of respondents also made specific comments in support of aspects of the nature and role of Monitors.

3.4   Comments were made on a range of aspects of the proposed nature and roles of Monitors, and these are presented in the remainder of this section.

Aspects of the proposed nature and roles of Monitors

3.5   The most common themes relating to the proposed nature and roles of Monitors were:

- The inclusion of two types of Monitor (with different roles, and the payment of Prison Monitors).
- Reporting and communication issues.
- Recruitment and appointment.
- Independence.
- The number and composition of Monitors appointed.

3.6   Other themes on which comments were made were:

- Training and support.
- The frequency of visits by Monitors.
- Prisoner complaints.
- The allocation of Monitors to prisons.
- The general functions and overall roles of Monitors.

3.7   Within these overall themes, comments were made on issues relating to Monitors overall, as well as issues relating specifically to Prison Monitors and issues relating specifically to Lay Monitors. These are considered by theme (with reference to a particular type of Monitor where appropriate) to avoid repetition.

Two types of Monitor

3.8   The inclusion of two types of Monitor (Prison Monitors and Lay Monitors) with different roles, and the proposed payment of Prison Monitors, was the most common theme in relation to Monitors.

3.9   One respondent stated specifically that they agreed in principle with the split between Prison and Lay Monitors, arguing that there needed to be some strategic and oversight function to the daily processes, and it was appropriate that resources be made available for this.

3.10   Most of the specific comments, however, focused on raising issues and / or concerns, or making suggestions.

3.11   Most respondents identified some issues or concerns with the proposal to have two types of Monitor. The most common related to their having two different roles, and the proposal for one of the roles to involve paid Monitors.

3.12   Among the comments made about the differences in the roles, some respondents expressed a general view that the separation would have a negative impact on the service. It was also suggested that this was part of a hierarchical structure (mentioned in Section 2) and would increase complexity and bureaucracy. One of the VCs expressed concern that Prison Monitors would be seen as the "professionals" and Lay Monitors as the "amateurs".

3.13   A few VC respondents and one of the local authority respondents stated that there was a lack of clarity about the relationship between Prison and Lay Monitors, and the specific roles of each. Several respondents argued that the different powers could lead to confusion among Monitors, within prisons, among prisoners and for SPS staff. It was also argued that having two "tiers" of Monitors could have an impact on prisoners' trust and confidence, as well as upon the willingness of people to volunteer to be Lay Monitors (discussed further in para 3.30). One respondent argued that Lay Monitors would do the bulk of the work. Reference was also made to Professor Coyle's suggestion that only a single tier of independent monitors would be required for each prison.

3.14   A further common issue with the proposal to have two types of Monitor related to the Prison Monitors being a paid role, and many respondents identified issues or concerns with this. These comments focused largely on a perceived lack of need for the Prison Monitors. It was argued, for example, that justification for them had not been established, or that respondents could not see the need for this. Several respondents stated that Professor Coyle had expressed the view that, if his recommendations were implemented, there would be no need for paid Monitors. Some also stated that the Justice Committee had questioned their need, and sought clarity of their role. One VC expressed the view that having paid Monitors may not be OPCAT compliant.

3.15   A few VCs also suggested that paid Monitors would be expensive and that there would be a lack of added value from them (linking to comments about costs and value for money made in Section 2). One individual respondent made reference to para 3.20 of the proposed Explanatory Document and questioned why, if the introduction of Prison Monitors would ensure a robust structure, a different model had been adopted for the Independent Visitors for Police Cells (where three area co-ordinators provide administrative, co-ordination and training support).

Suggestions

3.16   Several respondents made specific suggestions about addressing these issues or concerns. These included:

- Clear specification, clarification and more detail of the roles and responsibilities of Monitors (Prison and Lay), including the view that

the mandate and powers of HMCIPS and the Monitors should be comprehensively set out in a legislative framework.

- Reconsideration of the proposed hierarchy and different powers, and combination of the two roles.
- Making the general duties outlined in section 7B of the Order similar to those in section 7A.
- Clarity of why there was a difference in the powers of the Monitors to hear complaints from prisoners.
- All independent monitoring tasks being undertaken by lay members.

3.17   As noted in the previous section, suggestions were also made about other options for the use of the relevant resources.

Reporting and communication issues

3.18   Comments on reporting and communication issues were also very common in relation to the roles of Monitors.

3.19   One local authority respondent stated that they welcomed the introduction of annual reporting of the outputs of Prison Monitors. Another respondent expressed agreement that Prison Monitors should submit their reports to HMCIPS.

3.20   A large number of respondents focused on raising issues or concerns, and / or making suggestions.

Issues or concerns

3.21   The two most common issues or concerns raised relating to reporting and communication were: the lack of inclusion in the draft Order of direct access to the Scottish Ministers; and the lack of inclusion of a requirement for an annual report to be submitted to Scottish Ministers and published.

3.22   The lack of direct access to Scottish Ministers for Monitors links to points made earlier about the structure, and a concern about hierarchical reporting from Lay Monitors to Prison Monitors to HMCIPS. Some respondents noted that Visiting Committee members currently should bring any matters of concern to the attention of the prison Governor, and, if they did not believe the Governor had remedied the matter within a reasonable period, they could notify Scottish Ministers. It was suggested that the proposed changes may remove this route. It was stated that there was no provision for Prison Monitors to report concerns to Scottish Ministers if they remained unsatisfied with the outcome further to it having been reported to HMCIPS, and that there was no role for Lay Monitors in this.

3.23   Additional concerns included that this may: compromise the system; take away a "safeguard"; undermine independence; make the lines of communication less clear; stop the immediacy of some reports / comments or resolution; and make it possible for reports to be filtered or amended.

3.24   Several respondents also expressed concerns about the lack of inclusion of a requirement for the Monitors to submit an annual report on monitoring to Scottish Ministers and publish the results. Issues raised included views that this would:

remove a safeguarding requirement under the existing legislation; and reduce effectiveness and public accountability.

3.25   A few respondents stated that there had been a previous Scottish Government commitment to the inclusion of these issues, but they had been omitted.

3.26   One local authority respondent raised a concern that no provision was made in the draft Oder for Monitors to meet on a regular basis to hear reports by the prison Governor and to discuss relevant issues relating to monitoring. A few VCs also stated that the draft Order did not provide for the setting up of a committee for each establishment, nor require it to meet a prescribed number of times each year.

3.27   Several respondents raised concerns that there was no mention of a requirement for Lay Monitors to produce a written report and inform the prisoners of their findings. This is discussed later in this section in relation to the role of Monitors in prisoner complaints.

Suggestions

3.28   Several respondents made suggestions in relation to these issues. These included:

- Incorporation in the Order of Recommendation 6 from the Coyle report (relating to Monitors bringing matters of concern to the attention of the Governor, then to the attention of Scottish Ministers).
- Provision in the legislation of direct access for Monitors to Scottish Ministers (including, in the view of some, to include Lay Monitors specifically).
- Specific provision in the legislation of a requirement to prepare an annual report to Scottish Ministers of the year's business and to publish these reports.
- Specific provision in the legislation of a requirement for a summary of progress across all prisons.
- Incorporation in the Order of Recommendation 13 of the Coyle report (that Monitors for each prison should elect a Chairperson and meet as a group in the prison at least every two months).
- Clear specification of the number of meetings to be held annually within the prison and specification of the presence of the Governor at these meetings to speak to his / her report.
- Clear specification of a requirement for Lay Monitors to submit a written report on each visit with a copy to the Governor for response, the final report being held in a location available to other Lay Monitors and prison staff.
- Specific provision in the legislation of a requirement for Monitors to advise a prisoner of their findings in relation to complaints.
- Retention of the provision that Lay Monitors should have a clear responsibility for maintaining good relationships with the prison Governor, staff and prisoners.

Recruitment and appointment

3.29   Comments on recruitment and appointment of Monitors were also very common and focused on the identification of issues or concerns, and / or suggestions.

<u>Issues or concerns</u>

3.30   A large number of respondents raised issues or concerns about recruitment and appointment. Among these, a common theme was the potential difficulty in recruiting suitable Monitors (particularly Lay Monitors) and the potential loss of existing volunteers (with a number of comments on the current quality and diversity of this group). A number of respondents suggested that issues such as: the role of the Lay Monitors in relation to Prison Monitors; the proposed hierarchical structure; the "lower status" or subordinate role for Lay Monitors; or general changes to the provisions may be a disincentive, and make recruitment more difficult.

3.31   Comments were also made about the appointments process, and it was argued, for example, that the current proposals lacked detail about the appointments process and the requirements for Prison Monitors and Lay Monitors. Two VCs suggested that there appeared to be a reluctance to commit to an open and transparent process for Prison Monitors. One HRO raised concerns about a lack of information about a number of related issues, including the recruitment, selection and monitoring of the Monitors. Two VCs suggested a lack of reference to issues such as: the term of appointment; the eligibility criteria; or the circumstances in which a Monitor might be asked to resign. A further VC stated that the proposed conditions of appointment appeared to be more about administrative convenience than operative excellence.

3.32   One IMCO expressed concern at an appointment being made by a Government official or appointee.

<u>Suggestions</u>

3.33   Several respondents made specific suggestions relating to recruitment and appointment, and these included:

- Provision of more information about recruitment and appointments (including confirmation that the local authority will have no role).
- Clarification of the qualifications, skills and competences expected of Monitors and specification by Regulation of the qualifications for Prison Monitors.
- Written commitments in the legislation to open and transparent, community-based recruitment.
- Specification in the Order or Prison Rules of issues such as: the appointments process (and detailed aspects of this); the term of appointment; the eligibility criteria; re-appointment; and the circumstances in which a Monitor might be asked to resign.
- Incorporation in the Order of Recommendation 7 of the Coyle report, that monitors should be appointed under an open public appointments system for specified periods.

- Provision of assurance that previous criminal records should not decrease an individual's chance of formally engaging within the process, with the development of relevant safeguards (with which one respondent offered assistance).

Independence

3.34 The issue of the independence of Monitors was also a key area of concern, and is linked to issues raised previously in Section 2 and at other points in the report. Many respondents identified such issues or concerns in relation to the nature and roles of the Monitors, and some suggestions were highlighted.

Issues or concerns

3.35 As noted, general concerns about independence in the proposed structure were discussed in Section 2. The issue raised most frequently in relation to the nature and roles of Monitors related to the proposal that Lay Monitors would report to, and take instruction from Prison Monitors. This was raised particularly (although not only) by VCs. It was argued, for example, that it would compromise the independence of both types of Monitor, and the monitoring process.

3.36 For example, it was suggested that Prison Monitors, as paid Monitors, would be viewed as civil servants, with their independence compromised by the requirement to take instructions from HMCIPS and / or by their payment.

3.37 It was further argued that the independence of the Lay Monitors would be compromised by their need to assist and comply with instructions of Prison Monitors. One VC respondent suggested that this may not be OPCAT compliant. A few VCs also stated that the setting of priorities by the Prison Monitors and HMCIPS would undermine Lay Monitors' independence.

3.38 It was also suggested (as noted in Section 2) that a perceived lack of independence and the use of paid Prison Monitors may undermine prisoner (and potentially staff and public) confidence in the Monitors, and in the system as a whole.

Suggestions

3.39 Suggestions relating to the structure overall were noted in Section 2 and at other points in this section.

3.40 One VC made the specific additional suggestion that there should be clarification of whether the Lay Monitors would have any input to the process of setting priorities, arguing that their experience would be invaluable and their involvement would provide them with a clear understanding of expectations.

3.41 A further additional suggestion was that there should be a written commitment in the legislation to adequately trained and supported self-managing teams of Lay Monitors.

Number and composition of Monitors appointed

3.42   Many respondents made comments about the number and composition of Monitors appointed.

3.43   One respondent stated that they considered the powers proposed in Section 7A (2) (whereby the Chief Inspector must ensure that at least three Prison Monitors are appointed at any given time) to be appropriate, given the geography and population distribution of Scotland.

3.44   As with other issues, however, most of the comments focused on raising issues or concerns, and / or making suggestions.

Issues or concerns

3.45   Several respondents raised issues or concerns relating to the number and composition of Monitors appointed. For example, a few stated that there was a lack of detail of these issues in the new system, with no specification of the number of Monitors required and no minimum number of Lay Monitors.

3.46   One HRO identified a range of detailed information about the composition of Monitors (e.g. in terms of expertise; gender balance; ethnic minority representation; and principles relating to the status of national institutions for the promotion and protection of human rights) which were seen not to be explicit in the draft Order.

3.47   One criminal justice organisation expressed concerns in relation to Prison Monitors that a minimum of three, with a requirement to visit each prison in their area at least once a month, might not be sufficient.

Suggestions

3.48   Many respondents made specific suggestions about these issues. These included:

- Recruitment of sufficient monitors and clarification of the requirements.
- Ensuring the legislation establishing the new structure encompasses the key elements set out by OPCAT (including that the number of independent monitors should be sufficient to carry out their duties according to the Prisons [Scotland] Act 1989 and the Prison Rules).
- Specification of the number of Monitors to be appointed to individual prisons (including the number of Lay Monitors for each prison).
- Recruitment of people from a variety of backgrounds, with a range of skills and experience (including, in the view of one local authority, the inclusion of a serving local councillor).

Training and support

3.49   Comments on training and support were also common, and these included some issues or concerns, but focused particularly on the identification of suggestions.

3.50   A few respondents highlighted issues or concerns with training and support to Monitors. These tended to focus on a perceived lack of information about the training and administrative support to be provided to them. One VC stated that they had expected a commitment to nationally provided and supported training, mentoring and evaluation, but that these were not contained in the current draft Order nor the supporting documentation. Some suggested that the provision of additional training and administrative support would be welcome. A few VCs stated that the model in the draft Order seemed to focus entirely on oversight and control.

3.51   One of the VCs stated that there was no mention of holding regular Monitor meetings (an issue raised above) and argued that these were essential for information and training. One VC raised a question about who would organise and pay for the training for HMCIPS and the Monitors.

Suggestions

3.52   As noted, issues relating to the provision of training and support were raised in Section 2 in relation to the use of resources. A large number of respondents made additional specific suggestions about training and support, which included:

- Provision of more information and clarity in the Order about training, support and guidance to Monitors.
- Provision of additional resources to develop training and support.
- The use of paid employees to support Monitors (e.g. with training and administrative tasks), with one criminal justice organisation, for example, suggesting dealing with Recommendation 14 of the Coyle report in the Order.
- General provision of administrative support.
- Standardisation of training for Lay Monitors and development of high quality provision.
- Arrangements for introductory and ongoing training (currently provided by the AVC).
- Inclusion of the requirement for appropriate training for Monitors within the responsibilities of HMCIPS.
- Further detail in the draft Order of the level of support to be provided by HMCIPS.
- Support to Lay Monitors to enable them to be flexible in their approach and raise issues they consider pertinent and important.

Frequency of visits

3.53   A further common theme on which comments were made related to the frequency of visits by Monitors.

Issues or concerns

3.54   Several respondents identified issues or concerns relating to the frequency of visits, including the lack of specification of the frequency and regularity of monitoring requirements. It was argued, for example, that there was a lack of specific detail

other than to state that Prison Monitors must visit at least once a month, with no specification of the frequency for Lay Monitors.

3.55   Additionally, one local authority respondent expressed the view that a minimum visit of once a month by Prison Monitors appeared to be "light touch".

<u>Suggestions</u>

3.56   A few respondents made specific suggestions, which included:

- Provision for continuation of visits by Monitors on a regular, unannounced basis.
- Specification in the legislation of the minimum number and frequency of visits by Lay Monitors.
- Ensuring the legislation establishing the new structure encompasses the key elements set out by OPCAT (which had a key objective to establish a system of regular visits by independent bodies).

Prisoner complaints

3.57   Many respondents made comments on the role of Monitors in relation to prisoner complaints. A few welcomed the continued involvement of Lay Monitors in hearing complaints. One stated generally that Sections 7A and 7B gave roles for Monitors in the investigation of prisoners' complaints, and this was both welcome and necessary.

3.58   One IMCO expressed support for Lay Monitors having a role in the complaints system if properly defined and aligned to wider complaints handling and scrutiny. The respondent provided details of the ways in which they believed this could be beneficial. A local authority respondent stated that they agreed that independent monitors should complement the existing prison complaints process.

3.59   Most of the comments about complaints, however, as with other themes, related to the identification of issue or concerns, and / or suggestions.

<u>Issues or concerns</u>

3.60   Several respondents highlighted issues or concerns with prisoner complaints. These included a perceived lack of clarity and definition of the role of Monitors in the complaints process. For example, one local authority respondent stated that there was insufficient detail in the draft Order about how, in practice, the independent Monitors would complement the prison complaints process. Another respondent expressed concern about whether the role of Lay Monitors in the complaints system, in the Order as currently drafted, was properly defined and aligned to wider complaints handling and scrutiny. They suggested that the proposed role was not significantly different from the role of the VCs on complaints, and would not therefore address key concerns around lack of consistency and variation in approach highlighted in the Coyle report.

3.61   A few respondents expressed concern that Lay Monitors would not be able to support prisoners with the prison complaints process (which, it was stated, entitled a

prisoner to be supported at an Internal Complaints Committee and included the right to take a complaint forward to the Scottish Public Services Ombudsman [SPSO]). It was also argued that the draft Order did not include a role for the Monitors (of either type) in assisting prisoners to prepare and make complaints. One local authority respondent stated that many prisoners would have literacy difficulties, leading to difficulties in representing their cases. One respondent stated that prisoners' protection would be curtailed by this, and that there would be uncertainty for both prisoners and Monitors.

3.62   A criminal justice organisation also raised a concern that the removal of Monitors from being able to represent prisoners at Internal Complaints Committee hearings could lead to a duplication of effort where a prisoner did not receive a satisfactory outcome, as their next approach would be to the independent Monitors.

3.63   One of the IMCOs made very detailed comments about complaints handling. They expressed a concern about the alignment and integration of the Lay Monitor complaints role with the existing complaints process (including the roles of both the SPS and SPSO) and the potential to undermine the approach, and create parallel systems for raising and responding to complaints. It was suggested that this would add complexity to the process for prisoners and cause confusion. The respondent argued that it was unclear, for example, what would happen if the complainant wanted to access both the Lay Monitor and the SPS internal complaints process (suggesting that, as drafted, both the SPS and the Lay Monitor would be required to investigate, respond and report separately) with potential for confusion and / or conflicting responses.

3.64   The same respondent argued that the proposed requirement to report the outcome of each investigation would create potential for overlap with the SPS and SPSO statutory processes. They also stated that this could be a significant burden on Lay Monitors and increase expectations of what they could do for individuals. It was stated further that the status of reports and recommendations and how these should be followed up was also unclear.

3.65   As noted previously (in relation to reporting and communication), several respondents raised concerns that there was no mention of a requirement for Lay Monitors to produce a written report and to inform the prisoners of their findings. It was suggested, for example, that this would make the process for complaints "less vigorous" and robust.

3.66   A further concern related to the absence of a duty of the Governor to provide a confidential setting for Monitors to hear complaints (discussed in Section 4).

3.67   A few respondents raised concerns about comments made by another respondent, suggesting that these were based on a misunderstanding of the independent status of monitoring and the way in which the wider requests system operated.

Suggestions

3.68   Specific suggestions in relation to the role of Monitors in prisoner complaints included:

- Provision of additional detail in the Order regarding the complaints process (with some suggestions of specific issues for which details should be given).
- Further consideration of the role for Lay Monitors in complaints handling and how this relates to the existing statutory roles of the SPS and SPSO.
- Clarification of roles in complaints handling, to ensure that they are defined well and work together (with the role of Monitors complementing other aspects of complaints processes, and, in the view of one respondent, a need to ensure that the existing process for handling complaints, particularly that of the SPS, remains the principal avenue through which prisoners can raised complaints).
- Continuation of a role for Lay Monitors in dealing with prisoner concerns and complaints and provision of detail of the role (with suggestions made about the nature of this).
- Definition of "complaints".
- Continuation of a role for Monitors to support prisoners with the formal SPS complaints procedure, including representing prisoners at Internal Complaints Committee hearings and representations to the SPSO.
- Clarity of the status of reports and recommendations (including follow up and requirements to publish).
- Retention of a requirement for Lay Monitors to report verbally to the prisoner or member of staff who raised an issue, prior to submitting a written report to the Governor.
- Provision in the legislation of a requirement for Monitors to advise the prisoner of their findings in relation to complaints.
- Clear requirements for the recording and reporting of complaints statistics and performance information.

3.69   While some of the comments and suggestions focused on Lay Monitors, one respondent stated that, whilst not the main purpose of Prison Monitors, they should not specifically be excluded from investigating any complaint which a prisoner made to them.

Allocation of Monitors to prisons

3.70   Several respondents made comments on the allocation of Monitors to prisons, with most raising issues or concerns, and / or making suggestions. One respondent, however, stated that they considered the powers proposed in Section 7A (3) (relating to Prison Monitors being assigned to prisons: within a particular area of Scotland; particular prisons within Scotland; or all prisons in Scotland by the Chief Inspector) to be appropriate, given the geography and population distribution of Scotland.

Issues or concerns

3.71   In terms of issues or concerns, the most common was the potential loss of local knowledge, and lack of representation of the local community, with Lay Monitors able to be assigned to any or all prisons in Scotland. Comments included the perceived value of building up particular knowledge of an establishment over a

period of time, as well as the perceived benefits of involvement of members of the local community in which the prison is situated. One local authority respondent stated that, as prisons become more "community-facing", the local connection would be even more important to aid engagement, ensuring that Lay Members had an awareness of issues within areas and local services that could assist prisoners.

3.72   A small number of additional issues or concerns were identified. For example, one respondent argued that there would be no provision for a committee for each prison. Another stated that a basic principle of quality monitoring was the need for in-depth knowledge of, and regular commitment to a particular establishment. A further respondent questioned whether it would be necessary or feasible to appoint a Lay Monitor (on the basis of being a volunteer and receiving only expenses) to cover all areas.

<u>Suggestions</u>

3.73   Specific suggestions included:

- The removal of Section 7B (2)(c) (making reference to Lay Monitors being assigned to all prisons in Scotland.
- Clear commitment in the legislation to Lay Monitors working together in a specific prison.
- Ensuring that Lay Monitors are linked to local communities.
- Ensuring a consistent body of Lay Monitors from the area local to a prison (although one respondent stated that some could be appointed outwith their local catchment area).

General functions and overall role

3.74   A number of respondents made comments on the general functions and overall role of Monitors. These focused on issues or concerns, and / or suggestions, some of which overlapped with issues raised in Section 2.

<u>Issues or concerns</u>

3.75   Some comments focused on a perceived overall lack of detail in specifying the role of Monitors, and / or the general omission of functions currently undertaken by VCs. It was argued, for example, that under the current legislation (Prison Rules 2011) most of the requirements for independent monitoring by VCs were specified in the legislation. A few respondents also made reference to the provision of additional information in the "Guide for Visiting Committees" issued by the SPS. It was stated that the draft Order proposed instead that guidelines would be produced by the incumbent HMCIPS. One VC argued that this represented a serious reduction of the rights of prisoners to services and information, as well as failing to ensure that the roles and responsibilities were "future-proofed".

3.76   Some VCs gave detailed examples of information currently specified, but omitted from the proposals, and one individual respondent made reference to the provisions recorded in para 1-9 of the proposed Explanatory Document. One VC respondent provided a table containing a comparison of the existing duties of Lay

Monitors in the Prison Rules 2011 and the contents of the draft Order (highlighting whether specific issues were contained within each).

3.77 Several respondents identified a perceived lack of clarity in relation to the detailed role of the Lay Monitors (for example noting that the draft Order referred to them "assisting" Prison Monitors and complying with any instructions issued by the Prison Monitor). Two VCs stated that they felt that the duties of the Lay Monitor would be entirely at the discretion of the Prison Monitor.

3.78 Specific additional concerns relating to the overall role of Monitors included a perceived lack of distinction between inspection and monitoring (raised previously, but also raised specifically relating to the roles of Monitors). A few respondents for example, highlighted reference to Prison Monitors having to maintain records about matters "inspected". One individual respondent highlighted a reference to "inspection and monitoring" standards, and a few respondents raised a concern about monitoring becoming ongoing inspection, or Lay Monitors being used to collect statistics for inspection.

3.79 A few VCs expressed disappointment that there appeared to be no intention to include the new Monitors in membership of the UK National Preventive Mechanism (NPM). They also argued that the new Monitors may still be excluded through being regarded as an extension of HMCIPS (which is already a member).

<u>Suggestions</u>

3.80 Some suggestions relating to these issues have been noted previously. Additional suggestions included:

- Retention of the obligation in current legislation and the Prison Rules for VCs and prison staff to afford prisoners a number of rights.
- Addition to the Order of the existing functions of VCs which have been omitted, with clear written commitments within the legislation.
- Clarity of the roles and responsibilities of Lay Monitors (with specific suggestions for inclusion in the role).
- Addition to the new legislation that Lay Monitors should be able to deal with issues relating to prisoner transport, health and community and voluntary support, all of which are provided by outside agencies.
- Revisiting the terminology of the draft Order in relation to the role of Prison Monitors and Lay Monitors to ensure a clear distinction between inspection and monitoring.
- Provision of clearer governance arrangements to ensure that the functions of inspection and monitoring remain distinct and operate separately.

Other issues

3.81 A very small number of additional issues or concerns were raised, and / or suggestions made.

3.82 One IMCO suggested naming the paid monitors "Prison Monitor Co-ordinators" and the Lay Monitors "Independent Prison Monitors".

3.83   One local authority respondent argued that the financial assumptions underpinning the proposals were unclear, including the level of payment being proposed for Prison Monitors.

3.84   One HRO stated that the proposed Order referred only to travel and subsistence expenses for Lay Monitors. They argued that it was important that they received reimbursement for expenses incurred in the performance of their duties such as loss of earnings, accommodation and childcare.

SECTION 4: OTHER ASPECTS OF THE DRAFT ORDER AND RELATED ISSUES

4.1   This section presents the findings on other aspects of the draft Order and related issues.

Summary of Section 4

Issues or concerns on other aspects of the draft Order included comments on the Order overall (e.g. that it did not reflect fully the recommendations of the Coyle review, as well as some general criticisms and comments on the overall level of detail).

Several respondents raised issues or concerns relating to the potential for amendment of the system without reference to the Scottish Parliament or the public.

Several respondents made comments on the establishment of an Advisory Board or Group (including that this had been omitted from the draft Order).

Comments were also made which related broadly to access issues, including concerns about access to space and / or access to documents.

A few additional issues or concerns were raised and / or suggestions made about rights and protection (for prisoners and Monitors) and the level of scrutiny and accountability in the system.

A small number of VC respondents argued specifically that they did not believe that the tests in the Public Services Reform Act had been met. Some specific comments were also made on aspects of the Explanatory Note and proposed Explanatory Document.

A further broad theme was the identification of additional requirements for the proposals or their implementation. Suggestions related to: the roles of other stakeholders; funding; guidance and standards; transition; and the wider context.

Comments were also made on the consultation itself. These focused on: the nature of the respondent and / or their response; and views of the consultation process.

Overall additional issues raised

4.2   In terms of comments on other aspects of the draft Order and related issues, the overall themes included:

- Other aspects of the draft Order and proposed Explanatory Document.
- Additional requirements for the proposals or their implementation.
- The consultation itself.

4.3   As with the previous sections, there are overlaps between some of these issues and those already detailed pertaining to the general proposed structure (Section 2) and the nature and roles of the Monitors (Section 3). Detailed issues raised previously will not be reiterated in this section, but additional points will be presented below.

Other aspects of the draft Order and proposed Explanatory Document

4.4   Additional comments were made about other aspects of the draft Order and proposed Explanatory Document in a number of areas. Many respondents, for example, provided their overall views of the Order as a whole. Other themes related to: the potential for amendment of the system; an Advisory Board; access issues; rights, protection, scrutiny and accountability; pre-conditions of reform and improving the exercise of public functions; and aspects of the content of the Explanatory Note and proposed Explanatory Document.

Overall views of the draft Order

4.5   Many respondents made additional comments relating to overall views of the draft Order, including most of the VC and individual respondents, and a small number of others. As with other themes, these tended to focus on issues or concerns and / or suggestions.

Issues or concerns raised

4.6   The most common additional issue or concern raised in relation to the Order overall was that the proposals were not seen to reflect fully the recommendations of the Coyle review (with some stating, for example, that only a few of the recommendations were contained in the proposals). A large number of VCs (and some other respondents) expressed this view, and a few argued that the Scottish Government had returned to a previous position. Some also stated that, had these recommendations been implemented, this would have provided assurance of a high standard of monitoring, and compliance with OPCAT.

4.7   Several VCs expressed the view that the draft Order was seen to be a "missed opportunity" to implement a "gold standard" independent monitoring system that would have the support of stakeholders. Some respondents also argued that the proposed system had attracted considerable criticism, or expressed additional negative views about the Order overall.

4.8   Several respondents made comments about the overall lack of detail contained in the draft Order (sometimes relating this to some of the requirements of the existing legislation which were not detailed in the draft Order). Some expressed specific concerns about the impact of the perceived lack of detail (e.g. on transparency and on potential changes to the system).

Suggestions

4.9   Some additional suggestions were also made relating to the Order overall. These included:

- Reconsideration / implementation of the recommendations in the Coyle report.
- Changing the oversight and administration of VCs to ensure they meet the OPCAT obligations.
- Introduction of direct funding from the Scottish Government to VCs or changing the management of the funding.
- Consideration of the model of support arrangements for Independent Custody Visitors for Police Cells.
- Specification of more detail generally (and in the areas highlighted earlier in the report) and removal of ambiguity about roles, duties and practice.
- Clear written commitments in the legislation to the stipulations in Section 17 of the Prison Rules, and clear details of the administration of the new system and the management of independent monitoring.

Amendment of the system

4.10   Several respondents (particularly VCs and one of the HROs) raised issues or concerns relating to the potential for amendment of the system.

Issues or concerns raised

4.11   Respondents who commented on the potential for amendment expressed concerns that a perceived lack of detail in the draft Order, and the provision of the detail of the roles and responsibilities of Lay Monitors in a "guideline" overseen by HMCIPS, raised potential for significant changes to be made to the system without reference to the Scottish Parliament or the public.

4.12   One of the HROs stated that the independence of the new structure would be undermined if the executive Government had the legal authority to alter its mandate, composition and powers, or to dissolve or replace it at will.

4.13   One of the VCs also stated that they were concerned that the management and functions of the new system would be open to interpretation by HMCIPS.

4.14   Specific suggestions included:

- More detailed specification in the primary legislation (as noted above).
- Encompassing the key elements set out by the OPCAT in the legislation establishing the new structure (including the mandate and powers, as well as other issues detailed elsewhere).
- Ensuring that the new arrangements are "future-proofed and person-proofed" so that they cannot be adjusted without significant consideration.

Advisory Board

4.15   Several respondents made comments relating to an Advisory Board or Group.

Issues or concerns

4.16   Several respondents raised issues or concerns about an Advisory Board or Group. Among these, some stated that the establishment of an Advisory Board had been omitted from the draft Order (although one suggested that they had previously been advised that this would be the case). One stated that there was no detail of the membership and function of an advisory committee.

4.17   One of the IMCOs stated that the existence of a properly constituted Advisory Group would ensure the independence of the monitoring process and provide essential advice to HMCIPS from an expert perspective, informed by relevant experience and knowledge. One of the VC respondents raised the question of who would be responsible for appointments and training in the absence of establishment of an Advisory Board or Group.

4.18   A few VC respondents stated that the Lay Monitors were to have no communication or dialogue with an Advisory Group (whilst also noting that it was not mentioned in the Order).

4.19   One VC respondent questioned why, if the necessary procedures were put in place, there would be a requirement for an Advisory Group, expressing a concern that the influence of a non-statutory Advisory Group may compromise the independence of Prison Monitors.

Suggestions

4.20   Several respondents made suggestions relating to an Advisory Board or Group. These included:

- Clarity about whether an Advisory Board or Group would be established.
- Inclusion of a requirement to establish such a Board or Group.
- Specification in the legislation of the terms of reference, role and remit of this.

- Provision in the legislation for an open and transparent appointment process for members of the Board or Group.
- Inclusion of direct representation from active Lay Monitors within the membership.

Access issues

4.21   Some comments were also made which could be seen to relate broadly to access issues.

<u>Issues or concerns raised</u>

4.22   A few VC respondents and one of the local authority respondents raised issues or concerns about access to space and / or access to documents. These link to other points made elsewhere.

4.23   In terms of access to space, a few respondents stated that the proposed legislation did not contain a duty for the prison Governor to provide a confidential setting for lay members to hear complaints and deal with requests from prisoners. One of the VCs expressed the specific view that this could dilute activity in this area, while others stated that dealing with request and complaints was central to their work

4.24   A few VCs also expressed concerns about the discretion of Governors to withhold documents from Lay Monitors if, in their opinion, disclosure would have implications for the security of the prison.

4.25   A small number of VCs raised a specific issue relating to the amendment to Section 120(3) (b) of the Prison Rules 2011 stating that it omitted the words "requests or". They argued that this would mean that prison Governors would no longer be required to arrange for a request to be passed to the monitoring body and suggested that this appeared to be a drafting error.

<u>Suggestions</u>

4.26   A few respondents made additional specific suggestions relating to access issues, and these included:

- Specification of the requirement for the Governor to provide a confidential setting for Lay Monitors to deal with complaints and requests from prisoners, or of the right for Lay Monitors to have confidential space when discussing issues with prisoners or staff.
- Specification of the provision of appropriate accommodation and other facilities for Monitors.
- Removal of the clause relating to prison Governors' discretion to withhold documents.
- Clarity in the legislation of unfettered access to the prison (or all areas of the prison) for Lay Monitors.
- Remedying a perceived drafting error relating to the amendment to Section 120(3)(b) of the Prison Rules 2011.

Rights, protection, scrutiny and accountability

4.27   Some of the comments relating to rights and protection and the level of scrutiny and accountability in the system have been raised at previous points in the report. While these will not be reiterated here, a few additional issues were raised and / or suggestions made, which are detailed below.

Issues or concerns raised

4.28   A number of respondents stressed the general importance of prisoners' rights, or the importance of specific issues such as safeguards, and access to a clear complaints process.

4.29   One of the HROs argued specifically that there was a lack of reference in the draft Order to OPCAT or to other relevant human rights standards required to establish an effective system that prevents human rights violations in the prison system. The respondent provided detailed information about OPCAT in their response.

4.30   One of the HROs also argued that the proposed Order made no reference to provision to members of the new structure of those privileges and immunities as were necessary for the independent exercise of their functions (e.g. immunity from personal arrest or detention, and from seizure or surveillance of papers and documents; non-interference with communications; and protection from legal action in respect of words spoken or written, or acts carried out in the course of the performance of their duties).

4.31   One of the IMCOs stated that any new duties on bodies would raise the question of what people would do if they were unhappy with the way they were carried out.

4.32   A further respondent raised a specific issue with Section 7B (5)(c) of the draft Order. They stated that, subject to the exceptions in (i) and (ii), this would grant complete discretion on a matter of disclosure sought by a Lay Monitor to the Governor, without affording any right of review to either a Prison Monitor or HMCIP. This also links to issues raised previously in relation to access.

4.33   Some additional comments were made relating to overall accountability and the opportunity for public scrutiny. For example, one of the VCs stated that there was no evidence of open and transparent reporting, accessible to the public, relating to each prison. They argued that the draft Order proposed new legislation which would remove the opportunity available currently for a high level of public scrutiny, replacing this with a short section in the annual report of HMCIPS, which they argued would be based on paid staff providing "ad hoc reporting".

Suggestions

4.34   A few respondents of different types made additional suggestions relating to rights, protection, scrutiny and accountability. In addition to suggestions detailed earlier about specific issues, these included:

- Ensuring respect for human rights is at the core of prison monitoring.
- Explicit articulation of human rights and OPCAT in the legislation.
- Consideration of other relevant human rights standards in developing legislation in this area (with a number of examples given).
- Provision of privileges and immunities necessary to members of the new structure, and protection of confidential information collected.
- Provision of at least the same opportunity for scrutiny by the Scottish Parliament, Justice Department, public, prisoners and prison staff in the new legislation as in the old.
- Clarity of roles and the process for complaints about Monitors.
- Provision of a right of review either to Prison Monitors by extending their authority under section 7A (4), or to HMCIPS.
- Specification in the legislation of public reporting and audit procedures, and independence from executive control.

Pre-conditions of reform and improving the exercise of public functions

4.35   Some specific comments were also made on the pre-conditions for reform and improving the exercise of public functions. A small number of VC respondents argued specifically that they did not believe the tests in the Public Services Reform Act (which, they stated, required a number of pre-conditions to be met before existing bodies could be abolished) had been met.

4.36   These respondents provided specific details of their concerns in relation to different aspects of this. For example, in relation to Section 16(2)(a) that "the provision is proportionate to the policy objective" a small number of respondents made reference to para 3-22 of the proposed Explanatory Document or the perceived justification for the legislation in terms of the need for OPCAT compliance. They argued that the relevant issues could have been achieved without legislation (a point made by a number of other respondents, although not necessarily specifically linked by them to the pre-conditions).

4.37   In relation to Section 16(2)(b) that "the provision does not remove any necessary protection", a few respondents made reference to para 3-23 of the proposed Explanatory Document, and argued that, in their view, the necessary protection was being removed. As noted, concerns were raised previously about the perceived lack of specification of some protections in the proposals.

4.38   In relation to Section 16(2)(d) "conferred functions consistent with the general objects or purpose of a person whose functions have been abolished" a few respondents made reference to para 3-26 of the proposed Explanatory Document, arguing that it was not the case that all of the functions of VCs were being replicated.

4.39   In relation to Section 27(1)(c)(ii) "improving the exercise of public functions", a few respondents made specific reference to paras 3.30 -3.37 of the proposed Explanatory Document and to the suggestion that the legislation would improve the exercise of public functions having regard to efficiency, effectiveness and economy. As noted in Section 2, a few argued that this was not the case (e.g. making reference to issues discussed previously relating to aspects of the structure, roles

and costs and raising specific issues with some of the assertions in these paragraphs).

Explanatory Note and proposed Explanatory Document

4.40   Some respondents made specific reference to aspects of the Explanatory Note and the proposed Explanatory Document. Where these have not already been included at various relevant points in the text, they are discussed below.

4.41   One of the VCs, for example, expressed a general concern about a lack of clarity in the Explanatory Note, and a few respondents suggested that the proposed Explanatory Document was misleading in some areas.

4.42   One VC commented that the Explanatory Note and consultation correspondence recognised some perceived omissions in the draft Order, and used different language. They stated, however, that it would be the legislation coming from the draft Order which would provide for the quality and integrity of future independent prison monitoring.

4.43   Additional comments on the proposed Explanatory Document included that:

- In relation to para 1-10, it was argued that, while this suggested that Professor Coyle had proposed the abolition of VCs, he had actually been asked to review the Justice Minister's proposals.
- In relation to para 1-11, it was argued that, while this noted that the current system was not OPCAT compliant, it did not give the reason for this in terms of their funding being managed by the SPS. References to compliance in paras 2-12 and 3-22 were also highlighted.
- In relation to paras 2-14 to 2-16, it was argued that, while these paragraphs referred to the 2011 consultation, there was no reference to the outcome, or there was a lack of prominence given to the consultation. (As noted already, some respondents also provided details of the historical background.)
- In relation to para 3-26, it was argued that there may be inaccuracies within the cross-referencing.

Additional requirements for the proposals or their implementation

4.44   Many respondents identified additional related requirements which they considered important to the proposals or their implementation. These related to:

- The roles of other stakeholders.
- Funding.
- Guidance and standards.
- Transition.
- The wider context.

Roles of other stakeholders

4.45   Several respondents made additional comments or suggestions relating to the roles of other stakeholders. For example, one respondent stated that, in addition to the requirement for robust scrutiny of prison conditions by Prison and Lay Monitors, there must remain a role for solicitors in this field. The same respondent noted that the proposed role for Monitors in the investigation of prisoners' complaints, while welcome and necessary, could not be allowed to override in any way the prisoner's right to independent legal advice, in particular where it was alleged that there had been a breach of Articles 3, 5, 8, 9 or 14 of the European Convention on Human Rights (ECHR).

4.46   Additional comments were also made in relation to the role of the SPSO, and one respondent provided detailed background information about this. Another respondent argued that the role of the SPSO seemed to be relatively little known to prisoners. The same respondent stated that it was not clear whether, and if so how, the roles of the SPSO and Monitors would dovetail (reflecting a concern raised previously). They argued that there should be specific clarification of the roles. A further specific suggestion in relation to the role of the SPSO was that clarity should be provided about whether the SPSO would have jurisdiction to review complaints about the Prison and Lay Monitors.

4.47   One criminal justice organisation respondent stated that it was important to hear the voices of those held in prison as well as the independent observations of Monitors. They suggested the co-option (over a period, or for an individual monitoring visit), of a prisoner monitor who, they suggested, would help the process of communication with the prison population.

4.48   Another criminal justice organisation respondent argued that Monitors would encounter prisoner concerns relating to community issues such as housing, health and education. They stated that this would place the Monitors in a position of reflecting on issues occurring within the prison, but delivered and inspected by other bodies. It was suggested that the Order or guidance should make clear the interface between Monitors and these other operating bodies within the prison (i.e. the bodies responsible for delivery of these services and their scrutiny bodies).

4.49   One criminal justice organisation respondent stated that they would welcome some statutory requirement for the formal involvement of the Scottish Human Rights Commission (SHRC) with the process. They argued that the organisation's expertise should not be ignored and that the monitoring function should be aware of new developments in human rights, as well as being active leaders in this field.

4.50   One local authority respondent argued that consideration should be given to whether prisoners could benefit from an advocacy service if the new system of Monitors was unable to assist them as VC members currently could.

4.51   A few respondents argued that a national "council" (.e.g. with functions similar to the AVC) should be created for Lay Monitors. One respondent made specific reference to the implementation of Recommendation 15 of the Coyle report, relating to provision for a Council of Independent Prison Monitors to include one monitor from each prison, and for this Council to agree protocols for particular issues.

Funding

4.52   Comments on costs, resources and funding issues have been noted previously, and one respondent added that the legislation should specify the source and nature of funding. They also argued that the Order should provide funding at a level which would enable all Monitors to carry out their statutory role.

Guidance and standards

4.53   A few respondents made comments on guidance. One, for example, stated that new legislation should lay out clearly the preparation of a Guide to Monitoring for both Prison and Lay Monitors. A few other respondents made reference to the existence of current guidance and a code of conduct for VC members.

4.54   Some respondents commented on standards. A few expressed the view that the proposals would not provide a "gold standard". One stated that, while there was an expectation that inspection and monitoring standards would be produced, these would not address their concerns with the structural arrangements. Another stated that the proposals did not provide a foundation for "gold standard" evaluation and that this should include not only the evaluation of individuals, but also of teams. A further respondent argued specifically that there should be further clarity on standards issues (e.g. the standard to be expected in relation to the working of Monitors). One VC also stated that some of the requirements may need to be supported by paid staff (who, in their view, should not be involved in day to day monitoring) to deliver on them.

Transition

4.55   A small number of respondents stated that there would be a need for a transitional period for the changeover to a new system. One criminal justice organisation expressed the view that the way the transitions were managed would be as important as the establishment of the new monitoring arrangements. The respondent stated that they hoped the experience and expertise of the existing VCs and visitors would benefit the new systems as they evolved.

The wider context

4.56   A few comments were also made about the wider context. For example, one respondent argued that a local solution should be considered for the most remote areas of the Highlands and Islands. They argued that, due to the length of time a "legalised custody" was held in Legalised Police establishments, there would be no opportunity for Legalised Prisoners to be interviewed within these remote areas under the new monitoring arrangements. They also stated that there was a great cost in time, travel and accommodation for custody visitors attending the island areas in particular.

4.57   One criminal justice organisation respondent argued that the Order should place a statutory duty on prisons to highlight the work of the Monitors. Another argued that effective communication to prisoners and prison staff would be important in the roll-out across prisons of the role of Prison Monitors.

4.58   One respondent stated that the SPS, with some forward planning, would be able to adapt current systems and processes to suit the needs of HMCIPS in the oversight of Prison Monitors and Lay Monitors.

4.59   One of the VC respondents stated that the reform of VCs must not be seen as distinct from broader reform of criminal justice services and the ongoing development and enhancement of community planning.

4.60   One of the HROs made suggestions relating to the importance of reporting by the NPM. It was also argued that the NPM, its members and staff should be required to regularly review their working methods and undertake training, including human rights training, in order to enhance their ability to exercise their responsibilities under the OPCAT.

4.61   One local authority respondent suggested that the Government should seek to review how the new system works in practice within a reasonable period following implementation.

4.62   A few respondents made comments about the need to take account of the comments made in the consultation in the further development of the draft Order.

The consultation itself

4.63   Comments on the consultation itself focused on themes such as: the nature of the respondent and / or their response; and views of the process.

Respondent and response

4.64   Several respondents provided additional information in their response about issues such as: the nature of their organisation; their aims; funding; and / or their work. Some made specific reference to their role and expertise, or the relevance of this to the issues under consideration.

4.65   Several respondents provided information about the nature of their response. This covered issues such as, for example:

- The background material considered.
- How the response was developed.
- Whose views were represented in the response.
- The focus of the response.

4.66   A small number of respondents expressed their agreement with the material in another respondent's submission.

The consultation process

4.67   Some additional comments were made on particular aspects of the consultation process. As noted, for example, some respondents provided details of the historical background to the current situation or commented on their involvement in this. Some were critical of the nature of the process of change, and / or the time taken. One VC stated that they did not find the consultation material "user-friendly".

4.68   One respondent expressed the view that, while they understood the need to seek the views of the SPS, it would not be appropriate for the SPS to have a role in determining the level of scrutiny it was subjected to by independent monitors.

4.69   Several respondents welcomed having had the opportunity to comment on the draft Order.

ANNEX 1   THE RESPONDENTS

Aberdeen City Council
Amnesty International Scotland
Anne Freebairn
Association of Visiting Committees (AVC)
East Renfrewshire Community Health and Care Partnership
Falkirk Council
Glasgow City Council Social Work Services
Glasgow Community Justice Authority
Her Majesty's Inspectorate of Prisons for Scotland
HMP Aberdeen Prison Visiting Committee
HMP Addiewell Prison Visiting Committee
HMP and YOI Cornton Vale Over 21s Prison Visiting Committee
HMP and YOI Cornton Vale Under 21s Prison Visiting Committee
HMP Barlinnie Prison Visiting Committee
HMP Dumfries Prison Visiting Committee
HMP Edinburgh Prison Visiting Committee
HMP Glenochil Prison Visiting Committee
HMP Kilmarnock Prison Visiting Committee
HMP Perth Prison Visiting Committee
HMP Shotts Prison Visiting Committee
HMYOI Polmont Prison Visiting Committee
Howard League Scotland
Lerwick Visiting Committee for Legalised Police Cells
Murray Dickie
National Council of Independent Monitoring Boards
North Lanarkshire Council
Perth and Kinross Council
Positive Prison? Positive Futures
Prison Fellowship Scotland
Renfrewshire Council
Scottish Consortium on Crime and Criminal Justice
Scottish Human Rights Commission
Scottish Prison Service
Scottish Public Services Ombudsman
South Lanarkshire Council Social Work Resources
The Law Society of Scotland

GSR

GOVERNMENT SOCIAL RESEARCH

Social Science in Government