



CONSULTATION SUBMISSION

***Strengthening the
Independent Scrutiny
Bodies through Legislation***

Ministry of Justice

New Methodologies and
Strategy Team, Arm's Length
Bodies, Sponsorship, and
Intelligence Division

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ABOUT THE ZAHID MUBAREK TRUST

Zahid Mubarek Trust (ZMT) is the national charity advocating for racial justice in the prison system. The ZMT was established following a racist murder of the 19-year old Zahid Mubarek at HMYOI Feltham in 2000. Alongside its high-profile policy work, the ZMT carries out an independent, evidence-driven external scrutiny and support work in prisons.

The Trust delivers a specialist work on race equality in the CJS, with a particular focus on the prison system, to support the reduction of racial disparity and the improvement of the treatment of and outcomes for Black, Asian and minority ethnic prisoners.

ABOUT THIS RESPONSE

Prisons are in dire situation due to the growing prison population, lack of resources and lack of adequate staffing levels, all of which has been exacerbated during the pandemic. Whilst the Trust welcomes overall intention of strengthening independent scrutiny bodies in custodial settings, the limitations of this consultation process and its timing should also be acknowledged. Whilst the ZMT welcomes the opportunity to respond to this consultation, it would have been appropriate to conduct wider consultation on this important matter, enabling better and more meaningful engagement with the civil society organisations and academia.

The response document focuses on the following independent scrutiny bodies in prisons: *Prisons and Probation Ombudsman (PPO)*, *Her Majesty's Inspectorate of Prisons for England and Wales (HMI Prisons)*, *Independent Monitoring Boards (IMBs)* and *Lay Observers (Los)* and *Independent Advisory Panel on Deaths in Custody (IAP)*. It reflects the Trust's over 20-year experience of working in prisons and dealing with the independent scrutiny bodies.

ZMT also conducted consultation meetings with *Lived Experience Advisory Group on Race Equality in the CJS* which is a newly established network of prison leavers from Black, Asian and minority ethnic backgrounds.

ZMT is immensely grateful to those who generously gave their time to inform this response (in alphabetical order): Charlotte Weinberg (Safe Ground), Professor Sir Malcolm Evans (University of Bristol), Professor Nicola Padfield, (University of Cambridge), Professor Nick Hardwick (Royal Holloway University of London), Professor Rachel Murray (University of Bristol) and Dr Philippa Tomczak (University of Nottingham).

RESPONSE TO THE QUESTIONS:

Prisons and Probation Ombudsman (PPO)

a) Do you agree that the PPO should be established in legislation? Please give a reason/s for your answer.

Giving the PPO statutory powers is a way to improve the independence, transparency and in so doing achieving better outcomes through investigations. However, there needs to be a clearer definition of what the PPO is mandated to deliver including adding exceptional investigations to their remit. It has been noted that in this document there is no mention of the benefit of statutory powers in dealing with prisoner complaints. The ZMT thinks that this area of work is equally important and should be given adequate attention in legislation.

b) Do you agree that a statutory power should be created for the PPO to access places, people and documents? Please give a reason/s for your answer.

Having access to places, people and documents would be a way of increasing collaboration with other relevant bodies. For example, with Lay Observers when investigating deaths of offenders in PECS custody as part of exceptional investigations. Improved access to places, people and documents would also be beneficial for investigating prisoner complaints.

c) Do you think that the PPO should be reclassified as a Non-Departmental Public Body? Please give a reason/s for your answer.

Re-classification of the PPO as a Non-Departmental Public Body would allow greater independence which would be welcomed. The ZMT also stresses the importance of increasing the resources for the scrutiny bodies, including the PPO, to strengthen their ability to conduct the work sufficiently.

The Trust thinks that it would have been helpful to outline disadvantages as well as advantages of reclassification of all scrutiny bodies as suggested in the consultation document.

d) Are there any further legislative provisions you'd like to see for the PPO? Please explain.

Any proposed changes should take into account that independence per se does not guarantee effectiveness and additional powers and safeguards need to be put in place for driving the performance of these bodies up. Statutory footing / expanding investigative powers on their own has no clear relationship to driving performance and improving outcomes. What matters is the ability/ confidence / expertise to critique systematic issues.

It is also important that backwards facing organisations (such as the PPO) should have formal links with the NPM as the learning from the past can be powerful preventative measure.

Within the clarity of definition of the role of the PPO, the selection process and potential risk of conflict of interest must be mitigated.

It is also worth noting that any restructuring should be evidence-based and should clearly demonstrate potential positive outcomes for people in the criminal justice system.

Her Majesty's Inspectorate of Prisons for England and Wales (HMI Prisons)

e) Do you agree that the 'Inspectorate' should be recognised in statute? Please give a reason/s for your answer.

The Inspectorate is a member of the UK NPM and all members are consequently required to be functionally and operationally independent. Therefore, the Inspectorate is required to be functionally and operationally independent which would be achieved by putting it on a statutory footing. This will also lead to greater ability to fulfil these stipulations and meet the obligations of the United Nations Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

f) Do you agree that HMI Prisons should be given a statutory power to access places, people and documents which reflects the power they already have? Please give a reason/s for your answer.

Scrutiny bodies play a vital role in preventing ill-treatment and human rights abuse and any opportunity to strengthen their role and ability to do so should be considered.

g) Do you think that HMI Prisons should be reclassified as a Non-Departmental Public Body? Please give a reason/s for your answer.

Re-classification would result in more independence for HMI Prisons, for example in terms of staff employment, etc. which would be welcomed. However, as noted above, statutory footing alone does not guarantee its effectiveness and efficiency but is the necessary starting point. Reduction in sponsorship, in this case from the MoJ, and any future changes should incorporate sufficient funds for HMI Prisons to improve the ability and capacity to fulfil its remit.

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

Legislation may be needed to clarify the basis upon which HMI Prison operates. However, it is crucial that HMI Prisons does not become part of the managerial structure for prisons and retains its unique remit under OPCAT obligations.

For further and meaningful strengthening of its independence, effectiveness and efficiency, it is recommended to consider the possibility of reporting directly to the Parliament or the Cabinet Office.

Another issue worth considering is the relocation of HMI Prisons outside the government building to ensure that it is seen as independent by external parties and people in custody.

Independent Monitoring Boards (IMBs)

l) Do you agree that the Chair of the IMBs should be placed in statute? Please give a reason/s for your answer.

Without this role being recognised in legislation, the gulf between the Chair and individual board may increase. As each IMB board act individually, the governance structure, guidance and oversight are likely to be interpreted disparately. We wish for this recognition to increase the trust and respect amongst individual boards and prisoners. Whilst we recognise the importance of placing this role in statute, we also acknowledge the need for some clear safeguarding measures to ensure that the central leadership is balanced in its power and influence on day-to-day work of individual boards. We also hope that this legal recognition strengthens the scrutiny powers of this role in the eyes of the authorities.

In 2018 a new governance structure was put in place to develop a framework agreement with the Ministry of Justice, to clarify their independent role, their relationship with the sponsoring department and ministers. This organisation has existed since 2003, and yet 15 years later clarification was sought. It is essential that this clarification is laid down in legislation.

m) Do you agree that the National Management Board should be placed in statute? Please give a reason/s for your answer.

The IMB Management Board, appointed by the National Chair sets out the overall strategy and corporate business plans for the IMB. Yet the protocol between the MoJ and the IMB does not confer any legal powers or responsibilities. Placing this in statute hopefully will change this oversight.

n) Do you think that the IMBs should be reclassified as a Non-Departmental Public Body? Please give a reason/s for your answer.

The issue of the IMB's independence and effectiveness came up at the consultation meeting with the Lived Experience Advisory Group. There was a mixed feeling about whether the IMBs are viewed as independent bodies from prison structure and the MoJ, often leading to the loss of confidence and credibility among prisoners and families. This was particularly visible among prison leavers from Black, Asian and minority ethnic communities. It was highlighted that voices of the monitors have not been heard or acted upon sufficiently or adequately. Re-classification may lead to a more robust scrutiny body where the perception among service-users that the Ministry of Justice is 'marking its own homework' can be gradually erased.

As noted above, it is worth considering to relocate the IMB outside the government building to ensure that it is seen as independent by external parties and people in custody.

It is clear that a full compliance with OPCAT mandate and fulfilling its role effectively, would require additional resources which should be deemed necessary alongside any meaningful change.

o) Are there any further legislative provisions you'd like to see for the IMBs? Please explain.

In the case of the IMBs, as well as other NPM members, it would be welcomed to see further statutory duty to cooperate with each other and other relevant bodies. This should be considered alongside clear obligations and role under OPCAT.

On the IMB website states that their role is to "monitor the day-to-day life in their local prison or removal centre and ensure proper standards of care and decency are maintained". Many prison

leavers raised the issue of the effectiveness in performing this particular duty in prisons where proper standards of care and proper standards of decency have not been maintained. Although IMBs, as well as other NPM members, should be further divorced from any regulatory powers, it is crucial to consider how their effectiveness is seen from prisoners' perspective, particularly where the conditions remain below acceptable standards.

Lay Observers (Los)

p) Do you agree that the position of Chair should be placed in statute? Please give a reason/s for your answer.

Formalising and putting into statute a role that is ambiguous and which overlaps with other ALB's would not improve or give greater coherence in scrutiny. First there needs to be a clarity of the responsibilities that the Chair holds.

q) Do you agree that the National Council should be placed in statute? Please give a reason/s for your answer.

The National Council is responsible for:

- the fair and open recruitment, training, and professional development of Lay Observers.
- agreeing national policies.
- ensuring that visits are carried out and reports completed.
- bringing concerns to the attention of the contract managers, contractors, and other stakeholders.

Placing the National council in statute would be a route to improvements in transparency, accountability and thus leading to better outcomes.

r) Do you think that the LOs should be reclassified as a Non-Departmental Public Body? Please give a reason/s for your answer.

It is difficult to provide statutory, independent oversight of the treatment and care of detained persons under the care of Prison Escort and custody Service without the greater independence from its sponsors.

s) Are there any further legislative provisions you'd like to see for the LOs? Please explain.

It is not sufficient just to formalise these roles, in statute, the public needs to have a greater awareness of their function. There is very little information on their website, therefore, more transparency is required.

IAP

t) Do you agree that the IAP and its purpose of providing independent advice with the central aim of preventing deaths in custody should be established in legislation? Please give a reason/s for your answer.

Legislation brings clarification and therefore, would further improve the legitimacy of the IAP. Independent advice and expertise are essential on preventing deaths in custody, this role needs to be strengthened.

Merging IMBs and LOs

u) Do you think that the IMBs and LOs should be merged to make one body? Please give a reason/s for your answer.

These two ALB's already share a secretariat, merging them should bring clarity and provide a more streamlined approach to monitoring as they have similar aims and techniques. Combining a Monitoring Framework would provide a consistency of approach, dissemination of good practice and provide effective monitoring. Before a decision is made it is essential to look more carefully various aspects, including any risk of reduced capacity. It is essential that a meaningful consideration is given to key issues if a merger is to be considered.

'The Scottish Model'

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

In principle, simplified yet effective model of scrutiny should be considered. Having three monitoring bodies, all producing reports, on often the same things, might not be a good use of resources. However, for this to operate efficiently, clearly defined roles and responsibilities must be guaranteed and transparency and accountability must be paramount.

The 'Scottish Model' has two distinctive functions of monitoring, a broad and regular checking of prison functions and treatment of prisoners, and inspection, a more thorough and comprehensive scrutiny of how prisons are run. Monitoring is then divided into prevention, direct protection, and documentation. Notwithstanding is the fundamental requirement of continuous improvement.

Despite of some clear advantage of the "Scottish Model", it cannot be considered at this stage without adequate and separate consultation on this matter, particularly with the civil society. Any decision to merge HMI Prisons, the IMBs, and the Lay Observers would have significant implications and risks and it should be subject to an independent expert review in order that all the relevant factors and implications be considered. It is also worth noting that there are some clear cultural and geographical differences that need to be considered.

Any further consideration of the "Scottish Model" should be supported by solid evidence of efficiency which isn't currently available.

The National Preventive Mechanism

OPCAT and meeting the obligations should be the forefront of this consultation and any proposed change.

It is important to provide the NPM a statutory basis which has been the missed opportunity so far. It cannot be overemphasised the crucial role the NPMs play in preventing ill-treatment and human rights abuses in detention settings, and their role, remit and capacity should be strengthened further.

One way of insuring independence and effectiveness is to ensure that the NPM's Chair is selected by the NPM members rather than being the public appointee. This will ensure that the Chair is accountability to the NPM rather than to the Minister.

We would like to see all NPM members have legislative powers consistent with their OPCAT mandate. As mentioned earlier in this document, it is important that the UK NPM members have duty to cooperate with each other.

Other

a) Are there any other models that have not been outlined in this consultation document that you think would work?

Many factors, both internal and external, determine the effectiveness and efficiency of the ALBs. It is strongly recommended that any existing models are considered carefully and through meaningful consultation with civil society. It is possible that the best model would be specifically devised to reflect the specific needs and challenges of the prison system in England and Wales.

b) Do you think we should extend the tenure of our senior public appointees heading up the organisations we sponsor from 3 years to 5 years through non-legislative processes? Please give a reason/s for your answer

It is welcoming proposal to extend the tenure of senior public appointees. It is worth noting that a three-year period is too short to guarantee effective independence and functioning. However, it is recommended that necessary safeguards are introduced to ensure that any long appointments (i.e. 10 years) do not impede progress and limit fresh ideas.