

Prisoner Ombudsman for Northern Ireland Comments on the Justice No. 2 Bill - September 2015

Summary

I welcome the proposals in Part 2 and Schedule 3 of the Justice No 2 Bill. They reflect my aspiration and that of previous Prisoner Ombudsmen that the Office should be placed on a statutory footing. Commencement of the legislation would

- Provide statutory authority for the Prison Ombudsman. This should increase confidence of statutory bodies in sharing information with us;
- Affirm the Office's independence by removing it from prisons legislation;
- Place Northern Ireland in a better position than England & Wales where there is no immediate prospect of the Prisons & Probation Ombudsman being placed on a statutory footing.

The development of Regulations, which will underpin the legislation, will address important procedural matters such as updating Terms of Reference and protocols with the Northern Ireland Prison Service (NIPS) and the South Eastern Health & Social Care Trust (SEHSCT).

The proposals aim to legislate for an "As is" situation. This is in keeping with the traditional model of an Ombudsman as an independent and impartial investigator instead of/before complainants might take more formal action such as approaching the courts via judicial review.

The key proposals are to provide the Ombudsman a right of access to Prison Service witnesses, documents and other material for investigative purposes, as well as the right to publish reports. They do not provide the Ombudsman with powers of enforcement or discipline; and the rights of those subject to investigation are protected.

Background

The Prisoner Ombudsman's Office was set up in 2005 following a review which suggested that establishment of such an office would "*make a valuable contribution to defusing the tensions which are bound to arise in prisons in Northern Ireland.*"

This contribution is fulfilled through two specific functions:

1. Investigate and report on Complaints from prisoners and their visitors; and
2. Investigate and report on Deaths in Custody.

Independent investigation of complaints can help instil in prisoners greater confidence that their welfare is treated seriously and can help reduce tension and promote better relations. The Prisoner Ombudsman's powers regarding investigation of complaints by prisoners or visitors to prison establishments are currently set out in Rule 79 of the Prison & Young Offender Centre (NI) Rules 2009. ***This is unsatisfactory as it is inappropriate for an independent oversight body to be located within prisons legislation.***

In relation to deaths in custody, the Prisoner Ombudsman currently has a “standing commission” from the NIPS. This means he requires an invitation from the Director-General to investigate each time a prisoner dies. ***This is unsatisfactory as it means he has no statutory authority or powers for a duty which the state is required to fulfil under Article 2 of the European Convention on Human Rights.***

Ombudsman investigations into prison deaths are part of a three-pronged process (the other elements being a police investigation and the Coroner’s Inquest) by which the state fulfils its Article 2 duty. This process allows every aspect of a prisoner’s death to be thoroughly and independently explored.

Draft death in custody reports are shared with the NIPS, SEHSCT and the next of kin. Final reports are also sent to the Minister of Justice and the Coroner’s Office, so that the facts plus our analysis and recommendations are shared with those who are directly affected. Our preference is to publish these reports in order to serve the public interest, though we offer to anonymise as publication has to be balanced against legal obligations in respect of data protection and privacy. Next of kin views are therefore important when publication is being considered.

Draft complaint reports are shared with the NIPS and complainants to ensure factual accuracy. Complaint reports are not published in order to protect the privacy of individuals involved. However summaries are included in the annual report and in our bi-annual newsletter which is circulated to prisoners.

We ask the NIPS and SEHSCT to ensure that any identifiable staff who are subject to criticism are provided with an opportunity to view relevant extracts of the draft report and comment on factual accuracy.

Our work is entirely demand-led, which means volumes are unpredictable. During 2014-15 we commenced investigations into three deaths and two serious self-harm incidents in custody. The situation was not as alarming as in England and Wales where there was a 64% increase in self-inflicted deaths in prison from the previous year. We received 1,429 complaints, the vast majority of which came from Maghaberry Prison.

A considerable amount of additional detail about how the Prison Ombudsman Office operates is available in the 2014-15 annual report:

http://www.niprisonerombudsman.com/publications/Annual_Report_2014-15.pdf

Clauses 28-29: The Office and its Functions

The proposed status of the Ombudsman as a corporation sole is similar to other oversight bodies such as Criminal Justice Inspection Northern Ireland. The proposed functions are in keeping with our current role, with the addition of one element at Clauses 34-35.

Clauses 30-31: Complaints

The draft Bill rightly proposes that the NIPS should have an opportunity to respond to complaints in the first instance; and that the Ombudsman can only become involved when a

complainant remains dissatisfied after exhausting the internal procedure. This is the conventional Ombudsman approach. The Office is easily-accessible for prisoners as we provide Freephone and Freepost services.

The subjects about which prisoners can complain, the exclusions and reporting arrangements are appropriate and do not differ materially from current practice.

It is important to clarify that prisoners' complaints about healthcare are not eligible for investigation by the Prison Ombudsman. Instead healthcare complaints must be raised with the SEHSCT. If a complainant is dissatisfied with the Trust response, then they can complain to the Northern Ireland Assembly Ombudsman. This can be confusing for prisoners, but it is the existing statutory position.

The process for referring concerns to the PSNI is outlined at Para 32 (6) in relation to deaths in custody, but does not feature explicitly in the complaints clauses. It is therefore worth clarifying that the Prison Ombudsman would apply the same process in relation to any concerns that arise during complaint investigations.

Clauses 32-33: Deaths in Custody

The proposed legislation would provide the Ombudsman with a statutory power to investigate the actions of NIPS officials in relation to a death in custody. ***This is helpful in strengthening the Office's authority and emphasising its independence.***

There is invariably a healthcare dimension to be considered in death in custody investigations. The Justice No 2 Bill does not propose to change the existing arrangement whereby the Ombudsman investigates healthcare matters on a non-statutory basis under the provisions of a protocol with the SEHSCT. The SEHSCT regards the Ombudsman's role as a duplication of its Serious Adverse Incident (SAI) process which has a statutory basis.

This arrangement poses considerable challenges for the Ombudsman's Office at operational level – essentially it delays access to healthcare information and to Trust staff for interview. We remain in ongoing discussion with the Trust about the arrangement and it is expected to be addressed in greater detail in the Regulations that will underpin the Justice No. 2 Bill. ***Regardless of who conducts death in custody investigations, it is essential that the performance of both the NIPS and the healthcare provider, and the interface between them, be investigated if the state is to properly fulfil its Article 2 responsibility.***

Clauses 34-35 Investigations requested by the Department

This proposal represents new work, but it provides a sensible means to investigate matters that have previously not fallen within the remit of any particular agency.

Clause 36 Powers of Ombudsman

The powers provided in this clause provide a statutory basis for investigations of the NIPS practice and to meet the requirements of Clauses 34-35. They are adequate for those purposes.

Clauses 37 Disclosure of Information

The provisions in this clause seem appropriate.

Clauses 38: Guidance in matters connected to national security

Since Justice was devolved in August 2010 the Prisoner Ombudsman has been required to have regard to guidance issued by the Secretary of State in relation to national security. However the guidance has never needed to be invoked. An updated version of the guidance meets the DoJ's and Northern Ireland Office's requirements without infringing the Prison Ombudsman's independence.

Clauses 39-40: Interpretation and Transitional provision

These provisions are acceptable.

Schedule 3

These provisions are acceptable.

Explanatory & Financial Memorandum

The right of entry to premises, powers of access to documents, power to report, requirement on the Department to respond to recommendations and duty on parties to cooperate are all essential components of an independent Ombudsman's Office. They are clearly articulated here.

The proposed staffing and funding arrangements mirror the existing arrangements which work well.

Other Matters

Proposed Name Change

The Justice No 2 Bill proposes to change the title of the Office from "Prisoner Ombudsman" to "Prison Ombudsman." This would assist at operational level by emphasising the Ombudsman's impartiality to everyone, particularly prisoners, NIPS and SEHSCT staff, while still allowing him to fulfil an advocacy role on prisoners' behalf. Useful analogies to be found elsewhere include e.g. the Pensions Ombudsman and the Prisons & Probation Ombudsman.

Cooperation with other oversight bodies

This office remains willing to work collaboratively with other oversight bodies, such as the Criminal Justice Inspectorate, the Northern Ireland Ombudsman and the Regulation & Quality Improvement Authority, in order to improve prison services in Northern Ireland.