2020

Introduction

The Criminal Justice Alliance (CJA) is a coalition of 160 organisations – including charities, think tanks, research institutions and staff associations – working across the Criminal Justice System (CJS). The CJA works to achieve a fair and effective CJS which is safe, smart, person-centred, restorative and trusted.

We welcome the opportunity to respond to this important consultation. One of our strategic workstreams is focused on scrutiny and accountability. In 2019, the CJA launched its 'Stop & Scrutinise' report, which looked at how community scrutiny of stop and search can be used to hold the police to account.

The briefing highlighted four key principles for effective community scrutiny: it must be independent and empowered, informed, representative and open and visible. These principles have been taken onboard and expanded by the College of Policing as part of new guidance on community engagement and scrutiny.

There are many ways in which the current national monitoring framework fails to fully meet this criteria and therefore we would urge the Ministry of Justice to look more thoroughly at the whole issue of scrutiny and accountability. We were particularly concerned that this consultation did not provide sufficient data, information and time to properly evaluate disadvantages and advantages of the Scottish model in England and Wales. We have set out our concerns and recommendations below, drawing on the expertise of our Scrutiny Expert Group.

Prison & Probation Ombudsman (PPO)

Do you agree that the PPO should be established in legislation?

YES.

We agree that the PPO should be established in legislation as this would provide a level of assurance and important practical protections such as unfettered access to data and information. Placing the PPO in legislation can also play a critical role in determining the scope of the recommendations it produces and ultimately holding stakeholders to account. Putting the PPO on a statutory footing would also reinforce the PPO's actual and visible independence.

Do you agree that a statutory power should be created for the PPO to access places, people and documents?

YES.

We agree that a statutory power should be created for the PPO to access places, people and documents; in particular, the power to compel witnesses to provide statements during investigations. Under this statutory power, witnesses would be compelled to attend an interview to answer questions or provide information.

The absence of this power restricts the PPO's basic function, which is to investigate fatal incidents and complaints. The consequence of such restrictions means that potentially crucial evidence is not collected which could influence outcomes and / or recommendations.

Do you think that the PPO should be reclassified as a Non-Departmental Public Body?

YES.

The reclassification of the PPO as a Non-Departmental Public Body would help foster trust and confidence. The Lammy Review noted a 'trust deficit' in the CJS among black, Asian and ethnic minority communities, many of whom are overrepresented in the CJS. In the 2017/18 annual report, the PPO highlighted that '*although the majority of complaints (58%) come from white complainants, black and Asian complainants are over-represented compared with their populations in prison... black prisoners make up 13% of the total prison population but account for 18% of complaints to the PPO'*. Furthermore '*Asian prisoners make up 8% of the total prison population but account for 12% of complaints to the PPO'*.

The annual report from the PPO also highlights that a disproportionally small number of complaints come from women – in 2018/19, the PPO completed investigations into just 41 complaints from women. The PPO is currently undertaking further research into the experience of women and black, Asian and minority ethnic complainants with focus groups and interviews with people in prison. It is vital women and black, Asian and minority ethnic people in prison have trust and confidence in the PPO. Reclassifying the PPO as a Non-Departmental Public Body, thereby clarifying its independence, would help strengthen trust, promote openness, and encourage complainants to raise concerns.

At present the PPO receives funding from the Ministry of Justice (MoJ) and the Home Office. Despite the PPO's operational work being independent of the MoJ, the fact that it is funded by the MoJ and Home Office means that the PPO is not wholly independent. It is for this reason that the PPO cannot be a member of the Ombudsman Association. As noted in the protocol between the MoJ and the PPO, '*the real, perceived and visible independence of the PPO from the MoJ and authorities in its remit is fundamental to the purpose and function of the PPO'*. In reclassifying the PPO as a Non-Departmental Body, we would also like to see consideration given to possible alternative funding arrangements so that the PPO is not financially dependent on the department it is scrutinising.

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

YES.

Recommendations for improvements following a fatal incident or investigation of complaints are frequently repeated. The PPO's 2018/19 annual report stated that the PPO continues to make the same recommendations repeatedly, '*at times in the same establishments, often after those recommendations have previously been accepted and action plans agreed to implement them*'. Making recommendations for policy and practice is an integral part of the PPO's work. There needs to be a stronger impact in practice to act on these recommendations and improve outcomes for people in prison and on probation.

We would like to see consideration given to the means by which repeated policy recommendations, particularly those related to fatal incidents, are made binding and ensure that adequate resources are provided. Practice failures and concerns need to be addressed urgently and sufficiently in order for the PPO to be effective. To amplify the independence of the PPO, consideration should also be given to the possibility of it reporting directly to Parliament rather than the department it is scrutinising.

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

Do you agree that the 'Inspectorate' should be recognised in statute?

YES.

We are in favour of placing the prisons inspectorate in statute as this would strengthen its independence and provide a greater ability to fulfil its function as outlined in the United Nations Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

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?

YES.

We agree that the HMI Prisons should be given statutory power to access places, people, and documents. This would grant the inspectorate unfettered access to vital information which could be crucial to the treatment and outcomes of people in prison.

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

YES.

The reclassification of HMI Prisons would result in greater perceived and visible independence. As with the PPO, the inspectorate currently receives funding from the MoJ and therefore is not wholly independent. In reclassifying HMI Prisons as a Non-Departmental Body, we would also like to see consideration given to alternative funding arrangements so that the inspectorate is not financially dependent on the department it is scrutinising.

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

YES.

To amplify the independence of HMI Prisons, consideration should be given to the possibility of it reporting directly to Parliament rather than the department it is scrutinising.

Independent Monitoring Boards (IMBs)

Do you agree that the Chair of the IMBs should be placed in statute?

YES.

We are in favour of a remunerated Chair who is appointed by the Secretary of State to be placed in statute. This would provide assurance of leadership for IMBs.

Do you agree that the National Management Board should be placed in statute?

YES.

We are in favour of providing statutory status to the National Management Board. This would strengthen its credibility and authority.

Do you think that the IMBs should be reclassified as a Non-Departmental Public Body?

YES.

We are concerned that the independent status of the IMBs is compromised by a reliance on civil servants in the Secretariat. This could erode trust and compromise the independence of the office. For example, IMBs launched a new hotline for people in prison to report concerns during the pandemic. The helpline was very beneficial in providing a continued service to people in prison and real-time information to ministers on how the crisis was being managed within prisons, allowing shortcomings in provision to be addressed more quickly. However, we understand that calls to the helpline made out of hours go to the Secretariat's answer phone. A civil servant from the Secretariat will then listen to the voicemail before transferring it to the respective IMB. Reclassifying the IMB as a Non-Departmental Public Body would help improve its independence.

Are there any further legislative provisions you'd like to see for the IMBs?

YES.

At present each IMB produces an annual report to help ministers understand how prison rules and regulations are being observed and working in practice. IMBs do not receive a direct response to matters they highlight that warrant further action. In 2017 the National Council for Independent Monitoring Boards noted such concerns in a written submission to the Justice Select Committee inquiry on Prison Reform Independent Scrutiny and commented that: *'IMBs share with HMI Prisons and the PPO concern about the ways that their evaluations, reports and (where appropriate) recommendations too often fail to get a constructive, considered response. As a consequence, opportunities to improve the fairness and humanity of treatment and to increase the quality of preparation for release are being lost.'* It is important that IMBs have the power to challenge ministers to ensure recommendations from Boards are considered and meet with an appropriate response. If they are effectively to be the 'eyes and ears' of the Secretary of State, then ministers must review and act on concerns reported by IMBs. Likewise, responses must be prompt.

There is a need for evidence that IMB reports make an impact and their concerns have been addressed. We would therefore like to see legislative provisions that place a requirement on ministers to respond to IMB reports and concerns within a statutory time limit, to demonstrate the intelligence they receive is being acted on. Furthermore, to amplify the independence of the IMB, consideration should also be given to the possibility of it reporting directly to Parliament rather than the department it is scrutinising.

Merging IMBs and Lay Observers (LOs)

Do you think that the IMBs and LOs should be merged to make one body?

NOT SURE.

The IMBs and LOs are currently managed by the same Secretariat. It is unclear how the proposed merger would impact the monitoring framework. We would therefore like to see further information on how resources will be distributed between the two bodies and how the respective bodies will maintain their independence.

Independent Advisory Panel on Deaths in Custody (IAP)

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?

YES.

We are in support of placing the IAP on a statutory footing as this would further improve the legitimacy and independence of its work. We also echo the Prison Reform Trust's recommendation that '*all major policy decisions affecting the welfare of people in custody should be subject to a safety impact assessment, and that the IAP should have a role in assessing the adequacy of those assessments and the implementation of any mitigating measures that they contain'*.

'The Scottish Model'

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?

NOT SURE.

Penal arrangements in Scotland are very different from those in England and Wales. This is the product of size, geography and administrative culture. The Scottish prison system is relatively small compared to that in England and Wales and relationships between administrators and office holders are by tradition much more intimate. We are not aware of a detailed appraisal of how the new Scottish model is working in practice and what has been gained, or possibly lost, as a result of the new arrangements. We are uncertain whether the adoption of the Scottish model would, if applied in England and Wales, address ongoing concerns about the efficiency and effectiveness of the current scrutiny framework in England and Wales.

One of the barriers to efficiency and effectiveness is the process of information sharing and joint working between the IMBs, the HMI Prisons and the PPO. During the pandemic we understand there was an increased level of information sharing and triangulating data between these bodies which is a positive and welcome development. However, there are currently no formal structures in place for information sharing and joint working to happen more regularly and beyond the time of the pandemic. We would like to see more formalised protocols in place and for this to be evaluated to better understand if a merger is desirable, or if better protocols would help address the need for better joint working instead.

IMBs are often having to make repeat recommendations in annual reports because earlier responses or the action that follows is inadequate. The limited response by ministers undermines the intensive nature of the production of reports. This is further frustrated by the lack of awareness and importance of the role of IMBs by those in prison and staff, magnifying mistrust and confidence in Boards. We would like to see more binding recommendations and timescales for responding (as noted above) and for this to be evaluated in order to better understand if a merger is desirable or if this would help address the concerns around repeat recommendations instead.

At present the UK has one of the most complicated monitoring frameworks for the CJS in Europe. We recognise that diversity also brings benefits, such as increased capacity to carry out monitoring on a day to day basis through the hard work of volunteers across the country. It is a complex system and the National Preventative Mechanism is made up of 21 statutory bodies with each of these reporting and producing information differently. It might be that introducing the Scottish model would simplify some of this reporting and introduce a greater level of consistency to the standards being applied by the different IMBs in England and Wales. However greater consistency could be achieved without a full merger, for example through the use of agreed protocols and / or frameworks and we would therefore like to see these piloted and evaluated.

A merger has the potential to create more direct and immediate reportage between the HMI Prisons and those on the ground. Currently prisons holding adults and young adults are inspected by HMI Prisons once every five years, whereas IMBs are in the prison every week. There is not currently any way in which an IMB with serious concerns could 'trigger' a full inspection of a prison by HMI Prisons. Better join up, for example including the ability to trigger a full inspection, could lead to a more intelligence-led approach to inspections. However, as noted above, it is not clear that a full merger is required to achieve this, which could potentially be resolved through better joint working protocols and information sharing agreements.

We are concerned that a merger would be a big step change, and although we have highlighted concerns with the current scrutiny framework, this consultation does not provide enough data, information and time to adequately evaluate disadvantages and advantages of the Scottish model in England and Wales. We would like to see a further consultation on the adoption of the Scottish model, with more information and a longer timeframe, so that opinions can be gathered from a wider range of key stakeholders, including service users. We would also like to see an independent assessment or evaluation of how the Scottish model is working in practice and what impact it has had, an impact assessment for the proposed merger and an Equality Impact Assessment. We have made several suggestions above, regarding the binding nature of recommendations, adequate resourcing, response timeframes and joint working protocols which may go some way to addressing some of our concerns. Therefore, a consultation would also need to assess whether any of these solutions have been adopted and their impact.

Other

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

Independent oversight of Courts

In December 2009, the government announced its intention to abolish the Inspectorate of Court Administration. This decision was confirmed as part of the review of Arm's Length Bodies in 2010. It was argued at the time that Her Majesty's Courts and Tribunal Service (HMCTS) had sufficient processes in place to negate the need for an independent inspectorate. We are concerned, however, that since 2010 there has been no independent scrutiny mechanism for the courts.

A performance tracker of courts in England and Wales by the Institute for Government in 2019 noted: '*A reduction in spending and a rise in case complexity have forced the courts to adapt and reform – a process that has prompted widespread concerns about the quality of justice now being dispensed across the UK*.' There has been a significant increase in the permanent closure of court buildings over the past decade, with many being sold off.

Half of magistrates' courts open in 2010 have since closed (162 out of 323). While fewer Crown Courts have been closed (eight out of 92), the use of Crown Court buildings has fallen since 2010/11. Another issue is that the number of days that Crown Courts are used to hear cases (sitting days) declined from 110,969 in 2010/11 to 101,689 in 2018/19. There are also ongoing concerns about the remaining court buildings being outdated and unfit for purpose. HMCTS highlighted in its latest annual report that it would be '*investing in larger-scale structural projects such as making sure that roofs aren't leaking and lifts are being fixed*.'

These are urgent issues which has been magnified by the COVID-19 outbreak. We understand various issues have arisen around the administration of the courts and the services available to victims, witnesses, defendants, and the legal profession, which would benefit from additional monitoring and scrutiny. The use of Nightingale courts, which are not purpose-built courts, has created safeguarding issues. For example, in an ordinary court setting, the victim has the right to enter the court building through a separate entrance from the defendant and their family, but CJA members have told us this is not always possible in a Nightingale court, causing distress of victims and witnesses. If there was independent oversight of the courts such concerns could have been more quickly highlighted and better addressed.

While we applaud efforts to keep the CJS functioning during the pandemic, there is a need for independent scrutiny to assess the impact of such measures. In particular, the use of technology for virtual hearings should be assessed to ensure that there is equal access and that it does not create poorer outcomes for victims or defendants.

We were pleased to see the roll out of Bail Information Services by Her Majesty's Prison and Probation Service in April, but we are concerned about the removal of this in August without warning or justification. These services are now only available on a 'reactive basis' at the request of the court, despite positive outcomes from earlier pilot sites in reducing the use of remand, which should be a priority, particularly during a pandemic. Independent scrutiny could have monitored how such services were being used and any concerns.

Therefore, we would like to see independent oversight of the courts re-established with adequate resources and clear objectives for scrutiny of issues which impact victims, witnesses, defendants and the legal profession. While this would involve the introduction of another scrutiny body and therefore add further complexities, this mechanism would help monitor and improve crucial issues such as those mentioned above.

<u>Community scrutiny of probation</u>

Probation remains the part of the CJS that does not have an independent community scrutiny mechanism. In 2014, the government put into force plans to change the way the probation service was managed. Before the reforms came into effect, there were Probation Boards which provided the community scrutiny function. Since the establishment of Community Rehabilitation Companies (CRC) this community scrutiny function was eliminated. The MoJ's upcoming overhaul of the probation service provides an opportunity to re-establish a community scrutiny mechanism which places emphasis on service user involvement and would help ensure reforms do not impact the quality of supervision. While HMI Probation inspect each provider annually, there is a need for more regular scrutiny, in particular at a time of such change. A community scrutiny mechanism would be in regular contact with staff and service users and could be beneficial for providing intelligence to HMI Probation and improving outcomes for those on probation.

During the pandemic, there was a lack of national scrutiny as inspections were halted, so a community scrutiny mechanism could have provided additional capacity, as the IMB helpline provided to people in prisons. This led to a lack of transparency and scrutiny about the impact of the pandemic and the response of the National Probation Service and CRCs, whereas prisons had short inspection visits and the IMB helpline gave valuable intelligence on issues and could highlight good practice.

In the 2018/19 annual report, the PPO noted that it had '*received 38 complaints from probation supervisees that were eligible for investigation this year, 31% fewer than in 2017/18'*. It went on to state that it is unclear why there had been a decrease, but that it intends to explore this further. A community scrutiny mechanism would help to understand the reason for the significant decrease, but also the low level of complaints more generally. It could engage service users on probation through phone calls, attending probation waiting rooms or through site visits to people doing community sentences. Therefore, we would like to see a community scrutiny mechanism for probation developed that is adequately resourced and representative of its service users.

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?

YES.

We agree that the tenure of our public appointees should be changed from three years to five years to provide greater consistency and sufficient time for them to set and deliver longer-term strategic goals and organisational priorities.

The National Preventive Mechanism (NPM)

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

We would welcome placing the National Preventative Mechanism (NPM) in statute. The primary purpose of the NPM is to prevent cruel, inhumane and degrading treatment of those deprived of their liberty. We believe that the NPM should be funded by government as an organisation in its own right and that its Secretariat should be more generously resourced than at present, in order to make it more effective.

The views expressed in this briefing are not necessarily those of any individual member or funder of the CJA.

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