



The Scottish Parliament  
Pàrlamaid na h-Alba

## **Justice Committee**

**1st Report, 2014 (Session 4)**

# **Proposed draft Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014**

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The Scottish Parliament  
Pàrlamaid na h-Alba

## **Justice Committee**

### **Remit and membership**

#### **Remit:**

To consider and report on:

- a) the administration of criminal and civil justice, community safety and other matters falling within the responsibility of the Cabinet Secretary for Justice; and
- b) the functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

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**Justice Committee**

**1st Report, 2014 (Session 4)**

**Proposed draft Public Services Reform (Prison Visiting Committees)  
(Scotland) Order 2014**

The Committee reports to the Parliament as follows—

INTRODUCTION

**The Order**

1. The proposed draft Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014 (“the draft Order”) was laid on 4 October 2013. A revised Explanatory Document was laid on 6 November 2013.<sup>1</sup>

*Super-affirmative procedure*

2. The proposed order was laid under the ‘super-affirmative procedure’ set out in section 26 of the Public Services Reform (Scotland) Act 2010. The procedure set out in this section allows the Parliament to scrutinise a draft of a Scottish statutory instrument (“SSI”), such as this draft Order, which will be subject to the affirmative procedure, and to propose amendments to the SSI. This is a precursor to the finalised SSI being laid before the Parliament under the affirmative procedure.

*Proposed structure of prison monitoring*

3. The draft Order makes amendments to the Prisons (Scotland) Act 1989 to abolish Prison Visiting Committees and create the roles of prison monitors and lay monitors. Both prison monitors and lay monitors will be appointed by Her Majesty’s Chief Inspector of Prisons Scotland (“the Chief Inspector”).

4. The draft Order makes changes to the Chief Inspector’s statutory role. These changes would bring the monitoring of prisons under his or her oversight, while retaining the Chief Inspector’s inspection functions.

5. Under the terms of the order, prison monitors would monitor and report on prison conditions and the treatment of prisoners within the prison. They would visit the prison or prisons to which they are assigned at least once a month. Without

<sup>1</sup> The Scottish Parliament. *Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014* Available at:  
<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/68697.aspx>

prior notice, prison monitors would have access to any part of those prisons and be able to speak to any prisoner, prison staff or prison visitor and examine records. Prison monitors would report to the Chief Inspector who may also pay them a salary and allowances. Lay monitors would assist prison monitors in their role.

## **Background**

### *Prison Visiting Committees*

6. Prison Visiting Committees (“VCs”) are statutory bodies which comprise of unpaid volunteers appointed to monitor conditions in prisons and to hear and investigate requests and complaints made by prisoners.

7. The main functions of VCs are for their members to frequently visit prisons and hear any complaints that may be made by prisoners. VC members must report matters to the Scottish Ministers as they see appropriate and they must be given free access to prisons and prisoners at any time.

8. During prison visits, VC members should inspect and taste the food provided to prisoners to ensure that it is of a good standard and that the kitchens and associated areas are clean. VC members should also pay particular attention to the living accommodation, gym, washrooms, workshops, education and social work facilities, reception, health suite, and segregation facilities at the prison.

9. VC members must also hear any application from a prisoner who has a request or a complaint and any interview with the prisoner must be conducted outwith the sight and hearing of prison officers. This part of the VC members’ role is central to the work of the committees. The nature of the prisoners’ complaints may cover all aspects of prison life, such as family visits and correspondence, welfare problems, transfer, prisons conditions, access to education and workshops, punishments or medical treatment.

### *Coyle Review*

10. In his Review of Proposals to Improve Arrangements for Independent Monitoring of Prisons<sup>2</sup>, Professor Andrew Coyle recommended that VCs should be abolished and replaced with a new system of voluntary independent monitors, to be appointed thorough a transparent process for specified periods and with a clearly defined role. He outlined a number of options for how the new system of independent monitoring could be structured, but did not specify a preferred option.

11. Professor Coyle stated that current arrangements for prison monitoring in Scotland do not meet the standards required by the Optional Protocol to the UN Convention Against Torture (“OPCAT”)<sup>3</sup>, but noted that, if his recommendations were implemented, Scotland would in future have a robust system for independent monitoring. All countries which ratify OPCAT legally bind themselves, under Article 17, to allowing visits by the UN Subcommittee for the Prevention of Torture

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<sup>2</sup> Coyle, A (2013) *Review of Proposals to Improve Arrangements for Independent Monitoring of Prisons* Available at: <http://www.scotland.gov.uk/Publications/2013/02/4584>

<sup>3</sup> United Nations High Commissioner for Human Rights. *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx>

to all places where people are deprived of their liberty and also to establishing “one or several independent national preventive mechanisms for the prevention of torture at the domestic level”.

12. The draft Order stems from the Scottish Government’s commitment to take forward reform of the system for the independent monitoring of prisons which would meet the Government’s obligations under OPCAT, following the Coyle Review.

## JUSTICE COMMITTEE SCRUTINY

### Background

13. The Justice Committee considered its approach to the draft Order at its meeting on 8 October 2013. It agreed to issue a call for written views on the draft Order and also to take oral evidence. The Committee received 29 responses to its call for evidence<sup>4</sup> and took oral evidence from a number of stakeholders on 20 November 2013.

### OPCAT compliance

14. Scotland’s current system of prison monitoring through the local VCs is not compliant with OPCAT. Professor Coyle explained that—

“It is important to understand that that is solely because the budget for their work sits with the Scottish Prison Service; it is not any judgment on the independent monitoring that they do.”<sup>5</sup>

15. The Committee heard evidence that the new structure, where monitors will be funded through HM Inspectorate of Prisons Scotland (“HMIPS”) will meet the requirements of OPCAT.

**16. The Committee welcomes the proposal to remove the funding and support of independent monitoring of prisons from the Scottish Prison Service thereby ensuring that prison monitoring in Scotland becomes OPCAT compliant.**

17. As noted above, OPCAT requires states to designate a ‘national preventive mechanism’ (NPM). The UK’s NPM is a body with 18 members, including HMIPS and the Scottish Human Rights Commission, and is co-ordinated through HM Inspectorate of Prisons for England and Wales. VCs are not currently members of the NPM because they are not OPCAT compliant.

### Independence of prison monitoring

18. Many respondents to the call for written views argued that the ideal approach to national preventive mechanisms was through a layered approach, including both monitoring and inspection as two distinct elements. This reflected the view of

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<sup>4</sup> All of the responses to the Committee’s call for evidence can be found here: <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/69498.aspx>

<sup>5</sup> Scottish Parliament Justice Committee. *Official Report*, 20 November 2013, Col 3758.

Nick Hardwick, HM Chief Inspector of Prisons for England and Wales, who, in his capacity as the head of the UK's NPM stated—

“The lay monitoring body provides a frequency of visiting that cannot be achieved by a professional inspectorate. The *regular* monitoring of detention is a key requirement of OPCAT (Article 19(a)). Moreover, monitoring by lay bodies helps to address general recommendations from the [UN's Subcommittee on Prevention of Torture] that civil society be involved in the work of the National Preventive Mechanism. The lay body publishes an annual report which, rather than being a snapshot of the prison at the time of an inspection, paints a picture of an establishment over the course of a year. The monitoring of the lay body complements the monitoring of the inspectorate and vice versa. In our view, it is these layers of monitoring that, in total, meet the OPCAT requirements.”<sup>6</sup>

19. Concerns were raised that the proposed structure undermines the distinction between inspection and monitoring of prisons. The Association of Visiting Committees (AVC) stated that there is a risk that “monitoring will end up as ongoing inspection” under the proposed structure.<sup>7</sup> Some respondents disagreed, in principle, with the prison monitoring function coming under the auspices of the Chief Inspector; for example, HMP Inverness Visiting Committee argued that the independence of VCs would be compromised.<sup>8</sup>

20. Joan Fraser from the AVC questioned the need to incorporate prison monitoring into HMIPS and to radically change the current situation. She claimed that funding of VCs could have been changed easily and that greater co-operation between VCs and HMIPS could have been achieved through a protocol between the bodies without the need to “turn the whole thing upside down”.<sup>9</sup>

21. While the AVC does not believe that the integration of inspection and monitoring is the best option, it said in its written submission “if the role of HMIP were to be rigorously circumscribed in legislation so that it fulfilled a support role with regard to monitoring but was not permitted to influence the work and priorities of independent monitors, then it might be a workable option.”<sup>10</sup>

22. The Chief Inspector, David Strang, recognised the distinct and separate functions of inspection and monitoring. He argued that there would be benefits of having the two functions undertaken within the same organisation; with better co-ordination and communication, there will be less duplication and both functions could inform and complement the work of the other.<sup>11</sup>

23. The draft Order inserts sections 7A and 7B into the Prisons (Scotland) Act 1989. The new subsections 7A(5) and 7B(4) state, respectively, that prison monitors must comply with instructions of the Chief Inspector and that lay monitors

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<sup>6</sup> Coyle, A (2013) *Review of Proposals to Improve Arrangements for Independent Monitoring of Prisons* (pp. 35) Available at: <http://www.scotland.gov.uk/Publications/2013/02/4584>

<sup>7</sup> Association of Visiting Committees. Written submission (8 November 2013).

<sup>8</sup> HMP Inverness Visiting Committee. Written submission (7 November 2013).

<sup>9</sup> Scottish Parliament Justice Committee. *Official Report, 20 November 2013*, Col 3771.

<sup>10</sup> Association of Visiting Committees. Written submission (8 November 2013).

<sup>11</sup> Scottish Parliament Justice Committee. *Official Report, 20 November 2013*, Cols 3770-3771.

must comply with instructions of prison monitors. Those subsections also state that both types of monitors must take account of any guidance on the monitoring of prisons published by the Chief Inspector.

24. Professor Coyle raised concerns that the powers given to the Chief Inspector to instruct monitors go too far in eliding the distinction between inspection and monitoring<sup>12</sup> and suggested that the requirement of monitors to comply with instructions should be replaced with a requirement to co-operate with the Chief Inspector<sup>13</sup>.

25. Diego Quiroz, from the Scottish Human Rights Commission (“SHRC”), echoed the view of Nick Hardwick that taken together monitoring and inspection “provide an effective means of preserving human rights and preventing abuse in prisons”. Mr Quiroz went on to say that “it is vital that the monitoring role does not get lost or subsumed within inspection work”.<sup>14</sup>

26. The structure proposed was particularly unwelcome to the AVC. Joan Fraser argued that it undermines the independence of prison monitoring and that monitors “could be instructed not to do certain things because they would be awkward or embarrassing”. She was clear that she did not expect the current Chief Inspector to act in such a way and argued that the legislation should be “future proofed and person proofed”.<sup>15</sup> The SHRC took the same view.<sup>16</sup>

27. David Strang stated that he envisaged co-operation to be a key feature of the new structure. He said “I do not anticipate wagging my finger and telling [monitors] that they will do something”; he continued “if the approach is to be successful, it must be co-operative and the prison monitors need to offer support”. Mr Strang suggested that the word “instruct” is used in the order for technical reasons.<sup>17</sup>

28. However, Mr Strang expressed concern that if there was not the power to instruct independent monitors, they may not co-operate. He continued—

“Our ambition is to ensure consistent and high-quality monitoring and good recruitment and training, and the proposed draft order as it is written would simply [give] the authority to implement a good system across the country.”<sup>18</sup>

29. The Scottish Government stated that bringing independent monitoring under the auspices of the Chief Inspector “introduces oversight and leadership from an individual already working in the field” and “plays to existing strengths”.<sup>19</sup>

30. When the Scottish Government responded to the Coyle Review, an important element of the proposed structure of support and oversight of prison monitoring

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<sup>12</sup> Professor Coyle. Written submission (3 November 2013).

<sup>13</sup> Scottish Parliament Justice Committee. *Official Report, 20 November 2013*, Col 3758.

<sup>14</sup> Scottish Parliament Justice Committee. *Official Report, 20 November 2013*, Col 3770.

<sup>15</sup> Scottish Parliament Justice Committee. *Official Report, 20 November 2013*, Col 3762.

<sup>16</sup> Scottish Parliament Justice Committee. *Official Report, 20 November 2013*, Col 3763.

<sup>17</sup> Scottish Parliament Justice Committee. *Official Report, 20 November 2013*, Cols 3761-3762.

<sup>18</sup> Scottish Parliament Justice Committee. *Official Report, 20 November 2013*, Col 3767.

<sup>19</sup> Explanatory document. Paragraph 3-19.

was to be undertaken by the establishment of an advisory group. The Scottish Government said—

“An Advisory Group comprising representatives from the Justice sector will be constituted with responsibility for monitoring, appointments and training.”<sup>20</sup>

31. In the same document, the Scottish Government also said—

“The Inspectors and Prison Monitors will be required to work to common standards. If these standards are to support independence and representativeness, it is not sufficient that they satisfy only HMCIP. They clearly need to be derived from current law and to reflect policy, international and professional guidance and research but they should also be subjected to critical examination by the Advisory Group.”<sup>21</sup>

**32. The Committee agrees that the functions of monitoring and inspection are distinct and complementary. The Committee also agrees that there would be benefits in the two functions working together within the same organisation. The Committee welcomes the goal of improving the consistency and quality of the monitoring of prisons.**

**33. However, the Committee believes that the operational independence of prison monitors is essential and this may be perceived to be compromised if HMIPS instructs and also pays them.**

**34. The Committee requires clarification from the Scottish Government on how it now envisages the distinctiveness of monitoring to be “future proofed and person proofed”; and how the draft Order will achieve the independence and representativeness of monitoring. The Committee would welcome more information on how the proposed advisory group will be constituted, whether it will have responsibility for monitoring and appointments and, if so, that these duties should be explicit in the draft Order.**

### **Prison monitors and lay monitors**

35. The draft Order will create two types of monitors. A small number of ‘prison monitors’, who will be salaried and will be assigned to certain prisons, and ‘lay monitors’ who will be expected to assist prison monitors with their monitoring duties. Lay monitors will have the power to hear complaints from prisoners, while prison monitors will not.

36. Professor Coyle described the idea of two-tiers of monitors as novel, unnecessary and expensive<sup>22</sup>; he did, however, accept that HMIPS would need additional resource to assist and co-ordinate the lay monitors’ work<sup>23</sup>. He went on

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<sup>20</sup> The Scottish Government (2013). *Response to the Review of Proposals to Improve Arrangements for Independent Monitoring of Prisons* (paragraph 41) Available at: <http://www.scotland.gov.uk/Resource/0042/00420798.pdf>

<sup>21</sup> The Scottish Government (2013). *Response to the Review of Proposals to Improve Arrangements for Independent Monitoring of Prisons* (paragraph 32) Available at: <http://www.scotland.gov.uk/Resource/0042/00420798.pdf>

<sup>22</sup> Professor Coyle. Written submission (3 November 2013).

<sup>23</sup> Scottish Parliament Justice Committee. *Official Report, 20 November 2013*, Col 3769.

to question the strategic thinking behind the proposal of two types of monitors.<sup>24</sup> He said—

“All we need is a single tier of independent monitors for each prison.”<sup>25</sup>

37. Joan Fraser argued that the draft Order should be changed to make it clear that the support provided by HMIPS to lay monitors is “there to ensure proper operation of independent monitoring by lay monitors”.<sup>26</sup>

38. Particular concerns were raised by a number of people about the differing powers of monitors in relation to hearing complaints. Lisa Mackenzie from the Howard League for Penal Reform Scotland speculated that this could either be an oversight or because paid monitors would visit prisons infrequently, and said that the distinction would be a source of confusion for prisoners wishing to make a complaint. She added that while administrative support for monitors is required, the Howard League questioned the value of having paid monitors.<sup>27</sup>

39. Joan Fraser argued that prisoners do not have faith in public servants and would not trust paid monitors, whereas they currently do trust volunteer members of VCs. She said, “I think that a hierarchy in which paid monitors oversaw the activities of lay monitors would result in prisoners not trusting any of it”.<sup>28</sup>

40. In its written submission, the AVC stated that recruitment of lay monitors would be difficult if the role is “subordinate to the paid monitors” and that VC members “are unlikely to be attracted to a role which is effectively one of unpaid help, being told when and where to monitor and how.”<sup>29</sup>

41. David Strang expressed his support for the creation of paid monitors. He argued that there would be benefits from having the people who will support lay monitors to also be monitors and have experience of visiting prisons. He stated that this will ensure that “they will have a higher level of credibility and better awareness and knowledge of the business of monitoring”.<sup>30</sup>

42. In response to an oral question at General Questions on 12 December 2013, the Cabinet Secretary for Justice said that—

“The Government, supported by Her Majesty’s chief inspector of prisons for Scotland, whom I met just last week, believes that the introduction of paid monitors to oversee the work of lay monitors will be an essential part of the new system. The paid monitors will perform a secretariat function, which will ensure that the system of independent monitoring is robust, accountable and consistent throughout Scotland.”<sup>31</sup>

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<sup>24</sup> Scottish Parliament Justice Committee. *Official Report*, 20 November 2013, Col 3769.

<sup>25</sup> Scottish Parliament Justice Committee. *Official Report*, 20 November 2013, Col 3758.

<sup>26</sup> Scottish Parliament Justice Committee. *Official Report*, 20 November 2013, Col 3766.

<sup>27</sup> Scottish Parliament Justice Committee. *Official Report*, 20 November 2013, Col 3765.

<sup>28</sup> Scottish Parliament Justice Committee. *Official Report*, 20 November 2013, Cols 3766 - 3767.

<sup>29</sup> Association of Visiting Committees. Written submission (8 November 2013).

<sup>30</sup> Scottish Parliament Justice Committee. *Official Report*, 20 November 2013, Col 3768.

<sup>31</sup> Scottish Parliament. *Official Report*, 12 December 2013, Col 25660.

43. **The Committee welcomes the commitment to provide administrative and secretariat support to independent prison monitors. The Committee has heard evidence of significant opposition to the creation of paid monitors additionally of their managerial role over volunteer monitors. The Committee questions the need for paid monitors and indeed their managerial role and requires more details from the Scottish Government on the benefits of both.**

44. **The Committee asks the Scottish Government to respond to the views expressed that having two layers of monitors could adversely affect the trust prisoners have for monitors and the willingness of people to volunteer to be lay monitors.**

45. **The Committee would also welcome clarification from the Scottish Government of why there is a difference in the powers of prison monitors and lay monitors to hear complaints from prisoners, which would seem to cause unnecessary confusion and complexity.**

#### **Detail in the order**

46. Many respondents gave evidence to the Committee that the level of detail in the draft Order is insufficient. The Chief Inspector said that he has been reassured that much of the detail of how the new system will work and indeed some of the apparatus of the new system, such as the advisory group, will be “part of the implementation”.<sup>32</sup>

47. Diego Quiroz noted that, as secondary legislation, one may expect to find more detail in the draft Order.<sup>33</sup> The SHRC’s written submission argued that certain duties under OPCAT should be expressed in the legislation. It said—

“Best practice suggests that the legislation establishing the new structure should be both comprehensive and clear enough to enable both the Chief Inspector for Prisons and new monitors to conduct their statutory function. A clear legal framework would also guarantee the independence of the new structure.”<sup>34</sup>

48. The SHRC suggested that more detail could be included in the draft Order regarding: roles and responsibilities of monitors; the duration of office and appointment process; the composition of the membership of the new organisation (especially in terms of the expertise and gender and ethnic balance); funding of the lay monitors; and the immunities and privileges of the monitors.<sup>35</sup>

49. **The Committee agrees that more detail in legislation would provide clarity and security of independence. The Committee recommends that the Scottish Government considers incorporating more detail into the Order in all or any of the areas suggested by the SHRC.**

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<sup>32</sup> Scottish Parliament Justice Committee. *Official Report, 20 November 2013*, Col 3762.

<sup>33</sup> Scottish Parliament Justice Committee. *Official Report, 20 November 2013*, Col 3763.

<sup>34</sup> Scottish Human Rights Commission. Written submission (11 November 2013).

<sup>35</sup> Scottish Human Rights Commission. Written submission (11 November 2013).

50. There were two areas where others raised particular concerns at the level of detail in the draft Order. Those areas were the complaints process and the frequency of visits.

#### *Complaints process*

51. Aside from the issue of the different powers of monitors to hear prisoners' complaints, the Committee also received evidence raising concerns about lay monitor's role in the wider prison complaints system.

52. VC members have a statutory duty to hear complaints from prisoners. The Coyle Review noted the importance of prisoners being able to complain to VC members as it is one of the few opportunities for them to speak face-to-face with an independent person.<sup>36</sup> The Coyle Review also noted the variability of VCs' record keeping of complaints.<sup>37</sup>

53. The Scottish Public Services Ombudsman (SPSO) absorbed the function of the Scottish Prison Complaints Commission in October 2010. In his submission to the Committee, the SPSO stated that he is concerned that complaints dealt with by lay monitors would be aligned and integrated into the existing complaints process and that there is a lack of clear detail and definition of the role of lay monitors in relation to complaints. The SPSO also noted the value of face-to-face interaction with prisoners and set out a number of ways that lay monitors may be able to complement the existing complaints process.<sup>38</sup>

54. Joan Fraser said that she believes that there is a specific benefit of prisoners being able to complain to monitors orally, given the high rate of illiteracy in prisons.<sup>39</sup> Professor Coyle argued that there should be clarity in the context of the complaints procedure, warning that "we will confuse people, and that is always a bad thing to do in a prison setting".<sup>40</sup>

**55. The Committee is sympathetic to the view that independent prison monitors should complement the existing complaints process. The Committee asks the Scottish Government to take account of the concerns raised by the SPSO and to consider adding more detail about the role of monitors in the Order in relation to complaints.**

#### *Frequency of visits*

56. A particular issue that a number of respondents commented on was the frequency of visits by monitors. The draft Order requires prison monitors to "visit the prison at least once a month or more frequently as instructed by the Chief Inspector".<sup>41</sup>

57. The draft Order does not specify how frequently lay monitors should visit prisons, except that they are to assist prison monitors. Currently Prison Rule (160) states that "not fewer than two members of a visiting committee shall visit the

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<sup>36</sup> The Coyle Review, paragraph 37

<sup>37</sup> The Coyle Review, paragraph 34

<sup>38</sup> Scottish Public Services Ombudsman. Written submission (8 November 2013).

<sup>39</sup> Scottish Parliament Justice Committee. *Official Report, 20 November 2013*, Col 3766.

<sup>40</sup> Scottish Parliament Justice Committee. *Official Report, 20 November 2013*, Col 3765.

<sup>41</sup> Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014, paragraph 2(3).

prison fortnightly”.<sup>42</sup> The AVC suggested that for this reason, the system of monitoring prisons will be “far less rigorous and robust”.<sup>43</sup>

58. The Explanatory Document states that the draft Order “does not remove any necessary protection”. It goes on to say that the new system will adapt the functions of VCs, provide clarity about the role of monitors, and will “ensure that the system of independent monitoring is more robust”.<sup>44</sup>

**59. The Committee recommends that the Scottish Government considers specifying a minimum requirement for the frequency of prison visits by lay monitors in the draft Order.**

#### DELEGATED POWERS AND LAW REFORM COMMITTEE

60. The Delegated Powers and Law Reform Committee (“DPLRC”) considered the draft Order at its meeting on 26 November. In its report, the DPLRC raised concerns that the meaning of the term “prison records” is unclear in the draft Order. The report said—

“It is not clear to the [Delegated Powers and Law Reform] Committee whether the term covers records located both within and outside prisons, nor whether the meaning intended is the same, irrespective of the person who exercises the function of inspecting records.”<sup>45</sup>

61. The DPLRC also drew a number of drafting errors to the attention of the Scottish Government.

62. The Scottish Government has undertaken to consider the term “prison records” and correct the drafting errors before the Order is laid for parliamentary approval in due course.

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<sup>42</sup> Professor Coyle. Written submission (3 November 2013).

<sup>43</sup> Association of Visiting Committees. Written submission (8 November 2013).

<sup>44</sup> Explanatory Document. Paragraph 3-23.

<sup>45</sup> Delegated Powers and Law Reform Committee. 59<sup>th</sup> Report, 2013 (Session 4). *Subordinate Legislation* (SP Paper 423).

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