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SP - Article 2 Compliant Inquiry

Thank you for your letters of 20 May 2008 and 11 June 2008 (the latter addressed to my colleague, Miss Ali McMurray) about the Article 2-compliant investigation into the treatment of SP whilst in Prison Service custody between September 2003 and September 2005. I was surprised that you had not copied the second of those letters to the Department of Health and the Howard League, but I will do so in sending them a copy of this one.

Before addressing the various matters you have raised, I think it useful to set out some of the history. As you will know, my office is required to investigate every death in Prison Service custody (as well as some other deaths) and is funded (albeit not generously) to do so. These investigations, alongside the Coroner's Inquest, represent an Article 2 compliant regime (i.e. it is reasonably prompt, independent, and effective, and involves the bereaved family). We are not required to investigate near deaths, nor are we funded to do so (although some, but not all, of the costs we incurred in D were met by the Prison Service). Nevertheless, I was pleased to be asked to take on both the D and SP inquiries and my own judgement is that, because of the synergies between fatal incident and near death investigations, it would be sensible were my office routinely engaged (and resourced accordingly) in whatever system for investigating near deaths may emerge in light of the forthcoming House of Lords consideration of the case of JL.

In conducting the D inquiry, I was conscious that there was no blueprint for an Article 2 compliant inquiry, and that very considerable discretion is vested in the Chair of any public inquiry. However, I was dismayed by the extent to which the inquiry became increasingly legalistic – and thus much more protracted, expensive, and, at times, adversarial. None of this is consonant with the values of my office – or indeed of any Ombudsman's office. There is now every sign of the SP inquiry going the same way.

I frankly do not see that any good purpose is served by inviting an Ombudsman to conduct an inquiry and then attempting to prevent him from doing so in his own way. My own view is that the methodology my office has developed over more than four years in respect of deaths in custody translates very well to near deaths. That methodology is robust, but it is not inflexible. On the contrary, I expect my investigators to take a rounded view of what has occurred. Such an approach seems to me of particular value in respect of SP, where the issues of self-harming behaviour amongst young women in custody, and the interface between the Prison Service and the Health Service, are both subtle and complex.

I had understood from meetings both with Safer Custody and Offender Policy Group and with the senior leadership of the Prison Service that they shared my view that the SP inquiry should be conducted so far as reasonably practicable without recourse to the legal profession. My experience in D was that legal costs represented almost the entire costs of the inquiry and were disproportionate to the issues at stake. For that reason, in SP I have not instructed either a solicitor or Counsel.

Be that as it may, it is clear that anything other than a legalistic approach to the SP inquiry does not meet with your clients' wishes. While I think the approach to be taken is a matter for me and not for the parties (much less for one of them unilaterally), and I do not believe that your reference to the "requirements *as set out for* an Article 2 investigation" (my emphasis) is meaningful, I do not think I am able to offer the sort of inquiry that the Prison Service envisages.

There is of course a clear distinction between my office's death in custody work and the D and SP investigations in that the former is *part* of an Article 2 compliant process while the latter must *constitute* an Article 2 compliant process in its entirety. However, I am increasingly of the view that it would be better to split near death inquiries into two phases – an investigation conducted by my office (or equivalent body) and a hearing or hearings presided over by a lawyer, Coroner, or Judge.

The conclusion that I draw from all of this will be manifest. But before reaching that point, I think it will be useful to the parties if I address some of the specific issues raised in your letters. I begin with your letter of 20 May and shall take each of your points in the order you raised them.

Terms of Reference

Terms of Reference were set at a meeting involving all the interested parties in December 2007. I am very disappointed that, some six months later, you are seeking to challenge them.

At the meeting at the end of last year, I heard protracted arguments from the Prison Service as to why my terms of reference should refer to child protection rather than to child welfare. Nothing at that time persuaded me that the change was either warranted or appropriate. I do not see how it would be

possible to consider someone's 'care' without considering their well-being. How else am I to measure the effectiveness of the care given? It seems to me that questions of welfare (or well-being) are absolutely fundamental in a case like SP where a teenage girl repeatedly self-injures to the extent that her life is threatened.

Disclosure/document gathering

I cannot accept the proposal that all requests for disclosure should go through Safer Custody and Offender Policy Group. Disclosure to the other parties is my responsibility, including any redacting necessary. It would not be appropriate for the Prison Service to control what the other parties can and cannot see. One of the four fundamental principles of an Article 2 compliant investigation is that the subject of the investigation (or their family) is fully engaged. It has been my responsibility as Chair of the inquiry to ensure that this is the case. I could not discharge this responsibility if the Prison Service were, in effect, determining what SP can and cannot see.

I have noted your comments about the "circuitous" approach to sharing of documents in D. I have to say, this is not a process I recognise. In any event, in the case of SP, my intention was that all papers were to be distributed direct from my office. The sharing of the documentation I have so far collated would have been done simultaneously to all those concerned.

I am also very surprised that you should suggest, notwithstanding the assurance that I have unfettered access to documents etc, that all disclosure of documents to the investigation itself should come from Safer Custody and Offender Policy Group. It is frankly not for the Prison Service to set "ground rules" once an independent inquiry is under way. In my nine years as Ombudsman I have had access to all Prison Service documents and am fully aware of issues relating both to security and to sensitivity. These are not matters on which I consider it either necessary or proper for me to take instruction or guidance from the Prison Service. I am particularly concerned by your reference to the relevance of particular documents. This would be a matter for me alone, as Chair of the inquiry, to determine. I cannot imagine how it would serve the purposes of an independent and robust investigation if the Prison Service were to seek to advise me on relevance. It would certainly do nothing to assure SP, or her family and representatives, that the investigation was indeed Article 2 compliant. I find the notion frankly ludicrous.

My terms of reference as Ombudsman guarantee my unfettered access to all Prison Service documents and staff. This is the foundation stone of the office, without which we would have no credibility and would not be able to operate effectively. Indeed, my position would be wholly untenable if the Prison Service could determine what I could and could not see. It is true that in investigating SP's care I am acting outwith my normal responsibilities, but the requirement for unfettered access must remain. Without it, there is frankly no point in my investigating. I doubt the Courts would be impressed by this

attempt to determine what an Article 2 compliant investigation should and should not consider.

Were I continuing this inquiry, I would continue to go direct to source for any information I required. I trust there would be no instruction to establishments not to accede to any request I might make for information.

Witnesses

In your letter you say your client is “very concerned” that I intended to conduct preliminary interviews. For my part, I see nothing unusual or inappropriate in the possibility of witnesses being interviewed twice. Those involved in criminal prosecutions may be questioned a number of times by different people. However, a much closer and more relevant analogy (that you – wrongly – dismiss) is that of fatal incidents, whereby staff are interviewed comprehensively by my investigators (and often by the police as well) and then are called to give evidence once again at the inquest (public hearing). Nevertheless, one reason why I reserved the right to conduct preliminary interviews was specifically to *reduce* the number of people who might need to be called to the hearing.

On the question of statements, I am guided by my experience in D and in my fatal incident investigations (of which I have now initiated some 900). There is clearly a place for statements from some witnesses, but interviewing is also very important. Not least, it means that I control what questions are asked and answered, have the opportunity to probe areas I consider are only being covered superficially, and can ask follow-up questions. It is also an opportunity to check understanding and avoid mis-interpretations. I see only limited value in statements that have been vetted and manipulated by the organisation at the centre of an investigation.

I understand your wish to know who will be interviewed in advance of that interview taking place. However, the same argument applies to access to Prison Service staff as to its documents. In this respect too, I necessarily enjoy unfettered access. I would therefore have reserved the right to approach staff direct, albeit that I would have copied you into any correspondence with them. I would have advised them that they might contact you (or their Union or their own legal representative) if they so wished, and would have allowed sufficient time for contact to be made before any interview took place. As you know, my Investigator Mr Bryan Woodward has been due to meet staff at HMPs New Hall and Low Newton on 8 and 9 July respectively for a general discussion about SP. Shortly after that date, it was my intention to identify those staff I wished to interview and provide for comment some proposed lines of questioning.

Experts

I acknowledge your points about taking the parties’ views about the relevant expertise and qualifications of any experts commissioned by the investigation. It would have been my intention to solicit comments from the parties on the

expert(s)'s terms of reference and instructions. However, it would have been for me to determine whether the cost was appropriate to the needs of the inquiry. It would be wholly inappropriate for an independent inquiry to consult the MoJ, the parent department of the Prison Service, on this matter.

Hearings

As you say, it would have become clear once the initial evidence had been gathered what evidence should be taken in public. Given the slippage to date, there would have been little value in holding a pre-hearing meeting on 17 July as planned. I must apologise to all recipients of this letter for not having cancelled that date earlier.

Publication

I proposed to follow exactly the same procedure in SP as for D so far as prior disclosure was concerned. That is, once my report was ready, I would have issued notices of criticisms I was minded to make to all those who might have inferred they were being criticised. (In respect of D, we went beyond what was necessary in that many of the so-called criticisms were not criticisms at all and had been tempered in the draft by the balancing evidence.) I see no reason why I should have altered this process, and would not have allowed the Prison Service 10 -15 days to consider my final report. This is far in excess of what is customary or necessary. (The report would have been published on my website. Of course, I would have had no objection to it being published on the MoJ website too.)

Turning to your letter of 11 June, I am very unhappy at your criticisms of the forums I planned to hold at New Hall and Low Newton. These were intended to inform the inquiry of some of the challenges faced by staff in caring for women who repeatedly self-harm. They were therefore focussed expressly on what I thought was the most significant aim of the inquiry: to help reduce the incidence of life-threatening self-harm amongst young women in custody. They were not concerned with the specifics of SP's care and your reference to legal representation wholly misunderstands both the format and the purpose. I am uncertain whether your further reference to these forums as "likely to increase the overall costs and length of the investigation" is more offensive than it is risible, or vice versa given the experience to date.

In sum, I have been saddened by what I regard as the Prison Service's inconsistent approach to this inquiry, by the attempt to dictate how I should conduct the investigation, and by the lack of focus on the core issue: life-threatening self-harm amongst so many young women prisoners. In particular, your two letters constitute an unwarranted and unacceptable attempt to fetter my independence and to restrict the way I carry out the inquiry.

I am also conscious of the very heavy demands made upon me personally and upon my colleague, Miss McMurray, with whom I conducted the D inquiry amongst many others. We currently have three Grade 6 colleagues on long-

term sick leave with very serious illnesses. The full complement of Grade 6s is only three, so the impact upon both the leadership and management of the Ombudsman's office speaks for itself.

In the circumstances, I think I should now withdraw from the SP inquiry and afford the parties an opportunity of considering who should take it forward and the way the investigation should be conducted. I have personally alerted the Director General of the National Offender Management Service to my intention.

I am conscious that my decision may be a disappointment to SP, with whom I met at the beginning of the year. However, I hope she will understand that it is not in her interests for me to continue with an inquiry that has made so little progress since I was first commissioned in November 2006.

I am copying this letter to Safer Custody and Offender Policy Group, the Howard League and the Department of Health.

STEPHEN SHAW
PRISONS AND PROBATION OMBUDSMAN