

# Prisons and the Law: National Rules and Local Discretion

**Stephen Shaw**, *Prisons and Probation Ombudsman for England and Wales.*

Most of us go through life trying to give the impression we are cleverer than we are. The secret of success for Willie Whitelaw, the bluff, affable and much-liked former Home Secretary, was to pretend he was dumber than he actually was.

Lord Whitelaw was once famously accused of going round the country stirring up apathy. I think he saw himself as promoting harmony. Whitelaw wanted to emphasise the benefits of One Nation Conservatism, with which he was unfashionably associated during Mrs Thatcher's reign, and which he saw as a necessary corrective to her individualistic philosophy. Who now says there is no such thing as Society?

The very opposite charge to that levelled at Lord Whitelaw is directed at those of us who talk about prisoners' rights. We are thought of as making problems where there are none, accused of putting ideas in people's heads, and criticised for creating a formalised legal structure wholly unsuited to the day-to-day realities of an operational service. Running a prison, it is said, is an art not a science. What staff (and prisoners) need is common-sense, not the ability to cite the Prison Rules by rote.

As an example of this view, here is an extract from a recent Board of Visitors' (BoV) annual report. After noting the number of foreign language books lying unread in the prison library, the public's watchdog bemoaned that:

*The ethnic books and tapes are rarely used as is all the Home Office literature which the library is obliged to have so that prisoners can have access to information regarding penal affairs.*

I am not encouraged by the BoV's apparent intolerance of 'ethnic' literature. But its central message seems to be: no prisoners are interested in anything but getting through their sentence — all this guff about rights is so much liberal do-gooding claptrap. The time and money spent on law books would be better directed to things that really matter like work and decent quality training.

It is a viewpoint which speaks to many parts of prison and public opinion. It clearly plays to those who

believe that prisoners abandon all their rights when they decide to commit crime and infringe the rights of others — witness the media criticism when any prisoner has the effrontery to cite the provisions of the Human Rights Act. But even those who take a less extreme position may doubt that the positive assertion of rights on behalf of rapists and murderers ranks very high on the Richter scale of social concern. (Even I, whose working life has mostly been spent promoting the rights of prisoners, do not believe this is a more important cause than ending child poverty, or stopping the use of land-mines, or finding a cure for cancer.)

The view that an excessive regard for legal rights is out of place in prison also reflects the opinions of those whose approach to prison management — while progressive and benign — is intensely practical. Some of the best governors of my acquaintance fit this bill. Indeed, I can hear the voice of one of them in my head as I pen these words. From this perspective, running a prison is about muddling through, doing the best you can on limited resources and limited information, making one hundred decisions a day and — in effect — making one hundred compromises. The law, the rules, the audit teams, may have their place, but they are something of a distraction from the real tasks.

Indeed, so say this group, excessive obeisance to the rules (the PSOs, the manuals, the Standards) is actively impossible. No-one has the time or inclination to read all the rules, let alone remember them. But it is also undesirable to apply the rules religiously. Prisons are acutely human institutions, so relationships matter more than regulations. Good sense and experience count more than abstract legal theorems.

I may have a surprise for you. I have a lot of sympathy for this view myself. Given the choice between a rule and doing the right thing, I have no hesitation in opting for the latter. I encourage my colleagues in the Ombudsman's office to take a flexible view of our own terms of reference. And I try to bring the same approach to my assessment of prisoners' complaints. I have just reviewed a decision concerning a prisoner's place in the Incentives and Earned Privileges scheme (IEP), which played fast-and-loose with the regulations but which resulted in a hugely sensible outcome. Far from overturning it, I praised the

governor concerned. Another example: I once witnessed an adjudication which broke every rule in the book. The adjudicator even discussed the best outcome with one of the staff witnesses during an adjournment. Virtually nothing was put down on the Record of Hearing. However, the actual outcome was a triumph of decency, creativity and good sense. It is just a good job no lawyer got to learn about it.

Ah, lawyers. Now there is a profession to raise the hackles of many prison staff. The first thing to do, wrote Shakespeare, is kill all the lawyers. I bet that strikes a chord with many readers. Indeed, hand on heart, how do most staff feel about the solicitors lining up at the gate for legal visits? As fellow criminal justice professionals? Or as over-paid shysters with smooth tongues and sharp suits? It is all right, I know the answer.

Since the extension of my remit to the National Probation Service, I have spent quite a bit of time explaining why probation — which has never had many complaints, save for the Family Court Welfare work it has now lost — should positively welcome the involvement of an Ombudsman and a growing complaints' culture. The reason I give is that an openness to customers' views, and a willingness to learn when things go wrong, is a characteristic of the most successful organisations. Witness Tesco — the most successful retailer of the last decade. The first thing you see on visiting a Tesco store is not an array of special offers or new products but a Customer Services desk where you take back the goods that do not work, or the bill that does not add up. (As ever, the language is significant: note this is 'Customer Services' not a 'Complaints Department'.)

A modern, effective, accountable public service — so I tell my probation audiences — is one which encourages and empowers its users (customers, clients, offenders) to make their views known. The converse also applies: the least effective agencies are those which are unaccountable, which discourage consumer feedback, or in which there is a view amongst all parties that there is no point complaining since nothing is going to improve. I take this to be one of the characteristics of so-called 'failing prisons'. (In a vain claim to immortality, you may have encountered this phenomenon in other articles as Shaw's Law: only sick institutions have no complaints.)

This is not to suggest I am blind to the impact which a growing consciousness of prisoners' rights has had on establishments. A small number of prisoners are serial complainants and make a disproportionate claim on the time of my office as they do on the prisons which hold them. I suspect most members of the public would be appalled to learn that, such is the volume of legal claims by prisoners, there are now some gaols obliged to employ full-time litigation managers. Recent developments may have exacerbated this trend. The Data Protection Act, for example, is a very necessary piece of legislation. But the demands it is making on

some prisons, as prisoners queue to pay their £10 for access to their records, do seem disproportionate to the benefits to society and to the prisoners themselves.

But once set free, there is no way of putting this genie back in the lamp. However much one may rue the development of a complaints and compensation culture, it is the way we live now. Prisoners, no less than prison (or any other) staff, see themselves first and foremost as individuals possessing inherent rights. Indeed, who has cost the Prison Service more in recent years through compensation claims — prisoners or prison staff? It is alright, I know the answer to that one too.

Although the courts may not be unduly willing to intervene on major issues of prison administration (decisions in Human Rights Act cases have been notably cautious, reflecting the conservatism of recent judicial decisions in prison cases in the United States), more and more individual decisions are likely to be challenged — either in the courts, or in complaints to the Prisons and Probation Ombudsman. One of the many advantages of Ombudsmen is that we offer a quicker, cheaper and more expert alternative to the adversarial ethos of the courts. I know that many of my decisions are unwelcome to governors and area managers. But do you really think you would be better off chancing your arm with the judges?

The tension between a rule-bound approach and the exercise of discretion reflects the different perspectives of Headquarters and establishments. Prison Service Headquarters tends to want certainty, consistency and procedural fairness. Prison governors tend to want the freedom to manage in the light of local circumstances, to exercise flexibility and choice, and be concerned with fairness of outcome. This is an age-old conflict, the balance between which is the result as much of fad, tradition and happenstance as of objective criteria. In the Prison Service the localities are increasingly in the ascendant. The current Headquarters review is underlining this point. In probation, the opposite is happening and the National Probation Directorate is calling the shots. Indeed, I have come across considerable dissatisfaction amongst members of probation boards who have discovered how little influence they actually exercise.

As Ombudsman, I try to take a balanced view between these two approaches. The rules come first, but there is a proper discretion as to how they are applied. My prisoner-complainants have a high threshold to overcome so long as decisions which affect them have been arrived at reasonably.

But that is the crux of the matter. Decisions should be reasoned. It is perfectly proper for a governor, say, to prevent a sex offender having access to particular material which may undermine his achievements on the sex offender treatment programme. I have no problem with individualised decisions arrived at in a deliberative manner. But bland assertions of 'security objections' or 'local

circumstances' will not do. Devolved responsibility does not mean the right to behave irresponsibly or illogically or without regard to fairness.

I began by quoting a BoV and I am sorry that a Board of Visitors should apparently mock the Prison Service for making its regulations and procedures available to prisoners. The law matters, especially Human Rights law. And procedural fairness and legitimacy matter a great deal too.

My limited international experience suggests that the Prison Service in England and Wales is far ahead of most prison administrations in terms of the quantity and quality of information it publishes and disseminates. I celebrate that fact, and the absence of

cynicism in most governors' commitment to the Prison Service's values. No-one who has seen Martin Narey's brave and moving video on Decency could doubt the strength of his personal commitment to the highest international standards of conduct.

In any case, what is so wrong if information is freely available but rarely referred to? I have a dictionary, thesaurus and guide to English usage on my bookshelves. But wordsmith that I am, there's nuffink I need to look up. Just like some prison staff and Boards of Visitors in their attitude to Prison Rules eh?

The Prisons and Probation Ombudsman for England and Wales can be contacted through its website: [www.ppo.gov.uk](http://www.ppo.gov.uk)

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# *Investigations into Deaths in Prison Custody*

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Last year, 72 prisoners died an unnatural death in prison custody. The vast majority of these took their own lives. Comparing this statistic with figures for recent years, this was a relatively encouraging result. No prisoners were killed by other prisoners. Each of these unnatural deaths is likely to have taken place while the prisoner was alone, unattended by prison officers, doctors or nurses, and far from his (occasionally her) family. What needs to be done is to discover how and why the death occurred.

This article explores these questions by running through the varied forms of inquiry that may or must take place. It then discusses the most recent, and still unfolding, legal developments before summarising the substantial changes that have taken place in law and practice over the past five years or so.

## **Prison Service investigation**

All unnatural deaths in prison custody are investigated by a senior investigating officer from another prison establishment. This officer will be commissioned by the area manager responsible for the prison where the death occurred to produce a thorough, comprehensive and prompt report into how the prisoner died. Prison officers interviewed during the course of the investigation are required to offer all reasonable co-operation. The family of the deceased is given the opportunity to be kept informed with the progress of the inquiry. Once it has been concluded, it

will be disclosed to the family. This however is subject to the views of the coroner.

## **Inquest**

A coroner will always be involved. Section 8 of the Coroners Act 1988 requires that there must always be an inquest when there is a death in a prison. And in such a case the inquest must always be held with a jury. The coroner might sometimes object to disclosure to the family of the internal Prison Service investigation into the death. He might feel that the conduct of the inquest would somehow be compromised if the family were to see the investigation report before the inquest has taken place. But this is rare, and is becoming more unusual.

The jury's verdict is certified in writing by the coroner and those jurors who agree with the verdict (some might dissent from it). This certificate is known as an inquisition. It sets out, so far as has been proved in the inquest, who the dead person was and how, when and where he came by his death. It does not identify any person as bearing responsibility for the death. There is currently a review of the coronial system, conducted for the Home Office and expected to conclude around early next year.

## **Criminal proceedings**

Aside from the Prison Service investigation and the inquest, there will sometimes be criminal proceedings arising from a death in custody. This is