



SIVILOMBUDET

Norwegian Parliamentary Ombud

CONSULTATION COMMENT REGARDING AMENDMENTS TO THE NORWEGIAN EXECUTION OF SENTENCES ACT (EXECUTION OF SENTENCES IN ANOTHER STATE ETC.)

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Reference is made to the Norwegian Ministry of Justice and Public Security's consultation paper of 30 January 2015 regarding amendments to the Norwegian Execution of Sentences Act (execution of sentences in another state etc.). The Ministry is proposing a general legal basis for the execution of sentences in another state (new Section 1 a), including rules regarding the right to medical care in a foreign prison.

According to the Ministry, the background for the proposal is the Norwegian Correctional Service's need for increased capacity for the execution of sentences and custody. The measures to increase capacity were discussed in Report to the Storting (White Paper) 12 (2014–2015) "*Utviklingsplan for kapasitet i kriminalomsorgen*" [*Development plan for the capacity of the Norwegian correctional service*], which was presented to the Norwegian Parliament (*Storting*) in 2014.

Below, comments are provided regarding the time limit for comments in the consultation process (point 1), the significance of the proposal for the Parliamentary Ombudsman (point 2) and for the Ombudsman's processing of individual complaint cases etc. (point 3). Finally, some remarks are made regarding the proposals that have been presented by the Ministry, including to certain questions that are not discussed in the consultation paper (point 4).

1 TIME LIMIT FOR COMMENTS

The Ministry has set a time limit of four weeks to provide consultation comments. This deviates from the main rule in point 5.2 of the Norwegian Instructions for Official Studies, where it is stated that the time limit for comments shall normally be three months and not less than six weeks. The short time limit for comments appears unfortunate, as the proposal raises many and, in part, complex legal issues, including several issues that lack adequate evaluation in the consultation memorandum. The Parliamentary Ombudsman cannot see from the consultation report that the decision regarding a short time limit for comments has been made by the Minister, in accordance with what follows from point 1.3 of the Norwegian Instructions for Official Studies.

The Ministry has proposed a general legal basis for transferring both Norwegian and foreign citizens for the execution of sentences in another state. It is presumed that transfers can be implemented with the use of force. Involuntary transfers of persons who are convicted in Norway to other states for the execution of sentences entail considerable changes to their rights. Considerations for the due process of convicted persons and the complexity of the questions such a legal basis raises, indicate that the introduction of this type of far-reaching rules should be carefully assessed and that a thorough consultation process should be facilitated.

The Parliamentary Ombudsman has noted the Ministry's justification for the short time limit for comments but cannot see that the current capacity in the Norwegian Correctional Service is such that it should take precedence over considerations for a sound legislative process.

The short time limit for comments entails that it is not possible to address all of the questions raised by the proposal for consultation. Moreover, it is not the task of the Parliamentary Ombudsman to conduct such a review. Below, some comments are provided to the pages of the proposal that affect the Parliamentary Ombudsman's area of work, with the reservations that follow from the short time limit for comments.

2 THE PARLIAMENTARY OMBUDSMAN'S PREVENTION MANDATE

Reference is made to the Ministry's clarification regarding the establishment of the Parliamentary Ombudsman's National Prevention Mechanism (NPM). According to the Ministry, the NPM with the Parliamentary Ombudsman should also conduct visits to prisons that Norway leases in another state, in the same manner as it does with Norwegian prisons. The justification for this is that the execution of sentences shall occur pursuant to Norwegian regulations and that Norwegian authorities are fully responsible for the execution of sentences in a justifiable manner.

Otherwise, this consultation memorandum does not contain any discussions regarding the implementation of the Parliamentary Ombudsman's prevention mandate in the territories of other states.

The Parliamentary Ombudsman cannot see that the impacts of the proposal on the NPM's visitation activities have been sufficiently clarified. Below, three questions that require further evaluation are highlighted.

2.1 The relationship between the Parliamentary Ombudsman's prevention mandate and foreign visiting bodies

Currently, 76 states have ratified the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) and established NPMs against torture and other cruel, inhuman or degrading treatment of punishment. The Ministry has determined that the NPM should visit a prison that is leased by the Norwegian authorities abroad.¹

However, the consultation memorandum does not contain any discussion regarding

¹ Cf. OPCAT Article 4.

the relationship with the receiving state's visitation body under OPCAT.

The Parliamentary Ombudsman does not take for granted that the receiving state's visitation body will find that places that are leased to a foreign state fall outside of its mandate.

The wording of the Optional Protocol and the fact that jurisdiction in several important areas will be shared between two states, suggests that the receiving state's visitation body will also have a mandate to conduct visits to such places. The proposed legal basis will presumably have the potential to create situations where NPMs from multiple states demand access to the same prison.

This is also the understanding of the UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT). In a recent statement, the SPT has found that both the NPM of the "sending state" and the NPM of the "receiving state" will have a mandate to carry out visits to such places, in accordance with the provisions of OPCAT and the SPT's Guidelines on national preventive mechanisms.

2.2 Implementation of the Parliamentary Ombudsman's NPM's visits in another state

The Ministry considers that Norway will not have jurisdiction outside of the prison in the receiving state. It is also considered that staff members (with the exception of a Norwegian manager and possible other personnel) will be subject to the jurisdiction of the receiving state. Furthermore, it appears that health services shall be provided pursuant to the legislation in the receiving state. The more detailed consequences of these conditions for the implementation of the Parliamentary Ombudsman's prevention mandate are not discussed.

The starting point for the Parliamentary Ombudsman is that effective prevention work requires a comprehensive approach.² This entails that the NPM, in addition to assessing risk factors for abuses in the prison, also examines the handling of risks during transport, escorted leaves and during stays at emergency primary care centres or hospitals. All of these places may be "places where persons are deprived of their liberty."³ Reference is in this context made to published reports from the Parliamentary Ombudsman's visits conducted to prisons and police custody facilities. In these reports, it emerges that medical departments in prisons, emergency primary care centres and possibly the specialist health services in connection with possible escorted leaves are covered by the mandate and are therefore included as a part of visits.

It is well-known that transport phases generally involve a high risk of violations of integrity. Furthermore, it is crucial to assess whether the health of inmates is safeguarded, irrespective of where the health services are provided. When inmates, in connection with medical treatment, are staying in means of transport or placed outside of the prison walls, the NPM therefore has the right to visits such places, cf. OPCAT, Article 4 (2).

² Cf. also the UN Subcommittee on Prevention, Guiding principles to the concept of prevention of torture, 30 December 2010, CAT/OP/12/6.

³ Cf. also the UN Subcommittee on Prevention, Guiding principles to the concept of prevention of torture, 30 December 2010, CAT/OP/12/6.

However, the proposal appears to presume that such places in the receiving state will fall outside of the areas to which the Parliamentary Ombudsman will have access.

The consultation paper otherwise does not address situations where the receiving state does not recognise the Parliamentary Ombudsman's mandate to conduct announced and unannounced visits to a prison. There are several conditions that might indicate that a receiving state will not accept such visits, including that the receiving state considers the mandate of its own visitation body to be sufficient, that the receiving state does not recognise the Parliamentary Ombudsman's authority to assess legislation and practices that affect the receiving state, or that the state has not consented to be bound by OPCAT. The consultation paper does not clarify whether the receiving state's recognition of the Parliamentary Ombudsman's mandate is a prerequisite for entering into an agreement.

Similarly, the consultation paper does not address whether there is a need for immunity or other forms of protection for staff members who carry out visits outside of Norway's borders as part of the implementation of the prevention mandate under OPCAT. These are matters that should be evaluated in greater detail.

2.3 Follow-up of recommendations from the Parliamentary Ombudsman's NPM

A key component of the Parliamentary Ombudsman's work as a NPM is to provide recommendations and enter into dialogue with government bodies regarding follow-up measures. When multiple states are responsible for different parts of the execution of sentences, this will impact on the Parliamentary Ombudsman's possibility to do so in a satisfactory manner, cf. OPCAT, Article 22. This is not discussed in the current consultation memorandum.

An agreement regarding execution of sentences in another state might therefore prevents the Parliamentary Ombudsman from entering into dialogue regarding necessary follow-up measures, because such responsibility lies with the government bodies of other states.

Reference is otherwise made to the fact that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), following its visit to the Belgian Tilburg Prison in the Netherlands in 2011, found it appropriate to send its report to both states. The CPT stated as follows:

“In application of the Interstate Convention, the Netherlands makes available the prison premises and the prison and medical staff and transfers the prisoners. Dutch criminal law is applicable within the prison. On the other hand, all the inmates present in the prison are serving final sentences imposed by Belgian courts, in pursuance of Belgian legislation, and the prison regime is Belgian. All the staff working in the prison are Dutch with the exception of the Prison Director, two Deputies and the staff from the Penitentiary Psychosocial Service. Taking account of the Interstate Convention, and particularly the aforementioned elements, there is clearly shared jurisdiction where Tilburg Prison is concerned. (...) Furthermore, the visit report has been forwarded to both States Parties, and it is for the authorities of these two States to reply, each in respect of the matters for which they are responsible.”⁴

⁴ CPT/Inf (2012) 19, paragraph 3.

The described distribution of responsibility is almost identical to that which is described in the consultation memorandum. The difference is that the CPT is a supranational body authorised to make recommendations to authorities in multiple states parties, whereas the Parliamentary Ombudsman is a national body and lacks the corresponding authority.

A similar issue might also arise if the SPT visits ‘Norwegian’ prison premises in a state that has not ratified OPCAT. Both situations appear unfortunate in relation to the objective of OPCAT.

3 THE PARLIAMENTARY OMBUDSMAN’S PROCESSING OF INDIVIDUAL COMPLAINT CASES ETC.

The Parliamentary Ombudsman is tasked with endeavouring to ensure that individuals in the realm are not unjustly treated by the public administration and help to ensure that the public administration respects and safeguards human rights, cf. Section 3 of the Norwegian Parliamentary Ombudsman Act. The Parliamentary Ombudsman may consider cases either in response to a complaint or on its own initiative. Any person who is deprived of their liberty is entitled to complain to the Parliamentary Ombudsman in a sealed letter, cf. Section 6, second paragraph of the Norwegian Parliamentary Ombudsman Act. Unrestricted by the duty of confidentiality, the Parliamentary Ombudsman is entitled to receive the information it requires from the public administration to discharge its duties and has access to all places of service, offices and other premises of any administrative body and any enterprise included in its area of responsibility, cf. sections 7 and 8 of the Norwegian Parliamentary Ombudsman Act.

The right of persons who are deprived of their liberty to complain is important to ensure due process. Inmates who are transferred to serve their sentences in a prison in another state will still be entitled to complain to the Parliamentary Ombudsman regarding injustices they believe have been committed by the Norwegian public administration. However, in several areas, the right to complain will be more limited than is the case for inmates in Norway. The Parliamentary Ombudsman is unable to process complaints relating to foreign authorities and officers and is also not entitled to receive information from authorities abroad. For instance, the consultation memorandum states that health services for inmates shall be purchased in the state in which the prison is located and that oversight of the professional practice of the health personnel and how the services are to be provided, will have to be provided by the supervisory bodies in the receiving state and according to the legislation in the receiving state. The Parliamentary Ombudsman will be unable to process complaints regarding the assessments made by foreign supervisory bodies, as opposed to what would have been the case for inmates in Norway.

It is a weakness in the consultation draft that the impacts on inmates’ possibilities to bring cases before the Parliamentary Ombudsman have not been described in greater detail. Furthermore, the consultation draft does not describe the relationship with possible ombudsman schemes in the receiving state. In some areas, it may be challenging to determine the boundaries of the mandates of the respective ombudsman schemes. There may be a risk of overlapping mandates and that neither of the ombudsmen consider themselves to have jurisdiction. For the inmates, it may be difficult to know to whom they should complain. This is unfortunate.

4 COMMENTS TO VARIOUS PARTS OF THE PROPOSAL

In the consultation memorandum, reference is made to the fact that an agreement was entered into between Belgium and the Netherlands in 2009 regarding the leasing of prison capacity. According to the Ministry, the bill relates to ongoing negotiations regarding a similar agreement between Norway and the Netherlands. However, the proposal is designed in a general manner and will provide a legal basis for transferring inmates to other states where corresponding agreements are entered into. This is also specified in the consultation paper.

The Ministry presents a solution whereby the Norwegian Execution of Sentences Act shall apply to the prison that is leased in the receiving state. However, criminal offences committed in the prison are subject to the legislation in the receiving state. Medical care that is provided during the stay will also be subject to the legislation in the receiving state.

To the Parliamentary Ombudsman's knowledge, the agreement between Belgium and the Netherlands regarding the leasing of capacity in Tilburg Prison is the only of its kind in Europe.

As mentioned, in 2011, the CPT visited Tilburg Prison in the Netherlands, where Belgium was leasing prison capacity. In its report following the visit, the CPT included a number of critical remarks.⁵ The Committee's remarks included the highlighting of problems with the transfer process, language barriers, training programmes and the implementation of visits, as well as challenges with medical services, especially in relation to specialist health services.

The Committee's report sheds light on many of the challenges that might arise with the execution of sentences in another state. Since an agreement between Norway and the Netherlands is relevant and the Ministry's bill appears to be based on the agreement between Belgium and the Netherlands, one could expect that the CPT's findings would be considered.

However, the consultation memorandum does not contain any discussion of the CPT's report. Below, some remarks are made regarding the submitted proposals, including in light of the Committee's findings.

4.1 Relationship with human rights

In the consultation memorandum, a relatively cursory review of the relationship with Norway's human rights obligations is made, including the prohibition against discrimination and the right to respect for private and family life.

The purpose of the proposal to introduce execution of sentences in another state (to reduce prison queues) is not expressly included in the discussion of the relationship with human rights. It is not discussed whether the measure is necessary to fulfil said purpose or whether a reasonable interest assessment has been made between the interests of society and the considerations for individual rights. The relationship with

⁵ CPT/Inf (2012) 19, paragraph 3.

inmates' rights under the UN. International Covenant on Economic, Social and Cultural Rights (ICESCR), including the right to enjoyment of the highest attainable standard of physical and mental health, is also not addressed.

The weaknesses in the human rights assessment also relate to the fact that it is not clearly specified who is the target group for the measure, on what specific conditions a transfer is to occur or how the conditions for execution of sentences are to be arranged in practice.

The Parliamentary Ombudsman stresses that the question of whether the human rights of transferred inmates are safeguarded will largely depend on the practical implementation.

It also appears from the consultation memorandum that "criminal offences that are committed in the prison [will] have to be subject to the criminal law and criminal procedure in the receiving state. The receiving state's rules regarding investigation, arrest, remand and sentencing will thereby apply." The challenges that might arise when transferring persons to states where other acts are punishable than in Norway and where other rules relating to criminal procedure apply, are not discussed.

The Parliamentary Ombudsman also cannot see that the consultation memorandum addresses possible risks relating to extradition to a third country from the receiving state, which might have extradition treaties with third countries with which Norway does not have corresponding agreements. In this context, reference is made to the fact that the UN Convention Against Torture, Article 3 (non-refoulement) and the ECHR, Article 3 prohibit the extradition or other transferring of a person to another state where there are grounds for believing that said person would be in danger of being subjected treatment or punishment contrary to the prohibition against torture etc.

4.2 Selection criteria and case processing rules for transfers

According to the Ministry, a key challenge for establishing equal execution of sentences is that the receiving state will normally be interested in reducing escorted leaves and leaves of absence to an absolute minimum. Here, the Ministry refers to the existing agreement between Belgium and the Netherlands, where the latter has not accepted ordinary departures from the prison. Therefore, the Ministry notes that the target group for transfers should be considered carefully.

The Parliamentary Ombudsman cannot see that the Ministry has sufficiently clarified who belongs in the target group. The Ministry has limited itself to providing some examples of individual inmates who should not be transferred. However, the scope of these examples is unclear. Among the matters that remain unclear is the significance this will have for a decision regarding transfer if the inmate has children. Furthermore, no clear guidance is provided regarding the duration or upper limit for a prison stay in another state. The timing of return for the inmate to serve their sentence in Norway will be important, including because the inmates will not have the option of leaves while serving their sentences abroad.

In the consultation memorandum, the role of health personnel in the assessment of who is unsuitable for execution of sentences abroad is discussed. Here, the Ministry concludes that the inadequate legal basis provided in Section 7 (c) of the Norwegian Criminal Procedure Act for the disclosure of health information for this purpose will

be resolved in that the inmate personally shares confidential health information with the correctional service. The Parliamentary Ombudsman considers this to be problematic.

The Ministry appears to presume that the prison in the receiving state shall be a department that is administratively subordinate to another prison in Norway. It appears unclear what consequences such a solution will have for the case processing rules in cases of transfers. In the proposal, it is not clarified who will be the decision-making authority, complaint mechanism, what rules apply for complaints etc. The CPT highlighted these matters following its visit to Tilburg Prison. The Committee noted that most of the persons were transferred involuntarily, on short notice and without a genuine possibility for oversight of the decisions regarding transfer. The Committee has also stated that:

“as a matter of principle, a prisoner who has been sentenced to imprisonment in one State should not, on the basis of an administrative decision, be forced to serve the sentence in another state”⁶

4.3 Prison staffing and case processing

In the consultation memorandum, reference is made to the fact that the prison in the receiving state shall have a Norwegian director and shall be staffed by officers from Norway and the receiving state.

We request an assessment of how language barriers are to be handled in a situation where it has to be presumed that a considerable share of the staff members do not speak Norwegian. In its visits to Tilburg Prison, the CPT highlighted problems that arose because the majority of the staff members spoke a language that the inmates did not master.⁷ For example, decisions regarding isolation were only announced to the inmates in Dutch, even though these decisions were issued pursuant to Belgian legislation. Such a practice will constitute a clear weakening of the inmates due process and generated considerable frustration in the case of the Belgian inmates.

A number of challenges of significance for the inmates' security and the safeguarding of their rights can be envisaged in situations where the staff members and the inmates do not speak the same language. This might also impact the security of the inmates. For instance, it is difficult to see how dynamic security work (security by establishing inter-personal relations and interaction between inmates and staff members) will not be adversely impacted by a situation where the staff members are unable to understand the inmates.

Furthermore, it is unclear how the rights of inmates pursuant to the Norwegian Execution of Sentences Act will be safeguarded if most of the staff members are not Norwegian employees. The consultation memorandum contains no account of training measures that can ensure the staff members' knowledge of the regulations they are tasked with enforcing. Furthermore, it is not clarified who is responsible for making decisions and considering complaints from the inmates.

In the consultation memorandum, reference is made to Section 13 (b) (5) of the Norwegian Public Administration Act as a legal basis for the disclosure of information that is not health information to another country's administrative bodies. This provision does not describe disclosure of information to bodies outside of Norway. We request a more detailed discussion of whether the provision provides a legal basis for

⁶ CPT/Inf (2012) 19, paragraph 8.

⁷ CPT/Inf (2012) 19, paragraph 37.

such disclosure, or if a clear legal basis should be provided for this purpose.

According to the consultation memorandum, the duty of confidentiality for another state's staff members should be solved by said staff members signing a non-disclosure agreement. However, it is unclear how possible breaches thereof are to be enforced by Norwegian authorities when it is clear that the staff members will be subject to the jurisdiction of the receiving state.

In the consultation memorandum it emerges that the inmates are to have equal rights to make phone calls and write letters as in a Norwegian prison. However, possible challenges relating to control of mail and phone correspondence in Norwegian are not discussed. Inadequate opportunities to carry out such control may result in inmates, in practice, experience a limitation of their opportunities to make phone calls or write letters.

4.4 Health services

The Ministry has proposed that the health services will be procured, entirely, from the state in which prison capacity is being leased but that the state is to be duty-bound to ensure that inmates serving their sentences abroad receive an offer of health services that is equal to the services to which they would be entitled if serving their sentences in Norway. Furthermore, the Ministry presents rules regarding supervision of compliance with this obligation and how a transferred inmate shall be able to complain regarding the provided medical care.

However, the Ministry has not clarified in more detail how practical challenges regarding access to health services are to be solved. In particular, we request a description of how language barriers will be handled, since it has to be presumed that health personnel in the majority of cases will not speak the same language as the inmates. It should be emphasised that good communication between health personnel and patient is crucial in order to be able to provide satisfactory medical care. Language barriers will also be relevant in cases of exchange of health information from Norway to the health authorities in the receiving state. Furthermore, this raises questions regarding the legal basis for disclosing confidential information to personnel in another country, who are subject to different rules.

It also emerges from the consultation memorandum that the complaint mechanism under the Norwegian Patient and User Rights Act only covers complaints that the health services in another state are not equal to the health services that exist in a Norwegian prison. For complaints pertaining the provision of health services by the health personnel, inmates must relate to the legislation in the receiving state. It is not discussed how inmates are to be able to safeguard their interests without mastering the language or being expected to have knowledge of the regulations in the receiving state.

4.5 Legal authority in regulations

In the consultation memorandum, it is proposed that the Ministry in regulations will be able to "determine the exceptions from the law that are necessary in order for sentences to be executed in another state".

The Parliamentary Ombudsman notes that such a proposal will entail that the Ministry is given a very broad authority to make exceptions from the law in an area of

law that regulates an intrusive form of state exercise of public authority. It is an important principle that exceptions from basic due process safeguards are adopted in the form of legislation by the Norwegian Parliament.

Even though it is stated in the consultation memorandum that specific agreements regarding Norwegian execution of sentences abroad must be approved by the Norwegian Parliament, it is questionable that such a broad authority is given to make exceptions from the law in this important area for due process.

5 SUMMARY

The proposal raises a number of difficult problems, several of which are inadequately evaluated or entirely devoid of evaluation. The brief time limit for comments significantly limits the possibility to provide comments that address all of the challenges raised by the proposal.

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Ombudsman