



IPRT
Irish Penal Reform Trust

IPRT Briefing

The Rule of Law and Prisons: Barriers to accessing justice

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Context

The right of access to the courts and to have grievances and complaints by prisoners dealt with effectively, transparently and efficiently are essential elements in the creation of a legitimate and fair prison regime.

Together with robust monitoring and inspection of prisons, the establishment of effective avenues of redress for prisoners who have a complaint about aspects of their detention serves a number of purposes. Mechanisms which allow for findings of fault in relation to the manner of a person's detention allow for responsibility to be apportioned, but also to encourage improvements in order to prevent further breaches of the law. The ability to make a complaint and have it heard by an independent body also enhances the legitimacy of prison regimes, reducing tension and alleviating frustration in the daily routines of our prisons.

In other publications¹, IPRT has called for the establishment of an independent complaints mechanism for prisoners, specifically an Ombudsman. At present, there is no independent body dedicated to hearing the complaints of prisoners which can make binding recommendations for improvement. IPRT believes that the current system for prisoners' complaints does not fully comply with international human rights standards for independent review of such complaints. IPRT concurs with the recommendation of the Committee for the Prevention of Torture that a body should be established which can receive and consider individual complaints directly². IPRT also believes that the internal complaints procedures in prisons should be easy to understand and that any adverse consequences of using the complaints system should be closely monitored and guarded against.

A proper complaints mechanism can also act to reduce costs associated with litigation on the part of the prison authorities. It also ensures that unmeritorious complaints can be refused by an independent entity.

In this briefing, IPRT examines other barriers to prisoners seeking to access justice, specifically through legal proceedings. IPRT makes a number of recommendations directed at prison policy-makers, but also the legal profession, in order to promote the rule of law within prison and access to justice.

The test for establishing the breach of a constitutional right

The Irish Courts have recently restated that in order to establish a breach of a constitutional right of a prisoner, the prisoner must establish an 'evil intent' on the part of the prison authorities in the actions alleged to breach the right.³

IPRT considers this test to place too high a hurdle for a prisoner wishing to litigate aspects of her detention. Breaches of rights are more likely to be shown to come from a lack of resources or an inability to address the impugned conditions than actual malice on the part of the authorities.

IPRT is encouraged that in *Kinsella v. Governor of Mountjoy Prison* Hogan J found no malice towards a prisoner, but nonetheless held that there had been a breach of his right to bodily integrity.

IPRT notes that under the European Convention on Human Rights a deliberate intention to breach Article 3 is not required in order to find that a person has been subjected to torture or to inhuman or degrading treatment.

IPRT urges lawyers and policy makers to bear in mind the approach of the ECtHR under Article 3 in cases relating to the breach of prisoners' rights in Ireland.

1 Irish Penal Reform Trust (2009) *Position Paper 7: Complaints, Monitoring and Inspection in Prisons*. Available at: http://www.iprt.ie/files/IPRT_Position_Paper_7_-_Complaints,_Monitoring_and_Inspection_in_Prisons.pdf p.2

2 *Report to the Irish Government on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 2 to 13 October 2006* (available at: <http://www.cpt.coe.int/documents/irl/2007-40-inf-eng.pdf>), at para 37.

3 *Mulligan v Governor of Portlaoise Prison & Anor* [2010] IEHC 269, para. 110.

Legal aid and the costs of litigation

The limited nature of legal aid for civil matters in Ireland is of concern in relation to the vindication of rights generally in Ireland.

In Ireland, unlike the United Kingdom, there is no specific 'Prison Law' legal aid scheme. While, for example, there may be provision for *habeas corpus* applications under the Attorney General's Scheme, most prisoners who take other kinds of cases risk significant cost orders against them. They are also liable to face security for costs orders, with which they are often unlikely to be able to comply. The Irish Courts have also specifically stated that legal aid is not required for prisoners at parole hearings.⁴

The question of costs is a significant hurdle for those considering applying to the courts for the vindication of their legal rights. In IPRT's view, it has also resulted in a less developed prison law jurisprudence than in other countries. IPRT also believes that the lack of legal aid for prisoners in taking cases concerning aspects of their detention, coupled with the absence of an independent complaints mechanism, could be taken into account by a court in deciding that prisoners do not have the right to an effective remedy for breaches of their Convention rights under Article 13 of the Convention.

IPRT calls on the Government to establish a system of basic legal aid provision for those wishing to vindicate their rights in detention through legal proceedings, most urgently in cases relating to decisions on parole.

Specifically, IPRT calls for the extension of the legal aid scheme to cover one further visit by solicitor and counsel to a prisoner after the conclusion of all matters relating to conviction and sentence. The early stages of a person's time in prison are when a prisoner is most vulnerable, and the provision of accurate information about the prison regime and rights most necessary. A visit from a prisoner's legal advisors at this point would provide an important safeguard in the treatment of prisoners.

Access to lawyers

IPRT is concerned that the current policies in many prisons for the times at which phone calls can be made often militate against immediate contact with a prisoner's chosen lawyer. The times at which phone calls may be made are often during the periods at which lawyers are likely to be in court. IPRT calls on prison authorities to show greater flexibility when a prisoner wishes to contact his or her solicitor.

IPRT is also concerned about reports received from prisoners about correspondence with solicitors being opened and read, in breach of Rule 44 of the Prison Rules, 2007. **IPRT calls on the prison authorities to investigate any claims made by prisoners in this regard and ensure strict enforcement of Rule 44.**

Standing

IPRT is concerned that non-governmental organisations with an interest in aspects of penal regimes may be deterred from becoming involved in cases on the basis that they will be refused permission to become so involved by virtue of the rules on 'standing' or sufficient interest.

The circumstances in which a non-governmental organisation can bring a case where there is no directly affected plaintiff or applicant are somewhat unclear. This lack of clarity, coupled with the real concern about costs being awarded against an NGO, act to prevent those organisations from taking cases seeking to vindicate rights. **IPRT calls on the Government to legislate in this area in order to make it easier for NGOs with a genuine interest in particular areas to become involved in litigation on behalf of others.**

IPRT further calls on the Government to consider allowing a form of class action to be taken by prisoners in relation to a common issue, rather than a series of individual cases, which is time-consuming and expensive.

⁴ *Barry v Sentence Review Group* [2001] 4 I.R. 167

Training for lawyers

IPRT calls on academic institutions and professional bodies to provide specific training and education in the areas of prison law and prisoners' rights in order to develop understanding of and capacity in these issues for current and future lawyers.

Information on rights

The vindication of all other rights depends upon the availability of information to prisoners about their rights. The European Court of Human Rights has taken a lack of information on a prisoner's rights into account in finding a breach of Article 3⁵. Under the European Prison Rules, prisoners are entitled to receive a notice of their rights.

IPRT calls on the prison authorities to ensure that prisoners are made fully aware in a language they understand, with appropriate provision for those with literacy difficulties, of their rights and entitlements while in prison.

Further information

Irish Penal Reform Trust (IPRT) is Ireland's leading non-governmental organisation campaigning for the rights of everyone in the penal system, with prison as a last resort. IPRT is committed to reducing imprisonment and the progressive reform of the penal system based on evidence-led policies. IPRT works to achieve its goals through research, raising awareness, building alliances and growing our organisation. Through its work, IPRT seeks to stimulate public debate on issues relating to the use of imprisonment, including on sentencing law and practice in Ireland.

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