

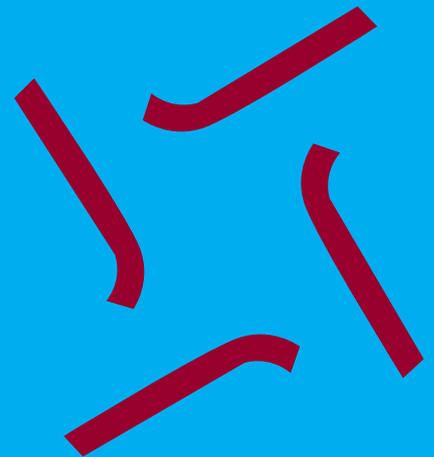


**IPRT**  
Irish Penal Reform Trust

# **Prison Litigation Network Project**

## **National Report on Ireland**

April 2016



The 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, and building alliances.

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Our thanks also go to Dr Mary Rogan for her comments on an earlier draft of this report.

## About this project

This report has been prepared by IPRT as the Irish national project partner to the Prison Litigation Network Project led by the University of Florence: [www.prisonlitigationnetwork.eu](http://www.prisonlitigationnetwork.eu)

The project was funded by the European Commission and examined national systems of judicial and non-judicial mechanisms for the protection of the rights of prisoners in a number of European countries including Belgium, UK, Spain and Italy. The project is the first step to setting up a network of researchers, practitioners and activists, aimed at the sharing of knowledge of legal systems and requirements, as well as best practice in such protection in a number of European jurisdictions. Additionally, the project focused on cataloguing and dissemination of the jurisprudence of the European Court of Human Rights, establishing standards under the European Convention on Human Rights relating to the treatment of prisoners and prison conditions.

As well as providing a compendium of information relating to national systems of protection in Ireland, the information contained in this report will also form part of a Europe-wide, comparative report to be presented at an international conference at the European Court of Human Rights in the summer of 2016.



The Prison Litigation Network is a European network of practitioners and researchers working to defend prisoners' rights. The Prison Litigation Network Project is funded by the Criminal Justice Programme of the European Union.

For more information on the Prison Litigation Network, visit: [www.prisonlitigationnetwork.eu](http://www.prisonlitigationnetwork.eu)

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## INTRODUCTION

This report has been prepared as part of a European project looking at national systems of judicial and non-judicial mechanisms for the protection of the rights of prisoners. The 'Prison Litigation Network' research project formed the first step towards setting up a network of researchers, practitioners and activists, aimed at the sharing of knowledge of legal systems and requirements, as well as best practice in such protection, in a number of European jurisdictions. Additionally, the project focused on cataloguing and dissemination of the jurisprudence of the European Court of Human Rights, establishing standards under the European Convention on Human Rights relating to the treatment of prisoners and prison conditions.

With the above aims in mind, the objectives of national research in a number of European countries (including Ireland) was twofold: first, to outline the nature and extent of judicial and non-judicial remedies and complaints mechanisms available to prisoners in those countries; and second, to consider any barriers that both prisoners and practitioners face when complaining or bringing court cases relating to prisoner treatment or prison conditions. National reports were also to consider any national and international critique of the available mechanisms of protection with a view to highlighting any improvements that may be necessary for those mechanisms to meet the European standards of independence and effectiveness – in particular in those countries, such as Italy, Romania and Bulgaria, against which the European Court of Human Rights issued pilot or quasi-pilot judgements, requiring systemic changes in prison systems.

The structure of the report follows the structure of research questions, agreed by the project partners to enable the comparison of information across a number of national jurisdictions with a variety of legal systems. As such, Part A of the report focuses on legal remedies and non-judicial complaints systems available in Ireland to prisoners wanting to raise issues relating to their treatment or to prison conditions. This part of the report also outlines a number of cases that have come before the European Court of Human Rights from Ireland on the same issues, as well as providing an outline of the critique of the national system by international bodies such as the European Committee for the Prevention of Torture (CPT). The first part of the report also discussed the role of external accountability mechanisms – such as the Office of the Inspector of Prisons – in ensuring the practical protection of the rights of prisoners. Part B of the report outlines the findings of a small empirical study, undertaken to assess the practicalities of prison litigation in Ireland, and discussing the barriers faced by prisoners and their representatives in accessing effective protection.

As well as providing a compendium of information relating to national systems of protection in Ireland, the information contained in this report will also form part of a Europe-wide, comparative report to be presented at an international conference at the European Court of Human Rights in the summer of 2016.

## Part A: Judicial and non-judicial systems for the protection of prisoners' rights in Ireland

### I. The prison system in Ireland – a brief introductory note

The prison system in Ireland consists of 14 prisons and places of detention of varied security regimes. Seven of those are located in or close to Dublin, with the remaining seven serving different parts of the country outside of the capital. Ireland has only one high security prison in Portlaoise, County Laois (male).<sup>1</sup> There are two open, low security prisons – Loughan House in County Cavan and Shelton Abbey in County Wicklow – for male prisoners. There is no open prison provision for women. Women prisoners are committed to the Dóchas Centre (part of the Mountjoy Prison Campus in Dublin) or to Limerick Prison. Whilst the Dóchas Centre is a purpose-built separate prison for women, in Limerick women are accommodated in a separate wing of an otherwise male establishment. A specialised Training Unit (part of the Mountjoy Prison Campus) is a semi-open low security prison for male offenders which focuses on education and training.<sup>2</sup> St Patrick's Institution (part of the Mountjoy Prison Campus) and Wheatfield Place of Detention in Dublin both hold 17-year-old male prisoners – the former those who are on remand, the latter those who are committed on sentence. As of 11<sup>th</sup> December 2015, there were no remand prisoners in St Patrick's; however, thirteen 17-year olds were held in Wheatfield Place of Detention (an adult prison).<sup>3</sup>

The operational (bed) capacity of the Irish prison system as of 11<sup>th</sup> December 2015 was 4,116, with the number of prisoners in custody standing at 3,746.<sup>4</sup> According to the measurement by bed capacity (rather than design capacity), three prisons were overcrowded on that particular date: Mountjoy (female) at 104% capacity; Limerick (male) at 105% and Limerick (female) at 104%.

While the number of prisoners in custody has fallen in recent years, the number of committals to prisons in Ireland is still very significant at 16,155 in 2014.<sup>5</sup> This was an increase of 2.7% on 2013.<sup>6</sup> Of those, 9,361 were for sentences of less than three months;<sup>7</sup> 8,979 people were committed to prisons in 2014 for non-payment of fines.<sup>8</sup> Slightly over

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<sup>1</sup> Cloverhill Prison in Dublin has a high security unit within an otherwise medium security remand prison.

<sup>2</sup> For more information, see: <http://www.irishprisons.ie/index.php/joomlaorg>.

<sup>3</sup> Irish Prison Service (2015a) *Prisoner population on Friday 11 December 2015* [on-line] (available at: [http://www.irishprisons.ie/images/dailynumbers/11\\_december\\_2015.pdf](http://www.irishprisons.ie/images/dailynumbers/11_december_2015.pdf)).

<sup>4</sup> Ibid.

<sup>5</sup> Irish Prison Service (2015b) *Annual Report 2014*, Longford: IPS (available at: [http://www.irishprisons.ie/images/pdf/ar2014\\_english.pdf](http://www.irishprisons.ie/images/pdf/ar2014_english.pdf)), p.19.

<sup>6</sup> Ibid. See also: Irish Prison Service (2014a) *Annual Report 2013*, Longford: IPS (available at: [http://www.irishprisons.ie/images/pdf/ar\\_2013.pdf](http://www.irishprisons.ie/images/pdf/ar_2013.pdf)), p.1.

<sup>7</sup> Irish Prison Service (2015b) *Annual Report 2014*, Longford: IPS (available at: [http://www.irishprisons.ie/images/pdf/ar2014\\_english.pdf](http://www.irishprisons.ie/images/pdf/ar2014_english.pdf)), p.19.

<sup>8</sup> Ibid. This was an increase of 10.6% on the previous year.

90% of all committals to prison were for sentences of 12 months or less.<sup>9</sup> Finally, 407 committals (involving 390 detainees) in 2014 were effected on the basis of immigration law.<sup>10</sup>

While significant improvements have been made to the physical conditions in prisons in recent years, a number of concerns remain. As of October 2015, just over half of prisoners were accommodated in single cells (55%).<sup>11</sup> Eight per cent of prisoners (284 individuals) were still required to 'slop-out' (a practice of disposing of human waste from buckets available in cells instead of having in-cell sanitation), while 37% of prisoners (1,367) were required to use toilet facilities in the presence of another prisoner.<sup>12</sup>

In October 2015, 389 prisoners were subject to a restricted regime.<sup>13</sup> The number of prisoners on 22- and 23-hour lock-up in October 2015 was 78.<sup>14</sup>

The most recent report of the European Committee for the Prevention of Torture (CPT) on their visit to Ireland in September 2014, acknowledged the considerable steps taken by the Irish authorities to improve conditions in prisons, including the reduction in overcrowding.<sup>15</sup> It has, however, noted a number of issues of concern, among those:

- a) the continuing use of slopping out by over 300 prisoners in the State at the time of the visit;
- b) the use of excessive physical force and verbal abuse by a small number of prison staff;
- c) the still-high levels of inter-prisoner violence;
- d) shortcomings in the investigations of deaths in prison, and in particular the lack of any internal review mechanism;
- e) shortcomings in the provision of healthcare in some of the prisons, with a recommendation that the Irish authorities should commission an independent body to review such provision;
- f) the continuing detention in prisons of persons with severe mental health problems, for whom care cannot be appropriately provided in the prison environment;

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<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Irish Prison Service (2015c) *Census Prison Population October 2015 – Cell Occupancy – In-cell sanitation* [online] ([http://www.irishprisons.ie/images/monthlyinfonote/oct15\\_incell.pdf](http://www.irishprisons.ie/images/monthlyinfonote/oct15_incell.pdf)).

<sup>12</sup> Ibid.

<sup>13</sup> Irish Prison Service (2015d) *Census of restricted prisoners October 2015* (available at: [http://www.irishprisons.ie/images/monthlyinfonote/oct15\\_restrict.pdf](http://www.irishprisons.ie/images/monthlyinfonote/oct15_restrict.pdf)).

<sup>14</sup> Irish Prison Service (2015d) *Census of restricted prisoners October 2015* (available at: [http://www.irishprisons.ie/images/monthlyinfonote/oct15\\_restrict.pdf](http://www.irishprisons.ie/images/monthlyinfonote/oct15_restrict.pdf)).

<sup>15</sup> Council of Europe (2015) *Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture, and Inhuman or Degrading Treatment of Punishment (CPT) from 16 to 26 September 2014*, Strasbourg: CPT (available at: <http://www.cpt.coe.int/documents/irl/2015-38-inf-eng.pdf>).

- g) issues regarding the separation of prisoners deemed a risk to others, with a recommendation from the CPT that clear rules and procedures are established to govern such segregation;
- h) the continued use in disciplinary proceedings of the sanction of a “loss of all privileges”, placing prisoners in conditions akin to solitary confinement for up to 56 days; and
- i) shortcomings in the implementation of the new *Prisoner Complaints Policy*, in particular with respect to prompt investigation and evidence collection relating to the most serious of complaints. These latter concerns are discussed in more detail later in this report.

## II. ECHR cases on prisoners’ rights – Ireland

Up to September 2015, there have been no successful cases against Ireland taken to the European Court of Human Rights that concerned the rights of prisoners, and overall there are very few cases taken to the Court from this jurisdiction. A search of admissibility decisions of the now-defunct European Commission on Human Rights and the most recent decisions of the Court reveal a number of attempts to argue cases which, in the end, have been declared inadmissible for a range of reasons. The following is the summary of such cases.

Richard O’Hara, a life-sentenced prisoner, brought two separate applications to the Commission in 1994 and 1998. His first application concerned issues relating to the review of his sentence, and is not of relevance here.<sup>16</sup> In his second application to the Commission,<sup>17</sup> the applicant raised a number of issues. Firstly, he complained again about the mechanism for review of his sentence. Secondly, he complained that the prison authorities censored, and on occasion withheld, his correspondence, including the letters to and from his solicitors, to and from the European Committee for the Prevention of Torture (CPT) and the then European Commission on Human Rights. This, he alleged, constituted a breach of Article 8 of the Convention, and also a breach of Article 13 due to a lack of effective remedy in national law. As some of the correspondence related to a legal case, he also alleged a breach of Article 6 with respect of access to a court. Finally, he complained that the prison authorities did not facilitate time for longer visits (more than half an hour), that he couldn’t accumulate visit entitlements to have longer visits, and that since his family had to travel a long distance, his visits were often lost. The Commission considered the latter complaints with respect to Article 8 and found that since the governor of the relevant prison had in fact granted him extended visits in the past, a case was not established for a breach of Article 8 ECHR. In relation to the alleged violation of Articles 6, 8 and 13 of ECHR as regards the interference with the applicant’s correspondence, the Commission found that

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<sup>16</sup> *O’Hara v Ireland*, Application No. 23156/94; admissibility decision 31 August 1994.

<sup>17</sup> *O’Hara v Ireland*, Application No. 26667/95; admissibility decisions 2 September 1996 and 14 April 1998.

the applicant did not resort to remedies available to him in Ireland (a judicial review or a constitutional challenge to the *1947 Prison Rules* which provided for interference in certain circumstances) and therefore, declared the application inadmissible for reason of non-exhaustion of domestic remedies.

In the case of *Holland v Ireland*,<sup>18</sup> the applicant again raised the issue of censorship of his correspondence by the prison authorities in an alleged violation of Article 8 of the Convention. Similar to the *O'Hara* case, the correspondence included letters to and from his solicitors, correspondence with the then European Commission on Human Rights, the CPT, his correspondence with members of the Dáil (the lower chamber of the Irish Parliament), the offices of various Government departments, the office of the President of Ireland and his correspondence with the Irish courts. The applicant also complained that a letter containing a High Court application that he wrote for another prisoner was not sent to the other prisoner's father as requested and was instead handed back to the applicant with a 'Censored' stamp on it. In relation to the latter incident, the applicant had previously instituted judicial review proceedings in the High Court in Ireland, seeking an order of *mandamus* directing the prison authorities to refrain from interfering with his correspondence. The application was rejected. In considering his complaint, the European Human Rights Commission stated – similarly to *O'Hara* – that it was open to the applicant to challenge the constitutionality of the relevant *Prison Rules 1947* in domestic courts, and therefore declared his application to the Commission inadmissible.

The applicant's second, and separate, complaint to the Commission related to his right to vote while in prison. The applicant stated that while serving his sentence, he was unable to vote in a number of elections (including Presidential elections) and a referendum. He stated that prisoners were not at the time barred by law from voting, and that the practical limitations on the right to vote (such as the failure of prison authorities to provide voting boxes in prisons) constituted a violation of Articles 6, 8, 9, 10, 13, 14 and 17 of the Convention and Article 3 of Protocol No. 1. In relation to this claim, the Commission decided to consider his claim on the basis of an alleged violation of Article 3 of Protocol No.1 only.

In this case, the Government argued that it was not obliged under the Convention to provide temporary release for prisoners to vote, and that any temporary release of prisoners who are entitled to vote to enable them to do so would be far too great a security risk to be a possibility. The Government also stated that it was not obliged to provide ballot boxes in the prison or the right to a postal vote. It further argued that a postal vote was not a constitutionally protected right in Ireland, and that in any case, registration for a postal vote took place at such an early stage that many prisoners would be released from prisons by the time the elections took place. The Commission recalled its earlier decisions regarding the right to vote being necessarily limited by the fact of imprisonment, and not arbitrary. It

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<sup>18</sup> Application No. 24827/94; admissibility decision 14 April 1998.

therefore found this part of Holland's application as manifestly unfounded.

The *McHugh* decision of 16 April 1998<sup>19</sup> concerned the refusal of prison authorities to allow a supervised visit (escorted leave) to the applicant's elderly mother who was not fit to visit him in prison.<sup>20</sup> At the time of the case, the applicant had served 13 years of his 40-year sentence and was seeking what amounted to temporary release to visit his mother who lived approximately 115 miles from the prison in which he resided. He sought an order of *mandamus* from the High Court to force the authorities to grant him the escorted visit. The High Court in Ireland stated that the decision to grant such a visit was in fact a decision on temporary release and therefore lay solely at the discretion of the Minister for Justice. The applicant appealed the decision to the Supreme Court in Ireland, which in turn rejected the appeal. The applicant alleged violation of Article 8 ECHR (the right to family life), Article 11 (the right to freedom of assembly) and Article 14 (freedom from discrimination) in that he was not afforded the same opportunity for an escorted visit as other prisoners. In relation to this part of the case, the applicant also alleged a breach of Article 6 (the right to a fair trial) in that he argued that a decision about his temporary release should be taken by an 'independent and impartial tribunal' and not the Minister.

In relation to the alleged breach of Article 6, the Commission stated that, in accordance with the established ECtHR jurisprudence, proceedings relating to the execution of a sentence (including regarding a decision on conditional or temporary release) fell outside the remit of the right to fair trial. The Commission determined that the said proceedings '...concern neither the determination of "a criminal charge" nor the determination of "civil rights and obligations" within the meaning' of Article 6 and therefore rejected the applicant's complaint in this respect. As the applicant did not exhaust domestic remedies in relation to the alleged breaches of Article 8 in conjunction with Article 14, i.e. he did not challenge the refusal on those grounds before the national courts, the Commission determined this part of the application to be inadmissible.

Finally, the applicant complained about prison authorities interfering with the correspondence between him and his solicitor, relating to appeal proceedings instituted by the applicant regarding his original criminal conviction. The applicant complained that those letters were read and "censored" by the prison authorities. As this part of the complaint did not invoke any specific articles of the Convention, the Commission considered it in light of the rights protected by Article 8. In response to the latter complaint, the Commission noted that Section 63 of the *Prison Rules 1947* (in force at the time of the case) required that all correspondence to and from prisoners is opened and read, and that the Rules also allow for

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<sup>19</sup> *McHugh v Ireland*, Application No.34486/97.

<sup>20</sup> The applicant raised a number of other matters in the application, relating to criminal proceedings (appeal of his original conviction) and his correspondence with his solicitors. The latter allegation was not very clear from the application; however, the Commission considered it in relation to an alleged violation of Article 8 ECHR. The Commission's view in this respect followed the reasoning in *O'Hara v Ireland*.

suppression and censorship of correspondence. The Commission further noted that the application of the *Rules* should, in the first instance, be challenged in domestic courts, which provide the protection of constitutional rights, allowing the courts to develop their own interpretation. Further, the Commission also observed that with respect to the applicant's allegations that interferences with his correspondence were not authorised by Rule 63 of the 1947 *Rules*, judicial review proceedings were available to him to challenge such interference and, insofar as reasons were not given for stopping or censoring correspondence, to obtain such reasons. The applicant had not issued any such proceedings; nor did he appropriately challenge the constitutionality of Rule 63. His application was therefore rejected on the grounds of non-exhaustion of domestic remedies.

The most recent case considered by the Court is that of *Lynch and Whelan*<sup>21</sup> and concerned a complaint by two prisoners, both of whom are serving a mandatory life sentence for murder. They both complained that their continuing detention breached Article 5 of the ECHR. They submitted that as decisions about the release of life-sentenced prisoners are taken following an assessment of risk and consideration for the prevention of further offending, the sentence itself turns over time into a preventative rather than a punitive measure. They also argued that as the decision on early release is taken by the Minister for Justice rather than a court, the process was in breach of Article 6 of the ECHR as it allowed the executive rather than a court to determine the duration of their sentences.

Both applicants' cases were unanimously declared by the Court to be inadmissible. The Court rejected Whelan's application as it was lodged outside the six-month time limit. In the case of Lynch, the Court considered that the courts in Ireland have, in their jurisprudence, clearly established that preventive detention is not part of Irish law. The Court considered that the mandatory life sentence was fully punitive and that the nature of the sentence did not change with the passage of time. The Court stated therefore that the causal relationship between his conviction and his imprisonment continued and it could not be argued that his detention was arbitrary in contravention of Article 5 ECHR. On the point relating to Article 6, the Court also rejected Lynch's argument that it was the Minister who effectively determined the duration of his imprisonment, as the life sentence could not be regarded as 'unfixed'.

The lack of successful cases before the European Court means that to date, there has been no requirement on the national authorities to directly implement a specific judgment of the Court. However, the European Convention on Human Rights Act 2003 (discussed later in this report), created an obligation on the national courts to consider the jurisprudence of the Court while interpreting and/or applying the provisions of ECHR in cases before them.

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<sup>21</sup> Applications nos. 70495/10 and 74565/10, ECHR 238 (2014). See also: European Court of Human Rights (2014) *Temporary release programme for life prisoner in Ireland does not make his detention arbitrary*, Press release 31.07.2014, Strasbourg: ECHR.

This should not, however, be taken as an indication of the Convention being directly enforceable in Irish courts. The jurisprudence of the Supreme Court in this respect states clearly that this is not the case, and caution has been urged with respect to the grounding of pleadings in the ECHR.<sup>22</sup>

### III. The protection of prisoners' rights in Ireland – the legal and institutional framework of judicial protection

#### 1. Protection of rights under the Irish Constitution (*Bunreacht na hÉireann*) 1937

A number of fundamental rights are explicitly protected in the Irish Constitution, Articles 40 to 44.<sup>23</sup> Of relevance to the current report, are the following rights:

- a) Equality before the law (Article 40.1);
- b) The right to life, protection of the person, their good name and their property (Article 40.1.2);
- c) The right to be free from arbitrary detention (Article 40.4.1);<sup>24</sup>
- d) Freedom of expression, assembly and association (Article 40.6.1);
- e) Protection of the family (Article 41.1.2);
- f) Freedom of conscience and religion (Article 44.2.1).

The constitutional jurisprudence in Ireland has long established – although not without controversy – that a number of *unenumerated rights* are also protected. In the case of *Ryan v Attorney General*,<sup>25</sup> it was held that the plaintiff enjoyed a constitutional right to bodily integrity, and that “the rights guaranteed by the Constitution were not confined to those to which the document extends express recognition”.<sup>26</sup> Since *Ryan*, the courts have recognised as many as twenty personal unenumerated rights, which include the right to privacy,<sup>27</sup> the right to bodily integrity, including the protection of mental health, and freedom from

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<sup>22</sup> Rogan, M. (2014) *Prison Law*, Dublin: Bloomsbury Professional, p.322. The ECHR has, however, been used in a number of cases, where applicants asked the courts in Ireland for declaration of a breach in relation to ECHR-protected rights. Such cases include, for example: *Killeen v Governor of Portlaoise Prison & Ors* [2014] IEHC 77 (a case concerning separation and solitary confinement); *Foy v Governor of Cloverhill Prison* [2010] IEHC 529 (a case concerning screened family visits); *Whelan v Governor of Mountjoy* [2015] IEHC 273 (a case concerning access to exercise in open air); *Dundon v Governor of Cloverhill Prison* [2013] IEHC 608 (a case concerning the application of Prison Rule 62 – separation); *McDonnell v Governor of Wheatfield Prison* [2015] IEHC 112 (a case concerning holding the prisoner in conditions which effectively constitute solitary confinement); *Clarke v The Health Service Executive & Ors* [2014] IEHC 419 (a case concerning the imprisonment of a person with serious mental health difficulties). In most such cases, where decision can be made on the basis of the Constitution, the ECHR point is not considered separately.

<sup>23</sup> Available at: <http://www.irishstatutebook.ie/en/constitution/index.html#part13>

<sup>24</sup> *Habeas Corpus* proceedings are covered by Article 40.4.2-4.

<sup>25</sup> [1965] I.R. 294 (H.C. & S.C.).

<sup>26</sup> Keane, R. (2004) ‘Judges as Lawmakers: The Irish Experience’, *Judicial Studies Institute Journal*, Vol.4, Issue 2, p.10.

<sup>27</sup> The Constitutional Review Group (1996) *Report of the Constitution Review Group*, Dublin: The Stationery Office (available at: <http://archive.constitution.ie/reports/crg.pdf>), p.188.

torture, inhuman and degrading treatment or punishment.<sup>28</sup> It is open for prisoners and their legal representatives to argue the protection of Constitutional rights in plenary summons proceedings or judicial review proceedings.

With respect to prisons, while the courts in Ireland have always been clear that prisoners retain certain rights under the Constitution, the doctrine of necessary limitations on the exercise of many of the rights due to the fact of imprisonment has been prevalent. This is expressed in the case of *State (McDonagh) v Frawley* where the Court held that:

*“...while ...held as a prisoner pursuant to a lawful warrant, many of the applicant’s normal constitutional rights are abrogated or suspended. He must accept prison discipline and accommodate himself to the reasonable organisation of prison life laid down in the prison regulations”.*<sup>29</sup>

However, the courts also recognise that any limitations on the exercise by prisoners of their constitutionally protected rights must be proportionate and that “those rights which are not necessarily diminished must continue to be upheld”.<sup>30</sup> This principle was expressed in the case of *Mulligan v Governor of Portlaoise Prison*, where the Court held that any restrictions:

*“... must be proportionate; the diminution must not fall below the standards of reasonable human dignity and what is expected in a mature society. Insofar as practicable, a prison authority must vindicate the individual rights and dignity of each prisoner.”*<sup>31</sup>

In discussing the protection under the Constitution, it is important to add that the courts in Ireland have also traditionally allowed prison governors a wide margin of appreciation in relation to the application of prison rules, and in many instances subjugated the protection of the rights of prisoners to the protection of security and good order in prisons. This is well illustrated by the following quote from the case of *Foy v Governor of Cloverhill Prison*:

*“[...] the balance between what is possible in terms of upholding rights and, on the other hand, maintaining the purpose of imprisonment within good order, is for the governor. Such decisions as he or she makes are subject to judicial review. Where such decisions are within the scope of the authority of the governor, as conferred by the Prison Rules, it is difficult to establish an arguable case. It is only possible to mount a challenge to the decision of a governor where it is shown to both infringe a right and, as to the balance of the exercise of that right with the duty of the governor*

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<sup>28</sup> Rogan, M. (2012a) *Prison Conditions Under Irish Law and the European Convention on Human Rights*, Dublin: Irish Penal Reform Trust (available at: [http://www.iprt.ie/files/The\\_law\\_on\\_Prison\\_Conditions.pdf](http://www.iprt.ie/files/The_law_on_Prison_Conditions.pdf)), pp.4-5.

<sup>29</sup> *State (McDonagh) v. Frawley* [1978] I.R. 131 at para. 135.

<sup>30</sup> Rogan, M. (2012a) *Prison Conditions Under Irish Law and the European Convention on Human Rights*, Dublin: Irish Penal Reform Trust (available at: [http://www.iprt.ie/files/The\\_law\\_on\\_Prison\\_Conditions.pdf](http://www.iprt.ie/files/The_law_on_Prison_Conditions.pdf)), p.4.

<sup>31</sup> *Mulligan v Governor of Portlaoise Prison*, [2010] IEHC 269, at para. 14. See also: Rogan, M. (2012a) (op.cit. above), p.4.

*to ensure proper order within the prison, to fly in the face of fundamental reason and common sense. Such cases are, of their nature, difficult to prove. A prison governor is entitled to some measure of latitude in judgment as to the decision which he or she makes.”*<sup>32</sup>

## **2. The Prison Rules 2007**

The day-to-day operations of prisons are governed by the *Prison Rules 2007* (2007 Rules) which outline the statutory basis for the treatment of prisoners while in the custody of the Irish Prison Service.<sup>33</sup> The 2007 Rules contain regulations concerning, amongst others:

- a) Reception and registration of prisoners (Part 2 of the 2007 Rules);
- b) Treatment of prisoners (Part 3), including, amongst others, regulations relating to accommodation, prison hygiene, clothing, bedding, food and drink, sanitary and washing facilities, out-of-cell time and structured activity, employment, support services, contact with the outside world (including visits, letters and telephone calls), privacy, searches, remission, transfer and release. This section also includes the rules relating to grievance procedures (complaints) described in more detail below;
- c) Control, discipline and sanctions (Part 4 of the 2007 Rules);
- d) Young prisoners (Part 5);
- e) Prisoners not serving a sentence (remand prisoners)(Part 6);
- f) Governors (duties and functions)(Part 7);
- g) Prison officers (duties and functions)(Part 8);
- h) Healthcare (Part 10);
- i) Education (Part 12);
- j) Vocational training (Part 13);
- k) Psychology service (Part 14); and
- l) Chaplains (Part 15).

While it is generally accepted that the 2007 *Rules* are justiciable and their breach may give rise to judicial review proceedings (with all the remedies described below available to the judges), it is not clear if such a breach can also be considered a breach of a statutory *duty*.<sup>34</sup> Additionally, the *Rules* give the prison authorities wide discretion in their implementation and many of the them are only implemented ‘as far as practicable’,<sup>35</sup> providing a gateway to limitations based on, for example, good order and security of the prisons.

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<sup>32</sup> *Foy v Governor of Cloverhill Prison* [2010] IEHC 529 at para.22.

<sup>33</sup> Available at: <http://www.justice.ie/en/JELR/prison%20rules%202007.pdf/Files/prison%20rules%202007.pdf>. *Prison Rules 2007* are a statutory instrument (not an Act of Parliament) and were published by the Minister for Justice under the power given to him by Section 35 of the *Prisons Act 2007*.

<sup>34</sup> Rogan, M. (2012b) *Taking Prison Law Cases: A Practical Approach*, Dublin: Irish Penal Reform Trust (available at: [http://www.iprt.ie/files/Taking\\_Prison\\_Law\\_Cases.pdf](http://www.iprt.ie/files/Taking_Prison_Law_Cases.pdf)), p.4.

<sup>35</sup> *Ibid.*

### 3. Procedural requirements

Proceedings concerning the protection of constitutional rights (which would normally be connected to an alleged breach of the Prison Rules) can be instituted by way of plenary summons proceedings (with pleadings and hearing of oral evidence) or judicial review proceedings in the High Court. Plenary proceedings have the advantage of the prisoner and their legal representatives being able to call evidence and cross-examine witnesses,<sup>36</sup> while judicial review is normally a much speedier procedure.<sup>37</sup> Plenary proceedings may “offer more room to examine the issues, and are often more appropriate when prison conditions are the cause of complaint”.<sup>38</sup>

Depending on the relief sought in either of the type of proceedings, the Court has a number of options regarding the issuing of relevant orders:

- a) An *order of certiorari* is an order quashing or cancelling a decision (in this case, of the prison authorities) on the basis that it was illegal or unconstitutional. Successful application for an order of *certiorari* means that any decision will be deemed null and void. The court may also issue an *order of prohibition* that prevents a decision from being taken in the first place.
  
- b) An *order of mandamus* is an order issued by the court to a public authority (such as the Prison Service) for the authority to perform some specific act (or to refrain from doing something) to fulfil its statutory duty. As per *Ananyev v Russia*,<sup>39</sup> such order will be regarded as a preventative remedy, designed to improve the material conditions of detention. In Ireland, judges have traditionally refrained from interfering with the duties of the executive (separation of powers) and, as mentioned previously, have given governors considerable latitude regarding the management of prisons. In light of this, “*Mandamus* is a difficult remedy to obtain in a prison context, but may be given in an appropriate case”.<sup>40</sup> In the case of *Mulligan*,<sup>41</sup> the court held that in an appropriate case it has

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<sup>36</sup> Rogan, M. (2014) *Prison Law*, Dublin: Bloomsbury Professional, p.308. Judicial reviews focus on analysis of sworn affidavits, which in certain cases may be amended after the Court has made itself familiar with the case (Rules of the Superior Courts, Order 84, Rule 23(2); available at: <http://www.courts.ie/rules.nsf/0/a53b0f76ffc6c5b780256d2b0046b3dc?OpenDocument>).

<sup>37</sup> An application for leave to apply for judicial review needs to be made “promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is certiorari, unless the Court considers that there is good reason for extending the period within which the application shall be made.” (Rules of the Superior Courts, Order 84, Rule 21(1)). A notice of motion or summons, must then be served within 14 days after the grant of leave, or within such other period as the Court may direct (Rule 22(3)).

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ananyev and others v Russia*, 10 January 2012 (Applications No. 42525/07 and 60800/08), para.97.

<sup>40</sup> Rogan, M. (2014) *Prison Law*, Dublin: Bloomsbury Professional, p.16.

<sup>41</sup> *Mulligan v Governor of Portlaoise Prison*, [2010] IEHC 269, at para. 99.

*“[...] jurisdiction to actually direct improvements in prison conditions where warranted to vindicate a constitutional right, and where the vindication of such right is not constrained by boundaries such as practicability. [...] The protection and vindication of that right might then have to be balanced against other constitutional provisions.”*

The above quote illustrates, however, that even where there exists a possibility of obtaining such a court order, any action required of the Irish Prison Service would be judged against practical considerations of what is possible within the prison context.

- c) In judicial review proceedings, the court may also award damages to the applicant (a compensatory remedy) provided that the applicant includes in a statement grounding his application a claim for such damages.<sup>42</sup>

### *Habeas Corpus proceedings*

*Habeas Corpus* proceedings are a non-general remedy, accessible only to those who are subject to detention. Such detention may, however, be non-related to criminal proceedings (for example, detention on account of mental health difficulties). *Habeas Corpus* application (under Article 40.4 of the Constitution) is an application for release in situations where the plaintiff argues his or her conditions are such that they endanger their life or health.

The burden of proof lies with the plaintiff (the prisoner) and has two apparent parts: one, to prove that the conditions of detention are such that they render the detention unlawful, and two, that the prison authorities are unwilling or unable to appropriately remedy the conditions.<sup>43</sup> A judge can also convert judicial review proceedings into an Article 40.4 inquiry (and vice-versa) should they decide that, in the circumstances of a particular case, *habeas corpus* proceedings would be more appropriate.<sup>44</sup>

The question in *habeas corpus* proceedings is “whether the conditions are so poor that immediate release is warranted”.<sup>45</sup> This would only happen in very exceptional circumstances “where the conditions under which a prisoner is being detained can invalidate a detention which is *prima facie* legal and authorised by a warrant”.<sup>46</sup> The Irish courts have consistently held that normally, prisoners should seek remedies by way of other

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<sup>42</sup> Rules of the Superior Courts, Order 84, Rule 24(1)(a) (available at: <http://www.courts.ie/rules.nsf/0/a53b0f76ffc6c5b780256d2b0046b3dc?OpenDocument>).

<sup>43</sup> Rogan, M. (2014) *Prison Law*, Dublin: Bloomsbury Professional, p.18.

<sup>44</sup> See for example, *Devoy v Governor of Portlaoise Prison* [2009] IEHC 288.

<sup>45</sup> Rogan, M. (2014) *Prison Law*, Dublin: Bloomsbury Professional, p.302.

<sup>46</sup> *State (Richardson) v Governor of Mountjoy Prison* [1980] ILRM 82, at para. 90.

forms of procedure, i.e. a constitutional complaint in plenary proceedings or judicial review.<sup>47</sup> *Habeas corpus*, it is held, “is a unique and important remedy, which may be sought swiftly to enable an inquiry into the detention of a person. The relief sought is the release of that person. It does not have a wider ambit. It is not a judicial review, nor is it a plenary summons”.<sup>48</sup> As such, not only is it an exceptional remedy, it is also very unlikely to succeed in situations where the person has been convicted of a criminal offence, and is being held on the basis of a lawful warrant.

#### **4. Civil action**

Another avenue for prisoners of taking cases against the prisons is civil action. Such actions can be taken in cases where it can be argued that the Prison Service and/or the individual prison had a duty of care towards the prisoner, and that duty was breached. Examples of possible avenues include:

- a) Cases under the *Occupiers’ Liability Act 1995*: these are cases where it can be argued that the Prison Service owed a duty of care to a particular prisoner as a ‘visitor’ to their premises (the prison). Examples of issues considered under this legislation include the case of *Power v Governor of Cork Prison*<sup>49</sup> in which the judge found in favour of the applicant who slipped on a wet floor in the prison toilet, sustaining head injury. In the particular circumstances of the case (where it was clear that the plaintiff did not contribute to the fall), the judge stated the prison owed a duty of care to prisoners to provide them with a safe environment. In the case, the judge awarded the plaintiff substantial compensation.
- b) Cases concerning the duty to protect prisoners from attacks by other prisoners: these are cases where a liability can be established due to the prison’s “failure to take due care to protect prisoners in their charge from being injured by other prisoners”.<sup>50</sup> In *Creighton v Ireland & Ors*,<sup>51</sup> Peter Creighton was attacked by another prisoner and seriously injured while waiting to be provided with a dose of methadone in the Medical Centre in Wheatfield Prison. Amongst other arguments pursued, Creighton argued that the prison should have provided more staff in the particular part of the waiting area holding a large number of prisoners, to prevent the attack. While the judge disagreed that more staff would

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<sup>47</sup> Rogan, M. (2014) *Prison Law*, Dublin: Bloomsbury Professional, pp. 304-305.

<sup>48</sup> *JW (a Minor) v The Health Service Executive* [2014] IESC 8, at para.17. The case concerned a care order in respect of a child, rather than a prison situation. Nevertheless, the principle expressed in this passage applies equally to prison-related inquiries.

<sup>49</sup> [2005] IEHC 253.

<sup>50</sup> Binchy, W. (nd) *Prisoners and the Law of Tort* [on-line] (available at: [http://www.iprt.ie/files/Prisoners\\_and\\_the\\_Law\\_of\\_Tort.pdf](http://www.iprt.ie/files/Prisoners_and_the_Law_of_Tort.pdf)), p.8.

<sup>51</sup> [2009] IEHC 257.

have necessarily prevented the attack, he stated that presence of staff among the prisoners would have resulted in a speedier intervention and the break up of the assault. The judge ordered that Peter Creighton be paid €40,000 in damages in respect of the serious injuries sustained to his face, his scalp, his flank posterior and his abdomen. Following an appeal, the Supreme Court stated that certain evidential issues should have been considered by the High Court judge in greater detail, and sent the case back for consideration in that Court, setting aside the original compensation order.<sup>52</sup> The case was finally resolved in 2013,<sup>53</sup> when the judge in the re-trial stated that the practice of congregating large number of prisoners in the same area at the Medical Clinic breached the prison's duty of care towards the prisoners, including Peter Creighton, and ordered €150,000 in general damages to be paid to him at the conclusion of the case.<sup>54</sup>

- c) Cases taken under the *Safety, Health and Welfare at Work Act 2005*, certain provisions of which apply to prisons (subject to considerations of safe custody, good order and security).<sup>55</sup>

## 5. Informal court complaint

Any prisoner in Ireland may write to the Central Office of the High Court and make a complaint regarding the basis or conditions of their detention.<sup>56</sup> These complaints are informal in nature and do not follow specific rules of the court. Where such complaint is made, the Court will investigate, including through asking for a report from the governor of the appropriate prison. A ruling on the complaint is given in open court and the procedure

*"[...] is a highly effective means of ensuring that prisoners are not isolated and that they have an ultimate authority to which to turn on matters of law. The informality of the system is of core benefit to its administration. Nothing about that informal procedure disables any form of judicial review [...]. Nor could that system undermine the entitlement of an interested party to apply for habeas corpus by way of an application to a judge of the High Court in the ordinary course. The procedure is in addition to other rights and procedures. It amounts to an exceptional means of access to the High Court that is for the benefit of prisoners."<sup>57</sup>*

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<sup>52</sup> [2010] IESC 50.

<sup>53</sup> See the full judgment here: <http://bnsolicitors.ie/index.php/peter-creighton-v-ireland-attorney-general-the-minister-for-justice-equality-and-law-reform-and-the-governor-of-wheatfield-prison/>.

<sup>54</sup> While this case was successful, a significant number of cases before *Creighton* were decided in favour of the prison authorities. For a comprehensive summary of those cases, see: Binchy, W. (nd) *Prisoners and the Law of Tort* [on-line] (available at: [http://www.iprt.ie/files/Prisoners\\_and\\_the\\_Law\\_of\\_Tort.pdf](http://www.iprt.ie/files/Prisoners_and_the_Law_of_Tort.pdf)).

<sup>55</sup> Binchy, W. (nd) *Prisoners and the Law of Tort* [on-line] (available at: [http://www.iprt.ie/files/Prisoners\\_and\\_the\\_Law\\_of\\_Tort.pdf](http://www.iprt.ie/files/Prisoners_and_the_Law_of_Tort.pdf)).

<sup>56</sup> See *Walsh and Ors v Governor of Midlands Prison and Ors* [2012] IEHC 229.

<sup>57</sup> *Ibid.*

This procedure is available to any prisoner, remanded or sentenced. It does not require the prisoner to have legal representation. It is unclear how often this procedure is used in practice.

## **6. Legal Aid in prison cases**

There is nothing in the law in Ireland that requires that prisoners be represented in cases relating to their treatment in detention. Prisoners can represent themselves, and can instigate *habeas corpus* proceedings, as well as judicial review or plenary proceedings, through direct petition.<sup>58</sup> However, the complexity of proceedings, including of evidential requirements, makes representation important, if not necessary.

Ireland has a number of legal aid schemes, administered by the courts and by the Legal Aid Board.<sup>59</sup> Of importance to this report is the *Legal Aid – Custody Issues Scheme* which is an *ex gratia* scheme which covers certain types of cases taken by prisoners. These include: *habeas corpus* applications, High and Supreme Court Bail Motions, certain types of judicial review, and extradition and European Arrest Warrant (EWA) applications.<sup>60</sup> Judicial reviews covered by the Scheme are those which: include application for an order of Certiorari, Mandamus or Prohibition *and* concerning criminal matters or matters where the liberty of the applicant is at issue.<sup>61</sup> The Legal Aid Board administers the Scheme, and the budgetary responsibility for it lies with the Department of Justice.<sup>62</sup>

Access to the Scheme is not automatic, and the applicant must satisfy the Court that s/he is not able to retain a solicitor using her or his own funds. The application for legal aid should be made at the commencement of the proceedings.<sup>63</sup> The Court then makes a recommendation to the Legal Aid Board as to whether the applicant should be given access to the Scheme,<sup>64</sup> and where the Court is satisfied that assignment of a counsel/solicitor is warranted by the nature of the case.<sup>65</sup> Representation paid from the Scheme is limited only to the remit of the Scheme, so for example, if a prisoner wanted to take a civil action (while in custody) alongside a *habeas corpus* application, only representation for the latter would

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<sup>58</sup> Rogan, M. (2014) *Prison Law*, Dublin: Bloomsbury Professional, p.321.

<sup>59</sup> JUSTICIA (nd) *Snapshot of the legal aid system in ten European Countries* [on-line] (available at: [http://www.eujusticia.net/images/uploads/pdf/Snapshot\\_of\\_the\\_legal\\_aid\\_system\\_in\\_ten\\_EU\\_Member\\_States.pdf](http://www.eujusticia.net/images/uploads/pdf/Snapshot_of_the_legal_aid_system_in_ten_EU_Member_States.pdf)).

<sup>60</sup> Legal Aid Board (2013a) *Legal Aid – Custody Issues Scheme. Scheme Provisions and Guidance Document*, Dublin: Legal Aid Board (available at: [http://www.legalaidboard.ie/lab/publishing.nsf/650f3eec0dfb990fca25692100069854/8a16115334c3af8a80257b7a00322754/\\$FILE/Legal%20Aid%20-%20Custody%20Issues%20Scheme%20Provisions%20&%20Guidance%20June%202013.pdf](http://www.legalaidboard.ie/lab/publishing.nsf/650f3eec0dfb990fca25692100069854/8a16115334c3af8a80257b7a00322754/$FILE/Legal%20Aid%20-%20Custody%20Issues%20Scheme%20Provisions%20&%20Guidance%20June%202013.pdf)), Part 1, point 2.

<sup>61</sup> *Ibid*, Part 1, Point 4.

<sup>62</sup> *Ibid*, Part 1, Point 2.

<sup>63</sup> *Ibid*, Part 2, Point 9.

<sup>64</sup> *Ibid*, Part 1, Point 3.

<sup>65</sup> *Ibid*, Part 2, Point 9.

be funded from the Scheme. Proceedings covered by the Scheme must be taking place in the High Court or the Supreme Court. Where there is more than one applicant, but only one matter is at issue before the Court, the solicitor and the counsel assigned shall represent all the applicants.<sup>66</sup>

The solicitor on record in the case can engage the services of an interpreter and claim the costs of such assistance, provided that interpretation or translation are deemed essential to the preparation and conduct of their client's case.<sup>67</sup> Where the costs of interpretation or translation are in excess of €2,000, the solicitor must obtain three different price quotes and provide proof of such quotes with the final claim.<sup>68</sup> Similar rules apply to services of expert witnesses which may be covered provided that such services are essential to the proper preparation and conduct of the case.<sup>69</sup>

Legal aid is also available for civil cases. This is means tested, taking into consideration both the person's income and capital.<sup>70</sup> The person applying for civil legal aid must also show that their case has merit before being awarded the financial support. In nearly all cases, a financial contribution has to be made by the applicant.<sup>71</sup> The Legal Aid Board can recover the cost of legal aid from any monies that are awarded as a result of the case taken with their support.<sup>72</sup>

## **7. A note on the European Convention on Human Rights Act 2003**

The European Convention on Human Rights was incorporated into the Irish domestic legal system through the introduction of the *European Convention on Human Rights Act 2003* (the 2003 Act).<sup>73</sup> The decision to incorporate the Convention largely stemmed from the provisions of the Belfast (Good Friday) Agreement 1998, ending hostilities in Northern Ireland. The Agreement, signed by British and Irish Governments, included a commitment to strengthening the protection of human rights in both jurisdictions, including through the incorporation of the ECHR.<sup>74</sup>

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<sup>66</sup> Ibid, Part 2, Point 10.

<sup>67</sup> Ibid, Part 2, point 12.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid, Part 2, Point 15.

<sup>70</sup> With some exceptions – for example, the person's home is not included as capital under the scheme. For details see: Legal Aid Board (2013b) *Civil Legal Aid*, Dublin: Legal Aid Board (available at: [http://www.legalaidboard.ie/lab/publishing.nsf/650f3eec0dfb990fca25692100069854/804c220cf90aa7f9802571fd0038044b/\\$FILE/Leaflet%201%20-%20Civil%20Legal%20Aid.pdf](http://www.legalaidboard.ie/lab/publishing.nsf/650f3eec0dfb990fca25692100069854/804c220cf90aa7f9802571fd0038044b/$FILE/Leaflet%201%20-%20Civil%20Legal%20Aid.pdf)).

<sup>71</sup> Ibid. This contribution is between €30 and €150.

<sup>72</sup> Ibid.

<sup>73</sup> Available at: <http://www.irishstatutebook.ie/pdf/2003/en.act.2003.0020.pdf>.

<sup>74</sup> See Part 6 of the Agreement (available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/136652/agreement.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf)). This is not to say that incorporation of the ECHR into domestic Irish legal system was not considered prior to the Agreement. For example, the 1996 report of the Constitutional Review Group (available here:

The 2003 Act provides for an interpretative incorporation of the Convention at a sub-constitutional level<sup>75</sup> and creates a number of obligations for the courts and “organs of the State”:<sup>76</sup>

- a) In accordance with Section 2(1) of the 2003 Act, the courts should, in interpreting and applying any statutory provision or a rule of law, in so far as is possible, do so in a manner which is compatible with the State’s obligation under the Convention.
- b) In interpreting and applying the Convention provisions, the courts should take notice of any declaration, decision, advisory opinion or judgment of the European Court of Human Rights, the former European Commission on Human Rights, and the Council of Ministers (in areas where it has relevant jurisdiction), and take due account of the principles laid down in such decisions in their judgments (Section 4 of the 2003 Act).
- c) In accordance with Section 3(1), subject to any statutory provision (other than 2003 Act) or rule of law, every organ of the State should perform its functions in a manner compatible with the State’s obligations under the Convention.

Two avenues of redress are specifically created by the 2003 Act:

- a) A tortious action (civil action) for a breach of statutory duty by the “organs of the State” under Section 3 of Act, for which damages or other equitable relief may be awarded. This action will be available *only* in cases where no other remedy exists.
- b) A declaration of incompatibility (of a statutory provision with the Convention; Section 5(1) of the 2003 Act) which may provide grounds for an *ex gratia* award of damages.<sup>77</sup>

Litigation with reference to the 2003 Act is a non-specific remedy (i.e. it can be accessed by everyone rather than being specific to prisoners).

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<http://archive.constitution.ie/reports/crg.pdf>) discussed the pros and cons of incorporation, and the 1998 Agreement specifically referred to the work of the Group as a basis of furthering discussions on the strengthening of human rights protections in Ireland.

<sup>75</sup> O’Connell, D., Cumiskey, S., Meenaghan, E. with O’Connell, P. (2006) *ECHR Act 2003: A Preliminary Assessment of Impact*, Dublin: Dublin Solicitors Bar Association (available at:

<http://www.lawsociety.ie/documents/committees/hr/echr/echrreport18oct06.pdf>), p.10.

<sup>76</sup> Defined as “a tribunal or any other body (other than the President or the Oireachtas or either House of the Oireachtas or a Committee of either such House or a Joint Committee of both such Houses or a court) which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised” (Section 1(1) of the 2003 Act). This definition does, therefore, include the Minister for Justice and the Irish Prison Service.

<sup>77</sup> O’Connell, D., Cumiskey, S., Meenaghan, E. with O’Connell, P. (2006) *ECHR Act 2003: A Preliminary Assessment of Impact*, Dublin: Dublin Solicitors Bar Association (available at:

<http://www.lawsociety.ie/documents/committees/hr/echr/echrreport18oct06.pdf>), p.13.

#### IV. The protection of prisoners' rights in Ireland – the legal and institutional framework of non-judicial remedies

##### 1. Prisoners' Complaints under Prison Rules 2007

Following their enactment in 2007, the *Rules* contained only very general provisions regarding a grievance procedure (complaints mechanism) available to prisoners, introducing three avenues for complaints:

- a) A meeting with a governor (Rule 55);
- b) A meeting with the Visiting Committee (Rule 56); and
- c) A meeting with officer of the Minister (for Justice, Rule 57).

Under Rule 55(1), if the prisoner so requests, the governor should meet with the prisoner as soon as is practicable. Where at such a meeting the prisoner makes a complaint, the governor should (again, as soon as practicable) inform the prisoner of an outcome of such a complaint.<sup>78</sup> In accordance with Rule 55(3), the governor should record the time and date at which the initial meeting with the prisoner took place, the nature of the complaint, and record any decision taken in relation to the complaint. Even less procedural detail is provided with regard to meetings with a Visiting Committee, where Rule 56 states only that the governor should pass on the prisoner's request for such a meeting to the Committee "without undue delay".<sup>79</sup>

A meeting with an officer of the Minister (other than the governor, a prison officer or another person working in the prison<sup>80</sup>) can be used by a prisoner to make a complaint or to appeal a decision made by a governor on a complaint already lodged.<sup>81</sup> A prisoner has to make such a request in writing, and the governor, without undue delay, should pass on such request to the Director General of the Prison Service.<sup>82</sup> An officer of the Minister is then required to meet with the prisoner as soon as possible to hear their complaint.<sup>83</sup> Where at the meeting a prisoner makes a complaint, or appeals a decision on a previous complaint, and where an action by a governor is required, the officer of the Minister can make a recommendation to the governor or advise the prisoner to make a complaint to the governor.<sup>84</sup> The officer of the Minister also has the power to direct a governor to comply with any such recommendations.<sup>85</sup> Under Rule 57(6), a record is kept by a governor of the name of the prisoner who requested the meeting, the date of the request, the date on which such a request was forwarded to the Director General of the Prison Service, the date

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<sup>78</sup> Rule 55(2) of the 2007 Rules.

<sup>79</sup> Please refer to section III of this report for further detail of the role of Visiting Committees in the handling of prisoner complaints.

<sup>80</sup> This would usually be a civil servant from the Irish Prison Service Headquarters.

<sup>81</sup> Rule 57 of the 2007 Rules.

<sup>82</sup> Rule 57(1) of the 2007 Rules.

<sup>83</sup> Rule 57(2) of the 2007 Rules.

<sup>84</sup> Rule 57(4) of the 2007 Rules.

<sup>85</sup> Rule 57(5) of the 2007 Rules.

of the meeting, any recommendation or direction made under Rule 57, and any action taken by the governor as a result of such a recommendation or direction.

The *Prison Rules (Amendment) Act 2013* (the 2013 Act) introduced a more detailed procedure for the investigation of the most serious categories of complaints.<sup>86</sup> Under the new Rule 57A(1), any allegation by a prisoner to a prison officer or a member of staff of the Irish Prison Service that an act has been committed which may constitute a criminal offence, must be notified to the governor and to the police (An Garda Síochána). The governor must, on such notification, record the name of the complainant and the date and time when the complaint was made, the details of the complaint, the time of the notification to the appropriate governor, the time and date of notification to the police, and the name of the police officer who received the notification. On notification of any such complaint, the governor must preserve any evidence relating to it (such as CCTV records), arrange for the prisoner to be examined and any injuries recorded, and arrange for the names of all potential witnesses to be recorded (this may include prisoners, staff and others).<sup>87</sup>

Notwithstanding any investigation under the new Rule 57A (as outlined above), an internal report now has to be made on any complaints alleging:

- a) Assault or use of excessive force against a prisoner; and
- b) Ill-treatment, racial abuse, discrimination, intimidation, threats or any other conduct against a prisoner of a nature and gravity likely to bring discredit on the Irish Prison Service.<sup>88</sup>

Where such complaints of serious misconduct are made, the relevant prison officer or other person to whom the complaint is made, has a duty to inform the appropriate governor, and the governor then records the relevant details.<sup>89</sup> The prisoner should be provided with assistance to record his complaint in writing and given assurance by the relevant governor that he or she will take steps to protect the prisoner from victimisation.<sup>90</sup> As with any complaints made under Rule 57A, the appropriate governor should preserve any evidence relating to the complaint and record the names of witnesses. Additionally, she or he should inform the prisoner that the complaint is being investigated and explain to them any relevant procedures.<sup>91</sup> The complaint then needs to be notified to the Director General of

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<sup>86</sup> These are now referred to as 'Category A' complaints and the process of investigation was informally introduced in 2012. In its reply to the *List of Issues* during examination of Ireland's Fourth Periodic Report under the ICCPR, the Government stated that between November 2012 and February 2014, 79 'Category A' complaints were received by prison authorities (see: UN Human Rights Committee (2014b) *List of issues in relation to the fourth periodic report of Ireland. Addendum: Replies of Ireland to the List of issues* [on-line] (available at: <http://www.cccprcentre.org/doc/2014/07/G1443170.pdf>), pp.15-16 and p.34.

<sup>87</sup> Rule 57A(2) of the 2007 Rules.

<sup>88</sup> Rule 57B(1) of the 2007 Rules. In some cases, investigation of such a complaint will fall under the new Rule 57A, in which case nothing that is done under Rule 57B can prejudice or interfere with the police investigation (Rule 57B(1)(c)).

<sup>89</sup> Rule 57B(2)(a) and (b).

<sup>90</sup> Rule 57B(2)(c).

<sup>91</sup> Rule 57B(3)(d).

the Prison Service and the Inspector of Prisons within 7 days.<sup>92</sup> Complaints made under the new Rule 57B are independently investigated by persons not connected to the particular prison,<sup>93</sup> and the prisoner must be made aware of their identity and contact details.<sup>94</sup> The independent investigators then advise whether there are any grounds for the complaint and make recommendations on the future management of serious complaints or on their subject matter.<sup>95</sup> Normally, a report on the investigation should be provided within three months,<sup>96</sup> including the reasons for any final outcome.<sup>97</sup> If the prisoner is not satisfied with the outcome of the investigation, he or she may write to the Inspector of Prisons or the Director General of the Irish Prison Service.<sup>98</sup> This, however, does not constitute a formal appeal, a fact confirmed by the Irish authorities to the European Committee for the Prevention of Torture.<sup>99</sup>

## **2. The Irish Prison Service ‘Prisoner Complaints Policy’**

The Irish Prison Service *Prisoner Complaints Policy* (the Policy) was published in June 2014,<sup>100</sup> following over 20 years of sustained criticism and national and international pressure to improve the internal and external systems of protection of prisoners’ rights in Ireland.<sup>101</sup> The *Policy* outlines the modes of investigation of different levels of complaints (including those made under Rules 55, 57A and 57B of the 2007 Rules as described above), categorised according to their seriousness and/or according to the addressee of the complaint.

In accordance with the *Policy*, **Category A complaints** are those defined in section 57B (1) of the Prison Rules 2007 and, to reiterate, include “Assault or use of excessive force against a prisoner or ill treatment, racial abuse, discrimination, intimidation, threats or other conduct against a prisoner of a nature and gravity likely to bring discredit on the Irish Prison Service”.<sup>102</sup> The procedure for the investigation of Category A complaints is prescribed in the Prison Rules 2007, Rules 57A and 57B, as outlined in the preceding section of this report.

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<sup>92</sup> Rule 57B(4).

<sup>93</sup> Rule 57B(5) of the 2007 Rules. Investigation teams may include persons from outside of the Irish Prison Service and a call for a pool of independent investigators was publicly advertised in 2013.

<sup>94</sup> Rule 57B(8) of the 2007 Rules.

<sup>95</sup> Rule 57B(6) of the 2007 Rules.

<sup>96</sup> Rule 57B(10)(a) of the 2007 Rules.

<sup>97</sup> Rule 57B(10)(b).

<sup>98</sup> Rule 57B(11) of the 2007 Rules.

<sup>99</sup> Council of Europe (2014a) *Report to the Government of Ireland 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 16 to 26 September 2014*, Strasbourg: CoE (available at: <http://www.cpt.coe.int/documents/irl/2015-38-inf-eng.pdf>), p.49.

<sup>100</sup> Available at: [http://www.irishprisons.ie/images/pdf/complaints\\_policy.pdf](http://www.irishprisons.ie/images/pdf/complaints_policy.pdf).

<sup>101</sup> For more detail on the criticism of the complaints system, see sections III and IV of this report.

<sup>102</sup> *Prisoner Complaints Policy*, p.5.

In accordance with the *Policy*, **Category B complaints** are complaints of a serious nature, which do not fall under any other category. These may include, for example, complaints about verbal abuse of prisoners by staff or inappropriate searches.<sup>103</sup> Category B complaints are investigated by a Chief Officer and the outcome can be appealed to the governor, and then be subject further to a review by the Director of the Irish Prison Service.<sup>104</sup> Any such complaint should be investigated within 28 days,<sup>105</sup> and the prisoner has to be notified of the outcome within 7 days of the investigation being completed.<sup>106</sup>

**Category C** complaints are described by the *Policy* as “basic service level complaints” which may include issues around visits, phone calls, missing clothes, etc.<sup>107</sup> These are investigated by Class Officers (senior officers) and may result from both a verbal or written complaint.<sup>108</sup> While a reply or acknowledgment of a Category C complaint has to be provided to the prisoner within 24 hours, there is no actual limit on how long the resolution may take. The relevant prisoner should be kept aware of any development relating to his or her complaint, and be notified when the complaint is resolved.<sup>109</sup> There is no formal appeal for Category C complaints should a prisoner not be satisfied with how his or her case has been dealt with.<sup>110</sup>

**Category D** complaints concern any issues that arise from the provision of professional services, such as healthcare and legal advice. While the *Policy* states that these should be resolved locally, the prisoner may also be informed of the possibility to complain to relevant professional bodies.<sup>111</sup>

**Category E** complaints are those made by the visitors to the prison. The *Policy* is very brief in respect of those, stating that relevant forms will be made available in relevant areas of the prison. While stating that these “will be investigated”, the *Policy* is silent on who will be investigating them and the process.

Finally, **Category F** complaints relate to the decisions taken by the Irish Prison Service (Headquarters) about, for example, the granting of temporary release or prison transfer.<sup>112</sup> If a prisoner raises any queries relating to such decisions, requests for information should

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<sup>103</sup> Ibid, p.9.

<sup>104</sup> Ibid, see Note 2; the Chief Officer appointed to investigate the complaint must be other than the Officer in charge of the area where the incident allegedly occurred or the area where the prisoner bringing the complaint is accommodated. The investigating Officer may also not have been present at any time when the alleged incident took place.

<sup>105</sup> *Prisoner Complaints Policy*, p.9.

<sup>106</sup> Ibid, p.10.

<sup>107</sup> Ibid, p.13.

<sup>108</sup> Either have to be appropriately recorded; *Prisoner Complaints Policy*, p.13.

<sup>109</sup> Ibid.

<sup>110</sup> Arguably, the prisoner can then use any of the process outlined in Rules 55 or 57 of the 2007 Rules, i.e. complain to the governor or request a meeting with the officer of the Minister, although this is not made clear in the *Policy*.

<sup>111</sup> *Prisoner Complaints Policy*, p.14.

<sup>112</sup> Ibid, p.15.

normally be dealt with within 7 days, with response to complaints about decisions taken having a time limit of four weeks.<sup>113</sup>

While the introduction of a more transparent prison complaints policy is a welcome development, its complexity can potentially create a barrier to prisoners who wish to complain. Additionally, it is of concern that complaints falling into categories C to F do not have an appeal mechanism, and in some cases the procedure for investigation is extremely vague.

The first external assessment of the new complaints system came in the recent European Committee for the Prevention of Torture's (CPT) report on their visit to Ireland in 2014.<sup>114</sup> On the positive side, the CPT acknowledged that complaint forms for all categories of complaints were now freely available in the visited prisons, and that complaints boxes were emptied every day and complaints categorised by a governor.<sup>115</sup> Focusing on Category A – i.e. the most serious of complaints – the CPT noted, however, significant issues with their investigation. In Mountjoy Prison, the CPT stated that while the record of complaints was “meticulous”, the quality of investigations varied considerably. The Committee noted that in cases of some investigations, evidence was not properly collected and that significant delays occurred in the external investigations.<sup>116</sup> Delays were also noted in Midlands Prison,<sup>117</sup> and in Limerick women's prison.<sup>118</sup> The CPT commented that “such delays might have a negative impact on the whole investigation and the new complaints system risks losing its credibility.”<sup>119</sup> As stated earlier, the Irish authorities also acknowledged that there is currently no mechanism for an appeal; an issue which they undertook to rectify.<sup>120</sup>

## **V. External national accountability mechanisms**

### **1. Inspector of Prisons**

The Office of the Inspector of Prisons was established in 2002, and placed on a statutory footing by the *Prisons Act 2007*. The Inspector is appointed by the Minister for Justice and Equality but acts independently from Government.<sup>121</sup> In accordance with Sections 31(1) and

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<sup>113</sup> Ibid.

<sup>114</sup> Council of Europe (2014a) *Report to the Government of Ireland 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 16 to 26 September 2014*, Strasbourg: CoE (available at: <http://www.cpt.coe.int/documents/irl/2015-38-inf-eng.pdf>), pp.49-52.

<sup>115</sup> Ibid, p.49.

<sup>116</sup> Ibid, p.50.

<sup>117</sup> Ibid, p.51.

<sup>118</sup> Ibid, p.64.

<sup>119</sup> Ibid, p.51.

<sup>120</sup> Council of Europe (2014b) *Response of the Government of Ireland to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Ireland from 16 to 26 September 2014*, Strasbourg: CoE (available at: <http://www.cpt.coe.int/documents/irl/2015-39-inf-eng.pdf>), pp.53-55.

<sup>121</sup> Section 30(5) of the *Prisons Act 2007*.

31(2) of the *Prisons Act 2007*, the Inspector is obliged to carry out regular inspections of all prisons, and for that purpose enjoys unfettered access to any prison establishment; can request any documents held in the prison, as well as bring any issues of concern to the prison governor, the Director General of the Irish Prison Service or the Minister for Justice.<sup>122</sup> The Minister for Justice can additionally ask the Inspector to investigate any matter relating to the management or operation of a prison, and report to her/him on any such investigation.<sup>123</sup> The *Prisons Act 2007* outlines the general areas on which the Inspector is obliged to report in respect of any prison. These include:

- a. the general management of the prison, including the level of its effectiveness and efficiency;
- b. the conditions and general health and welfare of prisoners detained there;
- c. the general conduct and effectiveness of persons working there;
- d. compliance with national and international standards, including in particular the Prison Rules;
- e. programmes and other facilities available and the extent to which prisoners participate in them;
- f. security, and discipline.<sup>124</sup>

All reports by the Inspector are presented to the Minister for Justice, who then presents them to the Dáil (lower house of Irish Parliament) and publishes them.<sup>125</sup>

The Inspector of Prisons is expressly excluded from investigating or adjudicating on individual complaints from prisoners, although he or she may examine the circumstances relating to such complaint where necessary for the performance of the Inspector's functions.<sup>126</sup> Since the amendment of the *Prison Rules 2007* in 2013, to include a mechanism for investigation of **Category A** complaints (as outlined above), the Inspector of Prisons also oversees all investigations of such complaints.<sup>127</sup> The initial remit of inspection and monitoring of prisons by the Inspector was extended in January 2012 to include all investigations into deaths in custody of the Irish Prison Service (those include deaths on temporary release).<sup>128</sup> In addition to conducting announced and unannounced inspections of all prisons, the Inspector also publishes an *Annual Report*, and thematic reports, such as

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<sup>122</sup> Section 31(1) of the *Prisons Act 2007*.

<sup>123</sup> Section 31(2) of the *Prisons Act 2007*.

<sup>124</sup> Section 32(2) of the *Prisons Act 2007*.

<sup>125</sup> Section 32(3) of the *Prisons Act 2007*.

<sup>126</sup> Section 31(6) of the *Prisons Act 2007*.

<sup>127</sup> Rule 57A(12) of *Prison Rules 2007* (as amended in 2013).

<sup>128</sup> Inspector of Prisons (2013) *Office of the Inspector of Prisons Annual Report 2012*, Nenagh: Inspector of Prisons (available here: <http://www.inspectorofprisons.gov.ie/en/IOP/Pages/PB13000004>), pp.11-12.

the *Report of an Investigation on the Use of 'Special Cells' in Irish Prisons* in 2010.<sup>129</sup> All reports into deaths in custody are also made publicly available.<sup>130</sup>

The current Inspector of Prisons in Ireland is Judge Michael Reilly, appointed to the Office in 2008. Following his appointment, Judge Reilly set out a number of *Standards for the Inspection of Prisons in Ireland*, with the general *Standards* and those for the inspection of juvenile facilities published in 2009, and further *Standards* for women's prisons published in 2011.<sup>131</sup> All *Standards* were developed taking account of the legal obligations to prisoners, imposed by both domestic and international law, including by the European Convention on Human Rights (ECHR). It is interesting to note that one of the main reasons, as outlined by the Inspector, to provide such a set of standards is the threat of litigation under both the national and international legislation. Currently, however, those standards are non-enforceable and remain simply guidance on the rights and obligations of prisoners.

The *Standards* as published by the Inspector are used as benchmarks in his announced and unannounced inspections of all prisons. The procedure for inspection, outlined in his *Annual Report 2009*, is based on a consultative approach, with inspections of particular prisons extending over a number of months. Detailed inspections begin with an unannounced visit which lasts for a minimum of two days.<sup>132</sup> A notice is then issued to the governor relating to any matters which are of concern to the Inspector, who then in turn works with the governor to address them.<sup>133</sup> A full, announced inspection is then carried out two to three months after the initial visit, with other, shorter visits taking place in between.<sup>134</sup> The process of inspection, therefore, results in a report which reflects the situation in a particular prison over time rather than at one particular moment.<sup>135</sup>

Outside of the detailed inspections, the Inspector of Prisons can also undertake ad hoc visits.<sup>136</sup> The general consultative approach to detailed inspections does not apply to situations where the Inspector finds serious and immediate issues to be addressed, in which case he informs the Minister immediately rather than by inspection report.<sup>137</sup>

Since the establishment of the Office of the Inspector of Prisons, it has operated within relatively limited resources and the office has a very small staff complement.<sup>138</sup> Between

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<sup>129</sup> Available here: <http://www.inspectorofprisons.gov.ie/en/IOP/Pages/PB10000007>.

<sup>130</sup> The investigations include deaths that occurred while a prisoner was on Temporary Release. See: <http://www.inspectorofprisons.gov.ie/en/IOP/Pages/WP14000001>

<sup>131</sup> See: <http://www.inspectorofprisons.gov.ie/en/IOP/Pages/standards?opendocument&start=0&year=2009>

<sup>132</sup> Inspector of Prisons (2009) *Office of the Inspector of Prisons Annual Report 2008*, Nenagh: Inspector of Prisons (available at: [http://www.inspectorofprisons.gov.ie/en/IOP/Pages/iop\\_annual\\_rpt\\_2008](http://www.inspectorofprisons.gov.ie/en/IOP/Pages/iop_annual_rpt_2008)), p.18.

<sup>133</sup> *Ibid*, p.19.

<sup>134</sup> *Ibid*, p.19.

<sup>135</sup> *Ibid*, p.20.

<sup>136</sup> *Ibid*, p.18.

<sup>137</sup> *Ibid*, p.20.

<sup>138</sup> For the description of staffing resources and how they have recently been expanded, see: Inspector of Prisons (2013) *Office of the Inspector of Prisons Annual Report 2012*, Nenagh: Inspector of Prisons, (available at: <http://www.inspectorofprisons.gov.ie/en/IOP/Pages/PB13000004>), pp.25-27.

2008 and 2014, the Inspector published only 9 full inspection reports, three of which concerned Mountjoy Prison in Dublin.<sup>139</sup> Since the Office's remit was extended to include an investigation of all deaths in custody (self-inflicted or otherwise), the Inspector has published 27 such reports. Despite limited resources, the Inspector has raised a number of important issues throughout the years, including – but not limited to – overcrowding, access to mental health services, access to drug treatment and inter-prisoner violence. The Inspector has also raised on a number of occasions the issue of an independent mechanism for the consideration of prisoner complaints, including through the publication of a relevant thematic report in 2010.<sup>140</sup>

The latter report, providing guidance on best practice relating to prisoners' complaints, was critical of a number of aspects of the then internal complaints procedure. Firstly, commenting on the complaints forms available to prisoners, the Inspector stated that in practice those included minimal details of the actual complaint, and the details of witnesses were rarely included.<sup>141</sup> The Inspector commented that prisoners with literacy difficulties had to rely on assistance from other prisoners, or others in the prison, and that there was no dedicated person in most prisons to help with completing the complaints forms.<sup>142</sup> The Inspector then commented that a copy of the complaint was issued to all prison officers who are referred to in the complaint, and those rostered in the area relevant to the complaint. The Inspector observed that, at the time of his investigation, there was no time limit for the provision of responses to the complaint by officers, nor were they normally questioned or interviewed.<sup>143</sup> In his review of complaints conducted at the time of his investigation, the Inspector found that evidence from officers was rarely included in the files.

At the time of the Inspector's investigation, the decision about a complaint was made by the governor of the relevant prison on the basis of information contained in the complaint file, and a recommendation from the investigating senior officer. There was no possibility for the prisoner to provide additional information or rebuttal of facts contained in the investigation file.<sup>144</sup> The prisoner was then informed of the outcome of his or her complaint by the governor.

The Inspector noted that a significant number of complaints tended to be withdrawn by prisoners, and that if a prisoner was transferred to another prison or released, the

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<sup>139</sup> Another one was an interim report on the Dóchas Centre (the women's prison in the Mountjoy Prison Campus in Dublin) published in December 2013 (available at: <http://www.inspectorofprisons.gov.ie/en/IOP/Pages/PR13000006>). Although it is clear from Inspector's *Annual Reports* that many other prisons are visited every year, such visits are often one-off visits unless undertaken specifically to follow-up on inspection reports.

<sup>140</sup> Inspector of Prisons (2010) *Guidance on Best Practice relating to Prisoners' Complaints and Prison Discipline*, Nenagh: Inspector of Prisons (available at: <http://www.inspectorofprisons.gov.ie/en/IOP/Pages/PB10000003>).

<sup>141</sup> *Ibid*, p.6.

<sup>142</sup> *Ibid*, pp.6-7.

<sup>143</sup> *Ibid*, p.7.

<sup>144</sup> *Ibid*, pp.7-8.

investigation into the complaint stopped.<sup>145</sup> The Inspector was also concerned that An Garda Síochána was not always informed by the prison authorities of complaints which alleged criminal behaviour by prison officers.<sup>146</sup> At the time of the investigation, prisoners told the Inspector that they had no confidence in the appeals process, should they be dissatisfied with the outcome of their complaint.<sup>147</sup> Prisoners also complained that in many cases, they were unable to provide the details of the identity of the relevant prison officer, as officers did not wear any form of identification.<sup>148</sup> More recently, the Inspector outlined the reasons why prisoners do not want to complain as follows:

- a) prisoners have no confidence in the complaints system;
- b) they are 'encouraged' not to complain;
- c) they are concerned with negative consequences for their situation in prison, should they complain;
- d) prisoners fear they will be transferred to another prison if they complain;
- e) in cases of serious complaints, they fear for their safety;
- f) they fear that they will not be protected from adverse consequences should they complain; and
- g) they fear they may not be granted temporary release should they raise a complaint.<sup>149</sup>

In 2010, the Inspector proposed a number of good practice guidelines regarding the investigation of prisoner complaints and some have now been implemented through the 2014 *Prisoner Complaints Policy* as detailed earlier in this report.<sup>150</sup> While not without initial problems (as outlined before), this is a progressive step towards an improved consideration of complaints brought forward by prisoners.<sup>151</sup> It is too early at this stage to comment on the new system's implementation in practice. However, the Inspector is currently conducting a review of the complaints system.<sup>152</sup>

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<sup>145</sup> Ibid, p.8.

<sup>146</sup> Ibid, p.9.

<sup>147</sup> Ibid. The only appeal at the time of the investigation was for the prisoner to ask for a meeting with the Minister for Justice or an Officer of the Minister. In practice, that Officer would have been the Director General of the Irish Prison Service or one of his/her colleagues.

<sup>148</sup> Ibid, p.9. Since the amendment of the *Prison Rules* in 2013, officers now must wear identification.

<sup>149</sup> Inspector of Prisons (2014) *Office of the Inspector of Prisons Annual Report 2013/2014*, Nenagh: Inspector of Prisons (available at: [http://www.inspectorofprisons.gov.ie/en/IOP/Pages/Inspector\\_of\\_Prisons\\_Annual\\_Report\\_2014](http://www.inspectorofprisons.gov.ie/en/IOP/Pages/Inspector_of_Prisons_Annual_Report_2014)), p.11.

<sup>150</sup> Ibid, pp.9-10.

<sup>151</sup> Ibid.

<sup>152</sup> Information provided to the Irish Penal Reform Trust. As of November 2015, the review is yet to be published.

## 2. Visiting Committees

Every prison and place of detention in Ireland has its own lay Visiting Committee, operating under the *Prisons (Visiting Committees) Act 1925* (the 1925 Act) and the *Prisons (Visiting Committees) Order 1925* (the 1925 Order). Each Committee consists of a number of independent members (between six and twelve),<sup>153</sup> appointed for a three-year term by the Minister for Justice and Equality.<sup>154</sup> Under the 1925 Act, the Prison Visiting Committees must visit prisons regularly and can hear complaints from prisoners;<sup>155</sup> report to the Minister for Justice on any abuses observed in a prison;<sup>156</sup> report to the Minister on any repairs which the Committee considers the prison to require urgently;<sup>157</sup> and report to the Minister on any other matter which the Committee considers to be necessary.<sup>158</sup>

Members of Prison Visiting Committees enjoy unfettered access to all parts of the prison<sup>159</sup> and can access all prison documentation.<sup>160</sup> Under Section 56 of the *Prisons Act 2007*, a prisoner can also request a meeting with the Visiting Committee or an individual member of it through the governor of any prison. The Visiting Committees report annually to the Minister for Justice and Equality. All reports are made available on the Department of Justice and Equality website.<sup>161</sup>

Eleven of the 14 prison Visiting Committees published their *Annual Reports* for 2014.<sup>162</sup> The *Annual Reports* are of differing length and format, and also tend to be very descriptive, rarely containing any critical commentary on prison conditions or prisoner complaints. Only three of those give an indication of the nature of complaints or requests brought by prisoners to the Visiting Committees; these are outlined below:

- a) Mountjoy Prison: the Committee noted that the number of complaints from prisoners showed a slight reduction on the previous year (2013), it does not however provide any numbers. The Committee states that complaints referred to a number of areas, including contact with children and family, personal security, screened visits, loss of clothing, speed of mail handling, temporary release, access to medical services, dental services and library books.
- b) Midlands Prison: the Committee met with 38 prisoners during the year in this prison. The main areas of complaints concerned missing property, healthcare issues, inter-prison transfers, issues with the tuck-shop, remission requests, and requests about work or training.

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<sup>153</sup> Although on occasion, these have had fewer than six members.

<sup>154</sup> Section 2 of the 1925 Act.

<sup>155</sup> Section 3(1)(a) of the 1925 Act.

<sup>156</sup> Section 3(1)(b) of the 1925 Act.

<sup>157</sup> Section 3(1)(c) of the 1925 Act.

<sup>158</sup> Section 3(1)(d) of the 1925 Act.

<sup>159</sup> Section 3(2) of the 1925 Act.

<sup>160</sup> Section 3 of the 1925 Order.

<sup>161</sup> See: [http://www.justice.ie/en/JELR/Pages/Publications\\_prisons\\_and\\_probation](http://www.justice.ie/en/JELR/Pages/Publications_prisons_and_probation)

<sup>162</sup> All reports are available at: <http://www.justice.ie/en/JELR/Pages/PB15000153>

- c) Limerick Prison: with very little detail provided, the Committee refers to complaints about transfers to other prisons; access to healthcare and medication; and positive indications by drug dogs.

No other reports provide any detail of the prisoners' concerns brought to the attention of the Visiting Committee.

The system of Prison Visiting Committees in Ireland has been subject to some considerable criticism. As members of the Committees are appointed by the Minister for Justice and Equality, also responsible for the Irish Prison Service, their structural independence has been questioned.<sup>163</sup> The formal powers of the Committees to hear complaints do not extend to a power to make a decision, and there is no formal mechanism of implementation of any recommendations made by the Committees in the course of their work.<sup>164</sup> A lack of standards or formal guidance on the work of the Committees leads to inconsistencies in their approach to prison monitoring. Organisations such as the Irish Penal Reform Trust have, therefore, long advocated a complete overhaul of the system with the view to strengthening its independence and powers of inspection and monitoring, as well as providing appropriate funding and training to members of the Committees.<sup>165</sup>

### **3. Irish Human Rights and Equality Commission**

The Irish Human Rights and Equality Commission was formally established, in its current form, on 1 November 2014, through the merger of two separate bodies: the Irish Human Rights Commission and the Equality Authority. The origins of the Irish Human Rights Commission lie with the Belfast (Good Friday) Agreement 1998, which contained a commitment to establish national human rights institutions in both the Republic of Ireland and Northern Ireland.<sup>166</sup> The original Equality Authority was established in October 1999, as a body responsible for promoting equality and combating discrimination under the relevant equality legislation.<sup>167</sup> The decision to merge the two institutions was taken in 2011 and the relevant legislation to effect the merger came into force in 2014.<sup>168</sup> The Commission is an independent statutory body, charged with protection and promotion of human rights and equality in Ireland, and a National Human Rights Institution (NHRI) with an A\* status under

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<sup>163</sup> Hamilton, C. and Kilkelly, U. (2008) 'Human rights in Irish prisons', *Judicial Studies Institute Journal*, Vol. 2, pp.58-85.

<sup>164</sup> Martynowicz, A. (2011) 'Oversight of Prison Conditions and Investigations of Deaths in Custody: International Standards and the Practice in Ireland', *The Prison Journal*, Vol.91, No.1, pp.81-102.

<sup>165</sup> Irish Penal Reform Trust (2009) *IPRT Position Paper 7: Complaints, Monitoring and Inspection in Prisons*, Dublin: IPRT (available at: <http://www.iprt.ie/contents/1466>).

<sup>166</sup> See: Irish Human Rights and Equality Commission (2014) *Our Journey* [on-line] (available at: <http://www.ihrec.ie/about/our-journey.html>).

<sup>167</sup> Ibid.

<sup>168</sup> *The Irish Human Rights and Equality Act 2014* (available at: <http://www.irishstatutebook.ie/pdf/2014/en.act.2014.0025.pdf>).

the *Paris Principles*.<sup>169</sup> The functions of the Commission, which are relevant to this report, include: raising awareness of human rights, keeping under review the adequacy and effectiveness of law and practice in Ireland in relation to the protection of human rights in the State, provision of legal assistance to those who are vindicating their rights through a legal process, the possibility to appear as *amicus curiae* before the High Court and Supreme Court as appropriate, and commissioning and publication of relevant research reports and good practice guidelines.<sup>170</sup>

The current Commission's predecessor (the Irish Human Rights Commission) raised, on a number of occasions, the issue of prison conditions with both national and international monitoring bodies. For example, in 2007 it engaged with the CPT and national authorities regarding the CPT's report on Ireland, having previously made submissions to the CPT before and during their 2006 visit.<sup>171</sup> Raising awareness of human rights standards, it also organised a conference in 2007 on *Human Rights and Criminal Justice*, which considered the rights of prisoners as one of its themes.<sup>172</sup> In 2008, the Commission provided a submission to the UN Human Rights Committee on the examination of Ireland's third periodic report under the International Covenant on Civil and Political Rights (ICCPR).<sup>173</sup> Some concerns raised in the report included: the lack of mandate of the Inspector of Prisons to investigate individual complaints from prisoners;<sup>174</sup> the issue of poor prison conditions, especially in the older prisons;<sup>175</sup> poor provision of rehabilitative programmes in prisons<sup>176</sup>; and the issue of lack of separation of children and young adults in the system from adult prisoners.<sup>177</sup> More recently, the Irish Human Rights and Equality Commission (IHREC) has also provided a submission to the UN Human Rights Committee's examination of Ireland's fourth periodic report in 2014.<sup>178</sup> The Commission criticised the lack of statutory framework for the separation of remand and sentenced prisoners in Ireland,<sup>179</sup> raised the issue of persistent overcrowding and the continuing practice of 'slopping-out' in some prisons,<sup>180</sup> inter-prisoner

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<sup>169</sup> See more here: <http://www.ohchr.org/EN/Countries/NHRI/Pages/NHRIMain.aspx> and here: <http://www.ihrec.ie/international/ourrole.html>.

<sup>170</sup> See *Functions* of the Commission here: <http://www.ihrec.ie/about/functions.html> and Sections 10 and 11 of *The Irish Human Rights and Equality Act 2014*.

<sup>171</sup> Irish Human Rights Commission (2008) *Annual report 2007*, Dublin: IHRC (available at: [http://www.ihrec.ie/download/pdf/annual\\_report\\_2007.pdf](http://www.ihrec.ie/download/pdf/annual_report_2007.pdf)).

<sup>172</sup> *Ibid*, p.40.

<sup>173</sup> Irish Human Rights Commission (2008) *Submission to the UN Human Rights Committee on the Examination of Ireland's Third Periodic Report on the ICCPR, March 2008*, Dublin: IHRC.

<sup>174</sup> *Ibid*, p.18.

<sup>175</sup> *Ibid*, pp.18-19.

<sup>176</sup> *Ibid*, p.20.

<sup>177</sup> *Ibid*, p.21.

<sup>178</sup> Irish Human Rights and Equality Commission (2014a) *Irish Human Rights Commission Submission to the UN Human Rights Committee on the Examination of Ireland's Fourth Periodic Report under the International Covenant on Civil and Political Rights, June 2014*, Dublin: IHREC (available at: <http://www.ihrec.ie/download/pdf/20140616113130.pdf>).

<sup>179</sup> *Ibid*, p.7.

<sup>180</sup> *Ibid*, p.38.

violence and investigation of deaths in custody,<sup>181</sup> and the complaints system.<sup>182</sup> Also in 2014, the Commission provided a submission to the CPT for the Committee's visit to Ireland.<sup>183</sup> Within its submission, the Commission expressed concerns in relation to: the delay in the ratification by Ireland of the Optional Protocol to the UN Convention against Torture (OP CAT<sup>184</sup>); overcrowding in prisons; the practice of 'slopping out'; and investigations of deaths in custody. The Commission also expressed concern about the prison complaints mechanism noting that even with the introduction of the *Prisoner Complaints Policy* and the amendments to the 2007 Prison Rules, the system still provides for very limited external oversight.<sup>185</sup> Further, the Commission criticised the continuing detention of 17-year-old boys with adults (in Wheatfield Place of Detention).<sup>186</sup>

Aside from its involvement with national and international monitoring bodies, the Commission provides advice and support for legal cases. The Commission has a number of avenues open to it in relation to court cases – appearance as *amicus curiae*,<sup>187</sup> initiation of legal proceedings in its own name on issues relating to the protection of human rights and equality, and the provision of individual legal assistance.<sup>188</sup> Examples of cases supported by the Commission (or its predecessors) include a case of a disabled prisoner who was a wheelchair user, and found it difficult to access and live in his cell,<sup>189</sup> and legal assistance provided to a family regarding an inquest into the death of a prisoner who died on temporary release following an overdose.<sup>190</sup>

More recently, the IHREC appeared as *amicus curiae* in the case of *McDonnell v the Governor of Wheatfield Prison*,<sup>191</sup> a case which considered the treatment and conditions of a prisoner who was kept separate from the rest of the prison population for his own protection and was, in effect, subjected to solitary confinement for long periods of time.<sup>192</sup>

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<sup>181</sup> Ibid, pp.39-40.

<sup>182</sup> Ibid, pp.41-42.

<sup>183</sup> Irish Human Rights and Equality Commission (2014b) *Submission on behalf of the Irish Human Rights and Equality Commission (Designate) to Representatives of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, August 2014*, Dublin: IHREC (available at: [http://www.ihrec.ie/download/pdf/ihrec\\_designate\\_report\\_to\\_cpt\\_7aug14.pdf](http://www.ihrec.ie/download/pdf/ihrec_designate_report_to_cpt_7aug14.pdf)).

<sup>184</sup> See the next section of this report for further details.

<sup>185</sup> Irish Human Rights and Equality Commission (2014b) *Submission on behalf of the Irish Human Rights and Equality Commission (Designate) to Representatives of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, August 2014*, Dublin: IHREC (available at: [http://www.ihrec.ie/download/pdf/ihrec\\_designate\\_report\\_to\\_cpt\\_7aug14.pdf](http://www.ihrec.ie/download/pdf/ihrec_designate_report_to_cpt_7aug14.pdf)), p.9.

<sup>186</sup> Ibid.

<sup>187</sup> Including making submissions to national courts and to the European Court of Human Rights. See: <http://www.ihrec.ie/publications/list/category/amicuscuriaesubmissions/>.

<sup>188</sup> See: <http://www.ihrec.ie/legal/>.

<sup>189</sup> Equality Authority (2008) *Casework Activity 2007* [on-line] (available at: <http://www.ihrec.ie/publications/list/casework-activity-2007/>), p.7.

<sup>190</sup> Irish Human Rights Commission (2013) *Annual Report 2012*, Dublin: IHRC (available at: <http://www.ihrec.ie/publications/list/annual-report-2012-tuarascail-bhliantuil-2012/>), p.5.

<sup>191</sup> [2015] IEHC 112 (see also: *McDonnell v the Governor of Wheatfield Prison*, No.2, [2015] IEHC 362).

<sup>192</sup> For a full text of IHREC's submission, see: [http://www.ihrec.ie/download/pdf/amicus\\_curiae\\_submission\\_mcdonnell\\_v\\_governor\\_of\\_wheatfield\\_prison.pdf](http://www.ihrec.ie/download/pdf/amicus_curiae_submission_mcdonnell_v_governor_of_wheatfield_prison.pdf). While the initial two cases (cited above, at FN 195) were decided by the High Court in favour of Mr

The Commission also appeared as *amicus curiae* in the case of *Attorney General v Damache*,<sup>193</sup> concerning extradition proceedings of Mr Ali Charaf Damache, an Irish citizen sought by the US and accused of committing acts of terrorism. In this case, the Commission provided a submission which included its views on the risk of Mr Damache being held in solitary confinement in the ADX Prison in Colorado (a so called ‘supermax’). The Court found that Mr Damache was at risk of being held in solitary confinement if surrendered, and refused the request for extradition.<sup>194</sup>

#### **4. NGOs - Irish Penal Reform Trust**

The Irish Penal Reform Trust (IPRT) was established in 1994 and is an independent charity campaigning for respect of human rights in prisons, with the use of custody as a last resort.<sup>195</sup> IPRT is an advocacy organisation, and focuses on evidence-based campaigning for change in State laws, policy and practice in relation to the use of imprisonment and for prison conditions that comply with international human rights standards. It is the only non-governmental organisation in Ireland that works solely on law and policy issues relating to prisons.<sup>196</sup> While it can provide sign-posting information to prisoners and their families, it does not have a specific advice function and does not provide individual legal assistance.<sup>197</sup>

IPRT’s main areas of activity are:

- a) research and evidence-informed advocacy, which includes carrying out or commissioning research, and publishing and disseminating policy positions on matters relating to prisons and penal reform;
- b) raising awareness of the work of the organisation and of issues relating to penal reform and the situation in prisons, which includes campaigning on key issues, disseminating facts and challenging the myths about prisons and prisoners, getting involved in inclusive debate about penal reform issues;

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McDonnell, directing the prison authorities to ensure more out of cell time was made available to him, the judgments were overturned by the Court of Appeal on 31 July 2015 (the judgment is yet to be published).

<sup>193</sup> [2015] IEHC 339.

<sup>194</sup> See also: IHREC (2015) *High Court judgement brings clarity to use of solitary confinement* (Press Release, 25 May 2015, on-line, available at: <http://www.ihrec.ie/news/2015/05/28/high-court-judgment-brings-clarity-to-use-of-solit/>).

<sup>195</sup> For IPRT’s statement of mission and aims, see: <http://www.iprt.ie/iprt-vision-mission>.

<sup>196</sup> There are a number of organisations – such as Care After Prison, Pathways, and the Irish Association for the Social Integration of Offenders – that are providing vital practical support for prisoners and former prisoners, as well as their families, in the process of re-integration after sentence. These service providers often contribute to the policy and law debate; however, this is not their main focus. IPRT co-operates with such organisations to ensure that their policy and campaigning work is evidence-based. IPRT also works with other rights-based organisations (such as the Irish Council for Civil Liberties and Children’s Rights Alliance) in areas of mutual interest.

<sup>197</sup> Irish Penal Reform Trust [on-line] *What we do* (available at: <http://www.iprt.ie/what-we-do>).

- c) working with partners across the public and community and voluntary sectors to effect change in prisons and penal policy,<sup>198</sup> including regular engagement with national and international monitoring bodies.

IPRT has a small complement of staff (currently four),<sup>199</sup> supported regularly by short- and longer-term interns, and the organisation's volunteer Board of Directors. Despite its relatively small size, IPRT has in recent years become a leading voice in public debate about prisons and the use of imprisonment in Ireland. While description of all of the organisation's activities is not possible within this short report, it is important to highlight that IPRT plays a fundamental role in campaigning for a more transparent and independent accountability mechanisms and complaints systems in Ireland.

Examples of activities in this area include the publication of a position paper on *Complaints, Monitoring and Inspection of Prisons* in 2009,<sup>200</sup> in which the organisation outlined international standards pertaining to accountability mechanisms in prisons and analysed the practice in Ireland against those standards. In its recommendations, IPRT called upon the Government to establish an Office of Prisoner Ombudsman and to introduce a process of external review of prisoner complaints. Additionally, it called for the strengthening of independence of the process of investigation of deaths in custody, and urged the Government to put the Inspector of Prisons' *Standards for Inspection* on a statutory footing. In the paper, IPRT stressed that a review of the functions and powers of the Prison Visiting Committees should take place as a matter of priority. It has also called upon the Government to speed up the ratification of the Optional Protocol to the UN Convention against Torture (OP CAT). In a separate publication on the mechanisms of monitoring the rights of children in detention in Ireland in 2014, IPRT also outlined the current arrangements for the consideration of complaints from under-18s and how these can be improved.<sup>201</sup>

Since 2009, the issue of the introduction of an independent complaints mechanism and the strengthening of existing accountability mechanisms has been at the centre of IPRT's campaigning – nationally and internationally. In March 2011, IPRT raised the issue of a lack of an independent complaints mechanism with the Universal Periodic Review Working Group of the Human Rights Council.<sup>202</sup> Also in 2011, in its joint submission with the Irish Council for Civil Liberties to the UN Committee against Torture's examination of Ireland's first periodic report in 2011, IPRT raised the issue of lack of an independent "system to

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<sup>198</sup> Ibid.

<sup>199</sup> Irish Penal Reform Trust [on-line] *IPRT Staff* (available at: <http://www.iprt.ie/contents/1164>).

<sup>200</sup> Irish Penal Reform Trust (2009) *IPRT Position Paper 7: Complaints, Monitoring and Inspection in Prisons*, Dublin: IPRT (available at: <http://www.iprt.ie/contents/1466>).

<sup>201</sup> Children's Rights Behind Bars (2014) *Human Rights of Children Deprived of Liberty: Improving monitoring mechanisms: National Report Ireland*, Strasbourg: Council of Europe (available at: [http://www.iprt.ie/files/IRELAND\\_FINAL\\_REPORT1.pdf](http://www.iprt.ie/files/IRELAND_FINAL_REPORT1.pdf)).

<sup>202</sup> Irish Penal Reform Trust (2011) *Submission to the UN Universal Periodic Review 12<sup>th</sup> session of the UPR Working Group of the Human Rights Council, October 2011*, Dublin: IPRT (available at: <http://www.iprt.ie/contents/2027>), p.4.

receive, investigate, and act upon complaints of ill-treatment made by prisoners in Ireland” and the lack of prisoners’ confidence in the internal complaints mechanisms.<sup>203</sup> The joint submission called upon the Irish Government to ratify OP CAT without further delay, and to establish a National Preventative Mechanism (NPM) as appropriate.<sup>204</sup> In 2012, the organisation published an updated briefing paper on the issue of complaints and monitoring, reiterating many of its 2009 recommendations, with new ones focusing on the provision of appropriate resources and powers to the Inspector of Prisons to investigate deaths in custody and the need for a mechanism of implementation of recommendations made by the Inspector in the course of his inspections.<sup>205</sup> While recognising the improvements in the complaints system since 2012 (as outlined in the preceding sections), IPRT continues to campaign on issues such as: the placing on a statutory footing of prison inspection standards; the public availability of complaints statistics and information about the nature of complaints; the review of the functions and powers of the Visiting Committees; and the ratification of OP CAT and establishment of the NPM in Ireland.<sup>206</sup>

Connected to ensuring greater accountability in prisons is IPRT’s work on promoting and supporting prison litigation in Ireland and engagement with legal practitioners. Since 2009, IPRT has organised/co-organised a series of seminars on prison law, including on ‘Irish Prison Law and the ECHR’ (April 2010), ‘Litigating Prison Conditions’ (July 2010), ‘Prison Conditions as a Constitutional Issue’ (July 2011), ‘Creative Use of Legal Instruments’ (December 2011) and ‘Prisoner Complaints and Obstacles to Prison Litigation (March 2012).<sup>207</sup> IPRT also supports legal practitioners through the provision of information and research on prison law and prison conditions, prison litigation, providing expert advice or suggesting expert witnesses and – in the past – publication of a prison law bulletin.<sup>208</sup>

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<sup>203</sup> Irish Council for Civil Liberties and Irish Penal Reform Trust (2011) *Joint Shadow Report to the First Periodic Review of Ireland under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, April 2011, Dublin: ICCL/IPRT (available at: <http://www.iprt.ie/contents/2108>), p.33.

<sup>204</sup> *Ibid.*, p.20.

<sup>205</sup> Irish Penal reform Trust (2012a) *IPRT Summary and Recommendations: Complaints, Monitoring and Inspection in Prisons*, Dublin: IPRT (available at: [http://www.iprt.ie/files/IPRT\\_Complaints, Monitoring and Inspection in Prisons 26062012.pdf](http://www.iprt.ie/files/IPRT_Complaints,_Monitoring_and_Inspection_in_Prisons_26062012.pdf)).

<sup>206</sup> See for example: Irish Penal Reform Trust (2012b) *Submission to the United Nations Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, in advance of her visit to Ireland from 19 to 23 November 2012*, Dublin: IPRT (available at: <http://www.iprt.ie/contents/2457>) or Irish Penal Reform Trust (2014a) *IPRT Submission to Human Rights Committee on Ireland’s Fourth Periodic Examination of Ireland under the International Covenant on Civil and Political Rights, June 2014*, Dublin: IPRT (available at: <http://www.iprt.ie/contents/2634>).

<sup>207</sup> For details, see: <http://www.iprt.ie/prison-law/3>.

<sup>208</sup> *Ibid.*

## **VI. Issues regarding complaints mechanisms, raised in reports of international monitoring bodies – 1993 to 2014**

### **1. European Committee for the Prevention of Torture, Inhuman or Degrading Treatment or Punishment (CPT)**

As can be seen in the preceding sections, the introduction of a transparent procedure for the investigation of prisoner complaints in Ireland is a relatively new development. The publication of the *Prisoner Complaints Policy* in 2014, and the partial overhaul of the complaints system, followed years of criticism from national and international groups and bodies. One such body is the European Committee for the Prevention of Torture (CPT) which, on a number of occasions, has commented on the inadequacy of the prisoner complaints system in Ireland. This included the entirely inadequate investigation of allegations of serious abuse by prison staff.

In its report on the 1993 visit to Ireland, the CPT noted a number of cases of alleged mistreatment of prisoners by prison staff, and in particular in Limerick and Mountjoy Prisons. The CPT also noted that incidents of mistreatment have not been thoroughly investigated, and on the rare occasions where such investigations took place, procedural issues arose in relation to the use of disciplinary proceedings against the relevant staff.<sup>209</sup>

The Committee stressed that prisoners should be able to complain both inside and outside of prison, and that they should have confidential access to an appropriate authority.<sup>210</sup> In this context, the CPT noted that at the time in Ireland, under *Prison Rules 1947*, prisoners were able to direct their complaints to the governor, but were not entitled to send confidential information to any external bodies. The CPT recommended that this be remedied as soon as possible.<sup>211</sup>

While acknowledging that the Prison Visiting Committees could play a useful role in hearing prisoners' complaints, the CPT noted that these are not fully structurally independent and that members of the Visiting Committees themselves stated they had little influence over how prisons were run.<sup>212</sup> The CPT therefore recommended that the functions of the Committees be reviewed.

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<sup>209</sup> Council of Europe (1995a) *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 26 [September] to 5 October 1993*, Strasbourg/Dublin: COE, pp.29-31.

<sup>210</sup> *Ibid.*, p.54.

<sup>211</sup> *Ibid.* See also ECHR admissibility decisions regarding confidentiality of prisoner correspondence referred to later in this report. The *Prison Rules 2007* protect confidentiality of certain correspondence, including with the CPT.

<sup>212</sup> *Ibid.*

In its response to the report, the Government stated that the Visiting Committees act as “guardians of prisoner rights”,<sup>213</sup> and added that prisoners are free to raise their concerns with local prison administrations, as well as complain to external bodies such as the CPT.<sup>214</sup> The Government stated that the planned introduction (at the time) of a new *Code of Discipline* for prison staff was to provide a clearer framework for investigation of prisoners’ complaints of ill-treatment.<sup>215</sup> The Government insisted, however, that even then such investigations may be hampered by lack of evidence of wrongdoing, in the context of certain difficulties in gathering statements and other evidence from those involved. Addressing the CPT’s concerns regarding the functions and powers of the Visiting Committees, the Government outlined some proposed changes (such as revoking their power to decide on disciplinary sanctions), but did not make any comment on reforms needed to ensure their independence or strengthening their mandate to hear and consider prisoner complaints.<sup>216</sup>

After its follow-up visit to Ireland in 1998, the CPT welcomed the introduction of a new *Disciplinary Code* for prison officers. However, it was very concerned at the fact that the Government at the time agreed with the Prison Officers Association that allegations made by prisoners about prison officers’ behaviour were to be investigated “...by way of a circular outside the Code”.<sup>217</sup> It was not clear at the time of the visit what procedure, if any, had been envisaged to deal with prisoners’ complaints in this respect.

As in 1993, the CPT noted again the lack of an independent complaints and monitoring mechanism in Ireland. The CPT noted the Government’s commitment to the introduction of more transparent complaints rules in the new Prison Rules and recommended that these be brought into force as soon as possible. It has also noted the Government’s intention to create a Prisons Inspectorate. As stated above, it was another nine years before the *Prison Rules 2007* became operational, and even then, the complaints mechanism did not include independent oversight. In 1998, the CPT expressed the view that the Visiting Committees could not be seen as fully independent, due to the fact that they were appointed by the Minister, but noted the Government’s intention to remove the power of the Committees to impose disciplinary sanctions on prisoners as a potentially positive development.<sup>218</sup> In its response to the CPT report, the Irish Government stated that it had revoked the powers of the Visiting Committees to grant special privileges or impose special punishments on prisoners and to hold inquiries on oath into charges against prisoners in relation to breaches

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<sup>213</sup> Council of Europe (1995b) *Response of the Irish Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Ireland carried out by from 26 September to 5 October 1993*, Strasbourg/Dublin: COE, p.20.

<sup>214</sup> *Ibid*, p.21.

<sup>215</sup> *Ibid*, p.43.

<sup>216</sup> *Ibid*, p.92.

<sup>217</sup> Council of Europe (1999) *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 31 August to 9 September 1998*, Strasbourg/Dublin: COE, p.25.

<sup>218</sup> *Ibid*.

of prison discipline.<sup>219</sup> However, at the same time, the Government gave the Committees the power to hear appeals against penalties imposed by the prison governors in what can be seen as an introduction of a role in prison management.<sup>220</sup> This has done little to clarify the function of the Committees as an independent complaints or monitoring mechanism. While the Office of the Inspector of Prisons was established in 2002, and later placed on statutory footing by the *Prisons Act 2007*, any real reform of the Visiting Committees has yet to take place.

Following its next visit to Ireland in 2002, the CPT noted in its report that senior management in prisons were determined to investigate allegations of ill-treatment by prison officers.<sup>221</sup> The Committee also noted that prisoners have been given the opportunity to complain to external bodies, including to the police. However, the CPT also stated with concern that:

*“... in all of the establishments visited, prisoners appeared to have very little confidence in the complaints system. The delegation found that, notwithstanding the allegations of ill-treatment received by it, very few prisoners actually filed a complaint. Moreover, the records examined at Mountjoy Prison showed that inmates who did complain of having been physically ill-treated often subsequently withdrew those complaints.”<sup>222</sup>*

In light of those concerns, the CPT stated that any complaint procedure should guarantee independence and impartiality, and that prisoners should not be discouraged from bringing their complaints to the attention of the prison authorities.<sup>223</sup> In response, the Irish Government stated that a number of avenues were open to prisoners to complain about ill-treatment, and these included: the police and the courts, the Visiting Committees, the prison chaplains and prison doctors, and the Minister for Justice.<sup>224</sup> According to the Government, prisoners were also free to complain to the European Court of Human Rights and the CPT.<sup>225</sup> Referring to the overall low level of register complaints of ill-treatment from prisoners (47 in years 2001-2002<sup>226</sup>), it was the Government's view that this was reflective of how well the issues were being dealt with within prisons “rather than necessarily being a

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<sup>219</sup> By virtue of an amendment to the *Visiting Committees Act 1925* by Section 19(5) of the *Criminal Justice (Miscellaneous Provisions) Act, 1997*. See: Council of Europe (1999) *Response of the Irish Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Ireland from 31 August to 9 September 1998*, Strasbourg/Dublin: COE.

<sup>220</sup> Ibid.

<sup>221</sup> Council of Europe (2003a) *Report to the Government of Ireland 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 20 to 28 May 2002*, Strasbourg: COE, p.19.

<sup>222</sup> Ibid.

<sup>223</sup> Ibid, p.20.

<sup>224</sup> Council of Europe (2003b) *Response of the Government of Ireland to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Ireland from 20 to 28 May 2002*, Strasbourg: COE, p.19.

<sup>225</sup> Ibid.

<sup>226</sup> Ibid, p.20.

symptom of any deficiency in the complaints procedures”.<sup>227</sup> The Government reiterated its commitment to reviewing the complaints procedure in the process of the drafting of new Prison Rules.

By the time of the 2006 CPT visit to Ireland, the frustration of the Committee at the continuing delay in introducing modern Prison Rules was evident. It stated that it was “dismayed” at what by the time of the visit was a 12-year delay, and that “continued delay in the adoption of new Prison Rules deprives governors of a modern framework for managing prisons and prevents the application of clearly defined safeguards for prisoners”.<sup>228</sup> The CPT also levelled some criticism on the investigation of allegations of assault by staff by An Garda Síochána (the Irish police force), and in particular raised concerns about the timeliness and thoroughness of such investigations.<sup>229</sup> The Committee once again noted, as it did in 2002, that prisoners had little confidence in the internal complaints system and recommended that an independent mechanism to deal with all prisoner complaints should be established.<sup>230</sup> In response, the Irish Government informed the Committee that the new *Prison Rules 2007* had finally been enacted and that under Rule 57 prisoners were now able to request a meeting with an officer of the Minister for Justice to hear their complaint.<sup>231</sup> In practice, such an officer (a civil servant) would have been nominated by the Director General of the Irish Prison Service. On investigation of the complaint, the designated officer could make a recommendation to the governor and the governor had to comply.<sup>232</sup> The Government’s response to the 2006 CPT report was silent on the issue of an independent complaints body which this latter procedure clearly did not provide.

Finally, during its 2010 visit to Ireland, the CPT was informed by the Irish Government that a new internal policy had been introduced by the Irish Prison Service, encompassing the investigation of all prisoner complaints, effective from January 2010.<sup>233</sup> While recognising that it was too early to assess the effectiveness of the new procedure, the CPT welcomed its introduction, and in particular welcomed the assurance contained within that prisoners making allegations of ill-treatment had to be afforded the protection of the governor from any adverse effects of making a complaint.<sup>234</sup> The CPT further recommended that the policy

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<sup>227</sup> Ibid, p.19.

<sup>228</sup> Council of Europe (2007a) *Report to the Government of Ireland 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*, Strasbourg: COE, p.18.

<sup>229</sup> Ibid, p.21.

<sup>230</sup> Ibid.

<sup>231</sup> Council of Europe (2007b) *Response of the Government of Ireland to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Ireland from 2 to 13 October 2006*, Strasbourg: COE, p.21.

<sup>232</sup> Ibid.

<sup>233</sup> Council of Europe (2011a), *Report to the Government of Ireland 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 25 January to 5 February 2010*, Strasbourg: COE, p.23

<sup>234</sup> Ibid.

should include a timeframe for any investigations, and noted that the Government informed it of its intention to review the procedures relating to serious complaints and the need to introduce an independent element to any such investigations.<sup>235</sup> In its response, the Government stated that a timeframe had in fact been adopted within the then new procedures, and that all investigations had to be concluded within four weeks.<sup>236</sup>

Commenting on the internal grievance (complaints) procedure available to prisoners under Rule 55 of the *Prison Rules 2007*, the CPT found that prisoners had little confidence in the process; the number of complaints was generally low; and some prisoners stated that they were concerned about the repercussions of raising a complaint against an officer.<sup>237</sup> The CPT recommended that the system of internal complaints should be further reviewed and

*“...prisoners ought to be able to make written complaints at any moment and place [...] in a locked complaints box on a prison landing (forms should be freely available and not be the subject of a specific application to the Governor); all written complaints should be registered centrally within a prison before being allocated to a particular service for investigation or follow up. In all cases, the investigation should be carried out expeditiously (with any delays justified) and prisoners should be informed within clearly defined time periods of the action taken to address their concern or of the reasons for considering the complaint not justified. In addition, statistics on the types of complaints made should be kept as an indicator to management of areas of discontent within the prison.”<sup>238</sup>*

As stated in the preceding sections, the *Prison Rules 2007* were amended in 2013 to introduce an element of independent investigation of the most serious allegations, and a revised *Prisoner Complaints Policy* was published by the Irish Prison Service in 2014. The CPT reported on its 2014 visit to Ireland in November 2015. The Committee’s comments with regard to the complaints system were discussed earlier in this report.

## **2. Reports of the UN Committee on Torture and a note on the ratification of the Optional Protocol to the UN Convention on Torture (OP-CAT)**

Ireland ratified the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UN CAT) on the 11<sup>th</sup> of April 2002. Ireland implemented the UN CAT domestically through the *Criminal Justice (United Nations Convention against Torture)*

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<sup>235</sup> Ibid.

<sup>236</sup> Council of Europe (2011b) *Response of the Government of Ireland to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Ireland from 25 January to 5 February 2010*, Strasbourg: COE, p.30.

<sup>237</sup> Council of Europe (2011a), *Report to the Government of Ireland 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 25 January to 5 February 2010*, Strasbourg: COE, p.55.

<sup>238</sup> Ibid, p.56.

Act 2000. The first monitoring report under Article 19 of the UN CAT was submitted by Ireland to the UN Committee in 2009, and examined in 2011.

In its statement to the UN Committee,<sup>239</sup> the Irish Government asserted that the principal mechanism for inspection of places of detention in Ireland is the Inspector of Prisons. The Government did not mention the Visiting Committees. At the time of the 2011 examination, the Government stated that the preparation of legislation to ratify the OP-CAT was approved in May of that year; however, it was unable to provide the Committee with an indicative date of when such legislation would be enacted.<sup>240</sup>

In its *Concluding Observations* on the 2011 examination of Ireland's first report under UN CAT, the UN Committee noted its concern at the lack of an effective and independent mechanism for the investigation of complaints from prisoners alleging ill-treatment by prison staff.<sup>241</sup> The Committee therefore recommended that Ireland should:

- a) establish an independent and effective complaints mechanism and ensure that in practice those who raised concerns are protected from victimisation and reprisals;
- b) institute prompt, impartial and thorough investigations into all allegations of torture and ill-treatment by prison staff;
- c) ensure that staff who are allegedly involved in torture or ill-treatment are suspended in their duties during any investigations; and
- d) provide information to the UN Committee on the number of complaints, the number of investigations carried out, the number of resulting prosecutions and convictions of any staff involved in ill-treatment and information on redress awarded to any victims.<sup>242</sup>

Following the publication of the 2011 Concluding Observations, the Government was asked by UN CAT to provide an update on the introduction of an independent system of complaints in Ireland's second periodic report under UN CAT scheduled for 2015.<sup>243</sup>

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<sup>239</sup> *Opening Statement for the consideration of Ireland's First Periodic Report under Article 19 of the Convention against Torture* by Mr. Seán Aylward, Head of Irish Delegation 23<sup>rd</sup> May 2011 [on-line] (available at: [http://www.apt.ch/en/opcat\\_pages/opcat-ratification-31/](http://www.apt.ch/en/opcat_pages/opcat-ratification-31/); accessed 25<sup>th</sup> November 2014).

<sup>240</sup> *Ibid*, p.5. The drafting of a General Scheme of 'Inspection of Places of Detention Bill' was approved on 17 May 2011, but the date of the publication of the *Bill* remains unknown. The legislation is intended to give legislative effect to the OP-CAT, strengthen the Office of the Inspector of Prisons, put the Council of Europe inspection regime on a statutory footing, and reform the Prison Visiting Committees (See: Irish Penal Reform Trust (2014b) *Did you know that Ireland hasn't met its commitment to ratify OPCAT?* [on-line] (available at: <http://www.iprt.ie/contents/2635>).

<sup>241</sup> UN Committee against Torture (2011) *Concluding Observations of the Committee against Torture: Ireland*, CAT/C/IRL/CO/1, 17 June 2011 (available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fIRL%2fCO%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fIRL%2fCO%2f1&Lang=en)), at para. 18.

<sup>242</sup> *Ibid*.

<sup>243</sup> UN Committee against Torture (2013) *List of issues prior to submission of the second periodic report of Ireland*, CAT/C/IRL/QPR/2 [on-line] (available at:

### **3. UN Human Rights Committee and examination of national reports under the ICCPR**

The UN Human Rights Committee has so far examined Ireland's record under the UN Covenant on Civil and Political Rights (ICCPR) four times: in 1993, 2000, 2008 and 2014. The 1993 *Comments* of the Committee were silent on prison conditions in the State, other than to say that the Committee welcomed Ireland's commitment to reviewing its prison policy.<sup>244</sup> Similarly, the 2000 *Concluding Observations* only mentioned briefly the need for the State to ensure that the conditions of detention are brought in line with international human rights standards.<sup>245</sup>

In its *Concluding Observations* on Ireland in 2008, the UN Human Rights Committee expressed its concern about the persistence of poor prison conditions in Ireland, especially with respect to overcrowding, the practice of 'slopping-out' of human waste (in some of the older prisons), the levels of inter-prisoner violence, and a shortage of mental health provision for those with mental health difficulties.<sup>246</sup> It has recommended that the elimination of 'slopping-out' and overcrowding should be treated as a priority, together with the separation of remand and sentenced prisoners throughout the system.<sup>247</sup> In 2014, while welcoming the measures taken by the Irish Government to improve prison conditions since the previous examination, the Committee reiterated its concern about poor conditions prevailing in some prisons, the continuing practice of holding remand and sentenced prisoners together, and the high levels of inter-prisoner violence.<sup>248</sup> At the same time, the Committee – while acknowledging the introduction of a new complaints system in Ireland – criticised it for the lack of independence in considering serious prisoner complaints.<sup>249</sup>

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[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fIRL%2fQPR%2f2&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fIRL%2fQPR%2f2&Lang=en)), at para. 18.

<sup>244</sup> UN Human Rights Committee (1993) *Consideration of reports submitted by States Parties under Article 40 of the Covenant: Comments of the Human Rights Committee, Ireland* [on-line] (available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f79%2fAdd.21&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f79%2fAdd.21&Lang=en)), p.2.

<sup>245</sup> UN Human Rights Committee (2000) *Report of the Human Rights Committee, Volume 1, General Assembly Official Records, Fifty-fifth Session, Supplement No.40 (A/55/40)* [on-line] (available at: [http://www.ccprcentre.org/wp-content/uploads/2012/04/A\\_55\\_40Vol-I\\_en.pdf](http://www.ccprcentre.org/wp-content/uploads/2012/04/A_55_40Vol-I_en.pdf)), p.66.

<sup>246</sup> UN Human Rights Committee (2008) *Consideration of reports submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, Ireland* [on-line] (available at: <http://www.ccprcentre.org/doc/2012/05/G0843349.pdf>), pp.4-5.

<sup>247</sup> *Ibid*, p.5.

<sup>248</sup> UN Human Rights Committee (2014a) *Concluding observations on the fourth periodic report of Ireland* [on-line] (available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/141/79/PDF/G1414179.pdf?OpenElement>), p.5.

<sup>249</sup> *Ibid*.

## Part B: THE PRACTICALITIES OF PRISON LITIGATION IN IRELAND

### I. Introduction

This part of the report looks at the practicalities of prison litigation in Ireland. It outlines the findings of a scoping study, undertaken between June and September 2015, together with examples of national cases illustrating some of the issues raised by interviewees. Before outlining the findings, it is appropriate to provide a note of caution that as the study was limited in scope, these should not be generalised but should be taken as indicative of some of the issues encountered in prison litigation by interviewees.

### II. Methodology

Between June and September 2015, eight individuals were interviewed as part of the research to seek their views on the practical challenges of prison litigation in Ireland. The interviewees were chosen to represent different perspectives on prison litigation, and included:

- five legal practitioners with direct experience of prison litigation;
- one representative of a prisoner support organisation;
- a representative of the Irish Human Rights and Equality Commission, a National Human Rights Institution (NHRI) charged with protecting and promoting human rights in Ireland; and
- the Director General of the Irish Prison Service.

The Irish Penal Reform Trust also approached the President of the High Court (in June 2015) to request permission to interview a number of judges who in the past considered prison-related cases. Unfortunately, due to other commitments, the judges were not available at the time specified in the request, and permission to interview them was therefore refused.

The interviews, conducted by phone, were semi-structured and thematic areas for discussion included (by group of respondents):

<b>Legal practitioners and others involved in litigation</b>	<b>Prison administration</b>	<b>Support organisations/former prisoners</b>
1. The role of the organisation/legal firm in litigating prison cases.	1. The role of the prison staff/Irish Prison Service (IPS) staff in handling complaints and legal cases.	1. The nature of the case taken (did it concern prison conditions, access to services, disciplinary processes, other?)
2. The frequency with which the person/law firm litigated prison cases (taking court action/other action relating to prisons/prisoners' rights).	2. How are IPS staff made aware of prisoner complaints?	2. Whether or not the person used the internal, prison complaints mechanisms and what was their experience.

<b>Legal practitioners and others involved in litigation</b>	<b>Prison administration</b>	<b>Support organisations/former prisoners</b>
3. The ways in which the practitioners/firms become aware of potential prison cases.	3. How are they made aware of cases taken to the courts?	3. Whether the person was represented by a lawyer when they took the case. If yes, how did they access the lawyer?
4. The ways in which prisoners (or their families/friends) access legal representation.	4. Does the Irish Prison Service monitor individual complaints from prisoners (nature/number).	4. How did they finance their case and whether they had access to any form of legal aid?
5. The most often alleged violations/most often raised concerns?	5. What the most often raised concerns in prison complaints?	5. The outcomes of the case, including any changes to the person's situation in prison.
6. The nature of remedies in prison cases.	6. What are the most often raised concerns in court cases taken against the IPS?	6. Any negative impacts on the person's situation, connected to the taking of the case.
7. Any barriers to prisoners accessing judicial protection.	7. How does the Prison Service respond to potential cases? (consider the use of mediation/negotiation/other informal ways of resolving cases/responding to cases in court)	7. Any barriers to prisoners accessing judicial protection.
8. Suggestions for any improvements which could be made to ensure access to the courts.	8. Who represents the IPS before the courts if necessary?	8. Suggestions for any improvements which could be made to ensure access to the courts.
9. Impact of any judgments on prison conditions/situation of prisoners.	9. What are the remedies that prisoners most often ask the courts to consider?	
10. Implementation of judgments.	10. Do judgments have an impact on the way in which prisoners are treated, and/or on prison conditions? If yes, in what ways? If not, what are the main barriers to implementation of judgments?	
	11. Has prison litigation in Ireland changed the way in which prisoners are treated/improved prison conditions?	

### III. Findings

#### 1. Prisoner complaints and queries

Generally, prisoners who are considering taking a case against the Irish Prison Service would contact solicitors who represented them in their original criminal trial. In some instances, other prisoners or third persons, such as chaplains, refer prisoners to a particular firm.

It was the view of legal practitioners that the demand for prison litigation in Ireland is substantial – as one of them put it, the demand is “far exceeding [the] firm’s capacity” (Interview 1), while another added that cases are being worked on “constantly” (Interview 2). Lawyers get “a lot of queries from prisons” (Interview 3) and those are often forwarded weekly. The issues about which complaints are made and/or cases are taken are varied, and include:

- a) prisoners on ‘protection’ (restricted regime);
- b) family/friends visits and queries about access to enhanced (longer) visits;
- c) issues regarding family members being banned from visiting (for example, for security reasons);
- d) compassionate release in light of illness or death in the family;
- e) issues regarding disciplinary proceedings in prisons; and
- f) withdrawal of visits or privileges as punishment;
- g) lack of access to medical treatment or other services in prisons;
- h) medical assessment of prisoners who have mental health issues (especially those on remand); and
- i) proceedings before the Parole Board.

Slopping out (i.e. the disposal of human waste into buckets due to lack of in-cell sanitation) in some prisons continues, and so do prisoner queries relating to this issue. In recent years, significant progress has been made towards the elimination of the practice. At the end of 2014, 304 prisoners had no in-cell sanitation, a reduction of 67% since the start of 2012.<sup>250</sup> With the opening of the new prison in Cork in February 2016, the number of prisoners required to slop out will be lowered to around 100.<sup>251</sup> However, prisoners and former prisoners who have been forced to use slopping out initiate many cases that are currently being considered.

While previous litigation regarding the impact of slopping out on prisoners in Ireland has been unsuccessful,<sup>252</sup> the *Irish Independent* reported in April 2015 that Irish prisoners have made over 800 claims for compensation relating to slopping out, with over 400 of those

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<sup>250</sup> Irish Prison Service (2015b) *Irish Prison Service Annual Report 2014*, Longford: Irish Prison Service, p40.

<sup>251</sup> Information provided by the Director of the Irish Prison Service in interview in September 2015.

<sup>252</sup> See: *Mulligan v Governor of Portlaoise Prison and Anor*, [2010] IEHC 269. See also: *IPRT disappointed at ‘slopping out’ decision*, 14<sup>th</sup> July 2010 (available at: <http://www.iprt.ie/contents/1750>).

cases settled.<sup>253</sup> Some test cases will, however, be coming before the courts in November 2015.

The number of queries is significant; legal practitioners were, however, aware that firms take on cases that have a good chance of success. Lawyers and their clients have to be strategic and as one practitioner put it: “You would not have the manpower to work with all the clients” (Interview 3).

## **2. Views on the Irish Prison Service internal complaints procedure**

As stated previously in this report, the new Irish Prison Service complaints procedure was introduced in June 2014. The system includes a provision for an investigation of the most serious complaints (Category A) by external investigators. Twenty investigators with different professional backgrounds (for example, legal, medical, ex-police and ex-probation officers) have been appointed to provide the investigatory capacity, although not all those persons are involved in investigations all the time (Director of the IPS). While there is no formal role for the Inspector of Prisons to oversee the internal complaints system, the Office provides such oversight on the basis of an agreement with the Irish Prison Service (Director General of the IPS). The Inspector reviews all Category A complaints (the most serious) and can ask that they are reinvestigated by a different member of the panel of investigators. The Director General of the IPS may also take such a step should the initial decision on a complaint be appealed to him.

It was the view of the Director General of the Irish Prison Service that the current system of investigation of the most serious complaints is far from ideal. The Irish Prison Service, which also pays fees for time spent on investigations, appoints the panel of investigators and so “The panel is working for you” (Director General of the IPS). Whilst acknowledging that the new system is still being embedded, the Director’s view was that, ideally, Category A and B complaints should all be investigated externally. “[...] we need an Ombudsman,” he stated. “We really need to take that next step.”

In relation to all complaints, the Director General acknowledged that the system is still at its early stages, but there is some evidence that it is being used. Currently, all complaints (whether they have been upheld or not) are catalogued and monitored at HQ level, and for the “[...] first time, we have this kind of data”. Monitoring includes looking at how many complaints are made on certain issues; how many are upheld and how many are not. The Director General’s view was that “complaining organisations are healthy organisations” and that he would be concerned if prisoners made no complaints. However, he acknowledged

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<sup>253</sup> *Irish Independent*, ‘Slopping out: Irish prisoners line up for €4.2m payout’, 19 April 2015 (available on-line at: <http://www.independent.ie/irish-news/slopping-out-irish-prisoners-line-up-for-42m-payout-31154067.html>).

that the complaints system is only beginning to function and that “it will take 10 years” for it to be properly embedded.

The legal practitioners’ experience was that the new system is significantly underused and that there is still little awareness amongst prisoners about the complaints process. One of the interviewees stated that “Unless you are in the top 5% of prisoners aware of their rights, you won’t complain” (Interview 3). There is no particular system in prisons of providing information to prisoners about *Prison Rules*, and what prisoners are entitled to. While some progress has been made, also due to the involvement of organisations such as the Irish Penal Reform Trust and the Irish Council for Civil Liberties in making information available in at least some prisons, there was general consensus amongst the respondents that levels of awareness of prisoners’ rights remain low.

Apart from a lack of awareness, prisoners also face practical barriers to engagement with the process, such as issues with literacy and numeracy, as well as facing “chill factors” (Interview 1) such as concerns of victimisation by staff and the consequences of being branded a ‘problematic’ prisoner. The recently introduced system of ‘incentivised regimes’ where prisoners gain certain entitlements in return for ‘good behaviour’ also contributes to the prisoners’ reluctance to complain. Those factors result in a situation where “prisoners put up with a lot and tolerate a lot” (Interview 3) before making a complaint or taking a court case. While there is nothing in the law to state that prisoners cannot be legally represented while making a complaint using the internal process, representation is often refused when asked for. “They should have the right to advocacy” (Interview 3) but at the moment such a right is not guaranteed by the current procedures. This was seen as a significant barrier to prisoner engagement with the complaints process. Lastly, it was the view of some of the legal practitioners that even if a complaint is lodged, prisoners will often make a “pragmatic decision” (Interview 1) to drop it once some improvements to their situation – for example, access to a certain service – is negotiated in the process of the resolution of the complaint. Those prisoners who do decide to take a legal case against the Prison Service would have “usually thought through taking cases very carefully” (Interview 4).

### **3. The practicalities of prison litigation**

Legal practitioners confirmed that one of the big difficulties in effecting change through prison litigation is the traditional reluctance of judges to intervene in the running of the prisons. The day-to-day management of prisons is viewed as the domain of individual governors, and while there have been some examples of cases where judges did direct the Prison Service to take or refrain from taking certain actions (with the most recent example, the High Court decision in *McDonnell v the Governor of Wheatfield Prison*), the reluctance to intervene is still prevalent. Concerns were also raised that cases may be compromised by “credibility issues” (Interview 2) and the fact that when two versions of the same events are

presented, judges are more likely to side with the prison authorities. As one legal practitioner put it, “prisoners do not have a level playing field” (Interview 2).

It was the view of some of the legal professionals that there is a tendency in the system to look for solution of prison cases by way of mediation or settlement. In those cases, changes to the individual prisoner’s circumstances are negotiated with the prison administration. Legal practitioners also commented on the fact that some cases do not get to conclusion as prisoners are released and do not wish to continue with the case (or the case becomes moot due to the fact of release). Generally, while there may be a lot of queries coming from prisoners, “not many cases are successful” (Interview 2).

In some cases, the use of mediation and settlements was seen as a way of avoiding litigation on the part of the prison authorities. However, for the Director General of the Irish Prison Service, this was a question of a pragmatic approach. He stated that while the Unit responsible for handling legal cases at the Irish Prison Service HQ looks at all of the cases, it tries to be pragmatic in its approach to selecting which ones to defend in court and which to resolve by settlement. “It’s an expensive system”, he said in interview, and while “sometimes we’d go in on principle and defend [a case]”, consideration of financial and human resources will play a part in deciding the strategy of dealing with a case.

The consideration of financial and human resources in taking prison cases was, in fact, something that was also of concern to lawyers and their clients. While legal aid is available for most prison law cases, the level at which it is provided (the amount) is often not sufficient to cover the costs of litigation.<sup>254</sup> The time commitment to prison cases is substantial – not just due to often complex legal issues, but also due to practical considerations of time spent on correspondence with the prison authorities; legal visits to clients; uncovering of evidence, and so on. Costs can only be recovered if the case is successful, and even then these are not always recovered in full. While legal practitioners “try to litigate” (Interview 4) prison cases, restrictions on legal aid play a significant part in the decision-making process regarding the taking of such cases, and it may therefore be difficult to attract lawyers to litigate in this area.

Other than issues with financing, in some instances it may be difficult to establish a case at all or access the necessary evidence. One of the practitioners gave an example of issues with disciplinary proceedings in prisons as being “difficult to pierce” (Interview 1). While disciplinary processes in prisons can be seen as ‘quasi-tribunals’, there is no right for prisoners to be legally represented at the hearings.<sup>255</sup> If issues arise with disciplinary proceedings, evidence can be difficult to obtain to challenge any decisions. Practitioners also expressed frustration at how prisons respond to their queries which are sometimes either ignored, responses are delayed, or only partial answers are provided.

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<sup>254</sup> One of the practitioners stated that a ‘standard’ judicial review brings around €1,500 of legal aid.

<sup>255</sup> Although there is no rule to state that they cannot be represented, it is difficult to obtain permission of the prison administration for the lawyers to attend.

These difficulties are well illustrated by the case of *Egan v Governor of Wheatfield Prison & Anor.*<sup>256</sup> In this case, Robert Egan was subject to disciplinary proceedings, following allegations that his partner brought and passed on prohibited items to him on two occasions in June 2013. Mr Egan, who denied any wrongdoing, was charged with a breach of prison discipline. Following adjudication by the governor, he was punished with: a) a forfeiture of 56 days evening association; b) a forfeiture of 56 days of making and receiving phone calls or letters; and c) a forfeiture of receiving any ordinary visits for 56 days. CCTV footage of the relevant visits formed part of the evidence considered in the adjudication process. In his affidavit, Mr Egan stated that he asked for and was refused the viewing of the footage. He stated that the Governor told him that if he wanted to view the footage, he would have to contact his solicitor. In turn, the governor in his affidavit stated that he had shown the footage to Mr Egan, and denied that he advised him he would have to contact his solicitor to view it. A Chief Officer present at the adjudication supported the governor's version of events. Considering the disparity in evidence, the judge stated that as there was no application to cross-examine the governor or the Chief Officer by Mr Egan's legal representatives, and as the burden of proof lay upon Mr Egan to prove his case, "on balance of probabilities" the judge accepted the governor's version of events. He therefore stated that Mr Egan did not establish a valid challenge to the way in which the disciplinary proceedings were undertaken.

In interviews for this research, some of the legal practitioners highlighted the particular issues with evidence at disciplinary hearings in prisons. They pointed out that the criminal burden of proof ('beyond a reasonable doubt') does not apply in those proceedings and prisoners are often punished 'on suspicion', even when they vehemently deny breaching prison rules. Some were concerned that prisoners are then branded as 'problem prisoners' (Interview 3).

The appeals process in disciplinary proceedings is an internal one, and prisoners can petition the Minister for Justice to review the governor's decision. (In practice, the review is done by the Irish Prison Service HQ/Director of the Prison Service.)<sup>257</sup> Robert Egan's case again illustrates the potential difficulties in that process. Mr Egan submitted a petition to the Minister (through prison staff) the day after his disciplinary hearing. Forty-three days later, that is from when the application had been made to the court for a judicial review, his petition had still not been dealt with. At the same time, the disciplinary sanctions against him took effect immediately after the original governor's decision. Mr Egan's solicitors wrote to both the governor and the Director General of the Prison Service on a number of occasions, seeking documentation relating to the original disciplinary proceedings, as well as requesting that the sanctions against Mr Egan be suspended, pending resolution of his petition to the Minister. They received no response to their correspondence. In court, the

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<sup>256</sup> [2014] IEHC 613.

<sup>257</sup> Section 14 of the *Prisons Act 2007*.

governor of Wheatfield Prison stated that the solicitors should have requested the documentation under Freedom of Information legislation and that no such request was made. An officer dealing with Mr Egan's petition for the Irish Prison Service stated that the delay in resolving the petition was caused by both the governor and the chief officer being on leave for a month.

The judge did not accept those explanations as valid. Addressing the governor's explanation for the lack of response to correspondence, the judge stated that:

*"If this is thought to be an explanation for the failure to answer the correspondence, it is entirely inadequate. It suggests [...] that it was believed that the solicitors [sic] correspondence did not warrant the courtesy of a reply because they were going to get the stock answer that the matter should be dealt with under the Freedom of Information Act. It is an entirely inappropriate response to solicitors who have been communicating with their client who was operating under the restriction described following a disciplinary hearing, in respect of which he was entitled to seek legal advice. The solicitors had a duty to inform themselves and obtain from those responsible for the decision, clear and transparent information as to the offences set out in the P19, the result of the determination, the nature of the petition, and any other relevant information which would assist them in offering their client the advice to which he was entitled in respect of an application by way of judicial review or in pursuing a petition."<sup>258</sup>*

While acknowledging that Mr Egan's solicitors may not have been entitled to request all the documentation, which they sought, the judge then added:

*"A solicitor acting on behalf of a prisoner should not be denied access to the essential documents to which his client was privy, whether because they were served upon him [...] or created by him such as the petition. The denial of these basic documents to the applicant's solicitors was calculated to inhibit or frustrate the applicant's right to seek and obtain legal advice concerning these matters. A solicitor is thereby inhibited from presenting the full evidence concerning a challenged decision appropriate to an application for leave to apply for judicial review to this Court. The court accepts that there may be issues concerning prison order, discipline or security which preclude the furnishing of certain materials, such as the CCTV footage or other relevant material, or there may be an issue arising in respect of disclosing footage or documents identifying third parties, who may also have rights to be protected. The court is also mindful of the nature of the disciplinary and petition process. [...] However, an applicant's solicitor should be entitled to a copy of the P19, a copy of the decision*

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<sup>258</sup> *Egan v Governor of Wheatfield Prison & Anor*, 2014, at para. 26.

*made and a copy of the petition submitted, together with the Minister's decision when made.*"<sup>259</sup>

The judge also criticised the delay in the consideration of Mr Egan's petition for a review of both the disciplinary process and sanctions by the Minister/Director General of the Irish Prison Service. He stated that it was "quite unfair and oppressive to a prisoner that he should be obliged to serve virtually the full period of the forfeiture ordered before that petition is determined."<sup>260</sup> The judge found that Mr Egan's constitutional right to fair procedures was breached in this instance, and ordered a stay of the further application of the sanctions imposed in the original disciplinary hearing until the resolution of the appeal petition.

#### **4. Systemic impact of successful prison cases**

Legal practitioners assessed the systemic impact of successful prison litigation as relatively minimal. While there are numerous cases being taken, despite the practical issues identified above, there is a "dearth of published judgements" (Interview 1) which makes the assessment of the systematic impact of litigation even more difficult. Generally, once the situation of an individual prisoner is resolved – for example, the person is given access to a particular service, having previously faced difficulties – it was the view of legal practitioners that it is unlikely that the issue will also be addressed on a system-wide level. There was some optimism expressed, though, that the raising of issues and the threat of litigation does have an indirect result in pushing for more systemic changes. An example given in this respect was the closure of St Patrick's Institution in Dublin and the transfer of most of the children and young people to detention schools. This – in the opinion of one interviewee – was a result of not only a lot of external pressure (including from national and international human rights organisations), but also due to a number of cases being taken on behalf of the young people detained there in the past.

The Director General's view of these issues, however, differed. He stated that once a decision is taken that the Prison Service was at fault, "if we were wrong, we put it right". This includes looking systematically at issues that can be addressed throughout the various prisons in the whole estate. His view was that "the only way to change the system is to be upfront about the problems" and that recent progress in eliminating slopping-out in prisons is just one example of how progress can be made once an issue is acknowledged as a problem. Other examples include the systematic decrease in the overall number of prisoners in the prison system,<sup>261</sup> which has largely eliminated overcrowding, and the replacement of some of the older prisons previously criticised for harsh conditions (for example, Cork Prison) with new facilities. Whilst many of those changes are a matter of

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<sup>259</sup> Ibid, at para. 27.

<sup>260</sup> Ibid, at para. 28.

<sup>261</sup> The prison system in Ireland held over a 1,000 people fewer in 2015 than it did in 2010.

political will, prison litigation definitely plays a role in making clear the need for such changes.

Other than the use of litigation, practitioners also praised the work of external oversight agencies in pushing for an improvement of prison conditions and the situation of prisoners on a systemic level. One interviewee mentioned the 'sterling work' of the Inspector of Prisons, Judge Michael Reilly, who they saw as an authoritative and credible voice in the protection of prisoners' rights. In the interviewee's view, the Inspector has not only pushed for many positive changes, but also raised awareness amongst the public of the issues prisoners face. They also mentioned the work of the former Ombudsman for Children, Emily Logan (now the Chief Commissioner of the Irish Human Rights and Equality Commission) who was instrumental in establishing the right of the Ombudsman for Children to receive complaints from young prisoners held in St Patrick's Institution. While the practitioners thought that Ireland would benefit from having an office of a Prison(er) Ombudsman, they were doubtful that any such office would be opened in the immediate future.

## CONCLUSIONS

While significant improvements have been made to physical conditions in Irish prisons, a number of concerns remain. These include the considerable number of prisoners accommodated in shared cells; the continuing practice of ‘slopping-out’ in a limited number of prisons; the still high levels of inter-prisoner violence; shortcomings in the provision of appropriate healthcare in some of the prisons; the continuing detention in prisons of persons with severe mental health difficulties; and the use of excessive disciplinary sanctions. The complaints system available to prisoners, while improved since the introduction of a new policy in 2014, continues to face questions over its independence (especially when it comes to the investigation of the most serious complaints) and effectiveness, and appears to be significantly underused by prisoners at present. The establishment of an Office of a Prisoner Ombudsman appears unlikely in the near future, and Ireland is still yet to ratify the Optional Protocol for the UN Convention against Torture and introduce the National Preventive Mechanism envisaged by the Protocol.

In those circumstances, prisoners often rely on raising any issues regarding their treatment or prison conditions through their legal representatives. This is far from easy, especially considering the limited level of legal aid in prison cases. Other barriers to litigation include the “chill factor” relating to the potential of intimidation or victimisation; the perceived reluctance of the courts to interfere in the running of the prisons; and potential evidential issues. Faced with those difficulties, many potential issues that could be considered by the courts are mediated before they reach that stage, improving the individual situation of the prisoner who raises them. In these circumstances, while there have been a number of very significant prison cases taken in Ireland over the years, their impact on systemic changes to the system is difficult to measure.

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#### **4. WEBSITES:**

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Irish Penal Reform Trust: [www.iprt.ie](http://www.iprt.ie)

Irish Prison Service: [www.irishprisons.ie](http://www.irishprisons.ie)

Office of Inspector of Prisons: <http://www.inspectorofprisons.gov.ie>

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