



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

## **Response on the Department of Justice Consultation on the Northern Ireland Law Commission Report on Bail in Criminal Proceedings**

1. The Northern Ireland Human Rights Commission ('the Commission') pursuant to Section 69(1) of the Northern Ireland Act 1998 reviews the adequacy and effectiveness of law and practice relating to the protection of Human Rights. In accordance with this function the following statutory advice is submitted to the Department of Justice ('the Department') in response to the consultation 'The Northern Ireland Law Commission Report on Bail in Criminal Proceedings'.<sup>1</sup>
2. The Commission bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights as incorporated by the Human Rights Act 1998 and the treaty obligations of the Council of Europe and United Nations (UN) systems. The relevant international treaties in this context include;
  - *The European Convention on Human Rights, 1950* ('ECHR') [UK ratification 1951];
  - *The International Covenant on Civil and Political Rights, 1966* ('ICCPR')[UK ratification 1976]; and
  - *The United Nations Convention on the Rights of the Child, 1989* ('UNCRC')[UK ratification 1991].
3. The Northern Ireland Executive (NI Executive) is subject to the obligations contained within these international treaties by virtue of the United Kingdom Government's ratification. In addition, Section 26 (1) of the Northern Ireland Act 1998 provides that "If the Secretary of State considers that any action proposed to be taken by a Minister or Northern Ireland department would be incompatible with any international obligations... he may by order direct that the proposed action shall not be taken."

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<sup>1</sup> *Northern Ireland Act 1998*, s.69 (4)

4. The Commission further recalls that Section 24 (1) of the Northern Ireland Act 1998 states that "A Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act – (a) is incompatible with any of the Convention rights".
5. In addition to these treaty standards there exists a body of 'soft law' developed by the human rights bodies of the United Nations and Council of Europe. These declarations and principles are non-binding but provide further guidance in respect of specific areas. The relevant standards in this context are;
  - The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 ('Basic Principles');<sup>2</sup>
  - Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse; and
  - The United Nations Standard Minimum Rules for Non- Custodial Measures (the Tokyo Rules).
6. In this advice the Commission sets out relevant aspects of international human rights law which the Department will wish to consider as it brings forward the reform proposals.

### Broader Context

7. The right to personal liberty and freedom from arbitrary detention is protected by the ICCPR, Article 9 and the ECHR, Article 5. The ECHR, Article 5, states:

*"Everyone has the right to liberty and security of person.*

*No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*

*(a) the lawful detention of a person after conviction by a competent court;*

*(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;*

*(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or*

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<sup>2</sup>United Nations General Assembly (1985) A/RES/40/34.

*when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;*

*(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;*

*(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;*

*(f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*

- 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.*
- 3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.*
- 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*
- 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation. "*

8. Under Article 5(3) a person charged with an offence must always be released pending trial unless the state can show that there are "relevant and sufficient" reasons to justify his or her continued detention.<sup>3</sup> There must be a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty.<sup>4</sup>

9. The European Court of Human Rights (ECtHR) has stated:

*"The Court would stress the importance of Article 5 (art. 5) in the Convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary*

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<sup>3</sup> *Wenhodff v Germany* (1968) 1 EHRR 55, para 7-9

<sup>4</sup> *Kudla v Poland* (2002) 35 EHRR 198 paras 110-111

*interference by the State with his or her right to liberty. Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5 para. 3 (art. 5-3), which is intended to minimise the risk of arbitrariness and to ensure the rule of law ... Furthermore, prompt judicial intervention may lead to the detection and prevention of serious ill-treatment, which, ..., is prohibited by the Convention in absolute and non-derogable terms."*<sup>5</sup>

10. The UN Human Rights Committee has consistently held that:

*"pre-trial detention should be the exception and that bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party".*<sup>6</sup>

**The Commission advises that the Department ensure that a revised legal framework recognises the exceptional nature of pre-trial detention.**

#### Imposition of Bail Conditions

11. The Commission notes that the proposed bail legislation will make provision for the imposition of bail conditions. The Commission advises that the imposition of bail conditions may engage a range of human rights including the right to private and family life, the right to freedom of association and the right to liberty.<sup>78</sup>

**The Commission advises that the framework governing the imposition of bail conditions acknowledges the potential for the human rights of a suspect to be engaged and require the court to ensure that any restriction is proportionate to the legitimate aim it seeks to achieve.**

#### Duty to Give Reasons

12. In the case of *Letellier v France*<sup>9</sup> the ECtHR recognised the importance of providing reasons for decisions relating to bail applications.

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<sup>5</sup> Aksoy para 76

<sup>6</sup> 167Communication No. 526/1993, *M. and B. Hill v. Spain* (Views adopted on 2 April 1997), UN doc. GAOR, A/52/40 (vol. II), p. 17, para. 12.3

<sup>7</sup> the Commission notes that the imposition of a curfew may amount to a deprivation of liberty *JJ* [2007] UKHL 45 at para 105 and 108

<sup>8</sup> *JJ* [2007] UKHL 45 at para 105 and 108

<sup>9</sup> (1992) 14 EHRR 83

**The Commission advises that bail legislation requires the provision and recording of the reasons for a refusal of bail.**

Remanding adults and children in custody: "No real prospect test"

13. The Commission recalls the Committee of Ministers of the Council of Europe recommendation on the use of remand in custody which states:

*"Remand in custody shall generally be available only in respect of persons suspected of committing offences that are imprisonable."*<sup>10</sup>

14. The Commission notes that the Prison Review Team identified the high number of prisoners held on remand as a key factor contributing to prison overcrowding.<sup>11</sup> At the time of its October 2012 Report, the Prison Review Team noted that half of the population of HMP Maghaberry were held on remand. The Report further recorded that the problem was compounded by lengthy delays in the criminal justice system in Northern Ireland.<sup>12</sup>

15. The problem of prison overcrowding and issues that arise as a consequence thereof was a matter of concern to the UN Committee against Torture during its examination of the UK's fifth periodic report on compliance with the UNCAT. In its concluding observations the UN Committee against Torture urged:

*" the State party to strengthen its efforts and set concrete targets to reduce the high level of imprisonment and overcrowding, in particular through the wider use of non-custodial measures as an alternative to imprisonment, in the light of the United Nations Standard Minimum Rules for Non- Custodial Measures (the Tokyo Rules)."*<sup>13</sup>

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<sup>10</sup> Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse

(Adopted by the Committee of Ministers on 27 September 2006 at the 974th meeting of the Ministers' Deputies)

<sup>11</sup> Prison Review Team 'Review of the Northern Ireland Prison Service Conditions, management and oversight of all prisons' October 2011

<sup>12</sup> Prison Review Team 'Review of the Northern Ireland Prison Service Conditions, management and oversight of all prisons' October 2011

<sup>13</sup> Committee Against Torture 'Concluding observations on the fifth periodic report of the United Kingdom, adopted by the Committee at its fiftieth session (6-31 May 2013) para 32

16. The Commission notes that earlier this year it was reported that 28.4% of prisoners in Northern Ireland are on remand compared with 13.6% in England and Wales, 16.5% in Scotland and 14.2% in the Republic.<sup>14</sup> These figures suggest an over reliance on the use of remand in Northern Ireland which is detrimental to defendants and contributes towards over-crowding of prisons in Northern Ireland.

**The Commission notes the proposal that a provision be included in forthcoming bail legislation restricting the power of a court to imprison a defendant on remand to circumstances where there is a real prospect that the defendant will receive a custodial sentence if convicted. The Commission advises that this proposal be included in the forthcoming bail legislation and that it should apply to adult and to child defendants.**

#### Decision making regarding bail for children

17. The Convention on the Rights of the Child Article 3 states:

*"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*

**The Commission advises that the legislation be appropriately drafted in line with the CRC and Article 3 in particular.**

#### Overuse of Remand for Child Defendants

18. The UNCRC Article 37 (b) states:

*"(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time"*

19. With respect to the remand of children, the UNCRC has stated:

*"The Committee notes with concern that, in many countries, children languish in pretrial detention for months or even years, which constitutes a grave violation of article 37 (b) of CRC. An*

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<sup>14</sup> NI Assembly Committee for Justice Official Report (Hansard) Session: 2012/2013 Date: Thursday, 16 May 2013 Prison Service Reform: Update (Figures provided to Committee members)

*effective package of alternatives must be available (see chapter IV, section B, above), for the States parties to realize their obligation under article 37 (b) of CRC to use deprivation of liberty only as a measure of last resort. The use of these alternatives must be carefully structured to reduce the use of pretrial detention as well, rather than "widening the net" of sanctioned children. In addition, the States parties should take adequate legislative and other measures to reduce the use of pretrial detention. Use of pretrial detention as a punishment violates the presumption of innocence. The law should clearly state the conditions that are required to determine whether to place or keep a child in pretrial detention, in particular to ensure his/her appearance at the court proceedings, and whether he/she is an immediate danger to himself/herself or others. The duration of pretrial detention should be limited by law and be subject to regular review.*<sup>15</sup>

20. The Youth Justice Review reported in 2011 that less than 1 in 10 children remanded to the Juvenile Justice Centre subsequently received a custodial sentence.<sup>16</sup> This finding strongly suggests that children in Northern Ireland are being remanded into custody when it is not absolutely necessary. Such a practice is in breach of the UNCRC, Article 37(b).

21. The Commission notes the finding by the Youth Justice Review that the high proportion of children held on remand:

*"reflects a serious gap in the provision of suitable bail packages to the court at an early stage that would ensure that young defendants can safely and securely be bailed to reside in the community".*<sup>17</sup>

22. The Commission further notes that the Department's Youth Justice Services area teams have been exploring initiatives to address this matter.

**Noting that evidence strongly suggests that children are held in pre-trial detention in circumstances where it is not absolutely necessary, the Commission advises that the discretion of the courts to remand a child defendant in custody be limited to circumstances in which there is a real prospect that the defendant will receive a custodial sentence if**

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<sup>15</sup> Committee on the Rights of the Child General Comment Number 10: Children's Rights in Juvenile Justice, 2 February 2007, CRC/C/GC/10 para

<sup>16</sup> Report on the Review of the Youth Justice System in NI (DoJNI 2011)

<sup>17</sup> Department of Justice 'A Review of the Youth Justice System in NI' 26 September 2011 pg 13

**convicted. The Commission further advises that this should form part of range of measures , including the development of suitable arrangements to accommodate child defendants who are on bail, to ensure compliance with Article 37.**