

**Consultation on a proposal to place the Office of the Northern Ireland Prisoner Ombudsman on a statutory footing**

1. The Northern Ireland Human Rights Commission (the
 Commission), pursuant to section 69(3) of the Northern
 Ireland Act 1998, shall advise the Executive Committee of the
 Assembly of legislative and other measures which ought to be
 taken to protect human rights.

2. The Commission bases its position 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 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];
* The United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (UNCAT) [UK ratification 1988];

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, the Northern Ireland Act 1998, section 26 (1)
 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.’

4. In addition to these treaty standards there exists a body of
 ‘soft law’ developed by the human rights bodies of the United
 Nations. These declarations and principles are non-binding
 but provide further guidance in respect of specific topics.
 The relevant standards in this context include;

* United Nations Standard Minimum Rules for the Treatment of Prisoners (the Standard Minimum Rules) (1977);
* United Nations Basic Principles for the Treatment of Prisoners (the Basic Principles) (1990);
* United Nations Body of Principles for the Protection of All Persons under Any Form of Detention and Imprisonment (1988);
* Council of Europe European Prison Rules (2006);

5. The Commission recalls that the State has an international
 obligation to protect the human rights of prisoners and
 observes there is no reference to human rights in the
 consultation document and nor is there evidence that
 consideration has been afforded to the prohibition on the
 Minister of Justice and the Department of Justice (the
 Department) contained in section 24(1) of the Northern
 Ireland Act 1998[[1]](#footnote-1).

6. The Commission further observes that while the consultation
 document welcomes views on the implications of the proposal
 on equality of opportunity for groups specified under section
 75 of the Northern Ireland Act 1998 (the Act) there is no
 reference in the document to consideration having been given
 by the Department to its duty under section 76 of the Act not
 to discriminate[[2]](#footnote-2).

7. Prisons are closed institutions and, as such the exceptional
 nature of the powers taken by the state over confined
 individuals makes effective external scrutiny of their use a
 matter of particular urgency[[3]](#footnote-3). There is a risk that
 investigations by the Office of the Prisoner Ombudsman (the
 Ombudsman) are not compliant with ECHR, article 2 and
 article 3 because they are either not sufficiently impartial, or
 are perceived to be not sufficiently impartial. This risk has
 been concisely identified by the previous Ombudsman as:

“Being placed on a statutory footing will positively impact the ability of the Prisoner Ombudsman’s Office to adequately meet human rights obligations in respect of investigations and improve efficiency and effectiveness by ensuring greater control over recruiting and deploying resources. It will also provide an extra level of assurance to statutory bodies, such as the Coroner and the PSNI, as to the extent they can rely on Prisoner Ombudsman investigations” [[4]](#footnote-4).

8. The Commission welcomed the creation of the Ombudsman in
 2005 having previously advanced the need for an ombudsman
 in a number of contexts[[5]](#footnote-5). The absence of a statutory basis for
 the Ombudsman is a long standing issue and which has been
 recognized as having created difficulties for the post-holders[[6]](#footnote-6).
 The Commission therefore welcomes the opportunity to
 comment on the proposal to place the Ombudsman on a
 statutory basis and provides the following statutory advice to
 the Department.

9. The Commission has a long standing interest in the rights of
 prisoners in Northern Ireland. In addition to direct
 engagement with the Northern Ireland Prison Service, the
 Commission has assisted prisoners and their families in
 individual cases and has published two investigations into the
 rights of detained persons in prison[[7]](#footnote-7).

10. Article 10 (1) of the ICCPR states that “All persons deprived of
their liberty shall be treated with humanity and with respect
for the inherent dignity of the human person*”*. Principle 5 of the Basic Principles states: ‘‘Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and [...]United Nations covenants”. The Standard Minimum Rules affirm that “the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation”[[8]](#footnote-8).

11. International human rights law requires therefore that prisoners be treated with dignity and that they retain all rights apart from the right to liberty. One of these rights is the right to make a complaint[[9]](#footnote-9) and the Standard Minimum Rules envisage an independent body where a prisoner can direct a complaint[[10]](#footnote-10).

12. Since the Ombudsman can investigate any eligible complaint
 from a prisoner[[11]](#footnote-11) this process could require consideration of a
 number of ECHR rights. Treating all persons deprived of their
 liberty with humanity and with respect for their dignity is a
 rule that, as a minimum, cannot be dependent on the material
 resources available and must be applied without distinction of
 any kind.[[12]](#footnote-12) The Commission advises that the Department
 examine the proposed legislative footing of the Ombudsman’s
 office to ensure that it has the statutory power and resources
 required to fulfil its function of an independent complaint
 system.

13. As noted, the Commission recognizes and acknowledges the
 wide range of issues considered by the Ombudsman’s
 complaints system. This advice focuses however on the
 requirement for independence of a complaints system where
 ECHR article 2 and article 3 is engaged.

14. In summary, the Commission advises that placing the
 Ombudsman on a statutory footing will comply with the NI
 Executive’s obligations under domestic and international
 human rights law particularly in respect to the right to life and
 to investigating allegations of torture, inhuman or degrading
 treatment.

15. The right to life is protected by ICCPR, Article 6 and ECHR,
 Article 2. The right not to be tortured or be subject to cruel,
 inhuman or degrading treatment or punishment is protected
 by ICCPR, Article 7 and ECHR, Article 3.

16. The NI Executive and relevent public authorities have a
 positive obligation to ‘secure’[[13]](#footnote-13) the rights of persons within
 their jurisdictions. In the context of a death in prison
 therefore if the state fails to undertake an official investigation
 this would amount to breach of the right to life. However, it
 would also entail a breach of the obligation if, after having
 investigated, the investigation is ‘ineffective’[[14]](#footnote-14).

17. The obligation on the authorities to account for the
 treatment of an individual in custody is particularly stringent
 where that individual dies[[15]](#footnote-15); however the procedural
 obligation to conduct an effective official investigation into
 allegations of violations of ECHR, article 2 is equally applicable
 where allegations are made of article 3 ill-treatment[[16]](#footnote-16).

18. The European Court of Human Rights (ECtHR) has ruled
 that the obligation to ensure that everyone’s life is protected by law includes a procedural duty to guarantee
 independent scrutiny in cases where a person has died[[17]](#footnote-17). The
 requirement of independence of the scrutiny body during the
 initial stages of the investigation is acknowledged and
 established by the ECtHR[[18]](#footnote-18).

19. The components of an ‘effective’ investigation are laid out by
 the ECtHR[[19]](#footnote-19); one of the criteria is that the investigation
 must be ‘independent’. The case of Jordan v United Kingdom
 defines independence as the absence of any ‘hierarchical or
 institutional connection’[[20]](#footnote-20) between the investigators and those
 implicated in events. The investigator’s independence must
 be a ‘practical reality’[[21]](#footnote-21). This is underpinned by the
 requirement under UNCAT for investigations into allegations of
 torture to be impartial[[22]](#footnote-22) and the requirement of proper
 procedures is “indispensable” for ensuring accountability of
 agents of the state in the context of the right to life[[23]](#footnote-23).

20. The ECtHR has stressed that the responsibility of the state to
 proceed with an ‘effective’ investigation is engaged even when
 there is no evidence that agents of the state have been
 implicated in the killing[[24]](#footnote-24) and the obligation to hold an article
 2 compliant investigation extends beyond where a death has
 occurred[[25]](#footnote-25).

21. One of the essential functions of independence is to ensure
 public confidence and, in this context, perception is important.
 The Courts have noted that “public perception of the
 possibility of unconscious bias is the key*”.*[[26]](#footnote-26) In the case of
 Khan v United Kingdom, one of Mr Khan’s complaints was that
 his right to an effective remedy under EHCR, article 13 had
 been violated. The ECtHR upheld this complaint because the
 remedy provided under national law – a complaint to the
 Police Complaints Authority - was not a right of recourse to an
 independent body. The Court ruled that the Authority’s close
 connection to government had not provided an effective
 remedy[[27]](#footnote-27).

22. In Anguelova v Bulgaria the ECtHR indicated that the
 fulfilment of the duty required “a sufficient element of public
 scrutiny of the investigation or its results to secure accountability in
 practice as well as in theory, maintain public confidence in the
 authorities’ adherence to the rule of law and prevent any
 appearance of collusion in or tolerance of unlawful acts…”[[28]](#footnote-28).

23. The European Committee for the Prevention of Torture (CPT)
 stresses that effective grievance and inspection procedures
 are fundamental safeguards against ill-treatment in prisons[[29]](#footnote-29)
 and the importance of prison oversight to protect these
 procedures is highlighted in the European Prison Rules[[30]](#footnote-30).

24. The Committee against Torture has commented on the UN
 Standard Minimum Rules for the Treatment of Prisoners and
 has recommended that the Rule is modified along the
 principle of UNCAT, article 13 to “ensure that any individual
 who alleges that he or she has been subjected to torture has
 the right to complain, and to have his or her case promptly,
 effectively and impartially examined by competent
 authorities”[[31]](#footnote-31).

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**Northern Ireland Human Rights Commission**

**Temple Court, 39 North Street**

**Belfast BT1 1NA**

**Tel: (028) 9024 3987**

**Textphone: (028) 9024 9066**

**SMS Text: 07786 202075**

**Fax: (028) 9024 7844**

**Email: information@nihrc.org**

**Website: www.nihrc.org**

1. Section 24(1) 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’. [↑](#footnote-ref-1)
2. Section 76 states that ‘it shall be unlawful for a public authority carrying out functions relating to Northern Ireland to discriminate, or to aid or incite another person to discriminate, against a person or class of person on the ground of religious belief or political opinion’. [↑](#footnote-ref-2)
3. Maguire, M. et al. 1985 Accountability and prisons: opening up a closed world, London: Tavistock Publications, at page 2 referenced in IPRT Position Paper 7 Complaints, Monitoring and Inspection in Prisons November 2009 [http://www.iprt.ie/files/IPRT\_Position\_Paper\_7\_-Complaints,\_Monitoring\_and\_Inspection\_in\_Prisons.pdf](http://www.iprt.ie/files/IPRT_Position_Paper_7_-Complaints%2C_Monitoring_and_Inspection_in_Prisons.pdf)**ovember** [↑](#footnote-ref-3)
4. <http://www.niprisonerombudsman.com/index.php/latest-news/prisoner-ombudsman-to-secure-new-statutory-powers/> [↑](#footnote-ref-4)
5. In evidence to the Steele Review of Safety in HMP Maghaberry; to the Northern Ireland Affairs Committee of the House of Commons; to the Parliamentary Joint Committee on Human Rights inquiry on deaths in custody and in views submitted to Government on the draft UK Report under the UN Convention Against Torture. [↑](#footnote-ref-5)
6. Brian Coulter resigned in 2007 because of his concern at a lack of progress in taking the matter forward <http://www.niprisonerombudsman.gov.uk/publications/ar/AR-0708.pdf> [↑](#footnote-ref-6)
7. Scraton P and Moore L 2005 2nd ed., The Hurt Inside: The imprisonment of women and girls in Northern Ireland, NIHRC, and 2007 The Prison Within: The imprisonment of women at Hydebank Wood 2004-2006, NIHRC [↑](#footnote-ref-7)
8. Rule 57 [↑](#footnote-ref-8)
9. See for example rule 35 (1) of the Standard Minimum Rules [↑](#footnote-ref-9)
10. Rule 2 states: It shall be possible to make requests or complaints to the inspector of prisons during his inspection. The prisoner shall have the opportunity to talk to the inspector or to any other inspecting officer without the director or other members of the staff being present [↑](#footnote-ref-10)
11. Complaints from ex-prisoners or visitors to prisons can also be eligible [↑](#footnote-ref-11)
12. UN Human Rights Committee, ‘General comment no. 21’, 1992, para. 3 and para 4. [↑](#footnote-ref-12)
13. ECHR, article 1 [↑](#footnote-ref-13)
14. See Belkiza Kaya and others v. Turkey App. Nos. 33420/96 and36206/97 and Adali v. Turkey App. No 38187/97 where the EctHR did not find evidence that organs of the state were involved in the killings; however found that there had been a lack of an adequate and effective investigation, leading to a procedural violation of article 2 [↑](#footnote-ref-14)
15. Salman v Turkey App. No 21986/93 [↑](#footnote-ref-15)
16. See Aksoy v Turkey 1997 23 EHRR 553, Aydin v Turkey 1998 25 EHRR 251, Assenov v Bulgaria 1998 EHRR 652, A v United Kingdom 100/1997/884/1096 [↑](#footnote-ref-16)
17. McCann and Others v UK 1995 ECHR45 [↑](#footnote-ref-17)
18. Brecknell v United Kingdom App. No. 32457/04 2008 ECHR 58 [↑](#footnote-ref-18)
19. Jordan v United Kingdom App. No. 24746/94 [↑](#footnote-ref-19)
20. Supra para 106 [↑](#footnote-ref-20)
21. Ergi v Turkey 2001 32 EHRR 18 [↑](#footnote-ref-21)
22. Article 12 [↑](#footnote-ref-22)
23. R (on the application of Amin) v Secretary of State for Home Department 2003 UKHL 51 para 20 referring to Jordan v United Kingdom para 114 [↑](#footnote-ref-23)
24. Yasa v Turkey App. No. 63/1997/847/1054 [↑](#footnote-ref-24)
25. In R (JL) v The Secretary State 2008 UKHL 6849 the House of Lords held that a near suicide of a prisoner which left him with brain damage automatically triggered an obligation under article 2 to conduct an investigation, which is independent, prompt and involves the next of kin [↑](#footnote-ref-25)
26. [Lawal v Northern Spirit Ltd 2003UKHL 35](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&&context=17&crumb-action=replace&docguid=ID7B6CD70E42711DA8FC2A0F0355337E9) and [R. (on the application of L) v Secretary of State for Justice 2009 EWHC 2416 (Admin)](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&&context=17&crumb-action=replace&docguid=I1480EB30B3B111DEB1FE9FEFBEFFBE54) [↑](#footnote-ref-26)
27. Khan v United Kingdom App. No. 35394/97 [↑](#footnote-ref-27)
28. App. No. 38361/97 ECHR 2002 IV para 140 [↑](#footnote-ref-28)
29. The CPT Standards: Substantive sections of the CPT’s General Reports, Strasbourg: Council of Europe pg 19 [↑](#footnote-ref-29)
30. European Prison Rules 2006 Rule 9 [↑](#footnote-ref-30)
31. Observations of the Committee against Torture on the revision of the United Nations Standard Minimum Rules for the Treatment of Prisons 16 December 2013 CAT/C/51/4 [↑](#footnote-ref-31)