

# NORTHERN IRELAND HUMAN RIGHTS COMMISSION

## Comments on the proposed draft Life Sentences (NI) Order 2001

February 2001

1. The Northern Ireland Human Rights Commission welcomes the proposed draft Life Sentences (NI) Order because it attempts to bring the law on the release of life sentenced prisoners in Northern Ireland into line with the requirements of the European Convention on Human Rights, which is part of the law of Northern Ireland by virtue of the Human Rights Act 1998. The Commission offers the following advice to the Northern Ireland Assembly's *Ad Hoc* Committee on further adjustments which could be made to the Order in order to copper-fasten its compliance with the European Convention. These comments are intended to be provisional only: they do not necessarily represent the Commission's final views. These will be transmitted to the Northern Ireland Office prior to the deadline of 15 March 2001.
2. Article 3(4) of the Order specifies the matters which the Life Sentence Review Commissioners *must* have regard to when discharging their functions under the Order. We recommend that a paragraph (c) should be added requiring the Commissioners to have regard to "the Convention rights of life prisoners".
3. Article 5(4) confers *a discretion* on the Secretary of State to direct at an appropriate stage that the early release provisions shall apply to an offender in respect of whom the court has decided under Article 5(3) not to apply the provisions. We recommend that this discretion be replaced with *a duty*, as in the case under Article 5(5) in respect of offenders who were aged under 18 when they committed the offence in question. To distinguish between offenders on the basis of their age in this regard is unjustifiable in law and would be difficult to justify under section 75 of the Northern Ireland Act 1998 (which requires designated public authorities - including the Northern Ireland Office - to promote equality of opportunity regardless of age).
4. Articles 5(4) and 5(5) suggest that it is the Secretary of State who would specify the part of the sentence which must be served before the early release provisions would apply to the prisoners in question. The Human Rights Commission finds it objectionable that a Government Minister should have the power to specify this period, especially as the Order gives no guidance on how the length of the period should be determined (there is no equivalent in this context to Article 5(2), which provides guidance to courts when specifying such a period). We recommend that such guidance be included in a new paragraph to be inserted immediately after the current Article 5(5).

5. Article 5(6) defines the phrase "appropriate stage" for the purposes of Articles 5 (4) and 5(5). The Commission finds this definition much too subjective. It is possible that the European Court of Human Rights would not accept (a) that a Government Minister should be empowered to take such decisions relating to the punishment of an offender and (b) that the decision can be so subjectively based. At the very least the word "reasonably" should be inserted before the word "determined" in line 3 of Article 5(6).
6. Article 6(4) requires the Life Sentence Review Commissioners, before directing a life prisoner's release, to be "satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined". Again the Human Rights Commission finds this provision too vague. It does not specify to which degree the Commissioners must be "satisfied" - beyond a reasonable doubt, on the balance of probabilities or in accordance with some other standard? Is it sensible to apply the same standard no matter how much time has elapsed since the release of the prisoner? Nor does the Order define what is meant in Article 6(4) by "serious harm". And must it be the case that it is serious harm "to the public" which is in question - what if a particular person would be at risk of serious harm from the offender (*e.g.* a person who testified against the offender at his or her trial)? Surely that would often be enough to justify not releasing the prisoner?
7. Article 6(4) does not require the Life Sentence Review Commissioners to have any regard whatsoever to the views of the victims of the prisoner, or to the views of the family of the victim if he or she is dead. The Human Rights Commission by no means wants to suggest that the views of such persons should be determinative of whether the life prisoner is given early release or not, but international human rights standards are increasingly saying that victims must be allowed to express their views to courts - and at the very least to be informed about decisions such as the early release of offenders.
8. Article 8(1) of the Order says that when a prisoner is released on licence the licence shall remain in force until the prisoner's death. This is a particularly harsh provision, one which is not mirrored in many other countries. It means that it is impossible for a life prisoner to wipe the slate completely clean even though he or she may have served a lengthy prison sentence and be a completely reformed character. There is an argument for saying that the force of a licence should at least diminish as a released prisoner's life progresses, so that recall to prison becomes more difficult to justify as the released prisoner gets older. It may be sensible to provide that once a specified number of years have elapsed since the person's release the licence automatically lapses.
9. Article 8(2) provides that a released life prisoner's licence can be subjected to conditions but it does not specify what kind of conditions can be imposed. Some conditions would clearly be unreasonable - *e.g.* that the released prisoner must always live in a certain area or that he or she should never be granted a passport.

10. Article 9 (1) of the Order allows the Life Sentence Review Commissioners to recommend the recall of a released life prisoner. But it does not specify what standard of proof the Commissioners should adopt before making such a recommendation or what factors the Commissioners should take into account before doing so. This is a serious flaw in the legislation. It is not clear, for example, whether the breach of *any* condition imposed on a released life prisoner, however trivial the breach, would automatically justify a recommended recall by the Commissioners.
11. Article 9(2) allows the Secretary of State to recall a released life prisoner to prison without first consulting the Life Sentence Review Commissioners. The Human Rights Commission fails to understand why it is necessary to confer such a power at all on a Government Minister: should not *all* recalls have to be preceded by a recommendation from the Life Sentence Review Commissioners? It is difficult to imagine a case arising in such urgent circumstances that a view from the Commissioners cannot first be sought.
12. The test for recall by the Secretary of State under Article 9(2) is "where it appears to him that it is expedient in the public interest to recall that person". This is a very vague test indeed. If this power of recall is to be retained at all, the word "expedient" should be replaced by "necessary" and the phrase "in the public interest" should be replaced by "to protect the public from serious harm".
13. Article 9(4) says that the Secretary of State shall refer the case of a recalled life prisoner to the Life Sentence Review Commissioners but it does not say when this must be done. The Human Rights Commission recommends that the phrase "as soon as possible" be inserted after the word "shall" in line 1 of Article 9(4).
14. Articles 10(1) and 10(2) suggest that it is the Secretary of State who would specify the part of the sentence which must be served before the early release provisions would apply to the prisoners in question. As stated in para. 4 above, the Human Rights Commission finds it objectionable that a Government Minister should have the power to specify this period, especially as the Order gives no guidance on how the length of this period should be determined (there is no equivalent in this context to Article 5(2), which provides guidance to courts when specifying such a period). We recommend that such guidance be included in a new paragraph to be inserted immediately after the current Article 10(2).
15. Article 10(4)(a) partly defines a transferred life prisoner as "a person on whom a court in a country or territory outside Northern Ireland has imposed one or more sentences of imprisonment or detention for an indeterminate period". It is unclear

16. Articles 11(1) and 11(2) again suggest that it is the Secretary of State who would specify the part of the sentence which must be served before the early release provisions would apply to the prisoners in question. For the reasons given at paras. 4 and 14 above, the Human Rights Commission has doubts about this method of proceeding.
17. The proposed Life Sentence Commissioners' Rules 2001 refer throughout to the Chairman of the Panel but they appear to make no provision for the appointment of such a person (in particular rule 3 does not seem to do so). The Human Rights Commission does not believe that the Chair of the Panel should have the powers specified in the Rules: they should all be exercised by the Panel acting collectively (or by majority if necessary).
18. Rule 9 of the proposed Life Sentence Commissioners' Rules 2001 deals with the location and privacy of hearings. The Human Rights Commission recommends that a new paragraph be inserted saying that the Human Rights Commission will be permitted to observe any hearing if the prisoner requests this. This would help the Commission to fulfil its statutory role as the promoter and protector of the human rights of *everyone* in Northern Ireland.
19. Rule 9(2) provides that the hearings shall be held in private unless the Chairman of the Panel otherwise directs. The Human Rights Commission recommends that this should be reworded to read that the hearings shall be held in public unless the Panel otherwise directs in accordance with Article 6 of the European Convention on Human Rights.
20. Rule 11(4)(2) [there may a misprint in the numbering system here] does not impose any time limits on the Chair of the Panel in relation to either (a) or (b). The Human Rights Commission believes such limits should be imposed in order to add certainty and celerity to the whole process (as required by Article 6 of the European Convention).
21. The Commission has the gravest of doubts about the compatibility of rules 15 and 16 of the proposed Life Sentence Commissioners' Rules 2001, which deal with the non-disclosure of confidential information and the appointment of "special advocates" to represent the interests of the prisoner. We believe that the special advocate procedure may well be in breach of Article 6 of the European Convention on Human rights (the fair hearing provision) because rule 16(3) prohibits a special advocate from communicating directly or indirectly with the very prisoner he or she has been appointed to represent! [There appears to be a misprint in para. 16(3): it should cross-refer to para. 16(4), not 16(5).]

**February 2001**

**Northern Ireland Human Rights Commission**

**Temple Court, 39 North Street,**

**Belfast BT1 1NA.**

**Tel: 028 9024 3987. Fax: 028 9024 7844**

**E-mail: [nihrc@belfast.org.uk](mailto:nihrc@belfast.org.uk). Web: [www.nihrc.org](http://www.nihrc.org).**