NORTHERN IRELAND HUMAN RIGHTS COMMISSION

Response to the Prison Service Consultation on Options for the Accommodation of Immigration Detainees

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights,[1] advising on legislative and other measures which ought to be taken to protect human rights,[2] advising on whether a Bill is compatible with human rights[3] and promoting understanding and awareness of the importance of human rights in Northern Ireland.[4] In all of that work the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding or "soft law" standards developed by the human rights bodies.

2. The Commission has consistently expressed serious concern about the policy of detaining immigration and asylum applicants at HMP Maghaberry since the introduction in 2000 of the Nationality, Immigration and Asylum Act. Prison is not an appropriate place for the location of immigration detainees.

3. The policy of detention, whether or not in prison, engages Article 5 of the European Convention on Human Rights (ECHR), and specifically 5(1)(f):

> 1. *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:* (…)
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> > *f. the lawful arrest or detention of a person to prevent his affecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*

4. These ECHR provisions have been given domestic effect through the Human

[1] Northern Ireland Act 1998, s.69(1).
[2] *Ibid*, s.69(3).
[3] *Ibid*, s.69(4).
[4] *Ibid*, s.69(6).

Rights Act 1998, and place a duty on the State to protect the right to liberty of everyone within its jurisdiction. Article 5(1)(f) does not of itself provide justification for detention but rather seeks to circumscribe detention to cases of necessity which may, rather than must, include immigration cases. While deprivation of liberty is permissible in Convention terms in some immigration situations (concerning those attempting irregular entry or actively being processed for removal), there must also be a proportionality of interference with any human right. The paragraph in the Convention is intended to convey only that detention is permissible for the shortest feasible period in some circumstances, such as where there is no alternative accommodation or where there is a risk to the public; it is not routinely required. The paragraph will very rarely justify detention in a prison, whether that prison be a high security one such as HMP Maghaberry or one holding medium to low risk prisoners such as HMP Magilligan.

5. Two further points need to be made about the wording of the Convention. The first reference to grounds for detention is to "prevent… an unauthorised entry", *i.e.* it was envisaged primarily as a ports-and-frontiers measure to facilitate refusal there and then of entry (unless the person was applying for asylum, in which case temporary entry should be allowed). It was not conceived as a measure to punish someone for having entered the country without authorisation, much less for having taken employment contrary to visa conditions or for having overstayed or otherwise infringed the terms of an entry authorisation. The second reference is to detention "of a person against whom action is being taken" with a view to removal, and it is highly questionable whether that could cover cases where the "action" is proceeding so slowly that a person is repeatedly refused bail with no sign of any progress in the processing of their papers by the Home Office. The Prison Service knows well that in Northern Ireland detentions have been extended again and again precisely because no meaningful "action" seems to have been taken between one hearing and the next; in at least one recent case in which the Commission took a close interest, this practice resulted in an evidently harmless individual being held for months in prison while officials in various agencies exchanged desultory correspondence about the possible whereabouts of her papers.

6. Article 5(1)(f) must be read in conjunction with further explicit pronouncements from a number of international human rights bodies, including the Council of Europe's Committee for the Prevention of Torture, which said as long ago as 1997:

> *On occasion, CPT delegations have found immigration detainees held in prisons. Even if the actual conditions of detention for these persons in the establishment concerned are adequate—which has not always been the case—the CPT considers such an approach to be fundamentally flawed. A prison is by definition not a suitable place in which to detain someone who is neither convicted nor suspected of a criminal offence.*[5]

[5] European Committee for the Prevention of Torture (CPT), 7th General Report, 1997.

7. Furthermore, the Council of Europe's Commissioner for Human Rights recommended in September 2001:

> *As a rule there should be no restrictions on freedom of movement. Wherever possible, detention* [of aliens] *must be replaced by other supervisory measures, such as the provision of guarantees or surety or other similar measures. Should detention remain the only way of guaranteeing an alien's physical presence, it must not take place, systematically, at a police station or in a prison, unless there is no practical alternative, and in such case must last no longer than is strictly necessary for organising a transfer to a specialised centre.* (…)
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> *Member States should avoid holding unaccompanied minors, pregnant women, mothers with young children in waiting areas. Where appropriate, unaccompanied minors must be placed in specialised centres and the courts immediately informed of their situation.*[6]

8. This Commission is aware that in the past women and their young children have been detained at HMP Maghaberry despite the very explicit recommendation of the Council of Europe's Commissioner for Human Rights.

9. The Northern Ireland Human Rights Commission is of course aware that some of those being held are suspected of immigration irregularities, such as overstaying, unlawful entry or working without permits, while others are asylum applicants, seeking refuge in the UK on the basis that they have a well-founded fear of persecution in their home states. The Commission makes it clear that it cannot endorse the detention in prison of persons in either of these groups. They have neither been accused, nor found guilty, of any crime that would warrant detention in a high security prison (in some cases for several months) alongside persons remanded for trial for, or convicted of, serious crimes.

10. In terms of asylum applicants it is particularly unacceptable that individuals who may well be fleeing situations where their physical and mental well being is seriously at risk should be subjected to prison conditions on their arrival in Northern Ireland. It has to be pointed out that several individuals who have been held in prison have subsequently been recognised as refugees, precisely because of their having been intimidated, threatened, falsely imprisoned and otherwise abused by the authorities in their countries of origin. For people escaping such dire situations to be locked up as criminals once they reached what they perceived to be a place of safety is a gross insult to humane values.

11. From the human rights standards it is clear that the practice of imprisonment of asylum applicants pending determination of their status is, in terms of

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[6] Recommendation of the Commissioner for Human Rights concerning the rights of aliens wishing to enter a Council of Europe member State and the enforcement of expulsion orders (CommDH/Rec (2001)1).

international law, deeply flawed. Asylum applicants must be accorded the protection of the provisions of the 1951 UN Convention relating to the Status of Refugees, Article 31 of which states:

> *1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.*
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> *2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.*

12. The detention policy has also been a matter of concern for the United Nations Committee Against Torture (CAT). In its Concluding Observations on the Third UK Report, the CAT recorded as a specific 'subject of concern': "The use of prisons as places in which to house refugee claimants".[7] There can be no doubt that the impending examination of the Fourth UK Report will bring similar statements of concern. This Commission will, in its submission to the CAT prior to its discussion of the Report, draw attention to the particularly unacceptable use of HMP Maghaberry.

13. This Commission is also unhappy about the scope for arbitrariness and abuse in the application by immigration officials of the powers to detain individuals under immigration and asylum legislation. Past UK reporting under international human rights instruments has suggested that, at any given time, only a very small proportion of those liable to be detained under immigration law was in fact held in custody. That is as it should be, given that the great majority of immigration offences do not involve any risk to the public. However it is vitally important that any exercise of the power to detain be in accordance with consistent, fair and transparent criteria. Given the serious consequences they have for the human rights of many individuals, it is inappropriate that the power to have a person detained in a prison be exercised administratively by an agency such as the Immigration Service that is not, as yet, closely overseen and assessed in those functions by any independent person or organisation. The Human Rights Commission has made a number of representations to Government to press for the cessation of prison detentions as a matter of urgency and has itself visited asylum and immigration detainees being held at Maghaberry Prison. From this Commission's own visits and from the information it has gathered on detainees, there appears to be no consistency in determining which individuals

[7] Conclusions and recommendations of the Committee Against Torture, November 1998 (*A/54/44, paras. 72-77).*

are detained and which are not. One of the stated criteria relates to 'imminent' removal, yet in Northern Ireland there have been cases of detention for many weeks with no date set or arrangements made for removal. This seemingly arbitrary use of powers is in urgent need of review. We have also established that many officials in the Prison Service itself, including some at the most senior level, do not seem to be aware of what criteria are applied when asylum applicants are selected for detention.

14. It must also be recalled that interference with the right to liberty (Article 5 ECHR) must comply with the non-discrimination provision that applies to all Convention rights (Article 14). Unless we are confident that there is no discrimination in the way the power is exercised—so that, for example, asylum applicants, men, black people or Muslims are no more or less likely to be detained than other groups, other things being equal—we cannot be confident that the power is being used lawfully. While the primary decision as to whether a person should be detained is that of the Immigration Service, as a public authority subject to the Human Rights Act 1998 the Prison Service is obliged to satisfy itself that it is not, by virtue of such discrimination, holding people unlawfully.

15. Aside from the very explicit advice by the international bodies cited above, this Commission is deeply disappointed that Government has not accepted the recommendation of the Steele Review of Safety at HMP Maghaberry, which on 29 August 2003 called for immigration detainees to be dealt with outside the prison system as a matter of urgency. The Steele panel believed that removing this burden from the Prison Service would release resources needed to help the prison management meet its primary responsibilities, especially in the context of the additional demands placed on it by compliance with the Review's recommendation on the separation of paramilitary prisoners, and referring also to the lack of reserve accommodation in the prison system. Government has failed to explain why accepting this recommendation is, according to the consultation document, 'not currently an option', despite the stated commitment of Government to respecting human rights and fundamental freedoms. The Commission is deeply concerned about the welfare of immigration and asylum detainees and believes that the current situation is unsatisfactory not only for the detainees themselves but also in terms of the extra pressures placed on Prison Service staff. As the consultation paper itself acknowledges, prison numbers are increasing dramatically and it is unreasonable for Government to insist on adding to existing pressures by continuing to detain individuals who present no risk to society.

16. It should be noted that the Steele Review's conclusion on this matter was fully endorsed by the House of Commons Northern Ireland Affairs Committee, which stated in its Second Report of the current session:[8]

We endorse the recommendation of the Steele Review, and other

[8] *The separation of paramilitary prisoners at HMP Maghaberry*, HC302-1 (11 February 2004), paras 147-8; emphasis as in original.

witnesses to our inquiry, that immigration detainees should be dealt with outside the prison system. We are disappointed that the Government for the moment appears to have rejected this important recommendation. All of the options presented by the Government as alternatives raise concerns for the wellbeing of the individuals concerned. Accommodation in the committal unit would be isolated, and with limited facilities. But both of the other options would immerse these individuals within a population of convicted criminals. If that is considered to be ill-advised for those on remand, it surely must be equally so in this case…

We cannot endorse any of the Government's proposals for the continued retention of immigration detainees within Northern Ireland's prisons. It would be wholly wrong to integrate them into the prisoner population at HMP Maghaberry; the other options each have drawbacks. We urge the Government to reconsider whether further options may be available.

17. The Commission has reflected on the different options that the Prison Service of Northern Ireland has put forward. However, none of the options is acceptable under the international human rights standards relating to the treatment of asylum and immigration applicants. Indeed, the paper itself has identified adequately the problems with each of the options. It appears that unless Government revises its current policy the future for detainees is a bleak one. They would be:

    - placed in a committal unit, where they have little or no access to recreational facilities, and possibly long periods of isolation when the number of detainees is small;
    - integrated into the prison population, where they will be effectively treated in the same way as are dangerous criminals and will be vulnerable to physical and verbal abuse from other prisoners, with their specific religious and dietary needs less likely to be met; or
    - moved to HMP Magilligan, where they will be a long distance from the individuals and organisations that currently visit them and offer various forms of legal, spiritual, cultural and welfare assistance.

16. Accordingly, it is not possible for this Commission to endorse any of the options. It appears to this Commission that the only reason for Government not agreeing to a non-custodial option such as dedicating a separate building (for example a hostel) where residents are free to leave and enter as they please is one based purely on economic considerations; that the number of detainees in Northern Ireland would be too small to justify the 'expense' to Government. To the Commission that is not an acceptable reason in a country as wealthy as the United Kingdom, a state that expresses a commitment to respecting the human rights of each and every individual, when the consequence of not making alternative provision is the unjust and avoidable deprivation of the fundamental human right to liberty.

17. There is also a broader concern regarding detention. Current Government

policy on and statements about asylum and immigration do not help in establishing better race relations in the UK as a whole or in this region of the state. Rather they give the impression that society needs to be 'protected' from 'foreigners'. Asylum applicants in particular have long endured a campaign of vilification and xenophobia, with significant elements of the media colluding in the development of a climate of suspicion and hostility. There is now a growing perception of asylum applicants and immigrants as presenting a threat to the fabric of society, a delusion that can only be fostered by their unjustifiable imprisonment. The state, by locking up people who do not deserve to be so treated, is fuelling the racist attitudes that find increasing expression in abuse of and violent attacks on ethnic minority members in the wider community. It is in our view more than a coincidence that, at the same time as telling one NIO agency that a high-security prison must not be used for immigration purposes, this Commission is being consulted by other parts of the NIO on the need for new measures for monitoring and combating crimes motivated by racial hatred.

18. There is an urgent need for Government to take the lead in promoting tolerance and understanding toward people of different nationalities, cultures and religions—nowhere more so than in Northern Ireland, given the recent sharp rise in racist attacks here. Facilitating integration into the community by ceasing the detention policy and providing new community-based approaches would be an important contribution in this regard.

19. The Commission would appreciate clarification of the extent to which the Prison Service has itself communicated its own views directly to the Home Office, which is the branch of Government currently responsible for the detention policy. The impression that the Human Rights Commission has repeatedly been given, by numerous officials at several levels within the Prison Service, is that there is something like unanimity as to the inappropriateness of holding immigration detainees within the hard-pressed prison estate. The Commission hopes that the Prison Service has shared that assessment with the Home Office (directly or via the Northern Ireland Office) and urged Government to make appropriate alternative arrangements for housing such persons.

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