

**SUBMISSION TO THE UNITED NATIONS'
HUMAN RIGHTS COMMITTEE UNDER THE
INTERNATIONAL COVENANT OF CIVIL
AND POLITICAL RIGHTS
(93rd Session 7-25 July 2008)**

**Shadow Report on the Sixth Periodic Report
of the United Kingdom of
Great Britain and Northern Ireland**



**NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION**

May 2008

Northern Ireland Human Rights Commission
Temple Court, 39 North Street
Belfast BT1 1NA

Telephone: +44 (0)28 9024 3987
Textphone: +44 (0)28 9024 9066
SMS Text: +44 (0)7786 202075
Fax: +44 (0)28 9024 7844
Email: information@nihrc.org
Website: www.nihrc.org

CONTENTS

	Page
Introduction	5
Constitutional and legal framework (Article 2)	5
The St Andrews Agreement 2006	5
Counter-terrorism legislation	6
National human rights institutions in the UK	7
Definition of 'public authority' under the Human Rights Act	8
Right to life (Article 6)	9
Public inquiries into Northern Ireland conflict-related deaths	9
Counter-Terrorism Bill 2008 and inquests	10
Unresolved deaths relating to the Northern Ireland conflict	11
Prohibition of torture and cruel, inhuman or degrading treatment (Article 7)	12
Electronic guns ('Taser X26')	12
Memoranda of understanding	13
Returned asylum seekers	13
Security of the person and the right not to be subjected to arbitrary detention (Article 9)	14
Immigration detention and asylum seekers	14
Detention without charge	15
Control Orders	16
Treatment of persons deprived of liberty (Article 10)	17
Women and girls in prison in Northern Ireland	17
Separation of juveniles	18
Freedom of movement (Article 12)	21
National Identity Card Register	21
Residence restrictions: UK Borders Act 2007	21
Right to a fair trial (Article 14)	22
Diplock Courts	22
Anti-Social Behaviour Orders (ASBOs)	23
Right to privacy, family life (Article 17)	25
National Identity Register and identity cards	25
Prohibition of hate speech (Article 20)	27
Hate crime legislation	27

Protection of children (Article 24)	28
Unaccompanied asylum seeking children	28
Equality before the law (Article 26)	28
Stop and search powers	28
Rights of ethnic, religious and linguistic minorities (Article 27)	30
Status of the Irish language	30

Introduction

1. The Northern Ireland Human Rights Commission (the Commission) is accredited with 'A' status by the International Co-ordinating Committee of National Human Rights Institutions, and is at present the only accredited NHRI in the United Kingdom. Since its creation in 1999 (by the UK Parliament, through the Northern Ireland Act 1998) the Commission has engaged extensively with United Nations and regional treaty monitoring processes, and has submitted parallel reports under all UN human rights treaties to which the United Kingdom is a party.
2. The Commission is grateful for the opportunity to provide a shadow report to the Human Rights Committee. This report builds on the Commission's submission to the Committee in October 2007, in reference to the formulation of the Committee's list of issues, and its submission of November 2007 to the Universal Periodic Review. This report is structured under reference to the Articles of the ICCPR.
3. Further to the submission to the Committee regarding the formulation of its list of issues, the Commission reiterates concerns with regard to the lack of information and statistics in many areas of the state report in relation to Northern Ireland.

Constitutional and legal framework (Article 2)

The St Andrews Agreement 2006

4. Since the UK was last examined by the Committee in 2001, there continues to be significant change in Northern Ireland following on from the signing of the Belfast (Good Friday) Agreement in 1998. In particular, the St Andrews Agreement, published by the British and Irish Governments in October 2006, led to the restoration of devolution in May 2007, following a period of suspension since October 2002.
5. The restoration of the Northern Ireland Assembly and Executive means that some matters are devolved to the Northern Ireland Assembly while others are either 'reserved' or 'excepted' for the responsibility of the UK Government at Westminster. While policing and criminal justice may in time become the responsibility of the Northern Ireland Assembly, it

remains at present a 'reserved' matter. Therefore, responsibility for policing and justice rests with the Secretary of State (Minister) for Northern Ireland at Westminster via the Northern Ireland Office. Immigration and asylum are 'excepted' matters and, consequently, will not be devolved to the Northern Ireland Assembly.

6. The St Andrews Agreement also led to the establishment of an independent Bill of Rights Forum, made up of representatives from political parties and civil society, to inform the Northern Ireland Human Rights Commission on the scope and content of a Bill of Rights for Northern Ireland. The Forum made its final report and recommendations to the Commission on the 31 March 2008.¹ The Commission will consider this report before making its recommendations to the UK Government on 10 December 2008.

Counter-terrorism legislation

7. Since the Committee last examined the UK in 2001, there has been a significant increase in the counter-terrorism powers available to the state. There has been a move away from an approach which involved the annual renewal of temporary or emergency powers (albeit such "temporary" powers were repeatedly renewed from 1973 onwards) principally aimed at acts arising out of the Northern Ireland conflict, to one whereby exceptional powers have been made permanently available in a series of counter-terrorism bills.²
8. Since 2000, the state has introduced four major pieces of counter-terrorism legislation, and a further Counter-Terrorism Bill is currently progressing through Parliament. All of the existing laws – the Terrorism Act 2000; the Anti-Terrorism, Crime and Security Act 2001; the Prevention of Terrorism Act 2005 and the Terrorism Act 2006 – led to significant erosion in the protection of human rights. Provisions, such as the indefinite detention of foreign nationals under the 2001 Act, have been successfully challenged in the Courts. The majority of measures have taken a firm place in the legal system, widening police powers and limiting the rights of suspects in the criminal justice system.

¹ *Final Report: Recommendations to the Northern Ireland Human Rights Commission on a Bill of Rights for Northern Ireland*, Bill of Rights Forum, Belfast, 2008.

² In July 2007, there was the repeal of a number of the provisions in Part VII of the Terrorism Act 2000 containing emergency powers that applied only to Northern Ireland.

9. Indicative of this trend is the Counter-Terrorism Bill 2008 that, at the time of writing, is before the UK Parliament. The Commission has concerns regarding the compatibility of many proposals in the Bill with the UK's obligations under international human rights law. A number of these matters are covered throughout this submission.
10. The Commission is concerned about counter-terrorism practices or commentary around them that targets and stigmatises the entire Muslim community. This has led to Muslims being perceived and targeted as a 'suspect community', a term often associated with the implementation of measures during the Northern Ireland conflict.
11. The Commission is disappointed that the UK Government, in the current Bill, does not appear to have drawn on the lessons from difficulties surrounding a number of counter-terrorism measures that were introduced in Northern Ireland during the conflict.

The Committee may wish to ask the UK what measures it will take to ensure the protection of human rights in the context of counter-terrorism legislation.

National human rights institutions in the UK

12. In relation to paragraph 9 of the previous concluding observations ("The State Party should consider the establishment of a national Human Rights Commission to provide and secure effective remedies for alleged violations of all human rights under the Covenant") the state report makes reference to the establishment of the Commission for Equality and Human Rights (CEHR) under the Equality Act 2006 (now called the Equality and Human Rights Commission or EHRC). It should be noted that the EHRC's remit is confined to Great Britain rather than the whole of the UK. In Scotland, a Scottish Commission is also being established. In Northern Ireland, separate arrangements exist with the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland.
13. The Commission is mindful of the principles relating to the status and functioning of national institutions for the protection and promotion of human rights (the 'Paris Principles'). In enacting the Justice and Security (Northern Ireland) Act 2007, the UK government imposed restrictions on the use of evidential powers (including a prohibition on

investigating 'national security' matters); restrictions fettering access to places of detention; and a time limit on the use of the new powers, effectively preventing the Commission from investigating any matters relating to the past conflict.

14. Even in the absence of the appropriate statutory powers the Commission has built up a substantial body of work on the human rights issues around places of detention. However, it appears the UK government has decided to exclude the Commission from the list of bodies forming the UK National Preventative Mechanism (NPM) under the Optional Protocol to the Convention Against Torture (OPCAT).

The Committee may wish to ask the UK to account for its failure to provide the Northern Ireland Human Rights Commission with adequate powers to match its functions as a broad-based human rights institution. The Committee may also wish to ask the UK if it intends to review its decision to exclude the Commission from the list of bodies forming the NPM under OPCAT.

Definition of 'public authority' under the Human Rights Act

15. The Commission is concerned about a legal loophole, which means that the Human Rights Act 1998 (the law domesticating the main provisions of the European Convention on Human Rights) does not cover public services when they are contracted out to private organisations.³ People directly affected will not have access to redress through the direct application of the Human Rights Act. By way of illustration, many thousands of older people in nursing or care homes are unable to secure remedies under the Human Rights Act from the home owners, for abuses of their rights if; as is increasingly the case, the homes are privately managed. (They would come under the scope of the Act if the homes were directly managed by public authorities). Private contractors are extensively involved in other rights-sensitive areas such as immigration detention, housing and prisoner transport.

³ On 20 June 2007, the UK's highest court (the House of Lords) handed down its judgment in the case of *YL v Birmingham City Council and others*, House of Lords [2007] UKHL 27. The decision held, by a majority of three to two, that a private care home providing care and accommodation for an elderly person under contract with a local authority, was not exercising "functions of a public nature" within s 6(3)(b) of the Human Rights Act 1998.

16. Remedies to this position cannot be undertaken by the devolved administration, but require legislation by the UK Parliament.⁴ At the time of writing, measures are being advanced to close the loophole in respect of healthcare through health and social care legislation currently progressing through parliament. It is vitally important that any proposed solutions to this problem include Northern Ireland and cover the whole range of affected issues.

The Committee may wish to ask the UK what plans it has to amend legislation in areas such as health and social care, immigration, housing and justice to redress this matter, and how this will include Northern Ireland.

Right to life (Article 6)

Public inquiries into Northern Ireland conflict-related deaths

17. The Commission notes that the Committee is raising the inquiries into the deaths of Robert Hamill, Billy Wright, and Rosemary Nelson. The Commission also notes that the Committee is seeking a response from the UK Government regarding the arrangements for the establishment of the inquiry into the death of Patrick Finucane on the basis of the Inquiries Act 2005; and on whether the limitations under the Inquiries Act 2005 are compatible with Article 6 of the Covenant.
18. In 2005, and despite opposition from the Commission and other human rights organisations, the Inquiries Act 2005 replaced all other legal bases for the running of inquiries, including those into controversial deaths that have taken place during the Northern Ireland conflict, which, in some cases, have involved allegations of state collusion. The 2005 Act made it impossible to set up truly independent inquiries into deaths (and other serious issues) by virtue of an unprecedented subordination of the inquiry process to the control of Government ministers at every stage, even though the actions of the executive may be the very subject of investigation.⁵

⁴ Under section 7(1)(b) of the Northern Ireland Act 1998, the Northern Ireland Assembly cannot modify, or create subordinate legislation in relation to, the Human Rights Act 1998.

⁵ Notably, the Billy Wright inquiry was converted by the Secretary of State for Northern Ireland into an inquiry to be held under the Inquiries Act 2005. The

19. The Commission is also concerned that the co-operation of certain state agencies has not been forthcoming in a manner that constitutes meaningful engagement with the inquiries that have been set up in Northern Ireland. For example, the Chairman of the Billy Wright Inquiry, Lord MacLean, expressed his disappointment over the difficulties the inquiry team experienced while trying to obtain the necessary documentation from state agencies.⁶

In addition to raising the compatibility of the Inquiries Act 2005 with Article 6, and the progress of the above inquiries, the Committee may wish to ask the UK what assurances it can give around the meaningful co-operation of all relevant state authorities and their agents with the above inquiries, and the publication, in full, of the findings of inquiries.

Counter-Terrorism Bill 2008 and inquests

20. At the time of writing, there are proposals within the Counter-Terrorism Bill currently proceeding through the UK Parliament, regarding inquests which strongly engage the obligation on states to conduct an effective investigation where an individual has been killed as a result of the use of force. Clauses 64 and 65 of Part 6⁷ outline proposals for powers to be given to the Secretary of State which would allow inquests to be held without a jury and for the appointment of a 'specially appointed coroner'.
21. The proposals seek the insertion of a new section into the Coroners' legislation to allow the Secretary of State to issue a certificate in relation to an inquest. This power would have the effect of the inquest being held without a jury, which could be exercised at any point before or during the inquest, where the Secretary of State, in the interests of 'national security', the relationship between the UK 'and another country' or 'otherwise in the public interest', does not wish material to reach the public domain. This power would also allow the Secretary of State to appoint a 'specially appointed coroner' to hear inquests, and to therefore discharge the original coroner if the inquest had already been underway.

Robert Hamill inquiry was also converted on 29 March 2006, following a request from the inquiry Chairperson.

⁶ See: Transcript of the Second Preliminary Hearing of the Billy Wright Inquiry, available at: <http://www.thebillywrightinquiry.org/ts02.html>; and Statement by the Inquiry Panel, 25 October 2007 (also available at: <http://www.thebillywrightinquiry.org>).

⁷ Bill as introduced on 24 January 2008.

22. Regardless of whether this measure extends only partially to Northern Ireland under the present legislation, the Commission is seriously concerned about these proposed provisions. Little detail, nor evidence have been provided as to their rationale. The role of the Specially Appointed Coroner is subject to modifications that may be made by secondary legislation. There are concerns that these proposals would grant extraordinary powers to the Secretary of State in individual inquests to vet coroners, exclude juries and not disclose information to bereaved families, their legal representatives and the public at large on any grounds that are deemed to be in the public interest. These reforms are being introduced without consultation and are not part of ongoing general reform of the Coroners system.
23. It is not clear how such powers could sufficiently guarantee independence of investigation, public scrutiny, effectiveness and involvement of victims' families in relation to Article 6 of the Covenant. The Commission is also mindful of Article 2 of the European Convention on Human Rights (ECHR) and decisions of the European Court of Human Rights in relation to cases in Northern Ireland, such as *Jordan v UK* (2001). A Minister could be making the decision to choose the Coroner and exclude the jury and information in cases involving either a service in which he or she has direct responsibility (such as the Prison Service) or in cases involving other state authorities for which he or she has shared responsibility.

The Committee may wish to ask the UK how the inquest provisions under the Counter-Terrorism Bill are compatible with the duty of independent investigation of a death under Article 6.

Unresolved deaths relating to the Northern Ireland conflict

24. Paragraph 65 of the Periodic Report makes reference to the establishment of the Historical Enquiries Team (HET), within the Police Service of Northern Ireland (PSNI), to review all unresolved deaths relating to the conflict between 1969 and 1998. Reference is also made in paragraph 65 to GBP £32 million being made available to the PSNI for this purpose.
25. The Committee should note that where the Director of the HET decides there is an allegation of state involvement in the death, the case is not dealt with by the HET but passed on to the Office of the Police Ombudsman for Northern Ireland. The Police Ombudsman has recently stated that 54 cases have

been already referred to his office by HET and the Director of HET has indicated there may be up to 300 prospective cases on their way to the Police Ombudsman.⁸

The Committee may wish to ask the UK to clarify what resources will be available to the Police Ombudsman to investigate historical enquiries cases.

Prohibition of torture and cruel, inhuman or degrading treatment (Article 7)

Electronic guns (Taser X26)

26. The Commission is of the view that there is an urgent need to reassess the Police Service of Northern Ireland (PSNI) proposals to introduce Taser X26 electronic guns. The Commission is concerned that the proposals are not in accordance with international human rights obligations, nor sufficient to ensure that the weapon is used only as an alternative to more lethal force.
27. The Commission draws attention to the fact that a UN Treaty body has expressed deep concern regarding Taser X26' electronic guns appearing to violate Articles 1 and 16 of the Convention Against Torture. Recommending that the respective state party should consider relinquishing the use of Taser X26, the Committee Against Torture is "concerned that the use of these weapons causes severe pain constituting a form of torture, and that in some cases it may even cause death, as recent developments have shown."⁹

The Committee may wish to ask the UK how the proposals by the PSNI to introduce 'Taser X26' electronic guns are compatible with Article 7.

⁸ Evidence given by Al Hutchinson, Police Ombudsman to the Northern Ireland Affairs Committee, House of Commons, 20 February 2008.

⁹ Committee Against Torture, *Conclusions and Recommendations of the Committee Against Torture: Portugal*, 39th Session, 2-23 November 2007, CAT/C/PRT/CO/4, 2008. The Commission notes the development of this Committee's thinking from 2006, when it considered that the use of Taser X26 should only be used as a "substitute for lethal weapons" to the more recent opinion cited above, which raises further and more serious concerns about the use of Taser X26. (Committee Against Torture, *Report on the USA*, CAT/C/USA/CO/2, 2006; and Committee Against Torture, *Report on Switzerland* CAT/C/CR/34/CHE, 2005.)

Memoranda of understanding

28. The Commission is conscious of the principle of non-refoulement, whereby there is a duty on a state party not to expel, return ('refouler') or extradite a person to another state where there are grounds for believing that he or she would be in danger of being subjected to torture.
29. The Commission welcomes the Committee raising the issue of Memoranda of Understanding (MoU) on Deportation with Assurances (referenced in paragraphs 55-57 of the state report) along with the UK's interventions in the cases of *Ramzy v Netherlands* and *Saadi v Italy* in the European Court of Human Rights (referenced in paragraphs 58-59 of the state report).
30. The Commission notes the view of the UN Special Rapporteur on Torture, that diplomatic assurances are unreliable and ineffective in the protection against torture and ill-treatment, and that states cannot resort to diplomatic assurances as a safeguard where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return.¹⁰
31. The Commission notes the recent decision by the European Court in *Saadi v Italy* to uphold the absolute principle of non-refoulement. The Commission also notes the recent decisions by the Court of Appeal in England and Wales (9 April 2008) in *AS & DD (Libya) v the Secretary of State for the Home Department* [2008], The Court of Appeal ruled that the UK could not legally proceed with the deportations and, in this instance, assurances obtained from Libya in a MoU were not sufficient to protect from violations of Article 3 of the European Convention on Human Rights.
32. The Commission would also like to draw attention to attempts to deport, or promote voluntary return, of suspects to Algeria without a MoU.

Returned asylum seekers

33. The Commission is concerned as regards the verification of the safety of persons returned following unsuccessful asylum

¹⁰ Report to Sixteenth Session of UN General Assembly by Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 20 August 2005, para 51.

claims in the UK. The Commission's concerns include persons removed to "safe third countries".¹¹

The Committee may wish to ask the UK what arrangements, if any, exist for verifying the safety of persons so removed upon their arrival at the destination country.

Security of the person and the right not to be subjected to arbitrary detention (Article 9)

Immigration detention and asylum seekers

34. Paragraph 16 of the concluding observations urges the state party to end the detention of asylum seekers in prisons. These concluding observations also raised concerns that the practice of dispersing asylum seekers may have deleterious effects on their inability to obtain legal advice. In addition, concern is expressed that asylum seekers have been detained in various facilities on grounds other than those legitimate under the Covenant.
35. In Northern Ireland since January 2006, immigration detainees and some asylum seekers have been transported to detention facilities in Scotland and England with the majority transported to Dungavel detention facility in Scotland. The decision to transport immigration detainees out of Northern Ireland was taken without any form of public consultation. Prior to this decision, the Commission had announced its plans to investigate UK immigration services in Northern Ireland, although it was not informed about the new arrangements to transport to Dungavel.¹²
36. Individuals deemed eligible for the fast track asylum procedure are held, in the first instance, at police custody suites before being transported to one of the immigration removal centres in Great Britain (usually by ferry). The Commission is aware that some individuals may end up spending up to four or five days in a custody suite – a facility wholly unsuited to detention of such duration.

¹¹ The Commission notes the recent decision by the European Court of Justice to annul the "safe third country" and "safe country of origin" provisions of Directive 2005/85/EC regarding common policy on asylum in Case C-133/06 brought by the European Parliament.

¹² The Commission's investigation into UK immigration services, in particular, the power to detain, is due for completion later this year.

37. The Commission has concerns regarding the lack of information about the number of people subject to immigration and/or asylum laws in Northern Ireland. At present, the Home Office does not provide aggregated data relating specifically to Northern Ireland. Likewise, there is a lack of clarity, at least insofar as information in the public domain, about the numbers of people transported from Northern Ireland to Dungavel or elsewhere in Scotland or England.
38. The Commission wishes to highlight the problems of individuals receiving continuity of legal advice when moved between Northern Ireland and other parts of the UK (which are separate legal jurisdictions). This issue was raised in recommendations by a delegation from the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) which urged the UK to take measures to decrease transfers, particularly removal to Scotland and from Northern Ireland.¹³

The Committee may wish to ask the UK how many asylum seekers have been removed from Northern Ireland to be detained in Great Britain, and what arrangements exist for access to legal advice prior to removal from Northern Ireland and for the continuing legal representation of persons so removed.

Detention without charge

39. The Commission is extremely disappointed that the Counter-Terrorism Bill currently progressing through Parliament proposes a new 'reserve power' to extend the pre-charge detention period to 42 days. With its current 28-day pre-charge detention, the UK already has the longest period of pre-charge detention of any European country or any common law country. Since 2000, the limit has already been increased twice from seven to 14 days in 2003¹⁴ and from 14 to 28 days in 2006.¹⁵
40. The Bill proposes that the accused person and/or their representative can be excluded from the hearing for further pre-charge detention beyond the current 28 days. The

¹³ European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Delegation to UK, 21-23 November 2007.

¹⁴ The Criminal Justice Act 2003.

¹⁵ The Terrorism Act 2006.

Commission remains concerned that any attempt to exclude the accused person and their legal representative seriously restricts the right to a fair hearing. However, this is particularly the case where the outcome of the hearing may be that the accused person is detained beyond 28 days.

The Committee may wish to ask the UK how such provisions are compatible with the Covenant.

Control Orders

41. The Committee raises the system of control orders under Article 9. The Commission has opposed the system of control orders under the Prevention of Terrorism Act 2005 because of its implications for individuals' rights under Articles 3, 5, 6, 8, 9, 10 and 11 of the European Convention on Human Rights and, therefore, Articles 7, 9, 14, 17, 18, 19 and 22 of the Covenant. The Commission was disappointed by the House of Lords' decision in relation to the system of control orders.
42. The Commission set out a number of its core concerns at the time of the passage through Parliament of the above legislation; these included:
 - the low level of proof ("reasonable suspicion of involvement in terrorism-related activity") needed to justify a control order, which may result in serious curtailment of civil liberties and human rights;
 - the fact that 'non-derogating' control orders which do not require judicial authorisation or confirmation may seriously infringe freedom of movement, expression and association;
 - the fact that the impact of the control orders makes them equivalent to criminal penalties but that they can be imposed without the benefit of the essential safeguards of a fair trial; and
 - the provision under paragraph 8 of the Schedule to the Bill that new control orders 'to the same or similar effect' may be imposed by the Secretary of State following a judicial quashing of a previous order.
43. The Commission is disappointed that the proposals set out in the Counter-Terrorism Bill, currently in Parliament, do not address any of the above issues. The Commission is opposed

to control orders and, therefore, is opposed to all measures designed to 'bed-in' or improve efficiency of control orders as an instrument. These measures are effectively to deal with problems created by the control orders regime itself.

The Committee may wish to ask the UK to radically overhaul the control orders regime.

Treatment of persons deprived of liberty (Article 10)

Women and girls in prison in Northern Ireland

44. Under Article 10, the UK's Periodic Report references England, Wales and Scotland but not Northern Ireland. The Commission has undertaken particular work in reference to the situation of female prisoners in Northern Ireland, to which we would like to draw the attention of the Committee.
45. While there is some fluctuation in numbers, on average, there are approximately 35 female prisoners in Northern Ireland at any one time. For example, in April 2008, there were 19 sentenced women prisoners and 15 on remand.¹⁶ These figures have remained at a similar level for a number of years.
46. In Northern Ireland, all adult women prisoners are held in one location – Ash House women's unit at Hydebank Wood Young Offenders' Centre and Prison. Since women and girl prisoners were transferred to Hydebank in June 2004,¹⁷ reports have been published by the Commission and Her Majesty's Inspectorate of Prisons (HMIP)/Criminal Justice Inspection (CJINI), noting significant concerns about safety and management, and inquiring into whether Ash House is a suitable environment for women and girl prisoners.¹⁸ After

¹⁶ Population report week beginning 7 April 2008, Hydebank Wood Prison, available at: <http://www.niprisonservice.gov.uk/module.cfm/opt/8/area/Population/page/population>.

¹⁷ Report on an Unannounced Inspection of the Imprisonment of Women in Northern Ireland, Ash House, Hydebank Wood Prison, 28-30 November 2004, HM Chief Inspector of Prisons and Chief Inspector of Criminal Justice in Northern Ireland.

¹⁸ Scraton P and Moore L, *The Prison Within – The imprisonment of women at Hydebank Wood 2004-2006*, NIHR, July 2007. Report on an Unannounced Inspection of the Imprisonment of Women in Northern Ireland, Ash House, Hydebank Wood Prison (as above). The Prison Service has responded directly to each of HMI's recommendations, available at: <http://www.niprisonservice.gov.uk/module.cfm/opt/5/area/Publications/page/publications/archive/false/cid/41>.

these reports were published, Ash House was upgraded to have safer cells, in-cell sanitation, dedicated classrooms, and enhanced fire safety measures.¹⁹ There is also improved access to the garden area. However, a number of the problems addressed in the reports are still a current concern.

47. The Commission carried out extensive research into the conditions at Ash House. The research findings of the Commission are detailed in its two reports, *The Hurt Inside* and *The Prison Within*.²⁰ The research demonstrated a pressing need for a discrete, separate and self-contained facility for women prisoners in Northern Ireland.
48. Since the research was carried out, the Commission welcomed the recent report into the Northern Ireland Prison Service carried out by the Northern Ireland Affairs Committee, which has recommended that development of plans, costings and a timetable for implementation for a discrete women's facility is treated as a "high priority".²¹

The Committee may wish to ask the UK what plans it has for ensuring that the commissioning of a purpose-built women's prison is treated as high priority.

Separation of juveniles

49. The UK has not withdrawn its reservation to articles 10(2)(b) and 10(3) of the ICCPR. In Northern Ireland, legislative measures continue to allow children as young as 15 years of age to be detained in Prison Service custody with adults. The UK's reservation permits this if "there is a lack of suitable prison facilities", meaning children can be detained with adults for reasons relating to availability, rather than their best interests.
50. The new Article 96 of the Criminal Justice (Northern Ireland) Order 2008 (the 2008 Order) states that a judge can commit a person who is 17 years of age to custody in the juvenile justice centre "...if the court has been notified by the Secretary of State that there is no suitable accommodation for that child available in the young offenders' centre". The Commission understands, from a reading of Parliamentary

¹⁹ Ash House Action Plan, p 25, available at: <http://www.niprisonservice.gov.uk/module.cfm/opt/5/area/Publications/page/publications/archive/false/cid/41>.

²⁰ Scraton P and Moore L, *The Hurt Inside*, NIHR, June 2005 and *The Prison Within*, NIHR, July 2007.

²¹ Northern Ireland Affairs Committee, First Special Report, 5 March 2008.

debates, that the intention behind this provision is to ensure that 17-year-old girls are no longer detained in Prison Service Custody, there being no young offenders' centre for girls in Northern Ireland.²² The Commission is of the view that, if Article 96 does indeed keep 17-year-old girls out of Prison Service custody, then in this respect, it is a positive and welcome development.

51. However, the Commission is concerned that there is a level of uncertainty about how Article 96 will work in practice. It does not explicitly prevent detention of all children in Prison Service custody with adults and, instead, suggests that this is prohibited only if there is a notification from the Secretary of State that there is no suitable accommodation in a young offenders' centre. In addition, given that there is already a young offenders' centre for males in Northern Ireland, the Commission is concerned that the new provisions will not reduce the incidence of boys under the age of 18 detained in Prison Service custody.
52. Even with Article 96 of the 2008 Order, the Commission understands that, in the absence of a notification from the Secretary of State indicating that there is no suitable accommodation in a young offenders' centre, detention of children alongside adults may still occur in the following circumstances:
 - The courts cannot sentence 17-year-olds to the juvenile justice centre if they will reach 18 years of age during their sentence and have received a custodial sentence within the last two years.
 - Young people can be remanded to the juvenile justice centre only if they are under 17 years and six months and have not received a custodial sentence in the previous two years.
 - Article 13 of the Criminal Justice (Children) (NI) Order 1998 provides that children as young as 15 years may be remanded to a young offenders' centre if they are believed to be at risk of harming themselves or others.
 - If management at the JJC considers that a child cannot safely be held there, then they may make recommendations to court to request that the child is moved to Hydebank Wood Young Offenders' Centre.

²² Baroness Harris of Richmond, House of Lords, Hansard, 29 April 2008 at Column 202 and Lord Laird at Column 207.

53. In its follow-up investigation, *Still in Our Care*, the Commission found that there was a lack of publicly available information about this practice in Northern Ireland. In *Still in Our Care*, the Commission recommended that “legislation should be revised to prohibit the detention of children in prison. In the interim, government should closely monitor the use of Prison Service custody for children ... and should place this information in the public domain”.²³ The remand, sentencing and transfer of children to Hydebank Wood Young Offenders’ Centre and Hydebank Wood Women’s Prison are situations that are still not openly monitored by the Northern Ireland Office and the Youth Justice Agency.
54. There are further concerns for girls in prison that arise due to the particular structure of the prison estate in Northern Ireland. Therefore, if boys under the age of 18 years are placed in Prison Service custody they are held in the Hydebank Wood Young Offenders’ Centre in Belfast. This caters for males who are aged 17 to 21 years of age on the date of sentencing. In general, males under the age of 18 years are accommodated on a separate landing although education and work are mixed. In contrast, there is no female young offenders’ centre and only one adult prison for females. As noted above, the Commission understands that Article 96 of the Criminal Justice (NI) Order 2008 will prevent courts from making an order which commits girls under the age of 18 to prison if there is a notification from the Secretary of State that there is no suitable accommodation in a young offenders’ centre. This means that girls less than 18 years of age should not be sentenced to Hydebank Wood Women’s Prison and, insofar as this is the case, it is to be welcomed. However, the Commission would question if, in practice Article 96 will in all cases prevent the detention of girls in Prison Service custody.

The Committee may wish to ask the UK why it has not removed the reservation to Articles 10(2)(b) and 10(3) of Covenant, and how it is monitoring the custody of children in Northern Ireland.

²³ *Ibid*, p 27, Recommendation 6.

Freedom of movement (Article 12)

National Identity Card Register

55. The Commission opposes the specific National Identity Register Identity Card Scheme established under the Identity Cards Act 2006 and UK Borders Bill 2007. A range of concerns are set out in more detail under Article 17.
56. The Commission is further concerned that under the Identity Cards Act 2006, the UK has taken a power to refuse to issue British citizens with a passport if they do not register on to the National Identity Register (NIR). NIR registration will involve disclosure, storage and usage of information not currently required for a passport application. The UK Government has long articulated that the primary mechanism for NIR registration for British citizens will be passport renewal.²⁴
57. The Commission does not regard the National Identity Register as either a necessary or proportionate response to the qualifying restrictions under Article 12(3).

The Committee may wish to ask the UK to explain how this power is compatible with Article 12(2) of the Covenant.

Residence restrictions: UK Borders Act 2007

58. The Commission is concerned about powers in Clause 16 of the UK Borders Act 2007. These measures impose reporting and residence restrictions on anyone who has temporary residence (limited leave to remain) in the UK, therefore obliging individuals to live and remain in certain locations. These blanket measures (against non-EEA nationals) engage Article 12 of the Covenant, as well as Articles 17 and 22.

The Committee may wish to ask the UK how the reporting and residency requirement powers are compatible with Article 12 of the Covenant.

²⁴ The UK's most recent National Identity Scheme Delivery Plan (2008) does not depart from this, although it indicates that the actual Identity Card (but not registration) may be optional at this stage.

Right to a fair trial (Article 14)

Diplock Courts

59. The Committee raises the issues of the discontinuation of Diplock Courts, and the Justice and Security (Northern Ireland) Act 2007 providing for a new system of non-jury trials in cases which are certified by the Director of Public Prosecutions for Northern Ireland, as detailed in paragraphs 118 and 119 of the state report.
60. In responding to consultation on the matter the Commission welcomed statements that the new arrangements will be based on the presumption of jury trial. However, the Commission voiced concerns that the system falls short of returning to one criminal justice model that allows only non-jury trial in exceptional cases. The measures run in parallel to the provision for non-jury trials in the Criminal Justice Act 2003; however, the two systems differ. It is the Commission's view that provisions of section 44 of the 2003 Act should provide the sole basis for non-jury proceedings in criminal cases, with possible necessary modifications in relation to jury protection measures to take account of the particular circumstances of Northern Ireland.
61. Accordingly, the Director of Public Prosecutions (DPP) should be required to apply to a judge of the Crown Court for the trial to be conducted without a jury. The DPP should be required to give reasons for the application, setting out evidence of a real and present danger of jury tampering or intimidation, and evidence that this danger remains regardless of steps that can reasonably be taken to prevent it. Reasons for the application should be made available to the defence to enable it to challenge the application in front of a judge who is not the trial judge in the case.
62. The Commission is not in favour of a 'scheduling-in' system. The Commission favours a system where the decision to move to a non-jury trial in a specific case depends on a clear risk of interference with, or perversion of, the administration of justice. Particular circumstances that would justify non-jury trial in Northern Ireland could be included in the legislation as examples of cases where there may be evidence of a real and present danger that jury tampering would take place (similar to section 44(6) of the Criminal Justice Act 2003).

In asking the UK to account for the number of cases certified at any stage in their proceedings by the Director of Public Prosecutions since the entry into force of the Act on the 1 August 2007, the Committee may wish to probe the level of evidence in such cases of a real and present danger of jury tampering taking place.

Anti-Social Behaviour Orders (ASBOs)

63. The Commission notes that the Committee has asked the state party to explain how the guarantees of Article 14 apply in relation to ASBOs, and how the possibility to incur a criminal record without actually having committed any recognisable criminal offence is compatible with Article 15. The Committee also specifically requests information in relation to children and ASBOs.
64. ASBOs were introduced in Northern Ireland in 2004, by way of the Anti Social Behaviour (Northern Ireland) Order. The police, Housing Executive²⁵ and local councils can apply to the court for a civil anti social behaviour order, breach of which constitutes a criminal offence. The orders can ban people from certain activities and from entering particular areas and clearly may engage rights to freedom of association and to freedom of peaceful assembly.
65. The only criteria the judge need consider is whether the person behaved in a manner that "caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself".²⁶ Breach of the civil order is a criminal offence punishable by up to five years imprisonment.
66. ASBOs apply equally to children from the age of 10 years. ASBOs have been sought disproportionately against children. For children, breach of such an order can result in a custodial sentence for acts which are not in themselves illegal.
67. The Commission has a long record of opposition to ASBOs, dating back to their introduction into Northern Ireland in 2004, and has expressed its concerns to Government with some considerable force. Unfortunately, the Commission's concerns have not been taken on board by Government. Our main concerns include:

²⁵ The Housing Executive is the state housing authority for Northern Ireland.

²⁶ Article 3, Anti-Social Behaviour (Northern Ireland) Order 2004

- the degree of discretion for the “relevant authorities”, that is, the police, housing authorities and local councils, seeking an ASBO in defining anti-social behaviour and deciding when to seek such an order
- Orders are sought in the ordinary courts and not in a youth court and, consequently, there are no automatic reporting restrictions²⁷
- an integral part of the order procedure involves the publication of its conditions and an invitation to those in the locality to inform the authorities of any breach thereof²⁸
- hearsay evidence is admissible²⁹
- children as young as 10 years of age can be made the subject of one of these orders³⁰
- the minimum duration of the ASBO is two years and its maximum duration is indefinite³¹
- Orders covering areas as large as England and Wales can be made³²
- the rights to education and home life can be affected by an exclusion from a particular area³³
- other children of the family may also have to relocate home and school, and/or may be victimised because of their association with the affected child,³⁴ and
- where an ASBO is made alongside a custodial sentence for criminal conviction, the effect is one of release on licence following the period in custody, with the risk of a return to custody for any breach of the conditions of the order, even when the behaviour would not normally attract a custodial sentence and may not even constitute a crime.

68. Despite the significant concerns expressed about ASBOs by this Commission and others since 2004, the Government recently extended its powers in relation to obtaining interim or emergency ASBOs. Under the Criminal Justice (Northern Ireland) Order 2008, emergency or interim orders (already provided for in legislation) can now be obtained without notice to the individual concerned. This extension of the powers to

²⁷ UNCRC Articles 6(1), 16, 19, 40(1), 40(2)(vii), 40(3) and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) Rules 8.1 and 8.2).

²⁸ UNCRC Articles 6(1) and 19.

²⁹ UNCRC Article 40(2)(b)(i) and (ii).

³⁰ UNCRC Article 40(1) and Beijing Rules 4.1.

³¹ Beijing Rules 5.1.

³² *Ibid.*

³³ UNCRC Articles 16(1) and 28.

³⁴ UNCRC Articles 2(2), 3 and 19.

obtain interim orders on an *ex parte* basis merely serves to exacerbate the Commission's existing concerns regarding the granting of ASBOs.

69. ASBO proceedings blur the division between civil and criminal law. The odds are very heavily stacked against the person against whom the order is sought. Without an opportunity to present arguments at an interim hearing, the likelihood of an inappropriate ASBO being granted is greatly increased. Breach of an interim order carries the same penalties as breach of a full order.

Right to privacy, family life (Article 17)

The National Identity Register and identity cards

70. The state party is establishing a wide ranging National Identity Register (NIR) which will be linked to Identity Cards. The relevant primary legislation is the Identity Cards Act 2006, and relevant provisions of the UK Borders Act 2007. The Commission opposes the specific NIR Identity Card scheme set out in the above legislation.³⁵ The Commission believes that the scheme unduly infringes on the right to privacy and that the legitimate aims set out for the scheme do not stand up to scrutiny, will be counter productive and/or are disproportionate.
71. The difficulties regarding human rights compliance do not relate to identity cards *per se* but to the gathering, storage and disclosure of information in relation to the National Identity Register. The legislation sets out over 50 registrable facts that are to be stored on the NIR and this can be added to without new legislation. This includes information about other numbers allocated to the individual and incorporates biometric data with photographs, signature and fingerprints. Unspecified "other biometric data" can also be added. There are concerns around the vast range of state and non-state actors to whom NIR data can be disclosed. The register will also contain a record "about occasions on which information recorded about him in the Register has been

³⁵ While recognising that many more limited identity card schemes do raise human rights issues, the Commission does not oppose identity card schemes *per se*. There is no international standard to this regard. The Commission does, however, oppose the specific NIR identity cards scheme and wishes to see this withdrawn.

provided to any person".³⁶ This means that whenever a public sector or private sector organisation requests the ID card, details of the request are permanently logged along with "other particulars" in relation to each such occasion. This, therefore, would build up a detailed profile of daily lives.

72. Further, it is the Commission's position that the impacts of the NIR identity card system will be discriminatory, particularly for Irish citizens in Northern Ireland and minority ethnic groups, especially Muslims and migrants, and therefore engages Article 2 of the Covenant.
73. The scheme aimed at "foreign nationals" (effectively non-EEA migrants³⁷) is directly compulsory, includes children and is to be backed by a severe sanctions regime which will include immigration sanctions, namely, 'refusal or rejection' of an application to enter or stay in the UK, or a variation (curtailment) or cancellation of a person's existing permission to enter or remain in the UK.³⁸ Immigration sanctions may be imposed in relation to compulsion regarding the application process, but also in other, as yet, undefined circumstances in which use of the card is 'required', potentially including taking employment, and accessing routine public services. The 'compulsory' identity cards could also be interpreted as the introduction of a 'papers please' environment, whereby foreign nationals and minority ethnic persons, perceived as foreign nationals, are compelled routinely carry identification. The Commission is concerned that this will lead to, or exasperate, racial profiling and other discriminatory practices.
74. The scheme geared at British citizens is often promoted as 'voluntary'. The Commission is concerned at any measures that make the continued enjoyment of basic human rights (such as access to services, employment or freedom of movement³⁹) dependent on NIR registration, effectively compelling subjection to the scheme. There are particular sensitivities in relation to Northern Ireland and Irish citizens, who constitute a considerable proportion of the population. It is the birthright of most people in Northern Ireland to be British or Irish citizens (or both) and to identify, and be

³⁶ Section 1, subsection (5)(i), Identity Cards Act 2006.

³⁷ Persons subject to immigration control – a person who, under the 1971 Immigration Act (c 77), requires leave to enter or remain in the UK (whether or not such leave has been given).

³⁸ There is also the sanction of refusal to issue an identity card, and the issuing of civil penalties.

³⁹ See paragraphs 53-55 of this report in relation to compulsion on British passport renewal.

accepted, as Irish or British (or both) as reaffirmed in the Belfast (Good Friday) Agreement 1998. Many of those who express their national identity as Irish are likely to be resistant to carrying British identity cards and, by extension, register on the NIR. Such persons will not be compelled to register if a primary enrolment route is through British passport renewal. The non-registration of a very large section of the population on the NIR could lead to its aims becoming completely unworkable in Northern Ireland or, alternatively, to problems for many Irish citizens in accessing employment and services and exercising freedom of movement within the Common Travel Area.⁴⁰

The Committee may wish to ask how the National Identity Register and its provisions are compliant with the Covenant.

Prohibition of hate speech (Article 20)

Hate crime legislation

75. Hate crime against ethnic minorities in Northern Ireland continues to rise despite the introduction of the Criminal Justice (No. 2) (NI) Order 2004, which was intended to afford certain minorities (ethnic, sexual orientation and persons with disabilities) additional protection from crimes against them.
76. In the period March 2006 to April 2007, the number of racist crimes increased by 15.4 per cent from the previous year. The Commission stresses the need for the relevant criminal justice agencies to take appropriate measures to tackle this form of crime in the region.
77. In particular, the Commission notes that while the Police Service of Northern Ireland uses the definition of a racist incident as recommended in the Stephen Lawrence report, this is not the definition used for statistical purposes by the Director of Public Prosecutions or by the Court Service in Northern Ireland. This makes it impossible to follow the progress through the criminal justice system of offences that are initially recorded by the police as racially motivated. Therefore, the deterrent purpose of the legislation is not being fulfilled.

⁴⁰ The Common Travel Area of the UK, Republic of Ireland, Isle of Man and Channel Islands whereby British and Irish citizens do not have to possess, carry or show passports.

The Committee may wish to ask the UK if the Public Prosecution Service for Northern Ireland can provide data in relation to the number of prosecutions, successful or unsuccessful, that it has pursued in relation to hate crimes.

Protection of children (Article 24)

Unaccompanied asylum-seeking children

78. At present, the UK Borders Agency guidance in relation to age disputes for unaccompanied asylum seekers provides that, in disputed age cases, the applicant is not treated as a child unless and until it is established that they are under 18 years of age.⁴¹ The Commission is of the view that this risks serious breach of the rights of unaccompanied asylum-seeking children. In addition, there are serious concerns about the manner of age assessments, including provision to use intrusive measures such as X-rays.⁴²

The Committee may wish to ask the UK if the approach to age disputes and its policy on the treatment of unaccompanied asylum seeking children pending age assessment is compatible with Article 24(1) of the Covenant.

Equality before the law (Article 26)

Stop and search powers

79. The Committee asks the UK for information as regards the use of stop and search powers under section 44 of the Terrorism Act 2000. The Commission also notes, in examining the UK, the recommendations of the Advisory Committee on the Framework Convention for the Protection of National Minorities (FCNM), which states that the UK Government must review stop and search powers to ensure they are exercised

⁴¹ UK Borders Agency, *Disputed Age Cases*, Home Office, London, available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/guidance/disputedagecases.pdf?view=Binary> [accessed 29 April 2008].

⁴² Dorling K, 'Seeking Change: Reforms to the Protection of Unaccompanied Asylum Seeking Children', *Childright* 245, 2008, pp 14-17.

fairly and proportionately.⁴³ The Advisory Committee also explicitly urged the UK Government to ensure "...that persons belonging to minority ethnic communities are not disproportionately stopped and searched".⁴⁴

80. The Commission feels that section 44 engages Article 26 of the Covenant (along with Article 17), and raises serious concerns for the protection of human rights as it dispenses with one of the most fundamental safeguards, 'reasonable suspicion', designed to protect the public against the arbitrary and subjective exercise of police powers.
81. While this type of search power remains in force, it must be subject to the most thorough monitoring and review. In Northern Ireland, Section 44 stop and search data includes gender and ethnicity but not factors such as age or religion. At the time of writing, the most recently available statistics on the use of Section 44 in Northern Ireland show that 124 persons were stopped and searched from 1 April to 30 June 2007; 1,112 from 1 July to 30 September 2007; and 722 from 1 October to 31 December 2007.⁴⁵
82. In relation to other stop and search powers, the Commission notes that the most recent human rights report for the Northern Ireland Policing Board shows "some disproportionality in the number of stop/searches of the Irish Traveller community", during the use of stop and search powers under the Police and Criminal Evidence (NI) Order 1989.⁴⁶

The Committee may wish to ask the UK about the monitoring and impact of section 44 and other stop and search powers with respect to Northern Ireland in relation to Articles 17 and 26 of the Covenant.

⁴³ Advisory Committee on the Framework Convention for The Protection of National Minorities, Second Opinion on the United Kingdom, 6 June 2007, ACFC/OP/II(2007)003, p 26.

⁴⁴ *Ibid*, p 26.

⁴⁵ Police Service of Northern Ireland, *Quarterly Report: Stop and Search Statistics 1 October 2007 to 31 December 2007*, PSNI, Lisnasharragh, Belfast, 2008.

⁴⁶ Northern Ireland Policing Board, *Monitoring the Compliance of the Police Service Northern Ireland with the Human Rights Act 1998, Annual Report 2007*, NIPB, Belfast, 2007, p 63.

Rights of ethnic, religious and linguistic minorities (Article 27)

Status of the Irish language

83. The UK should state how it plans to legislate for the status of the Irish language in Northern Ireland. This issue engages Article 27 of the Covenant, relevant UN Declarations (e.g. Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities); European regional instruments (the Charter on Regional and Minority Languages, and the Framework Convention on National Minorities); and the 2006 St Andrews Agreement, which provides:

Government will introduce an Irish Language Act reflecting on the experience of Wales and Ireland and work with the incoming [Northern Ireland] Executive to enhance and protect the development of the Irish language.

84. The Government consulted on such legislation in December 2006, and in more detail in March 2007. The proposals did not follow a rights-based approach and did not meet full conformity with treaty commitments. Responsibility for legislation was passed in May 2007 to the devolved administration which, in October 2007, indicated it would not enact an Irish Language Act. While treaty compliance can be achieved by regional authorities meeting relevant standards, if a devolved government does not deliver the state is still responsible, and the Commission therefore expects the UK Government to ensure that legislation is enacted.

The Committee may wish to ask the UK, in reference to Article 27 of the Covenant, when it plans to bring forward Irish language legislation.