



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

**Call for Evidence on the Justice (No. 2) Bill**

**Summary**

**The Northern Ireland Human Rights Commission (the Commission):**

- **advises the Committee to ask the Department of Justice (DoJ) to set out the basis for the statement of compatibility. The Commission also advises that DoJ considers the applicability of the advice given by the JCHR. This would assist the Justice Committee in their scrutiny function (para 7)**
- **advises that secondary legislation which engages human rights should be introduced by way of the affirmative resolution procedure. Accordingly, the Commission welcomes clause 46(3) (para 10)**
- **recommends that in considering clause 3(4) the Committee should ask DoJ for assurance that information on how a debtor can apply for the variation of an order and appeal a decision of the collection officer is included in guidance provided for under clause 21 of the Bill (para 13)**
- **advises that the Committee enquire how the DoJ will ensure that imprisonment is used as a measure of last resort, in order to reflect the language and spirit of CoE Recommendation 1469, and of the concluding observations of UN CEDAW and CAT Committees. The Commission recommends the Committee seeks assurance from DoJ that this is addressed in guidance (para 19)**
- **recommends that clause 12(1) is amended to ensure that the**

**court enquires into debtor's outgoings, potential hardship and caring responsibilities, in addition to date of birth, National Insurance Number and details of any relevant benefits received (para 22)**

- **recommends that regulations made under clause 15 ensure a detailed assessment of income and outgoings takes place at the time an interim bank account order is being considered to prevent the risk of destitution in the first instance (para 27)**
- **advises that a requirement to notify the debtor of this possibility is inserted into clause 15 which would help fulfil the State's obligations under ECHR, Article 3 and ICESCR, Article 11. In the alternative, the Committee should seek an assurance from the Department that relevant regulations and guidance will provide for claimants to be informed of the possibility of a hardship payment (para 29)**
- **recommends that regulations made under clause 18(6)(b) should provide that the responsible court takes into account the impact of a vehicle seizure order on an individual's employment to ensure that an individual is not deprived of their source of income in order and to comply with ECHR, Article 1, Protocol 1, ICESCR, Article 6 and CFREU, Article 15 (para 36)**
- **advises that the Bill be amended to provide the Prison Ombudsman with a power to carry out investigations on his or her own initiative (para 39)**
- **recommends that the Committee consider the inclusion of an additional function within clause 29 to provide that the Ombudsman must promote understanding and awareness of its complaints procedures to ensure that they are accessible to all prisoner (para 44)**
- **recommends, in light of the emphasis the Committee of Ministers have placed on investigators having the power to compel witnesses to ensure an effective investigation, that the Committee consider whether the Prison Ombudsman should be given a specific power to compel witnesses to assist in its investigations (para 60)**
- **advises that provided adequate resourcing is allocated, the**

**statutory framework for the office of the Prison Ombudsman should provide prompt and expeditious investigations into deaths in custody (para 62)**

- **advises that clause 33(7) be amended to provide that: "Regulations must make provision as to the procedures to be followed in relation to reports under this section and must in particular include provisions ...enabling the Ombudsman to publish the whole or any part of a report" (para 64)**
- **welcomes the emphasis placed on the involvement of the family of a deceased person in an investigation into a death by the Prison Ombudsman (para 66)**
- **advises the Committee to consider whether a clause should be inserted into the Bill modelled on section 58 of the Police (NI) Act 1998 requiring the Prison Ombudsman to disclose to the PSNI where a report indicates that a criminal offence may have been committed (para 71)**
- **advises that clause 37 be amended to permit disclosure of protected information to the Commission for the purposes of the exercise of any functions of that office (para 73)**
- **agrees with the conclusion of the JCHR that such an approach is a proportionate restriction of ECHR, Articles 8 and 10. Accordingly, the Commission welcomes clause 42 which extends of the offence of extreme pornography to include possession of pornographic images depicting rape and other non-consensual acts (para 84)**
- **recommends that due consideration is given to an amendment in the Bill to include the offence of disclosing private sexual photographs and films with intent to cause distress, giving due regard to CEDAW and the Optional Protocol to the CRC. This would bring the law into line with provision in England & Wales (para 90)**

## Introduction

1. The Northern Ireland Human Rights Commission (the Commission) pursuant to Section 69 (1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of Human Rights.<sup>1</sup> In accordance with this function the following statutory advice is submitted to the Committee for Justice in response to a call for evidence relating to the Justice (no.2) Bill.
  
2. The Commission bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights as incorporated by the Human Rights Act 1998 and the treaty obligations of the Council of Europe (CoE) and United Nations (UN) systems. The relevant international treaties in this context include:
  - the CoE European Convention on Human Rights (ECHR)<sup>2</sup>;
  - the International Covenant on Civil and Political Rights (ICCPR)<sup>3</sup>;
  - The International Covenant on Economic Social and Cultural Rights (ICESCR);<sup>4</sup>
  - The Convention on the Elimination of Discrimination Against Women (CEDAW);<sup>5</sup>
  - The United Nations Convention on the Rights of the Child (CRC);<sup>6</sup>
  - Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.<sup>7</sup>
  - The United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (UNCAT);<sup>8</sup>
  - The Charter of Fundamental Rights of the European Union (CFREU);<sup>9</sup>
  - The CoE Convention on Preventing and Combating Violence against Women (The Istanbul Convention).<sup>10</sup>

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<sup>1</sup> Northern Ireland Act 1998, Section 69(1)

<sup>2</sup> Ratified by the UK in 1951.

<sup>3</sup> Ratified by the UK in 1976.

<sup>4</sup> Ratified by the UK in 1976.

<sup>5</sup> Ratified by the UK in 1986

<sup>6</sup> Ratified by the UK in 1991

<sup>7</sup> Ratified by the UK in 2009

<sup>8</sup> Ratified by the UK in 1988

<sup>9</sup> Charter of the Fundamental Rights of the European Union, (2000/C 364/01)

<sup>10</sup> The Istanbul Convention was signed by the UK on 8 June 2012 but is yet to be ratified. The UK Mission at Geneva has stated, 'The UK's approach to signing international treaties is that we only give our signature where we are fully prepared to follow up with ratification in a short time thereafter.' See, UK Mission at Geneva, 'Universal Periodic Review Mid-term Progress Update by the United Kingdom on its Implementation of Recommendations agreed in June 2008' (March 2010) on recommendation 22 (France). A UK Parliamentary question in June 2015 indicated that the Government was committed to ratifying the convention and primary legislation would be

3. The Northern Ireland Executive (NI Executive) is subject to the obligations contained within these international treaties by virtue of the United Kingdom (UK) Government's ratification and the provisions of the Northern Ireland Act 1998.<sup>11</sup>
4. In addition to the treaties, there exists a body of 'soft law' developed by the human rights bodies of the UN and CoE. These declarations and principles are non-binding but provide further guidance in respect of specific areas. The relevant standards in this context include:
  - United Nations Standard Minimum Rules for the Treatment of Prisoners (the Minimum Standard Rules) (1977);
  - United Nations Basic Principles for the Treatment of Prisoners (the Basic Principles) (1990);
  - Council of Europe (CoE) Recommendation 1469 (2000) on "Mothers and babies in prison";
  - UN Human Rights Committee General Comment no 28 on Article 3 (Equality of Rights between Men and Women);
  - CEDAW General Recommendation No.19 (Violence against Women).

### **Compatibility**

5. The Commission notes that paragraph 60 of the Explanatory and Financial Memorandum accompanying the Bill states that all proposals have been screened and regarded to be Convention compliant. The Commission notes guidance from the Westminster Government to departments about disclosure of views regarding Convention compatibility in the Explanatory Notes that accompany a Bill. In order to discharge the Government's commitment to provide a human rights assessment, departments should do one of the following:<sup>12</sup>
  - state that the department does not consider that the provisions of the Bill engage convention rights;

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required to comply with the extra-territorial jurisdiction provisions in Article 44 of the Convention before it can be ratified, see written question HL582.

<sup>11</sup> In addition, Section 26 (1) of the Northern Ireland Act 1998 provides that 'if the Secretary of State considers that any action proposed 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.' 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'.

<sup>12</sup> Cabinet Office "Guide to Making Legislation" July 2015, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/450239/Guide\\_to\\_Making\\_Legislation.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450239/Guide_to_Making_Legislation.pdf), pg 86

- in a case where any ECHR issues arise but are not significant, deal with the issues in a short paragraph or paragraphs in the explanatory notes;
  - or where significant issues arise, state that issues arising as to the compatibility of the bill with convention rights are dealt with in a separate memorandum and provide a web address at which the memorandum can be accessed.
6. The Commission also notes the view of the Joint Committee on Human Rights (JCHR) which highlighted the good practice of departments in supplying a detailed human rights memorandum, giving a full explanation of the view that a Bill is compatible with human rights. The JCHR emphasised:<sup>13</sup>

*The provision of detailed human rights memoranda to Parliament is an important means of demonstrating the Government's fulfilment of that responsibility. It also facilitates Parliament in fulfilling its responsibility in that regard.*

- 7. The Commission advises the Committee to ask the Department of Justice (DoJ) to set out the basis for the statement of compatibility. The Commission also advises that DoJ considers the applicability of the advice given by the JCHR. This would assist the Justice Committee in their scrutiny function.**
8. The Commission advises the Committee to ask the Department of Justice (DoJ) to set out the basis for the statement of compatibility. The Commission also advises that DoJ considers the applicability of the advice given by the JCHR. This would assist the Justice Committee in their scrutiny function.

### Collection officers and orders

#### *Clause 2-Collection officers*

9. This clause will enable the DoJ to designate civil servants in the Department to be collection officers. The clause specifies general functions which include: to provide debtors with information and advice about payment of the sums due and secure compliance with collection orders. This clause will also enable the DoJ to make regulations to confer or impose functions on collections officers. According to Clause 46(3)

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<sup>13</sup> JCHR "Legislative Scrutiny: Welfare Reform Bill", para 1.11  
<http://www.publications.parliament.uk/pa/jt201012/jtselect/jtrights/233/23305.htm#a4>

regulations under clause 2(3), may not be made unless a draft has been placed before and approved by resolution of the Assembly.

10. **The Commission advises that secondary legislation which engages human rights should be introduced by way of the affirmative resolution procedure. Accordingly, the Commission welcomes clause 46(3).**

*Clause 3-Collection order*

11. Clause 3 provides that the court must make a collection order relating to the payment of the sum due, unless it appears to the court that it is impracticable or inappropriate to do so. The collection order must contain specific information including the amount of the sum due, the amount already paid and the outstanding sum due, information about how payments may be made under the terms of the Order, information how to contact the collection officer for securing compliance with the order, information about the effect of the Order and consequences about failing to comply with it. The court must serve the order on the debtor and send a copy to the collection officer. Where an appeal is made against the conviction or sentence, the collection order is suspended until the appeal is determined or abandoned.
12. The Commission notes that the debtor may apply to the collection officer to vary the order under clause 6 (2). Furthermore, the Commission notes that clause 20(1) makes provision for an appeal against a decision of the collection officer. These are important safeguards in the Bill to ensure the debtors rights, including those under Article 3 and Article 1, Protocol 1 of the European Convention on Human Rights (ECHR), Articles 6 and 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 15 of the Charter of Fundamental Rights of the EU (CFREU). It would be helpful if this information is included in materials given to an individual.
13. **The Commission recommends that in considering clause 3(4) the Committee should ask DoJ for assurance that information on how a debtor can apply for the variation of an order and appeal a decision of the collection officer is included in guidance provided for under clause 21 of the Bill.**

## Default on payment

### *Clause 9-Powers of court on referral of a debtor's case*

14. Clause 9(1) provides that the court on referral of a debtor's case has a number of powers including: giving additional time to pay, permitting payment of the outstanding amount by instalments, order the collection officer to make an application for deduction from benefits or make an attachment of earnings order (even if either of those approaches have been previously done), make a bank account order, making a vehicle seizure order in relation to a vehicle registered in the debtors name, issuing a warrant of distress<sup>14</sup> for levying the outstanding amount , imposing a supervised activity order where an individual is aged over 18, imposing an attendance order if the debtor is aged 16 or 17, issuing a warrant committing the debtor to prison, or remitting the whole or part of the outstanding amount. Clause 9, subsections (3) and (4) set out the sequence of using the options and provides for when, they may or may not be used.
15. The Commission welcomes the emphasis on the enforcement and collection of fines as an alternative to imprisonment. The Commission recalls that in 2013 the UN Committee against Torture recommended that the UK:
- strengthen its efforts and set concrete targets to reduce the high level of imprisonment and overcrowding in places of detention, in particular through the wider use of non-custodial measures as an alternative to imprisonment...*<sup>15</sup>
16. The Commission notes that the imprisonment of persons for fine default has contributed to recent increases in the prison population in Northern Ireland and accordingly welcomes efforts to reduce the number of persons committed to prison for fine default.<sup>16</sup> However the Commission notes the Bill does not make specific provision to ensure the protection of vulnerable persons, including women and those with mental health issues.<sup>17</sup>

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<sup>14</sup> A court order giving the power to seize goods from a debtor in order to pay creditors

<sup>15</sup> UN CAT Committee 'Concluding observations on the fifth periodic report of the United Kingdom, adopted by the Committee at its fiftieth session (6-31 May 2013) Para 30

<sup>16</sup> See Prison Population statistics at <http://www.dojni.gov.uk/index/ni-prison-service/nips-population-statistics-2.htm>

<sup>17</sup> NIHRC The Response of the Northern Ireland Human Rights Commission to the Department of Justice Consultation "fine collection and enforcement in Northern Ireland"



17. For example, the Council of Europe (CoE) Recommendation 1469 (2000) on “Mothers and babies in prison” invites Member states to recognise that custody for pregnant women and mothers of young children should only ever be used as a last resort for those women convicted of the most serious offences and who represent a danger to the community.<sup>18</sup>
18. In 2013, the Committee on the Convention on the Elimination of Discrimination Against Women (CEDAW) recommended that the UK continue to develop alternative sentencing and custodial strategies for women convicted of minor offences.<sup>19</sup> In 2013, the Committee on the Convention against Torture (CAT) called on the UK to ensure effective diversion from the criminal justice system for non-violent women offenders convicted of minor offences.<sup>20</sup> The CAT Committee in particular noted the high number of female prisoners with severe and enduring mental illness and high rates of self-harm amongst women prisoners in the UK.<sup>21</sup>
19. **The Commission advises that the Committee enquire how the DoJ will ensure that imprisonment is used as a measure of last resort, in order to reflect the language and spirit of CoE Recommendation 1469, and of the concluding observations of UN CEDAW and CAT Committees. The Commission recommends the Committee seeks assurance from DoJ that this is addressed in guidance.**

## Deductions from benefits

### *Clause 12-Enquiries into debtor’s means*

20. Clause 12 (1) provides that the court must enquire into a debtor’s means before ordering a collection officer to make a deduction from

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<sup>18</sup> CoE Recommendation 1469 (2000) adopted on 30 June 2000

<sup>19</sup> CEDAW Committee “Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland “July 2013, para 55 (b), available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fGBR%2fCO%2f7&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fGBR%2fCO%2f7&Lang=en)

<sup>20</sup> CAT Committee “Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, adopted by the Committee at its fiftieth session (6-31 May 2013)”, para 33, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGBR%2fCO%2f5&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGBR%2fCO%2f5&Lang=en)

<sup>21</sup> CAT Committee “Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, adopted by the Committee at its fiftieth session (6-31 May 2013)”, para 32

benefits. The court may require the debtor to provide his or her full name and address, date of birth and National Insurance number and details of any relevant benefit which the debtor receives.

21. The Commission notes that there is no reference in the clause to the court allowing the debtor to make representations to highlight outgoings, potential hardship and caring responsibilities. ICESCR, Article 11 requires State parties to ensure the right of everyone to an adequate standard of living, including adequate food, clothing and housing. The ICESCR Committee's general comment no. 12 on the right to adequate food requires States not to take measures that prevent such access.<sup>22</sup>
22. **The Commission recommends that clause 12(1) is amended to ensure that the court enquires into debtor's outgoings, potential hardship and caring responsibilities, in addition to date of birth, National Insurance Number and details of any relevant benefits received.**

Freezing bank accounts etc.

*Clauses 15 and 16- Interim Bank Account Orders and Hardship Payments*

23. Clause 15 makes provision for interim bank account orders, subsections (6) and (7) provide that regulations may make further provision in relation to the interim bank account orders and regarding further information from the deposit taker, make provision as to the contents and as to the service of an interim bank account order, make provision enabling a deposit taker to impose administrative charges of a specified amount in relation to costs incurred by complying with an interim bank account order and the creation of offences in connection with the order.
24. In addition to engaging ICESCR, Article 11, the Commission advises that a duty may arise out of the State's obligations under ECHR, Article 3 (prohibition on torture, inhuman and degrading treatment).<sup>23</sup> Destitution causing severe suffering may breach ECHR, Article 3 or in less severe cases, Article 8. For treatment to come within the scope of Article 3, it must achieve a minimum standard of severity.<sup>24</sup> The House of Lords ruled that the minimum standard may be achieved where a person is left "*with*

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<sup>22</sup> CESCR Committee "General Comment no 12: the Right to Adequate Food", E/C.12/1999/5. P 5

<sup>23</sup> Freedom from Torture, Inhuman and Degrading Treatment, Article 7 of the ICCPR contains a similar provision.

<sup>24</sup> *R v Secretary of State for the Home Department ex parte Limbuela, Tesema and Adam* [2005]UKHL 66, para 7.

*no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life.*<sup>25</sup>

25. Clause 16 (1) provides that where an interim bank account order is in force, the collection officer, may on written application from a debtor, make a hardship payment order if as a result of the interim order, the debtor or his or her family is unable to meet ordinary living expenses.
26. The interim bank account order may risk the debtor being exposed to destitution with the hardship payment order being the only means to resolve the situation. The Commission acknowledges that this provides an additional safeguard. However to ensure hardship payments are required only in exceptional circumstances the assessment prior to an interim bank account order must be robust to limit the risk of destitution.
27. **Whilst acknowledging the hardship payment order in clause 16 will provide a safeguard against destitution, the Commission recommends that regulations made under clause 15 ensure a detailed assessment of income and outgoings takes place at the time an interim bank account order is being considered to prevent the risk of destitution in the first instance.**
28. The Commission notes that there is no reference in either of the clauses to a requirement to notify the debtor of the possibility to apply for a hardship payment.
29. **The Commission advises that a requirement to notify the debtor of this possibility is inserted into clause 15 which would help fulfil the State's obligations under ECHR, Article 3 and ICESCR, Article 11. In the alternative, the Committee should seek an assurance from the Department that relevant regulations and guidance will provide for claimants to be informed of the possibility of a hardship payment.**

#### Seizure of vehicles

##### *Clauses 18: Vehicle Seizure Order*

30. Clause 18 provides that a vehicle seizure order is an order which may specify that a vehicle is to be sold or disposed of in accordance with

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<sup>25</sup> *R v Secretary of State for the Home Department ex parte Limbuela, Tesema and Adam* [2005]UKHL 66, para 7.

regulations and proceeds of the sale are to be applied in accordance with the regulations for the purpose of securing payment of the outstanding amount.

31. The Commission also notes that clause 18 (4) provides that a vehicle seizure order may not be made in relation to a vehicle which displays a current disabled persons badge or those used for the carriage of persons with disabilities, or a vehicle used for police, fire, rescue, ambulance purposes or vehicles used by a medical practitioner on call from a practitioners place of work.
32. Previously the Commission advised the DoJ that the seizure of vehicles should only be possible after an assessment has been conducted to ensure that neither action infringes on the person's right to an adequate standard of living or compromises the best interests of the child.<sup>26</sup> In addition the right to property may be engaged.
33. ECHR, Protocol 1, Article 1 states that:

*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
34. The Commission notes that the clause makes no specific reference to vehicles used for the purposes of employment. The Commission draws attention to the ECt.HR case of *Lallement v France*, in which the applicant complained that expropriation of part of his family farm made it financially unviable for the applicant to continue to farm the remaining portion of land and led to a loss of income. Furthermore, the compensation paid did not specifically cover the loss.<sup>27</sup> Whilst the case does not relate to fine default, the principle may be applicable in that interference of property, depriving an individual of his source of income could amount to a violation of Article 1, Protocol 1.<sup>28</sup>
35. Clause 18 also engages the right to work. ICESCR, Article 6 and CRFEU, Article 15 also provides that everyone has the right to work.<sup>29</sup>

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<sup>26</sup> NIHR "The Response of the Northern Ireland Human Rights Commission to the Department of Justice Consultation on Fine Collection and Enforcement", para 33.

<sup>27</sup> *Lallement v France*, Application no 46044/99, 11 April 2002

<sup>28</sup> *Lallement v France*, Application no 46044/99, 11 April 2002

<sup>29</sup> Charter of the Fundamental Rights of the European Union, (2000/C 364/01)

36. **The Commission recommends that regulations made under clause 18(6)(b) should provide that the responsible court takes into account the impact of a vehicle seizure order on an individual's employment to ensure that an individual is not deprived of their source of income in order and to comply with ECHR, Article 1, Protocol 1, ICESCR, Article 6 and CFREU, Article 15.**

### The Ombudsman

#### *Clause 28 The Prison Ombudsman for Northern Ireland*

37. The Commission welcomes Part 2 of the Bill which will place on a statutory footing the office of the Prison Ombudsman. The absence of a statutory basis for the Ombudsman is a long standing issue.<sup>30</sup>

#### *Clause 29 Main functions of Ombudsman*

38. The Commission notes that the main functions of the Prison Ombudsman do not include a general function to review prison conditions and carry out investigations on his or her own initiative. The functions listed in clause 29 are responsive either to a complaint, a death or a referral from the Department, the Bill currently does not allow for the Ombudsman to perform a pro-active role in investigating matters of systemic concern. In this regard, for example, the Commission notes clauses 8 and 9 of the Public Services Ombudsperson Bill which propose that the Public Service Ombudsman will have the power to investigate on his or her own initiative where there is reasonable suspicion of systemic maladministration or systemic injustice, subject to a number of procedural matters.

39. **The Commission advises that the Bill be amended to provide the Prison Ombudsman with a power to carry out investigations on his or her own initiative.**

40. The ECt.HR has developed extensive jurisprudence in relation to the treatment of prisoners. The ECt.HR has found that poor conditions of detention may amount to inhuman and degrading treatment, in violation of the ECHR, Article 3 (prohibition of inhuman or degrading treatment).<sup>31</sup> In addition a failure to provide an effective remedy which could be used to put an end to inhuman and degrading conditions of detention or to

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<sup>30</sup> 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>

<sup>31</sup> Ananyev and Others v Russia (Applications nos. 42525/07 and 60800/08) 10 January 2012

provide adequate and sufficient redress in connection with a related complaint may amount to a violation of the ECHR, Article 13 (right to an effective remedy).<sup>32</sup>

41. 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 Minimum Standard 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*".<sup>33</sup>

42. International human rights law requires therefore that prisoners be treated with dignity and have access to an effective remedy where their human rights have been abused. The Minimum Standard Rules envisage an independent body where a prisoner can direct a complaint to.<sup>34</sup>

43. The Commission notes that the Bill does not place a specific obligation on the Ombudsman to ensure the accessibility of the complaints procedure. The Commission notes the high proportion of prisoners with mental health problems and the low levels of literacy amongst the prison population.<sup>35</sup>

44. **The Commission recommends that the Committee consider the inclusion of an additional function within clause 29 to provide that the Ombudsman must promote understanding and awareness of its complaints procedures to ensure that they are accessible to all prisoner.**

## Complaints

### *Clause 30 Complaints and clause 31 Report of Investigation of Complaints*

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<sup>32</sup> Ibid

<sup>33</sup> Rule 57

<sup>34</sup> 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

<sup>35</sup> See generally CJINI and RQIA 'The Safety of Prisoners held by the Northern Ireland Prison Service' October 2014

45. The Commission notes that clause 30(5) makes provision for the enactment of Regulations which may amend the list of categories of complaints set out at clause 30(2)(a). The clause therefore empowers the Department to amend primary legislation by way of delegated legislation. Such a provision is classified as a 'Henry VIII Clause' and is a significant departure from the parliamentary process.

46. The UK Parliament Joint Committee on Human Rights has warned, with regard to Henry VIII clauses, that:

*"the power they purport to confer is so wide that it could be used to reduce legal protection for human rights without full parliamentary scrutiny".<sup>36</sup>*

47. The UK House of Lords Delegated Powers and Regulatory Reform Committee developed guidance on the use of Henry VIII powers in 2005, which states that:

*"All Henry VIII powers should be clearly identified. Although the Committee recognises that the appropriate level of parliamentary scrutiny for such powers will not be the affirmative procedure in all cases, where a Henry VIII power is subject to a scrutiny procedure other than affirmative, a full explanation giving the reasons for choosing that procedure should be provided in the memorandum".<sup>37</sup>*

The Commission acknowledges that under clause 46(3) a draft order under clause 30(5) must be laid before and approved by resolution of the Assembly.

48. The Commission recommends that the Committee seek an explanation from the Department as to why clause 30(5) is deemed necessary.

#### Deaths in custody

*Clauses 32 Investigations into deaths in custody and Clause 33 Report on investigation into death*

49. The Commission notes that investigating deaths in custody is one of the main functions of the Ombudsman. The right to life is protected by both the ICCPR, Article 14 and ECHR, Article 2. The ECHR, Article 2(1) states:

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<sup>36</sup> <http://www.publications.parliament.uk/pa/jt201314/jtselect/jtdraftdereg/101/10114.htm>

<sup>37</sup> <http://www.parliament.uk/documents/upload/DPRRguide.pdf>

*"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."*

50. The ECt.HR has ruled that the obligation to protect the right to life under article 2(1), read in conjunction with the State's general duty under Article 1 of the Convention to *'secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention'* requires by implication that there should be some form of effective official investigation when an individual is killed by the state.<sup>38</sup>

51. In the case of *Keenan v. UK* the ECtHR extended this procedural obligation to cases of death in custody, including self-inflicted deaths, the Court stated:

*" In the context of prisoners, the Court has already emphasised in previous cases that persons in custody are in a vulnerable position and that the authorities are under a duty to protect them. It is incumbent on the State to account for any injuries suffered in custody, which obligation is particularly stringent where that individual dies (see, for example, *Salman v. Turkey [GC], no. 21986/93, § 99, ECHR 2000-VII*). It may be noted that this need for scrutiny is acknowledged in the domestic law of England and Wales, where inquests are automatically held concerning the deaths of persons in prison and where the domestic courts have imposed a duty of care on the prison authorities in respect of those in their custody."<sup>39</sup>*

52. In its judgements the ECt.HR has elaborated on the essential elements of an effective investigation, these are:

- the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence'.<sup>40</sup>
- an investigation 'should be capable of leading to the identification and punishment of those responsible',<sup>41</sup> and as a result States

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<sup>38</sup> *McCann v UK* Series A, No 324, Application No 18984/91(1995).

<sup>39</sup> 27229/95 (2001) ECHR 242

<sup>40</sup> *Jordan v. The United Kingdom*, Application No. 24746/94, 04 August 2001, para 106; in respect of torture see *El-Masri v. The Former Yugoslav Republic of Macedonia*, Application No. 39690/09, 13 December 2012, para 184

<sup>41</sup> *Jordan v. The United Kingdom*, Application No. 24746/94, 04 August 2001, para 107



- 'must have taken the reasonable steps available to them to secure the evidence concerning the incident';<sup>42</sup>
- '[a] requirement of promptness and reasonable expedition is implicit',<sup>43</sup>
- 'there must be a sufficient element of public scrutiny of the investigation or its results';<sup>44</sup>
- 'the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests'.<sup>45</sup>

53. These principles have been endorsed in numerous judgements of the ECt.HR relating to Article 2 of the ECHR.<sup>46</sup>

54. The Commission notes that the State is required to provide an inquest when a death occurs in custody.<sup>47</sup> The Department of Justice has previously stated that one of the aims of the Prison Ombudsman's investigations is:

*"Assist the Coroner's inquest in achieving fulfilment of the investigative obligation arising under article 2 of the European Convention on Human Rights, by ensuring as far as possible that the full facts are brought to light and any relevant failing is exposed, any commendable action or practice is identified, and any lessons from the death are learned."*<sup>48</sup>

55. This is reflected at clause 32(2)(d) and at clause 33(1)(a) of the Bill. The Commission therefore notes that it is not intended that the Northern Ireland Executive will meet its obligation to ensure an effective investigation into deaths and serious injuries in custody by way of the investigations of the Police Ombudsman alone. A Coroner's inquest will be the principal mechanism for meeting this obligation, with the assistance of the Police Ombudsman and potentially alongside with a criminal investigation, where the circumstances require. The ECt.HR has stated

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<sup>42</sup> Jordan v. The United Kingdom, Application No. 24746/94, 04 August 2001, para 107; Aksoy v. Turkey, Application No. 21987/93, 18 December 1996, para 98; El-Masri v. The Former Yugoslav Republic of Macedonia, Application No. 39690/09, 13 December 2012, para 182-3

<sup>43</sup> Jordan v. The United Kingdom, Application No. 24746/94, 04 August 2001, para 108

<sup>44</sup> Jordan v. The United Kingdom, Application No. 24746/94, 04 August 2001, para 109

<sup>45</sup> Jordan v. the United Kingdom, Application No. 24746/94, 4 August 2011, para 109

<sup>46</sup> Andreou v. Turkey (application no. 45653/99) 27.10.2009

<sup>47</sup> Coroners Act (Northern Ireland) 1959

<sup>48</sup> DoJNI 'Consultation on a proposal to place the office of the Northern Ireland Prisoner Ombudsman on a statutory footing' 2014

that the form of the investigation '*may vary in different circumstances*'.<sup>49</sup> The ECt.HR has noted that '*whatever form the investigation takes, the available legal remedies, taken together, must amount to legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress.*'<sup>50</sup>

56. Noting that the investigation of the Prison Ombudsman will contribute towards the State meeting its Article 2 investigative obligation within this submission the Commission will analyse the clauses of the Bill relating to deaths in custody against the requirements of an effective investigation.
57. To ensure compliance with ECHR, Article 2 the Ombudsman must be able to secure relevant evidence concerning the incident leading to the death.<sup>51</sup> The Commission notes that under clause 36 the Ombudsman has powers to access premises and documents. It does not appear from clause 36 that the Ombudsman will have powers to interview individuals who may have information relevant to an investigation.
58. The Commission advises that following a number of judgements of the ECt.HR regarding the independence of processes for the investigation of conflict related deaths in Northern Ireland, the Committee of Ministers has recommended that the Police Ombudsman for Northern Ireland be able to compel former police officers to attend interviews.
59. The Commission acknowledges that under clause 36(4) it is a criminal offence for an individual to intentionally obstruct the Ombudsman in the carrying out of an investigation. However the Commission considers that the effectiveness of the Ombudsman's investigations would be augmented by empowering the office to compel witnesses for interview. This would be an easier way to ensure co-operation rather than having to pursue the matter through the courts.
60. **The Commission recommends, in light of the emphasis the Committee of Ministers have placed on investigators having the power to compel witnesses to ensure an effective investigation, that the Committee consider whether the Prison Ombudsman should be given a specific power to compel witnesses to assist in its investigations.**

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<sup>49</sup> McShane v. The United Kingdom, Application No. 43290/98, 28 May 2002 para 94 and Jordan v. The United Kingdom, para 105

<sup>50</sup> Ciobanu v. The Republic of Moldova, Application No. 62578/09, 24 February 2015, para 33

<sup>51</sup> Jordan v. The United Kingdom, Application No. 24746/94, 04 August 2001, para 107; Aksoy v. Turkey, Application No. 21987/93, 18 December 1996, para 98; El-Masri v. The Former Yugoslav Republic of Macedonia, Application No. 39690/09, 13 December 2012, para 182-3

61. Clause 32 obligates the Ombudsman to carry out an investigation into the death of a person at any prison in which they are held. Clause 32 does not place a requirement on the Ombudsman to initiate an investigation within a certain time period. However the Commission notes that the Ombudsman is subject to a general requirement to act efficiently, under clause 28(4)(a).

62. **The Commission advises that provided adequate resourcing is allocated, the statutory framework for the office of the Prison Ombudsman should provide prompt and expeditious investigations into deaths in custody.**<sup>52</sup>

*Clause 33 Report on investigation into death*

63. As set out previously the investigations into deaths must provide a sufficient element of public scrutiny.<sup>53</sup> The Commission notes that clause 33(7) will provide that Regulations "*may make provision ... enabling the Ombudsman to publish the whole or any part of a report*". The Commission considers that the Ombudsman should have the ability of his or her own volition to publish a report in whole or in part.

64. **The Commission advises that clause 33(7) be amended to provide that: "*Regulations must make provision as to the procedures to be followed in relation to reports under this section and must in particular include provisions ...enabling the Ombudsman to publish the whole or any part of a report*".**

65. Effective investigations into deaths in custody must provide for the involvement of the next of kin of the victim.<sup>54</sup> In this regard the Commission notes that when carrying out an investigation into a death the Ombudsman is required under clause 32(2) to ensure that an investigation addresses any concerns of the family of the deceased. In addition the Commission notes that the Ombudsman is required to report in writing on the outcome of an investigation to a relative of the deceased.

66. **The Commission welcomes the emphasis placed on the involvement of the family of a deceased person in an investigation into a death by the Prison Ombudsman.**

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<sup>52</sup> Jordan v. The United Kingdom, Application No. 24746/94, 04 August 2001, para 108

<sup>53</sup> Jordan v. The United Kingdom, Application No. 24746/94, 04 August 2001, para 109

<sup>54</sup> Jordan v. the United Kingdom, Application No. 24746/94, 4 August 2011, para 109

## Supplementary

### *Clause 37 - Disclosure of Information*

67. The State's investigative obligation extends to the prohibition on torture, inhuman and degrading treatment contained within Article 3 of the ECHR.<sup>55</sup> The ECt.HR has particularly found that where there are allegations of ill treatment where someone is in the custody of the state the investigative obligation arises.<sup>56</sup>
68. The Committee against Torture has commented on the UN Minimum Standard Rules and has recommended that the Rules be modified in line with the UN CAT, 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*".<sup>57</sup>
69. Where circumstances emerge that a prisoner has been seriously ill treated by a prison officer these should be addressed by way of a criminal investigation. The Commission notes that clause 37(1) empowers the Ombudsman to disclose information for the purposes of a criminal investigation.
70. The Commission notes section 58 of the Police (NI) Act 1998 which provides that: "*If the Ombudsman determines that the report indicates that a criminal offence may have been committed by a member of the police force, he shall send a copy of the report to the Director [of Public Prosecutions] together with such recommendations as appear to the Ombudsman to be appropriate*".
- 71. The Commission advises the Committee to consider whether a clause should be inserted into the Bill modelled on section 58 of the Police (NI) Act 1998 requiring the Prison Ombudsman to disclose to the PSNI where a report indicates that a criminal offence may have been committed.**

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<sup>55</sup> Assenov v Bulgaria (1998) 28 EHRR 652

<sup>56</sup> Ibid paragraph 102 – quote ""2. The Court considers that, in these circumstances, where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ...[the] Convention", requires by implication that there should be an effective official investigation. This investigation, as with that under Article 2, should be capable of ... "

<sup>57</sup> 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

72. The Commission notes that clause 37 contains a list of organisations to whom the Prison Ombudsman may disclose protected information to. The Northern Ireland Human Rights Commission is not listed under clause 37. The Commission is one of three UK National Human Rights Institutions with a mandate covering devolved and non-devolved matters in Northern Ireland. The Commission is empowered to carry out investigations and to enter places of detention with respect to an investigation.<sup>58</sup> The Commission has carried out a number of investigations relating to the human rights of prisoners and regularly engages with the Prison Ombudsman.<sup>59</sup>

73. **The Commission advises that clause 37 be amended to permit disclosure of protected information to the Commission for the purposes of the exercise of any functions of that office.**

#### Miscellaneous

##### *Clause 42- Possession of pornographic images of rape and assault penetration*

74. Clause 42 extends the existing offence of extreme pornographic images to include the possession of extreme images of rape and other non-consensual sexual penetration. This follows developments made in the rest of the UK.<sup>60</sup> For example, section 37 of the Criminal Justice and Courts Act 2015 amends the extreme pornography offence in the Criminal Justice and Immigration Act 2008 to cover the possession of extreme images of rape and assault by penetration.

75. The Commission welcomes clause 42. The Commission advises that the clause engages ECHR, Article 8 (which provides for the right to respect for private and family life) and Article 10 (which provides for the right to receive and impart information). Any interference with these rights must be for a legitimate aim, "in accordance with the law" and "necessary in a democratic society."

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<sup>58</sup> Northern Ireland Act 1998 section 69(c)

<sup>59</sup> NIHRC 'The Hurt Inside: The imprisonment of women and girls in Northern Ireland' (NIHRC Belfast: 2005). See also: NIHRC, 'Response to DOJNI Prison Estate Policy Consultation', December 2012

<sup>60</sup> See Explanatory Memorandum to the Bill, para 50

76. In the ECtHR case, *Opuz v Turkey*, the court held that interferences with private and family life of individuals may be necessary to protect the health and rights of others or to prevent the commission of criminal acts.<sup>61</sup>

77. The ICCPR, Article 19(2) provides that

*Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

78. The ICCPR, article 19(3) provides that the right to freedom of expression may be subject to certain restrictions, but shall only be such as provided by law and are necessary (a) for the respect of rights or reputations of others; or (b) for the protection of national security, public order, or of public health or morals.

79. The UN Human Rights Committee notes that:

*In relation to article 19, States parties should inform the Committee of any laws or other factors which may impede women from exercising the rights protected under this provision on an equal basis. As the publication and dissemination of obscene and pornographic material which portrays women and girls as objects of violence or degrading or inhuman treatment is likely to promote these kinds of treatment of women and girls, States parties should provide information about legal measures to restrict the publication or dissemination of such material.*<sup>62</sup>

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<sup>61</sup> *Opuz v Turkey*, Application No. 33401/02, 09.06.2009, para 144.

<sup>62</sup> General Comment no 28 on Article 3 (Equality of Rights between Men and Women) para 22.

80. Although yet to be ratified by the UK, the Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention) states:<sup>63</sup>

*Parties shall take the necessary legislative and other measures to promote and protect the right for everyone, particularly women, to live free from violence in both the public and the private sphere.*

81. The CEDAW Committee's General Recommendation No. 19 states:<sup>64</sup>

*Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms. ...*

82. The CEDAW Committee also stated:

*These attitudes also contribute to the propagation of pornography and the depiction and other commercial exploitation of women as sexual objects, rather than as individuals. This in turn contributes to gender-based violence.*<sup>65</sup>

83. The Commission notes the JCHR welcomed the provision of the Criminal Justice and Courts Bill dealing with the possession of extreme images of rape and other non-consensual sexual penetration. The JCHR stated:

*We consider that the cultural harm of extreme pornography as set out in the evidence provided to us by the Government and others, provides a strong justification for legislative action, and of the*

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<sup>63</sup> Article 4 of the Convention on Preventing and Combating Violence against Women and Domestic Violence, see <http://www.coe.int/t/dghl/standardsetting/convention-violence/convention/Convention%202010%20English.pdf>

<sup>64</sup> CEDAW Committee General Recommendation no. 19 "Violence against Women" 11<sup>th</sup> Session 1992, paras 11-12 available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>

<sup>65</sup> Ibid para 12

*proportionate restriction of individual rights to private life (Article 8 ECHR) and freely to receive and impart information (Article 10 ECHR).*<sup>66</sup>

**84. The Commission agrees with the conclusion of the JCHR that such an approach is a proportionate restriction of ECHR, Articles 8 and 10. Accordingly, the Commission welcomes clause 42 which extends of the offence of extreme pornography to include possession of pornographic images depicting rape and other non-consensual acts.**

85. The Criminal Justice and Courts Act 2015 created the new offence in of disclosing private sexual photographs and films with intent to cause distress, colloquially known as 'revenge porn'.<sup>67</sup> A person guilty of an offence would be liable on conviction on indictment to a term not exceeding 2 years or a fine or both, and on summary conviction to imprisonment for a term not exceeding 12 months, or a fine or both.<sup>68</sup> The Commission notes that the provisions were amendments made to the Bill in the Lords.<sup>69</sup> The offence extends to England and Wales.

86. The Commission notes that the Justice No. 2 Bill does not contain a similar provision. The Commission advises that a number of instruments are relevant in this context, including ECHR, Articles 8 and 10, the Istanbul Convention and General Recommendation No 19, CEDAW (see above).

87. The Commission notes that there is a duty on the State to ensure that, regardless of intent, Article 3(c) of the Optional Protocol to the Convention on the Rights of the Child (CRC) on the sale of children, child prostitution and child pornography is not violated. Article 3(c) requires state parties to ensure the offences of producing, distributing, disseminating, importing, exporting, offering, selling or possessing child pornography are fully covered under the criminal law.

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<sup>66</sup> JCHR "Legislative Scrutiny: (1) Criminal Justice and Courts Bill and (2) Deregulation Bill" para 1.50

<sup>67</sup> Section 33 and schedule 8 of the Criminal Justice and Courts Act 2015. Sections 34 and 35 are interpretative clauses.

<sup>68</sup> Section 33(9) of the Criminal Justice Act 2015

<sup>69</sup> See House of Commons Library "Criminal Justice and Courts Bill – Lords Amendments" (27 November 2014) SN/HA/7038, <http://researchbriefings.files.parliament.uk/documents/SN07038/SN07038.pdf>



88. Article 9(3) of the Optional Protocol to the CRC requires State parties to 'take all feasible measures with the aim of ensuring all appropriate assistance to victims of such offences, including their full social reintegration and their full physical and psychological recovery.'
89. Article 10(1) of the Optional Protocol to the CRC requires State parties to take all necessary steps to strengthen international co-operation by multilateral, regional and bilateral arrangements for the prevention, detection, investigation, prosecution and punishment of those responsible for act involving child pornography.
90. **The Commission recommends that due consideration is given to an amendment in the Bill to include the offence of disclosing private sexual photographs and films with intent to cause distress, giving due regard to CEDAW and the Optional Protocol to the CRC. This would bring the law into line with provision in England & Wales.**