

Guidance on Best Practice
relating to
Prisoners' Complaints
and Prison Discipline

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Judge Michael Reilly
Inspector of Prisons

10 September 2010

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Chapter 1

Introduction

- 1.1 All prisoners are entitled to make complaints. The prisoners' complaint procedure is governed by Rules 55 to 57 of the Irish Prison Rules 2007. The Prisons Act 2007 is silent on the complaints procedure.
- 1.2 Prison management is entitled to discipline prisoners for breaches of discipline contained in Schedule 1 of the Irish Prison Rules 2007. The prison disciplinary procedure is governed by Part 3 of the Prisons Act 2007 and Rules 66 to 68 of the Irish Prison Rules 2007. Sanctions for breaches of prison discipline are contained in Section 13 of the Prisons Act 2007.
- 1.3 Any complaints procedure or disciplinary procedure must be fair and transparent. There must be confidence in the system.
- 1.4 Over a period of 18 months I have been investigating the operation of both systems. If the systems operated in accordance with the laid down procedure as referred to in paragraphs 1.1 and 1.2 one might assume that the systems vindicated prisoners' rights and operated in accordance with our obligations to prisoners and best practice.
- 1.5 I found that the procedures in operation in Irish prisons relating to prisoners' complaints and the disciplining of prisoners fell short having regard to both criteria referred to at paragraph 1.4 and international best practice.
- 1.6 The purpose of this report is to give an overview of the current procedures, to give guidance having regard to our domestic and international obligations and best practice and make recommendations.
- 1.7 Chapters 2, 3 and 4 deal with prisoners' complaints and Chapters 5, 6 and 7 deal with prison discipline. These chapters follow the format set out in paragraph 1.6.

Chapter 2

Overview of current complaint procedures

- 2.1 Two parallel and independent systems should be in place to vindicate a prisoner's right to complain. Where a complaint suggests an illegal act this should be investigated by An Garda Síochána. Side-by-side with such an investigation a prisoner is entitled to make a complaint relating to the same incident to the prison authorities. This report only deals with the internal complaints procedure found in our prisons.
- 2.2 Prisoners can make a complaint to the Governor of the Prison, the Prison Visiting Committee, the Minister for Justice and Law Reform (hereinafter in this Report referred to as 'the Minister') or an officer of the Minister, a prison officer or any other person working in the prison. Following Ireland's ratification of various International Instruments prisoners can make a complaint to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter in this Report referred to as the 'CPT'), the United Nations Rights Committee and the United Nations Committee against Torture. Prisoners also have the same rights of access to the Domestic Courts and the European Court of Human Rights as other individuals.
- 2.3 I set out in paragraph 2.4 the general procedure followed when prisoners make complaints in Irish prisons. This is a general overview of the present complaints procedure. It may differ in certain aspects from prison to prison.
- 2.4 (a) When a prisoner makes a complaint he/she is issued with a prisoner complaint form. The prisoner, if he/she is sufficiently literate, writes out the nature of his/her complaint. On virtually all prisoner complaint forms that I examined I found the detail of the complaint minimal. Relevant details such as the names of witnesses, the circumstances leading to the complaint and other relevant information was rarely included. There is no dedicated person in the prison to assist prisoners complete a prisoner complaint form. They must rely on their own resources, help from a friend or assistance from a prison officer, chaplain or other

such person. The prisoner complaint form on completion is handed to the Governor.

- (b) The Governor of the prison delegates the investigation of the complaint to an officer not below the rank of a Chief Officer. The Chief Officer in many cases is the officer in charge of the landing or part of the prison relevant to the complaint or the landing or wing where the prisoner making the complaint is accommodated.
- (c) It is the general practice that a photocopy of the complaint form is issued to all prison officers referred to in the complaint or those rostered for duty in the area relevant to the complaint. Such officers are asked to supply their observations on the complaint made. There is no time limit by which such officers must respond. It is left to each prison officer to compile his or her statement. Such officers are not normally interviewed or questioned.
- (d) In the majority of the files I examined I could not find evidence of statements taken from other persons such as prisoners who might be potential witnesses.
- (e) The Chief Officer would view CCTV evidence if available. In certain cases he/she would make an assessment as to the relevance of such evidence. In certain cases he/she would take copies of such evidence and reduce parts to photographic stills.
- (f) When the Chief Officer has assembled the statements from the prison officers he/she completes a report of his/her investigation which will in many cases include his/her assessment of the situation and a recommendation. The Chief Officer's Report together with the original prisoner complaint form, the statements referred to above and any other evidence such as CCTV footage is then forwarded to the Governor of the prison.

- (g) In most cases the Governor makes a decision on the prisoner's complaint from the information in the file submitted to him/her by the Chief Officer. In most cases the Governor does not direct any further enquiries be made, does not take oral evidence and does not afford the prisoner a right of rebuttal. The Governor completes and signs the prisoner complaints form.
- (h) The prisoner is informed of the determination of his/her complaint by a nominated officer. He/she is handed a copy of the now completed prisoner complaint form which, *inter-alia*, advises him/her that he/she may appeal the determination by the Governor.
- (i) Side-by-side with the procedure outlined at (a) to (h) each prison maintains a prisoner complaints book. This book is meant to record, in short form, the name of the complainant, the nature of the complaint, the progress of the investigation and the ultimate determination of the complaint. There was no consistency across the prison estate as to the detail contained in such books. It was not possible on a perusal of such books to determine the state of any investigation. I brought this to the attention of the Irish Prison Service. A common prisoner complaints book is now in use in all prisons. Because of space restraints I have found that the information entered in such books is not sufficiently comprehensive in all cases to enable any regulatory authority have complete oversight of the investigation of any particular complaint.

2.5 During my inspection process I found that a significant number of complaints were marked withdrawn in the prisoners' complaints books. I also noticed that when a prisoner who had made a complaint was transferred to another prison or released the investigation of his/her complaint seemed to stop. There was never an investigation into the reasons why a prisoner withdrew his/her complaint. I brought my concerns to the notice of the Irish Prison Service. Since the introduction of new protocols by the Irish Prison Service in January 2010 referred to in paragraph 4.1 complaints now continue to be investigated

notwithstanding the transfer of a prisoner to another prison or his/her release. An investigation is now initiated when a prisoner withdraws a complaint.

- 2.6 I am aware that in certain cases prison officers against whom allegations of ill-treatment had been made were allowed remain in their present positions while the complaint was being investigated which meant that such officers were dealing with the prisoners who had made the complaint.
- 2.7 From my analysis of the prisoners' complaints books I was concerned to observe that An Garda Síochána were not always informed of complaints alleging criminal behaviour. Where the Gardaí were informed of a complaint alleging criminal behaviour and commenced an investigation the internal prison investigation seemed in most cases to be put on hold.
- 2.8 I spoke to many prisoners who informed me that even if they were dissatisfied with the Governor's decision they felt there was no point in appealing such a decision as they had no confidence in the appeals procedure.
- 2.9 At present the only avenue of appeal available to prisoners dissatisfied with a Governor's decision is to request a meeting with the Minister or an officer of the Minister. The *de facto* position is that when a prisoner appeals a Governor's decision it is appealed to the Director General of the Irish Prison Service being an officer of the Minister.
- 2.10 In a significant number of complaints the prisoners were unable to identify the officer or officers against whom they were complaining. Prison officers do not wear any form of identification. Many prisoners complained to me that they were at a disadvantage in this regard.

Chapter 3

Guidance on best practice for dealing with prisoners' complaints

- 3.1 Standards 119 to 126 of the *Standards for the Inspection of Prisons in Ireland*¹ are the relevant standards that apply to the prisoners' complaints process. This Chapter should be read in conjunction with and should act as an explanatory memorandum of such standards.
- 3.2 I have stated in a number of my reports that the deprivation of liberty is a punishment in itself. Whilst deprived of their liberty prisoners are still entitled to be treated with humanity and with respect for the inherent dignity of the human person and the State is obliged to treat prisoners in this manner. As prisons are closed environments prisoners are largely dependent on the State to exercise their rights on their behalf (those rights which have not lawfully been taken from them). It is, therefore, fundamental that prisoners are given an opportunity to make complaints/requests to the authorities and to independent bodies. The requirement of an effective complaints procedure together with oversight by an independent body are safeguards against the infliction of ill-treatment on persons deprived of their liberty and the infringement of their human rights.
- 3.3 In order for prisoners to make a complaint they must be aware of their entitlement to do so, who they are entitled to make a complaint to and how the complaints procedure operates. **Rule 35 of the United Nations Standard Minimum Rules for the Treatment of Prisoners and Rule 30 of the European Prison Rules** provide that on admission each prisoner should receive a copy of the rules governing the prison which should set out, *inter alia*, their rights and duties and the operation of the complaints process, in a language that he/she can understand. If prisoners are unable to read they should be informed orally². There should be a designated person in each prison to facilitate prisoners in making complaints.

¹ Inspector of Prisons Standards for the Inspection of Prisons in Ireland - 24 July 2009

² Rule 35(2), United Nations Standard Minimum Rules for the Treatment of Prisoners & Rule 30.1, European Prison Rules

3.4 The onus is on the State to ensure that prisoners' rights and obligations as contained in the Prison Rules are communicated effectively to them. The CPT have stated that:-

*"it is axiomatic that rights for persons deprived of their liberty will be of little value if the persons concerned are unaware of their existence"*³.

In this connection the **European Court of Human Rights** has recognised that a right to receive information exists as a corollary to **Article 10 of the European Convention on Human Rights** which enshrines the right of freedom of expression. In *Ciorap v Moldova*⁴, when considering an application under Article 3 (prohibition of torture or inhuman and degrading treatment or punishment), Article 8 (right to respect for private and family life) and Article 10 the Court stated that:-

*"to the extent that such information was vital for protecting the applicant's rights such as those guaranteed by Articles 3 and 8 of the Convention, the authorities' failure to give the applicant a copy of the prison rules has been taken into account when dealing with his complaints under those articles"*⁵.

The Court stated that as it looked at the prisoner's lack of information in relation to Articles 3 and 8 it would not be necessary to independently examine the complaint under Article 10. As the Court's jurisprudence is continuously evolving there is a possibility that in the future it may establish that a State's failure to provide prisoners with a copy of the Prison Rules may amount to an infringement of their rights under Article 10.

3.5 A prisoners' complaint system should, in certain circumstances have two aspects to it - one within the prison system and one independent of the prison system. **Rule 36 of the United Nations Standard Minimum Rules for the Treatment of Prisoners and Rule 70 of the European Prison Rules** give guidance on the internal complaints system.

³ CPT, Report to the Government of Turkey, CPT/Inf (99) 2 at para. 26,

⁴ 19 June 2007

⁵ at paragraph 122

According to these rules prisoners should have sufficient opportunity to make a request or a complaint to prison management. Solving a complaint through mediation is advocated where appropriate and only where that fails should formal proceedings go ahead⁶. All requests or complaints should be dealt with promptly and the prisoner should be informed of the outcome⁷. Prisoners should have a right to appeal the prison management's decision to an independent body⁸. Any internal investigation should not be dependent on the progress of any outside agencies' investigation. If a prisoner withdraws a complaint it should still be investigated and the reasons behind the withdrawal should also be examined. The Governor of the prison should oversee the operation of the prisoner complaints system.

3.6 In addition to an internal complaints system it is important that prisoners can make a complaint "in proper form" to a judicial authority or other independent and competent authority⁹. If the complaint is sent by written correspondence the prison authorities should not open this correspondence. **The European Court of Human Rights** has vigorously upheld a prisoner's right to correspond with the authorities stating in the case of *Campbell v UK* that this right can only be interfered with in exceptional circumstances¹⁰. The Court further stated that where it is necessary to open correspondence to verify the identification of the person or body being corresponded with it should only be done in the presence of the prisoner.

3.7 There are many variations of independent oversight bodies or regulatory authorities with jurisdiction over prisons to be found in Europe:- (a) Independent Lay Visiting Bodies, (b) a Prisoner Ombudsman, (c) a Quasi Judicial Body consisting of a Local Complaints Committee and a National Appeals Body, and (d) specialist Judges and Courts which deal exclusively with prisoners' complaints¹¹. The extent to which each type conforms with the criteria of a competent independent authority depends on the powers afforded to the

⁶ Rule 70.2 European Prison Rules

⁷ Rule 36(4) of the UN Standard Minimum Rules for the Treatment of Prisoners and Rule 70.3 of the European Prison Rules

⁸ Rule 70.3 of the European Prison Rules

⁹ Rule 36(3) of the UN Standard Minimum Rules for the Treatment of Prisoners

¹⁰ Judgement of 25th March 1992

¹¹ see Van Zyl Smit at p. 308-310

body, who it is appointed by, who it reports to and whether it has statutory backing or not.

- 3.8 The State is under an obligation to investigate all complaints made by prisoners. A distinction must be made between matters which could be dealt with locally by prison management perhaps through mediation and matters of a serious nature such as alleged ill-treatment of prisoners or the deprivation of their human rights which must be investigated in a fair, transparent and independent manner which inspires confidence. The importance of investigating allegations of ill-treatment was established by the **European Court of Human Rights** in *Assenov v Bulgaria* where the Court stated that :-

"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 leading to the identification and punishment of those responsible. If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity"¹².

- 3.9 The CPT is of assistance in its **14th General Report** detailing the criteria required for an effective investigation into alleged ill-treatment:-

- (a) The persons responsible for carrying out the investigation must be independent from those implicated in the allegation. The officials concerned must not be from the same service as those who are the subject of the investigation. The CPT favours a system whereby all allegations of ill-treatment are given to the

¹² Judgement of 28 October 1998, at para. 102

Prosecutor's Office who then decides whether an investigation is warranted. Similarly it considers that the Prosecutor's Office should exercise close and effective supervision of the operational conduct of an investigation into possible ill-treatment by public officials.

- (b) The investigation must be thorough. It must be capable of leading to a determination of whether force or other methods used were justified in the circumstances, and to the identification and, if appropriate, punishment of those concerned. The CPT has stated that this:-

*"is not an obligation of result but of means, that is that all reasonable steps be taken to secure evidence concerning the incident including inter alia to identify and interview the alleged victims, suspects and eye-witnesses, to seize instruments and to gather forensic evidence"*¹³.

- (c) The investigation must be conducted in a prompt and reasonably expeditious manner. This is self explanatory.
- (d) In order to secure accountability in practice as well as in theory there should be a sufficient element of public scrutiny of the investigation and/or its results. The victim must, in all cases, (or the next of kin if the victim is deceased) be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.
- (e) The CPT recognises that disciplinary proceedings provide an additional type of redress against ill-treatment and may take place in parallel to criminal proceedings. It further states that:-

¹³ 14th General Report on the CPT's activities CPT/Inf (2004) 28 at para. 33

*"disciplinary culpability of the officials concerned should be systematically examined, irrespective of whether the misconduct in question is found to constitute a criminal offence"*¹⁴.

It permits inquiries into possible disciplinary offences by public officials to be performed by a separate internal investigations department within the structures of the agencies concerned.

3.10 **The European Court of Human Rights** has emphasised the importance of effectively investigating credible allegations of ill-treatment, particularly where it may involve a violation of a prisoner's rights. In the case of *Labita v Italy* the **Grand Chamber of the Court**, when dealing with an application regarding ill-treatment by prison officers under Article 3, found, having regard to the lack of a thorough and effective investigation into the credible allegation made by the applicant, that there had been a violation of Article 3¹⁵. This finding was made despite a further finding that there was not sufficient evidence before the Court to enable it find that the treatment *per se* reached the level required in order to satisfy the requirements of torture or inhuman or degrading treatment or punishment.

3.11 The CPT, in its **Report to the Irish Government in 2006**, stated that:-

*"many prisoners did not have confidence in the complaints system and did not wish to file a complaint, even when it involved ill-treatment"*¹⁶.

The perceived fairness of a complaints system by prisoners is fundamental to its effectiveness in combating impunity and promoting a safe custodial environment. The prisoners must have faith in the system or they will be dissuaded from making a complaint thus frustrating the purpose of a complaints, system.

¹⁴ 14th General Report on the CPT's activities CPT/Inf (2004) 28 at para. 37

¹⁵ Judgement of 6 April 2000, at para. 136

¹⁶ CPT, at para. 37

- 3.12 **Rule 70.4 of the European Prison Rules** points out the importance of prison management ensuring that prisoners are not disadvantaged for exercising their right to make a complaint.
- 3.13 In addition to prisoners being entitled to make complaints prisoners' relatives or legal advisors should also be entitled to make complaints on behalf of prisoners¹⁷. **Rule 70 of the European Prison Rules** provides that the content of such complaints should be considered by prison management unless the prisoner does not consent to the making of the complaint.

¹⁷ Rule 70.5 of the European Prison Rules 2006

Chapter 4

Recommendations - Prisoners' complaints

- 4.1 In January 2010 the Irish Prison Service gave guidance to senior management in the Irish prisons for dealing with prisoners' complaints. This is a welcome step. This guidance set out protocols for investigating complaints specifying in particular the duties of senior management in each prison but all within the structures of the present complaints procedure as set out in Chapter 2 of this Report.
- 4.2 Following my review of best practice and having regard to our Domestic and International Obligations as set out in Chapter 3 it is clear that the procedures as detailed in paragraph 2.4 do not accord with best practice. As a general comment they cannot be said to be either fair or transparent for the following reasons:-
- (a) Many prisoners are disadvantaged because of literacy problems in being unable to adequately fill out prisoner complaint forms.
 - (b) Delegating the investigation of complaints to a Chief Officer in the prison and especially the Chief Officer in charge of officers who may be under investigation cannot be said to accord with best practice.
 - (c) Submitting photocopies of the prisoner's complaint to officers should not happen.
 - (d) The absence of a thorough investigation and the identification of other evidence or witnesses suggest an investigation that lacks transparency.
 - (e) Evidence harvested for an investigation must be properly preserved if it is to be used in any subsequent proceedings. There are no protocols in place to ensure that such is the case.
 - (f) The present procedure whereby Governors make decisions lacks transparency.
- 4.3 Prisoners' complaints can range from minor complaints that could be dealt with locally in the prison to major complaints which, at times, allege ill-treatment of prisoners or an infringement of their human rights.

- 4.4 There is no independent complaints body to which prisoners can make complaints. It is not within my remit to receive individual complaints or to investigate individual matters unless the Minister asks me to. The Prison Visiting Committee can receive complaints but they have no power to resolve such complaints and so do not satisfy the criteria for an independent complaints body. This leaves prisoners in a lacuna.
- 4.5 It is therefore essential that the procedure for investigating prisoners' complaints is fair, transparent and accepted as such by prisoners. It is not sufficient that regulatory authorities such as my office or the CPT have subsequent oversight of such systems. It is the systems, the procedures and the personnel involved in both that must be independent in order that a prisoners' complaints procedure can be seen to be fair and transparent.
- 4.6 There are many models of independent bodies that could be adopted. To promote debate one could look at the Irish Ombudsman's Office, the Garda Síochána Ombudsman Commission or Irish Ombudsman for Children. There are other models to be found internationally.
- 4.7 I have set out in detail the authorities that are relevant to give guidance on what is required in order that a prisoner complaints procedure could be developed which would be both transparent and have the support of prisoners, management and the general public. It is for the Irish Prison Service to develop appropriate procedures.
- 4.8 The Prison Act 2007 and the Irish Prison Rules 2007 would require amendment to give effect to the enhanced prisoner complaints procedure as referred to in paragraph 4.7. I am unable to give guidance as to the precise amendments as it is for the Minister to decide on the appropriate model.
- 4.9 I set out in paragraph 2.8 the present procedure for appealing a Governor's decision. This procedure is not in accordance with best practice. A proper Appeals Procedure should be put in place.

- 4.10 All prisoners' complaints must be dealt with expeditiously. The gathering of evidence must be immediate. The reason is that relevant evidence may be lost, relevant witnesses may be moved, transferred or released. All evidence including CCTV, forensic and medical evidence must be harvested. Possible witnesses must be identified.
- 4.11 Protocols should be put in place to ensure that prison officers against whom allegations of ill-treatment have been made are not left in positions where they are in contact with the prisoner making the complaint during the period of the investigation.
- 4.12 No matter what complaints procedure is in place a dedicated person or persons should be appointed in each prison whose duty it is to assist prisoners in making complaints. These people should be independent in that they should not be involved in any way with either the prisoner making the complaint or the persons complained of.
- 4.13 All prison officers should wear some form of identification at all times when they are on duty. I have drawn attention to this in the past. In my Annual Report 2008, I recommended that all prison officers should wear some form of identification. This could be similar to the identification numbers worn by members of An Garda Síochána. This should be attended to as a matter of urgency.

Chapter 5

Overview of current prison discipline procedures

- 5.1 Prison disciplinary procedure is governed by Part 3 of the Prisons Act 2007 and Rules 66 to 68 of the Irish Prison Rules 2007. Acts which amount to breaches of prison discipline are contained in Schedule 1 of the Irish Prison Rules 2007. Sanctions for breaching prison discipline are contained in Section 13 of the Prisons Act 2007. In 2006 the Irish Prison Service, by circular, informed all Governors how disciplinary hearings should be conducted.
- 5.2 When a prisoner breaches prison discipline the prison officer who witnessed the breach reports same to the Governor in writing. The Governor has discretion as to whether or not to hold a disciplinary enquiry into the alleged breach.
- 5.3 If the Governor decides to hold an enquiry the prisoner is informed in writing of the nature of the alleged breach. The time frame for holding the enquiry is between one and seven days after the prisoner has received notice. The prisoner and the relevant prison officer attend the hearing. The Governor informs the prisoner of the nature of the allegations against him/her and the prisoner is given a chance to respond. The officer may also give evidence. Other evidence including CCTV may be adduced. The Governor records all details, responses and submissions on the disciplinary form referred to as a **P19** form. The prisoner is entitled to call a witness or witnesses and to have an interpreter present if necessary. If the Governor makes a determination that the prisoner has breached a prison rule the prisoner is entitled to make plea in mitigation before any sanction is imposed. The Governor informs the prisoner of the sanction imposed.
- 5.4 The Governor has authority to impose a range of sanctions including the sanction of loss of remission of not more than 14 days. Other authorised sanctions include, *inter alia*, confinement to a cell for not more than 3 days, prohibiting the prisoner from engaging in specified activities or having contact with his/her family and friends for not more than 60 days.

- 5.5 The Governor is obliged to complete the **P19** Form and sign same.
- 5.6 Section 14 of the Prisons Act 2007 provides, *inter alia*, that a prisoner who is found by a Governor to have committed a breach of prison discipline and on whom a sanction under Section 13 has been imposed may within 7 days of its imposition petition the Minister concerning the finding or sanction or both finding and sanction. The Minister may after consulting the Governor affirm, modify, suspend (subject to any specified terms or conditions) or revoke the sanction and cause the petitioner to be notified accordingly.
- 5.7 Section 15 of the Prisons Act 2007 provides, *inter alia*, that a prisoner who was found by a Governor to have committed a breach of prison discipline and on whom a sanction of forfeiture of remission of portion of his or her sentence has been imposed may appeal such finding and or sanction to an Appeal Tribunal.¹⁸ An Appeal Tribunal is independent in the performance of its function.¹⁹ The prisoner is entitled to attend the hearing before the Appeal Tribunal and is entitled to avail of legal aid.²⁰ The Appeal Tribunal has wide powers.
- 5.8 During my inspection of **P19** forms I found inadequate detail relating to:-
- (a) Whether the disciplinary procedure was explained to the prisoner and whether the prisoner understood same,
 - (b) the evidence given,
 - (c) whether and how the evidence was cross-examined,
 - (d) whether adequate enquiries were made relating to other evidence such as CCTV evidence and or witnesses,
 - (e) Governor's findings and remarks,
 - (f) whether the prisoner made a plea in mitigation and what it was, and

¹⁸ Prisons Act 2007, Sect. 15

¹⁹ Prisons Act 2007, Sect. 16(2)

²⁰ Prisons Act 2007, Sect. 15(4)(b)

- (g) whether the prisoner understood that there was an appeals procedure and whether this procedure was explained to him/her.

I found that the sanctions imposed varied greatly from prison to prison and even within the same prison. There is no 'tariff' structure for sanctions either in individual prisons or across the prison system.

- 5.9 A frequently used sanction is loss of all privileges for 56 days. This could amount to *de facto* solitary confinement for that period. For serious infractions of the Prison Rules I found that prisoners were sometimes transferred to Cork Prison, the Midlands Prison or Portlaoise Prison which all have dedicated disciplinary units. Prisoners who are subject to disciplinary sanctions in these units are mainly subject to a loss of all privileges and are therefore held in *de facto* solitary confinement.
- 5.10 In certain prisons I found large numbers of **P19** forms which related to what might be termed trivial acts or conduct on the part of prisoners.
- 5.11 In a significant number of cases disciplinary proceedings were taken against prisoners who had lodged complaints alleging ill-treatment. In none of these cases could I ascertain whether the evidence relevant to the alleged ill-treatment formed part of the evidence in the disciplinary proceedings. This was because of inadequate information on the **P19** forms.
- 5.12 On talking to prisoners, many of them and the majority of younger prisoners, were not aware of how the disciplinary system operated or as to their rights in that regard.
- 5.13 It was evident from both talking to prisoners and looking at the **P19** forms that prisoners were not inclined to appeal a Governor's decision. There are a number of reasons for this of which the following are the most important:-

- (a) the majority of prisoners are not aware of their rights of appeal or the procedures to be followed when appealing,
- (b) the majority of prisoners have no confidence in the appeals system, and
- (c) most sanctions imposed take effect immediately regardless of whether a prisoner is appealing.

Chapter 6

Guidance on best practice for dealing with prison discipline

- 6.1 Standards 191 to 196 of the *Standards for the Inspection of Prisons in Ireland*²¹ are the relevant standards that should apply to the prison discipline system. This Chapter should be read in conjunction with and should act as an explanatory memorandum of such standards.
- 6.2 The maintenance of discipline in a prison is necessary in order to provide safe and secure custody so long as there are clear disciplinary procedures in place, the breaches of prison discipline and the sanctions for such breaches are clearly set out and the disciplinary procedure is not used arbitrarily. The prison discipline system can affect the way in which prisoners perceive the fairness of the prison regime.
- 6.3 In its **2nd General Report** the CPT highlighted the importance of having a transparent disciplinary system stating at paragraph 55 that:-
- "it is also in the interests of both prisoners and prison staff that clear disciplinary procedures be both formally established and applied in practice; any grey zones in this area involve the risk of seeing unofficial (and uncontrolled) systems developing".*
- 6.4 **Rule 56 of the European Prison Rules** states that disciplinary mechanisms should be mechanisms of last resort and, where possible, mediation should be used to resolve disputes.
- 6.5 According to **Rule 57 of the European Prison Rules** there are 5 elements to a prison discipline system that should be determined by National Law:-

²¹ Inspector of Prisons Standards for the Inspection of Prisons in Ireland - 24 July 2009

- (a) *"the acts or omissions by prisoners that constitute disciplinary offences;*
- (b) *the procedures to be followed at disciplinary hearings;*
- (c) *the types and duration of punishment that may be imposed;*
- (d) *the authority competent to impose such punishment; and*
- (e) *access to and the authority of the appellate process."*

In paragraphs 6.6 to 6.26, I outline the obligations owed by the State to prisoners under International best practice with regard to each element.

(A) The acts or omissions by prisoners that constitute disciplinary offences

6.6 I stated at paragraph 3.4 that prisoners should be informed of the Prison Rules and their rights and obligations under them. It follows that prisoners should be aware of what is expected of them and of the sanctions they can expect if they fail to respect these requirements.

6.7 **Rule 57.1 of the European Prison Rules** states that:-

"only conduct likely to constitute a threat to good order, safety or security may be defined as a disciplinary offence".

The Rules do not give details regarding conduct that should or should not constitute a disciplinary offence.

6.8 The CPT has given guidance as to legitimate disciplinary offences in their various reports. The following extracts are of relevance:-

- (a) **Report on the UK, CPT/Inf (2000) 1** stated at paragraph 151 that the making of false and malicious complaints against a prison officer should not be regarded as a

disciplinary offence as it could, under certain circumstances, deter prisoners from making a genuine complaint.

- (b) **Report on Turkey, CPT/Inf (2002) 8** stated at paragraph 119 that self-harm should not constitute a disciplinary offence.

6.9 **Rule 55 of the European Prison Rules** highlights the importance of alleged criminal acts committed in prison being referred to, investigated and dealt with by the relevant authority.

(B) The procedures to be followed at disciplinary hearings

6.10 I stated at paragraph 6.3 that the CPT has highlighted the importance of having "clear disciplinary procedures" to prevent unofficial systems from developing. As regards the form disciplinary procedures should take it has given the following advice:-

- (a) prisoners should be informed in writing of the charges against them,
- (b) prisoners should have sufficient time to prepare their defence,
- (c) prisoners should be allowed to cross examine evidence given against them,
- (d) prisoners should be allowed to call witnesses on their behalf, and
- (e) prisoners should be allowed to make a plea in mitigation before the imposition of any penalty²².

In their **2nd General Report** at paragraph 55 the CPT stated that:-

"disciplinary procedures should provide prisoners with a right to be heard on the subject of the offences it is alleged they have committed."

²² CPT Report to the Government of Ireland, CPT/Inf (2007) 40 at para. 88

6.11 The jurisprudence of the **European Court of Human Rights** is of significant relevance. In the case of *Campbell and Fell v UK*²³ the European Court of Human Rights had to determine whether a prison disciplinary offence should be regarded as a "criminal charge" in order to afford prisoners the due process safeguards as provided for under Article 6 of the European Convention on Human Rights. Article 6 provides for the right to a fair trial. The text of Article 6 is attached at **Appendix 1** of this Report. The criteria as to what constitutes a "criminal charge" under Article 6 was laid out in the case of *Engel and Others v the Netherlands*²⁴ which involved military discipline proceedings. The European Court of Human Rights (Commission at that time) considered that a:-

"criminal charge was an autonomous concept, independent of its classification in a domestic legal system".

The Court laid out 3 requirements that would determine whether a matter could be classed as a "criminal charge"; (a) how the matter was designated in National Law, (b) the nature of the offence, and (c) the nature and degree of the severity of the penalty.

6.12 In *Campbell and Fell v UK* the Court considered that where a prisoner was subject to prison discipline proceedings which might lead to a deprivation of liberty there was a strong presumption that the proceedings were substantively very similar to a criminal trial and for that reason attracted the due process requirements of a fair trial as set out in Article 6. The Court, at paragraph 72, stated:-

"by causing detention to continue for substantially longer than would otherwise have been the case, the sanction came close to, even if it did not technically constitute, deprivation of liberty and the object and the purpose of the Convention require that the imposition of a measure of such gravity should be accompanied by the guarantees of Article 6."

²³ 7 EHRR 165

²⁴ 1 EHRR 647

6.13 The protections afforded to prisoners appearing before a prison disciplinary hearing were strengthened in the case of *Ezeh and Connors v UK*²⁵. The European Court of Human Rights determined that where a potential sanction for a prison disciplinary breach is a loss of remission the defendant is entitled to legal representation before a prison disciplinary hearing. In this case the maximum penalties that could have been imposed had been 42 days loss of remission and the actual sanctions imposed were 40 days and 7 days respectively. **The Grand Chamber of the Court** found, at paragraph 129, that:-

"the deprivation of liberty which were liable to be, and which actually were, imposed on the applicants cannot be regarded as sufficiently unimportant and inconsequential as to displace the presumed criminal nature of the charges against them".

The result of this case means that in practice where there is a possibility that a prisoner, who is subject to disciplinary proceedings, could lose remission as a sanction he/she is entitled to the due process requirements under Article 6 of the European Convention on Human Rights. This position was confirmed by the European Court of Human Rights in the cases of *Young v UK*²⁶ where the prisoner received a sanction of 3 days loss of remission and *Black v UK*²⁷ where the prisoner received a sanction of 5 days loss of remission.

6.14 **Rule 59 of the European Prison Rules** gives further guidance as to how the disciplinary process should proceed stating that:-

"Prisoners charged with disciplinary offences shall:

- (a) be informed promptly, in a language which they understand and in detail, of the nature of the accusations against them;*
- (b) have adequate time and facilities for the preparation of their*

²⁵ 39 EHRR 1

²⁶ Application No. 60682/00, Judgement of 16 January 2007

²⁷ Application No. 56745/00, Judgement of 16 January 2007

defence;

- (c) *be allowed to defend themselves in person or through legal assistance when the interests of justice so require;*
- (d) *be allowed to request the attendance of witnesses and to examine them or to have them examined on their behalf; and*
- (e) *have the free assistance of an interpreter if they cannot understand or speak the language used at the hearing."*

(C) The types and duration of punishment that may be imposed

6.15 **Rule 60 of the European Prison Rules** provides that punishments shall be in accordance with National Law, the severity of the punishment shall be proportionate to the offence, all forms of inhuman and degrading punishments shall be prohibited, punishment shall not include a total prohibition on family contact, solitary confinement shall only be imposed as punishment in exceptional circumstances for as short a time as possible and instruments of restraint shall never be applied as a punishment.

6.16 In their various reports the CPT has elaborated on what it considers inappropriate sanctions. The following extracts from the reports of the CPT are of relevance:-

- (a) **Report on Ireland CPT/Inf (2007) 40** at paragraph 92 the CPT criticised the imposition of loss of all privileges for up to 56 days stating that this amounted to *de facto* solitary confinement. It further stated at paragraph 94 that:-

"although the implementation of a regime under which prisoners are segregated from others for prolonged periods may, in exceptional cases, be justified for reasons of order and security, the application of such a measure as a punishment is unacceptable".

(b) **2nd General Report of the CPT CPT/Inf (92) 3** at paragraph 56 the CPT cautioned that solitary confinement can, in certain circumstances, amount to inhuman and degrading treatment and where used shall be for as short a time as possible.

(c) **Report on Ireland CPT/Inf (2007) 40** stated at paragraph 95 that:-

"visits between a prisoner and his relatives should under no circumstances be withdrawn for a prolonged period".

This is reiterated in **Rule 60.4 of the European Prison Rules** which states:-

"Punishment shall not include a total prohibition on family contact".

(d) **Report on Azerbaijan CPT/Inf (2009) 28** stated at paragraph 53 that any restrictions on family contacts as a form of punishment should be used only where the offence relates to such contacts.

6.17 Various International Instruments prohibit the use of solitary confinement as a punishment for juveniles due to the deleterious effects it may have²⁸. The importance of juveniles maintaining contact with their families is stressed by many International Instruments which advocate that only in exceptional circumstances, and having due regard to the best interests of the juvenile, shall contact between a juvenile and his/her family be withdrawn as a disciplinary measure²⁹.

6.18 The **European Court of Human Rights** considers loss of remission to be a most serious sanction stating in the case of *Campbell and Fell v UK* (which was followed in the case of *Ezeh and Connors v UK*) that:-

²⁸ CRC 3(1) & 37(c), SMR 37, RPJDL 67, EPR 60.5, ERJO 8, 49.1 & 95.3

²⁹ CRC 3(1) & 37(c), SMR 27, 79 & 80, RPJDL 67, EPR 24.2 & 60.4, ERJO 8, 49.1 & 95.6

*"the practice of granting remission... creates in him (the prisoner) a legitimate expectation that he will recover his liberty before the end of his term of imprisonment. Forfeiture of remission thus has the effect of causing the detention to continue beyond the period corresponding to that expectation"*³⁰.

It follows that loss of remission as a disciplinary sanction should be used parsimoniously and only for the most serious breaches.

6.19 In England and Wales loss of remission is imposed as a sanction for a breach of prison discipline only for the most serious offences, e.g. assaulting a prison officer.

6.20 **Rule 63 of the European Prison Rules** states that prisoners should not be punished twice for the same act or conduct.

(D) The authority competent to impose such punishment

6.21 I stated at paragraph 6.12 that it was established in *Campbell and Fell v UK* that the due process protections under Article 6 of the European Convention on Human Rights apply to prison disciplinary hearings. Article 6(1) requires a tribunal to be "independent and impartial".

6.21 The independence and impartiality of a tribunal consisting of a Board of Visitors was examined in *Campbell and Fell v UK*. The European Court of Human Rights found that the body was sufficiently independent and impartial.

6.22 The independence of a disciplinary tribunal was resolved by the European Court of Human Rights, in a prison context, in *Whitfield and Others v United Kingdom*³¹. The applicants had been found guilty of disciplinary offences and lost remission. The applicants complained that the Governor was not independent and so were denied their

³⁰ *Campbell and Fell v UK*

³¹ Application No. 46387/99) Judgement of 12 April 2005

right to a fair hearing under Article 6(1). The Court found that since the prosecution, investigation, adjudication and sentencing of the applicants had all been carried out by the Governor, who was answerable to the Home Office (which was responsible for the operation of the Prison Service), it could not be said that there was structural independence between those charged with the roles of prosecution and adjudication. The Court thus found that the Governor did not satisfy the requirements of Article 6.

6.23 The English Prison Rules were amended to bring English Domestic Law into line with the jurisprudence of the European Court of Human Rights. The rules now provide that the Governor must at the outset determine whether the charge against the prisoner is so serious that he/she could lose remission if found guilty. If this is the case the Governor must refer the case to an independent adjudicator. The adjudicator is a District Judge. Prison Governors investigate all other cases.

(E) Access to and the authority of the appellate process

6.24 **Rule 61 of the European Prison Rules** requires that:-

"a prisoner who is found guilty of a disciplinary offence shall be able to appeal to a competent and independent higher authority."

6.25 At paragraph 55 of their **2nd General Report** the CPT stated that prisoners should have a right to:-

"appeal to a higher authority against any sanctions imposed."

6.26 Although Article 6 of the European Convention on Human Rights does not refer to a right to appeal³² the European Court (Commission at the time) of Human Rights stated in

³² A right of appeal for criminal cases is contained in Article 2 of Protocol 7 of the Convention.

*Delcourt v Belgium*³³ that where an appeals procedure is provided for in Domestic Law the fair procedure guarantees contained in Article 6 are applicable.

³³ 17th January 1970, at para. 25

Chapter 7

Recommendations - Prison Discipline

- 7.1 The Department of Justice and Law Reform and the Irish Prison Service should ensure that all prison disciplinary procedures conform to best practice as set out in Chapter 6 of this Report. This will require amendments to the Prisons Act 2007 and the Irish Prison Rules 2007.
- 7.2 Consideration should be given to the setting up of an independent complaints system to deal with complaints where a determination could result in loss of remission. As I pointed out at paragraph 6.23 the English Prison Rules have been amended to address this situation. In this Country this issue was addressed in the context of disciplinary proceedings in the Armed Forces by the amendment of the relevant Act.
- 7.3 Legal representation should be available to prisoners involved in disciplinary proceedings which could result in loss of remission and not just in the appeal process as at present.
- 7.4 The disciplinary procedure applied to adult prisoners should be transparent and standardised across the entire prison estate. Prisoners should be made aware of the rules of the prison and of the consequences of breaking such rules.
- 7.5 The Irish Prison Service and local management should be aware that in certain aspects the disciplinary procedure and sanctions that apply to juveniles are different to those which apply to adults.
- 7.6 Prison Governors should be conscious that only conduct likely to constitute a threat to good order, safety or security is defined as a disciplinary offence. Greater efforts should be made to resolve issues by mediation. This would lead to greater confidence in the system.

- 7.7 Prison Governors should be aware of their obligations when imposing sanctions that could amount to virtual solitary confinement.
- 7.8 Punishment 'tariffs', especially in the same prison should be consistent.
- 7.9 Prison Governors should adhere strictly to the laid down procedures for dealing with disciplinary matters and should in particular ensure that comprehensive records are maintained.

ARTICLE 6 of the European Convention on Human Rights - Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:-
 - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and facilities for the preparation of his defence;
 - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - (d) to examine and to have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.