Response to the Draft Prison and Young Offender Centre Rules (Northern Ireland) 1994

Prepared by the Committee on the Administration of Justice

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Introduction

The Committee on the Administration of Justice (CAJ) is encouraged by several elements of these draft Rules. We welcome the trend reflected in the draft towards a more accountable Prison Service and the extent of the consultation exercise which the Prison Service has undertaken in respect of these Rules. Among the specific provisions we are especially encouraged by the inclusion of a set of general principles (Rule 2), a specific rule on the needs of foreign nationals (Rule 24), the recognition of education as a regime activity deserving of payment (Rule 52), the emphasis on the objective of maintaining family contact (Rule 65), and the recognition of cultural and religious differences in the provision of food (Rule 82). Overall however we feel that the draft still falls well short of providing an appropriate legal framework for the regulation of prisons. In large part this is because the development of new Prison Rules is not accompanied by a new Prison Act. The Prison Act (Northern Ireland) 1953 is 29 years older than the current Prison Rules and even more in need of review. Only with the passing of a new Prison Act can the rights of prisoners be given effective legal protection. We would urge the Northern Ireland Office to give immediate attention to this issue.

Nevertheless even without an Act guaranteeing legally effective rights there is much that the Prison Rules can do to ensure that the rights guaranteed to prisoners by

international instruments are respected by the prison administration. Respecting such rights is in itself central to good prison administration. Ignoring or violating prisoners' rights is a recipe for disorder in any prison. In this respect we feel that the draft Rules is disappointing in a number of aspects. In particular it fails to ensure that the prisoner's right to a fair hearing - to hear information adverse to him or her, to be given reasons for decisions and to have an opportunity to challenge them - is fully respected as regards many key decisions affecting prisoners' lives. It leaves the authorities power to intrude on the small realm of privacy left to prisoners (for example by searches or mail censorship) on the basis of vague and ill defined criteria. It fails to offer an adequate response to the acknowledged problem of what to do with the prison disciplinary system and it does little to improve prisoners' access to independent and effective means of dealing with grievances. These criticisms are explored in more detail in relation to specific draft rules below. A final introductory point is to note that both men and women are detained in prisons and make visits to prisons. To reflect this the Rules should contain more gender equal or gender neutral language. We note that this point has been taken on board in the drafting of other codes of practice, for example those pertaining to the powers of Authorised Investigators who operate under the Northern Ireland (Emergency Provisions) Act 1991.

Rule 1

The CAJ has no objection in principle to the combining of the Prison and Young Offender Centre Rules into one document. However we feel that it is vital that this should not lead to a deterioration in the treatment of young offenders or a failure to respect the obligations contained in Article 10(3) of the International Covenant on Civil and Political Rights that "Juvenile Offenders shall be separated from adults and accorded treatment appropriate to their age and legal status". It is therefore

important that regimes for young offenders do not simply replicate those for adult prisoners. We are not convinced that this is always ensured by these draft rules.

Rule 2

As indicated above we welcome the decision to include a list of general principles and we are especially encouraged by the commitment contained in draft Rule 2(1)(i). We still feel, however, that such principles should be included in a primary statute. Turning to the principles themselves we are of the view that in draft Rule 2(1)(i) could be tightened by referring not to "otherwise in the interests of safety etc." but instead to "as are necessary for the interests of safety etc.". The current formulation is too subjective and suggests that a prisoner's rights may be ignored once a safety or security interest is raised. There is no indication of an objective balance between rights and security. We are also concerned that the draft set of principles includes no general commitment to giving prisoners reasons for decisions affecting them (apart from the implication of draft Rule 2(1)(e)'s indication that "where appropriate" prisoners will be able to "contribute" to decisions affecting them). The Home Office, in its response to Woolf indicated that prisoners should normally be given reasons. If the objectives of draft Rule 2(1)(b) are to be achieved giving reasons would seem to be essential. A final thought in this area is that the inclusion of a commitment to respect international standards, such as those contained in the European Prison Rules or the UN Body of Principles for the Treatment of all People in Detention might have provided another independent benchmark by which to evaluate implementation of the Rules.

Rule 6

We welcome the idea of a staff code of conduct. This will be of value to both staff and prisoners. Our concerns here are by way of clarification. Will this code apply to

governors and prison service headquarters staff and will it be made available to prisoners?

Rule 7

This remains a disturbingly broad power, especially as it appears to permit the suspension of all Prison Rules whenever the Secretary of State chooses to do so. The explanatory memorandum indicates that this will only be in exceptional circumstances but this is not ensured by the wording of the rule. Would it permit even the rules on reasonable use of force to be disregarded if the Secretary of State were to declare an emergency? In international human rights law on state of emergency regimes there is a need for objective criteria as to when an emergency can be declared, objective scrutiny of the powers invoked under it and a list of rights which may not be ignored during an emergency. Similar principles should apply here. Some provisions, such as those on medical treatment, disciplinary punishments and the use of force should be declared to have force regardless of the emergency situation. The Secretary of State should have to direct his or her mind to certain criteria, before declaring an emergency for example that the safety and security of the prison cannot be maintained without the invocation of emergency powers.

Rule 9

We are encouraged to see the introduction of some criteria into the exercise of classifying prisoners. However the use of a criteria such as "temperament" remains disturbingly vague. How is a prisoner's "temperament" to be assessed and by whom? In view of the use of such criteria it is especially disturbing that this Rule contains no reference to a prisoner being able to see any of the reports which form the basis of his or her classification, having an opportunity to challenge those reports

or make representations, or being given reasons for any classification decision. The English High Court in the Duggan case has indicated that those classified into Category A should at least be given the gist of information adverse to them. It is disappointing to see Northern Ireland falling behind England in this regard.

Rule 11

In most respects this draft Rule provides more detail on issues of accommodation than was available in the previous Rule. However it still lacks the precision of the European Prison Rules (EPR) on matters such as access to toilets and showers (EPR's 17 and 18). Moreover while draft Rule 11(4) refers to "minimum standards required for the preservation of health" it is not clear where such minimum standards are derived from. More detail could have been supplied on such matters in the Rule. At the very least there should be a precise reference to where such information can be found. There is no discussion of whether a code of standards is to be devised and to whom it might be available. A similar criticism can be applied to draft Rules 12-13. Again reference to a more detailed code would have enhanced the value of such Rules.

Rule 16

This is one of the most unsatisfactory elements of the proposed Rules. The Rule retains the hopelessly vague basis of "as the governor may order" as the criteria for ordering what can be, and has in fact often proved to be, a severe invasion of the minimal level of privacy that prisoners retain. It is our view that there needs to be a distinction made in the levels of intrusiveness of searches, with a higher level of justification required the more intrusive a search becomes. Thus cell searches should be distinguished from frisk searches and strip searches. It is intolerable that such an extensive invasion of a person's dignity as a strip search can be authorised

without even a requirement that they are reasonably suspected of concealing something. There also needs to be a gradation of authority with regard to authorising a search. General searches of a prison, for example, should require the authorisation of a Minister of State.

We are concerned that the draft Rule indeed may mark a retreat from the very limited protection given in the current Rule 9. The introduction of draft Rule 16(4) seems to authorise what would otherwise be assault on the flimsy ground that a governor feels that it is necessary. There is no requirement of reasonable suspicion that the prisoner has something concealed on their person or that a strip search is the only method whereby it may be detected. We are also concerned that only the authorisation of "a governor" as opposed to the main governor of the prison is required. A second retreat appears in that draft Rule 16 seems to require that strip searches be conducted out of "the sight of" other officers or prisoners whereas old Rule 9(5) refers to being "in the presence of". The explanatory memorandum still refers to searches only being in the presence of officers of the same sex so it is difficult to see the purpose of altering the wording.

Rule 21

While it is encouraging to see a rule change to ensure that a prisoner has a more immediate medical examination we feel that draft Rule 21(2) should indicate that the "officer" referred to is a medically trained officer. Examination by an officer without medical training might be of limited medical value.

Rule 23

The commitment to providing information to prisoners remains a rather thin provision. While we welcome the commitment to providing prisoners with information we feel that it is important that prisoners be facilitated when they wish to find out

things which they have a legitimate right to know. There is, for example, no commitment to giving prisoners a copy of the rules on arrival in prison or to making available Standing Orders or Circular Instructions. While draft Rule 23(4) provides for prisoners being able to consult the Rules at a "reasonable time", this is an unnecessary limitation and is likely to provide occasion for petty disputes. Providing prisoners with a copy of the Rules may reduce mistrust and suspicion that decisions of the authorities are arbitrary. It would facilitate the sense that the Rules are a set of standards for all those who live and work in the prison rather than something "owned" purely by the authorities who may select which rules to apply. Most of the Standing Orders and a significant number of circular instructions are now available in prisons in England and Wales. It is disappointing to find that this is another aspect in which Northern Ireland appears to be falling behind.

Rule 24

As indicated above we are pleased to see this provision in relation to the treatment of foreign nationals. To strengthen this we would recommend that information for prisoners be made available in a number of minority languages and that a prohibition on racist conduct be included in the code of conduct.

Rule 25

We welcome the provision in Draft Rule 25(4) relating to the conditions for the transport of prisoners. Draft Rule 25(5) still leaves some ambiguity as to who is responsible for prisoners removed from the prison on medical grounds when they are in hospital. We feel that the Rules should make it clearer that the prisoner is primarily in the care of the medical personnel.

Rule 27

The Draft Rule on temporary release remains a very general one. More specific criteria may be available in the Standing Orders and could be incorporated into the Rule.

Rule 32

Extending the period for which a prisoner may be removed from association without the approval of a member of the Board of Visitors from 24 to 72 hours seems a retrograde step. This is especially so in the case of young offenders and is one area where the amalgamation of the rules may be undesirable. The initial check after 24 hours is still a valuable safeguard, both to prevent arbitrary decisions to remove from association and to examine the conditions in which the prisoner is being detained. However there is no reason why a Board member, perhaps a different Board member could not examine the case in the light of more information after 72 hours. The criteria on which removal is based remain the very broad "good order and discipline" and there is no opportunity for a prisoner to make representations or be given reasons as to why they are being removed from association. We feel that having a review of a prisoner's removal from association at monthly intervals is too long. It is our view that there should be more frequent reviews and that the longer the period of removal from association the greater the number of board members which should be involved in the decision. Consideration could be given to the full board reviewing these decisions at their monthly meeting. Preferably, given that it is undesirable to mix the Board's discipline and welfare functions, and that the decision to extend removal from association (except where this is sought by the prisoner) is likely to be a sharply contested one, this application should be made before a Prison Ombudsperson. At these reviews there should be a presumption that the prisoner should be returned to association. The present provisions allow for the possibility of

prisoners spending unlimited amounts of time in removal from association. It is clearly undesirable that decisions to extend a prisoner's removal of association to over a year should require the same decision making structure as applies to their removal for a month. This can lead to prisoners being largely abandoned in such conditions. Removal from association that exceeds six months should require judicial approval. A final point in this area is that the Rules should make clear that prisoners removed from association on Rule 32 grounds should have the same rights as other prisoners except where this is rendered impossible by the conditions of removal from association.

Rule 34

In order that prisoners and their families may have a proper understanding of what is and is not allowed to be brought into a prison there should be an obligation on the governor of each prison to publish and make available a list of prohibited articles.

Rule 36

The provisions on the conduct of discipline hearings contain no reference to advising a prisoner of his or her right to request legal representation. Case law in judicial review actions has indicated that even in proceedings before a governor a prisoner has a right to seek legal representation and that in some circumstances he or she should be granted it.

Rule 38

It was our view that there were already too many disciplinary offences in the 1982 version of the Rules. We are therefore rather disappointed to see that the number of offences in draft Rule 38 has actually risen from 21 in the old Rule 31 to 25. We are pleased that the old offences of "making false or malicious allegations" and "making

repeated and groundless complaints" have gone. However the all encompassing "in any way offends against good order and discipline" remains. This provision is so vague that it comes close to offending the principle that people should not be retrospectively punished for things which were not offences when committed. Against the argument that this offence is necessary to prevent new practices of disobedience developing we can only say that good prison management should find other ways to deal with such problems and that a system of local governors' rules could deal with such difficulties.

Other offences have largely been retained with only a minor change of name, such as "treating anyone with disrespect" or "being indecent in language, act or gesture" - these now appear in draft Rues 38(16) and 38(18). There are also a number of new offences which give rise to concern. Notably those contained in draft Rules 38(9) and 38(17). The former is another vague provision wherein the meaning of "obstructs" requires clarification. The latter may be justified on health grounds but the case is not made out for this and otherwise it seems unnecessary.

Rule 40

Apart from our general concerns as to Boards of Visitors retaining power over disciplinary offences we are disturbed to see that they may still order up to 180 days loss of remission and up to 56 days in cellular confinement for disciplinary offences. The former is a very lengthy penalty and it may well amount to a "criminal" penalty within the meaning of Article 6 of the European Convention on Human Rights, thereby necessitating legal representation at any hearing at which a prisoner faces such a penalty. We are also concerned that in addition to certain specified offences the Board will have jurisdiction over any offences referred to them where the governor feels that the penalties available in his or her hearing offer insufficiently serious punishment. Research for the Woolf report suggested that when charges

were referred in these circumstances Boards of Visitors felt that they were obliged to support the governor's decision by convicting and awarding a higher penalty. No similar research has been carried out in Northern Ireland. In its absence there must be concern as to the wisdom of continuing this practice.

Rule 45

We are pleased to see that the right to petition the Secretary of State to quash a finding of guilt or mitigate a punishment is established. However this is still not an adequate substitute for the independent element that a Prison Ombudsperson or Complaints Adjudicator would have added.

Rule 51

The inclusion of education in the definition of work contained in Rule 51(9) is welcome. However we feel that it should also be clearly established that there is parity of pay for work and education. This would ensure conformity with European Prison Rule 77 which indicates that "education should be regarded as a regime activity that attracts the same status and basic remuneration within the regime as work".

Rule 54

As part of ensuring that prisoners have access to all relevant material there should be a requirement that each library keep and make available to prisoners all relevant legal materials.

Rule 58

We welcome the removal of the requirement that the Chaplain assist the governor in the enforcement of the Rules. However as Rule 58(2) makes the chaplain subject to

the rules and regulations of the prison we see no need for draft Rule 58(1). The chaplain should be viewed as providing independent religious services to prisoners rather than as an extension of the prison administration in any way.

Rule 63

It is unclear what exactly this means. Why should such interviews not simply be out of the sight and hearing of prison officers?

Rule 64

This is a welcome development, especially the reference to religious books other than the Bible.

Rule 65

The general principle expressed in this draft Rule is a welcome one. However we feel that the Rule could also contain a commitment on the part of the prison authorities to assist the maintenance of such contact.

Rule 67

This draft Rule still leaves prisoners' correspondence subject to very widely phrased restrictions. In the Silver case the European Court of Human Rights indicated that stopping correspondence on the ground that it was "objectionable" violated the requirement in Article 8 of the Convention that restrictions be "prescribed by law". Publication of the relevant Standing Order does much to comply with this but it is disappointing that the rule remains unchanged. There is also no reference to the possibility of prisoners having access to telephones. Such a development would be especially welcome in the case of young prisoners. Prisoners have access to phones in most other European jurisdictions and it is very disappointing to see that

there is still no movement on this in Northern Ireland.

Rule 68

The provision on visits remains unchanged despite significant changes in the practice in Northern Ireland. The prison service has thus shown itself able to deal with more frequent visits. Failure to reflect this change in the Rules is an opportunity missed to send positive signals about the changes that have taken place in the Prison Service. A right to only one visit a month seems especially undesirable in the case of those detained in Young Offenders Centres. We are also concerned at the negative way in which Rule 68(7) is phrased. If the Prison Service is to live up to the commitments of European Prison Rule 43(1), that "Prisoners shall be allowed to communicate with their families and , subject to the needs of treatment, security and good order, persons or representatives of outside organisations and to receive visits from those organisations as often as possible" a different approach is required. This would entitle prisoners to receive visits from whoever they chose subject to a power of the governor to prevent a person visiting where he or she had reasonable grounds to suspect that the visit would pose a threat to prison security.

Rule 69

The rationale given in the explanatory memorandum for this provision seems expressly coercive. Although the Criminal Evidence (NI) Order 1988 does allow inferences to be drawn from silence it is less than clear that many of these circumstances will apply to people already in prison. Also no indication is given as to the conditions of such interviews. For example will they be under caution, will the prisoner be informed of their right to seek legal advice and will they be tape recorded?

Rule 72

It is encouraging to see the provision on a prisoner's access to legal advice reflecting recent developments in English and European Courts. However draft Rule 72(2) still seems to limit confidential legal consultations to matters which might result in litigation rather than all legal matters. The Rule might also establish the right of prisoners to be present if a letter is opened under Rule 72(4).

Rule 73

Our concerns as to the vague criteria on which searches of prisoners can be made apply with equal force to searches of visitors.

Rule 74

The provision on complaints is spelled out in more detail than the old Rule 41. However there is still no independent element in the complaints process and no requirement that answers be given to complaints within a specified time. We would also strongly endorse the idea of creating a Prisons Ombudsperson to hear prisoners' complaints along the lines of the Woolf report. Such a post could go a long way towards removing the sense of powerlessness that many prisoners may feel, a sense that is inimical to the development of a positive environment in prison. Ideally though such an institution should be created by primary legislation.

Rule 82

We welcome the reference to taking into account a prisoner's religious and cultural requirements in the provision of food. We would be concerned that this should ensure that prisoners can eat a healthy and balanced diet in full compliance with their religious and cultural convictions.

Rule 125

Boards are not given time limits within which to reply to complaints. Nor are they given any guidance as to what criteria they might utilise in inspecting the prison.

Rule 127

We are disappointed to see that there is neither a requirement nor even a power for Boards to make their reports available to the public. In general we feel that Boards should be given a clearer sense of their "welfare" role in prisons as they lose their "disciplinary" functions. A code of standards is vital to give them objective criteria by which to operate. The Boards should be involved in the drafting of this. They could also be involved in the formulation of governor's local rules, with a power to refer any which they feel are in violation of a prisoners rights or inimical to their welfare, and which are not required by security to the Minister of State. The issue of the composition of Boards also requires further examination. The Secretary of State should be under a duty to consult a range of organisations in determining who should be appointed.

innocent until proven guilty. Only exceptional circumstances should justify its restriction.

Rule 115

The clarification on the status of the governor is important but the Rules make no reference to the powers and role of the controller of prisons in Northern Ireland.

Rule 124

Neither of the two alternative discipline procedures meets with our approval. We feel that the best approach would be to move in the direction of the situation which now prevails in England, Scotland and Wales whereby the governor retains jurisdiction over minor disciplinary offences with anything more serious being dealt with through the ordinary criminal law. Of the two however we prefer the second as it ensures that there is at least a separation of Board members into those who do and do not hear disciplinary proceedings. The second approach goes some way down the road to the Prior Report suggestion of independent disciplinary tribunals. If a concern remains that there is a need for a body within the prison system to deal with more serious offences committed in prisons then this may be a better approach. In view of the small number of disciplinary adjudications on serious offences in Northern Ireland one panel with an independent, legally qualified chair might suffice. Such a panel would conform better to the requirements of Article 6 of the European Convention on Human Rights in respect of an independent tribunal. A system of disciplinary panels with independent chairs has operated well in Canada since 1980. Arguments of cost, upon which the government based its rejections of Prior's recommendations are neither wise nor valid. Getting this area right is most important when it comes to assuring people that justice prevails in the prisons.

Rule 86

Draft Rule 86(1) is a significant improvement on what has gone before but still does not ensure the independence of medical staff from the prison administration. We also feel that this Rule should guarantee a prisoner's right to seek a second opinion from their own doctor. Rule 26(1) of the European Prison Rules provides for medical services to be organised "in close relation with the general health or administration of the community or nation." Similarly the European Committee for the Prevention of Torture use as "indicators" or "early signs" pointing to potential abuses, the "medical care provided by the authorities ..and links with the outside world in general". We would therefore advocate that the Prison Medical service should be incorporated into the National Health Service. This would ensure that prisoners have access to independent professional medical care and that they have adequate avenues of redress against sub standard medical care. We would also recommend that specific rules relating to the treatment and conditions of detention of prisoners suffering from mental illness be introduced.

Rule 91

Draft rule 91(2) seems unnecessary unless it is an attempt, which is unlikely to be successful, to exclude prisons from sex discrimination legislation. At the very least the Rules should contain not this negative provision but a positive commitment to equal treatment of male and female prisoners.

Rule 101

The reference in draft Rule 101(2) to unconvicted prisoners having access to a daily bath or shower "if possible" is too weak. This should be a right of people who are