CAJ
Committee on the Administration of Justice

Promoting Justice / Protecting Rights

CAJ's Submission no. S428

CAJ's submission to Department of Justice consultation on a proposal to place the office of the Northern Ireland Prisoner Ombudsman on statutory footing

April 2014

2nd Floor, Sturgen Building
9-15 Queen Street
Belfast BT1 6EA

Tel – 028 9031 6000
Email – info@caj.org.uk
Web – www.caj.org.uk

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About CAJ

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The Committee seeks to ensure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. The CAJ works closely with other domestic and international human rights groups such as Amnesty International, Human Rights First (formerly the Lawyers Committee for Human Rights) and Human Rights Watch and makes regular submissions to a number of United Nations and European bodies established to protect human rights.

CAJ's activities include - publishing reports, conducting research, holding conferences, campaigning locally and internationally, individual casework and providing legal advice. Its areas of work are extensive and include policing, emergency laws and the criminal justice system, equality and advocacy for a Bill of Rights.

CAJ however would not be in a position to do any of this work, without the financial help of its funders, individual donors and charitable trusts (since CAJ does not take government funding). We would like to take this opportunity to thank Atlantic Philanthropies, Barrow Cadbury Trust, Hilda Mullen Foundation, Joseph Rowntree Charitable Trust, Oak Foundation and UNISON.

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Response to Department of Justice consultation on a proposal to place the office of the Northern Ireland Prisoner Ombudsman on a statutory footing

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The Consultation

The Department of Justice has issued a consultation in the following terms:

"The Hillsborough Castle Agreement published in February 2010 contained a commitment to review the position of the Prisoner Ombudsman in light of experience elsewhere. The purpose of this consultation is to highlight the issues examined in that review and seek views from interested parties on the proposal to create an independent statutory basis for the appointment of the Northern Ireland Prisoner Ombudsman and the discharge of the functions of the Ombudsman's office."

The Role of the Prisoner Ombudsman

CAJ understands the role of the Prisoner Ombudsman to be: "to exercise his powers to undertake the efficient, effective and independent investigation of eligible complaints and of deaths, or near-deaths, in prison custody in a manner best calculated to secure the confidence of the public and members of the Prison and Probation services in the integrity of the operation of those functions." In responding to this consultation, CAJ first wishes to express its surprise that the consultation document makes no reference to the state's obligations to persons in its custody under international human rights standards and law and in particular the lack of reference to the Human Rights Act, which gives further effect to most of the rights under the European Convention on Human Rights (ECHR), except in relation to the role of the Prisoner Ombudsman in assisting a Coroner's Inquest to ensure compliance with Article 2 ECHR. Directly relevant to the role of the Prisoner Ombudsman are the procedural obligations under Articles 2 (Right to Life) and 3 (Prohibition of Torture) to fully investigate cases involving unexpected deaths and allegations of torture or ill-

treatment. These are the minimum standards which must be complied with and must be interpreted in consideration of other international standards[1].

We will outline our understanding of the implications of these very similar obligations for the Terms of Reference and structure of the Prisoner Ombudsman below and, because of their significance, our response will focus on these matters.

The Law

Article 2 of the ECHR lays a substantive obligation on the state to protect people under its jurisdiction from any unlawful taking of life by putting in place an appropriate legal and administrative framework and the necessary law enforcement machinery to deter the commission of offences against the person, and for the prevention, suppression and punishment of breaches of such provisions.[2] Article 2 also lays down a procedural obligation to properly investigate cases of potentially unlawful killing, whatever the circumstances or perceived perpetrators (see below). Both these obligations may be engaged in the case of deaths in custody.

[1] This includes the: International Covenant on Civil and Political Rights; Universal Declaration of Human Rights; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Recommendation (2006) 2 of the Committee of Ministers to member states on the European Prison Rules; Recommendation No. R (98) 7 of the Committee of Ministers to member states concerning the ethical and organisational aspects of health care in prison; Recommendation (2006) 13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse; United Nations Standard Minimum Rules for the Treatment of Prisoners; United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders ("The Bangkok Rules"); United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, United Nations General Assembly Resolution 43/173; The UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions; The Model Protocol for a Legal Investigation of Extra-Legal , Arbitrary and Summary Executions ('Minnesota Protocol') as set out in the UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions; The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; The UN Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity

[2] See Akpinar and Altun v. Turkey [2007] 56760/00 §49

Article 3 of the ECHR also lays down the substantive obligation to secure to everyone within the state's jurisdiction the right to their physical and moral integrity. This obligation is particularly engaged if the person in question is under the control of state authorities and, if torture or ill-treatment is alleged, the state will be under a duty to demonstrate its adherence to it. The European Court of Human Rights (ECtHR) has said:

> "When the events in issue lie wholly, or in a large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries regarded as resting on the authorities to provide a satisfactory and convincing explanation."[3]

Article 3 also lays down an investigative obligation which is, to all intents and purposes, identical to that established under Article 2, the reasoning being that the substantive obligation "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."[4]

In a series of Northern Ireland cases at the beginning of the millennium, the European Court of Human Rights severely criticised the UK for not properly investigating deaths where the individuals may have been killed unlawfully by state actors.[5] In the lead case of *Jordan* the ECtHR laid down the characteristics of an effective investigation. These were:

- *Independence* – individuals investigating a death must be fully independent of those implicated in a death; this independence must be both hierarchical and practical;

- *Effectiveness* – an investigation must be able to determine the lawfulness of the actions of those responsible for the death and to lead to the identification, and where appropriate, punishment of those responsible[6]. All reasonable steps must be taken to secure evidence concerning the incident, including eye-witness testimony, forensic evidence, and where appropriate an autopsy;

[3] Semouni v. France [1999] 25803/94 §87
[4] Assenov and Other v. Bulgaria [1998] 90/1997/874/1086 §102
[5] Jordan v UK [2001] 24746/94; Kelly & Ors v. UK [2001] 24746/94; McKerr v. UK [2001] 28883/95; Shanaghan v. UK [2001] 37715/97; McShane v. UK 43290/98; Finucane v. UK [2003] 29178/95
[6] See Mahmut Kaya v. Turkey [2000] 22535/93 §§ 124-6 for how Article 2 interacts with Article 13 (right to an effective remedy) in cases involving the unlawful deprivation of life

- *Sufficiently open to public scrutiny (transparency)* – there should be a sufficient element of public scrutiny of the investigation or results to secure accountability in practice as well as in theory and the next-of-kin should be involved to the extent necessary to safeguard their legitimate interests;

- *Prompt and carried out with reasonable expedition* – to maintain public confidence in the maintenance of the rule of law and to prevent any appearance of collusion or tolerance of unlawful acts. Investigations into deaths caused by state agents must be initiated by the state of its own motion and not by the next-of-kin or other concerned parties.

These principles are now the established law of the European Court and have been fully accepted by UK courts.[7] They were originally established in the context of cases where unlawful state involvement in killing was alleged, but have been extended well beyond that.[8] They also represent minimum standards and must be applied to particular circumstances flexibly.

When it comes to deaths in custody, as well as allegations of ill-treatment, there is a special and particular obligation on the authorities. Persons under detention or in any kind of state custody enjoy a presumption *iuris tantum*, on the part of the state, of the latter being responsible for any damage suffered; this means there is an inversion of the burden of proof: the state must demonstrate that it has complied with its obligation and has respected the right to life of the affected person:

> "In assessing evidence, the Court has generally applied the standard of proof 'beyond reasonable doubt'...Such a proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly, or in large part, with the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death

[7] See e.g. McCaughey and Grew [2011] UKSC 20.
[8] Dimitrova v. Bulgaria [2011] 44862/04 §75 "Even in situations in which there is no suggestion that a violent or suspicious death is due to official action, the authorities are under the obligation to carry out an independent and impartial official investigation that satisfies certain minimum standards as to its effectiveness."

occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation."[9]

In summary, then, under Articles 2 and 3, in respect of deaths or possible ill-treatment in prisons, the state has an obligation to provide for a proper investigation of the events and in a context where the burden of proof lies on the responsible authorities to provide a convincing and satisfactory explanation.

Implications for the Role of the Prisoner Ombudsman

Given that the role of the Ombudsman is to "investigate" complaints and deaths, where relevant the investigation must be compliant with Article 2 or 3. It is accepted that the Prisoner Ombudsman's investigation may not represent the totality of the state's investigatory processes – the police, health regulatory officials and the Coroner, amongst others, may also be involved. However, if there is a shortcoming, in terms of compliance with the relevant Article, in one aspect of an investigation, such as lack of independence, this could contaminate the entire process. Furthermore, in cases of deaths in custody it appears that it is the Prisoner Ombudsman who takes the lead and, for example, only calls in the police if he believes a crime has been committed.

In our view, therefore, the Prisoner Ombudsman's Office must be compliant with the requirements of Articles 2 and 3 of the ECHR.

The principles of Articles 2 and 3 put into practice

This section will look at each of the principles and how they might be put into practice in relation to the Prisoner Ombudsman.

[9] Suheyla Aydin v. Turkey [2005] 25660/94 §147

Independence

The European Court has said that independence "means not only a lack of hierarchical or institutional connection but also a practical independence."[10] We take that to mean that those who are investigating a case must not be under the command or control of any person or agency who was involved in the case, they must not be, or have been, part of the same institution and they must not be subject to any interference by people who may have an interest in the case.

It is important to stress that the issue is not with a proven bias in any given individuals who may be part of the governance or the investigative team. The recent decision of the English Court of Appeal[11] made the point clear**.** This case, which ruled that the Iraq Historic Allegations Team, set up to investigate allegations of ill-treatment of Iraqi detainees by members of the British armed forces, lacked the requisite independence to fulfil the investigative obligation under Article 3,[12] set out clearly the significance of ensuring that investigative mechanisms are independent:

> "...for the appellant to succeed in establishing a lack of independence, it is not necessary for him to prove that some element or person in IHAT actually lacks impartiality. One of the essential functions of independence is to ensure public confidence and, in this context, perception is important. As Lord Steyn said when giving the single opinion of the Appellate Committee in *Lawal v Northern Spirit Ltd* [2003] ICR 856, albeit in a different context (at paragraph 14): 'Public perception of the possibility of unconscious bias is the key.'"[13]

The consultation document recognises the importance of perception and we concur that it is a good reason to establish the office on a statutory basis.

[10] Jordan v. UK Op. Cit. §106
[11] Ali Zaki Mousa v Secretary of State for Defence & Anr [2011] EWCA Civ 133
[12] While these are allegations of torture and the court recognised that this is essentially an Article 3 rather than an Article 2 case, as we have noted, it was common ground that the same basic principles apply.
[13] *Ibid,* Paragraph 35

The person or body in charge of the investigation must be capable of acting independently without control or interference, direct or indirect, from government, any agency of the state, any political party or any other interest group in society. In our legal system that probably means that an organisation needs to be set up by statute as a legal person, with the requisite powers (see below). We therefore fully support the proposal that the Prisoner Ombudsman be put on a statutory footing.

There are different possible models for this. So, for example, the Police Ombudsman's Office (OPONI) is a "corporation sole" giving the power and responsibility to an individual. However, as CAJ pointed out in its response to a DOJ consultation on the operation of OPONI last year[14] the independence of this Office was undermined even with this structure. The lesson is that a separate governance structure is a necessary but not sufficient condition for practical independence.

In the same submission we put forward reasons why a corporate Board might not be a good idea for this kind of institution. We noted that the Police Ombudsman, like the Director of the Public Prosecution Service, had to take decisions in a quasi-judicial manner and also had to take personal responsibility for the robustness and independence of investigations. We noted that: "It would be quite wrong for such conclusions and decisions to be subject to a process of debate and compromise within a collective body. In investigating complaints against the police, the issue is not reflecting the different interests, currents and attitudes within Northern Ireland society but of exposing wrongdoing without fear or favour and of vindicating proper actions equally robustly when appropriate." We think these considerations are also relevant for the Prisoner Ombudsman. We would not rule out a collective body as such, but all its members would have to be wholly disinterested and impartial and not beholden to any particular interest group or political party within Northern Ireland. The point here is that any governing body, sole or corporate, must take decisions based solely on the law or clear, objective and public criteria relating to the progress of investigations. However, on balance, we support the Department's view that a corporation sole would be the appropriate model for the Prisoner Ombudsman.

This raises the issue of an appointment process which must be transparent and end up with a postholder(s) completely independent of all special interests in Northern Ireland.

[14] http://www.caj.org.uk/files/2012/06/07/S386

Effectiveness

The effectiveness of an investigation depends on the relevant body having sufficient powers to determine the full circumstances and nature of the actions of those responsible for the death or ill treatment and, either through its own efforts or by reference to another body, to lead to the identification, and where appropriate, prosecution and punishment of those responsible. In practice the body must have a sufficiently wide brief in terms of *what* is to be investigated and the actual powers on the ground so that *how* it is investigated is effective. The consultation document suggests that "an authorised person acting on behalf of the Prisoner Ombudsman will have the right of entry to any prison or young offenders' centre and may require to be given access to such premises and documents which are necessary for the purposes of their investigation." In addition to this, there should be a clear duty on Prison Service personnel – and on all others having official business within the prison, whatever their agency – to cooperate with and attend for interview with, if required, the Prisoner Ombudsman's investigators. It would also be important to establish a detailed Memorandum of Understanding between the office and the PSNI to determine in what precise circumstances a case would be referred to the police and what role the Prisoner Ombudsman would have in the investigation thereafter. Regarding deaths, it is envisaged that the Prisoner Ombudsman will have a duty to report on investigations to the Justice Minister so there will have to be some level of involvement even if the police take over the investigation.

The current Terms of Reference of the Prisoner Ombudsman contain a series of exclusions (Paragraph 6)[15]. It is presumed that these exclusions only refer to complaints – when it comes to deaths, unless some other Article 2 compliant mechanism is deployed, no person,

[15] The Terms of Reference do not cover: policy decisions taken by a Minister and the official advice to Ministers upon which such decisions are based: the merits of decisions taken by Ministers, except in cases which have been approved by Ministers for consideration by the Prisoner Ombudsman; healthcare related complaints; the personal exercise by Ministers of their function in the certification of tariff and the release of mandatory life sentenced prisoners; actions and decisions outside the responsibility of the NIPS such as issues about conviction and sentence; cases currently the subject of civil litigation or criminal proceedings, and the decisions and recommendations of outside bodies such as the judiciary, the police, the Public Prosecution Service, the Immigration Service, the Probation Service, the Sentence Review Commissioners, Life Sentence Review Commissioners, Remission of Sentences Commissioners, Loss of Remission Commissioners and their secretariat; actions and decisions taken by contracted-out service providers; and the actions and decisions of people working in prisons who are not employees of the NI Prison Service

body or policy can be lawfully excluded from an investigation. The same would be the case where the complaint consists of an allegation of ill treatment that might violate Article 3. Even in other cases, some of the exclusions seem unjustified. This is particular the case in regard to the policies and decisions of Ministers (if they result in harm, the Prisoner Ombudsman should be free to say so) and the actions of non-Prison Service personnel working in prisons and contracted-out service providers. The responsible authorities – in this case the Prison Service and Department of Justice – cannot avoid their obligations under the Human Rights Act by sub-contracting or through the involvement of other agencies. The Prison Governor is "in command of the prison"[16] and is therefore responsible for everything that happens within it. The Terms of Reference for Complaints should be amended appropriately.

We also note that the Terms of Reference for Complaints and for Deaths do not contain any reference to national security. In a document obtained by CAJ under Freedom of Information, entitled: "NIO Protocol on 'Handling Arrangements for National Security Related Matters after the Devolution of Poling and Justice to the Northern Ireland Executive,'" it is suggested that the Police and Prisoner Ombudsman will normally report to the [Northern Ireland] Minister of Justice but will report to a UK minister (NIO Secretary of State) on 'national security' matters who may issue the Ombudsman with 'guidance' on 'matters relating to national security.' (Annex A, paras 4.1 & 6.1) CAJ would question what the practical implications of this statement are and why, if this is in fact the position, this information was not shared in the context of the consultation.

Transparency

There should be continuing liaison with the next-of-kin and families of the deceased and, where relevant, of complainants. Protocols and procedures should be established to ensure this happens. The consultation document envisages the publication of an Annual Report; subject to necessary redaction, reports on individual deaths in custody should also be published.

[16] Rule 116 Prison Rules Northern Ireland

Promptness

There is no reason why investigations should be delayed in the case of a death, near-death or allegation of ill treatment. However, the essence of the principle is a demonstration of the determination of the state to act properly and forcefully to uphold the rule of law in all cases without exception. In the case of the Prisoner Ombudsman, this determination must be demonstrated by the proper resourcing of a new body and the vigour with which it undertakes its duties.

Conclusion

CAJ supports the proposal to put the Prisoner Ombudsman on a statutory footing and supports the concept of a "corporation sole." However, we urge the Department of Justice to accept that the office must be capable of carrying out, or being a compliant element of, investigations which fully implement the obligations of Articles 2 and 3 of the ECHR. We have spelt out some of the implications of that for the structure and operations of the Prisoner Ombudsman but we also believe that the Department should access authoritative legal opinion on these matters before moving to legislation.

Committee on the Administration of Justice, April 2014

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