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Ms Melissa Murray
The PILS Project
41 Arthur Street
Belfast
BT1 4GB

Your Ref.

8th November 2011

Re: PILA & PILS CONFERENCE 2011

Dear Melissa

Thank you for your invitation to speak at the workshop on Prisoners at the PILA & PILS Conference on 11th November 2011. I confirm my attendance and enclose herein some notes that might guide discussions in the workshop.

If I may be of further assistance, please do not hesitate to contact me.

Yours Sincerely

JOSEPH O'KEEFFE
Bar Library

PRISONERS' RIGHTS AND THE ECHR

Persons detained in prison, whether on remand or serving a sentence, are by the very nature of imprisonment subject to a restriction of the rights and freedoms enjoyed by other members of society. The restriction of a prisoner's rights and freedoms must, however, be proportionate and the State should have regard to the aim to preserve the inherent dignity of the prisoner. In addition to the European Convention on Human Rights, the relevant domestic materials provide a detailed source of rights and restrictions for prisoners. In Northern Ireland, the conditions in which prisoners are accommodated in prisons are prescribed by law and it is apt to note Rule 2 and Rule 64 of the Prison and Young Offenders Centre Rules (NI) which provide:

2(1) These rules are made with regard to the following general principles-

- (b) the treatment of prisoners shall be such as to sustain their self respect and health and to encourage them to develop a self of personal responsibility;*
- (c) prisoners' living conditions shall be compatible with human dignity and acceptable standards in the community;*
- (j) prisoners should retain all rights and privileges except those removed as a necessary consequence of their imprisonment.*

Rule 64 provides:

64. Imprisonment is by the deprivation of liberty a punishment in itself. The conditions of imprisonment and the prison regime shall not therefore, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in this.

65. Every effort shall be made to ensure that the regimes of the institutions are designed and managed so as -

- (a) to ensure that the conditions of life are compatible with human dignity and acceptable standards in the community;*

(b) to minimise the detrimental effects of imprisonment and the differences between prison life and life at liberty which tend to diminish the self respect or sense of personal responsibility of prisoners.

There are a large number of rights, fundamental, social and economic, which arise in the context of prisoners, each of which provides a potential area for consideration by the Courts as to whether such rights should be enjoyed by a prisoner or whether it is proportionate for those rights to be restricted, in full or in part. A provisional list of actual or potential rights could include the following:

- Right to Marry
- Right to Vote
- Right to Privacy
- Right to Freedom from Discrimination
- Right to Property
- Right to Earn a Livelihood
- Right to Food
- Right to Employment
- Right to Hygiene and Sanitation
- Right to Fair Trial in disciplinary hearings
- Right to Procreate and/or Conjugal Rights
- Right to Associate
- Rights Relating to Searches and Drug Testing
- Right to Recreation
- Right to Bodily Integrity
- Right to Freedom of Religion
- Right to Education
- Rights of Mothers
- Right to Communication
- Right to Fair Trial parole hearings

The ECHR contains what might be referred to as fundamental rights – however, other international rights documents recognise other social and economic rights. In Northern Ireland, as part of the outworking of the Good Friday Agreement, consideration has been given to a Bill of Rights which could include many social and economic rights not presently expressly recognised within the ECHR. If a Bill of Rights is implemented (in whatever form), should those rights be extended in full to prisoners? If so, how best could such rights be upheld in a prison environment?

Case law on prisoners' rights is plentiful, however, a few areas of particular and recent interest are:

Hygiene and Sanitation

The issue of in cell hygiene and sanitation is one which, in an increasing prison population, will give rise to complaints that the prisoner is subject to inhuman and degrading treatment (Article 3) and that his right to a private life is breached (Article 8). In Northern Ireland, "slopping out" persisted in HMP Magilligan until relatively recently. In *Justin Martin v Northern Ireland Prison Service* [2006] NIQB 1 the High Court held that the conditions in HMP Magilligan breached Article 8 in respect of the toileting and washing facilities.

In HMP Maghaberry, the cells have been modernised to the extent that each cell has its own toilet. A question which might arise is whether there is sufficient screening around the toilet to facilitate some degree of privacy from a cell-mate; whether the toilet can be kept sufficiently clean so as not to pose a health hazard (where prisoners may be restricted from using strong detergents).

The European Court of Human Rights has considered a number of cases where the lack of in cell sanitation has featured in relation to in cell sanitation against the background of significant prison overcrowding and generally poor conditions. In certain circumstances the ECtHR has found there to be a breach of Article 3 (for example, *Kalashnikov v Russia* (App No 47095/99); *Novoselov v Russia* (App no 66460/01)). The conditions of prisons in Russia represent a stark contrast with those in the UK and Ireland, to the extent that an argument grounded upon Article 3 may be contrasted against those conditions and found to be insufficient to merit a breach. To what standard should prisons be equipped to provide for the sanitation needs of prisoners? In the present economic environment, will prisoners' conditions be relegated in order to save public finances?

Voting

In the Republic of Ireland it is settled law that prisoners have the right to vote. In Northern Ireland, as in the rest of the UK, prisoners do not have the right to vote. The ECtHR held in *Hirst v UK (Application no. 74025/01)* that the UK is in breach of Article 3 of the First Protocol by imposing a blanket ban on voting in respect of all prisoners. The High Court in Northern Ireland considered the issue in *R v. Secretary of State, ex parte Toner and Walsh [2007] NIQB 18* where Gillen J upheld the position in *Hirst* as being applicable to voting in the NI Assembly election. In *Greens & MT UK (Applications nos. 60041/08 and 60054/08)* the ECtHR again found the UK to be in breach of Article 3 of the First Protocol and the Grand Chamber gave the UK until 11th September 2011 to introduce legislative proposals. The UK has requested and obtained an extension of this deadline until the outcome of another case (*Scoppola v Italy (No 3)*) is known.

In this particular area, the European Court has imposed its judgment despite consistent opposition from the UK Government and argument that the extension of the right to vote to prisoners is a matter within the margin of appreciation of each State. This factual scenario gives rise to a vital question – should all signatory States be subject to the same prison policy? How far should each individual State be permitted to deviate from the Convention in respect of prisoners? Will certain circumstances prevailing in signatory States justify different treatment of prisoners in different States?

Searches

In Northern Ireland provision is made for full body searching of all prisoners upon entry to and exit from a prison. Recently, the High Court has held there not to be a breach of Articles 3 or 8 in relation to either consensual full body searches or forcible full body searches of non-compliant prisoners (*In re Brendan Conway [2011] NIQB 40 & 49*). It is anticipated that this is a complaint which will continue to arise, particularly in respect of the type of search employed in relation to non-compliant prisoners.