ACCESS TO JUSTICE: LEGAL PATHWAYS TO JUSTICE FOR THE RIGHTS OF PEOPLE IN PRISON

SEPTEMBER 2024

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Disclaimer

This report was designed, initiated, and led by Dr Amina Adanan from the School of Law and Criminology in Maynooth University, and was funded by the Irish Research Council (New Foundations). Irish Penal Reform Trust (IPRT) is the civic society project partner for this report.

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This report is presented in good faith to inform and stimulate wider debate and reform on this topic.

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Abbreviations

CFR	EU Charter of Fundamental Rights.
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.
GDPR	General Data Protection Regulation.
ECHR	European Convention on Human Rights.
ECHR Act 2003	European Convention on Human Rights Act 2003.
ECtHR	European Court of Human Rights.
FLAC	Free Legal Advice Centres.
ICCL	Irish Council for Civil Liberties.
IHREC	Irish Human Rights and Equality Commission.
IPRT	Irish Penal Reform Trust.
IPS	Irish Prison Service.
NPM	National Preventative Mechanism.
OIP	Office of the Inspector of Prisons.
OPCAT	United Nations Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.
PCO	Protective Costs Order.
PILA	Public Interest Law Alliance.
SPT	Subcommittee on the Prevention of Torture and Cruel, Inhuman or Degrading Treatment or Punishment.
UPR	UN Human Rights Council's Universal Periodic Review.

Foreword

Irish Penal Reform Trust (IPRT) has long been committed to ensuring that people in prison are aware of their rights to legal information and advice, to advocacy and to legal representation. More importantly, IPRT is committed to ensuring that people in prison know that even though they are deprived of their liberty, this does not extinguish all their other human rights while they are in custody. As a result, we were delighted to be invited to act as a civic society partner on this project exploring public litigation for prisoners' rights.

IPRT recognises the importance of accessing legal information and advice to promote the highest possible standards of human rights recognition and compliance within the criminal justice system. This access could lead to litigation in the Superior Courts, challenging a systemic human rights issue within the prison estate; however, it could also mean that an individual could find out that they have rights regarding their own personal circumstances and be empowered to seek help, legal assistance, or to advocate for themselves. In either scenario, the end result is largely the same, because both enable the just and humane treatment of people in prison and can have a wider ripple effect not only for the individual involved but also the wider prison community.

Undoubtedly the provision of clear and accessible information can lead to individual empowerment. However, an individual cannot assert or even identify a right, if they do not realise that they have rights in the first place. It is vital that the integrity of the right to access information and advice be promoted and protected by all stakeholders - the legal professional community, civil society actors, the judiciary, and by the State and its political and legal representatives.

IPRT welcomes the report findings and recommendations which address multiple aspects of the legal system from education to systemic reform. The recommendations encompass, thematically, reform of civil legal aid, reforms in the legal system to counter prohibitive costs, embedding prison law in legal education, overhauling the internal prison complaints system and the long-called for and long-awaited State ratification of OPCAT. We are now the only EU Member State that has not yet taken this important step.

As part of a broader community of lawyers and advocates, we are all tasked with pressing for change and progress to ensure that everyone has access to justice. This report provides a solid underpinning for how this process of reform could and should be implemented.

It was a privilege for IPRT to act as a civic society partner on this project that was researched and authored by Dr Amina Adanan, and which was generously funded by the Irish Research Council. We want to extend our sincere thanks to Dr Amina Adanan for her tireless work on this project and her commitment to ensuring access to justice for all. We also express our thanks to Andrea Pownall, the Research Assistant working alongside her on the project.

Finally, we want to express our gratitude to and appreciation for all the interview Participants whilst also acknowledging the barriers to people in prison taking part directly in the research at this juncture. We also want to thank those who attended the closed roundtable in Maynooth University, who were so considered and open in their contributions, shared in good faith, and who all gave so generously of their time to this research.

Saoirse Brady
IPRT Executive Director

Executive Summary

Notwithstanding the notable public interest cases that advance the rights of disadvantaged groups in Ireland,[1] and the positive impact that some prison law cases have had,[2] the rights of people in prison remain under litigated. Previous research by IPRT identified that there is a need for an increase in public interest litigation to advance the rights of people in prison in Ireland.[3] Using mixed method research methodologies (doctrinal research and 26 semi-structured interviews), this report identifies and examines the barriers and issues that arise in public interest prison law in order to shed light on this topic and to identify areas for reform.

In doing so, the research illustrates a web of inter-connected problems that inhibit prisoner rights issues from being addressed in a legally effective way that protects the rights of those affected. These barriers include, and are not limited to, difficulties in accessing Civil Legal Aid (including operational barriers within the Civil Legal Aid and Legal Aid-Custody Issues Schemes), blocks in accessing legal information and legal representation, the general difficulty in prison law litigation, and deference to State authority.

This report concludes with 9 recommendations in the area of:

(A) Reform of Civil Legal Aid and access to information for people in prison, taking account of the unique situation faced by this group in accessing legal information and civil legal aid. To ensure best use of State resources, an unmet legal needs assessment of people in prison should be conducted, to allow for the provision of targeted legal information for people in prison at an early stage.

(B) Necessary reforms in the legal system, including more certainty in the protection of applicants from adverse costs orders, and ensuring that applicants who take meritorious and necessary cases in the public interest have their costs covered irrespective of the outcome of the litigation.

(C) Access to justice in the management and operation of prisons, including improving access to legal representation for people in prison, and providing an effective and functional prisoner complaint system (that complies with human rights standards).

(D) The prioritisation of the State's ratification of OPCAT and the enactment of the Inspection of Places of Detention Bill. Here, it is imperative that the bodies that will make up the National Preventive Mechanisms and the Co-ordinating National Preventative Mechanism are adequately funded and resourced to carry out their functions in compliance with OPCAT, and that they are granted independence in conducting their functions.

(E) Embedding prison law in legal education. Here, it is recommended that universities and professional legal training bodies consider increasing access for students and trainee lawyers to gain knowledge of prison law, and public interest law, within the modules that they offer in their institutions. In addition, prisons should be more accessible for trainee lawyers and Judges to visit regularly, for these groups to see the reality of prison conditions on a day-to-day basis.

1 See for example, *O'Meara v Minister for Social Protection and the Attorney General* [2024] IESC 1; *Foy v An t-Ard Chláraitheoir & Others* [2007] IEHC 470.

2 See for example, *Simpson v Governor of Mountjoy Prison and others* [2019] IESC 81, which led to the introduction of a compensation Scheme of Settlement for people who had to engage in 'slopping out' while in prison.

3 Irish Penal Reform Trust, Prison Litigation Network Project: National Report on Ireland (IPRT, April 2016).

PART I: BACKGROUND TO THE RESEARCH AND CONTEXT

1. Introduction

Access to justice, or the right of access to legal remedies, is a fundamental norm of human rights law, guaranteed by European and international human rights law.[1] This right is particularly important for marginalised and disadvantaged groups in society (including those in penal detention) who do not have the financial resources necessary to access the courts system in relation to civil law matters, such as human rights breaches. Importantly, research shows the positive economic and social benefits that a society experiences when access to justice is widened.[2] The pathways between social disadvantage, poverty, addiction, poor mental health, lack of education, adverse childhood experiences, time spend in State care and committal to prison are well documented in this jurisdiction and in others. These factors contribute to the over representation of socially disadvantaged groups in Irish prisons, in line with similar statistics in penal populations abroad. As one scholar notes, '[w]hile "prisoners are among the most stigmatised and socially excluded citizens in the community", they have extremely high legal needs'.[3] People in penal detention, in control of the State, are in a particularly vulnerable position, because they rely on the State and its agents to access justice in response to wrongs by the State and its agents.

One of the ways that human rights breaches experienced in prison (for example, in relation to prison conditions) can be addressed is through public interest law. Although no set definition exists for this term, public interest law is generally accepted as falling within the field of public law, as a 'way of working with the law for the benefit of vulnerable and disadvantaged people'.[4] There are a range of tools under the wider heading of public interest law. They involve law reform (for example, research, lobbying, and campaigning conducted by stakeholders), legal education (for example, the teaching of public interest law in third-level and professional legal education institutions), community legal education (for example educating disadvantaged and vulnerable groups on the law and demystifying its content) and public interest litigation.[5] Public interest litigation, which is the subject of this report, 'involves the use of litigation (i.e. the process of bringing a case to court) in a strategic manner to advance the position of disadvantaged and vulnerable groups'.[6]

This report analyses public interest litigation in Ireland as it relates to the protection of the rights of people in prison, exploring the barriers, obstacles and opportunities that arise in this area of law and practice. Throughout this report, the term, 'public interest prison litigation' is used to describe this realm of law. It should be noted that litigation is intended as an action of last resort, and it is one part of the wider potential solutions to bridge the gaps that exist in relation to prisoner rights. Here, the other tools of public interest law are also important, such as law reform, legal education, and community legal education.

At the time of writing, the prison population in Ireland exceeded 5000 people,[7] who are located in 12 penal institutions across the State, consisting of ten 'closed' prisons and two 'open' prisons.[8] There are many systematic human rights issues that are present in Irish prisons, including overcrowding, access to healthcare and an ineffective prisoner complaint system.[9] In recent times, clear progress has been made by public interest prison litigation, for example one

1 Universal Declaration of Human Rights 1948, Art. 8; European Convention on Human Rights 1950, Art. 6(1); EU Charter of Fundamental Rights, Art. 47; Francesco Francioni, 'The Rights of Access to Justice under Customary International Law' in Francesco Francioni (ed.), *Access to Justice as a Human Rights* (Oxford University Press, 2007) pp 1-55.

2 Lisa Moore and Trevor CW Farrow, 'Investing in Justice: A Literature Review in Support of the Case for Improved Access (Canadian Forum on Civil Justice, August 2019).

3 Carolyn McKay, 'Digital Access to Justice from Prison: Is There a Right to Technology' (2018) 42 *Criminal Law Journal* 303- 321, p 304.

4 Mel Cousins, 'How public interest law and litigation can make a difference to marginalised and vulnerable groups in Ireland' in Free Legal advice Centres, 'Public Interest Law in Ireland – the reality and the potential' (FLAC, Conference Proceedings, 6 October 2005) 11-24, p 11.

5 ibid; Gerry Whyte, *Social Inclusion and the Legal System* (2nd edn, Institute of Public Administration, 2015).

6 Cousins, ibid, p 11.

7 In July 2024, the prison population exceeded 5000. For example, on 11 July 2024, there were 5039 people in prison, see Irish Prison Service statistics on the prison population, 11 July 2024.

8 Information from Irish Prison Service website www.irishprisons.ie/prisons/, accessed 15 July 2024. In some literature, the Irish Prison Service list 13 prisons in the State, counting the Limerick male and female prisons as two separate prisons.

9 Irish Penal Reform Trust, 'Progress in the Penal System: A framework for penal reform' (IPRT, 2022).

case led to the introduction of a compensation Scheme of Settlement for people who had to engage in 'slopping out' while in prison.[10] The purpose of this work is to explore the law and practice of public interest prison litigation in Ireland, examining the obstacles and issues that are present and the factors that contribute to this overlooked area of law.

1.1 Prisoners as a marginalised and disadvantaged group

The composition of a nation's prison population is indicative of, 'its socio-economic and socio-political context'.[11] In Ireland, 'it is widely known that most prisoners have a history of social exclusion, including high levels of family, educational and health disadvantage, and poor prospects in the labour market',[12] and this mirrors research conducted in other countries. Available statistics on people in prison give a picture of the social profile of the prison population. As the Irish Prison Service (IPS) notes, almost 70% of the prison population left school at 14,[13] and 70% have a literacy problem.[14] Previous research shows the overrepresentation of people from deprived areas in prison.[15]

Additionally, the IPS estimate that 70% of people committed to prison enter with an addiction or substance abuse problem,[16] while previous research showed that 60% of sentenced women have a mental illness,[17] compared with 27% of sentenced men.[18] There is ample data that shows the over representation of members of the Traveller community in prison,[19] and the additional barriers faced by minority ethnic prisoners and foreign national prisoners in the prison setting.[20] Moreover, people who have difficulties accessing housing, health and social welfare supports on release from prison are more likely to return to prison.[21] All of this data demonstrates the intersectional grounds of discrimination that people in marginalised groups experience and the pathways to prison that are set in motion by their life circumstances.

1.2 Public interest litigation in Ireland

One of the key features of public interest litigation is that, if successful, the outcome benefits not only the applicant, but all persons in the same position.[22] Legal activism to advance the rights of a group of people largely began in Ireland from the 1960s onwards with cases such as *Ryan v*

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10 *Simpson v Governor of Mountjoy Prison and others* [2019] IESC 81. Litigation continues for persons who were excluded from the Scheme, see for example *Coffey v Governor of Limerick Prison and others and Collopy v Governor of Limerick Prison and others* [2024] IEHC 99.

11 Rudolph Jansen and Emily Tendayi Achiume, 'Prison Conditions in South Africa and the Role of Public Interest Litigation Since 1994' (2011) 27(1) *South African Journal on Human Rights* 183-191, p 183.

12 Irish Penal Reform Trust, 'The Vicious Circle of Social Exclusion and Crime: Ireland's Disproportionate Punishment of the Poor' (IPRT, January 2012) p 6.

13 Patsy McGarry, 'Almost 70% of Irish prisoners are early school leavers' (Irish Times, 5 July 2022). This compares with the national average of 4% of the general population leaving school before the age of 15. See Central Statistics Office, 'Census 2022 Profile 8- The Irish Language and Education' (website of the CSO), available at www.cso.ie/en/releasesandpublications/ep/p-cpp8/census2022profile8-theirishlanguageandeducation/levelofeducation/#:~:text=Level%20of%20Education%20by%20Age,those%20aged%2065%20and%20over, accessed 12 March 2024.

14 Patrick Freyne, 'Prisoner literacy: "I wrote to my girlfriend. She wrote back and I could read it": A peer-to-peer literacy programme in Portlaoise Prison is proving a huge success' (Irish Times, 19 March 2022).

15 Ian O'Donnell and others, 'When prisoners go home: Punishment, Social Deprivation and the Geography of Reintegration' (2007) 17(4) *Irish Criminal Law Journal* 3-9; Paul O'Mahony, 'Punishing Poverty and Personal Adversity' in Ivana Bacik and Michael O'Connell (eds.), *Crime and Poverty in Ireland* (Roundhall, 1998) pp 49-67; Paul O'Mahony, *Mountjoy Prisoners: A Sociological and Criminological Profile* (Stationary Office, 1997).

16 Health Research Board, 'Focal Point Ireland: national report for 2023- Prison (Health Research Board, 2024) p 7. See also Harry G Kennedy, and others, 'Mental Illness in Irish Prisoners: Psychiatric Morbidity in Sentenced, Remanded and Newly Committed Prisoners' (National Forensic Mental Health Service, Dundrum, 2004) p 1.

17 Kennedy, ibid.

18 Irish Penal Reform Trust, 'Progress in the Penal System: A framework for penal reform' (n 9) p 19.

19 See for example, Liz Costello, 'Travellers in the Irish Prison System' (IPRT, 2004).

20 David Doyle and others, 'Foreign national prisoners, discrimination and race relations in Irish prisons' (2024) 57(2) *Journal of Criminology* 143-160. David Doyle and others, '"Sometimes I'm Missing the words": The rights, needs and experiences of foreign national and minority ethnic groups in the Irish penal system' (IPRT, 2022).

21 Irish Prison Service, 'Irish Prison Service Strategy 2023-2027' (IPS, 2023) p 7.

22 Public Law Project, 'Guide to Strategic Litigation' (2014), available at https://publiclawproject.org.uk/content/uploads/data/resources/153/40108-Guide-to-Strategic-Litigation-linked-final_1_8_2016.pdf, accessed 27 May 2024, p 1.

Attorney General and *McGee v Ireland*.[23] Yet, the concept of public interest law and litigation, in a structured and concentrated way is a relatively recent phenomenon. Writing in 2006, Dr Mel Cousins noted that public interest law was 'not a term which is very familiar in an Irish context'.[24] Since then, there has been (and continues to be) a lively community of lawyers and civil society organisations who are active in public interest law.

This development has been led by lawyers and civil society organisations such as the Free Legal Advice Centres (FLAC) and other community law centres,[25] and the establishment of the Public Interest Law Alliance (a project of FLAC). Cases such as *Foy v An t-Ard Chláraitheoir & Others* (which led to the enactment of the Gender Recognition Act 2015) and *O'Meara v Minister for Social Protection and the Attorney General* (which declared the exclusion of unmarried families from the Widow/ Widower's Pension scheme to be unconstitutional),[26] demonstrate the ability of a positive judicial decision to advantage not only the applicant, but others in the same situation. Public interest complaints are taken on national level to the Superior Courts,[27] to the European Court of Human Rights,[28] and on an international level to the United Nations Treaty Monitoring Bodies.[29]

Even when a successful judgment is granted, it does not necessarily mean that the decision will be implemented by the Executive. As such, a campaign is often required in conjunction with the court decision.[30] In addition, it is possible for the Executive to change the law to negate the impact of the judicial finding, following a positive decision for the applicant.

Previous case law demonstrates the difficulty in using litigation to advance socio-economic rights of marginalised groups that incur public expenditure on the State. In *Sinnott v Minister for Education, TD v Minister for Education* and *O'Reilly v Limerick Corporation*,[31] the majority of the Supreme Court cited the doctrine of the separation of powers as an impediment to the granting of mandatory orders requiring the State to take positive action to provide services and facilities for socially deprived groups. Here, the Supreme Court stated that it was not within its power to direct the Executive as to how public monies should be spent.[32] This judicial approach is also applied to prison litigation in relation to prison conditions, as discussed below in sections 2.1 and 3.1.

1.3 Methodology

The starting point for this research was to explore public interest prison litigation in Ireland. The research design was created in consultation with IPRT and the original purpose of this research was to explore strategic litigation in the area of prison law. As the research began, it became apparent that for those working in this area the impetus for litigation is mostly client-led, and often a strategic goal is not the main aim. The research design was widened to focus less on strategic litigation and more on public interest prison litigation as a whole. It is well documented that there are barriers and issues that arise in public interest litigation in this

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23 In *Ryan v Attorney General* [1965] IR 294, the applicant challenged the insertion of fluoride in the public water system. Here, the Supreme Court held that there was an unenumerated (or implied) right to bodily integrity in Art. 40.3 of the Irish Constitution. In *McGee v Attorney General* [1974] IR 284, the applicant successfully argued that there was an unenumerated right to marital privacy in Art. 40.3 of the Irish Constitution. It is generally accepted that public interest litigation began in the United States with the case of *Brown v Board of Education of Topeka* 347 US 483, which held that racially segregated public schools were unconstitutional.

24 Cousins (n 4) p 11.

25 Such as the Ballymun Community Law Centre, Community Law and Mediation and the Mercy Law Resource Centre.

26 *Foy v An t-Ard Chláraitheoir & Others* [2007] IEHC 470 (under the European Convention on Human Rights Act 2003); *O'Meara v Minister for Social Protection and the Attorney General* [2024] IESC 1.

27 For example, see *Foy v An t-Ard Chláraitheoir & Others*, ibid; *McGee v. Attorney General* (n 23).

28 For example, see *Norris v Ireland* (Application no 10581/ 83), Judgment 26 October 1988; *Airey v Ireland* (Application no 6289/73), Judgment 9 October 1979.

29 For example, see *Kavanagh v Ireland* (CCPR/C/71/D/819/1998), 26 April 2001.

30 Scott L Cummings, 'Public Interest Litigation in Comparative Perspective' (2020) 26(2) *Australian Journal of Human Rights* 184-194, p 190. This situation arose after the positive decision in *Foy v An t-Ard Chláraitheoir & Others* (n 26), where FLAC had to engage in advocacy and policy on a national, European and International level to lobby for the enactment of the Gender Recognition Act 2015, see the timeline of this continuous advocacy in Free Legal Advice Centres, 'A Story of great human proportions: Lydia Foy and the struggle for Transgender Rights in Ireland' (FLAC, 2018).

31 *Sinnott v Minister for Education* [2002] 2 IR 545, *TD v Minister for Education* [2001] IESC 101 and *O'Reilly v Limerick Corporation* [1989] ILRM 181.

32 This approach is not without criticism, see for example, Whyte (n 5).

jurisdiction and in others,[33] and this project aims to analyse this area of law as it applies to prison litigation in Ireland. The research questions for this project are: (1) *What are the barriers and issues that arise in public interest prison law in Ireland* and (2) *What factors and infrastructure are required to enhance and cultivate public interest litigation in the area of prisoners' rights in Ireland?*

To answer these questions, this report relied on a mixed method approach to methodology, using doctrinal and qualitative research methods. This project seeks to bridge the gap between existing research in this area and the issues that arise in practice, which is one of the goals of using qualitative research for evidence-based practice.[34] Legal doctrinal methodology was used in addition to semi-structured interviews with legal professionals in the field to ground evidenced-based answers to the research questions. In the context of legal research, the doctrinal method is defined as 'research into the law and legal concepts', it is the foundation of the common law and the dominant methodology in the discipline.[35] Relying on this methodology, a detailed analysis of primary sources (such as case law, legislation and draft legislation) and secondary sources (such as reports of prison monitoring bodies and reputable organisations in the field, and academic commentary) was conducted. This methodology was used in relation to materials on prison law and public interest law, looking to this jurisdiction and abroad.

For this report, 26 semi-structured interviews were conducted with persons with knowledge and experience of prison law and/ or public interest law in Ireland and abroad. Semi-structured interviews as a method of qualitative research allow for a certain amount of flexibility in the conversation and as such, 'can make better use of the knowledge-producing potentials of dialogues'.[36] Nearly all Participants were professionals including, Judges, barristers, solicitors, members of civil society organisations and academics. Most of the legal practitioners interviewed act for the side of the applicant in prison litigation, however some practitioners also act for the State. Given the topic of this report, it was necessary to interview more practitioners who act for applicants in human rights cases.[37] As Alan Bryman and others note, '[an interview] sample must accurately represent the population from which it was gathered or be the most ideal group from which to study the topic of interest'.[38]

It was originally intended to interview rights-holders as part of this research, however recruitment from this group was difficult taking into account ethical and practical considerations. One interview was conducted with one person who had experience of litigation while in penal detention, however the data from this interview was not included in the report. IPRT assisted in identifying and recruiting the Participants, and contributed to the drafting of the interview questions. Participants were recruited through IPRT's and the researcher's networks, and through 'cold calling' via letters and email. A snowball sampling method was also used for the interviewee selection process, based on the recommendations of Participants themselves.[39] The interviews took place between April-December 2023 and lasted between 40-90 minutes. Participants received the interview questions in advance, and most interviews took place online, except for one, which took place in person. Where Participants consented, the interview was recorded and then transcribed (in total 25 interviews were recorded and transcribed). Ethical approval to conduct the interviews was granted by the Maynooth University Ethics Committee.

The data set from the interviews was subject to thematic analysis using manual coding,[40] given that thematic analysis is considered 'a foundational method for qualitative analysis'.[41] Thematic analysis

33 See for example, FLAC, 'Lydia Foy and the struggle for Transgender Rights in Ireland' (n 30); Whyte (n 5); Brian Kearney-Grieve, 'Public Interest Litigation: Summary of a meeting of organisations from Northern Ireland, the Republic of Ireland, South Africa and the United States' (South Africa, May 2011, Atlantic Philanthropies).

34 Margarete Sandelowski, 'Using Qualitative Research' (2004) 14 (10) *Qualitative Health Research* 1366–1386, p 1369.

35 Terry Hutchison and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83-119, p 85.

36 Svend Brinkmann, 'The Interview' in Norman K Denzin and Yvonna S Lincoln (eds.), T*he Sage Handbook of Qualitative Research* (5th edn, Sage, 2018) 576-599, p 579.

37 The selection of potential interviewees will depend on the nature of the research, see Jennifer Rowley, 'Conducting research interviews' (2012) 35(3/4) *Management Research Review* 260-271, pp 264-265.

38 Alan Bryman and others, *Social Research Methods* (Oxford University Press, 2022) p 90 (insertion added).

39 This method of recruitment in qualitative research is useful for contacting a specific group of hard to reach people, see ibid, pp 82-84.

40 Virginia Braun and Victoria Clarke, *Thematic Analysis* (Sage, 2022) pp 51-74.

41 Virginia Braun and Victoria Clarke, 'Using thematic analysis in psychology' (2006) 3(2) *Qualitative Research in Psychology* 77-101, p 78. See also Braun and Clarke, *Thematic Analysis*, ibid.

is defined as 'a method for identifying, analysing and reporting patterns (themes) within data'.[42] During this process, themes and sub-themes were identified across the interviews. As seminal scholars on thematic analysis, Professor Virginia Braun and Dr Victoria Clark, note '[a] theme captures something important about the data in relation to the research question, and represents some level of patterned response or meaning within the data set'.[43] The themes were identified using a 'bottom-up' or inductive approach based on the content of the interviews, and they are reflected in the sub sections of the report findings. Here an 'essentialist or realist method' of thematic analysis was adopted, which reports the 'perspectives of different research participants, highlighting similarities and differences, and generating unanticipated insights'.[44] **Qualitative research is based on human experience, and it should be noted that the interview content, and the quotations in this report, are reflective of the experience of the Participants.[45] The quotes included represent a snapshot of subjective views at a particular period in time.[46]** In line with thematic analysis, the themes were compared with information in the law and literature to confirm the evidence based-research findings,[47] and to allow for analysis of the issues highlighted.

In March 2024, a closed roundtable meeting took place in Maynooth University where the preliminary findings and recommendations were reviewed by experts in the fields of prison law, public interest law and the themes identified in the research. The feedback from this review was then incorporated into the research and written into this report, which was reviewed by IPRT in advance of publication. Although, the IPS and State Claims Agency were invited to participate in the interviews and declined, the IPS provided a response to some of the sections of this report, which is incorporated into this report.

This research focuses on the adult prison population, unless otherwise stated. Although many of the points raise will be applicable to litigation involving young people in prison.

42 Braun and Clarke, 'Using thematic analysis in psychology', ibid, p 79.

43 ibid, p 82.

44 Lorelli S Nowell and others, 'Thematic Analysis: Striving to Meet the Trustworthiness Criteria' (2017) 16 *International Journal of Qualitative Methods* 1-13, p 2. See also ibid, p 81.

45 Anne Galletta and Willian E Cross, *Mastering the Semi-Structured Interview and Beyond: From Research Design to Analysis and Publication* (New York University Press, 2013) p 45; Sandelowski (n 34) p 1368.

46 Any quotations cited in this work are not being asserted as facts through their use in this report; they are statements that were made in good faith by the research participants regarding their experience and views of the subject matter.

47 Nowell and others (n 44) p 11; Galletta and Cross (n 45) pp 173-190.

PART II: LEGAL FRAMEWORK CONCERNING PRISON LAW IN IRELAND

2. Applicable Law

Before presenting the findings of this research, it is necessary to present the legal framework and applicable law that apply to people in prison. The main sources of fundamental rights for people in prison in Ireland are Bunreacht na hÉireann 1937 (the Constitution of Ireland), the Prisons Act 2007, the Prison Rules and the European Convention on Human Rights Act 2003. This part of the report outlines how each of these instruments make up the legal framework that aims to protect the rights of people in prison. In addition to the sources of law described in the sections of this part of the report, the EU Charter on Fundamental Rights (CFR) applies to the State when implementing EU Law.[1] In practice (within the context of public interest prison law), the CFR is relied on in cases concerning European Arrest Warrants.[2]

The rights guaranteed under international human rights law apply to people in prison in Ireland,[3] to the extent that the rights are limited by deprivation of liberty and the nature of imprisonment. However, international treaties can only be enforced judicially where they are incorporated into domestic law, as required under Article 29.6 of Bunreacht na hÉireann. International penal law (such as the UN Standard Minimum Rules for the Treatment of Prisoners),[4] and the Council of Europe's Revised European Prison Rules are important sources of rights for people in penal detention in Ireland, but they are non-justiciable and are considered 'soft law' (non-binding), unless incorporated into legislation.

2.1 The Irish Constitution

Bunreacht na hÉireann 1937 is the ultimate source of rights protection for people in penal detention, and as such, the Superior Courts have a significant role in guaranteeing that the constitutional rights of people in prison are upheld. While in prison, all persons maintain their constitutional rights that are not limited by deprivation of liberty.[5] Importantly, the Prison Authority has a responsibility to 'vindicate the individual rights and dignity of each prisoner' as far as possible,[6] and all prisoners must be 'treated humanely and with human dignity'.[7] The case law affirms a non-exhaustive list of rights that apply to people in prison, including the right to bodily integrity,[8] the right to privacy,[9] the (limited) right to health,[10] freedom from torture, inhuman and degrading treatment or punishment,[11] the right to free communications,[12] the right to natural and constitutional justice,[13] and the right of access to the Courts.[14]

Any interference with a constitutional right of a person in penal detention must be no more than is necessary.[15] It must also be proportionate to the aim that the infringement seeks to achieve, and 'must not fall below the standards of reasonable human dignity'.[16] This principle means that the greater the interference with the constitutional right on the part of the State, the greater the

1 EU Charter on Fundamental Rights, Article 51.

2 See for example, *Minister for Justice, Equality and Law Reform v Celmer* [2019] IESC 80.

3 For example the UN International Covenant on Civil and Political Rights 1966, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.

4 The UN Standard Minimum Rules for the Treatment of Prisoners are also referred to as the 'Mandela Rules'.

5 *McDonnell v Governor of Wheatfield Prison* [2015] IECA 216 (Court of Appeal judgment); *Murray v. Ireland* [1985] I.R. 532; *The State (Susan Richardson) v The Governor of Mountjoy Prison* [1980] ILRM 82.

6 *Mulligan v Governor of Portlaoise Prison* [2010] IEHC 269, para 14.

7 *Devoy v Governor of Portlaoise Prison* [2009] IEHC 288, para 88.

8 *The State (C) v Frawley* [1976] IR 365.

9 *Mulligan v Governor of Portlaoise Prison* (n 6).

10 *Kinsella v Governor of Mountjoy Prison* [2011] IEHC 235; *Mulligan v Governor of Portlaoise Prison*, ibid.

11 *The State (C) v Frawley* (n 8); *Mulligan v Governor of Portlaoise Prison* (n 6).

12 *Holland v Governor of Portlaoise Prison* [2004] 2IR 573.

13 ibid.

14 *Gilligan v Governor of Portlaoise Prison*, High Court, unreported, McKechnie J., 12 April, 2001.

15 *Holland v Governor of Portlaoise Prison* (n 12).

16 *Mulligan v Governor of Portlaoise Prison* (n 6), para 14. See also *Killeen and Dundon v Governor of Portlaoise Prison* [2014] IEHC 77.

necessity for the justification for that infringement.[17] Unless proven otherwise, there is a presumption that the constitutional rights of prisoners are respected by the State.[18]

The Superior Courts have made it clear that it is not their role to 'micromanage' the daily management and operation of prisons.[19] Instead, it is the role of the Courts to supervise that the Irish Prison Service (IPS) is conducting its functions in line with the Constitution, with the Courts only intervening in exceptional circumstances. In *Connolly v Governor of Wheatfield Prison*, Hogan J. stated:

> 'In view of the acute difficulties involved in prison management, the judicial branch can but rarely be prescriptive in terms of specific conditions of prison conditions, not least given that this is ultimately the responsibility of the executive branch… In this regard, the supervisory function which the Constitution ascribes to the courts must therefore often be confined in the first instance to prompting, guiding and warning the executive branch lest these precious values of human dignity (in the Preamble) and the protection of the person (in Article 40.3.2) might inadvertently be jeopardised in any given case'.[20]

Additionally, the case law demonstrates that the separation of powers doctrine prevents the Judiciary from granting an order directing the IPS (which are part of the Executive, as IPS comes under the remit of the Minister for Justice),[21] to take a particular action. In *McDonnell v Governor of Wheatfield Prison*, the Court of Appeal refused to grant a mandatory order directing the IPS, as to how the applicant's time in solitary confinement should be managed.[22] Here, the Court of Appeal stated that a 'specific order of this kind cannot easily be aligned with the separation of powers and the Government's function as the Executive authority'.[23] Here, the Court affirmed that it is the function of the IPS to determine what actions to take to protect the safety of prisoners.[24] However, the Court did imply that under the right circumstances, an order directing the IPS to take particular action could be granted when 'imperatively necessary to safeguard fundamental constitutional rights'.[25] In *Mulligan v Governor of Portlaoise Prison*, the High Court stated *obiter dictum* that the Courts could intervene by issuing an order of *mandamus* against the IPS in the case of 'an ongoing and serious threat to a prisoners applicant's health'.[26]

It is more common for the Courts to grant a declaration that a constitutional breach has occurred, but this only happens in exceptional circumstances.[27] Practice shows that when a breach of a right occurs, the Courts will usually defer to the IPS to rectify the situation, which is discussed below in section 3.1.

2.2 The Prisons Act 2007 and the Prison Rules 2007

As the foremost legal expert on Irish prisons, Professor Mary Rogan, notes, '[t]here have been remarkably few pieces of legislation governing the prison system since the foundation of the State'.[28] The central legislative framework that applies to the penal system in Ireland is provided by the Prisons Act 2007 and the accompanying statutory instrument, the Prison Rules.[29] The power to govern and manage prisons in Ireland lies with the Executive, represented by the IPS, as set out in the 2007 Act. The Prison Rules 'govern all aspects

17 *McDonnell v Governor of Wheatfield Prison* (n 5), para 60. See also *Holland v Governor of Portlaoise Prison* (n 12).

18 *The State (Susan Richardson) v The Governor of Mountjoy Prison* (n 5).

19 *McDonnell v Governor of Wheatfield Prison* (n 5); *Connolly v Governor of Wheatfield Prison* [2013] IEHC 334; *Dundon v Governor of Cloverhill Prison* [2013] IEHC 608; *Walsh v Governor of the Midlands Prison* [2012] IEHC 229.

20 *Connolly v Governor of Wheatfield Prison,* ibid, para 23.

21 The General Scheme of the Irish Prison Service Bill 2023 proposes to establish the IPS and its Director General on a statutory basis, see Draft General Scheme of an Irish Prison Service Bill 2023, Head 5.

22 *McDonnell v Governor of Wheatfield Prison* (n 5). This case was an appeal from the High Court that had found in favour of the applicant.

23 ibid, para 91. Comparably, in *Mulligan v Governor of Portlaoise Prison* (n 6), the High Court stated that the Courts don't have the power to direct the Executive to spend public resources to rebuild the block in a prison, at para 123.

24 *McDonnell v Governor of Wheatfield Prison*, ibid, para 98.

25 ibid, para 94.

26 *Mulligan v Governor of Portlaoise Prison* (n 6), para 99. In this case, the Court found against the applicant.

27 See for example, *Simpson v Governor of Mountjoy Prison and others* [2019] IESC 81; *Kinsella v Governor of Mountjoy Prison* (n 10).

28 Mary Rogan, *Prison Law* (Bloomsbury, 2014) [1.20].

29 SI No 252/2007 Prison Rules 2007.

of prison life' (although they are non-justiciable),[30] and they must be read in light of the Constitution.[31]

The Prisons Act 2007 is not as detailed as the Prison Rules. It focuses on macro level aspects of the penal system, and contains provisions governing aspects such as prison discipline, the construction and extension of prisons and the functions and powers of the Office of the Inspector of Prisons. In contrast, the Prison Rules cover more granular details concerning the daily prison regime. However, the 2007 Act and the Prison Rules contain some overlapping principles, particularly regarding prison disciplinary procedures.[32] The Prison Rules are heavily influenced by the Council of Europe's European Prison Rules 2006,[33] and since 2021 they have been under review by the Department of Justice, with the aim of bringing them in line with the Revised European Prison Rules 2020.[34]

On a day-to-day basis in the prison setting, the Prison Rules are the main guide for both staff and prisoners. They set out the rules that apply to all people in penal detention, dictating the prison regime and rules concerning provisions for people in prison (e.g. bedding and food), rules of association, contact with the outside world, privacy and grievance procedures. In addition, the Prison Rules contain the list of duties and responsibilities of Prison Governors and Prison Officers. Where the Prison Rules are not followed by prison staff, it may lead to a finding of *ultra vires* by a Court by way of judicial review.[35]

Prison Governors have the responsibility to run prisons on a day-to-day basis, in line with the direction of the Minister for Justice and the Director General of the IPS.[36] The Governor of each prison has discretion in the daily operation of the prison,[37] as set out in Rule 75(3) of the Prison Rules.[38] Prison Governors must interpret the Prison Rules in line with the Constitution,[39] specifically, 'the right to be treated humanely and with human dignity'.[40] As affirmed by Edwards J. in *Devoy v Governor of Portlaoise Prison and Others*, the IPS is 'obliged to comply with the Prison Rules save in exceptional circumstances of overwhelming urgency justifying direct reliance on the State's constitutional duty to preserve life'.[41] When it comes to restricting the rights of the prisoner, the Courts have held that the Prison Authority, 'should not resort in the first instance to extraordinary measures if they can achieve the desired result by means of ordinary measures'.[42] The case law also recognises the difficulties faced by the IPS in managing and operating prisons.[43]

2.3 The European Convention on Human Rights Act 2003

The European Convention on Human Rights Act 2003 (ECHR Act 2003) incorporates the European Convention on Human Rights 1950 (ECHR) into Irish domestic law, on a sub-Constitutional level. The legislation provides for a number of obligations that apply to some organs of the State.[44] Section 2 states that the Courts are to interpret legislation

30 Mary Rogan, 'Judicial conception of prisoners' rights in Ireland: an emerging field' (ERA, Strasbourg, 6-7 November 2014), available at https://arrow.tudublin.ie/cgi/viewcontent.cgi?article=1006&context=aaschlawcon, accessed 28 May 2024, p 2.

31 *McDonnell v Governor of Wheatfield Prison* (n 5); *Killeen and Dundon v Governor of Portlaoise Prison* (n 16), para 6.9; *Holland v Governor of Portlaoise Prison* (n 12).

32 Rogan, *Prison Law* (n 28) [1.18].

33 Committee of Ministers Recommendation Rec (2006) 2 to Member States on the European Prison Rules.

34 Committee of Ministers Recommendation Rec (2006) 2-rev of 1 July 2020 to Member States on the European Prison Rules.

35 Rogan, *Prison Law* (n 28) [1.17]. Judicial review is the legal mechanism that allows individuals to challenge the way in which a procedure or law was followed by a public body exercising its powers. Such applications are made to the High Court.

36 Prison Rules, Rule 75(1); *Devoy v Governor of Portlaoise Prison* (n 7), p 82.

37 *Dundon v Governor of Cloverhill Prison* (n 19), para 77; *The State (Susan Richardson) v The Governor of Mountjoy Prison* (n 5).

38 Prison Rule 75(3)(1) reads: '[t]he Governor shall develop and maintain a regime which endeavours to ensure the maintenance and good order, and safe and secure custody and personal well-being of the prisoners'.

39 *McDonnell v Governor of Wheatfield Prison* (n 5); *Foy v Governor of Cloverhill Prison* [2010] IEHC 529; *Heaney v Ireland* [1994] 3 IR 593.

40 *Devoy v Governor of Portlaoise Prison* (n 7), p 83. Prison Rule 75 (2) (iii) requires the Governor 'to conduct himself or herself and perform his or her functions in such a manner as to respect the dignity and human rights of all prisoners'.

41 *Devoy v Governor of Portlaoise Prison*, ibid, p 87.

42 ibid.

43 *McDonnell v Governor of Wheatfield Prison* (Court of Appeal judgment)(n 5), para 64; *McDonnell v Governor of Wheatfield Prison* [2015] IEHC 112 (High Court judgment), para 114; *Connolly v Governor of Wheatfield Prison* (n 19); *The State (Susan Richardson) v The Governor of Mountjoy Prison* (n 5).

44 Under the ECHR Act 2003, the definition of 'organ of the State' excludes the Oireachtas (including the President), ECHR Act 2003, s. 1(1).

and rules of law in the context of Ireland's obligations under the ECHR 'so far as is possible'. The Courts must also take 'judicial notice' of the declarations, decisions of the European Court of Human Rights (ECtHR) and the Council of Europe's Committee of Ministers.[45] Additionally, every organ of the State (as defined under the Act) is to perform its functions in a manner compatible with the State's obligations under the ECHR, as set out in Section 3(1). Thus, this provision is applicable to the IPS in their management and operation of the prisons in the State.

A number of remedies are provided for in the ECHR Act 2003. Where a person has suffered injury, loss or damage due to a breach of Section 3(1) of the ECHR Act 2003, they can make an application for damages in the Circuit Court or the High Court, where 'no other remedy in damages is available'.[46] Such proceedings must be made within one year of the breach, however this period can be extended by the Court.[47]

At this juncture it is also worth noting that under the Public Sector Equality and Human Rights Duty, the IPS is obligated to protect the human rights of rights holders, as the obligation applies to all public bodies (as defined under the Irish Human Rights and Equality Commission Act 2014).[48] Included in this duty, is the requirement to set out 'an assessment of the human rights and equality issues it believes to be relevant to the functions and purpose of the body and the policies, plans and actions in place or proposed to be put in place to address those issues' within its strategic plan.[49]

The Superior Courts can issue a 'Declaration of Incompatibility' confirming that a law or the actions of a public body are incompatible with the State's obligations under the ECHR, 'where no other legal remedy is adequate and available'.[50] However, the legislation also states that where such a declaration is made it, 'shall not affect the validity, continuing operation or enforcement of the statutory provision or rule of law in respect of which it is made'.[51] There is an obligation on the Taoiseach to bring the matter before the Houses of the Oireachtas within 21 days of the declaration of incompatibility,[52] although there is no obligation on the State to amend the law. In *Carmody v Minister for Justice and Others*, the Supreme Court described the remedy under Section 5 of the ECHR Act as 'limited', noting that, '[i]t does not accord to a plaintiff any direct or enforceable judicial remedy'.[53] If a declaration of incompatibility is granted, the applicant can make a submission to the Attorney General for compensation,[54] and a discretionary *ex gratia* payment can be granted by the Government to the injured party.[55]

As many leading academics and practitioners in the field have noted, the ECHR Act 2003 is highly restrictive in its remit.[56] In practice, declarations of incompatibility are granted sparingly,[57] as are findings that a public body has failed in its obligations under Section 3(1) of the Act.[58] This situation is unsurprising given the supremacy of the Constitution in the Irish legal system and the

45 ECHR Act 2003, s. 4.

46 ECHR Act 2003, s. 3(2). Such damages are awarded at the discretion of the Court.

47 ECHR Act 2003, s. 3(5). This time period was not extended in *Simpson v Governor of Mountjoy Prison and others* (n 27).

48 Irish Human Rights and Equality Commission Act 2014, s. 42(1)(c).

49 Irish Human Rights and Equality Commission Act 2014, s. 42(2)(a). Here, it is notable that the current IPS Strategic Plan does not address the Public Sector Equality and Human Rights Duty, as the 2019-2022 Strategic Plan did. However, the IPS publishes a Public sector Duty Action Plan annually, which outlines steps taken by the IPS to achieve this obligation.

50 ECHR Act 2003, s. 5(1).

51 ECHR Act 2003, s. 5(2)(a).

52 ECHR Act 2003, s 5(3).

53 *Carmody v Minister for Justice and Others* [2009] IESC 71, p 14.

54 ECHR Act 2003, s. 5(4)(b).

55 ECHR Act 2003, s. 5(4)(c).

56 See for example, Michael Farrell, 'Making the ECHR Effective in Domestic Law' (paper given to Irish Centre for European Law conference on Human Rights Law, October 2016), available at https://independent.academia.edu/FarrellMichael/Papers, accessed 10 March 2024. Fiona de Londras, 'Declarations of Incompatibility Under the ECHR Act 2003: A Workable Transplant? (2014) 35 *Statute Law Review* 50-65; Donncha O'Connell, 'Watched Kettles Boil (Slowly): The Impact of the ECHR Act 2003' in Ursula Kilkelly (ed.), *ECHR and Irish Law* (2nd edn, Jordan Publishing, 2008) 1-20; Fiona deLondras and Cliona Kelly, *European Convention on Human Rights Act* (Roundhall, 2010).

57 As far as the author is aware, declarations of incompatibility have been granted in these cases: *Donegan v Dublin City Council & Gallagher v DCC* [2012] IESC 18; *Foy v An t-Ard Chláraitheoir & Others* [2007] IEHC 470.

58 *O'Donnell v South Dublin County Council* [2007] IEHC 204.

judicial interpretation of constitutional fundamental rights.[59] Where an applicant seeks a declaration of unconstitutionality *and* a declaration under Section 3 or Section 5 of the ECHR Act 2003, the Courts will first assess the issue in light of the Constitution. In *Carmody v Minister for Justice and Others*, the Supreme Court clarified that this is the order in which such issues should be addressed because '[a]ny such declaration [of unconstitutionality] means that the provisions in question are invalid and do not have the force of law'.[60]

The question of the order in which remedies under the Constitution and the ECHR Act should be addressed has also arisen in prison litigation. In *Simpson v Governor of Mountjoy Prison and others*, the applicant sought a number of declarations under the Constitution (concerning breaches of fundamental rights including the rights to dignity, privacy and bodily integrity, and freedom from inhuman and degrading treatment), in addition to a declaration under Section 3 of the ECHR Act 2003 that the Prison Governor and the IPS had failed in their functions in a manner consistent with the State's obligations under the ECHR. Here, Mac Menamin J. affirmed, 'the need for resort to the ECHR Act of 2003 only arises if no remedy can be found under the Constitution'.[61]

Additionally, the case law shows that the scope of a right under the Constitution can provide equivalent or more protection than that provided for under the ECHR.[62] This point was addressed by Hogan J. in *DF v Garda Commissioner and Others (No. 3)* where the Judge held that, 'every protection in respect of the guarantee against torture and inhuman and degrading treatment is necessarily and by definition subsumed in the concomitant protection of the person in Article 40.3.2 and the protections of bodily integrity in Article 40.3.1'.[63] As such, the impact on the ECHR Act 2003 on prison law has been limited,[64] indeed the same can be said in respect of the impact of the Act on public interest litigation in general.

2.4 The European Court of Human Rights

People in prison continue to be protected by the ECHR, to the extent that the rights and freedoms are not limited by virtue of penal detention. The case law of the ECtHR has been instrumental in advancing the rights of prisoners.[65] While the most commonly litigated Article of the ECHR concerning prison conditions is Article 3 (freedom from torture or inhuman or degrading treatment or punishment), people in prison are entitled to a wide array of rights. Rights and freedoms specific to the prison setting include: the (qualified) right to respect for correspondence,[66] freedom from extreme prison overcrowding,[67] access to toilet and washing facilities,[68] the (qualified) right to communication with the outside world,[69] accountability for injuries suffered while in penal detention,[70] and prompt access to a legal representative in respect of criminal matters (unless there are compelling reasons that justify the delay).[71]

It is important to note that under the ECHR principles, many of the substantive rights and freedoms may be limited on a particular ground such as prison safety and security.[72] Such infringements must be proportionate to the aim that the limitation seeks to achieve and must not infringe a prisoner's rights to dignity.[73] As previous research by IPRT shows, there are few applications

59 See for example, *Simpson v Governor of Mountjoy Prison and other* (n 27); *McD v L* [2009] IESC 81; *Carmody v Minister for Justice and Others* (n 53).

60 *Carmody v Minister for Justice and Others,* ibid, p 16 (insertion added).

61 *Simpson v Governor of Mountjoy Prison and others* (n 27), para 65.

62 *Odem v Minister for Justice, Equality and Law Reform* [2023] IESC 26, para 8; *DF v Garda Commissioner and Others (No. 3)* [2014] IEHC 213.

63 *DF v Garda Commissioner and Others (No. 3),* ibid, para 41. See also comments by Cregan J. in *McDonnell v Governor of Wheatfield Prison* (High Court judgment) (n 43), paras 109-110.

64 Rogan, 'Judicial conception of prisoners' rights in Ireland: an emerging field' (n 30), p 2; Liam Herrick, 'Prisoners' Rights' in Ursula Kilkelly (ed.), *ECHR and Irish Law* (2nd edn, Jordan Publishing, 2008) 325-351.

65 See generally, European Court of Human Rights, 'Guide on the case-law of the European Convention on Human Rights: Prisoner's Rights (Council of Europe, 29 February 2024).

66 *Hirst v United Kingdom (No 2)* (Application 74025/01), Judgment 6 October 2005, para 69.

67 *Orchowski v Poland* (Application no 17885/04), Judgment 22 October 2009.

68 *Ananyev and others v Russia* (Application nos 42525/07 and 60800/08), Judgment 10 January 2012, para 156.

69 *Aliev v Ukraine* (Application no 41220/89), Judgment 29 April 2003, para 187.

70 *Mustafayev v Azerbaijan* (Application no 47095/09), Judgment 4 May 2017, para 53.

71 *Ibrahim and others v United Kingdom* (Application nos 50541/08, 50571/08, 50573/08 and 40351/09), Judgment 13 September 2016, paras 255-259.

72 See generally, 'Guide on the case-law of the European Convention on Human Rights: Prisoner's Rights' (n 65), para 5.

73 *Vinter and others v United Kingdom* (Application nos 66069/09, 130/10 and 3896/10), Judgment 9 July 2013, para 113.

from Ireland to the ECtHR concerning the rights of people in prison.[74] In *DG v Ireland*,[75] the ECtHR unanimously found a violation of Article 5(1)(d) of the ECHR (concerning the unlawful detention of a young person) and Art 5(5) ECHR (concerning the enforceable right to compensation for breaches of Art 5 ECHR) in respect of a young person who was detained in St Patrick's Institution.[76] Many applications against the State concerning the rights of people in prison have been found to be inadmissible.[77]

74 Irish Penal Reform Trust, Prison Litigation Network Project: National Report on Ireland (IPRT, April 2016) pp 4-8.

75 (Application 39474/98), Judgment 16 May 2002.

76 Here, the ECtHR unanimously found no violation of Arts 3, 8 (right to respect for private and family life) and 14 (prohibition of discrimination) ECHR.

77 *Lynch and Whelan v Ireland* (Application nos 70495/10 and 74565/10), Decision 8 July 2014' *McHugh v Ireland* (Application no 34486/97), Decision 16 April 1998; *O'Hara v Ireland* (Application no 26667/95), admissibility decisions 2 September 1996 and 14 April 1998; *Holland v Ireland* (Application no 24827/94), admissibility decision 14 April 1998.

PART III: RESEARCH FINDINGS

Part III of the report presents the themes identified in the research findings from the interviews conducted with Participants. This Part of the report is divided into two sections, the first part focuses on barriers and issues that arise in public interest prison litigation. The second section presents additional themes evident in the research findings, and other aspects of prison law that are relevant to public interest prison law.

3 Public interest prison litigation in Ireland

Public interest lawyers play an instrumental role in advancing the rights of marginalised groups.[1] As Professor Mary Rogan comments, '[w]e must never lose sight of the fact that lawyers engaged in prison law cases play an essential role in ensuring accountability and the upholding of the rule of law in places which are very far from public view'.[2] Within Ireland, prisoner rights litigation is led by a relatively small group of solicitors and barristers (which is a typical feature of public interest law),[3] who generally specialise in criminal law. It often occurs that these lawyers represent their clients in matters of criminal law, pre-conviction, and in matters concerning prison law, post-conviction. However, criminal law and civil law public interest cases are two different areas of specialisation.[4] One Participant commented that they inform clients to contact them while in detention should any issues arise concerning prison conditions that they cannot resolve.[5] Additionally, public interest prison lawyers must have a knowledge of judicial review and civil procedures for prison law cases.[6] As such, knowledge of prison law is a specialised field, that requires training or self-education.[7] There are several factors that contribute to this small pool of specialised lawyers including gaps in legal education, the stigma attached to working with people in prison, and general difficulties in conducting prison law litigation; all of which are discussed further below.

Several Participants noted that despite the low level of public interest cases in Ireland and the difficulties in taking prison law cases, there are lawyers who are willing to take these cases.[8] As one Participant noted, '[l]itigation is expensive, it's difficult, but when you actually do get a win, it's just fantastic'.[9] As another Participant noted, '[t]he goal of the prison case is not to gain financially, but to address a particular issue'.[10]

Traditionally there have been few prisoner rights cases in Ireland. Indeed, writing in 2000, legal expert, Paul Anthony McDermott commented that Irish prison law was in still in 'an early stage of development'.[11] There has been an increase in reported cases since then, however, most legal professional Participants interviewed did note that there are relatively few prison law cases.[12]

Many Participants viewed the Courts as a positive means of protecting the rights of people in prison, when compared to the actions of the Executive. Giving slopping out litigation as an example, one Participant noted that the case law of the European Court of Human Rights was clear on the prohibition of slopping out and that this had been brought to the attention of the Government on many occasions (for example in the reports

1 Catherine Albiston, Scott L Cummings and Richard L Abel, 'Making Public Interest Lawyers in a Time of Crisis: An Evidence-Based Approach' (2021) 34 *Georgetown Journal of Legal Ethics* 223-294; Joel F Handler, *Social Movements and the Legal System: A Theory of Law Reform and Social Change* (Academic Press, 1978) 25-33.

2 Mary Rogan, *Prison Law* (Bloomsbury, 2014) [9.56].

3 Mel Cousins, 'How public interest law and litigation can make a difference to marginalised and vulnerable groups in Ireland' in Free Legal advice Centres, 'Public Interest Law in Ireland – the reality and the potential' (FLAC, Conference Proceedings, 6 October 2005) 11-24, p 15.

4 Mary Rogan, 'Judicial conception of prisoners' rights in Ireland: an emerging field' (ERA, Strasbourg, 6-7 November 2014) p 9.

5 Participant 2.

6 Rogan, *Prison Law* (n 2) [9.02].

7 Participant 2 also commented that they had taken it upon themselves to self-teach prison law.

8 Participants 15, 21, 22, 23 and 25.

9 Participant 24. Participant 2 also echoed this sentiment.

10 Participant 4.

11 Paul A McDermott, *Irish Prison Law* (Round Hall Sweet and Maxwell, 2000) p vii.

12 Participants 1, 2, 4, 8, 12, 21 and 24.

of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment).[13] They noted:

> '[T]he courts have shown that even in the most unappealing situations, they are prepared to do the right thing, and where society in general would throw away the key in respect of a lot of offenders, the courts are vigilant to ensure that, for instance, solitary confinement is limited and has to be justified on an objective basis. They are anxious to ensure that, you know, prisoners do have an effective access to the courts in a way that the politicians are simply not prepared to do...'[14]

Most prison cases are taken under Article 40.4 *habeas corpus* proceedings in the Constitution (where the applicant challenges the legality of their detention), or by way of judicial review or plenary proceedings, with most cases relating to prison conditions.[15] The circumstances of the facts will dictate which procedure is appropriate.[16] Although on its face, *habeas corpus* proceedings may not be assumed to include complaints concerning prison conditions, Hamilton J. (as he was then) suggested otherwise in *The State (Greene) v Governor of Portlaoise Prison*.[17] Here, Hamilton J. stated that *habeas corpus* could be used to challenge prison conditions where there was an alleged breach of constitutional rights.[18]

All Participants with knowledge of prison law and / or public interest law highlighted the importance of the Constitution in protecting the rights of people in prison, and most viewed Article 40 of the Constitution as offering positive protections for people in prison. Tort law is another avenue for people in prison, in particular contexts, such as incidents of negligence or where there is a breach of a duty of care.[19]

Only in exceptional circumstances would a person in prison be released on account of deplorable prison conditions, e.g. where the IPS was unable or unwilling to improve the conditions.[20] The Court will only order a release under Article 40.4 where a person's detention is not 'in accordance with law'.[21] The case law also shows that in order for prison conditions to warrant a release of a person in prison, there must be some mal intent on the part of the Prison Authorities.[22] Similarly, Hogan J. stated in *Kinsella v Governor of Mountjoy Prison*:

> '... as illustrated by decisions such as *The State (Richardson) v Governor of Mountjoy Prison*, absent something akin to an intentional violation or manifest negligence on the part of the authorities (which is not the case here), it would be only proper to give them a fair opportunity to remedy the situation in the light of this decision'.[23]

It is worth noting that in this case, notwithstanding the lack of bad intent on the part of the Prison Authorities, the Court found a breach of the applicant's personal rights under Article 40.3.2° of the Constitution.[24]

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13 The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) is a human rights monitoring body within the Council of Europe. It was established under the Council of Europe's European Convention for the Prevent of Torture and Inhuman or Degrading Treatment or Punishment 1987. For more information on the CPT, see section 5.1.

14 Participant 10.

15 Rogan, *Prison Law* (n 2) [9.03].

16 *Devoy v Governor of Portlaoise Prison* [2009] IEHC 288, p 12. In this case, the court referred to its 'inherent jurisdiction to convert a misdirected application for an enquiry under Article 40.4. 2° to judicial review proceedings, and vice versa'.

17 High Court, 20th May 1977.

18 Similarly, in *The State (Susan Richardson) v The Governor of Mountjoy Prison* [1980] ILRM 82, Barrington J. affirmed, '[e]xceptionally, however, the conditions under which a prisoner is detained may be such as to make his detention unlawful, notwithstanding the existence of a valid warrant. In such case, *habeas corpus* will lie', at 91.

19 William Binchy, 'Prisoners and the Law of Torts' (undated), available at www.iprt.ie/site/assets/files/6327/prisoners_and_the_law_of_tort.pdf, accessed 5 June 2024.

20 As stated in *The State (Susan Richardson) v The Governor of Mountjoy Prison* (n 18). See also *Kinsella v Governor of Mountjoy Prison* [2011] IEHC 235.

21 *The State (McDonagh) v Frawley* [1978] IR 131, 137.

22 *The State (Susan Richardson) v The Governor of Mountjoy Prison* (n 18). In *Brennan v Governor of Portlaoise Prison* [1988] IEHC 140, Budd J. stated that a further grounds for an order for release from confinement under Article 40 would be 'a serious breach of the law such as a conscious and deliberate violation of the prisoners' rights by systematic torture, might well entitle him to be released'.

23 *Kinsella v Governor of Mountjoy Prison* (n 20), para 14.

24 This Article reads: 'The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen'.

3.1 The difficulties in prison litigation

Nearly all Participants had difficulty listing positive factors concerning prison law litigation in this jurisdiction. Notably, all Participants who act for the applicant in prison law litigation spoke of the barriers faced at all stages of the pre-litigation and litigation process, from the initial raising of the complaint with the IPS, to the litigation procedure, to deference being granted to the State. As one Participant commented, 'the litigation itself is hard fought at every stage',[25] while another stated, 'the existing system is already groaning at the seams'.[26] Another Participant noted:

> '...[T]hey're very difficult. They're very time consuming. You're up and down to the prison. You're drafting affidavits. You're working late at night. I'd a High Court Judge on Friday afternoon, telling me I needed an affidavit in on Monday morning, you know, so you have to be incredibly committed to what you're doing'.[27]

This point was especially true of the 'big' constitutional cases that require much time and resources. These hurdles in prison litigation are mirrored in the literature. As is noted:

> '...prison law practitioners are often met with difficulties in gathering evidence, delays in correspondence, difficult strategic and tactical decisions, and, particularly where judicial review proceedings are anticipated, considerable time pressure... Practice in this field can be difficult, and is not helped by the historical lack of education and training'.[28]

This reality feeds into a perception among the practitioner community that prison law cases are difficult. As one Participant noted:

> '...you do need good lawyers, who know what they're doing to take the cases. And if those lawyers believe that they're not going to be successful then they're not going to be interested in taking cases unless they're you know, a slam dunk, which prison cases rarely are'.[29]

Several Participants stated that it is harder to get leave for judicial review in recent years, not only in the area of prison law.[30] As one lawyer stated, (which is worth quoting at length):

> 'It's very hard to bring litigation to the various steps. I mean even to bring a judicial review now requires quite a lot of procedural toing and froing before the case is even listed. You're meant to have an affidavit from the applicant. That's often very hard if the case is urgent and if you can't get an affidavit from the applicant, you actually have to go in before the judicial review Judge and look for permission to bring a case without an affidavit from the applicant, or else the Central Office won't accept the papers. And so it just shows how convoluted it can be, even to get in the door in the context of judicial review. Then you can find that you know that the State are querying the manner in which you've taken proceedings. If you take plenary proceedings, they may say it's really a public law matter and should have been taken by way of judicial review. If you take it by way of judicial review, often you find that the State are saying that the matter should have proceeded by way of plenary proceedings and in the past Judges have been quite inclined to agree, and then you can be faced with a costs award against you before you've even gotten going'.[31]

There was also a belief among some Participants that the Judiciary may give undue deference to the Prison Authorities/ State in litigation,[32] which is a feature of public interest litigation generally and not unique to prison cases.[33] As one Participant noted:

> 'So you know, there's once you get in, once you get as far as what will be judicially reviewed, then there are them hurdles as well, and the State tends to allow or the courts tend to give huge leeway to the State and to bodies like them. So ... there are barriers within the courts system as well'.[34]

This view is mirrored in the case law, where the IPS has a 'wide area of discretion in the administration of the prisons in the interests of security and good order',[35] 'subject to the Constitution and law'.[36] The case law makes it clear that Prison Governors

25 Participant 1.

26 Participant 20.

27 Participant 2.

28 Rogan, *Prison Law* (n 2) [1.01].

29 Participant 15.

30 Participants 1, 4, 14, 15, 20.

31 Participant 15. The difficulties in getting affidavits from people in prison was also noted by Participant 2.

32 Participants 1, 2, 22, 24.

33 Participant 24.

34 Participant 24.

35 *The State (Susan Richardson) v The Governor of Mountjoy Prison* (n 18) 91. *See also Devoy v Governor of Portlaoise Prison and Others* (n 16) p 12 and *Dundon v Governor of Cloverhill Prison* [2013] IEHC 608, para 77.

36 *Devoy v Governor of Portlaoise Prison and Others*, ibid, p 12.

have, 'broad discretion' in implementing the Prison Rules, and that this must be done in line with the Constitution,[37] in particular, 'the right to be treated humanely and with human dignity'. [38] However, where there is clear mal intent on the part of Prison Officers, Judges will find against the Prison Authorities.[39]

Since the early prison litigation cases, a trend emerged whereby the Courts will not grant the relief sought by the applicant if the Prison Authorities are willing to take action to improve the situation.[40] In one of the first cases to challenge the constitutionality of the slopping out regime in Irish prisons, Barrington J. acknowledged that the appropriate relief was an order *mandamus* (mandatory order) requiring the State to take positive action to alleviate the applicant's health concerns.[41] The matter was adjourned and when the Court resumed, the relief sought was not granted because, 'the authorities were willing to alter the regime the necessity for making'.[42] At the same time, the case law also shows that where a constitutional breach is found to exist, it can be an opportunity for the IPS to rectify the situation. In *Kinsella v Governor of Mountjoy Prison*, the applicant was transferred to another prison following the finding of a breach of constitutional rights.[43] This view of the Courts, as evident in the case law, is in line with the position that it is not the role of the Courts to micro manage the daily running of prisons, as outlined above in section 2.1. Indeed, in some cases, the Prison Officials agreed with the poor conditions of the applicant in prison, and sought to improve the situation.[44]

Judicial deference to Prison Authorities is not unique to Irish law and is a feature of prison law cases in other jurisdictions, such as the US.[45] As US Prison Law expert, Professor Sharon Dolovich, notes, '[i]t is not unreasonable for courts to grant a measure of deference to state actors tasked with a job as complex, challenging, and hazardous as running the prisons', given that Courts are far removed from the extremities of the penal environment.[46] However, in the context of using the law to advance the rights of people in prison, in such instances the result may be beneficial to the applicant, but it means that others in the same situation are not necessarily granted the positive outcome in the decision.

Several Participants noted the difficulties in proving allegations of abuse against Prison Officers, particularly where the applicant may have substance abuse issues and may lack credibility.[47] The lack of independent oversight in relation to negative behaviour of prison staff towards people in prison was noted by the Joint Oireachtas Committee on Justice in its 2023 report on 'Pre-Legislative Scrutiny of the General Scheme of the Inspection of Places of Detention

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37 *Devoy v Governor of Portlaoise Prison and Others*, ibid, p 83; *Killeen and Dundon v Governor of Portlaoise Prison* [2014] IEHC 77, at 6.9.

38 *Devoy v Governor of Portlaoise Prison and Others*, ibid, p 83.

39 See for example, the tort case of *Savickis v Governor of Castlerea Prison and others* [2016] IECA 310, which concerned an assault on a person in prison by a Prison Officer.

40 *The State (Susan Richardson) v The Governor of Mountjoy Prison* (n 18), 90; Held by Budd J. *obiter* in *Brennan v Governor of Portlaoise Prison* (n 22).

41 *The State (Susan Richardson) v The Governor of Mountjoy Prison*, ibid.

42 ibid.

43 *Kinsella v Governor of Mountjoy Prison* (n 20) para 17 (postscript). Similarly, in *Mulligan v Governor of Portlaoise Prison* [2010] IEHC 269, the IPS detailed the efforts made to improve sanitation conditions in Portlaoise Prison at the time, see paras 74-82. In this case, no breach of constitutional rights was found. This deference to the IPS can be contrasted with *Simpson v Governor of Mountjoy Prison and others* [2019] IESC 81, where the IPS was on notice of the situation of the applicant (regarding health concerns in relation to the practice of slopping out) and had not taken steps to alleviate the situation, see paras 100 and 103.

44 See the position of the Prison Governor in *McDonnell v Governor of Wheatfield Prison* [2015] IECA 216 (Court of Appeal judgment), para 72.

45 See for example, Danielle C Jefferis, 'Carceral Deference: Courts and Their Pro-Prison Propensities' (2023) 92(3) *Fordham Law Review* 983- 1020; Sharon Dolovich, 'Forms of Deference in Prison law' (2012) 24(4) *Federal Sentencing Reporter* 245-259. See also the case law of the European Court of Human Rights regarding prisoner rights, see European Court of Human Rights, 'Guide on the case-law of the European Convention on Human Rights: Prisoner's Rights (Council of Europe, 29 February 2024).

46 Dolovich, 'Forms of Deference in Prison law', ibid, p 245.

47 In particular, these Participants highlighted the lack of credibility of applicants generally, Participants 4, 9, 10, 15, and 21. The lack of credibility of applicants from disadvantaged groups in other categories of public interest law cases was noted at the roundtable in Maynooth University in March 2024.

Bill 2022'.[48] Here, the Committee recommended that, 'statistical information related to disciplinary measures applied against Prison Officers for misconduct should be formally recorded in annual reports'.[49] The tort case of *Savickis v Governor of Castlerea Prison and others* is a rare example of a person in prison taking successful legal action against a Prison Officer for assault.[50] Here, the CCTV evidence and medical evidence were of vital importance, especially as the State defendants denied the allegations. Arguably, this case also demonstrates the importance of access to evidence in prison litigation, which is not always guaranteed, as is discussed below in section 3.2. It was the opinion of one Participant that systematic breaches of rights or material conditions are less difficult to prove, given the reports of prison oversight mechanisms on these ongoing issues.[51]

Several participants noted that there are high stakes involved for the client in prison law cases, where the case is not successful. The long duration of litigation can also affect clients.[52] Moreover, an unsuccessful case can lead to an implicit or explicit affirmation of the policy that the case seeks to change.[53] As one Participant commented, 'if you bring such a [prison] case and don't succeed, not only are there cost implications, there is a very real risk that their conditions within the prison can deteriorate instead of improving'.[54] Cases can also have an effect on lawyers. As one Participant stated:

> '...[a]nd overall, what's my impression of being involved in those cases? They're incredibly difficult and they're often very emotive and they're draining, but they can be very rewarding. You know if you've got somebody who gets a good result in the end, it can be very rewarding and they can be incredibly disappointing when you feel that if anything, you've made the situation worse'.[55]

3.2 Communication with the Irish Prison Service and access to information

A consistent theme in the interviews with Participants who advocate and litigate on behalf of people in prison was the difficulties faced in communicating with the IPS. Here, some of the issues cited were: significant delays in response (which can have a negative effect in meeting timelines for judicial review), incomplete responses to requests for information, and delays in accessing evidence. In order for people in prison to have access to justice, it is hugely important that the communication channels between their legal representative(s) and the IPS are effective and efficient. Moreover, litigation is costly and time consuming for all involved. Thus, if an issue can be resolved through prior communication, it can be a more efficient means of dispute resolution. As Professor Mary Rogan notes:

> 'The practitioner representing the prisoner then also faces the prospect of often slow and uninformative correspondence going back and forward with the Prison Authorities, both at the level of the local prison and with the higher authorities in the Irish Prison Service'.[56]

However, recent improvements in relation to communication with the IPS were noted by some practitioners.[57] Here, it is worth noting that the recently published 'Attorney General's State Litigation Principles' include the principle to 'avoid legal proceedings where possible' and 'to seek to avoid any unnecessary delay in the management of claims and litigation'.[58] The impact that these principles have on public interest litigation and advocacy will become apparent in time.

During litigation, evidence is vital to prove the applicant's version of events as to the facts, given the perceived lack of credibility in prisoner statements.[59] One Participant spoke of difficulty in getting legal aid for a client who faced barriers in

48 Joint Committee on Justice, 'Report on Pre-Legislative Scrutiny of the General Scheme of the Inspection of Places of Detention Bill 2022' (Houses of the Oireachtas, 33/JC/36, March 2023) p 22. In its evidence to the Committee, the Office of the Inspector of Prisons noted that the same names of prison staff are appearing in category A complaints made by people in prison against prison staff, at p 22.

49 ibid, p 8.

50 See note 39.

51 Participant 15.

52 Participant 1.

53 Participants 6 and 19.

54 Participant 20 (insertion added).

55 Participant 2.

56 Rogan, *Prison Law* (n 2) [9.01].

57 This point was made during the roundtable of experts in Maynooth University in March 2024.

58 Attorney General, 'State Litigation Principles' (Government of Ireland, 21 June 2023), principles 1 and 2.

59 Participants 4, 8, 9, 10 and 15. In *McD v Governor of X Prison* [2018] IEHC 688, the defendant sought to rely on 'the lack of credibility or truthfulness of the plaintiff', para 42.

having their version of events believed, due to their medical condition.[60] In addition, they noted that:

> 'Even if a prisoner is adamant that that's not the case, and even if the prisoner is pretty credible, there will be a reluctance to effectively say, would I prefer the prisoner's view over that of the Prison Officer, just because they're a prisoner and [it] would be kind of deemed inherently less reliable. And so that's where records and CCTV become important'.[61]

Yet, those interviewed noted that it can be difficult in getting evidence from the IPS. Two Participants questioned the quality of record keeping within the prison service, which then has a negative impact on gathering evidence.[62] As one Participant stated, 'something that can happen is that records that you're looking for to assist the case, CCTV footage that you're looking for to assist the case, that sort of stuff just doesn't come to hand or is not really, readily accessible'.[63] There can be difficulties in accessing evidence and the length of time it takes to get discovery or records.[64] There was a perception that the IPS do not always provide evidence voluntarily, which adds to the length of time of proceedings.[65] From the perspective of the IPS, it notes that evidence can be supplied, where it is requested in a timely manner, and, 'CCTV, for example is not retained, unless there has been a notable incident'.[66]

The lack of information will impact on whether the case is taken or not. As one Participant commented, 'you can't just say to the court that you took a case, asked for information from the IPS and didn't get it. You won't get costs on this basis'.[67] Additionally, in respect of prison conditions, it is difficult for lawyers to view first-hand the conditions in which a person in prison is living, as client meetings take place in a meeting room (either in-person or by video link), with the person in prison escorted to and from the meeting.[68] On this point, the IPS highlighted that reports of the Office of the Inspector of Prisons, the Prison Visiting Committees and the Chaplain annual reports provide publicly accessible information on the general conditions in which prisoners live.[69] It is possible for a Judge to order a Prison Governor to give evidence regarding specific prison conditions, which can be effective.[70] In *Kinsella v Governor of Mountjoy Prison*, the Prison Governor did not dispute the sub-standard conditions in which the applicant was detained.[71] Similarly, prison staff gave evidence in support of the applicant's situation in *McD v Governor of X Prison*.[72]

Issues also arise around the General Data Protection Regulation (GDPR) and access to evidence. One Participant noted the difficulties in accessing data via GDPR, where a particular form is required, which takes time to get.[73] They noted that it then takes time to arrange for the person in prison to sign the form, where there can often be a two week wait for an in-person visit.[74] Here, the IPS note that '[r]equests are often delayed being assigned to decision makers while we wait for the solicitors to respond to requests…, often several weeks or months after we correspond with them'.[75] The same Participant noted they often receive heavily redacted information following the GDPR request.[76] It was also noted that the delay in receiving information under GDPR can impact on

60 Participant 15.

61 Participant 15.

62 Participants 2 and 15.

63 Participant 4.

64 Participants 1, 2, 9, 15, 20, 22.

65 Participant 15.

66 Email feedback from Irish Prison Service, dated 10 July 2024.

67 Participant 15.

68 Participant 2.

69 Email feedback from Irish Prison Service, dated 10 July 2024.

70 Participant 2.

71 *Kinsella v Governor of Mountjoy Prison* (n 20), para 5.

72 See note 59, at para 136

73 Participant 20. The IPS stress that it 'cannot release the personal information of a data subject to a third party without a signed consent'. In addition, 'the consent needs to include the records being requested, the Solicitor or other third party to which they are to be released, the data subject's signature and the date'. The IPS, 'requires certain identifying documentation from the requester to allow the decision maker to ensure they are releasing the correct data', email feedback from Irish Prison Service, dated 17 July 2024.

74 Participant 20.

75 Email feedback from Irish Prison Service, dated 17 July 2024.

76 Participant 20.

meeting the time limits required for judicial review. The Participant commented, even where they have a consent form from the client, it can take weeks or months to get the information:

> 'There is a 3 month time limit to bring it [to] judicial review. So something happens that you contest and the difficulty is you only have three months within which to go to the High Court. But to do that you need P19 forms [relating to prison discipline] or you need medical records, you need something from the prison, and they will go through huge lengthy procedures and the three months is up before you get the documentation you need. That's a big problem'.[77]

Another Participant commented that they had seen meritorious cases collapse due to not meeting judicial review time limits.

In response to this point, the IPS note the volume of GDPR queries that they receive and suggest that more targeted requests can reduce the delay, such as 'requesting specific timeframes or specific records as opposed to a full prisoner file'.[78] The IPS also affirmed that it responds to GDPR requests within the statutory timeline, as set out in the legislation.[79] It also highlighted that the GDPR legislation allows the data subject (i.e. the person in prison) the right to a copy of information concerning them and that the 'requester is only entitled to their own personal data in an access request and redactions often need to be made to exclude non-personal data and third party personal data'.[80] IPS are cognisant of the delays in the processing of requests and note:

> '[D]elays on processing the requests due to several factors such as the large amount of data being requested, the number of requests being received, the inclusion of non-personal data in the requests, and the need to obtain data from the prisons themselves where it is not held in Longford [IPS Headquarters] and the need for the IAO [Information Access Office] to review files before issue (not medical or psychology).'[81]

If people in prison are to have their right of access to courts realised, it is vital that they (and persons acting on their behalf) have access to information, which is an integral element of the right of access to the courts under European law.[82]

Additionally, the delays in correspondence with the IPS can impede upon the ability to meet deadlines for judicial review.[83] Based on their experience, two Participants felt that the IPS left things until the last minute before litigation to be solved.[84] It was further commented that:

> '...[I]t will take litigation before the prison service will respond appropriately and then sometimes when they do, it transpires that the matter could have been resolved prior to litigation, in fact, might not even be appropriate for litigation. But that doesn't become apparent because the prison service never responded in the first instance and so the attitude of the prison service to queries on human rights issues is a problem'.[85]

In particular, the correspondence at the beginning can have implications for the awarding of costs later on.[86] In response to this point, the IPS draws attention to the fact that once on notice of litigation, the Chief State's Solicitors Office is engaged and from that point on the IPS is led by its advice and the advice of the Attorney General.[87] In addition, the IPS affirms that it, 'has commenced a project to better coordinate management of pre-litigation correspondence'.[88]

77 Participant 20 (insertions added).

78 Email feedback from Irish Prison Service, dated 10 July 2024.

79 Email feedback from Irish Prison Service, dated 16 July 2024.

80 Email feedback from Irish Prison Service, dated 17 July 2024.

81 Email feedback from Irish Prison Service, dated 17 July 2024 (insertions added) The Information Access Office is the section of IPS Corporate Services that deal with GDPR requests. IPS also note that sometimes GDPR requests are made directly to the prison and may not be passed to the Information Access Office.

82 Handbook on European Law relating to access to justice (European Union Agency for Fundamental Rights and Council of Europe, 2006) para 2.1.1.

83 Participants 1, 4 and 20.

84 Participants 4 and 15.

85 Participant 15.

86 Participants 2 and 4.

87 Email feedback from Irish Prison Service, dated 10 July 2024.

88 Email feedback from Irish Prison Service, dated 16 July 2024.

3.3 Access to clients and clients' access to legal representation

Barriers in accessing clients in prison was a common theme among practitioners interviewed for this project, with one Participant describing it as 'very difficult'.[89] Although, the increasing reliance on video link communication was viewed positively by one Participant.[90] Two Participants spoke about significant delays in arranging visits to clients and the short duration of meetings.[91] As a result, it can be challenging to get people in prison to swear affidavits.[92] As one Participant stated:

> 'I mean you can get professional visits but there's often a long waiting time, it's often quite burdensome to actually get into the prison and then the time that you can have with your clients to take those instructions can be very limited as well'.[93]

Another Participant stated, '[y]ou're asked to go in in the evenings and on Saturdays. It's increasingly difficult to get access to your clients'.[94] Given the limited access to clients, in *Ryan v Governor of Midlands Prison*,[95] a solicitor swore an affidavit on the basis of their own knowledge and information from a phone call with their client, and the affidavit was admissible as evidence in a *habeas corpus* application.[96] The issue of delays in meeting with clients is not new, as previously noted:

> '...[a] practitioner may find it difficult to get an appointment to see a prisoner for a couple of days after the initial contact, diluting the power of immediate recollection, and sometimes resulting in the issue having either changed or resolved itself'.[97]

In *Marley v Governor of the Midlands Prison and others*,[98] the applicant argued that the delay in accessing his legal advisor and the delay in receipt of correspondence from his solicitor amounted to a denial of justice that negated the validity of his detention. Due to a lack of evidence, Holland J. did not address the complaint in detail, preferring instead to refer the matter for judicial review. However, the Judge noted that ultimately, this matter ought to be solved by 'constructive engagement' between the parties.[99] In this case, there was a delay of 10 days in the applicant meeting with his solicitor. More recently, Judge Desmond Zaidan in Naas District Court highlighted the difficulties for barristers and solicitors in contacting their clients in custody.[100]

The IPS note that there are a number of options open to a legal professional to contact their clients, including phone, written communication and video link.[101] In addition, the IPS noted that in some cases, practitioners book visits and then fail to show or block book visits and subsequently do not use the reserved slots.[102] There are a number of factors that are leading to the demand for professional visits from lawyers, as the IPS note that it has:

> ...[C]onsiderably improved our video link offering and better take-up of video link consultations might support the IPS in their endeavours to meet all demands for legal professional consultation while managing the highest ever prisoner population. Increased sittings in the Courts has also contributed to an increase in demand for legal professional consultation without the allocation of resources to meet this new demand.[103]

People in prison are entitled to receive visits from and communication with their legal

89 Participant 20.

90 Participant 4. In *Egan v Governor of Cloverhill Prison* [2024] IECA 111, a solicitor noted their preference for in person visits with vulnerable clients, at para 21.

91 Participants 4 and 20.

92 Participants 2, 4 and 15.

93 Participant 4.

94 Participant 20.

95 [2014] IEHC 338.

96 [2014] IEHC 338, para 10. This was also a feature in *McDonnell v Governor of Wheatfield Prison* [2015] IEHC 112 (High Court judgment), which is referred to in *McDonnell v Governor of Wheatfield Prison* (Court of Appeal judgment) (n 44), para 69.

97 Rogan, *Prison Law* (n 2) [9.01].

98 [2022] IEHC 121.

99 ibid, para 22.

100 See 'Judge criticises prison authorities because lawyers can't contact clients in jail' (Leinster Leader, 14 March 2024), available at www.leinsterleader.ie/news/naas/1450181/judge-criticises-prison-authorities-because-lawyers-can-t-contact-clients-in-jail.html, accessed 19 March 2024.

101 Email feedback from Irish Prison Service, dated 10 July 2024.

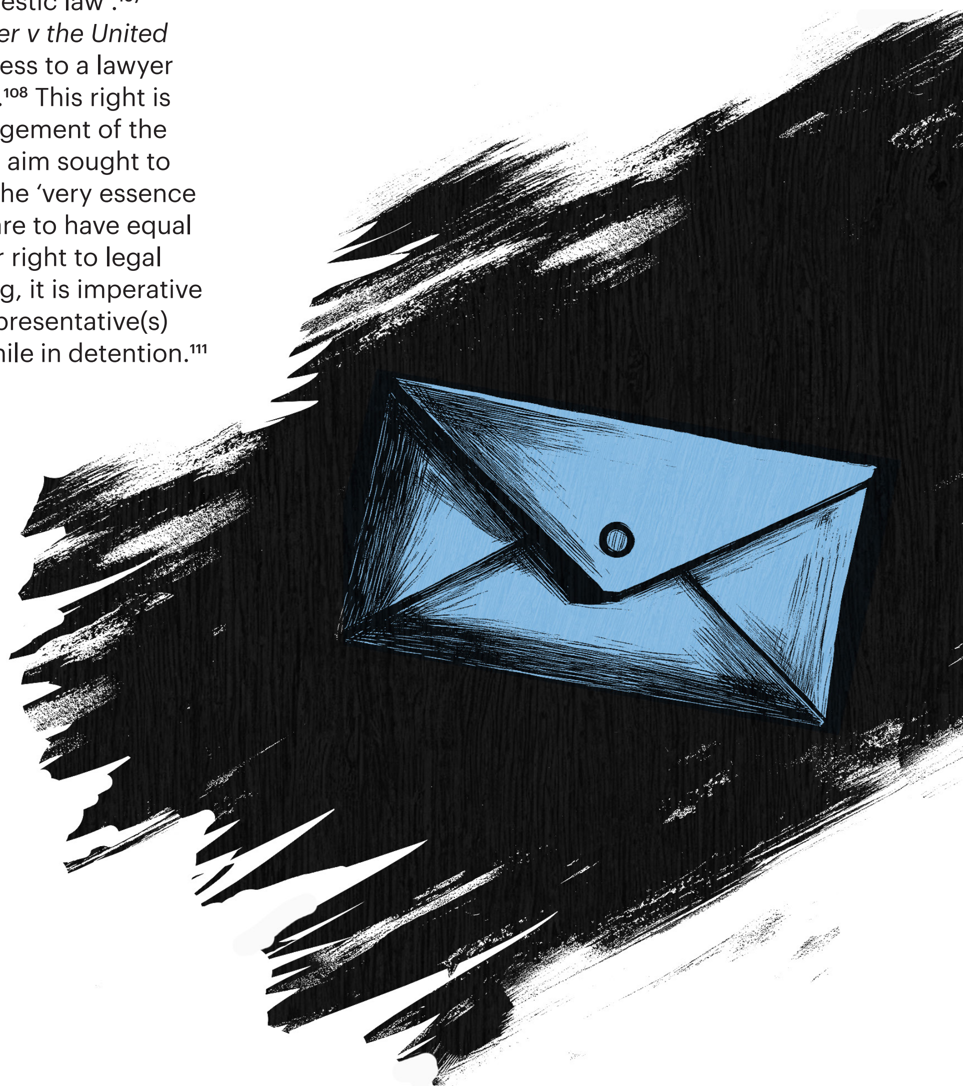
102 ibid.

103 ibid.

representative(s), as set out in the Prison Rules,[104] the Revised European Prison Rules,[105] and the Mandela Rules.[106] In particular, the Mandela Rules (which are one of the instruments informing the ongoing review of the Prison Rules) specifically state that '[p]risoners shall be provided with adequate opportunity, time and facilities to be visited by and to communicate and consult with a legal adviser… without delay… on any legal matter, in conformity with applicable domestic law'.[107] Moreover, the ECtHR case of *Golder v the United Kingdom* confirms the right of access to a lawyer in respect of non-criminal matters.[108] This right is not absolute,[109] however any infringement of the right must be proportionate to the aim sought to be achieved and must not impair the 'very essence of the right'.[110] If people in prison are to have equal access to justice, and to have their right to legal advice realised in the prison setting, it is imperative that they can access their legal representative(s) within a reasonable time period while in detention.[111]

3.4 Procedural barriers in the judicial process

In addition to the general issues that arise in prison advocacy and litigation, there are structural barriers within the legal system that prohibit cases being initiated and successfully concluded. This sub-section focuses on the procedural and structural barriers that exist in public interest prison litigation.



104 Prison Rules, Rule 38. People in prison are also entitled to phone their legal advisors, see Prison Rules, Rule 46(5).

105 European Prison Rules, Rule 23. See also the Committee of Ministers, Commentary on the European Prison Rules (CM (2020 17-add2) 20 February 2020) pp 13-14.

106 Mandela Rules, Rule 61.

107 Mandela Rules, Rule 61(1). In addition, the United Nations Office on Drugs and Crime has recognised the importance of legal advice for people in prison, 'Ensuring that prisoners have access to legal counsel following conviction and sentencing is key to enabling prisoners to enjoy their right to legal assistance during complaints procedures, appeals, applications for pardon or clemency', United Nations Office on Drugs And Crime, Handbook on strategies to reduce overcrowding in prisons' (UNODC and International Committee of the Red Cross, 2013) pp 82-83.

108 *Golder v the United Kingdom* (Application no 4451/70), Judgment 21 February 1975. Here, the ECtHR held that Golder was denied consultation with a solicitor concerning a libel complaint against the Prison Authorities, resulting in a breach of the ECHR.

109 *Ashingdane v the United Kingdom* (Application no 8225/78), Judgment 28 May 1985, para 57.

110 Handbook on European Law relating to access to justice (n 82) p 165, citing *Ashingdane v the United Kingdom*, ibid.

111 The right of access to a lawyer in respect of criminal proceedings and in proceedings related to the European Arrest Warrant is enshrined in EU Directive 2013/48/EU of 22 October 2013.

3.5 The financial cost of prison litigation

For most people, particularly disadvantaged groups, the cost of litigation is 'prohibitively expensive from the outset'.[112] In entering litigation, the applicant runs the risk of having to pay their own legal fees, in addition to the other side's costs, if unsuccessful.[113] Prison litigation is costly, with many cases taking place in the High Court and requiring specialist knowledge and expertise.[114] In addition, the cost of stamp duty was highlighted as a barrier to litigation.[115] The risk of having costs awarded against the applicant (where the applicant has to pay the respondent's legal fees and costs), if the case is unsuccessful, is described by public interest law expert, Professor Gerry Whyte as, 'a major deterrent to pursuing litigation'.[116]

The awarding of costs in litigation is at the discretion of the court.[117] One of the biggest barriers to public interest litigation in Ireland (in general), is the fear of having costs awarded against the client, if they lose the case and this was commented on by several Participants.[118] As one Participant commented, 'a lot of these cases result in losses, so you know I'd say for every 10 cases, 10 cases that's brought, there's only one that's won'.[119] Where a costs order is issued against the applicant (to pay the respondent's legal fees), the State can take this cost out of the applicant's social welfare payments,[120] or property that they own. Under Irish law, 'costs follow the event' in legal proceedings,[121] which means that decisions as to legal costs are determined (at the discretion of the court), following the conclusion of the proceedings. Generally, the successful party can expect to have their costs covered.[122] As one Participant commented:

> '...the prospects of costs being awarded is a very important consideration because if you are getting into serious litigation on human rights, there may be significant outlay in terms of reports from engineers and psychologists and other disciplines and the solicitor would probably be paying for that in advance themselves'.[123]

Some Participants commented on the difficulty in getting costs awarded in prison litigation.[124] Indeed, the recent case of *Murray v Governor of Midlands Prison* illustrates this point.[125] Here, a High Court Judge granted none of the orders sought by the applicant (including an order for costs), in a case concerning the question of whether the prison disciplinary regime applied to a prisoner's behaviour in a courtroom.[126] The decision regarding costs was overturned on appeal by Judge Ní Raifeartaigh, where the Court of Appeal recommended that payment should be made under the Legal Aid (Custody Issues) Scheme.[127]

In exercising their discretion as to the awarding of costs, it is possible for Judges to depart from the general rule that costs follow the event, in exceptional circumstances.[128] Case law shows

112 Lisa Vanhala and Jacqueline Kinghan, 'Using the law to address unfair systems: a case study of the Personal Independence Payments legal challenge' (The Barring Foundation and Lankelly Chase, 2019) p 13.

113 Public Interest Law Alliance, 'Public Interest Litigation: The Costs Barrier & Protective Costs Orders' (PILA, 2010) p 5.

114 Costs can be categorised under four headings: lawyers' costs, client costs, recovery of costs and the costs of expert witnesses, see Free Legal Advice Centres, 'Public Interest Law in Ireland – the reality and the potential' (FLAC, Conference Proceedings, 2006) pp 17-18.

115 Participant 2 noted 'you're talking around €200 just to file your motion and affidavit… and prisoners don't have that'. This was also highlighted at the roundtable with experts in Maynooth University in March 2024.

116 Gerry Whyte, *Social Inclusion and the Legal System* (2nd edn, Institute of Public Administration, 2015) p 165.

117 Rules of the Superior Courts 1986, Order 99, Rule 1(1).

118 Participants 2, 6, 8, 12, 15 and 20.

119 Participant 22.

120 Participant 20.

121 Rules of the Superior Courts 1986, Order 99, Rule 1(4).

122 Mark deBlacam, *Judicial Review* (3rd ed., Bloomsbury, 2017) [52.16]. There are exceptions to the general rule.

123 Participant 15.

124 Participants 1, 2, 4, 15 and 20.

125 *Murray v Governor of Midlands Prison and others* [2022] IEHC 672.

126 Here, the applicant threw a bible at the Judge during his sentencing hearing and was subsequently disciplined under the prison disciplinary regime. Murray challenged the application of the prison disciplinary regime to acts in the courtroom, by way of judicial review. It was held that the prison disciplinary regime applies while a person is in lawful custody, which includes inside the courtroom.

127 *Murray v The Governor of Midlands Prison & Ors* [2024] IECA 42. See section 3.6.1 for information on the Legal Aid Board- Custody Issues Scheme.

128 See for example, *Dunne v Minister for the Environment and others* [2007] IESC 60.

that the Courts are willing to depart from the rule where the legal issue, (as opposed to the subject matter),[129] relates to fundamental constitutional issues that concern 'sensitive aspects of the human condition',[130] or the separation of powers,[131] novel areas of law that have not been litigated,[132] and planning issues of public importance.[133] However, a departure from the general rule regarding costs does not mean that a full order for costs will be granted.[134] As noted by O'Hanlon J. in *Salih v General Accident Fire and Life Assurance Corporation Limited*, 'the right to apply for security for costs in the very limited category of cases where this is recognised by our law is intended to do justice between the parties'.[135] In *McDonnell v Governor of Wheatfield Prison,*[136] a partial costs order was granted by Hogan J. due to the important constitutional questions in the case (concerning the solitary confinement regime in prison), notwithstanding that the applicant was unsuccessful.

One Participant noted the barrier that an adverse costs order (where the unsuccessful applicant has to pay the other side's costs) poses in prison litigation, stating that 'there is still the very real threat of costs orders which act as a significant disincentive and [have a] chilling effect for public interest litigation here'.[137] This situation places civil society organisations in a particularly vulnerability position, where they are considering to initiate public interest prison litigation.[138]

In limited circumstances, the Irish Courts may grant a Protective Costs Order (PCO) in favour of the applicant, which can limit the liability for payment of costs. A PCO is 'an order made at the outset of litigation by which the applicant can ensure certainty as regards costs'.[139] There are three types of PCO: (1) An order stating that the applicant will not pay costs if they are unsuccessful, but that they can recover costs if they win; (2) An order that no party will have to pay the other parties' costs or; (3) An order limiting the maximum amount of costs that the losing party has to pay.[140] One of the downsides to PCOs is that depending on their scope, they may not guarantee that the applicant's lawyers in a public interest case will get paid or that other costs will be recovered after the proceedings, even where the applicant is successful. There is little precedent for such orders in Irish law,[141] outside of public interest challenges in environmental law under the legislation incorporating the Aarhus Convention into domestic law.[142]

In *Allen v United Kingdom*, the ECtHR held that the refusal of a PCO did not infringe the applicant's Article 6 rights under the ECHR.[143] Here, the ECtHR held that the general rule that costs follow the event was justified as it had the legitimate aim of reducing frivolous litigation and protecting the successful party. The strict criteria that the Irish Courts impose on applications for a PCO (in non-environmental cases) specifically, that the applicant has no private interest in the outcome of the case,[144] poses an additional barrier to public interest litigation. Moreover, as the Public Interest

129 Whyte (n 116) p 167.

130 *Thomas McCormack and another v Oliver Rouse* [2014] IEHC 396, paras 12-13. Here, the examples cited by the High Court were *Norris v Attorney General* [1984] IR 36 (concerning the right to privacy of homosexual couples), *Roche v Roche* [2006] IESC 10 (concerning the constitutional status of human embryos) and *Fleming v Ireland* (2013) IESC 19 (concerning the right to die with dignity).

131 *Thomas McCormack and another v Oliver Rouse*, ibid, para 14.

132 ibid, para 16.

133 *McEvoy and Smith v Meath County Council* [2003] IEHC 31.

134 As noted by Mac Eochaidh J., in *CA and Another (Costs) v Minister for Justice, Equality and Law Reform and Others* [2015] IEHC 432, para 18.

135 [1987] IR 628.

136 n 44.

137 Participant 12 (insertion added).

138 Liam Herrick, 'Obstacles to Litigation for Prisoners: case Study of IPRT, Lennon and Carroll v Governor of Mountjoy Prison' (PILA seminar, 9 February 2012) p 9.

139 Public Interest Law Alliance, 'Public Interest Litigation: The Costs Barrier & Protective Costs Orders' (n 113) 8.

140 ibid.

141 In *Max Schrems v Data Protection Commissioner* [2014] IEHC 310, Hogan J. granted the first PCO in Ireland, which limited the maximum amount of legal costs for the applicant to pay to €10,000.

142 The Aarhus Convention provides for such orders. See for example, *Dublin County Council v Shillelagh Quarries Ltd & Murphy* [2015] IECA 28; *O'Connor v The County Council of the County of Offaly* [2020] IECA 71.

143 *Allen v United Kingdom* (Application no 5591/07), Decision on Admissibility, 6 October 2009.

144 *Friends of the Curragh Environment Ltd v An Bord Pleanála & Others* [2006] IEHC 243; *Village Residents Association Ltd v An Bord Pleanála and McDonalds* [2000] 2 IR 321.

Law Alliance (PILA) note, the restriction that the applicant of a PCO has 'no private interest in the outcome of the case',[145] is at odds with the requirement under an application for leave for judicial review that the applicant has 'sufficient interest' in the proceedings.[146]

This lack of certainty regarding costs has a negative impact on the initiation of prison litigation. One Participant commented, 'I mean... there's always the risk with prison cases that you're just not going to get your costs'.[147] Another Participant noted, '[y]ou know, it's risky, like, you could put a lot of hard work into something and not get a penny and I mean, you do have to fund your own office, your own secretary and people do forget that Irish barristers are self-employed...'[148] A further Participant noted:

> 'The uncertainty in terms of outcome, the uncertainty in terms of costs and the uncertainty in terms of the remedies which would be available at the end of what is a convoluted and uncertain route, I think, they are all disincentives to bringing cases in relation to substandard prison conditions and breaches of constitutional and convention rights... in reality lawyers do tend to engage in litigation where there is a pay cheque guaranteed at the end of it, and there's a very limited number of lawyers who are prepared to engage in representing causes where the outcome is uncertain and where the prospect of payment is even less certain'.[149]

Due to the difficulty in obtaining costs for prison law cases, many prison law cases are taken *pro bono*,[150] on the basis of 'no foal, no fee'. If the case is won, the applicant can apply to have their costs paid by the State. If the case is lost, the applicant runs the risk of having an order for costs (to pay the respondent's costs) awarded against them and their lawyers will not be paid for their work. This occurrence is in part because of the limited access to Civil Legal Aid.[151] Whether or not a case is taken on this basis depends on firms willing to take the risk, which will ultimately be contingent on the decision of firm owners.[152] As one Participant noted, 'prisoners are dependent on the goodwill of solicitors'.[153] Some Participants spoke of the limited amount of *pro bono* cases that can be taken,[154] with one solicitor stating '... there's only so much *pro bono* work you can do'.[155] The unsustainability of acting *pro bono* in litigation was also noted, '... you're doing a whole pile of *pro bono* work that you may or may not ever get paid for it. That's the problem'.[156] In Ireland, it is not possible to fund litigation by way of donations or crowdfunding, due to the rule against 'Champerty and Maintenance',[157] as was cited as a barrier to prison litigation by one Participant.[158] The difficulties in accessing State funding in public interest cases are not unique to Ireland.

145 *Friends of the Curragh Environment Ltd v An Bord Pleanála & Others,* ibid, citing Dyson J. at para 74 of *R (On the Application of Corner House Research) v Secretary of State for Trade and Industry* [2005] 4 All ER 1.

146 Public Interest Law Alliance, 'FAQ on 'Protective Costs Orders' (undated), available at www.pila.ie/assets/files/pdf/faq_on_pcos.pdf, accessed 29 February 2024, p 3. See also 'Public Interest Litigation: The Costs Barrier & protective Costs Orders' (n 113).

147 Participant 4.

148 Participant 22.

149 Participant 14.

150 Participants 1, 2, 10, 18 and 25. 2,500 legal practitioners have signed PILA's Pro Bono Pledge, in which 20 hours pro bono per year is promised. See Eilis Barry, 'An overview of unmet legal needs' (Access To Justice 2021 Conference), available at www.flac.ie/assets/files/pdf/eilis_barry_a2j_speech_-_unmet_legal_needs.pdf, p 3, accessed 12 March 2024. In addition, barristers may sign up to the Voluntary Assistance Scheme that links barristers with a Civil Society Organisation.

151 Participant 8. See next section for information on Civil Legal Aid.

152 Participant 2.

153 Participant 2. There were similar comments made by Participant 10.

154 Participants 2, 13 and 21.

155 Participant 2. Similar comments were echoed by Participant 21.

156 Participant 20.

157 Ciara Brennan and others, 'Strategic Climate Litigation on the Island of Ireland: Building cooperation at domestic and transboundary levels' (Environmental Justice Network Ireland, December 2023) p 10.

158 Participant 12.

3.6 Civil Legal Aid

The Civil Legal Aid Scheme was established by the Civil Legal Aid Act 1995 (and subsequent regulations), and it is administered by the Legal Aid Board.[159] The Legal Aid Board provides legal aid and legal advice to people, who meet the criteria, and cannot afford to pay for independent legal services. Under the legislation, legal aid refers to legal 'representation by a solicitor of the Board, or a solicitor or barrister engaged by the Board'.[160] An applicant will qualify under the Civil Legal Aid Scheme where the following conditions are met:

- They meet the financial eligibility test,
- They have reasonable grounds to be a party in the proceedings,
- There is a reasonable likelihood of success,
- Legal proceedings must be the 'most satisfactory' way of providing the solution sought by the applicant, and
- The Legal Aid Board believes it is reasonable to grant a certificate of Legal Aid under the circumstances.[161]

The legislation lists the subject areas that are excluded from the Civil Legal Aid Scheme,[162] including 'test cases' whereby the applicant establishes a precedent or a point of law that benefits them and others in their position,[163] and class actions.[164] Notably, the Civil legal Aid Act 1995 allows the Legal Aid Board to grant legal aid to an applicant, 'where the State is, by virtue of an international instrument, under an obligation to provide civil legal aid to the person', provided that the applicant complied with any requirements set out in the international instrument.[165] The limited application of Civil Legal Aid and its inability to fund public interest cases is well documented. Since 2020, the Civil Legal Aid Scheme has been under review, with the establishment of the Civil Legal Aid Review Group,[166] and at the time of publication, the review was ongoing. Although, there is a constitutional right to Criminal Legal Aid, there is no equivalent in respect of Civil Legal Aid and by their nature, public interest law cases are civil law cases. Notably, civil society organisations are excluded from legal aid provision,[167] as they are not 'natural persons' as established in *Friends of the Irish Environment v Legal Aid Board*.[168]

Civil Legal Aid is means tested and considers the individual's income and the merit of their case. In many cases, the person applying for legal aid will be liable to a financial contribution. In the event that the applicant is granted an order for costs against the other party, the Legal Aid Board, 'may take appropriate action for the recovery of such costs which shall be paid over to the Board'.[169] If a person loses their case, and the other party's costs are awarded against them, the Legal Aid Board will not be liable to pay such costs and the person will be deemed personally responsible.[170] The lack of available Civil Legal Aid in Ireland has a restrictive effect on public interest litigation in general in Ireland. As FLAC commented, '[t]he current legal aid system does not meet the standards established by the European Court of Human Rights in the *Airey* case; that is that the right of access to the courts be "practical and effective"'.[171]

159 Free Legal Advice Centres, 'Civil Legal Aid in Ireland: Forty Years On' (FLAC, 2009) 3, available at www.flac.ie/assets/files/pdf/cla_in_ireland_40_years_on_final.pdf?issuusl=ignore, accessed 12 March 2024.

160 Civil Legal Aid Act 1995, s. 27(1).

161 Civil Legal Aid Act 1995, s. 28(2)(a)-(e).

162 Exclusions include: 'defamation, disputes concerning rights and interests in or over land, civil matters within the jurisdiction of District Court..., [certain types of] licensing, [certain types of] conveyancing, election petitions...'. Civil Legal Aid Act 1995, s. 28(9)(a) (insertions added).

163 Civil Legal Aid Act 1995, s. 28(9)(a)(viii).

164 Civil Legal Aid Act 1995, s. 28(9)(a)(ix).

165 Civil Legal Aid Act 1995, s. 28(5)(a).

166 'Minister announces review of Civil Legal Aid Scheme' (website of the Department of Justice, 2 June 2022), available at www.gov.ie/en/press-release/68fab-minister-announces-review-of-civil-legal-aid-scheme/, accessed 16 April 2024.

167 Ciara Brennan and others, 'Strategic Climate Litigation on the Island of Ireland: Building cooperation at domestic and transboundary levels' (n 157) 11.

168 [2020] IEHC 454.

169 Legal Aid Board, 'Monies Recovered/ Costs' (website of the Legal Aid Board), available at www.legalaidboard.ie/en/lawyers-and-experts/legal-professionals-in-civil-cases/judicial-separation-and-divorce-in-the-circuit-court/terms-and-conditions/monies-recovered-costs.html, accessed 20 June 2024; Civil Legal Aid Act 1995, ss. 33(6) and (7).

170 Legal Aid Board, 'Financial Eligibility & Contributions' (website of the Legal Aid Board), available at www.legalaidboard.ie/en/our-services/legal-aid-services/do-i-qualify-/financial-eligibility-contributions.html, accessed 20 June 2024.

171 Free Legal Advice Centres, 'Civil Legal Aid in Ireland: Forty Years On' (n 159) 23.

3.6.1 The Legal Aid - Custody Issues Scheme

The Legal Aid- Custody Issues Scheme (formerly the Attorney General's Legal Aid Scheme) is a non-statutory Scheme that provides for legal representation in certain matters not covered by Civil Legal Aid or Criminal Legal Aid.[172] It can be applied to several forms of litigation conducted in the High Court, Court of Appeal and the Supreme Court. It is an *ex gratia* Scheme and the budgetary responsibility for the Custody Issues Scheme is under the Department of Justice and Equality and Law Reform.[173] It applies to the following areas of litigation:

(i) 'Habeas Corpus (Article 40.4.2).
(ii) Supreme Court Bail Motions.
(iii) Such Judicial Reviews as consist of or include Certiorari, Mandamus or Prohibition and concerning criminal matters or matters where the liberty of the applicant is at issue.
(iv) Applications under Section 50 of the Extradition Act 1965, Extradition Applications and European Arrest Warrant Applications (including Bail Applications directly related to these cases).
(v) High Court Bail Motions related to criminal matters'.[174]

In the prison law context, the Scheme is most applicable to *habeas corpus* challenges concerning the legality of a person's detention, which means that not all cases concerning prison conditions will come under its terms. For example, *Simpson v Governor of Mountjoy Prison and others*,[175] the case that led to a substantial reduction in the number of people slopping out in Irish prisons, involved a 30 day hearing in the High Court (and an appeal to the Supreme Court) and did not come under the Custody Issues Scheme.

The purpose of the Legal Aid-Custody Issues Scheme is to provide legal representation to persons who cannot afford the legal services and require such legal assistance. Applications to the Custody Issues Scheme must be made at the beginning of proceedings. The applicant must receive a recommendation from the court,[176] which is then considered by the Legal Aid Board, 'taking into account the provisions of the Scheme and, where deemed appropriate, the advice of the Chief State Solicitor's Office, the Office of the Director of Public Prosecutions or, as required, the Office of the Attorney General'.[177] In complex or important cases, the appointment of one Senior Counsel may also be considered.[178] Only reasonable expenses are covered by the Custody Issues Scheme.[179] Where there is more than one applicant, but only one matter is at issue before the Court, the solicitor and the counsel assigned shall represent all the applicants. As noted by the Court of Appeal, 'the Legal Aid Board's Custody Issues Scheme is essentially discretionary, requiring that legal representatives obtain at all stages recommendations from the Court for the application of the Scheme'.[180] Under the Legal Aid- Custody Issues Scheme, fees are calculated in accordance with the 'parity' mechanism,[181] where the applicant's legal representative(s) are to be paid on a parity with the State's legal representatives.

172 Legal Aid Board, 'Circular on Legal Services: A guide to decision making and best practice' (10th edn, Legal Aid Board, July 2017) pp 1-6, available at www.legalaidboard.ie/en/freedom-of-information/circulars-on-legal-services-july-2017-edition-pdf.pdf, accessed 12 March 2024.

173 Legal Aid-Custody Issues Scheme Provisions & Guidance Document (website of the Legal Aid Board), available at www.legalaidboard.ie/en/lawyers-and-experts/legal-professionals-in-criminal-legal-aid-ad-hoc-cases/legal-aid-custody-issues-scheme/, accessed 17 April 2024.

174 Legal Aid-Custody Issues Scheme (website of the legal Aid Board), available at www.legalaidboard.ie/en/lawyers-and-experts/expert-witnesses-and-service-providers-in-criminal-cases/expert-witness-fees-procedures-and-guidelines-document/legal-aid-%E2%80%93-custody-issues-scheme.html, accessed 17 April 2024.

175 See note 43.

176 Legal Aid-Custody Issues Scheme (n 174). Here, the applicant must convince the court that they cannot secure legal representation otherwise and that a recommendation to the Legal Aid Board that the case be funded under the Scheme be granted, see deBlacam, *Judicial Review* (n 122) [52.40].

177 Legal Aid-Custody Issues Scheme Provisions & Guidance Document (n 173).

178 deBlacam (n 122) [52.40].

179 Translation/Interpreter service fees may only be covered by the Scheme when deemed essential. Expert witness fees will only be covered by the Scheme when deemed essential to the proper preparation and conduct of the applicant's case.

180 *AB v The Clinical Director of St. Loman's Hospital* [2018] IECA 123, para 41.

181 Legal Aid-Custody Issues Scheme (n 174).

3.6.2 Findings on access to Civil Legal Aid and the Legal Aid- Custody Issues Scheme

It is well documented that lack of access to legal aid is a significant barrier to public interest litigation in Ireland,[182] and this is mirrored in other jurisdictions.[183] Every person interviewed for this research commented on the limitations of access to civil legal aid in respect of prison law cases. The general consensus was that it is very difficult to have prison cases funded under the Civil Legal Aid Scheme and Custody Issues Scheme, and this has a chilling effect on litigation. One Participant commented, 'there is no legal aid system for prisoner rights cases or advocating on behalf of prisoners in any form'.[184] As was also noted:

> '[W]ithout legal aid it's very difficult to understand how people can make use of any remedies that are available… well firstly you've got the problem of finding lawyers who are in a position to act, potentially without payment, and whether that could be fulfilled by NGOs or not, which is usually not the case, and secondly the individual risk it puts a prisoner in our jurisdiction of having costs orders made against them if they lose the case'.[185]

Although *habeas corpus* applications are covered by the Legal Aid- Custody Issues Scheme, some lawyers noted that the Legal Aid Board's definition of liberty can lead to the Legal Aid Board not paying out the funds for a case.[186] It was noted that '…there've been cases even where a Judge has granted a recommendation for the Custody Issues Scheme. But then the Legal Aid Board have not paid out'.[187] Moreover, it was also noted that the Legal Aid-Custody Issues Scheme does not cover payment for mediation work such as writing letters or advocating on behalf of a client.[188] The level of Legal Aid fees was also listed as a barrier by all practitioners interviewed. This point was highlighted by previous IPRT research,[189] and in recently lawyers have protested regarding the low level of fees under the Criminal Legal Aid Scheme.[190] Another Participant spoke of having to judicially review a decision of the Legal Aid Board that a prison conditions case fell outside the concept of liberty.[191] As they noted, 'that wasn't without a long fight, and the legal aid position isn't clear, and the legal aid fees to be quite frank aren't good anyway'.[192] As one Participant put it, 'you're relying on winning the case and getting an order for costs, if you intend to get paid for it'.[193] This situation has the effect of making some lawyers take prison cases outside of the Civil Legal Aid Scheme and Legal Aid-Custody Issues Scheme, and on the basis of 'no foal, no fee',[194] a situation that is common in other European countries. The effect of this reality is that it reduces the number of public interest cases concerning people in prison, most of which take place in the High Court, and as such, are costly and require a lot of time and resources. As one Participant noted:

> 'There's no costs system where we can hire counsel to litigate these cases. They do it for us on the basis that they may or may not get paid at the end of the day. And some of these cases are very large. We've had cases that ended up in Europe and they're very time consuming'.[195]

Another Participant stated:

> 'But like I say I don't think there is a proper legal aid system in place at the moment and that just inhibits practitioners from actually taking cases unless there's a very high chance of success and there's usually not a very high chance of success in these cases unfortunately'.[196]

182 Whyte (n 116); Free Legal Advice Centres, 'Public Interest Law in Ireland- the reality and the potential' (FLAC, Conference Proceedings, February 2006), available at www.flac.ie/assets/files/pdf/flac_pil_proceedings.pdf, accessed 17 April 2024.

183 Brian Kearney-Grieve, 'Public Interest Litigation: Summary of a meeting of organisations from Northern Ireland, the Republic of Ireland, South Africa and the United States' (South Africa, May 2011, Atlantic Philanthropies) p 4; David C Fathi, 'The challenge of prison oversight' (2010) 47 *American Criminal Law Review* 1453-1462, p 1458.

184 Participant 2.

185 Participant 19.

186 Participants 15 and 21.

187 Participant 15.

188 This point was noted during the roundtable with experts in Maynooth University in March 2024.

189 Irish Penal Reform Trust, Prison Litigation Network Project: National Report on Ireland (IPRT, April 2016) p 46.

190 Mary Carolan, 'Barristers step up protests over "pitiful" criminal legal aid fees' (Irish Times, 14 July 2023). At the time of writing, some criminal barristers engaged in a strike in July 2024 as part of their campaign to increase the level of fees for Criminal Legal Aid.

191 Participant 21.

192 Participant 21.

193 Participant 2.

194 As commented by Participant 21.

195 Participant 20.

196 Participant 4.

This situation is no doubt a factor in the number of lawyers who work in this field and thus, the number of cases taken. It is recommended that the fees for Civil Legal Aid lawyers are increased to reflect the work, time and resources that go into these types of cases. The limited amount of legal aid makes it difficult for law firms to work in this field; this also has an impact on the resources that firms have to take cases to the European and international human rights monitoring mechanisms.[197] As one Participant noted:

> 'You can incorporate whatever [international treaties] you want into law, but you have to have the resources to be able to challenge the cases and you have to be able to pay staff to do nothing else and we were able to do that in the old days, but the legal aid cuts, which... haven't been reversed, means that we don't have the staff anymore that we used to have to do these things'.[198]

Ultimately, the lack of Civil Legal Aid can have a negative impact on the ability of firms to take cases. Within the context of the review of the Civil Legal Aid Scheme, consideration should be given to the possibility of restructuring the Scheme to make it more accessible and effective for rights holders, including those in detention. In its submission in response to the public consultation on the review of the Civil Legal Aid Scheme in 2023, IPRT recommended that, '[c]onsideration should be given to the particular financial and human resources required for prison-related litigation, with a view to expanding the scope of available aid in such cases'.[199] IPRT also advocated that the rights and need of people in prison be taken into account in the review.[200] As Hederman J. commented in *Fallon v An Bord Pleanála*, 'the Court must always bear in mind that no litigant with an arguable case should be effectively denied access to the courts solely because of poverty'.[201] One solution is to ensure access to targeted legal information within the prison setting,[202] at an early stage. This proposal would lend itself towards reducing the need for litigation at a later stage and be a more efficient use of resources. Here, the establishment of a Prisoner Advice Service, like in the UK, should be explored.[203] At present, when it comes to access to justice, people in prison experience an additional gap in accessing justice as a disadvantaged group, as they are physically removed from accessing such information.

In contrast with Criminal Legal Aid,[204] there is no constitutional right to Civil Legal Aid.[205] As the Council of Europe and EU Fundamental Rights Agency note, '[f]or the right of access to a court to be effective, States may have to provide legal aid, translation or other practical support to enable individuals to access court proceedings'.[206] Under the ECHR, States are not obligated to provide civil legal aid in all circumstances.[207] However, if the litigation is particularly complex, which makes legal representation an imperative, the failure of a State to provide the applicant with legal representation may amount to a breach of Article 6 of the ECHR where it leads to a denial of access to a court.[208] Such complaints to the ECtHR should be assessed on a case by case basis.[209] As the Council of Europe and the EU Fundamental Rights Agency note, '[t]he specific circumstances of each case are important. The key test is whether an individual "would be able to present his case properly and satisfactorily without the assistance of a lawyer"'.[210]

197 Participants 20 and 21.

198 Participant 20.

199 Irish Penal Reform Trust, 'Submission on the Review of Ireland's Civil Legal Aid Scheme' (IPRT, 3 February 2023) para 10.

200 ibid, para 14.

201 *Fallon v An Bord Pleanála* [1992] 2 IR 380.

202 Irish Penal Reform Trust, Submission on the Review of Ireland's Civil Legal Aid Scheme (n 199) para 10.

203 The Prisoner Advice Service is an independent legal charity providing free legal advice and support to adult prisoners throughout England and Wales regarding their legal, human and healthcare rights, conditions of imprisonment and the application of Prison Law and the Prison Rules. For more information see www.prisonersadvice.org.uk/, accessed 17 July 2024.

204 *State (Healy) v Donoghue* [1976] IR 325.

205 Gerard Hogan and others, *JM Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional, 2018) [7.3.187- 7.3.190]. Here, the writers note that '[i]t is also arguable that the Supreme Court has failed to explain adequately why criminal legal aid is constitutionally protected but civil legal aid is not' at [7.3.190].

206 Handbook on European Law relating to access to justice (n 82) p 26.

207 ibid, 59 citing *Del Sol v France* (Application no 46800/99), Judgment 26 February 2002, para 20.

208 ibid, 59-60 citing *P, C and S v The United Kingdom* (Application no 56547/00), Judgment 16 July 2002, paras 88-91. See also *Airey v Ireland* (Application no. 6289/73), Judgment 9 October 1979.

209 Handbook on European Law relating to access to justice, ibid, p 64.

210 ibid, citing *McVicar v United Kingdom* (Application no 46311/99, 7 May 2002) para 48.

Access to effective legal aid for people in prison is enshrined in the Mandela Rules,[211] and in the Revised European Prison Rules.[212] As the Commentary on the European Prison Rules highlights, this right applies to both criminal and civil matters.[213] The European Prison Rules also state that free legal aid schemes shall be brought to the attention of people in prison.[214] At present, there is no provision of the Prison Rules that addresses access to legal aid for people in prison. As Hamilton CJ. noted in *Malone v Brown Thomas & Co Ltd*, '[a]ccess to the Courts is the constitutional right of every citizen: it is access not merely to the High Court but also to this Court and no unnecessary monetary obstacle should be placed in the path of those who seek access to the courts'.[215]

3.7 Mootness

Mootness can arise where a legal dispute no longer exists between parties, thus making the court unlikely to proceed with the matter. As O'Malley J. noted in *Dundon v Governor of Clover Hill Prison*, '...a case is not moot if the controversy still affects or potentially affects the rights of the parties'.[216] If an issue becomes moot before it is heard in court, this will also be a barrier to the progression of the law, hence a live dispute must exist and be present at all stages throughout the court process. For this reason, people in prison long term will be more suitable applicants in prisoner rights cases. However, this reality means that people in prison short term, who experience the same or similar human rights issues as those in prison long term, are less likely to pursue a legal remedy. Additionally, a person in prison taking a legal case in respect of treatment in prison or prison conditions may be transferred to another prison while the litigation is ongoing.[217] Some Participants also noted that in the time it takes for a case to be heard, the person may have been released from prison or the law may have changed.[218] It was also noted that the lack of Judges can have an impact of the length of time it takes to conclude proceedings, which means that by the time the case is heard in court, the issue can be moot.[219] Another Participant spoke of a potential case that was not taken, as the client was due to be released from prison, noting that if there is a chance of the issue becoming moot, it will impact on whether a case is taken.[220] Where an issue becomes moot due to the actions of one party, costs can still be awarded against that party.[221]

211 Mandela Rules, Rule 61(3) reads: 'People in prison should have access to effective legal aid'.

212 Revised European Prison Rule 23.1 reads: 'All prisoners are entitled to legal advice, and the Prison Authorities shall provide them with reasonable facilities for gaining access to such advice'. Rule 23.2 reads: 'Prisoners may consult on any legal matter with a legal adviser of their own choice and at their own expense'.

213 Committee of Ministers, Commentary on the European Prison Rules (CM (2020 17-add2) 20 February 2020) p 13.

214 Revised European Prison Rule, Rule 23.3.

215 [1995] 1 ILRM 369.

216 *Dundon v Governor of Clover Hill Prison* (n 35) para 61. See also *Goold v Collins and others* [2004] IESC 38.

217 In *Dundon v Governor of Clover Hill Prison*, ibid, the applicant was transferred to another prison, however as the case concerned the application of the Prison Rules, O'Malley J. ruled that the legal dispute was still live because the applicant was still in custody and the prison rules still applied to him.

218 Participants 1, 15 and 21.

219 Participant 15.

220 Participant 21.

221 See for example, *CA and Another (Costs) v Minister for Justice, Equality and Law Reform and Others* (n 134); *Cunningham v President of the Circuit Court and DDP* [2012] IESC 39.

4. Other aspects of Public Interest Prison Law

This section highlights the research findings that relate to other aspects of public interest law that concern the rights of people in prison.

4.1 Legal education of public interest prison litigation

The provision of legal education is one of the pillars of public interest law and involves, 'incorporating an awareness of public interest into third level and professional legal education through, for example, the teaching of public interest law or the development of clinical (i.e. practical) legal education as a structured part of the course of education'.[1] As noted above, many prison law cases are taken by criminal lawyers and public interest law cases concerning the rights of people in prison require a specialist knowledge of prison law, judicial review and civil procedure.[2] Thus, legal education is a necessary foundation in public interest prison litigation.

The lack of opportunity in relation to prison law education and the impact this has on the number of lawyers who specialise in this area was noted by some Participants.[3] On this point, a Participant commented on the need for specialist lawyers who can bring cases.[4] It was also noted that not all criminal lawyers are familiar with public interest law,[5] although another Participant believed that 'the development of legal education, the development of legal publications and legal academia in general has created an environment whereby, you know,... public law can flourish'.[6] One Participant commented:

> 'There's no focus on it [prison law]. And you're picking up knowledge piece by piece. So even if they come to you. If they're lucky, they'll come to a lawyer that has some idea, and I don't know that there are very many that are very knowledgeable in the area of prison law. Even like, I suppose I'm lucky because okay I have, I have a basic understanding. I've done my best to educate myself, but I do have access to very good counsel who I can always run things by as well. So I would have an established, almost team in terms of looking at cases to ascertain whether or not there is a litigation point at issue, and so I do think there's a dearth of suitably qualified people to bring those cases'.[7]

In particular, the importance of drafting letters accurately during correspondence with the IPS was described as 'crucial' in terms of subsequent proceedings,[8] and this can also have repercussions on costs awarded in the case.

Additionally, some Participants spoke of a lack of knowledge among lawyers in taking cases to ECtHR and/ or the UN Treaty Monitoring Bodies,[9] though notably, most of the prison lawyers interviewed had knowledge of the case law of the ECtHR in the area of prison law. One Participant commented that due to the resource and time constraints facing law firms, it can be difficult for lawyers in this area to engage in legal education, for example to learn about the practicalities of taking cases to the ECtHR.[10] Additionally, the Participant added, 'to take these cases where we are already at the pin of our collar, it's becoming increasingly impossible'.[11] A gap in the knowledge of the judiciary when it comes to the realities of the prison conditions was also expressed in some interviews.[12] In addition, Judges not visiting prisons regularly was noted by one Participant, who commented:

> '[I]t's interesting how Judges know so little about what happens in the prisons despite the fact that they send a lot of people there. You know, I mean most Judges might have been in a prison once or twice in their life and they certainly don't get the annual visit. But of course, an annual visit is always going to be sanitised anyway'.[13]

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1 Mel Cousins, 'How public interest law and litigation can make a difference to marginalised and vulnerable groups in Ireland' in Free Legal Advice Centres, 'Public Interest Law in Ireland – the reality and the potential' (FLAC, Conference Proceedings, 6 October 2005) 11-24, p 11.

2 See section 3.

3 Participants 1, 2, 8, 10, 12 and 25.

4 Participant 24. Participant 12 felt that there is a lack of knowledge on prison law within the community of legal practitioners, which results in fewer cases.

5 Participant 13.

6 Participant 23.

7 Participant 2 (insertion added).

8 Participant 2.

9 Participants 1, 8, 10, 14 and 18.

10 Participant 20.

11 Participant 20.

12 Participants 8, 12, 22.

13 Participant 22.

The lack of opportunity for legal education in prison law in third level is another factor that is likely to impede students embarking on careers in public interest prison law. Indeed, past research in the US demonstrates the connection between legal education in law school and whether a student embarks on a career in public interest law.[14] The few opportunities to study prison law in third level institutions and/ or the professional training institutions was also noted in some interviews.[15] Although, one Participant disagreed, and noted that 'both third level and community education [are] starting to look at public interest litigation in relation to prisoners in a way that they haven't done before'.[16] Writing in 2006, Mel Cousins noted, '[t]here is a very limited focus on public interest law in many of Ireland's universities and professional law schools'.[17] Today, several law schools and community law centres teach modules in the general areas of public interest law and legal advocacy.[18]

Sadly, a void exists in the opportunities to learn prison law in third level institutions. It is important that students considering a career in criminal law be exposed to prison law and policy and the realities of the prison system.[19] This point is particularly important given the over representation of marginalised groups in the prison populationand the overlap of prison law with other legal subjects such as youth justice, mental health law, and immigration law.[20] Given the nexus between socio-economic disadvantage and prison, it is important that law schools expose students to legal education in this area, given that they are future legal professionals. Yet, the starting point for most criminal law curriculums is the investigation of crime and the end point is the conviction and sentencing.[21] As US Prison Law expert, Professor Sharon Dolovich notes, '[f]or law schools to omit the law of prisons from their otherwise capacious course offerings is to reproduce the normative exclusion at the core of society's carceral bargain, and to keep prisoners invisible to the very people- future lawyers- best positioned to help vindicate their legal rights'.[22] Additionally, it is important that the professional training bodies expose students to prison law (potentially within criminal law related modules).[23] Given that it is members of the legal profession who are appointed to the Judiciary, it is imperative that legal practitioners have knowledge of this area of law.

14 Robert V Stover, 'Law school and professional responsibility: the impact of legal education on public interest practice' (1982) 66 (4) *Judicature* 194-206.

15 Participants 2, 8 and 10.

16 Participant 14 (insertion added).

17 Cousins (n 1) p 13.

18 For example, Coolock Community Law and Mediation, Atlantic Technological University, Dublin City University, Griffith College, University of Galway, Trinity College Dublin, University College Cork and University College Dublin.

19 Sharon Dolovich, 'Teaching Prison Law' (2012) 62(2) *Journal of Legal Education* 218-230, p 223.

20 ibid, pp 225-226.

21 ibid, p 218.

22 ibid, p 229.

23 It should be noted that in the past the Law Society offered a module to Trainees on prison law, which was removed due to a lack of uptake. This point was raised at the roundtable of experts in Maynooth University in March 2024.

4.2 The need for community legal education in prisons

The judicial system relies upon a bottom-up approach, wherein individuals have to identify breaches of the law on their own accord before pursuing a claim (or other remedy) to enforce their rights. As was noted, a person in prison may not realise that a particular situation is in breach of their rights.[24] For an individual to recognise that a breach of a right or freedom has occurred, they need to have an awareness that such a law exists. Although public interest law aims to help the vulnerable and disadvantaged members of society, there is an urgent 'need for legal education and awareness raising'.[25] For this reason, one of the pillars of public interest law is community legal education,[26] defined as, 'a range of measures to 'demystify' the law and to raise awareness of the law amongst disadvantaged and vulnerable people'.[27] Such measures include the provision of information to the group, training and education.

The general lack of empowerment of the people in prison was a strong theme in the interviews with Participants. The position is not surprising given that the majority of the Irish prison population 'come from backgrounds characterized by marginalization and disenfranchisement, recognized as core barriers to taking action against state bodies or powerful groups'.[28] In some cases, particularly in civil cases (such as public interest cases), the applicant is excluded from the court room, on account of the lack of in-cell security in the Four Courts.[29] Many prisoners, particularly those who have been in State care at some point during their lives,[30] are reluctant to engage with people in authority. This reality can also be a barrier to people seeking justice in respect of prison conditions,[31] particularly given that rights holders in penal detention are completely reliant on prison staff to access justice, even in its most basic form.

As research demonstrates, there are a range of factors will impact on the person's willingness or consciousness to seek redress. As Irish Prison Law experts van der Valk and others note in relation to their research on the use of the use of the complaint system in Irish prisons:

> 'Across this work, we see that the processes of considering something to be first, a wrong, second, caused by a blameworthy other, and third, something to act upon, are all situated within social, cultural, and psychological contexts'.[32]

Previous research in Romania suggests that factors influencing whether or not a person in prison engages with legal mobilisation (i.e claims against the prison) include: the characteristics of the individual; the penal status of the individual (e.g. the length of their sentence, the prison regime); the level of concern for rights (e.g. within the prison community and rights discourse with those outside the prison) and the culture of legal mobilisation in the prison (i.e. in relation to making complaints).[33]

As US Prison Law expert, David C. Fathi, notes, ['p]risons also house a uniquely powerless population. Prisoners are overwhelmingly poor and lacking in formal education; many are functionally illiterate'.[34] The vast majority of people in prison in Ireland come from lower socio-economic groups, and many professionals interviewed noted that there is a lack of knowledge of rights among rights holders.[35] The experience of trauma will also impact on a person in prison's ability to seek legal assistance,[36] and some people may feel a stigma

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24 Participants 2, 21 and 24. This point was noted at the roundtable on in Maynooth University in March 2024.

25 Michael Farrell, 'Using Law and Litigation in Public Interest' in Free Legal advice Centres, 'Public Interest Law in Ireland – the reality and the potential.' (FLAC, Conference Proceedings, 6 October 2005) 99-102, p 102.

26 Cousins (n 1) 11.

27 ibid.

28 Sophie van der Valk, Eva Aizpurua and Mary Rogan, '"[Y]ou are better off talking to a f****** wall': The perceptions and experiences of grievance procedures among incarcerated people in Ireland' (2022) 56(2) *Law & Society Review* 261-285, p 262. See also David C Fathi, 'The challenge of prison oversight' (2010) 47(4) *American Criminal Law Review* 1453-1462, p 1453.

29 Mary Rogan, Prison Law (Bloomsbury, 2014) [9.26]. This point was also made by Participant 2.

30 The link between time in State care and prison is well established in this jurisdiction and others, see Nicola Carr and Paula Mayock, 'Care and Justice: Children and Young People in care and Contact with the Criminal Justice System' (IPRT, 2019.)

31 Participant 9.

32 van der Valk, Aizpurua and Rogan (n 28) p 263.

33 Christina Dâmboeanu, Valentina Pricopie and Alina Thiemann, 'The path to human rights in Romania: Emergent voice(s) of legal mobilization in prisons' (2021) 18(1) *European Journal of Criminology* 120-139.

34 Fathi (n 28) p 1453.

35 Participants 2, 6, 9, 19, 21, 24.

36 Participant 9.

attached to their situation, which will also act as a barrier to pursuing a solution.[37] In addition, many people in prison have literacy, mental health and addiction issues that will affect their ability to seek redress for breaches of fundamental rights.[38] Although, one Participant did comment that they thought that in comparison with other countries, people in prison in Ireland did have knowledge that they could go to court about certain matters.[39] Another Participant noted that in many cases, it was the clients that came to them with the issue.[40] As the case law and research shows, people from marginalised groups can and do use the law to improve their situation and 'to assert their identity'.[41]

It was also noted that many people in prison may wish to keep a low profile and serve their sentence without drawing attention to themselves, via complaints or litigation.[42] Additionally, people in prison may not wish to take cases for fear of reprisals.[43] In addition, there may be a perception that the prison will be favoured in litigation.[44] One Participant noted how on occasion, they found that a client did not know something was a breach of their fundamental rights, until it was highlighted to them. They noted:

> 'The number one, I think prisoners aren't educated in terms of their rights. They don't know that their rights are being breached. And unless you know very often it's kind of you'll be having a consultation with them and they'll mention something and they won't realise that, in fact, that's a breach of their rights'.[45]

This corresponds to research conducted in Australia, which showed that many people in prison have difficulty in recognising that they have a legal issue and struggle to identify a legal remedy.[46]

In terms of community legal education and the provision of legal information to the rights holder, one Participant stressed the importance of marginalised groups first having access to legal information and advice, at an early stage.[47] They noted:

> '[Y]our traditional civil legal aid model is predicated on the person knowing that they have a legal issue and then going through all the hoops and the legal representation, whereas you have to kind of start with the information and advice and then you have to have your pathway to your dedicated service before you even get to what happens in court'.[48]

The Participant spoke about the need to access the 'unmet legal need' so that information and supports can be targeted.[49] They also noted that with vulnerable groups, the information and advice have to be brought to them, as research shows that this is the most effective way of communicating the information. Research in other jurisdiction highlights the unmet legal needs that prisoners face while in prison and that it is not limited to conditions of imprisonment and includes other areas such as family law, accessing employment services and housing.[50]

Recent research completed by the Citizens Information Service shows the difficulties faced

37 Participant 9.

38 Participant 14.

39 Participant 10.

40 Participant 1.

41 van der Valk, Aizpurua and Rogan (n 28) p 263 citing Dave Cowan, 'Legal Consciousness: Some Observations' (2004) *Modern Law Review* 67(6) 928-958.

42 Participants 8, 9, 14 and 25.

43 Participants 7 and 8. This view is in line with previous research, see van der Valk, Aizpurua and Rogan (n 28) p 263; Kristin Bumiller, 'Victims in the Shadow of the Law: A Critique of the Model of Legal protection' (1987) 12(3) *Journal of Women in Culture and Society* 421-439, p 426.

44 Participant 7.

45 Participant 2.

46 Anne Grunseit, Suzie Forell and Emily McCarron, 'Taking Justice into Custody: The Legal Needs of Prisoners' (Law and Justice Foundation of New South Wales, July 2008) p 104.

47 Participant 24.

48 Participant 24.

49 Participant 24.

50 In Australia see, Grunseit, Forell and McCarron (n 46). In Canada see, Department of Justice, 'Study of the Legal Services Provided to Penitentiary Inmates by Legal Aid Plans and Clinics in Canada' (Department of Justice Legal Aid Research Series, June 2005), available at www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr03_la10-rr03_aj10/rr03_la10.pdf, accessed 26 May 2024. In the US, see Michele M Leering and Nicole Paviglianiti 'Stymied, Stigmatized and Socially Excluded: A Pilot Study Exploring Unmet Civil Legal Needs of People Incarcerated at the Quinte Detention Centre' (Community Advocacy & Legal Centre, March 2020). In England, see Tim Hardie and others, 'Unmet Needs of Remand Prisoners' (1998) 38(3) *Medicine, Science and the Law* 233-236.

by people in prison in accessing information and assistance from external services, such as banking and State services (for example the National Driver Licence Service and Passport Office) and the negative impact this situation has on their well-being.[51] The study also demonstrates that people in prison have a need to access information and services (by phone or internet), from a range of external service providers and how difficult this is for them. The report highlights the importance of this issue in light of the human rights duty incumbent on all public bodies that provide a service to service users, as set out in section 42 of the Irish Human Rights and Equality Commission Act 2014.[52] While in prison, rights holders have access to a range of information on concerning their rights in prison, such as the Prison Rules, and IPRT and Irish Council for Civil Liberties', 'Know Your Rights As a Prisoner' booklet.[53] Although, previous research notes the barriers faced by non-English speaking prisoners in accessing the Prison Rules in an understandable manner and the lack of this information being shared with them on committal, as is required under the Prison Rules.[54] There is a need to consider how to disseminate the information in the 'Know Your Rights As a Prisoner' booklet in an accessible format in the languages spoken in the prison.[55]

4.3 The role of civil society organisations

Civil society organisations (CSOs) play a vital oversight role in relation to prison reform and this position was recognised by almost all Participants interviewed. Additionally, CSOs are an integral part of public interest law. In this regard, it is imperative that these organisations are resourced adequately. In the Irish penal landscape, there are a small number of CSOs that work specifically on prison reform or closely related matters. In addition, organisations such as IPRT and the Irish Council for Civil Liberties have relatively small teams and limited resources for their wide remit of work. These organisations carry out a myriad of functions including highlighting criminal justice and prison issues in the media, conducting research, monitoring conditions for people in detention, providing information to rights holders and advocating for improvements to criminal justice and prison policy at a national, European and international level. In respect of the latter, all of the CSOs interviewed for this report stressed the important role that the prison oversights mechanism such as the CPT, the UN Treaty Monitoring Bodies and the Universal Periodic Review process play in advocating for progressive changes in Irish prisons.

In other jurisdictions, it is common for CSOs to initiate public interest prison litigation. For example, in the United States, the American Civil Liberties Union has a specific team that works on Prisoner's Rights. In the United Kingdom, the Howard League has the capacity to initiate legal cases against the State. The issue of legal standing can be a serious burden for CSOs in this jurisdiction and before other courts, including the ECtHR. Indeed commenting on the latter court, one Participant commented 'the European Court is too restrictive in terms in granting local standing to NGOs' and as a result, there are a 'large range of issues where prisoners are not reachable'.[56]

Lennon and Carroll v Governor of Mountjoy Prison is an example of IPRT initiating litigation on behalf of two prisoners with severe mental health issues

51 Citizens Information, 'Prison Research Report: Equality of Access to Information and Services Enhances Personal Power' (Citizens Information Board, 2022). This study mirrors similar work in other jurisdictions, see for example The Justice Project, Final Report Part 1: Prisoners and Detainees (Law Council of Australia, August 2018), available at https://lawcouncil.au/justice-project/final-report, accessed 26 May 2024.

52 Citizens Information, ibid, pp 15-16. This was also noted by the Office of the Inspector of Prisons in its COVID-19 Thematic Inspection of Limerick Prison on 6-7 April 2021 (OIP, 2021) p 11.

53 Irish Council of Civil Liberties and Irish Penal Reform Trust, 'Know Your Rights: Your Rights As A Prisoner' (ICCL and IPRT, 2021).

54 David Doyle and others, '"Sometimes I'm Missing the words": The rights, needs and experiences of foreign national and minority ethnic groups in the Irish penal system' (IPRT, 2022). The IPS is taking steps to provide materials in a number of languages to people upon committal to prison.

55 It was noted that when first published, the booklet was available in 3 languages, as stated at the roundtable in Maynooth University in March 2024.

56 Participant 7.

with specific needs. Notwithstanding that the High Court granted the organisation leave to initiate the proceedings and held that the organisation had legal standing to act on behalf of the affected people, the possibility of an adverse costs order being awarded against it, if the case was lost, was a major factor in the decision not to proceed with the matter legally.[57] CSOs have responsibilities to their Board and Trustees, and it follows that an unsuccessful case, resulting in an adverse costs order would have substantial repercussions for these organisations. It follows that a number of Participants instead felt that constructive engagement with the State authorities regarding a particular area of reform is an alternative to litigation and can be just as effective.[58] The potential to receive ring-fenced funding specifically to take litigation could be helpful to CSOs when considering potential litigation to help mitigate the considerable financial risk they face in such instances.

4.4 The prisoner complaint system

Given the barriers that exists in public interest prison litigation, it is important that all efforts have been made to resolve the situation before the commencement of court action, and that all available remedies within the prison infrastructure have been pursued. One way in which people in prison can seek to alleviate a situation is by using the prisoner complaint system, although use of the complaint mechanism is not a formal requirement before litigation can commence.[59] People in prison have the right to make complaints regarding their conditions of detention, as provided in the Prison Rules,[60] the Council of Europe's Revised Prison Rules and the Mandela Rules.[61] Moreover, the importance of an effective prisoner complaint system is recognised by the ECtHR.[62]

As acknowledged by the ECtHR in *Ananyev and Others v Russia*, '[f]iling a complaint with an authority supervising detention facilities is normally a more reactive and speedy way of dealing with grievances than litigation before courts'.[63] Moreover, ECtHR case law affirms that, '[t]o be efficient, the system must ensure a prompt and diligent handling of prisoners' complaints, secure their effective participation in the examination of grievances, and provide a wide range of legal tools for the purpose of eradicating the identified breach of Convention requirements'.[64] If people in prison are empowered to use an independent and properly functioning grievance mechanism, in which they have confidence, it would reduce

57 Liam Herrick, 'Obstacles to Litigation for Prisoners: case Study of IPRT, Lennon and Carroll v Governor of Mountjoy Prison' (PILA seminar, 9 February 2012) p 9.

58 Participants 7, 8 and 24.

59 The prisoner complaint system itself is subject to judicial review, see *McDonnell v Governor of Wheatfield Prison* [2015] IECA 216 (Court of Appeal judgment), para 101. In his extensive review of the prisoner complaint system, former Chief Inspector of Prisons, Judge Michael Reilly, recommended that, '[p]risoners, except in the event of undue delay in the investigation of their complaints, must exhaust the internal prison complaints' procedure prior to bringing their complaints before a judicial or other authority', see Judge Michael Reilly, 'Review, Evaluation and Analysis of the Operation of the present Irish Prison Service Prisoner Complaints Procedure' (Office of the Inspector of Prisons, April 2016) p 52.

60 Prison Rules, Rules 55-57.

61 Revised European Prison Rules, Rules 70(1) and 70(2); Mandela Rules, Rule 56(3).

62 *Ananyev and Others v Russia* (Application nos 42525/07 and 60800/08), Judgment (First Section) 10 January 2012, paras 214-216. As Van der Valk and Rogan note: 'The primary principles arising from the ECtHR's analysis of effective remedies in prison show that a complaints body for prisoners must, either on its own or in combination with other forms of redress, fulfil the following conditions. It must:
(1) be independent of the authorities in charge of the penitentiary system;
(2) secure the inmates' effective participation in the examination of their grievances;
(3) ensure the speedy and diligent handling of the inmates' complaints;
(4) have a wide range of legal tools for eradicating the problems that underlie these complaints; and
(5) be capable of rendering binding and enforceable decisions, and any relief must be capable of being granted in reasonably short time-limits'.
See Sophie van der Valk and Mary Rogan, 'Prisoner Complaints Mechanisms: Assessing Human Rights Requirements and the Role of a General Ombudsman' (2020) 26(4) *European Public Law* 801–822, p 806.

63 *Ananyev and Others v Russia*, ibid, para 215.

64 ibid, para 214.

the need for a legal representative to intervene and advocate on their behalf concerning dispute resolution with the IPS.

Under the current system, there are six classifications of complaints, ranging from the most serious complaints (category A complaints) to less serious, but nevertheless important, complaints (category F complaints). Applications from people in prison are received by the Prison Governor or Assistant Governor who then categorises the complaint type and forwards it to the relevant staff member or independent investigator to conduct the investigation.[65] Category A complaints relate to allegations of 'assault or use of excessive force against a prisoner, or ill treatment, racial abuse, discrimination, intimidation, threats or any other conduct against a prisoner of a nature and gravity likely to bring discredit on the Irish Prison Service'.[66] In respect of category A complaints, Prison Governors have statutory obligations concerning the preservation of evidence, the identification of witnesses, medical treatment of the victim, and other matters.[67] Any complaint that the Prison Governor receives that may constitute a criminal offence, must be notified to An Garda Síochána.[68]

The category A complaint and evidence must be communicated to the Director General of the IPS and the Inspector of Prisons must be notified within seven days of receipt of the complaint.[69] The IPS Director General must then instruct one or more persons to investigate the complaint, where it falls within the scope of Rule 57B of the Prison Rules.[70] The independent investigators are selected from a panel of Serious Complaints Investigators.[71] The investigation team has 3 months to investigate the matter, unless there are 'exceptional circumstances'.[72]

As available data shows, there are long delays in the completion of category A investigations, due to the difficulties in recruiting suitably qualified investigators and the back log that accumulated during the Covid-19 pandemic, when in person interviews were not possible.[73] After the investigation is complete, the investigation team must send the investigation report to the Prison Governor who makes the ultimate finding on the complaint 'on the basis of the report'.[74] In making a decision on the findings, the Governor can come to one of the following conclusions:

(i) There are reasonable grounds for sustaining the complaint,

(ii) There are no reasonable grounds for sustaining the complaint, or

(iii) It has not been possible to make a determination as set out at (i) or (ii)…[75]

Investigation reports are confidential,[76] and complainants must be informed of the possibility of writing to the Office of Inspector of Prisons (OIP) and the Director General of the IPS if they are not satisfied with the decision.[77]

65 van der Valk and Rogan (n 62) p 808.

66 Prison Rules, as amended by S.I. No. 11/2013 - Prison Rules (Amendment) 2013, s. 57B (1)(a).

67 Irish Prison Service, 'Prisoner Complaints Policy' (1 November 2021), available at: www.irishprisons.ie/wp-content/uploads/documents_pdf/11-011-Prisoner-Complaints-Policy.pdf, accessed 21 May 2024, at p 7.

68 Prison Rules, as amended by S.I. No. 11/2013 - Prison Rules (Amendment) 2013, s. 57A(1). The OIP annual report 2021 provides an example of an instance where an assault in prison, which should have been reported to An Garda Síochána, was not reported. See Office of the Inspector of Prisons, Annual Report 2021 (OIP, February 2021) p 28.

69 Irish Prison Service, 'Prisoner Complaints Policy' (n 67) p 7. Once a complaint is categorised as a category A complaint, the OIP is immediately notified through the IPS Prisoner Information Management System. In 2022, this requirement was met in the vast majority of category A complaints (95%), see Office of the Inspector of Prisons, Annual Report 2022 (OIP, March 2023) p 22.

70 Irish Prison Service, 'Prisoner Complaints Policy', ibid, p 8.

71 The panel members are made up of working barristers, retired members of An Garda Síochána, a retired solicitor and retired members of the Defence Forces, email feedback from the Irish Prison Service, dated 16 July 2024.

72 Irish Prison Service, 'Prisoner Complaints Policy' (n 67) p 8; Prison Rules, as amended by S.I. No. 11/2013 - Prison Rules (Amendment) 2013, s. 57B(10).

73 Ken Foxe, 'More than 1,000 complaints made by prisoners last year including 70 serious 'Category A' reports' (The Story, 18 July 2023), available at www.thestory.ie/2023/07/18/more-than-1000-complaints-made-by-prisoners-last-year-including-70-serious-category-a-reports/, accessed 21 May 2024. In its 2022, annual report, the Office of the Inspector of Prisons noted the delays in the appointment of investigators to investigate category A complaints, see Office of the Inspector of Prisons, Annual Report 2022 (n 69) 22. The IPS has requested resources for the recruitment of more independent investigators, email feedback from the Irish Prison Service, dated 10 July 2024.

74 Irish Prison Service, 'Prisoner Complaints Policy' (n 67) p 8.

75 Prison Rules 2007, as amended by S.I. No. 11/2013 - Prison Rules (Amendment) 2013, s. 57B(10) (b).

76 Irish Prison Service, 'Prisoner Complaints Policy' (n 67) p 9.

77 ibid.

Although the OIP does not have a role in deciding the complaint findings, it has an important oversight role regarding category A complaints and receives investigation reports,[78] which are then reported in its annual report. In addition, the role of the OIP is to review any relevant material from these complaints and it can, if it so chooses, commence an investigation into anything arising in the complaint that is considered relevant.[79] In its 2021 annual report, the OIP commented that some reports it received contain 'an executive summary with limited supporting documentation', the same information that Prison Governors receive in making their decision on the finding.[80] Here, the OIP notes:

> 'It continues to be a matter of concern for the Inspectorate that Governors are tasked with making decisions on serious allegations of wrongdoing without sight of the complete investigation file, including access to CCTV footage. Once again, the Inspectorate recommends that Governors should be provided with the complete investigation file to allow them to make an informed decision.'[81]

Notwithstanding the findings of the independent investigator concerning a category A complaint, the ultimate decision on the complaint rests with the Prison Governor. In its 2021 annual report, the OIP expressed concern that 'the Governor assigned to review the investigation findings did not in all instances uphold the Independent Investigator's findings'.[82] Arguably, allowing Prison Governors this power gives them a type of quasi-judicial role, where they come to a decision on the basis of information available to them, which calls into question the independence of their decision making capabilities in relation to people they govern on a day-to-day basis. This situation raises questions regarding the level of independence in the determination of category A prisoner complaints,[83] and is a further argument in support of allowing people in prison access to the Ombudsman.[84]

Available data (from a Freedom of Information request) shows that in 2022, out of 70 Category A complaints received, 1 was upheld, 26 were not upheld, 37 were incomplete, while 5 were either withdrawn, vexatious or outside of the scope of the mechanism.[85] That more than half of the Category A applications received were incomplete suggests that complainants may require additional support in completing the application process, and that reform of the application process is needed. Data from the Dóchas Centre shows that between 2018 and 2020, only one category A complaint was upheld, out of 21.[86] Apart from category A complaints, there is no legal obligation for the IPS to give a reason for the complaint finding.[87] Similarly, category A complaints are the only complaint category that requires the person making the complaint to contribute to the process.[88]

People in prison can write a letter to the OIP or Minister, but there is a perception that these letters might be inappropriately screened by the IPS. As one Participant noted,. '...they [people in prison] don't have faith in the system in the sense that your letter to the Inspector of Prisons is one of the letters that the prison service is not legally supposed to open, but nobody believes that they don't, you know, so again, anything you

78 In its 2022 annual report, the OIP noted that it received 50 investigation reports, compared with 85- the previous year, Office of the Inspector of Prisons, Annual Report 2022 (n 69) p 23.

79 Prison Rules 2007, as amended by S.I. No. 11/2013 - Prison Rules (Amendment) 2013, s. 57B(12) reads: 'The Inspector of Prisons shall have oversight of all investigations carried out under this Rule, shall have access to any material relevant to any such investigation and may investigate any aspect that he or she considers relevant.'

80 Office of the Inspector of Prisons, Annual Report 2021 (n 68) p 28.

81 ibid.

82 ibid. Here the OIP noted that in one instance, a Prison Governor who did not agree with the Independent Investigator's finding, subsequently directed that an internal review be conducted. This internal IPS review 'found no grounds for the complaint'. As the OIP highlighted, the Prison Rules do not provide for such an internal review. On another occasion, the OIP sought the report of an independent investigator and was told that the report 'could not be located'.

83 van der Valk, Sophie and Mary Rogan (n 62) p 813; Ian O'Donnell, Ireland's prisons urgently need external scrutiny: there is no effective complaint system for prisoners or access to the Ombudsman' (Irish Times, 7 February 2022). See response of the IPS regarding this point at note 111.

84 The proposal to give people in prison access to the Ombudsman is discussed below in section 6.4.

85 Foxe (n 73).

86 Data from Minister for State at the Department of Justice (Hildegarde Naughton) Response to Parliamentary Question, 24 June 2021, available at https://www.oireachtas.ie/en/debates/question/2021-06-24/365/, accessed 3 July 2024.

87 van der Valk and Rogan (n 62) p 814.

88 ibid.

write down, the feeling is [it] can and will be used against you'.[89] Here, the IPS emphasise that letters to the OIP come under Rule 44 of the Prison Rules and such letters are not screened.[90] The IPS notes that a 'full exercise to re-affirm the confidentiality of Rule 44 correspondence has just concluded with the roll-out of colour coded post boxes to segregate post'.[91] This programme involves, 'an updated circular to Governors, information video for prisoners and poster campaign for staff'.[92]

Prison staff also have a role in decision making in other categories of complaints in the prison system. Here scholars note, '[p]rison staff, even when not directly involved in the circumstances giving rise to the complaint, would also not be considered sufficiently independent under the test for an effective remedy under Article 13 of the Convention'.[93] Similarly, IPRT notes, '[i]nternal, governmental inspection is not, however, considered sufficient to ensure the appropriate independent oversight of prisons; neither is the existence of an internal complaints mechanism'.[94]

Category B complaints are 'complaints of a serious nature, but not falling within any other category of complaint',[95] for example, 'verbal abuse of prisoners by staff, inappropriate searches or any other conduct against a prisoner of a nature likely to bring discredit on the Irish Prison Service'.[96] This category of complaint is investigated by a Chief Officer (a staff member), who must not have been present at the time of the incident.[97] As part of this role, they must gather relevant evidence and interview persons etc.[98] The Chief Officer has 28 days to conduct the investigation, except in exceptional circumstances, and their decisions can be appealed to the Prison Governor and then reviewed by the IPS Director General.[99]

Category C complaints are complaints that relate to services in the prison such as 'visits, phone calls, reception issues, missing clothes, not getting post on time, not getting appropriate exercise'.[100] These complaints are investigated by prison staff who are Class Officer level or above.[101] Available information shows that these are the most common category to which complaints relate.[102] Category D complaints are those that are made against professionals working in the IPS, examples include medical, legal or financial staff.[103] Visitors to the prison can also make complaints, which come under category E. Category F complaints relate to decisions made by the IPS Headquarters, such as 'the granting of temporary release [and] prison transfers'.[104]

The issues and shortcomings of the prisoner complaint system in its current form are not new and have been raised by the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT),[105] the OIP,[106] civil society organisations,[107] IPS staff,[108] and academics.[109] Indeed, the IPS supports reform of the prisoner complaint system and has called for

89 Participant 9 (insertion added).

90 Email feedback from the Irish Prison Service, dated 10 July 2024.

91 ibid.

92 ibid.

93 van der Valk and Rogan (n 62) p 813.

94 Irish Penal Reform Trust, 'Complaints, Monitoring and Inspection in Prisons' (IPRT position Paper 7, 2009), available at www.iprt.ie/site/assets/files/6157/iprt_position_paper_7_-_complaints-_monitoring_and_inspection_in_prisons.pdf, accessed 19 March 2024, p 4.

95 Irish Prison Service, 'Prisoner Complaints Policy'(n 67) p 12.

96 ibid.

97 ibid.

98 ibid.

99 ibid.

100 ibid, p 16.

101 ibid.

102 van der Valk and Rogan (n 62) p 810.

103 Irish Prison Service, 'Prisoner Complaints Policy'(n 67) p 16.

104 ibid.

105 CPT report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 23 September to 4 October 2019' (Strasbourg, 24 November 2020) p 6.

106 Office of the Inspector of Prisons, Annual Report 2022 (n 69) p 23; Judge Michael Reilly (n 59).

107 See for example, Irish Penal Reform Trust, 'Complaints, Monitoring and Inspection in Prisons' (n 94).

108 See for example, the evidence of staff in X prison in *McD v Governor of X Prison* [2018] IEHC 668, para 136.

109 See for example, van der Valk and Rogan (n 62); Ian O'Donnell (n 83).

change in this area.[110] Criticisms by external bodies include: the lack of independence of the system and the lack of external scrutiny (even for the most serious category of complaints),[111] and lengthy delays in the complaint process (even in relation to serious matters concerning people in prison, such as self-harm).[112]

A limited number of cases highlights some of the issues regarding the prisoner complaints procedure. For example, *McD v Governor of X Prison* addressed the omission to interview a key staff witness in establishing the facts in a complaint that was not upheld by the Prison Governor.[113] Commenting on the shortcomings of the complaint system in the judgment, Baker J. commented:

> '...the failures being attributable to a failed system rather than to any individual failure of the persons engaged with the management of the complaints systems within the prison. This system is grossly under resourced, one person bears the responsibility for fact finding, and even he, the relevant Chief Officer in charge of complaints, was singularly unclear about the precise extent of his role. The system dealing with complaints was unsatisfactory and not compliant with basic levels of fairness or procedural correctness'.[114]

Here, the courts are also aware that it is not their role to make decisions regarding the complaints procedure when there are persons with better knowledge of the operation of prisons.[115]

The inefficiencies of the complaint system were highlighted by two of the Participants.[116] Despite the shortcomings, one Participant stated that they still advise their clients to use the complaint system, as it could have repercussions later if the case goes to court, particularly in terms of the awarding of costs.[117] They also noted that if the complaint system was working as it should, there would be less need for lawyers to advocate on behalf of clients (for example by intervening and write letters etc.) concerning prison conditions.

The prisoner complaint system has been under official review by the Department of Justice since the publication of former Inspector of Prisons, Judge Michael Reilly's, independent review of the mechanism in 2016.[118] The ongoing review includes a commitment to amend the Prison Rules to allow for a streamlined complaints process and for the Office of the Ombudsman to take jurisdiction of prisoner complaints (as a form of independent review and oversight of how prisoner complaints are handled). The recommendations in Judge Reilly's independent review were accepted, and since then the Department of Justice and the IPS have been in 'advanced discussions with the Ombudsman Office with the aim of establishing an effective complaint's system for prisoners'.[119] This new complaint system was expected to be introduced in 2019,[120] however at the time of publication, the new prisoner complaint system is still under review and little information has been shared publicly as to the status of this review.[121]

The author notes that the IPS Strategic Plan lists the upgrade to the complaint process as part its Strategic Pillar on Governance,[122] and the IPS is currently awaiting a Statutory Instrument that is

110 Email feedback from the Irish Prison Service, dated 10 July 2024.

111 The IPS do not accept that the system is not independent and note that, '[a]ll serious complaints are categorised as Category A and assigned to an external independent investigator. Category A complaints are also recorded on a purpose-built database for oversight by the Office of the Inspector of Prisons who reports on this activity annually. As soon as a complaint is categorised it is visible to the Inspector of Prisons on the PIMS [Prisoner Information Management System] database meeting reporting requirements', email feedback from the Irish Prison Service, dated 10 July 2024 (insertion added).

112 *McD v Governor of X Prison* (n 108), para 144; van der Valk, Aizpurua and Rogan (n 28) p 276.

113 *McD v Governor of X Prison*, ibid, para 135. Here, the Prison Governor acknowledged that this shortcoming was 'not acceptable'.

114 ibid, para 148.

115 ibid, para 155.

116 Participants 2 and 9.

117 Participant 2.

118 Judge Michael Reilly (n 59).

119 Minister of Justice (Charles Flanaghan) Response to Parliamentary Question, 30 January 2019, available at www.kildarestreet.com/wrans/?id=2019-01-30a.320, accessed 1 July 2024.

120 ibid.

121 In February 2023, the then Minister for Justice confirmed that the necessary regulations were 'at an advanced stage', see Minister for Justice (Simon Harris) Response to Parliamentary Question, 15 February 2023, available at www.kildarestreet.com/wrans/?id=2023-02-15a.280&s=complaints+AND+prison+AND+appeals#g293.q, accessed 1 July 2024.

122 Irish Prison Service, 'Irish Prison Service Strategy 2023-2027' (IPS, 2023) p 23.

being drafted by the Department of Justice and the Office of Parliamentary Counsel.[123] Here, it is imperative that this progress is prioritised in order to provide an effective remedy for persons in penal custody. This current situation in relation to the prisoner complaint system presents a worrying trend and has led scholars to note that, '[t]he human rights standards in this field are not being complied with at present in the Irish case'.[124] Research in other countries shows that effective complaint procedures and perceptions of procedural fairness in prison can have positive outcomes for prisoner-staff relationships,[125] and are connected to the level of violence in prison.[126]

Recent research by Irish Prison law experts, Van der Valk and others, on prisoner engagement with the prisoner complaint system in Ireland, confirms a negative perception of the complaints system among people in prison, but notes that that confidence in prison staff was linked to 'greater satisfaction with the complaint system'.[127] Their research also shows that, '[p]eople in prison ranked quick responses, getting reasons for a decision, and the possibility of independent review as the most important factors of a good complaint system'.[128] ECtHR case law affirms that, '[t]o be efficient, the system must ensure a prompt and diligent handling of prisoners' complaints, secure their effective participation in the examination of grievances, and provide a wide range of legal tools for the purpose of eradicating the identified breach of Convention requirements'.[129] In order to reduce the barriers faced by people in prison in accessing justice, it is vital that an independent, effective and efficient prisoner complaints system be put in place.[130] Moreover, such a mechanism would reduce the need for a legal representative to intervene and advocate on a prisoner's behalf, if prisoners were empowered to use a functional and efficient procedural remedy.

123 Email feedback from the Irish Prison Service, dated 10 July 2024.

124 van der Valk and Rogan (n 62) p 820.

125 ibid, 801 citing Kitty Calavita and Valerie Jenness, *Appealing to Justice: Prisoner Grievances, Rights, and Carceral Logic* (University of California Press, 2014); Ben Crewe, *The Prisoner Society: Power, Adaption and Social Life in an English Prison* (Oxford University Press, 2012).

126 van der Valk, Aizpurua and Rogan (n 28) p 264, citing David Bierie, 'Procedural Justice and Prison Violence: Examining Complaints among Federal People in Prisons (2000–2007)' (2013) 19(1) *Psychology, Public Policy, and Law* 15–29.

127 van der Valk, Aizpurua and Rogan, ibid, p 278.

128 ibid.

129 *Ananyev and Others v Russia* (n 62) para 214.

130 As the ECtHR affirmed, '[i]n addition to being independent, the supervising authority must have the power to investigate the complaints with the participation of the complainant and the right to render binding and enforceable decisions', *Ananyev and Others v Russia*, ibid, para 216.

5. The importance of external prison oversight mechanisms

All of those interviewed for this study, spoke about the important and effective work of both the Office of the Inspector of Prisons (OIP) and the European Committee on the Prevention of Torture and Inhuman Degrading Treatment or Punishment (CPT). Indeed, one Participant described the slopping out litigation as an example of where there were consequences for the State not adhering to international standards.[1] Another Participant noted:

> 'There's definitely a very positive value in having those oversight committees and the fact that they make recommendations. And if those recommendations are adopted like that's much more effective than bringing a case to the High Court, you know, because that has a broader sweep'.[2]

Indeed, another Participant was of the belief that prison oversight mechanisms can be a 'more effective way of dealing with those issues than actual legal cases', taking into account the hurdles faced throughout legal proceedings.[3] The reports of these prison oversight mechanisms are cited by lawyers as evidence in cases and when advocating on behalf of clients and in correspondence with the IPS. One Participant commented that the reports of the CPT are, 'very, very valuable indeed in terms of equipping litigants and their legal advisers who are contemplating bringing cases before the domestic courts'.[4] The positive value of reports of the Ombudsman for Children and reports of the UN Treaty Monitoring Bodies in litigation was also noted.[5]

5.1 The European Committee for the Prevention of Torture and Inhuman Degrading Treatment or Punishment

The reports of the CPT are particularly important in prison litigation. One participant based in Europe noted that they are valuable for lobbying and when used as evidence in cases.[6] One Participant in Ireland commented that the courts have been particularly open to this form of evidence in the past ten years or so and that perhaps the change in attitude was due to the value of the CPT reports before the ECtHR.[7] Another Participant commented that reports of the CPT could lead to a person in prison being able to support an application of a constitutional or Article 3 ECHR violation.[8] A further Participant recalled visiting the Dóchas Centre and seeing signs up for staff and people in prison to get ready for a CPT visit the following week, which they interpreted as an indication of the importance of CPT visits to the IPS.[9]

Notably, a number of Participants highlighted that the CPT reports are more suitable as evidence of systematic human rights issues, rather than specific situations of particular individuals.[10] In respect of the OIP and the CPT, one lawyer commented:

> '[W]here there's an accumulated effect of many years of reports damning the State over failure to like overcrowding, for example, lack of in cell sanitation, ill treatment of prisoners. These are all things which would be documented over many years, which the State had to respond to'.[11]

Overall, the CPT was viewed extremely positively by all Participants. One Participant spoke of contacting the CPT directly in respect of a person in prison that they were concerned about, and receiving an effective response from the Committee.[12] The media attention that the CPT reports attract,[13] and the fact that the Government has to respond to the recommendations of the CPT, creates a sense of some sort of accountability on the part of the Government,[14] and there was a sense among several lawyers that it encourages the

1 Participant 15.
2 Participant 2.
3 Participant 4.
4 Participant 14.
5 Participant 15.
6 Participant 19.
7 Participant 21.
8 Participant 23.
9 Participant 13.
10 Participants 2, 8, 10, 13, 15.
11 Participant 15.
12 Participant 2.
13 Participant 8.
14 Participants 2, 15 and 21.

Government to do better. In addition, comparison between successive reports can be effective.[15] As one Participant stated, 'it puts them [the Government] at high risk of litigation, if that's not being dealt with'.[16]

5.2 The Office of the Inspector of Prisons

The OIP was established on a statutory basis under Part 5 of the Prisons Act 2007 and is headed by the Inspector of Prisons (Chief Inspector), who leads a team of Inspectors. The Office operates independent of Government and its functions include: conducting regular prison inspections (pre-organised and unannounced visits) and submitting outcome reports to the Minister for Justice,[17] and investigating any matter concerning the management or operation of a prison and submitting the outcome report to the Minister for Justice.[18] It should be noted that the OIP cannot publish its own reports without the approval of the Minister for Justice, and that under section 31(4) of the Prisons Act 2007, the Minister has powers to redact all or part of any report submitted to them.[19] This power of the Minister limits the capabilities of the OIP to fulfil its independent role. As one participant noted, 'ultimately their reports and recommendations are stymied by the fact that they don't have enforcement here and they have to be submitted to the Minister who has the power to withhold or release them'.[20]

In January 2024, an inspection report of the Dóchas Centre, conducted by the OIP in 2020 during the COVID-19 pandemic, was published with redactions after being withheld for a number of years, on the basis of advice from the Attorney General.[21] Out of this initial inspection, the Minister for Justice requested two further reports concerning the Dóchas Centre (an investigation report and a supplementary report), which were submitted to the Minister in 2022.[22] Both reports have been withheld to date, following legal advice from the Attorney General, but it is hoped that they will be published (possibly in a redacted format) by the end of the year.[23] At the time of writing, there have been no published general inspection

15 Participant 1.

16 Participant 2.

17 Prisons Act 2007, s. 31(1).

18 Prisons Act 2007, s. 31(2).

19 Prisons Act 2007, s. 31(4) states: 'The Minister may omit any matter from any report so laid or published where he or she is of opinion —
(a) that its disclosure may be prejudicial to the security of the prison or of the State, or
(b) after consultation with the Secretary-General to the Government, that its disclosure—
(i) would be contrary to the public interest, or
(ii) may infringe the constitutional rights of any person'.

20 Participant 9.

21 Office of the Inspector of Prisons, 'Inspection Report Oversight Monitoring Visit During Covid-19 Pandemic: Mountjoy Female Prison (Dóchas Centre) (OIP, 25 January 2024); Written Answer by Minister for Justice (Simon Harris), 30 May 2023, available at www.kildarestreet.com/wrans/?id=2023-05-30a.1448, accessed 3 July 2024.

22 Written Answer by Minister for Justice (Simon Harris), ibid.

23 In February 2024, the Secretary General of the Department of Justice stated that these two reports would be published by the end of the year, see comments of Oonagh McPhillips before the Committee of Public Accounts, 15 February 2024, available at www.oireachtas.ie/en/debates/debate/committee_of_public_accounts/2024-02-15/4/, accessed 26 July 2024.

reports concerning closed prisons since 2013, and since then, only thematic and functional reports have been published in respect of closed prisons. Although general inspection reports have not yet been published, general inspections have taken place, as the OIP has conducted eight unannounced general inspections as part of the Inspectorate's new programme of regular inspections.[24] In 2012, the Prisons Act 2007 was amended to allow the Chief Inspector to investigate the death of people in prison or any person released from prison where the death occurred within one month of release.

The Chief Inspector does not have the power to make decisions regarding complaints by people in prison, however, they can examine information relating to a complaint where this action is in line with their functions,[25] and 'may investigate any aspect that he or she considers relevant'.[26] The Chief Inspector can also receive letters from people in prison.[27] The OIP submits an annual report to the Minister for Justice before the end of March each year,[28] which is published by the Department of Justice.

In the interviews conducted, a number of Participants noted the positive weight that the reports of the OIP on systematic human rights issues in prison carry in the courtroom.[29] One participant noted:

> '[T]he Inspector of Prisons reports were extremely valuable in, for example, the slopping out litigation and one of the reasons why, is that the Inspector had visited the prisons on a regular basis and had seen things at first hand and had written about them in his reports in [a] graphic enough way…'[30]

Another Participant noted:

> 'I've actually used some of the inspectors reports in court…and it's actually quite helpful [when] you've got a Judge who might be unsympathetic and wants to help the prison service but then you can say look you hang on a second, the Inspector of Prisons said last year about what's going on so I actually think they are potentially really really important and we should really support them'.[31]

The important role of the OIP in investigating deaths in custody was also noted in some interviews. One participant noted:

> 'I've had cases, you know, where a prisoner had committed suicide and the Inspector of Prisons had investigated it as, he or she, has a statutory function to do and then the findings are presented in the report and then those findings can then be pleaded… in great detail and you get far, far more detail from those kind of reports than you'd be able to kind of scrabble together when you were drafting your case'.[32]

It was noted by a Participant that the person appointed to the role of OIP is important.[33] Another Participant highlighted the increase in resource allocation to the OIP in recent years, and the growth in staff numbers,[34] while several Participants noted the importance of the OIP being adequately resourced.[35] The lack of enforcement powers of the prison oversight mechanisms to ensure that report findings are implemented was also noted by one Participant.[36] However, the OIP submits its reports and recommendations to the IPS for their response before it is submitted to the Minister. A report is usually accompanied by an action plan where the IPS can accept, partially accept or reject a recommendation and outline the actions it intends to take or the reasons for that action.

24 OIP, 'Watchdog Inspects Midlands Prison and National Violence Reduction Unit' (OIP website, 10 July 2024), available at www.oip.ie/watchdog-inspects-midlands-prison-and-national-violence-reduction-unit/, accessed 10 July 2024. In addition, the Irish Prison Service note that since 2021, general inspections have taken place in Arbour Hill, Cloverhill, Dóchas Centre, Limerick, Midlands, Mountjoy and Shelton Abbey, email feedback from the Irish Prison Service, dated 11 July 2024.

25 Prisons Act 2007, s. 31(6).

26 Prison Rules 2007, as amended by S.I. No. 11/2013 - Prison Rules (Amendment) 2013, s. 57B(12). For more information on the role of the OIP in the prisoner complaint process, see section 4.4.

27 Prison Rules, Rule 44.

28 Prisons Act 2007, s. 32.

29 Participants 10, 13, 15, 18 and 21.

30 Participant 15.

31 Participant 21.

32 Participant 15.

33 Participant 18.

34 Participant 9.

35 Participants 2, 9, 10 and 20.

36 Participant 9.

5.3 Prison Visiting Committees

The Prisons (Visiting Committees) Act 1925 established a Prison Visiting Committee (PVC) for each prison in the State. This Committee is an external monitoring body with the capacity to visit prisons and receive complaints from people in prison,[37] although their powers are limited in terms of resolving complaints. Members are appointed by the Minister for Justice, and each Committee should have 6-12 members.[38] In practice, PVCs are composed of 2-6 members.[39] PVCs also have the duty to report to the Minister for Justice, Equality and Law Reform concerning any matter concerning the prison, including abuses that they observe in prison and any repairs that they deem to be necessary.[40] It is open to any person in prison to request a meeting with the PVC, or a member thereof, by making such a request to the Prison Governor.[41]

The PVC as a means of prison oversight was viewed as ineffective by two Participants.[42] As one Participant stated, 'I would have less confidence in them'.[43] This finding is in line with the limitations of PVCs that are well documented,[44] and this position mirrors the attitude towards PVCs in England and Wales.[45] As IPRT note, the reports of the PVCs 'tend to be very descriptive, rarely containing any critical commentary on prison conditions or prisoner complaints'.[46] Case law on slopping out shows that the reports of PVCs were submitted as evidence of abysmal slopping out conditions in Mountjoy and Portlaoise Prisons respectively.[47]

Issues that persist in relation to the functioning of these bodies (some of which have been highlighted by PVCs themselves) include a lack of independence and transparency in terms of appointment of membership,[48] the limited content of PVC annual reports,[49] lack of training and support for PVC members,[50] and many of these issues have persisted for decades. For this reason, IPRT has 'long advocated a complete overhaul of the system with the view to strengthening its independence and powers of inspection and monitoring, as well as providing appropriate funding and training to members of the Committees'.[51] As Irish Prison expert, Professor Ian O'Donnell, notes:

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37 Prisons (Visiting Committees) Act 1925, s. 3(1)(a).

38 Prisons (Visiting Committees) Act 1925, s. 2(1) and (2).

39 Ian O'Donnell, 'Ireland's prisons urgently need external scrutiny: There is no effective complaints system for prisoners or access to the Ombudsman' (Irish Times, 7 February 2022).

40 Prisons (Visiting Committees) Act 1925, s. 3(1)(b)-(d).

41 Prisons Act 2007, s. 56.

42 Participants 9 and 10.

43 Participant 10.

44 Joint Committee on Justice, meeting 18 October 2022, available at https://data.oireachtas.ie/ie/oireachtas/debateRecord/joint_committee_on_justice/2022-10-18/debate/mul@/main.pdf, accessed 20 March 2024; O'Donnell (n 39); Irish Penal Reform Trust, 'Complaints, Monitoring and Inspection in Prisons' (IPRT position Paper 7, 2009), available at www.iprt.ie/site/assets/files/6157/iprt_position_paper_7_-_complaints-_monitoring_and_inspection_in_prisons.pdf, accessed 19 March 2024; Mary Rogan, 'Visiting Committees and Accountability in the Irish prison System: Some Proposals for Reform' (2009) 31 *Dublin University Law Journal* 298-323.

45 Sophie van der Valk, Eva Aizpurua and Mary Rogan, '"[Y]ou are better off talking to a f****** wall": The perceptions and experiences of grievance procedures among incarcerated people in Ireland' (2022) 56 (2) *Law and Society Review* 261-285, p 264, citing Ben Crewe, *The Prisoner Society: Power, Adaptation and Social Life in an English Prison* (Oxford University Press, 2012).

46 Irish Penal Reform Trust, Prison Litigation Network Project: National Report on Ireland (IPRT, April 2016) p 27.

47 In *Simpson v Governor of Mountjoy Prison* [2017] IEHC 561, para 15-16, the applicant submitted the report of the Mountjoy PVC as evidence, along with reports of other prison monitoring bodies. Similarly the judgment in *Mulligan v Governor of Portlaoise Prison* [2010] IEHC 269, makes reference to the Portlaoise PVC's continual highlighting of the lack of in-cell sanitation in consistent reports between 1997-2003, at para 9.

48 Two Participants also commented on the lack of transparency in the appointment of PVC membership, Participants 9 and 10. The recent Department of Justice review of PVCs and the Draft General Scheme for the Inspection of Places of Detention Bill 2022 recommend that members of PVCs are appointed through the Public Appointment Service, see Department of Justice, Report on a review of Prison Visiting Committees (March 2023) p 5; Draft General Scheme for the Inspection of Places of Detention Bill 2022, Head 13.

49 Rogan (n 44) p 303; Ian O'Donnell, 'Stagnation and Change in Irish Prison Policy' (2008) 47(2) *Howard Journal of Criminal Justice* 121-133, p 123.

50 Rogan, ibid, p 304 citing PVC reports; Irish Penal Reform Trust, Prison Litigation Network Project: National Report on Ireland (n 46) p 28.

51 Irish Penal Reform Trust, ibid.

> 'If prisons are to be places of hope it is essential that they are transparent. We need to know that conditions and treatment meet acceptable standards. This requires independent monitoring and a meaningful way for people deprived of their liberty to raise issues and ventilate complaints'.[52]

In 2023, the Department of Justice published its review of PVCs,[53] and it is intended that considerable structural and functional changes to PVCs will form part of the legislation ratifying OPCAT (as it stands, the Draft General Scheme of the Inspection of Places of Detention Bill 2022).[54] In order to reduce the barriers faced by people in prison in accessing justice, it is vital that an independent, effective and efficient prisoner complaints system is put in place, and this includes any functions of the PVCs to receive and decide on prisoner complaints. This reform is especially important, given that recent research demonstrates the PVCs are the oversight mechanism with which people in prison are most familiar.[55] Moreover, as the situation currently stands, PVCs are one of the few options open to people in prisons to highlight issues concerning their detention. It is imperative that this option works in an effective and transparent manner.

5.4 The Irish Human Rights and Equality Commission

As Ireland's national human rights institution, the Irish Human Rights and Equality Commission (IHREC) has a number of legal and policy functions in relation to the protection and promotion of human rights and equality in Ireland. Its functions include: providing human rights information to the public; the provision of human rights and equality education and training; legislative scrutiny and reviewing laws in terms of their effectiveness regarding human rights and equality.[56] Its legal functions are: submitting *amicus curiae* briefs to the Superior Courts in cases (subject to the discretion of the courts),[57] and providing legal assistance to people engaged in legal proceedings.[58] IHREC also has the capacity to initiate legal proceedings of its own accord,[59] which until recently it had not executed.[60]

The efforts of IHREC in the area of *amicus curiae* briefs was noted by a number of those interviewed.[61] However, to date IHREC has intervened as a friend of the court in few prison cases,[62] and on occasion it has been refused permission to submit *amicus curiae* briefs to proceedings.[63] As one Participant noted, '[t]he *amicus* can add value there by pointing to, for example, treaty monitoring bodies, findings and case law which maybe isn't in the case of

52 O'Donnell (n 39).

53 Department of Justice (n 48).

54 The proposed reforms to PVCs under this draft legislation are discussed below in section 6.3.

55 7 out of 10 people in prison have knowledge of the PVCs, placing them ahead of the OIP and CPT in terms of prisoner knowledge, see Sophie van der Valk, Eva Aizpurua and Mary Rogan, 'Towards a typology of prisoners' awareness of and familiarity with prison inspection and monitoring bodies' (2023) 20(1) *European Journal of Criminology* 228-250, p 234.

56 For a full list of IHREC's functions and powers, please see Irish Human Rights and Equality Commission Act 2014, s. 10(2).

57 Irish Human Rights and Equality Commission Act 2014, s. 10(2)(e).

58 Irish Human Rights and Equality Commission Act 2014, s. 10(2)(f).

59 Irish Human Rights and Equality Commission Act 2014, s. 10(2)(g) and s. 41.

60 See *Irish Human Rights and Equality Commission v Minister for Children, Equality, Disability, Integration and Youth and others* [2024] IEHC 493. In December 2023, the IHREC announced that it would be initiating legal proceedings against the State regarding the State's obligations to provide accommodation for asylum seekers. In August 2024, the High Court found in favour of the IHREC that the State was in breach of its obligations to International Protection applicants under the EU CFR.

61 Participants 2, 12, 15, 18 and 21.

62 IHREC made an *amicus curiae* submission in *McDonell v Governor of Wheatfield Prison* in both the High Court and Supreme Court stages. It also submitted an *amicus curiae* brief in four cases concerning detention conditions in Oberstown Detention Centre, see Irish Human Rights and Equality Commission, 'Irish Human Rights and Equality Commission Secures Court Role in Oberstown Child Detention Cases' (IRHEC press release, 9 January 2017), available at www.ihrec.ie/irish-human-rights-equality-commission-secures-court-role-oberstown-child-detention-cases/, accessed 26 July 2024. IHREC also made an *amicus curiae* submission in *McCann v Judge of Monaghan District Court and others* [2009] IEHC 276, which concerned imprisonment for non payment of civil debt, see www.ihrec.ie/documents/amicus-curiae-submission-civil-debt-imprisonment-case-mccann-v-judge-of-monaghan-district-court-and-others-1-may-2009/ accessed 29 August 2024

63 Public Interest Law Alliance, 'High Court declines application by IHREC as *amicus curiae* in Oberstown detention case' (PILA Bulletin, 21 December 2026), available at www.pila.ie/resources/bulletin/2016/12/21/high-court-declines-application-by-ihrec-as-amicus-curiae-in-oberstown-detention-case, accessed 22 May 2024. This decision was successfully appealed, see Irish Human Rights and Equality Commission, 'Irish Human Rights and Equality Commission Secures Court Role in Oberstown Child Detention Cases', ibid.

the applicant and they can add value that way'.[64] However, it was noted that IHREC doesn't intervene in many prison cases,[65] and another Participant felt that the IHREC could do more in the area of prison law.[66] Another Participant noted:

> 'I think it lends an air of gravitas to any proceedings... because of their objective nature... If you're in a prison case where you're representing the prisoner and the State is representing the prison, it's very adversarial. So it's good to have that objective middle ground. I think it's good for both sides. And I think it's good for the Judge'.[67]

The work of IHREC behind the scenes in the area of prison law was noted by another Participant.[68] Such action includes when the IHREC represented a person in prison who took legal action concerning slopping out, which was ultimately settled.[69] The importance of IHREC being adequately funded was also highlighted by a Participant.[70]

5.5 The European Court of Human Rights and international monitoring bodies

It is open to rights holders in prison and their representatives to apply to the European Court of Human Rights (ECtHR) in Strasbourg and the United Nations Treaty Monitoring Bodies to which Ireland is bound. The ECtHR is the tribunal that oversees the implementation of the European Convention on Human Rights (ECHR) in member States of the Council of Europe. The UN Treaty Monitoring Bodies are the mechanisms that oversee the implementation of the core UN human rights treaties, each core UN human rights treaty has a Committee attached to it for that specific treaty. The most relevant UN Treaty Monitoring Bodies for people in prison are the UN Human Rights Committee (which is attached to the International Covenant on Civil and Political Rights) and the UN Committee against Torture (which is attached to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). Domestic remedies must first be exhausted before a complaint or communication can be made by an applicant to the ECtHR or the UN Treaty Monitoring Bodies.

In practice, few complaints are made against the Irish State concerning rights of people in prison to the ECtHR and the UN Treaty Monitoring Bodies.[71] There have been applications regarding rights of people in prison to the ECtHR, most of which have been unsuccessful.[72] *Kavanagh v Ireland*, before the UN Human Rights Committee shows the difficulties in enforcing decisions concerning civil and political rights post-judgment.[73] Here, the applicant was successful in arguing that his right to equality before the law under Article 26 of the International Covenant on Civil and Political Rights was breached by a decision

64 Participant 15.

65 Participant 2 and 18.

66 Participant 24. Other Participants noted that IHREC could do more in the area of public interest law generally, other than contribute via *amicus curiae* submissions, Participants 6 and 25.

67 Participant 2.

68 Participant 15.

69 See Irish Human Rights and Equality Commission, Annual report 2020 (IHREC, 2020) p 22 The IHREC also fund research concerning prisoner rights, see for example, Joe Garrihy and Ciara Bracken-Roche, 'The Secondary Punishment: A Scoping Study on Employer Attitudes to Hiring People with Criminal Convictions' (IPRT, 2024) and David Doyle and others, '"Sometimes I'm Missing the words": The rights, needs and experiences of foreign national and minority ethnic groups in the Irish penal system' (IPRT, 2022).

70 Participant 10.

71 There are few cases against the State to the UN Treaty Monitoring Bodies in general.

72 In *O'Hara v Ireland* (Application no 26667/95), Admissibility Decisions 2 September 1996 and 14 April 1998, the applicant argued a breach of Article 8 ECHR (the right to private and family life) in respect of a limit to the duration of family visits. In addition, the applicant argued that the Prison Authorities had interfered with his rights under Articles 6 (right to a fair trial), 8 and 13 (right to an effective remedy) of the ECHR by censoring his correspondence. Here, the Commission found that the application was inadmissible for a number of reasons, including the non-exhaustion of domestic remedies. *Holland v Ireland*, (Application no 24827/94), Admissibility Decision 14 April 1998 also concerned censorship of correspondence and was held to be inadmissible on the grounds of non-exhaustion of domestic remedies. See also *McHugh v Ireland* (Application no 34486/97), Admissibility Decision 16 April 1998. See however, *DG v Ireland* (Application 39474/98), Judgment 16 May 2002, where the applicant was successful.

73 CCPR/C/71/D/819/1998, 26 April 2001.

to try him in the Special Criminal Court in the absence of 'reasonable and objective criteria for the decision'.[74]

For this research, all persons interviewed were asked about the effectiveness of the ECtHR and the UN Treaty Monitoring Bodies in realising rights for people in prison. Among those Participants that had knowledge of or experience in this area, many barriers were cited. The limited time and resources of practitioners and law firms was cited as a reason for the lack of applications from Ireland concerning prison law,[75] as well as cost considerations,[76] the length of time it takes to exhaust domestic remedies,[77] and the low level of damages.[78] One Participant who had experience of taking (non- prison law) cases to the ECtHR spoke of the difficulties in doing so, they commented, 'I've been in a number of cases in Strasbourg and it's always a disappointing outcome'. This Participant also noted:

> '...[I]t's a lot of work to bring a case to Strasbourg. I mean, you know, I know the application form doesn't look that daunting, but I mean, you have to do the application form. The solicitor has to put together all the relevant papers. And if you don't do it right, they send the thing back and then you're out of time because there's now a four month time limit. I mean, they did this to me in a case. We had a very important case... and one of the boxes hadn't been ticked correctly on the form, and they sent the form back. And then by the time we got the form, we were outside of the six months and we sent the form back. And they said, oh, you're out of time now. So, I mean, the Strasbourg court basically is, you know, they have hundreds of thousands of cases and only a very small percentage get past the very first hurdle'.[79]

Two Participants noted that a further reason for the low level of cases to the ECtHR from Ireland could be because of a reasonable success rate in the Superior Courts,[80] while it was also commented that practitioners tend to focus on domestic law.[81] Given the preference for the Judiciary to rely on the Constitution instead of the ECHR Act, as set out in Section 2.3, this situation is not surprising. It was also noted that there is little difference between the scope of the right to dignity in the Constitution and the ECHR in practice.[82] Some Participants cited a lack of knowledge and education in relation to making complaints to the ECHR and the UN Treaty Monitoring Bodies.[83]

In other countries, the ECtHR case law has profoundly impacted the realisation of rights of people in prison in the respondent State. Indeed, one Participant based in the UK believed that if not for the cases taken against the UK Government in the area of prison law (for example concerning parole), the prison law in the UK would not have developed in the way that did.[84] In relation to the UN Treaty Monitoring Bodies, the lack of ability to enforce successful decisions was also cited as a discouraging factor in utilising this option.[85] In contrast, two Participants viewed the State reporting mechanism under the UN Treaty Monitoring Bodies and the Universal Periodic Review (UPR) under the UN Human Rights Council as being of immense benefit for protecting the human rights of people in prison.[86] As one Participant commented:

> '... we have used human rights monitoring committees ... and the UPR and use the mechanisms to highlight what's going on and it's a fantastic mechanism to, it is a way of holding the State to account because the State has to go and appear before the committees and answer what the NGOs are saying. So I think it's, as a mechanism that kind of its potential isn't really appreciated'.[87]

74 ibid, para 12.

75 Participants 15, 20 and 21.

76 Participant 15.

77 Participants 13 and 21.

78 Participants 13 and 18.

79 Participant 21. This sentiment was also echoed by Participant 7, who has experience of talking prison cases to the ECtHR concerning countries other than Ireland. In February 2022, the time limit to make an application to the ECtHR was reduced from 6 to 4 months, after the date of the final decision of the domestic tribunal.

80 Participants 15 and 21.

81 Participant 15.

82 As stated at roundtable in Maynooth University in March 2024. Participant 18 also noted that constitutional protections can be equivalent or more that ECHR protections.

83 Participants 13, 15, 18 and 24.

84 Participant 19.

85 Participants 13 and 24.

86 Previous research demonstrates the capacity of the UPR to exert pressure of States to improve their human rights record, as in the absence of political pressure, change is dependent on the good will of States. See Valentina Carraro, 'Promoting Compliance with Human Rights: The Performance of the United Nations' Universal Periodic Review and Treaty Bodies' (2019) 63 *International Studies Quarterly* 1079-1093, pp 1088-1089.

87 Participant 24.

6 Proposed changes to the monitoring of prisons at a national level

In June 2022, the Government published the Draft General Scheme for the Inspection of Places of Detention Bill 2022.[88] The purpose of the draft law is to serve as the domestic legislation that incorporates the UN Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) into domestic law, once the treaty is ratified by the State.[89] The treaty allows for the Subcommittee on Prevention of Torture and Cruel, Inhuman or Degrading Treatment or Punishment (SPT) to visit and inspect places of detention within the States that come under OPCAT.[90] Under OPCAT, States must establish at least one National Preventative Mechanism (NPM),[91] an independent body that will 'regularly examine the treatment of the persons deprived of their liberty in places of detention',[92] including prisons.

6.1 The establishment of a National Preventative Mechanism and the Co-ordinating National Preventative Mechanism

Although no detailed definition for an NPM is provided under the Draft General Scheme for the Inspection of Places of Detention Bill 2022, the draft law states that entities may be designated as such by the Minister,[93] yet NPMs are to be independent.[94] It is likely that existing inspection bodies will be designated as NPMs.[95] Importantly, the Chief Inspector of Prisons is to be granted the role of NPM - as Chief Inspector of Places of Detention-[96] in relation to the inspection of prisons, Garda stations,[97] vehicles used by An Garda Síochána or the IPS to transport persons, or any place in a which a person is detained immediately before a court appearance (including places of detention within the court building).[98]

In granting the role of NPMs to existing inspection bodies, such as the Inspector of Prisons (meaning the OIP), it is vital that these bodies receive effective and targeted training to ensure that the OPCAT standards are met, in addition, their functional and financial independence must be guaranteed.[99] In its submission to the Joint Oireachtas Committee on Justice concerning the pre-legislative scrutiny of the Bill, IPRT highlighted that the SPT and the NPM are to be preventative bodies rather than investigative in nature,[100] a point that the draft legislation appears to overlook. The Joint Oireachtas Committee on Justice

88 Draft General Scheme for the Inspection of Places of Detention Bill 2022, available at <www.gov.ie/pdf/?file=https://assets.gov.ie/228123/94b395af-c07c-4233-969f-ae838db02569.pdf#page=null>, accessed 23 May 2023.

89 It is the policy of the State to ensure that domestic legislation incorporating a treaty into the national legal system is enacted prior to ratification of an international treaty. The Joint Committee on Justice report on the Pre-Legislative Scrutiny of the Bill recommends that OPCAT be ratified prior to the enactment of the legislation and stakeholders advocated for this position. See Joint Committee on Justice, 'Report on Pre-Legislative Scrutiny of the General Scheme of the Inspection of Places of Detention Bill 2022' (Houses of the Oireachtas, 33/JC/36, March 2023) p 7 and p 13.

90 The SPT consists of 25 members who are independent of their State of nationality. For more information, please see OPCAT and SPT website, available at www.ohchr.org/en/treaty-bodies/spt, accessed 23 May 2024.

91 OPCAT, Part IV.

92 OPCAT, Art 19(a).

93 Draft General Scheme for the Inspection of Places of Detention Bill 2022, Head 18. This provision is to give effect to Article 17 of OPCAT.

94 Draft General Scheme for the Inspection of Places of Detention Bill 2022, Head 18(4).

95 Draft General Scheme for the Inspection of Places of Detention Bill 2022, Head 18, explanatory note.

96 Draft General Scheme for the Inspection of Places of Detention Bill 2022, Head 5(5).

97 As IPRT note, there are approximately 120 Garda stations across the State, which is an incredible amount of locations for the Chief Inspector's Office to visit, see Irish Penal Reform Trust, Submission to the Joint Committee on Justice on the General Scheme of the Inspection of Places of Detention Bill 2022, (IPRT, 5 August 2022) para 8. At present, the OIP inspects prisons only.

98 Draft General Scheme for the Inspection of Places of Detention Bill 2022, Head 19(1). Other NPMs will be designated to inspect other places of detention, such as healthcare settings etc.

99 Joint Committee on Justice, 'Report on Pre-Legislative Scrutiny of the General Scheme of the Inspection of Places of Detention Bill 2022' (n 89) p 7. This proposal is in line with the SPT guidelines on NPMs.

100 Irish Penal Reform Trust, Submission to the Joint Committee on Justice on the General Scheme of the Inspection of Places of Detention Bill 2022 (n 97), para 6.

recommends that the legislation include a formal role for civil society organisations in the 'designation and operation of NPMs'.[101] It also recommends that the NPMs be accountable to the Oireachtas rather than the Department of Justice, given that other monitoring bodies, such as the Ombudsman and the IHREC report to the Oireachtas.[102] In addition, it is imperative that these NPMs are allocated appropriate funding and resources to conduct these inspection and that the inspections be separate to the existing inspections schedule carried out by these bodies.[103]

Under the Draft General Scheme for the Inspection of Places of Detention Bill 2022, the Co-ordinating role of the NPM is to be given to the IHREC.[104] As part of this role, the functions of IHREC are: to liaise with international monitoring bodies that inspect places of detention; to consult and liaise with NPMs; to review the reports of the NPMs and advise the NPMs on any systematic issues evident from the reports; to coordinate the reports of the NPM submitted to international bodies; to provide guidance to NPMs regarding their obligations under OPCAT.[105] As part of its functions under the proposed legislation, IHREC will make recommendations to the Minister, in consultation with NPMs, on matters relating to 'any matter relating to the prevention of torture and other cruel, inhuman or degrading treatment or punishment in places of detention in the State'.[106] In its submission on the Draft General Scheme for the Inspection of Places of Detention Bill 2022, the IHREC recommends that the co-ordinating body's functions are expanded to include the co-ordination of the activities of NPMs.[107] In particular, IHREC also recommends that the functions of the co-ordinating body should include, 'to raise awareness and organise training in relation to OPCAT, to facilitate peer-to-peer assistance and reviews amongst NPMs, and to facilitate a forum for the development of good practices for OPCAT type inspections amongst NPMs'.[108] It is imperative that the IHREC receive adequate funding, resources and training to complete this mandate, which is in addition to its existing remit of work.[109]

101 Joint Committee on Justice, 'Report on Pre-Legislative Scrutiny of the General Scheme of the Inspection of Places of Detention Bill 2022' (n 89) p 9.

102 ibid, p 14.

103 In its submission on the General Scheme of the Inspection of Places of Detention Bill, IHREC recommends that the State funds and resources the NPMs and the co-ordinating body so that they can operate effectively, see Irish Human Rights and Equality Commission, 'Submission on the General Scheme of the Inspection of Places of Detention Bill' (IHREC, October 2022) p 18.

104 Draft General Scheme for the Inspection of Places of Detention Bill 2022, Head 16.

105 ibid.

106 ibid.

107 Irish Human Rights and Equality Commission, 'Submission on the General Scheme of the Inspection of Places of Detention Bill' (n 103) p 39.

108 ibid, pp 39-40.

109 Irish Penal Reform Trust, Submission to the Joint Committee on Justice on the General Scheme of the Inspection of Places of Detention Bill 2022 (n 97) para 12; Irish Human Rights and Equality Commission, 'Submission on the General Scheme of the Inspection of Places of Detention Bill' (n 103) pp 37-40.

6.2 The Chief Inspector of Places of Detention and the Inspectorate of Places of Detention

Significantly, as noted above, the Draft General Scheme for the Inspection of Places of Detention Bill 2022, creates the role of a Chief Inspector of Places of Detention, which will replace the current role of Inspector of Prisons.[110] Once the new NPM is established, the current Inspector of Prisons will be appointed as Chief Inspector of Places of Detention for a period of 12 months.[111] The draft legislation sets out the functions of the Chief Inspector, which are to 'carry out regular inspection of all prisons in the State',[112] taking into account, 'the rights of prisoners and to existing laws, regulations, policies and procedures relating to the management and operation of prisons'.[113] Here, IPRT have recommended that this list be expanded to include explicit reference to OPCAT.[114]

The Chief Inspector will also have the power to conduct investigations regarding the management or operation of a prison, including a 'serious adverse incident' (such as an attempted murder, attempted suicide or serious assaults) or deaths of people in custody or those who have died within 4 weeks of release from prison.[115] The explanatory note to Head 9 (concerning serious adverse incidents) states that it is not the case that the Chief Inspector will have a role in investigating all such incidents, but that they should have a role in the triage stage in deciding how the matter should be investigated, 'the assumption that following this triage IPS will continue to progress the majority of matters internally'.[116] Here, the Chief Inspector will have an oversight role in relation to such investigations,[117] and they can also bring any matters relating to an investigation to the attention of the Minister for Justice or the Director General of IPS.[118] In contrast, the Joint Oireachtas Committee on Justice recommends that such reports into 'serious adverse incidents' be laid before the Oireachtas.[119]

In order for the Inspectorate for Places of Detention to realise its additional mandate, it is vital that the Office be funded and resourced appropriately.[120] The limitations of the draft legislation were noted by one Participant who commented: '…so financial independence, power to publish their own reports was not in the Bill, the suggestion was that the current Inspector of Prisons would just subsume all these extra activities when they struggle to, you know, complete their existing activities…'.[121] This point was highlighted by the stakeholders that contributed to the Joint Oireachtas Committee on Justice's pre-legislative scrutiny of the Inspection of Places of Detention Bill 2022, in relation to all the monitoring bodies granted responsibilities under the proposed legislation.

110 Draft General Scheme for the Inspection of Places of Detention Bill 2022, Head 5 and explanatory note. Part 5 of the Prisons Act 2007, which governs the mandate of Office of the Inspector of Prisons will be repealed and replaced by the new legislation.

111 Draft General Scheme for the Inspection of Places of Detention Bill 2022, Head 5 (5) and explanatory note.

112 ibid, Head 8 (1).

113 ibid, Head 8 (2).

114 Irish Penal Reform Trust, Submission to the Joint Committee on Justice on the General Scheme of the Inspection of Places of Detention Bill 2022, (n 97) p 17.

115 Draft General Scheme for the Inspection of Places of Detention Bill 2022, Head 8(3), Head 9 and Head 10 and explanatory notes.

116 ibid, Head 9 explanatory note.

117 ibid, Head 9 explanatory note.

118 ibid, Head 8(4).

119 Joint Committee on Justice, 'Report on Pre-Legislative Scrutiny of the General Scheme of the Inspection of Places of Detention Bill 2022' (n 89) p 9.

120 ibid, p 8.

121 Participant 9.

6.3 Proposed changes to the Prison Visiting Committees

The Draft General Scheme for the Inspection of Places of Detention Bill 2022 proposes that the members of PVCs are appointed by way of public appointment through the Public Appointment Service, with the Minister reserving the ultimate decision making powers of appointment.[122] It is proposed that the PVCs will now come under the oversight and monitoring of the Chief Inspector.[123] Importantly, '[v]isits by members of PVCs shall be independent and regular and they shall be OPCAT compliant'.[124] However, stakeholders, such as IPRT, have expressed concern that the number of visits of PVCs is reduced under the proposal.[125] Concern was also expressed at the production of one single annual report being required of the Chief Inspector (on the basis of all the PVCs annual reports), and that this would result in individual prison issues becoming overlooked.[126] The draft law does not make it clear if the individual annual reports of PVCs will be made public. In this regard, IPRT note:

> 'It is not enough for a composite report to be published by the Chief Inspector in the place of publication of each individual PVC annual report (Head 13(13)). While a composite report that identifies broad themes or consistent issues arising across the prison estate would be helpful, this must be in addition to publication of individual prison reports. Such individual reports play an important function in highlighting the issues arising in specific prisons and non-publication risks certain issues remaining hidden from public scrutiny'. [127]

The Joint Oireachtas Committee on Justice recommends that members of PVCs receive financial remuneration for their work and that they be accountable to the Oireachtas.[128] In addition, it also recommends that the membership take into account gender balance and include people who have experience of imprisonment.[129]

122 Draft General Scheme for the Inspection of Places of Detention Bill 2022, Head 13(4) and explanatory note.

123 ibid, Head 13(1) and explanatory note.

124 ibid, Head 13 explanatory note.

125 Joint Committee on Justice, 'Report on Pre-Legislative Scrutiny of the General Scheme of the Inspection of Places of Detention Bill 2022' (n 89) p 17.

126 ibid, p 18.

127 Irish Penal Reform Trust, Submission to the Joint Committee on Justice on the General Scheme of the Inspection of Places of Detention Bill 2022, (n 97) para 68.

128 Joint Committee on Justice, 'Report on Pre-Legislative Scrutiny of the General Scheme of the Inspection of Places of Detention Bill 2022' (n 89) p 7.

129 ibid, p 9.

6.4 Access to an Ombudsman for people in prison

In June 2016, the Government announced that it would bring prisons under the remit of the current Office of the Ombudsman.[130] When the Ombudsman was established, the investigation of complaints from people in prison was explicitly excluded from the remit of the Office,[131] due to a concern that Republican prisoners would exploit the complaint facility.[132] The Office of the Ombudsman investigates complaints from the public regarding decisions of public bodies and although its decisions are non-binding, it has the power to make recommendations, request apologies and explanations, and it can also direct financial compensation.[133] As scholars note, as things currently stand, without access to the Ombudsman, the only option people in prison have to seek external investigation of complaints is to complain to court.[134] This situation means overcoming the barriers identified in this report. Giving people in prison access to the Ombudsman complaint mechanism will bring Ireland in line with other jurisdictions (such as the England and Wales, Scotland, Northern Ireland and New Zealand).

There are merits to expanding the current remit of the general Office of the Ombudsman to include complaints from people in prison. The expertise and experience that the general Office of the Ombudsman has in dealing with complaints regarding public bodies, would be an advantage.[135] In addition, van der Valk and Rogan assert there is it has a symbolic meaning to including prison complaints in the general public complaints structures, given that prisons are excluded from public view.[136] Some stakeholders that contributed to the Joint Oireachtas Committee on Justice regarding the pre-legislative scrutiny of the General Scheme of the Inspection of Places of Detention Bill 2022, advocated for a separate prison ombudsman to be established to deal with complaints from prisons.[137] Here, it was asserted that a specific ombudsman for prisons is likely to have a considerable number of complaints to address, and this would reduce the workload of the NPMs (which do not have investigative mandates under OPCAT).[138] Other stakeholders also recommended that the Ombudsman be given the power to investigate serious category A and B complaints, which should be dealt with externally of the prison system.[139] This assertion was also the position of a previous Director General of the IPS.[140] In line with current practice, before making a complaint to the Ombudsman, people in prison would first have to exhaust the internal prison complaints system.[141] As giving prisoners access to an Ombudsman becomes a reality, it is imperative that the Office of the Ombudsman is given the sufficient finance, staff, resources, training and expertise to fulfil this additional mandate.

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130 Office of the Ombudsman, 'Ombudsman Peter Tyndall has warmly welcomed the announcement by Tánaiste and Minister for Justice and Equality, Frances Fitzgerald, that prisoners will be able to have their complaints independently investigated by his Office' (Office of the Ombudsman press release, 8 June 2016), available at www.ombudsman.ie/news/ombudsman-welcomes-tanais/, accessed 25 May 2024.

131 Ombudsman Act 1980, s 5(e)(iii). This section was replaced by s. 8 of the Ombudsman (Amendment) Act 2012, which removed this exclusion.

132 Sophie van der Valk and Mary Rogan, 'Prisoner Complaints Mechanisms: Assessing Human Rights Requirements and the Role of a General Ombudsman' (2020) 26(4) *European Public Law* 801–822, p 815.

133 ibid.

134 ibid, p 813.

135 ibid, p 817.

136 ibid.

137 Joint Committee on Justice, 'Report on Pre-Legislative Scrutiny of the General Scheme of the Inspection of Places of Detention Bill 2022' (n 89) p 21.

138 ibid.

139 ibid.

140 Irish Penal Reform Trust, Prison Litigation Network Project: National Report on Ireland (n 46) p 44.

141 Judge Michael Reilly, 'Review, Evaluation and Analysis of the Operation of the present Irish Prison Service Prisoner Complaints procedure' (Office of the Inspector of Prisons, April 2026) p 52; van der Valk, and Rogan (n 132) p 815.

PART IV: CONCLUSION AND RECOMMENDATIONS

7. Conclusion

This report has sought to identify and analyse the barriers and issues that arise in public interest prison law in Ireland. In doing so, the research illustrates a web of inter-connected problems that inhibit prisoner rights issues from being addressed in a legally effective way that protects the rights of the those affected. The protections are codified in law (as set out in the legal framework), but it is the many procedural and practical barriers that impede the realisation of those rights for people in prison. All of these barriers and issues raise the question as to whether people in prison are being guaranteed their right to an effective remedy. It is also clear that cases are not being brought and there are a number of factors that contribute to this situation, as shown in this report. Although, litigation is a last resort, there are earlier steps that can be taken in certain circumstances (for example, using an effective and independent complaint system or constructive engagement with the Irish Prison Service) that are not available for the reasons outlined above. The missing pieces of this research are the voices and experiences of rights holders. For this reason, this report recommends that further research on public interest prison litigation from the perspective of the rights holder is undertaken, and that an unmet legal needs assessment be conducted for people in prison.

One of the overall findings of this research is that systematic issues in prisons are more likely to be litigated (for example, points regarding solitary confinement or slopping out), rather than 'micro' level concerns that are specific to an individual (for example assaults by prison staff). One of the reasons for this situation is because of the structural inadequacies in the systems in place, in addition to the fact that evidence of systematic breaches is more likely to be documented over a continuous period by the external prison oversight mechanisms. This situation raises serious questions in relation to the broad range of issues that are not being addressed through grievance procedures and legal mechanisms.

Given the 'clustered' nature of legal problems that arise for disadvantaged groups,[1] it is evident that prisoners would also benefit from legal information on other areas such as housing, social welfare and family law.[2] Practical early advice is needed to support those whose problems are messy and multiple.[3] As noted above, one of the core tenets of public interest law is the provision of legal education within the community.[4] Unmet legal need should be followed up with targeted legal information provided to people in prison. One way to empower people within the prison setting is to provide targeted rights-based information to those in detention. Given the practical difficulties that people in prison face in accessing information,

1 Luke Clements, *Clustered injustice and the level green* (Legal Action Group, 2020).

2 Chief Justice's Working Group on Access to Justice Conference 1st and 2nd October 2021, available at www.flac.ie/assets/files/pdf/access_to_justice_conference_-_final_report.pdf, accessed 19 March 2024, p 6. At this juncture, it is worth noting that the UK's Prisoner Advice Service also provides advice on immigration law and it advises women prisoners in the area of family law.

3 Eilis Barry, 'An overview of unmet legal needs' (Access To Justice 2021 Conference), available at www.flac.ie/assets/files/pdf/eilis_barry_a2j_speech_-_unmet_legal_needs.pdf, p 57, accessed 12 March 2024.

4 Mel Cousins, 'How public interest law and litigation can make a difference to marginalised and vulnerable groups in Ireland' in Free Legal advice Centres, 'Public Interest Law in Ireland – the reality and the potential' (FLAC, Conference Proceedings, 6 October 2005) 11-24, p 11.

the information and advice must be brought to them, as research shows that this is the most effective way of communicating the information to disadvantaged groups. Here, there is a role for prison staff and civil society organisations (CSOs) that provide information to people in prison, as these are the professionals that work with people in prison and build relationships with rights holders.

There are points of important structural reform that are needed in this area (for example, giving people in prison access to an Ombudsman, more effective Civil Legal Aid). For these reforms to be adopted political will and leadership is needed from the Executive and recognition that these amendments are important and are warranted. Traditionally, prisoner rights are not prioritised as a political issue, which ignores the fact that socially disadvantaged groups in society are over represented in our prisons. In the much cited words of the world's most famous prisoner, Nelson Mandela, '[i]t is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones'.

The recommendations of this report speak to the institutional and structural changes that are required to seek to ensure that rights holders have access to an effective remedy. There are positive relationships between stakeholders working in this field, for example between lawyers and CSOs. It is important that all stakeholders continue to engage and collaborate to improve the structural limitations that prevent the rights of people in penal detention from being realised. It is envisaged that the report and recommendations can be used as a starting point for stakeholders in this area to promote the necessary reforms.

8. Recommendations

The research findings and discussion in this report on public interest prison law, form the basis of these recommendations, which can be grouped into five sections:

(A) REFORM OF CIVIL LEGAL AID AND ACCESS TO INFORMATION FOR PEOPLE IN PRISON.

(B) NECESSARY REFORMS IN THE LEGAL SYSTEM.

(C) ACCESS TO JUSTICE IN THE MANAGEMENT AND OPERATION OF PRISONS.

(D) THE STATE'S RATIFICATION OF OPCAT.

(E) EMBEDDING PRISON LAW IN LEGAL EDUCATION.

(A) REFORM OF CIVIL LEGAL AID AND ACCESS TO INFORMATION FOR PEOPLE IN PRISON.

1. Unmet legal needs assessment and the provision of targeted legal information.

The information in this report, and in other research, demonstrates that there is a significant unmet legal need among people in prison. This void is not limited to potential breaches of constitutional rights concerning prison conditions but includes information on a range of legal issues which are of importance to people in penal detention, including family law, housing law and social welfare law. It is recommended that the Department of Justice and the Legal Aid Board undertake an unmet legal needs assessment of people in prison to: (1) assess the extent of this unmet legal need, and (2) identify the categories of information that needs to be accessible to people in prison. This action would ensure that targeted legal information is provided to better meet the needs of people in prison. In the long-term, the establishment of a Prisoner Advice Service (such as in the UK) should be explored.

2. The establishment of a pilot scheme to provide targeted information to people in prison.

At present, there is no specialised community law centre providing legal information and advice to prisoners.[5] Research shows that with disadvantaged groups, information needs to be brought to them within their community. Here, it is recommended that the Department of Justice and the Legal Aid Board establish a pilot scheme to provide inreach legal information to people in prison, with a view to this becoming a longer term endeavour.[6] Access to legal information should be provided by people trained in the areas of law for which there is a demand. Such points of contact should be people who regularly have contact with people in prison (and build relationships with rights holders) and can identify a legal need of the individual, who may not be aware of the legal issue themself.

3. The Civil Legal Aid Law Review Group should consider and provide for the removal of barriers to access effective civil legal aid for people in prison.

This research has shown the difficulties in accessing Civil Legal Aid in prison law cases. Within the context of the review of Civil Legal Aid Scheme, consideration should be given to the possibility of restructuring the Scheme to make it more accessible for persons in penal detention and attention must be given to the expansion of Civil Legal Aid (and the Legal Aid- Custody Issues Scheme) to include cases concerning prison conditions. For example, by providing access to targeted legal information within the prison setting, at an early stage. This proposal would lend itself towards reducing the need for litigation at a later stage, and be a more efficient use of resources.

In addition, it is recommended that the Department of Justice and the IPS ensure that the update to the Prison Rules includes a provision on access to legal aid, bringing the Prison Rules in line with the Revised European Prison Rules.

5 The Law Society's street law programme facilitates the teaching of law in some prisons by trainee solicitors. Here the subjects include human rights, employment law, refugee rights and discrimination. See Law Society, 'Street Prison Law' (Law Society website), www.lawsociety.ie/public/Public-Legal-Education/streetlaw-prison, accessed 19 March 2024. In addition, the Citizen's Information Service in South Leinster provide a Prison In-reach service that provides information to people in the Midlands Prison on a range of areas. The in-reach Citizen's Information Service is being expanded to some other prisons, including Arbour Hill Prison.

6 See Barry (n 3) p 7 for an example of legal information being given by outreach workers to marginalised groups in Canada.

(B) NECESSARY REFORMS IN THE LEGAL SYSTEM.

4. Certainty of protection from adverse costs orders.

It is clear from this research that the fear of having an adverse costs order against a client has a chilling effect on the number of prison cases taken in this jurisdiction. This feature is a barrier to all types of public interest litigation in the State. It is recommended that applicants who take meritorious and necessary cases in the public interest have their costs covered irrespective of the outcome of the litigation. Additionally, increased protections should be granted to applicants from adverse costs orders. It is necessary that official guidance be published in this area.

(C) ACCESS TO JUSTICE IN THE MANAGEMENT AND OPERATION OF PRISONS.

5. Improved access to legal representation for people in prison.

This report demonstrates the difficulties that lawyers sometimes face in accessing clients in prison. If people in prison are to have equal access to justice, and to have their right to legal advice realised in the prison setting, it is imperative that they can access their legal counsel while in detention. The IPS and individual Governors should ensure that there are no barriers for people in prison accessing their legal representatives.

6. Providing an effective and functional prisoner complaint system.

The Department of Justice should finalise the Review of the Prison Rules and provide an independent, effective and functional prison complaints system as a matter of urgency. As IPRT has previous noted, the ongoing delay in the review 'put the rights of people in custody at risk'.[7] The Department of Justice should ensure that the State's obligations under the ECHR concerning the requirements of an independent, effective and efficient prisoner complaint system (as set out in the ECtHR case law) are incorporated into the new complaint/ grievance procedures. In conducting its reform of the prisoner complaint system, it is also recommended that the Department of Justice takes into account the international and national scholarship on best practice in relation to complaint/ grievance procedures in a penal setting, and the views of people in prison should also be included in the review.

7. Public Sector Equality and Human Rights Duty of the Irish Prison Service and increased transparency in the organisation.

Under the Public Sector Equality and Human Rights Duty, IPS is obligated to protect the human rights of rights holders.[8] As the gatekeeper for rights holders in penal detention, it is vital that the IPS prioritise its human rights obligations to its service users. Here, continuous professional development for all levels of IPS staff, and continuous engagement with the IHREC are important to make this obligation a reality.

Additionally, it is recommended that the IPS increase transparency concerning a number of areas that are pertinent to the rights of people in prison. These areas include: more transparency around the nature of complaints made (without compromising the identity of those involved), providing more information on the oversight into the behaviour of prison staff in the case of assault. Such information should be provided in the annual reports of the IPS.[9]

7 Irish Penal Reform Trust, Progress in the Penal System: A framework for penal reform (IPRT, 2022) p 65.

8 Irish Human Rights and Equality Commission Act 2014, s. 42(1)(c).

9 Joint Committee on Justice, 'Report on Pre-Legislative Scrutiny of the General Scheme of the Inspection of Places of Detention Bill 2022' (Houses of the Oireachtas, 33/JC/36, March 2023) p 22.

(D) THE STATE'S RATIFICATION OF OPCAT.

8. Resourcing national prison oversight mechanisms.

The Government should prioritise the enactment of the Inspection of Places of Detention Bill, ratify OPCAT and ensure that the bodies that will make up the National Preventive Mechanisms (NPMs) are adequately funded and resourced to carry out their functions in compliance with OPCAT. It is vital that this legislation be enacted as soon as possible to ratify OPCAT. Ratification measures must ensure that the proposed Inspectorate of Places of Detention and the IHREC, as the co-ordinating body (for all NPMs), are allocated the appropriate level of independence,[10] and be given the resources, training and funding needed to fulfil their mandate in an effective way.[11]

(E) EMBEDDING PRISON LAW IN LEGAL EDUCATION.

9. Increasing access to prison law and prisons for students, trainees and legal professionals.

It is recommended that universities and professional legal training bodies consider increasing access for students and trainee lawyers to gain knowledge of prison law, and public interest law, within the modules that they offer in their institutions. Training and education should also be made more accessible on how practitioners can make complaints to European and international monitoring mechanisms, including the ECtHR and the United Nations Treaty Monitoring Bodies. In addition, prisons should be more accessible for trainee lawyers and Judges to visit regularly, for these groups to see the reality of prison conditions on a day-to-day basis.

10 In particular, the Inspectorate of Places of Detention must have the ability to publish its own reports without the permission of the Minister for Justice.

11 Notably, Article 18(3) of OPCAT declares, '[t]he States Parties undertake to make available the necessary resources for the functioning of the national preventive mechanisms'.

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