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Submission from PRILA to the Council for Penological Cooperation

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Revision of the European Prison Rules

Background

Prisons: the rule of law, accountability and rights (PRILA) is a research project funded by the European Research Council, grant agreement 679362. Its principal investigator is Professor Mary Rogan, School of Law, Trinity College Dublin. The PRILA team comprises Dr Eva Aizpurua, Dr Christine Morgenstern, Sarah Curristan, Sophie van der Valk and Ray O'Keeffe.

PRILA aims:

1. To find out whether 'accountability' is a distinctive norm of the European legal system in the field of prisons;
2. To engage in comparative legal analysis on the topic of accountability in prisons by exploring European law and that of the United States and the Inter-American Court of Human Rights;
3. To find out how accountability is experienced by prisoners, prison staff and staff of bodies such as Ombudsmen, inspectors, and bodies which deal with complaints;
4. To create a typology of accountability bodies in European prison systems, and examine the relationship between the presence of such bodies and other indicators of prison regimes.

PRILA seeks to contribute to policy and practice in Europe and internationally and welcomes the opportunity to make a submission to the Council for Penological Cooperation as it engages in its assessment of possible revisions to the European Prison Rules, building on its revision to the existing commentary.



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This submission makes recommendations concerning the European Prison Rules as they apply to the inspection and monitoring of prisons and complaints mechanisms in prisons. It is based on a review of European and international human rights law as it applies to these areas, as well as a review of the literature on the topic. It is submitted that there is an opportunity now to build on the important principles on inspection and monitoring and complaints contained in the European Prison Rules and the commentary thereto, but also to supplement them and ensure they are as comprehensive and strong as those contained in the Mandela Rules and under OPCAT, and, indeed, to exceed those standards. PRILA welcomes the revision of the commentary which has already taken place and commends the work put into it.

This submission examines each rule and part of the commentary which relate to inspection and monitoring of prisons, and then to complaints, in turn. It then provides some general observations on inspection and monitoring and complaints. This submission does not refer to the revised commentary in great detail, but focuses on areas which, PRILA respectfully submits, should also be included within the rules themselves.

The current rules and commentary: inspection and monitoring

Preamble

The Preamble could be updated to include reference to OPCAT.

Rule 9

Rule 9 of the European Prison Rules states that “all prisons shall be subject to regular governmental inspection and independent monitoring”.

The commentary notes that the need for inspection and monitoring has the status of a general principle, and recognises the importance of such oversight.

Rule 9 contains an important statement of principle and should be retained.



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Part VI of the rules then goes on to draw a distinction between “governmental inspection” and “independent monitoring”.

Rules 92 and 93 taken together

Rule 92 states that “prisons shall be inspected regularly by a governmental agency in order to assess whether they are administered in accordance with the requirements of national and international law, and the provisions of these rules”.

Rule 93.1 states that “the conditions of detention and the treatment of prisoners shall be monitored by an independent body or bodies whose findings shall be made public”.

Rule 93.2 states: “such independent monitoring body or bodies shall be encouraged to cooperate with those international agencies that are legally entitled to visit prisons”.

- PRILA submits that the rules should be amended so that no distinction is made between the objectives of governmental and external inspections. The objective of both should be to ensure prisons are managed in accordance with national law, with a view to bringing about the objectives of penal and corrections services and to protect the rights of prisoners’ and to ensure that the European Prison Rules are, as a whole, respected, as the revised commentary now makes clear.
- PRILA submits that such an approach would be in keeping with rule 83(2) of the Mandela Rules which states: In both cases [internal and external inspections], the objective of the inspections shall be to ensure that prisons are managed in accordance with existing laws, regulations, policies and procedures, with a view to bringing about the objectives of penal and correctional services, and that the rights of prisoners are protected
- PRILA submits that the complementarity of these mechanisms should be mentioned in the rules.
- PRILA submits that it is correct for the rules to avoid prescribing a particular type of monitoring system.

Rule 92



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- PRILA submits that the new rules might also take the opportunity to note that governmental inspection plays a key role in fulfilling these objectives and can act as a follow up for recommendations of independent bodies.
- PRILA submits that the rules could be revised to state that internal inspection bodies should be at a level within the organisational hierarchy above that of the institutions being inspected.

Rule 93

- PRILA submits that the rules should state that the reference to the independence of monitoring bodies should be supplemented by mentioning structural and functional independence and that the method of appointment should be such to ensure their impartiality.
- Article 18 of OPCAT requires that States guarantee the functional independence of the NPMs as well as the independence of their personnel.
- PRILA submits that the revised rules should note the importance of having a diversity of expertise amongst independent monitors, particularly medical expertise, and include a requirement for gender diversity in keeping with rule 25.3 of the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules).
- PRILA submits that the highest priority within this section of the process of revision of the rules concerns the powers of inspectors and monitors. At present, this is a very notable absence in the rules. The revised commentary has clearly noticed this gap and seeks to redress it by including a more detailed set of powers than in the original commentary.
- The Mandela Rules contain a useful template for the drafting of the powers which inspectors and monitors should have. Rule 84 states:

1. Inspectors shall have the authority:

- (a) To access all information on the numbers of prisoners and places and locations of detention, as well as all information relevant to the treatment of prisoners, including their records and conditions of detention;

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- (b) To freely choose which prisons to visit, including by making unannounced visits at their own initiative, and which prisoners to interview;
- (c) To conduct private and fully confidential interviews with prisoners and prison staff in the course of their visits;
- (d) To make recommendations to the prison administration and other competent authorities.

- These powers reflect the priorities of the CPT in its reporting on the work of inspection procedures in Member States, and the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas; they should be stated explicitly in the European Prison Rules.
- The principle that conversations between inspection bodies, prisoners, prison staff and others with information to share with the inspection body must be confidential should be explicitly stated in the rules. This is a key concern within the reports of the Committee for the Prevention of Torture.
- It is also submitted that the European Prison Rules need to contain an explicit statement that reprisals against those who speak to inspectors and monitors (a matter of concern to the CPT) will not be tolerated and national authorities should put in place mechanisms to ensure that this does not happen.
- The rules could also note the importance of ensuring that prison authorities and domestic inspection bodies engage with and are open to civil society organisations as well as international monitoring bodies.
- PRILA submits that a duty on the authorities to examine recommendations made by inspecting bodies and enter into a dialogue with those bodies should also be included, as is the case under Article 22 of OPCAT.
- PRILA submits that the requirement to publish reports of independent monitors should be retained and that there should be a duty on national authorities to respond to those reports within a particular timeframe.

Other relevant rules



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Rule 83(a) states that: “the prison authorities shall introduce systems of organisation and management that ensure that prisons are managed to consistently high standards and are in line with international and regional human rights instruments”.

This rule could cross reference with the revised rules on governmental inspection.

Lending additional credence and weight to inspection and monitoring

It is further submitted that increased prominence to inspection and monitoring in the European Prison Rules is warranted in light, not only of the introduction of OPCAT, but also the greater focus being placed on the reports of inspection and monitoring bodies as sources of information which can enhance mutual trust in the European Union.

Requests and complaints

Basic Principles

- PRILA submits that the right to an effective remedy, incorporating the right to make a complaint, should be contained in the Basic Principles, given its importance to redressing the power imbalance within prisons and ensuring access to justice. The CPT has stated in its 27th General Report that: “complaints mechanisms constitute a fundamental safeguard against torture and inhuman or degrading treatment of persons deprived of their liberty”.

Rule 70.1

Rule 70.1 states: “Prisoners, individually or as a group, shall have ample opportunity to make requests or complaints to the director of the prison or to any other competent authority”.

- PRILA submits that the distinction between requests and complaints is important and should be maintained.
- PRILA submits that consideration should be given as to whether different mechanisms for resolving requests as compared to complaints should be noted in the rules. PRILA notes that having an overly formal procedure for resolving ‘every day’ requests is to be avoided as this may result in delays, but also inhibit a sensible resolution of matters by staff.



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- PRILA submits that the reference to “ample opportunity” could be supplemented by making reference to there being no barriers to making requests or complaints or to the need for the prison authorities to take the necessary means to facilitate them.
- PRILA notes that the recent 27th General Annual Report published by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment (CPT) states that on several occasions during its visits to prisons that “the Committee has encountered many persons deprived of their liberty who were unaware that they had the possibility to complain”. This finding underscores the importance of implementing processes that both effectively and convincingly inform prisoners of their rights in this regard. It is recommended that this rule is expanded to contain express reference to the provision of information regarding prisoners’ right to access the complaints mechanism.
- This recommendation should also be extended to those admitted to custody who are non-native speakers, have sensory disabilities or literacy difficulties. This is supported by Rule 55.1, Rule 55.2 and Rule 55.3 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), which assert that additional communicative measures should be taken to ensure that all persons in custody are fully informed of their rights. It is recommended that this position is also endorsed within the European Prison Rules.
- PRILA further submits that the related rule 30.1 on the provision of information should be amended in line with rule 54 of the Mandela Rules such that the rule should include reference to the possibility of making a complaint or request and the associated procedures.
- PRILA submits that, in addition to a proposed revised Rule 30, it is also important that individuals with literacy difficulties are provided for under the complaints system provisions. This cohort comprises a particularly vulnerable group in terms of accessing a system that is predominantly paper-based. Additionally, there are other vulnerable groups in prison that may be left at a disadvantage because of the system’s format. For example, prisoners with visual difficulties, non-native speakers, or those who have fine motor impairment, significant health problems, or a severe psychological illness, may all encounter greater difficulty in submitting complaints in writing. It is recommended that the rules be expanded to refer to the inclusion of provisions for persons with specific needs and that due consideration is required to supporting access to the system for all those in custody, including physical access to the forms and the delivery method.

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- PRILA submits that there should be explicit reference to the fact that a complaint does not need to be made in writing and that all orally submitted complaints should be recorded in writing by the prison authorities.
- PRILA submits that staff training is key in both implementing the complaint system and also ensuring a healthy attitude to complaints. In order to improve the recognition of prisoners' right to complain and foster receptiveness of complaints within the prison environment, it is strongly proposed that the right to lodge a complaint perspective should be addressed and embraced within staff training and supported by the prison's organisational culture. It is important that staff at all levels are aware of the benefits of the system and are confident in carrying out any associated investigations or informing prisoners of its purpose. An express reference should be made to training in this area in the staff training section of the rules.
- PRILA notes that Rule 56.3 of the Mandela Rules states that prisoners should be allowed to make complaints "without censorship as to substance". It is proposed that the consideration be given to supplementing the European Prison Rules in this way by clearly stating that censorship, interference with, or doctoring of complaints is unacceptable.
- PRILA also notes that, under the Mandela Rules, Rule 56.1 states that "Every prisoner shall have the opportunity *each day* to make requests or complaints" [italics added]. It is suggested the European Prison Rules also adopts this position, or states that there are no limitations as to when complaints can be submitted, as 'ample opportunity' may be differentially interpreted and implemented.

Rule 70.2

Rule 70.2 states: "if mediation seems appropriate this should be tried first".

- PRILA submits that reference to mediation could be maintained, but that this rule should be clarified by stating that complaints and requests should be resolved at the lowest possible level appropriate to their content and to provide more information on what mediation means in this context. Reference to proper training for staff in mediation should be made.
- PRILA notes that the CPT advocates a two-pronged system of internal and external complaints mechanisms. Internal mechanisms help to identify and remedy problems in a speedy way and should be immediately accessible, which can be achieved by permitting



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oral complaints and responding to all complaints within a “narrowly defined time span”. The CPT is also of the view that more serious and/or sensitive complaints should be subject to a separate internal procedure, which goes directly to the governor or prison director.

- PRILA also suggest that the declaration of complaints as inadmissible on the basis of their (perceived lower) severity or magnitude should be discouraged.
- PRILA submits that cross-reference to the rules on investigating allegations of torture or ill-treatment be made in the rules to reinforce the position that such matters require a particular form of investigation which stands outside the usual complaints procedures.

Rule 70.3

Rule 70.3 states: “if a request is denied or a complaint is rejected, reasons shall be provided to the prisoner and the prisoner shall have the right to appeal to an independent authority”.

- PRILA submits that the requirement for reasons should be retained and this rule should also include a duty on the prison authorities to provide information on the next steps when a complaint is denied or a request rejected.
- PRILA submits that there should be a possibility of bypassing to an external remedy if a decision is not provided by the prison authorities in a reasonable time, as to prevent prisoners from lodging complaints with external bodies due to inordinate delays internally would be contrary to the interests of justice.
- PRILA submits that consideration must be given to whether the rules should include a requirement that the external or independent body be given the power to issue binding decisions. PRILA submits that care should be taken in this area, as many offices of Ombudsmen do not exercise binding authority, but rely on dialogue with the authorities and moral authority. PRILA submits that the rules should certainly include a requirement that prisoners have access to an effective remedy, within the meaning of the Convention, but that the rules do not necessarily have to state that an external complaints body acts in this role.
- In this regard, PRILA notes, for example that, the Mandela Rules refer to ‘reviewing or remedial powers’ and in the European Prison Rules’ commentary reference is made to a final binding decision. The Rules should provide further clarity of the expectations of the role of the independent authorities referred to in Rule 70.3.

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- PRILA further notes that the Tokyo rules require that that efforts should be made to establish an Ombudsman to receive and investigate complaints made by juveniles deprived of their liberty and to “assist in the achievement of equitable settlements”.¹
- PRILA submits that in all cases, however, the complaints body must have adequate resources, including human resources and training. Avoiding delay must be emphasised.
- PRILA submits that reference could be made to the importance of prison authorities using the outcomes of complaints as opportunities for learning and preventing future violations of rights and, where appropriate, holding people to account for any wrongdoing discovered.

Rule 70.4

70.4 Prisoners shall not be punished because of having made a request or lodged a complaint.

- PRILA submits that this rule should be retained. PRILA submits that the rules should also state that no financial or legal sanctions should be imposed on complainants.
- PRILA submits that direct and confidential access to complaints systems should be mentioned in the rules and that the necessary efforts must be made to ensure that complainants are free from intimidation and reprisals.

Rules 70.5 and 70.6

Rule 70.5 states: “The competent authority shall take into account any written complaints from relatives of a prisoner when they have reason to believe that a prisoner’s rights have been violated”, while rule 70.6 states: “no complaint by a legal representative or organisation concerned with the welfare of prisoners may be brought on behalf of a prisoner if the prisoner concerned does not consent to it being brought”.

- PRILA submits that these rules should be retained. PRILA notes, however, that cross-reference may be made here to investigations of torture or ill-treatment, which should be instigated by the state and not the family or the person concerned.

¹ Rule 77, United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted by General Assembly resolution 45/113 of 14 December 1990.

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- By extension, all necessary information on the prison's internal complaints system should be made publicly available for those wishing to submit complaints on the prisoner's behalf. It is recommended that reference to the provision of this information is expressly stated.

70.7 Prisoners are entitled to seek legal advice about complaints and appeals procedures and to legal assistance when the interests of justice require.

- PRILA submits that this rule should refer to 'appeals and review procedures' and be supplemented by a reference to prisoners being entitled to have access to an effective legal remedy.

Other issues

Information

As noted above, the provision of information is essential to the operation of an effective complaints system. However, information on inspection and monitoring mechanisms should also be provided to prisons.

Rule 30.1 of the European Prison Rules states: "at admission, and as often as necessary afterwards all prisoners should be informed in writing and orally in a language they understand of the regulations governing prison discipline and their rights and duties in prison." This should be expanded to refer to the complaints system and mechanisms of inspection and monitoring.

Record-keeping

Record-keeping, a strong feature of the CPT's recommendations generally, is also encouraged when it comes to complaints. It calls for a specific register of complaints, which should also record follow-up action taken to remedy the complaint. Such a register can act as an operational and management tool to, for example, examine staff performance. National statistics should also be compiled and published to allow for analysis of the prison system and the complaints mechanism. The commentary to the European Prison Rules also calls for the registration of complaints and requests for the benefit of the administration and its management as well as the for those inspecting prisons.

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An analysis of requests and complaints is indicative of prison conditions and the quality of prison life for both prisoners and staff. While there is benefit in sharing complaints data with visiting bodies, as described above, data arising from complaints should be viewed as an opportunity for organisational learning. It is proposed that the European Prison Rules should state that the prison administration has a responsibility to use the information that is generated internally to improve prison conditions and foster best practice. PRILA submits that reference to the importance of record-keeping about complaints should be contained in the rules.

Inspection and complaints

PRILA notes the view of the CPT that inspection and complaints mechanisms should be kept separate, with a clear dividing line between them. It is respectfully submitted that the revised commentary to the rules may have inadvertently clouded understanding of the prison authorities on this point somewhat by noting in the section on inspection and monitoring that the European Court of Human Rights has not been inclined to accept that complaints which do not vest a personal right for the person concerned, or which cannot result in a binding or enforceable decision, represent effective remedies. This is, of course, correct, but is not necessary to include in this particular section. Inspection and monitoring bodies with a generally preventive mission through visits, reporting and making recommendations, generally speaking, do not take on this role, or involve a separate body within a larger organisation taking on this role. Perhaps the text on effective remedies could be moved to the section concerning complaints, or to a more general rule on the right to an effective remedy.

Follow up and thanks

The PRILA team would be delighted to respond to any questions or feedback arising out of this submission. The PRILA team has funding to participate in any discussions that we may usefully contribute to. We are very grateful for the opportunity to feed into your discussions at this point and look forward to further engagement on these issues. We wish you the very best in your work.

Further information: Please do not hesitate to contact the PRILA team using prila@tcd.ie or 00 353 87 700 4552, or Principal Investigator Professor Mary Rogan using mary.rogan@tcd.ie

