

**Guidance on Best Practice
relating to the Investigation of
Deaths in Prison Custody**

Office of the Inspector of Prisons
24 Cecil Walk
Kenyon Street
Nenagh
Co. Tipperary
Ireland

Tel: (+353) 67 42210
E-mail: info@inspectorofprisons.gov.ie
Web: www.inspectorofprisons.gov.ie

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of the Prisons Act 2007.

Judge Michael Reilly
Inspector of Prisons

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Chapter 1

Introduction

- 1.1 A State is obliged to protect the human rights of its citizens. When a State deprives citizens (and others) of their liberty it has a heightened obligation to protect their human rights. The right to life is the most fundamental of human rights. A State is therefore under a duty to protect the lives of prisoners in its custody. When a prisoner dies while in the custody of the State it has been established that there is an obligation on the State to conduct an effective investigation into the death of such prisoner.

- 1.2 Over the three year period since taking up the position of Inspector of Prisons I have examined the investigation procedure employed by the Irish Prison Service when investigating deaths in custody. I found that there is no consistent procedure for the investigation of prisoners' deaths across the Irish Prison Service. I also found that such investigations did not meet the requirements of international best practice.

- 1.3 The purpose of this Report is to give an overview of the current investigation process (Chapter 2), to give guidance having regard to international best practice (Chapter 3), to reach conclusions and to make a number of recommendations as to how the current process could be improved to comply with this State's obligations in this regard (Chapter 4).

Chapter 2

Overview of current investigation procedures following a death in the custody of the Irish Prison Service

- 2.1 There are a number of categories of prisoners deemed to be in the custody of the Irish Prison Service. Prisoners in the State's 14 prisons are in the physical custody of the Irish Prison Service. Prisoners are also in the physical custody of the Irish Prison Service whilst in hospital either as a day patient or an in-patient when they are in the care of prison officers (or in the community subject only to electronic tagging orders) or on temporary release while in the care of prison officers. This Report deals with the investigation of the deaths of these categories of prisoners. Prisoners are also deemed to be in the custody of the Irish Prison Service while living in the community on Temporary Release before the termination of their sentences. Prisoners sentenced to life imprisonment but released on licence are also regarded as being in the custody of the Irish Prison Service until they die. The investigation (if any) of the deaths of these last two categories are not relevant to this Report. There is a third category of persons who are deprived of their liberty by the State. These are people in the Central Mental Hospital who have been transferred to the hospital from prison. I do not have powers of inspection of such coterie of prisoners. There is a lacuna in the law in this regard. I feel that the investigation of the deaths of such persons should be treated in the same way as deaths in custody of the categories of prisoners set out in the first part of this paragraph and that best practice as set out in this Report should apply in all such cases.
- 2.2 Following the death of a prisoner in prison the Governor is obliged under Rule 47 of the Irish Prison Rules 2007 to inform, *inter alia*, the deceased's next of kin, the Coroner having jurisdiction, An Garda Síochána, the Minister for Justice and Law Reform (hereinafter in this Report referred to as the 'Minister'), the Director General of the Irish Prison Service and the Inspector of Prisons.

- 2.3 At present three different concurrent investigations may be carried out when a death in custody occurs. These are investigations by An Garda Síochána, the Coroner having jurisdiction and an internal investigation by the particular prison. I outline briefly in paragraphs 2.4 to 2.7 the form such investigations take.
- 2.4 In all cases when a death in custody occurs the Gardaí are notified. The Gardaí carry out an investigation to ascertain if a full criminal investigation should be carried out. If appropriate such an investigation is carried out and, where relevant, a prosecution follows.
- 2.5 In all cases when a death in custody occurs the Coroner having jurisdiction is notified. An inquest is held in all cases. The purpose of the inquest is to
- (a) establish the facts surrounding the death,
 - (b) place those facts on the public record, and
 - (c) make findings on
 - 1. the identification of the deceased,
 - 2. the date and place of death, and
 - 3. the cause of death.

In this country a verdict of ‘unlawful killing’ can be brought in in appropriate cases.

- 2.6 The Prison Governor carries out an internal investigation. The procedure adopted in such internal investigations may differ from prison to prison but in broad terms involves a Chief Officer from that prison collecting reports from prison officers which set out, mostly in inadequate detail, what they know of the circumstances surrounding the death of the prisoner. This is an internal investigation undertaken by the specific prison authorities responsible for vindicating the prisoner’s right to life.
- 2.7 The Governor of the prison is required to prepare a report on every prisoners’ death in prison for the Minister under Rule 47(8) of the Irish Prison Rules 2007. The Inspector of Prisons also gets a copy of this report. The report is

generally not finalised until after the Coroner's inquest is held. Included in the report are, *inter alia*, details regarding the prisoner's history in prison, the result of any criminal investigation regarding the prisoner's death, medical evidence, the results of the post mortem and toxicology results (where relevant), the statements of the prison officers and an overview by the Governor of the Prison.

2.8 I am aware that a Commission of Investigation was established in April 2007 under the Commissions of Investigation Act 2004 following the death in Mountjoy Prison of Prisoner Gary Douch. The terms of reference of the Commission of Investigation are wide. It may be that the Commissioner will address some or all of the issues which are the subject matter of this Report. I am informed that the Report of this investigation is not yet to hand. I am not aware as to when this Report will be published. I deemed it necessary, for the reasons set out in paragraph 1.2 and, because of the inadequacies of the present process to address this serious and important issue of deaths of prisoners while in custody.

2.9 This Report is to be taken as guidance to the Department of Justice and Law Reform, the Irish Prison Service and local Prison Management as to the procedures that should be adopted when a prisoner dies in custody.

Chapter 3

Guidance on best practice for investigating deaths in prison custody

3.1 Article 2 of the European Convention on Human Rights provides for the fundamental right to life. It confers an obligation on the State to protect the lives of its citizens and particularly the lives of those who it deprives of their liberty. Through its jurisprudence the European Court of Human Rights (and its predecessor the Commission) has determined that there are three elements to Article 2:-

- (a) The case of **McCann and Ors -v- United Kingdom**¹ decided that individuals must be protected from killings by state agents, including unintentional killings that result from more than the minimum use of force absolutely necessary as defined in the second paragraph of Article 2².

- (b) The case of **Osman -v- United Kingdom**³ decided that there is a positive obligation on the State to protect the lives of individuals who are actually known, or ought to be known, to be at risk. This obligation may be breached in circumstances where the authorities failed to take reasonable measures within the scope of their powers to avert the risk to the prisoner. It was breached in the case of **Rebai -v- France**⁴ where the threat came from a third party (in this case a cell mate) and in the case of **Keenan -v- United Kingdom**⁵ where the threat came from the detainee himself.

¹ Report of the European Commission for Human Rights of 4th March 1994 (see also the Judgement of the European Court of Human Rights of 5th September 1995)

² Simor, J., (ed), "Human Rights Practice", (2008) London: Sweet and Maxwell, at para 2.003

³ Judgement of 28th October 1998

⁴ Decision of the European Commission of Human Rights, 25th February 1997

⁵ Judgement of 3rd April 2001

- (c) The case of **Edwards -v- United Kingdom**⁶ decided that there is a second positive obligation on the State to carry out an effective investigation following a death in state custody.

I dealt with the State's obligations under the first two elements in Chapter 4 of my Report titled "*The Irish Prison Population- an examination of duties and obligations owed to prisoners*", (published in October 2010). The third element, referred to as the procedural requirement of Article 2, is the subject matter of this Report.

- 3.2 The procedural aspect of Article 2 was first considered by the European Commission of Human Rights and confirmed by the European Court of Human Rights in **Mc Cann and others -v- United Kingdom**⁷ which involved the killing of 3 suspected IRA members by the security forces during a security force operation in Gibraltar. The Commission in its Report observed at paragraph 193 that -

"Having regard therefore to the necessity of ensuring the effective protection of the rights guaranteed under the Convention, which takes on added importance in the context of the right to life, the Commission finds that the obligation imposed on the State that everyone's right to life shall be protected by law may include a procedural aspect. This includes the minimum requirement of a mechanism whereby the circumstances of a deprivation of life by the agents of a state may receive public and independent scrutiny".

In this case it was established that the State has a duty to investigate killings by members of its security forces. The European Court of Human Rights in the case of **Edwards -v- United Kingdom** extended this duty to include all deaths in state custody. The Court made this duty clear in the case of **Salman -v- Turkey** where it stated that the duty to investigate deaths in custody "*is not*

⁶ Judgement of 14th March 2002

⁷ Report of 4th March 1994

*confined to cases where it is apparent that the killing was caused by an agent of the State"*⁸.

3.3 The requirements for an effective investigation under the third element of Article 2 were outlined by the European Court of Human Rights in **Jordan -v- United Kingdom**⁹:-

- (a) The first requirement is that the investigation must be initiated by the State with the Court observing at paragraph 105 that -

"The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures."

- (b) The second requirement of an effective investigation is that it must be independent. The Court stated at paragraph 106 that -

"it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent

⁸ Judgement of 27th June 2000, at para. 105

⁹ Judgement of 4th May 2001

from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence".

- (c) The third requirement of an effective investigation is whether it is, in the words of the Court found at paragraph 107, -

"capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard".

- (d) The fourth requirement is the promptness within which the investigation is initiated. The Court acknowledged the importance of the investigation being initiated promptly stating at paragraph 108 that-

"It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts".

- (e) The fifth requirement is that there must be an element of public scrutiny in order to ensure public confidence in the investigation. The Court acknowledged at paragraph 109 that -

"there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case".

- (f) The sixth requirement is the involvement of the next of kin in the procedure with the Court stating at paragraph 109 that they should be involved to

"the extent necessary to safeguard his or her legitimate interests".

The Court also found that the provision of legal aid to a victim's next of kin may be required to enable adequate representation in the proceedings.

3.4 The **Jordan Case** concerned a death following the use of lethal force by police. The European Court of Human Rights in the case of **Edwards -v- United Kingdom** applied the Jordan criteria where the death of a prisoner occurred following an assault by his cell mate who was mentally ill. The European Court's approach in **Edwards** was subsequently endorsed in the United Kingdom by the House of Lords in **R (Amin) -v- Secretary of State for the Home Department**¹⁰.

3.5 The European Court of Human Rights in the case of **Keenan -v- United Kingdom** (referred to in greater detail in paragraph 3.15) referred to the suicide of a prisoner in dealing with an application for a remedy under Article 13 of the Convention on Human Rights.

¹⁰ [2004] 1 A.C 653

3.6 It is clear from paragraphs 3.4 and 3.5 that the criteria applied in the **Jordan Case**, as set out in paragraph 3.3, should apply in all cases of deaths in custody.

3.7 The burden of proof is on the State to prove that it undertook an effective investigation. In this connection the European Court of Human Rights in the case of **Salman -v- Turkey** stated at paragraphs 99 and 100, that

"The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies.. Indeed, the burden of proof [in such cases] may be regarded as resting on the authorities to provide a satisfactory and convincing explanation".

In the absence of such an explanation from the State the Court may conclude that the death was due to acts or omissions on the State's part, as was held in the aforementioned case¹¹.

3.8 The European Court of Human Rights has never conclusively explained what form the investigation should take but through its jurisprudence it can be deduced what forms will satisfy the Article 2 requirements. The different forms of investigations that have been examined by the Court are discussed in paragraphs 3.9 to 3.18.

3.9 In many countries one of the main forms of investigation following a death in custody is that carried out by a coroner through an inquest. Various inquest systems have been examined by the European Court of Human Rights. In **Jordan -v- United Kingdom** the Court found a violation of Article 2 in respect of the failings in the investigation into the death following the use of force by police. In this case a police investigation was undertaken but the Director of Public Prosecutions gave a direction that no prosecution should take place due to insufficient evidence. A coroner's

¹¹ at paragraphs 315-316

inquest was subsequently held (in Northern Ireland) but the European Court of Human Rights concluded at paragraph 130 that although an inquest may provide a useful fact-finding function in some cases,

"the Court considers that in this case it could play no effective role in the identification or prosecution of any criminal offences which may have occurred and, in that respect, falls short of the requirements of Article 2".

3.10 Similarly in the case of **Kelly and others -v- United Kingdom**¹² the Court found that there had been a violation of the procedural aspect of Article 2 as the inquest (in Northern Ireland) could not apportion blame. In this case the relatives had been denied access to relevant documents and there had been excessive delay in holding the inquests into the deaths. In Northern Ireland an inquest can only make findings and not return a verdict and was, therefore, in this case precluded from reaching a verdict of unlawful killing.

3.11 Juxtaposed to the findings made in the **Jordan** and **Kelly** cases the Court found in **McCann -v- United Kingdom** that the inquest (in Gibraltar) satisfied the requirements for an effective investigation. It found, *inter alia*, that the proceedings were conducted in public, the next of kin of the deceased were legally represented, evidence from 79 witnesses was heard, the hearing which lasted 19 days involved a detailed examination of the events surrounding the killings and the lawyers representing the next of kin were able to cross-examine the key witnesses. The Court did not consider therefore

*"that the alleged various shortcomings in the inquest proceedings... substantially hampered the carrying out of a thorough, impartial and careful examination of the circumstances surrounding the killings"*¹³.

¹² Judgement of 4th May 2001

¹³ Judgement of 5th September 1995 at paragraph 163

In Gibraltar and England inquests can return a verdict including one of unlawful killing.

3.12 When an inquest is a primary investigative source into a death in custody a problem may arise if a criminal prosecution is initiated and the inquest has to be suspended pending the conclusion of the criminal prosecution. If the accused pleads guilty at the subsequent trial in many cases evidence may not be heard regarding the circumstances of the death. If the inquest is not subsequently re-opened the procedural obligation under Article 2 will not be satisfied in the absence of another investigation which inquires into the circumstances surrounding the death. The European Court of Human Rights found, for the aforementioned reason, a violation of Article 2 in a number of cases including **Edwards -v- United Kingdom**.

3.13 It is evident from the preceding paragraph that criminal proceedings alone will not satisfy the procedural requirement of Article 2 unless there is an examination of the circumstances surrounding the death.

3.14 Article 13 of the European Convention on Human Rights is also of relevance to the procedural requirement under Article 2. Article 13 provides for an effective domestic remedy for an individual whose rights under the Convention have been violated by the State (i.e. state agents). The European Court of Human Rights in the case of **Ergi -v- Turkey**¹⁴ explained that the requirements of Article 13 are stricter than those under Article 2 stating at paragraph 98 that "*the effectiveness*" of the remedy provided under Article 13 must be assessed by reference to the serious nature of an allegation under Article 2 of the Convention, and that -

"the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including

¹⁴ Judgement of 28th July 1998

effective access for the relatives to the investigatory procedure. Seen in these terms the requirements of Article 13 are broader than a contracting State's procedural obligation under Article 2 to conduct an effective investigation".

3.15 The European Court of Human Rights adopted the same position in **Keenan -v- United Kingdom** where the applicant, a mother, was applying for a remedy under Article 13 following her son's death by suicide whilst in prison. The Court held at paragraph 132 that -

"... despite the aggregate of remedies referred to by the Government, no effective remedy was available to the applicant in the circumstances of the present case which would have established where responsibility lay for the death of Mark Keenan. In the Court's view, this is an essential element of a remedy under Article 13 for a bereaved parent."

3.16 The fact that an individual can pursue a civil claim in relation to a death (that engages Articles 2 or 3 of the Convention) does not discharge the State of its Article 2 procedural obligation to investigate the particular death. In **Jordan -v- United Kingdom** the European Court of Human Rights explained at paragraph 141 that-

"Civil proceedings would provide a judicial fact-finding forum, with the attendant safeguards and the ability to reach findings of unlawfulness, with the possibility of damages. It is however a procedure undertaken on the initiative of the applicant, not the authorities and it does not involve the identification or punishment of any alleged perpetrator. As such, it cannot be taken into account in the assessment of the State's compliance with its procedural obligations under Article 2 of the Convention".

3.17 Therefore, where no proper investigation is undertaken into a death in state custody the remedies normally available for a violation of a Convention

Right in a National Court, such as a financial remedy following civil proceedings, may be rendered ineffective¹⁵.

- 3.18 Where civil proceedings alone fail to satisfy the requirements under Articles 2 and 13 this impacts on the requirement under Article 35(1) to exhaust domestic remedies before making an application to the European Court of Human Rights. If the domestic remedy is rendered ineffective as in **Keenan -v- United Kingdom** an applicant whose rights have been breached may no longer be required to exhaust all domestic remedies¹⁶.

¹⁵ Korff, D., "The Right to Life- A Guide to the Implementation of Article 2 of the ECHR", (2006) Council of Europe: Strasbourg, at p. 41

¹⁶ *ibid*

Chapter 4

Conclusions and Recommendations

- 4.1 When a death occurs in our prisons three separate investigations can take place – A Garda investigation (paragraph 2.4), the coroners investigation (paragraph 2.5) and an internal investigation by the prison authorities having custody of the deceased prisoner (paragraphs 2.6 and 2.7).
- 4.2 I am satisfied that the present investigation procedures by An Garda Síochána as detailed in paragraph 2.4 are robust, independent and transparent and fulfil part of the criteria for an independent investigation which would satisfy certain elements of Article 2 of the European Convention on Human Rights as outlined in Chapter 3 of this Report.
- 4.3 I am satisfied that the inquest procedures set out in paragraphs 2.5 are robust, independent and transparent and fulfil part of the criteria for an independent investigation which would satisfy certain elements of Article 2 of the European Convention on Human Rights as outlined in Chapter 3 of this Report.
- 4.4 I am not satisfied that the internal investigation as detailed in paragraphs 2.6 and 2.7 meets those parts of the criteria for an independent investigation which would satisfy the elements (other than those referred to in paragraphs 4.2 and 4.3) of Article 2 of the European Convention on Human Rights as explained in the case of **Jordan -v- United Kingdom** and referred to in detail in Chapter 3. The internal investigation is neither robust, independent nor transparent.
- 4.5 The European Court of Human Rights' current position is that the procedural obligation may be satisfied through a combination of processes. The requirements do not need to be satisfied through a single process. I am satisfied that provided the investigation processes taken as a whole fulfill the **Jordan** requirements the procedural aspect of Article 2 should not be violated.

- 4.6 It is for the Minister to bring forward either primary or secondary legislation including amending the Irish Prison Rules 2007 to provide that this State does comply with our obligations to properly investigate all deaths in prison custody.
- 4.7 There are many models that could be looked at but in an effort to be helpful and to provoke debate I suggest two solutions which, in my view, would satisfy the requirements of best practice as set out in **Jordan -v- United Kingdom** and would not fall foul of the procedural requirements of Article 2 of the European Convention on Human Rights.
- (a) A system similar to the Garda Ombudsman Commission which undertakes independent investigations into all deaths in the custody of An Garda Síochána could be considered. This Commission, which has statutory powers, carries out a criminal investigation and, or, an investigation into the circumstances surrounding a particular incident which in many cases runs in parallel with a Garda investigation. In all cases, even where criminality is not found to be an issue, the Commission continues its investigation into all aspects surrounding such deaths. The results of such investigations with recommendations are submitted to the Commissioner of An Garda Síochána. In a prison context such an investigation procedure with statutory powers of investigation, similar to the Garda Ombudsman Commission's statutory powers, allied to an inquest would, in my view, satisfy the criteria laid down by the European Court of Human Rights in the case of **Jordan -v- United Kingdom** and would not fall foul of the procedural requirements of Article 2 of the European Convention on Human Rights. A Garda investigation could run in parallel with such an investigation. This model would require the enactment of primary legislation.
- (b) Continue with the present investigation procedure conducted by An Garda Síochána and the Coroner and put in place an independent investigative procedure which would be robust and transparent in

gathering all evidence, identifying and questioning witnesses and ensuring that all aspects surrounding the death including, *inter alia*, the actions of or the non actions of prison officers and others are identified. Such an investigation procedure allied to the Garda investigation and an inquest would, in my view, satisfy the criteria laid down by the European Court of Human Rights in the case of **Jordan - v- United Kingdom** and would not fall foul of the procedural requirements of Article 2 of the Convention on Human Rights. This model would not necessarily require the enactment of primary legislation.

- 4.8 It must also be borne in mind that where procedures are not adhered to or where persons, be they officers of the state or otherwise, have not acted in accordance with laid down protocols that these deficiencies are not only recorded but acted upon. If disciplinary action is to be taken or if procedures are found to have been breached it is clear from Chapter 3 that such findings must be seen to have been reached through an independent process which is fair, transparent and open to public scrutiny.
- 4.9 It is a requirement that the investigation must be of such a thorough and effective nature as to be capable of leading to the identification and punishment of those responsible.
- 4.10 It is also a requirement that the relatives of a deceased prisoner have appropriate access to the investigative procedures as detailed in Chapter 3.
- 4.11 The Irish Prison Rules 2007 should be amended to provide that the Inspector of Prisons and any other persons or bodies deemed appropriate by the Minister be notified of the deaths of those prisoners categorised in the first part of paragraph 2.1 of this Report and subsequently furnished with a full report of all of the investigations of such deaths.