



**NGO Submission to the United Nations Committee against Torture:
*Follow-up to the 2017 Concluding Observations of the Committee
against Torture***

23 November 2018

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About ICCL

Founded in 1976, the Irish Council for Civil Liberties (ICCL) has worked tirelessly over 40 years to defend and strengthen constitutional rights protections and to ensure the full implementation of international human rights standards in Ireland. The ICCL draws on the tradition of civil liberties activism in many countries, including the civil rights movements in Northern Ireland, the United Kingdom and the United States. It has developed strong partnerships with a broad range of civil society organisations in Ireland and networks and alliances with similar organisations internationally. ICCL was a founder member of the International Network of Civil Liberties Organisations (INCLO) and a founder and coordinator of the JUSTICIA European Rights Network of 19 civil society organisations working in the area of procedural rights, defence rights, and victims' rights. Domestically focused and internationally informed, ICCL has played a leading role in some of Ireland's most important human rights campaigns.

Contact Details

Address: Irish Council for Civil Liberties (ICCL)
Unit 11
First Floor, 34 Usher's Quay
Dublin 8
Ireland

E-mail: info@iccl.ie

Website: www.iccl.ie

Twitter: @ICCLtweet

Introduction

This report by the Irish Council for Civil Liberties (ICCL) to the United Nations Committee Against Torture (CAT) forms part of the process of 'follow-up' to the CAT's second set of [Concluding Observations](#) on Ireland, published in August 2017.¹ The ICCL's [report](#) to the CAT in 2017² contributed to those Concluding Observations along with the reports of numerous other NGOs working in Ireland.

The CAT designated three of the recommendations in its August 2017 Concluding Observations as 'follow-up' issues, requiring a response from the Irish Government within one year.

The 'follow-up' recommendations, which are collated in a [document produced by the CAT](#), concern:

- (1) Ratification of the Optional Protocol to the Convention Against Torture (OPCAT) and systematic inspection of and public reporting on all places of **deprivation of liberty** in the State;
- (2) The effectiveness of State complaints mechanisms and other remedies regarding **Garda (police) malpractice**; and
- (3) The ongoing absence of a thorough and impartial investigation, and effective access to remedies and reparation, regarding the **Magdalene Laundries** abuse.

The Irish Government's [Follow-up Report](#) to the CAT was published in August 2018.³ The present report by the ICCL provides further information to the CAT in relation to the three 'follow-up' issues.

OPCAT and inspection of all places of deprivation of liberty

8. The State party should:

(a) **Immediately ratify the Optional Protocol and establish a national preventive mechanism, ensuring that this body has access to all places of deprivation of liberty in all settings;**

(b) **Ensure that existing bodies which currently monitor places of detention as well as civil society organizations are allowed to make repeated and unannounced visits to all places of deprivation of liberty, publish reports and have the State party act on their recommendations.**

¹ United Nations Committee against Torture, Concluding observations on the second periodic report of Ireland, UN Doc CAT/C/IRL/CO/2 (31 August 2017), https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fIRL%2fCO%2f2&Lang=en

An explanation of the CAT 'follow-up' procedure is here: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/210/35/PDF/G1521035.pdf?OpenElement>

² Irish Council for Civil Liberties, Submission to the UN Committee against Torture for the Examination of Ireland's Second Periodic Report (26 June 2017), https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCAT%2fCSS%2fIRL%2f27963&Lang=en

³ Ireland, Information on follow-up to the concluding observations of the Committee against Torture on the second periodic report of Ireland, UN Doc CAT/C/IRL/CO/2/Add.1 (28 August 2018), https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fIRL%2fCO%2f2%2fAdd.1&Lang=en (hereinafter 'Ireland, Follow-up report to CAT, 2018').

(a) Ratification of OPCAT and establishment of an effective National Preventive Mechanism

Ratification status

Despite signing the OPCAT in 2007, Ireland is now one of only four EU countries that [have not ratified](#) the instrument.⁴ This leaves people who are either legally or *de facto* deprived of their liberty in Ireland in a particularly vulnerable position, because they do not have the protection of the independent, human rights-focused inspection and monitoring system which the OPCAT requires states to establish. It is recognised by states globally that the risk of torture or ill-treatment is greater when individuals are under the control of others, and the OPCAT exists to enforce the absolute legal obligation of states to take all reasonable measures to ensure that individuals who are deprived of their liberty are treated with respect for their human dignity.

The Minister for Justice [has indicated](#) that the Government wishes to put in place legislation establishing a National Preventive Mechanism (NPM) *before* Ireland ratifies the OPCAT.⁵ However, as the ICCL has [previously highlighted](#),⁶ it is not necessary for Ireland to have an NPM in place before ratifying the OPCAT. Articles 11 and 24 [OPCAT](#) provide states with the option of ratifying the instrument first, and then establishing an NPM with the assistance and advice of the UN Subcommittee on the Prevention of Torture.

Consultation requirements

The Government's report to the CAT suggests that it has undertaken comprehensive consultation with relevant stakeholders regarding the remit and operational aspects of a future NPM. The ICCL is concerned that the Department's consultation has not been wide enough, in that it has not been advertised publicly and the civil society stakeholders approached privately by the Department do not represent all sectors or settings where people are deprived of their liberty.

In particular, civil society organisations working in the area of **immigration** appear not to have been consulted. In addition, only one civil society organisation active in the area of **health and social care** appears to have been consulted.

As the ICCL highlighted in a March 2018 [submission](#) to the Department of Health on its Deprivation of Liberty Safeguard Proposals,⁷ the Government's [preliminary draft Heads of Bill on deprivation of liberty](#), which are intended to form Part 13 of the [Assisted Decision-Making \(Capacity\) Act 2015](#), are seriously inadequate to ensure protection from arbitrary detention and mistreatment in care settings. This suggests that the design of the future NPM in relation to health and social care settings is in danger of being similarly flawed.

The ICCL has received expressions of concern from people with disabilities and who are advocates for the rights of people with disabilities that they have not had an opportunity to engage with the Government in relation to the design of Ireland's NPM – notwithstanding Ireland's recent ratification

⁴ See United Nations Office of the High Commissioner, Status of Ratification Interactive Dashboard, <http://indicators.ohchr.org/>

⁵ Houses of the Oireachtas, Written Answers, 5 July 2018, <https://www.iccl.ie/wp-content/uploads/2018/05/ICCL-submission-on-deprivation-of-liberty-safeguards-web-version.pdf>

⁶ Irish Council for Civil Liberties, 'Submission to the UN Committee Against Torture for the State Examination of Ireland's Second Periodic Report' (26 June 2017), https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2FCAT%2FCSS%2FIRL%2F27963&Lang=en

⁷ Irish Council for Civil Liberties, 'Submission to the Department of Health for its Consultation on the Deprivation of Liberty Safeguard Proposals' (16 March 2018), <https://www.iccl.ie/wp-content/uploads/2018/05/ICCL-submission-on-deprivation-of-liberty-safeguards-web-version.pdf>

of the UN Convention on the Rights of Persons with Disabilities (UNCRPD). People with disabilities in Ireland and older people are acutely affected by practices of arbitrary deprivation of liberty (including a wide range of coercive practices) and deprivation of legal capacity, and it is imperative that the Government consults adequately with people with disabilities and older people who have lived experience of coercive practices and other stakeholders working in the arena of health and social care services.

Government's proposals to date regarding the NPM design

The Minister for Justice, Charlie Flanagan TD, [has stated that](#) he intends to publish before the end of 2018 a General Scheme of a Bill to establish a system of independent inspection of all places of deprivation of liberty in the State.⁸

The ICCL has not seen the draft content of the legislation or any written policy from the Department of Justice regarding its intentions for the NPM. However, the ICCL understands that the Department intends to give the existing Inspector of Prisons the task of inspecting all places of criminal justice detention (including police stations) and *also* to designate the Inspector of Prisons as the coordinating body for the NPM. The Department appears to intend that the Minister for Health will have power under legislation to prescribe additional bodies that will inspect sectors other than criminal justice.

The ICCL is highly concerned at these proposals. We do not believe the Inspector of Prisons is either the correct body to inspect places of Garda detention nor the appropriate body to coordinate the NPM. This is not meant in any way to call into question the expertise of the current Inspector of Prisons and her staff; rather we are concerned that:

- As the Irish Penal Reform Trust (IPRT) sets out in its NGO follow-up submission to the CAT, the Inspector of Prisons is greatly hampered in carrying out its role of monitoring prison conditions at present due to resource constraints and has published only one prison inspection report since 2014 (despite being required to regularly inspect each of the twelve prisons in Ireland).
- A landmark [report](#) entitled *The Future of Policing in Ireland*, published by the Commission on the Future of Policing (CFP) in September 2018,⁹ recommends the overhaul of the Garda Inspectorate oversight body via the creation of a new Policing and Community Safety Oversight Commission (PCSOC). The CFP report recommends that PCSOC's functions should include 'carrying out inspections or inquiries concerning the delivery of policing services and advising on and monitoring the implementation of recommendations arising from such inspection'.¹⁰ The Department of Justice is, the ICCL assumes, currently considering how to legislate for the creation of PCSOC. It is clear that PCSOC should have responsibility for the inspection of places of Garda detention.
- Much of the deprivation of liberty that takes place in Ireland occurs not in the criminal justice system but in contexts of health and social care provision, as has been the case throughout the history of the Irish republic. In their 2017 [report](#) for the Irish Human Rights and Equality

⁸ See Dail debates, Priority Questions, 5 July 2018, <https://www.kildarestreet.com/debate/?id=2018-07-05a.16>

⁹ Ireland, Commission on the Future of Policing, *The Future of Policing in Ireland* (September 2018) (hereinafter 'CFP Report'),

[http://policereform.ie/en/POLREF/The%20Future%20of%20Policing%20in%20Ireland\(web\).pdf/Files/The%20Future%20of%20Policing%20in%20Ireland\(web\).pdf](http://policereform.ie/en/POLREF/The%20Future%20of%20Policing%20in%20Ireland(web).pdf/Files/The%20Future%20of%20Policing%20in%20Ireland(web).pdf)

¹⁰ CFP report, p44.

Commission (IHREC) on Ireland and OPCAT, Rachel Murray and Elina Steinerte noted that there have been many ‘discussions around the possible establishment of a criminal justice inspectorate’ in Ireland. They stated that a criminal justice inspectorate would not be sufficient to meet Ireland’s obligations under OPCAT because OPCAT “encompasses not only the more ‘traditional’ places of detention such as prisons, police cells, but also immigration detention facilities, psychiatric hospitals, care homes, secure accommodation for children, nursing homes, etc.”¹¹

ICCL recommendations regarding the NPM design

Along with our partner civil society organisation, the IPRT, the ICCL recommends that the legislation establishing an NPM should designate all relevant inspection and monitoring bodies collectively as the NPM and establish the Irish Human Rights and Equality Commission (IHREC) as the coordinating body. The IHREC has ‘A status’ as Ireland’s National Human Rights Institution. It is also Ireland’s independent monitoring mechanism for the UNCRPD and is currently publicly recruiting a Disability Advisory Committee.

Regarding the **independence and powers** of the constituent inspection mechanisms, the Government urgently needs to consider the detail of IHREC’s 2017 [report](#) on Ireland and OPCAT by Rachel Murray and Elina Steinerte, which compares the existing inspection mechanisms’ statutory powers and level of independence with the OPCAT’s requirements. The Government must also consider and respond to the IPRT’s Statement of Principles on Legislation to Ratify OPCAT, which sets out the minimum requirements under OPCAT for the inspection mechanisms’ independence, functions and staffing. The IHREC report and the IPRT’s Statement of Principles should together act as a roadmap for legislation which both establishes the framework of the NPM and enhances the constituent inspection mechanisms’ powers and independence so that they comply with the OPCAT’s requirements.

Regarding the **contexts of deprivation of liberty** that must be included in the NPM’s remit, the ICCL supports the view of the authors of the IHREC’s 2017 [report](#) on Ireland and OPCAT that the following existing inspection regimes are relevant: Inspector of Prisons, GSOC and the Garda Síochána Inspectorate (both of which are subject to reform pursuant to the CFP recommendations), Chief Inspector of Social Services, Inspectorate of Mental Health Services, Office of the Ombudsman for Children, Children’s Visiting Panels and Prison Visiting Committees.

Crucially, the ICCL believes that the Health Information and Quality Authority (HIQA) should also be included in the NPM’s remit. The Office of the Ombudsman should also be consulted regarding its potential role as it currently receives complaints from people who rely on state care services and also from people living in Direct Provision Centres (which cater for people seeking international protection).

There are numerous contexts of deprivation of liberty in Ireland which are not currently regulated and which need to be included in the future NPM’s remit. The authors of the IHREC’s 2017 [report](#) on Ireland and OPCAT note that:

The most significant gap that was identified in terms of places of detention and deprivation of liberty which did not currently have any form of inspection were Garda stations. Other areas over which there is some uncertainty as to which body covers inspection, if there are any at all, include

¹¹ Rachel Murray and Elina Steinerte, *Ireland and the Optional Protocol to the UN Convention against Torture* (Irish Human Rights and Equality Commission 2017) 7.

transport and transit between prisons and court; court cells; military detention; detention of individuals awaiting deportation; detention facilities at airports and ports and on flights; as well as de facto detention and in voluntary settings.¹²

The ICCL believes that there are even more unregulated contexts of deprivation of liberty that should fall within the NPM's remit: these include all forms of deprivation of liberty in the health and social care arena, and Direct Provision Centres.

(b) Effective monitoring of all places of detention in Ireland

The IHREC's 2017 [report](#) on Ireland and OPCAT contains an appendix which sets out the statutory powers of several bodies that currently have responsibility for monitoring places of detention in Ireland, and compares these with the independence and operational requirements of the OPCAT. As noted above, the Government has not produced a plan for an NPM which recognises and responds to these existing gaps.

It is vital to highlight that there are many contexts in Ireland in which people are routinely deprived of their liberty without legal authorisation. The State is aware that older people and people with disabilities are frequently restrained (chemically, physically or psychologically), detained and/or deprived of legal capacity while being institutionalised or restrained. In addition, the State is aware that its system of providing for the basic needs of people seeking international protection, in Direct Provision Centres, subjects individuals to intense suffering on account of their experience of institutionalisation, continuous supervision and control and social isolation.

In **Appendix 1** to this report, the ICCL sets out our view of the legal meaning of 'deprivation of liberty' and the remit of OPCAT, and the consequent requirement on the State to include health and social care settings, and Direct Provision Centres, within the purview of the NPM. **Appendix 2** to this report is a copy of the ICCL's March 2018 submission to the Department of Health for its Consultation on the Deprivation of Liberty Safeguard Proposals, which highlights that Irish law continues to be seriously inadequate to ensure protection from arbitrary detention and mistreatment in care settings.

Garda complaints and redress mechanisms

20. The State party should:

(a) Strengthen the independence and effectiveness of the Garda Síochána Ombudsman Commission to receive complaints relating to violence or ill-treatment by the police and to conduct timely, impartial and exhaustive inquiries into such complaints;

(b) Try persons suspected of acts of violence or ill-treatment and, if they are found guilty, sentence them to punishment commensurate with the gravity of their acts;

(c) Provide information on the number of complaints filed with the Commission which may relate to torture or ill-treatment and on the final outcome of such complaints processed by the Commission;

¹² Rachel Murray and Elina Steinerte, *Ireland and the Optional Protocol to the UN Convention against Torture* (Irish Human Rights and Equality Commission 2017) 8.

(d) Ensure that victims have access to effective remedies and reparation;

(e) Sensitize the public about the existence and functioning of the Commission.

(a) Independence and effectiveness of the Garda Síochána Ombudsman Commission (GSOC)

Ireland's Commission on the Future of Policing (CFP) published a landmark [report](#) entitled *The Future of Policing in Ireland* in September 2018.¹³ The ICCL made two major submissions to the CFP during 2018: (1) a [preliminary report](#) entitled *Rights-Based Policing: How Do We Get There?*,¹⁴ and (2) a [comprehensive report](#) entitled *A Human Rights-Based Approach to Policing in Ireland*, authored by Alyson Kilpatrick BL, former Independent Human Rights Advisor to the Policing Board of Northern Ireland.¹⁵ The ICCL was glad to see that its research and proposals regarding the importance of placing human rights law and standards at the centre of policing reform in Ireland were accepted and utilised by the CFP.

The CFP report states as its first principle that 'human rights are the foundation and purpose of policing' and as its third principle that 'accountability and oversight structures should be clear and effective'.

The CFP report makes major recommendations for the overhaul of the system for managing complaints regarding Garda behaviour.¹⁶ It recognises that, at present, 'GSOC does not have the resources to investigate independently the volume of complaints it is receiving, and, aside from those involving allegations of a criminal offence, most are passed back to An Garda Síochána. This means that in some cases, the police are investigating serious complaints against themselves'.¹⁷

The CFP report recommends that GSOC should be replaced by a body, perhaps named the Independent Office of the Police Ombudsman (IOPO), which should receive all complaints about the police service from whatever source.¹⁸ The CFP also recommends that the Secretary General of the Department of Justice should no longer account to parliament for GSOC's budget; rather, the head of the IOPO should be the IOPO's accounting officer.

Regarding the **type of conduct** complained of, the CFP report recommends that:

- If the IOPO judges a complaint to be a performance management matter, IOPO should refer it to the police service for resolution.
- All complaints that go beyond performance management and involve alleged breaches of human rights or accepted standards of policing should be investigated by IOPO.

¹³ Ireland, Commission on the Future of Policing, *The Future of Policing in Ireland* (September 2018) (hereinafter 'CFP Report'), [http://policereform.ie/en/POLREF/The%20Future%20of%20Policing%20in%20Ireland\(web\).pdf/Files/The%20Future%20of%20Policing%20in%20Ireland\(web\).pdf](http://policereform.ie/en/POLREF/The%20Future%20of%20Policing%20in%20Ireland(web).pdf/Files/The%20Future%20of%20Policing%20in%20Ireland(web).pdf)

¹⁴ Maeve O'Rourke, *Rights-Based Policing: How Do We Get There?* (ICCL 2018), <https://www.iccl.ie/wp-content/uploads/2018/01/RIGHTS-BASED-POLICING-ICCL-submission-to-CFP-2.pdf>

¹⁵ Alyson Kilpatrick, *A Human Rights-Based Approach to Policing in Ireland* (ICCL 2018), <https://www.iccl.ie/wp-content/uploads/2018/09/Human-Rights-Based-Policing-in-Ireland.pdf>

¹⁶ See CFP Report, pp 48 – 52.

¹⁷ CFP Report, p48.

¹⁸ CFP Report, pXI.

- IOPO's remit should be expanded to include complaints relating to incidents involving non-sworn personnel of An Garda Síochána as well as sworn police.

Regarding the **independence** of the investigation process, the CFP report recommends that:

- All complaints that fall within the IOPO's remit (i.e. all those involving alleged breaches of human rights or accepted standards of policing) should be investigated by IOPO itself, not by police, and IOPO should be adequately resourced to do so with appropriately experienced investigators.
- If concerns are raised within the organisation in relation to an incident which would not be appropriately addressed by the performance management process, the incident should be referred to IOPO even where there has been no complaint from the public.
- IOPO should make recommendations for changes to policy or practice based on lessons learned from complaints.

As to the **effectiveness** of the investigation process, the CFP report recommends that:

- All investigations by IOPO should be handled with fairness and transparency throughout the process in the interests of both the complainants and those involved in incidents under investigation.
- Special care should be taken to ensure that those processes are available to everyone, particularly those who may be fearful, suspicious, under stress or have any manner of disability.
- New legislation should perhaps expand the current scope of the judicial inquiry process contained in the Garda Síochána Act 2005 to include an inquiry into the processes and procedures of the complaints body.
- All performance management complaints should be documented, and remedial action taken should be recorded in a database accessible to IOPO.

The ICCL welcomes the CFP recommendations regarding an independent police complaints mechanism. We call on the Government to legislate swiftly – a call that GSOC itself has also made on the basis that 'the CFP proposals for a new complaints structure are not dependent on other recommendations for change'.¹⁹

However, the ICCL has several outstanding concerns which we believe also need to be dealt with in new legislation. Specifically:

- To date, several aspects of GSOC's procedures appear to **deny the right to an effective investigation** into allegations of torture or ill-treatment, violations of the right to life or other serious human rights violations involving members of the police service. In the ICCL's experience, victims (including next of kin of deceased individuals) who complain to GSOC are not provided with legal representation and are treated merely as witnesses and not provided with any real opportunity to participate in the investigation. Victims are not informed fully about the issues that are under investigation, they are not provided with the opportunity to see or know about any of the evidence under consideration, and they are not given the

¹⁹ Garda Síochána Ombudsman Commission, Press Release, 'GSOC welcomes the report by the Commission on the Future of Policing in Ireland' (18 September 2018), <https://www.gardaombudsman.ie/news-room/archive/gsoc-welcomes-the-report-by-the-commission-on-the-future-of-policing-in-ireland/>

opportunity to comment on the evidence being provided by other parties. It is imperative that the new IOPO procedures be human rights-proofed and that its enacting legislation fulfils the right of victims to an effective investigation while also protecting the procedural rights of those accused of wrongdoing.

- Specific attention appears not yet to have been paid to the **needs of people with disabilities and people in other vulnerable situations**; for example, for independent advocacy, and/or legal representation, and/or other special measures to enable them to complain of mistreatment and participate in an effective investigation. The Victims' Rights Alliance, of which the ICCL is a member, has been advocating for the establishment of an office of Victims' Ombudsman in Ireland, which could play a role in identifying the needs of individuals who have grounds to complain to GSOC (or in future the IOPO) on an ongoing basis.
- It is not clear that all human rights violations will be covered by the IOPO, particularly because the **Garda Síochána (Discipline) Regulations 2007 are not consistent with the Garda Code of Ethics**, which emphasises the human rights obligations of members of An Garda Síochána. As stated in the Garda Code of Ethics, a breach of the Code is not necessarily a breach of the Disciplinary Regulations. The CFP report recommends a comprehensive review of the Disciplinary Regulations; the ICCL highlights that this review must involve human rights-proofing. In addition, the ICCL believes that in order to fully address the history of systematic failures in police communication with and other treatment of victims of crime in Ireland, breaches of the obligations contained in the Criminal Justice (Victims of Crime) Act 2017 ought to be explicitly categorised as disciplinary offences in revised Disciplinary Regulations.
- It is still not clear whether and how complaints which are deemed to involve **national security** policing operations will be dealt with. The CFP report notes that there is an 'issue of IOPO access to Garda Stations and documentation contained therein which may include sensitive security information'.²⁰ The CFP report states that regulations and protocols need to be established 'to support the operational effectiveness of the complaints process while maintaining security protections'.²¹ The ICCL emphasises that national security policing should not be in any way exempted from the purview of the independent complaints body, as the State's human rights obligations apply equally in the area of national security policing.
- The ICCL believes that there is a need to establish a system of **referrals from the Department of Justice and Equality to GSOC** where officials in the Department of Justice believe that an issue warrants investigation. As the ICCL noted in our [report](#) to the CFP in January 2018, an *ad hoc* Independent Review Mechanism between 2014 and 2016 consisting of six barristers who trawled through 320 complaints made over decades to the Department of Justice regarding Garda behaviour had to establish a line of communication with GSOC in order to discover which of the complaints had already been submitted to GSOC and what the status of the

²⁰ CFP Report, p52.

²¹ Ibid.

complaint was within GSOC in the absence of this knowledge within the Department.²² This suggests the urgent need for a more permanent, streamlined and transparent approach.

- The ICCL believes that the new independent complaints body needs to have **expert human rights legal input** into its frameworks, procedures and substantive practice and policy recommendations. The CFP report recommended the establishment of a Human Rights Unit at a high level within An Garda Síochána and also the creation of a post of Human Rights Adviser to the proposed Policing and Community Safety Oversight Commission. However, the CFP did not make any recommendations regarding specific human rights expert input into the IOPO. The ICCL firmly believes that the IOPO must also have human rights legal advice available to it, because the IOPO is the State’s primary mechanism for vindicating the right to an effective investigation for human rights violations involving police.

(b) Trial and punishment of perpetrators of violence or ill-treatment

In its Follow-up Report, the Irish Government has not provided the CAT with any information about the trial or punishment of members of An Garda Síochána who are suspected to have perpetrated acts of violence or ill-treatment.

Every aspect of the Garda disciplinary process is currently opaque and confusing.

The CFP report does not make recommendations regarding the Director of Public Prosecutions’ (DPP) involvement in the trial and punishment of members of An Garda Síochána who commit acts of violence or ill-treatment (or indeed other grave human rights violations). Data regarding the number of such cases considered by the DPP and the number of such cases brought to trial and their outcomes is unavailable.

The confusing and opaque nature of the DPP’s decision-making process and the DPP’s interaction with the GSOC (future IOPO) procedures and outcome was highlighted recently, in relation to the death of journalist Dara Quigley. Ms Quigley died by suicide several days after a member or members of An Garda Síochána uploaded onto Whatsapp and Facebook CCTV footage of her walking naked in a Dublin street and being detained for protective reasons under the Mental Health Act.²³

In August 2018 it was reported that Ms Quigley’s family had received information from GSOC that none of the Gardaí involved in the unauthorised publication of these deeply personal and private images will face prosecution.²⁴ Instead, the family was told, GSOC would proceed with a ‘disciplinary’ investigation. The ICCL has not been able to ascertain the reason for the refusal to prosecute any of the Gardaí involved.

²² Maeve O’Rourke, *Rights-Based Policing: How Do We Get There?* (ICCL 2018), <https://www.iccl.ie/wp-content/uploads/2018/01/RIGHTS-BASED-POLICING-ICCL-submission-to-CFP-2.pdf> p39, citing Independent Review Mechanism, Overview Report (July 2016), <http://www.justice.ie/en/JELR/IRM%20Overview%20Report.pdf/Files/IRM%20Overview%20Report.pdf> p4

²³ Rónán Duffy, *‘Deplorable and revolting’ treatment of deceased activist Dara Quigley is raised in the Dáil*, TheJournal.ie (May 2017) Available at: <http://www.thejournal.ie/dara-quigley-dail-3384651-May2017/>

²⁴ Dublin Inquirer, ‘Family “Bitterly Disappointed” Garda Likely to Avoid Criminal Prosecution for Dara Quigley Filming’ (8 August 2018), <https://www.dublininquirer.com/2018/08/08/family-bitterly-disappointed-garda-likely-to-avoid-criminal-prosecution-for-dara-quigley-filming>; Conor Feehan, *Garda who filmed tragic journalist Dara Quigley to avoid prosecution*, Independent.ie (August 2018) Available at: <https://www.independent.ie/irish-news/garda-who-filmed-tragic-journalist-dara-quigley-to-avoid-prosecution-37184945.html>

(c) Complaints filed with GSOC which may relate to torture or ill-treatment

No statistics have been published by the Government in its report to the CAT or by GSOC specifically detailing the number of complaints filed which may relate to torture or ill-treatment and their final outcome.

(d) Access to effective remedies and reparation

In addition to deficiencies in, and the urgent need for major reform of, the GSOC process discussed above, there are other shortcomings in the availability of remedies and reparation for mistreatment by members of An Garda Síochána.

Regarding **compensation**, GSOC does not have the power to award any measure of compensation to a person who is determined to have been the victim of Garda malpractice.

Regarding **access to the courts**, there is generally no civil legal aid available for individuals to complain of human rights violations by State actors in the Irish Courts through constitutional actions or actions under the European Convention on Human Rights Act 2003. There is also no provision in the Criminal Justice (Victims of Crime) Act 2017 for legal aid to be provided to victims of crime whose case is being pursued in the criminal courts. The European Union Victims' Directive, upon which the Criminal Justice (Victims of Crime) Act 2017 is based, grants victims the right to legal aid only where they are party to criminal proceedings. In Ireland, victims are not party to legal proceedings (rather they are treated only as witnesses).

Regarding the **effectiveness of quasi-judicial investigations**, the ICCL is seriously concerned that special Government-ordered inquiries into Garda conduct under [section 42](#) Garda Síochána Act 2005 are not explicitly required by legislation to act in accordance with the right to an effective investigation into alleged or suspected violations of the right to life, the right to freedom from torture and ill-treatment and other grave human rights violations. The ICCL highlighted our concerns about section 42 investigations in our submission to the CFP in January 2018.

Section 42 Garda Síochána Act 2005 provides powers to compel the production of evidence and the attendance of witnesses. However, it does not specify that proceedings must take place in public or the circumstances in which they may not; it makes the publication of any report of the inquiry a matter of the Minister's discretion; and it does not make any provision regarding the entitlements of alleged victims, including next of kin of the deceased, to participate in the proceedings (for example, to see or comment on the evidence being considered).

The ICCL has written to the five judges currently conducting inquiries under section 42 Garda Síochána Act 2005 into allegations of historic Garda malpractice (most involving Garda investigations following deaths),²⁵ to request information about what if any hearings they have decided to hold in public and what their reasons are for holding hearings in private, and what their procedures are. We are awaiting a response.

The procedures attaching to State investigations into 'historical' institutional abuses involving the Gardaí are also of concern to the ICCL. Members of the Gardaí are known to have returned girls and women to institutions such as Magdalene Laundries and Mother and Baby Homes where they were

²⁵ See Department of Justice, Webpage regarding Inquiries under section 42 Garda Síochána Act 2005, <http://www.section42inquiries.ie/en/S42l/Pages/Inquiries>

detained without legal authority for much of the 20th century. Investigations into the Magdalene Laundries and Mother and Baby Homes have to date been conducted wholly in private and neither the survivors of the institutions nor the public have had access to (nor the opportunity to comment on) any of the evidence being considered by the inquiry.

(e) Public awareness

The CFP report was widely publicised, and the ICCL is keen that the process of legislating to implement its recommendations should commence without delay. The legislative process should include public consultation.

In addition, the CFP's proposals for measures to embed a human rights-based and community-based approach to policing in Ireland must be given priority and adequately resourced. A human rights-based and community-based approach to policing is essential in order to ensure that the public is well informed and therefore in a position to hold the police service to account.

Additional: The Charleton Report, October 2018

In October 2018, Mr Justice Peter Charleton published a 400-page [report](#)²⁶ setting out the findings of an independent public Tribunal inquiry into suspicions that Garda management (including then Garda Commissioner, Martin Callinan) had deliberately orchestrated a campaign over several years to destroy the reputation of Garda Sergeant Maurice McCabe, who raised concerns as a 'whistleblower' about systematic dereliction of duty by members of An Garda Síochána.

Mr Justice Charleton found that, together with Garda press officer Superintendent David Taylor, then Garda Commissioner Martin Callinan (the most senior member of management of An Garda Síochána) had engaged in a 'campaign of calumny'²⁷ against Sergeant McCabe, 'a genuine person who at all times has had the interests of the people of Ireland uppermost in his mind' and 'disclosed...an extremely serious state of lack of application to duty and failure to follow basic and fundamental procedures'.²⁸ Specifically, the Garda Commissioner and press officer spent several years spreading the false claim that Sergeant McCabe was accused of child sexual abuse, and telling politicians, journalists and others that Sergeant McCabe was not to be believed or trusted.²⁹ In the wake of the Charleton report, Maurice McCabe is currently pursuing civil proceedings against former Commissioner Martin Callinan.

Mr Justice Charleton's recommendations are of great relevance to the manner in which complaints against Gardaí are managed generally.

Speaking of the previous [Morris Tribunal](#) which found grave and systematic breaches of discipline by Gardaí in Donegal in the 1990s and early 2000s, and the oversight structures established since then, Mr Justice Charleton concludes:

It is obvious that while structures have been superimposed on the police force, there is still trouble. It is the same kind of trouble that was identified a dozen and more years ago by Mr Justice

²⁶ Mr Justice Charleton, 'Third interim report of the tribunal of inquiry into protected disclosures made under the Protected Disclosures Act 2014 and certain other matters' (11 October 2018), http://opac.oireachtas.ie/AWDData/Library3/Third_Interim_Report_121254.pdf (hereinafter 'Charleton report')

²⁷ Charleton report, pp275, 290.

²⁸ Charleton report, p288.

²⁹ See also Conor Lally, 'Martin Callinan sabotaged himself over two days of madness' *The Irish Times* (11 October 2018), <https://www.irishtimes.com/news/crime-and-law/martin-callinan-sabotaged-himself-over-two-days-of-madness-1.3660617>

Morris. Therefore, more structures are not the answer to these problems. Structures can readily be put in place. A change of culture is markedly more difficult.³⁰

... Part of the answer is in restoring accountability and, most importantly, in restoring the structure of command. Failure to address these by the immediate re-imposition of a strong command structure and appropriate structures of discipline will do Ireland no service.³¹

Mr Justice Charleton's recommendations regarding the disciplinary process are as follows:

Those gardaí accused of ill-discipline should be subject to correction by senior officers without the need to resort to the elaborate structures which constitute what is in effect a private trial using procedures akin to our criminal courts. A simplified structure is called for. Private industry uses a system of simply taking a statement of what is wrong, passing it to the employee and considering any response offered. As Mr Justice Morris recommended, that could be used together with an appeal system within police structures. The discipline process as it currently exists is far too technical. Garda discipline rules should be supplemented with open-ended obligations and breach of these should invoke a simplified disciplinary code. Currently, it is far too easily impeded by court applications.³²

Magdalene Laundries

26. The State party should:

(a) Undertake a thorough and impartial investigation into allegations of ill-treatment of women at the Magdalen laundries that has the power to compel the production of all relevant facts and evidence and, if appropriate, ensure the prosecution and punishment of perpetrators;

(b) Strengthen the State party's efforts to ensure that all victims of ill-treatment who worked in the Magdalen laundries obtain redress, and to this end ensure that all victims have the right to bring civil actions, even if they participated in the redress scheme, and ensure that such claims concerning historical abuses can continue to be brought "in the interests of justice"; take further efforts to publicize the existence of the ex gratia scheme to survivors of the Magdalen laundries living outside Ireland; fully implement the outstanding recommendations on redress made by Mr. Justice Quirke; promote greater access of victims and their representatives to relevant information concerning the Magdalene laundries held in private and public archives; and provide information on these additional measures in the State party's next report to the Committee.

(a) Thorough and impartial investigation with the power to compel the production of facts and evidence, leading to prosecution and punishment of perpetrators if appropriate

The Government's report to the CAT makes clear that it has no intention to initiate an investigation into alleged torture and ill-treatment in the Magdalene Laundries as recommended by the CAT.

³⁰ Charleton report, p293.

³¹ Charleton report, p294.

³² Charleton report, pp298, 299.

The Government claims that the McAleese Committee found “no factual evidence to support allegations of systematic torture or ill-treatment of a criminal nature in these institutions”.³³ The Government states, further:

in light of facts uncovered by the McAleese Committee and in the absence of any credible evidence of systematic torture or criminal abuse being committed in the Magdalen laundries, the Irish Government does not propose to set up a specific Magdalen inquiry or investigation. It is satisfied that the existing mechanisms for the investigation and, where appropriate, prosecution of criminal offences can address individual complaints of criminal behaviour if any such complaints are made.³⁴

The ICCL notes for the record that (as the CAT is already aware) the Government did not give the McAleese Committee the remit to investigate alleged abuse of girls and women in Magdalene Laundries and the Committee did not issue a public call for evidence concerning the treatment of girls and women in Magdalene Laundries. The Committee was tasked by the Government with establishing the facts of State involvement with the Magdalene Laundries only. There were no terms of reference for the Committee establishing any legal framework according to which the experiences of girls or women could be judged. Furthermore, of the 118 survivors who spoke to the McAleese Committee, 58 were at the time still institutionalised in the care of the religious congregations responsible for operating the Magdalene Laundries. To this day, the Government has refused the requests of civil society organisations for every woman who still lives in the care of the religious orders to be referred to the National Advocacy Service so that she has access to an independent advocate.

Notwithstanding the above, the McAleese report does contain extensive evidence of systematic torture or ill-treatment and criminal abuse of girls and women in Magdalene Laundries. Therefore, the ICCL rejects entirely the Government’s characterisation of the contents of the McAleese report. In the ICCL’s view, the McAleese report and other publicly available evidence provide clear grounds to believe that torture and ill-treatment, and criminal abuse, occurred systematically in the Magdalene Laundries and that therefore a dedicated investigation and truth-telling process is required.

As the Justice for Magdalenes Research (JFMR) group set out in detail in its 2017 NGO [report](#) to the CAT,³⁵ the contents of the McAleese report demonstrate that, routinely, girls and women were: involuntarily detained in Magdalene Laundries and not free to leave, given no information regarding the reasons for their detention or their expected release date, stripped of their identity, forced to work constantly, not paid wages for the work they were forced to carry out, denied contact with the outside world and isolated from the rest of society, subjected to degrading and humiliating punishments, and subjected to verbal denigration and humiliation. The McAleese Report also demonstrates that girls and women who died while confined in Magdalene Laundries were sometimes buried in unmarked graves and/or without the nuns registering their death.³⁶

³³ Ireland, Follow-up report to CAT, 2018, para 14.

³⁴ Ireland, Follow-up report to CAT, 2018, para 18.

³⁵ Justice for Magdalenes Research, NGO Submission to the UN Committee Against Torture in respect of Ireland (July 2017), pp8, 9, https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/IRL/INT_CAT_CSS_IRL_27974_E.pdf

³⁶ Chapter 16 of the IDC Report acknowledges that in 1993 (only 17 years after a burial plot at High Park ceased to be used as such), one of the religious congregations received permission from the State to exhume and cremate 155 bodies of Magdalene women, 80 of whom were unidentified. Chapter 16 further notes that no death certificates were located for 15% of women known to have died in all Magdalene Laundries, up to the 1990s. See IDC Report, Ch 16, see also Irish Human Rights Commission, *Follow Up Report on State Involvement with Magdalen Laundries*, June 2013 (*IHRC Follow-up Report*), p101, <https://www.ihrec.ie/documents/ihrc-follow-up-report-on-state-involvement-with-magdalen-laundries-june-2013/>

JFMR's 2017 report to the CAT also summarises the evidence contained in the McAleese report regarding State involvement in the placements of girls and women in Magdalene Laundries (including in the absence of legal authority) and in financially and contractually supporting the institutions while failing to effectively regulate and monitor them.³⁷

Mr Justice Quirke's 2013 *Magdalen Commission* report acknowledged that involuntary detention; forced unpaid labour; denial of education; and degradation, humiliation, stigmatisation and exploitation were systemic features of the Magdalene Laundries.³⁸ Mr Justice Quirke, then President of the Irish Law Reform Commission and former High Court judge, stated that he spoke personally with 173 Magdalene survivors in the course of devising his recommendations for the *ex gratia* Scheme and that '[a]lthough their recollections often provoked emotion, they were entirely credible'.³⁹

The assertion in the Government's report to the CAT that there is 'no credible evidence' that systematic torture or ill-treatment or criminal abuse occurred in Magdalene Laundries flies in the face of not only former Taoiseach Enda Kenny's State apology to the survivors in February 2013 but also the more recent official apologies to the women and their families by the Minister for Justice⁴⁰ and the President of Ireland⁴¹ during the 'Dublin Honours Magdalenes' gathering in June 2018.

In the ICCL's view, the Government's continued denial of responsibility for human rights violations, and its refusal to produce its own administrative records and require the production of the administrative records of the religious congregations, is compounding the dignity violations which the women experienced in the past and is undermining the value of the State's apologies.

³⁷ Justice for Magdalenes Research, NGO Submission to the UN Committee Against Torture in respect of Ireland (July 2017), pp12, 13, https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/IRL/INT_CAT_CSS_IRL_27974_E.pdf

³⁸ Report of Mr Justice John Quirke/ Report of the Magdalen Commission Report on the establishment of an *ex gratia* Scheme and related matters for the benefit of those women who were admitted to and worked in the Magdalen Laundries, May 2013, ("Magdalen Commission Report"), para 4.09, <http://www.justice.ie/en/JELR/Pages/PB13000255>
At p8: 'All of the women who worked within the designated laundries worked without pay, some for very long periods of time.'

At para 5.13: 'A very large number of the women described the traumatic, ongoing effects which incarceration within the laundries has had upon their security, their confidence and their self-esteem. Many described the lasting effects of traumatic incidents such as escape from the laundries and subsequent recapture and return'.

At para 3.03: 'The consultation process conducted by the Commission suggested that a large number of young girls and women who were admitted to the Magdalen laundries were degraded, humiliated, stigmatised and exploited (sometimes in a calculated manner)'.

At para 5.09: 'A number of the women were deprived of an education when they were admitted to the laundries at an early age and provided with no further education'.

³⁹ Report of Mr Justice John Quirke/ Report of the Magdalen Commission Report on the establishment of an *ex gratia* Scheme and related matters for the benefit of those women who were admitted to and worked in the Magdalen Laundries, May 2013, ("Magdalen Commission Report"), para 4.09, <http://www.justice.ie/en/JELR/Pages/PB13000255>

See also 4.05 After detailed discussion the Commission concluded that, in order to discover the present needs and interests of the Magdalen, it was necessary to speak to them personally. The resultant "conversation" between the Commission and the Magdalen women was intended to be both an information gathering process and an opportunity for the Magdalen women to convey directly to the Commission who they were, where they were, what their circumstances were and what could be done to assist them and make their lives more comfortable. It was anecdotal in nature, has not been scientifically validated and was not and does not purport to be scientifically based. The information compiled was processed and collated and was used by the Commission in order to obtain an informal understanding of the needs and interests of the Magdalen women and of particular categories and sub-sets of those women.

⁴⁰ See for example, Juno McEnroe, 'Magdalene redress: Official Ireland took its time with apology, admits Charlie Flanagan' *Irish Examiner* (6 June 2018), <https://www.irishexaminer.com/ireland/magdalone-redress-official-ireland-took-its-time-with-apology-admits-charlie-flanagan-471525.html>

⁴¹ See for example, "'Ireland failed you": President Higgins apologises to Magdalene Laundries survivors at Aras an Uachtarain event' *Irish Examiner* (5 June 2018), <https://www.irishexaminer.com/breakingnews/ireland/ireland-failed-you-president-higgins-apologises-to-magdalone-laundries-survivors-at-aras-an-uachtarain-event-846951.html>

Ordinary civil and criminal justice mechanisms are not available to the survivors of Magdalene Laundries and do not represent effective remedies because, among other reasons:

- all survivors who have received payments under the *ex gratia* scheme have been forced to waive their legal rights of action against the State;
- the Statute of Limitations, the civil costs regime and the lack of any legislation providing for group or class actions all present procedural barriers to the women’s access to the civil courts;
- the Government is consistently educating State officials, including law enforcement officials, that the systematic treatment of girls and women in Magdalene Laundries was *not criminal*;
- the Government is refusing to release any of the contents of the McAleese archive, which contains all state records concerning the Magdalene Laundries;
- the State has not compelled the public production of the religious congregations’ administrative archives, and the religious congregations refuse to open their administrative archives to the public; and
- survivors of the Magdalene Laundries have not been enabled to access adequate rehabilitative services; the women have not been provided with private and limitless psychotherapy services or the full range of other health and social care services recommended in the Quirke report, which the Government accepted ‘in full’ in 2013.

(b) Other forms of redress and reparation

The ICCL is concerned that the survivors of Magdalene Laundries have not been provided with the full range of **health and social care services** that holders of the ‘HAA card’ are entitled to.

Mr Justice Quirke’s very first recommendation was that ‘Magdalen women should have access to the full range of services currently enjoyed by holders of the Health (Amendment) Act 1996 Card (“the HAA card”)⁴². The ICCL wrote to the Minister for Justice about this issue in January 2018, along with Justice for Magdalenes Research, the National Women’s Council of Ireland, Sage Support and Advocacy Service, and Amnesty International Ireland. This letter is attached as **Appendix 3**. The ICCL’s concerns about the limits to the health and social care provision under the Magdalene *ex gratia* scheme have not been allayed. No changes appear to have been made to the services available to Magdalene survivors under the Redress for Women Resident in Certain Institutions card, and the Department of Justice has not established the dedicated fund promised by former Minister Frances Fitzgerald for complementary therapies such as massage, reflexology, acupuncture, aromatherapy and hydrotherapy. In addition, the ICCL has received expressions of concern from survivors living abroad that they cannot afford to pay for health and social care services out-of-pocket, and that the Government’s system of reimbursement should instead be a system of up-front payment.

It is very welcome that the Department of Foreign Affairs and Trade has recently **advertised** the Magdalene *ex gratia* scheme, and the ICCL recommends that such advertising be repeated periodically. It is also essential that the scheme does not close at any point, given the extreme vulnerability that many of the women who spent time in Magdalene Laundries experience.

⁴² Report of Mr Justice John Quirke on the establishment of an *ex gratia* Scheme and related matters for the benefit of those women who were admitted to and worked in the Magdalen Laundries (May 2013) (‘Magdalen Commission Report’), <http://www.justice.ie/en/JELR/2.%20THE%20MAGDALEN%20COMMISSION%20REPORT.pdf/Files/2.%20THE%20MAGDALE%20COMMISSION%20REPORT.pdf> p7.

The Department's funding of the voluntarily organised 'Dublin Honours Magdalenes' event in June 2018 was another very welcome measure. It is imperative that the Government now commits to implementing in full Mr Justice Quirke's recommendation for a **Dedicated Unit** which would provide ongoing advice and support to survivors of Magdalene Laundries regarding their needs and entitlements in general. The Government must also honour its commitment to funding a substantial **memorial**, potentially in the form of a museum (as Judge Quirke's report suggested) in order to ensure education of the public and of future generations and thus a guarantee of non-repetition of the Magdalene Laundries abuse. It is worth noting that in September 2018, the elected councillors of Dublin City Council voted to prevent the sale of the Sean McDermott Street Magdalene convent site to a hotel chain. The motion that the Councillors passed disapproved of the plans for sale on the basis that the Government has not yet implemented all recommendations of the CAT regarding the Magdalene Laundries, nor has it implemented the first recommendation in the 2009 Ryan Report concerning the endemic abuse of children in State-funded, Church-run residential schools, which was for a memorial.⁴³

Regarding the **Ombudsman's recommendations** for revision of certain aspects of the *ex gratia* scheme following a finding of 'maladministration' in a November 2017 [report](#) entitled *Opportunity Lost*, the ICCL welcomes the appointment of Mary O'Toole SC as independent reviewer of cases where survivors of Magdalene Laundries received payments reflecting less time than they stated they had been institutionalised, and cases where women were 'deemed' to lack capacity and prevented from applying to the scheme. The ICCL also welcomes the long-delayed measures, announced earlier this month, to accept into the *ex gratia* scheme women who were forced to work in Magdalene Laundries as girls while registered on the rolls of adjacent children's educational institutions.

The ICCL has outstanding concerns regarding the Department's implementation of the Ombudsman's recommendations, however:

- The ICCL is concerned that the Department of Justice may repeat its previous mistake of relying primarily or solely on documentary evidence produced by the religious congregations and fail to consider testamentary and other corroborating information produced by survivors as having any or equal evidentiary value. Earlier this month the Department produced an 'Addendum' to the *ex gratia* scheme which stated that women who are seeking payments for time spent working in Magdalene Laundries as children when they were supposed to be receiving an education must produce 'records' and that the scheme will be administered on a presumption that no child below the age of 12 worked in a Magdalene Laundry unless 'evidence' to demonstrate otherwise is produced.⁴⁴
- The ICCL still believes that it is necessary for the Department of Justice to refer every woman who remains institutionalised, never having left a Magdalene Laundry, to the National Advocacy Service so that she may be provided with access to independent advocacy assistance. To the ICCL's knowledge, the Government has not arranged for these referrals to take place.

⁴³ See for example, 'Council votes to block sale of Magdalene Laundry in Dublin's north inner city to hotel chain' *Journal.ie* (13 September 2018), <https://www.thejournal.ie/magdalene-sean-mcdermott-4234817-Sep2018/>

⁴⁴ See for example Conall O'Fatharta, 'Magdalene redress criteria under fire' *Irish Examiner* (17 November 2018), <https://www.irishexaminer.com/breakingnews/ireland/magdalene-redress-criteria-under-fire-886037.html>; Conall O'Fatharta, 'Women excluded from Magdalene Laundries redress must provide 'records' of work' *Irish Examiner* (15 November 2018), <https://www.irishexaminer.com/breakingnews/ireland/women-excluded-from-magdalene-laundries-redress-must-provide-records-of-work-885479.html>

- The ICCL is alarmed at the prospect of the Government developing guidance regarding the operation of future ‘restorative justice’ or ‘redress’ schemes without public consultation, and specifically, without consulting survivors who have experienced compounded suffering due to both the inadequate administration of *ex gratia* schemes and the State’s reluctance to ensure accountability for past systematic human rights violations. The ICCL reiterates our call, made in January 2018 in conjunction with four other organisations,⁴⁵ for a public consultation process which will support women who spent time in Magdalene Laundries and other individuals who have attempted to access governmental ‘restorative justice’ and ‘redress’ schemes to participate.

⁴⁵ See Letter from ICCL, Justice for Magdalenes Research, NWCI, Sage and Amnesty International Ireland to Charlie Flanagan TD, Minister for Justice and Equality, 11 January 2018 (**Appendix 3**).

APPENDIX 1:

The remit of OPCAT

Author: Maeve O'Rourke, Senior Research and Policy Officer, Irish Council for Civil Liberties
Contact: maeve.orourke@iccl.ie

Introduction

One of the key questions we face when considering how Ireland's National Preventive Mechanism (NPM) should work is **what are the places or contexts of deprivation of liberty** that the NPM must extend to?

In their 2017 [report for IHREC](#) on Ireland and OPCAT, Rachel Murray and Elina Steinerte noted that there have been many 'discussions around the possible establishment of a criminal justice inspectorate' in Ireland. They stated that a criminal justice inspectorate would not be sufficient to meet Ireland's obligations under OPCAT because OPCAT:

encompasses not only the more 'traditional' places of detention such as prisons, police cells, but also immigration detention facilities, psychiatric hospitals, care homes, secure accommodation for children, nursing homes, etc.¹

The IHREC report highlighted a number of contexts of deprivation of liberty which are not currently regulated in Ireland and which need to be included in the future NPM's remit:

The most significant gap that was identified in terms of places of detention and deprivation of liberty which did not currently have any form of inspection were Garda stations. Other areas over which there is some uncertainty as to which body covers inspection, if there are any at all, include transport and transit between prisons and court; court cells; military detention; detention of individuals awaiting deportation; detention facilities at airports and ports and on flights; as well as de facto detention and in voluntary settings.²

However, the ICCL believes that there are even more settings that should be included in the NPM's remit. Specifically, we believe that all forms of deprivation of liberty in the social care arena, and Direct Provision Centres, should also be included in our NPM.

The ICCL is concerned that the Department's consultation has not been wide enough, in that it has not been advertised publicly and the civil society stakeholders approached by the Department do not represent all sectors where people are deprived of their liberty and/or institutionalised.

In particular, civil society organisations working in the area of **immigration** appear not to have been adequately consulted.

In addition, the Department of Health's [preliminary draft Heads of Bill on deprivation of liberty](#), which are intended to form Part 13 of the [Assisted Decision-Making \(Capacity\) Act 2015](#), are seriously inadequate to ensure protection from arbitrary detention and mistreatment in care settings. This suggests that the design of the future NPM in relation to **health and social care settings** is in danger of being similarly flawed.

Ireland has a terrible history of arbitrary deprivation of liberty and widespread human rights violations in places of detention and institutionalisation. For this reason in particular (because of what it suggests about our historic inability to recognise and protect from ill-treatment in places of detention and institutionalisation), the ICCL is concerned that the Irish NPM's remit should be as inclusive as possible of places and forms of deprivation of liberty and institutionalisation. Ian O'Donnell and Eoin O'Sullivan

note that ‘in 1951 the proportion of the population in coercive confinement was more than 1 per cent (i.e. over 1,000 per 100,000 population).³ They explain: ‘prison was a relatively minor contributor to the overall apparatus of coercive confinement, with many more people incarcerated against their will in psychiatric hospitals or a variety of institutions that served to conceal the “scandal” associated with unmarried motherhood’.⁴ As recognised in the 2017 IHREC report on OPCAT and in the ICCL’s [recent submission to the Department of Health](#) on the government’s Deprivation of Liberty Safeguard proposals, Ireland is still failing to adequately regulate numerous systems of deprivation of liberty which it knows exist.

In order to explain the need to be as inclusive as possible in designing our NPM, the remainder of this paper focuses on (1) the purpose of OPCAT, which is to implement Ireland’s absolute obligation to ensure that people deprived of their liberty are treated with dignity; (2) the definition of deprivation of liberty according to OPCAT and international and European human rights jurisprudence; (3) the Irish State’s knowledge of the widespread existence of *de facto* deprivation of liberty in Direct Provision and social care settings; and (4) comparative practice in other countries.

(1) Purpose

The purpose of OPCAT is to assist states in implementing their absolute obligation to prevent torture and other cruel, inhuman or degrading treatment or punishment occurring within their jurisdictions.⁵ It is universally accepted that deprivation of liberty gives rise to a heightened risk of torture or ill-treatment occurring and that states have more intense obligations of supervision in these contexts.

Article 10 of the International Covenant on Civil and Political Rights (ICCPR)⁶ and its equivalents in universal and regional human rights law place a positive obligation on states to ensure that those who are deprived of their liberty are treated humanely and with respect for their dignity.

The CAT’s General Comment No 2 states that:

each State party should prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control, for example, in prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions *as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm* (emphasis added).⁷

Therefore, it is of the utmost importance that Ireland’s NPM responds to the *actual* conditions of vulnerability that people experience in Ireland, rather than a technical and exclusionary definition of deprivation of liberty (for example, that recognises only places of detention that are currently regulated by the State).

Due to the power imbalances that exist in the health and social care contexts, where people are dependent on others, the State’s obligations to protect and defend human rights take on extra significance in this arena. Health and social care settings are places of heightened risk of arbitrary deprivation of liberty, torture or other ill-treatment, lack of respect for legal capacity and the right to informed decision-making, and unlawful interferences with private and family life. These risks are even greater for people who fall into groups that have traditionally experienced discrimination and negative stereotyping.

(2) Definition of deprivation of liberty under OPCAT and international/comparative human rights law

Article 4(2) OPCAT states:

1. Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given

by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention) ...

2. For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.

The OPCAT was adopted in 2002. On its face, Article 4 OPCAT requires that the deprivation of liberty is either directly effectuated by, or sanctioned by, the state. In theory therefore it could be argued that OPCAT does not require inspection of places of detention that are not already regulated by the state. However, this would be an approach that would deny protection to people who are in the most vulnerable situations of deprivation of liberty – i.e. those who do not currently have recourse to law.

Importantly, the Subcommittee on the Prevention of Torture (SPT) has begun to take a more expansive approach to interpreting the OPCAT's requirements and therefore the necessary remit of NPMs – in a way that echoes other treaty bodies' recognition of states' positive obligation under the right to liberty to monitor private places of detention.

In response to a request for guidance from the New Zealand Human Rights Commission in 2015, the SPT informed the Commission that 'the preventive approach which underpins the OPCAT means that as expansive an interpretation as possible should be taken in order to maximise the preventive impact of the work of the NPM'.⁸ The SPT continued:

The SPT therefore takes the view that any place in which a person is deprived of liberty (in the sense of not being free to leave), or where it considers that a person might be being deprived of their liberty, should fall within the scope of its visiting mandate and, in consequence, under the visiting mandate of an NPM if it relates to a situation in which the State either exercises, *or might be expected to exercise a regulatory function*. As a tool of prevention, the NPM ought therefore to be able to access as broad a range of potential places of deprivation of liberty as possible in order to determine whether the State ought to be exercising such a regulatory function, as well as to examine the manner in which existing detention powers and regulatory functions are being exercised⁹ (emphasis added).

The 2017 IHREC report notes that the SPT made a similar statement in its 2016 Annual Report.¹⁰ Regarding the SPT's visiting practices, the IHREC report states that:

While there have been attempts by some States parties to limit the scope of places of deprivation of liberty that would be covered by the NPM mandate,¹¹ the practice of the SPT during its own in-country visits is to adopt the broadest possible understanding of the term including centres for children,¹² psychiatric hospitals,¹³ naval base corrective cells,¹⁴ airport immigration facilities,¹⁵ accommodation centres for refugees and asylum seekers¹⁶ and detoxification centres.¹⁷

While considering the definition of deprivation of liberty, it is also worth noting that, in his July 2017 [report](#) to the UN General Assembly on the extra-custodial use of force, the UN Special Rapporteur on Torture (SRT), Prof Nils Melzer, highlighted that the Austrian and Brazilian NPMs have chosen to extend their functions to places and instances of extra-custodial use of force and coercion. The SRT stated that:

Although the Optional Protocol does not require States to provide national preventive mechanisms with powers of oversight outside places where persons are deprived of their

liberty, nothing in the relevant instruments prevents the extension of their monitoring responsibilities, as a matter of national law, to the use of force in extra-custodial settings.¹⁸

International / comparative jurisprudence regarding the meaning of deprivation of liberty

The definition of deprivation of liberty under human rights instruments is broad and does not in principle exclude any particular *form* of detention or restraint.

Deprivation of liberty need not be caused by physical force. A person's inability to leave a place or escape a situation may also arise due to non-physical forms of coercion, including the exercise of power over a person who is dependent on another for care and/or to meet their basic needs.

Physical confinement

A common definition of deprivation of liberty under international human rights law is lack of freedom to leave a place at will. Article 4(2) OPCAT defines deprivation of liberty as 'any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority'.¹⁹ According to the Inter-American Commission on Human Rights, 'the concept of "deprivation of liberty" encompasses: [a]ny form of detention, imprisonment, institutionalization, or custody of a person in a public or private institution which that person is not permitted to leave at will'.²⁰ The ECtHR finds the objective aspect of a deprivation of liberty to exist where a person is 'under continuous supervision and control and not free to leave'.²¹ The HRC, meanwhile, has held that a person will not be deprived of their liberty if they 'know that they are free to leave at any time'.²²

Coercion

Lack of physical freedom to leave a place at will, and physical restraint, are not the only established conceptions of deprivation of liberty in international human rights law, however. The ECtHR has held that an 'element of coercion' is indicative of a deprivation of liberty.²³ The Court rejects the notion that deprivation of liberty must take any particular form.²⁴ It holds that what matters is the 'degree or intensity' of the restriction on movement²⁵ and the 'concrete situation' of the person concerned having regard to the 'type, duration, effects and manner of implementation of the measure in question', among other factors.²⁶ Harris, O'Boyle and Warbrick note that the ECtHR has held resulting social isolation to be a key factor in determining the existence of a deprivation of liberty.²⁷

The ECtHR has found deprivations of liberty to exist in the mental health care context even where premises are unlocked²⁸ and where a person has previously gone on outings or visits away from the institution.²⁹ Individuals have been found to be 'not free to leave' where permission to leave the premises is required,³⁰ where a person's guardian is required to consent to the person leaving,³¹ where there are restrictions as to the length of time and destination to which a person may go,³² where an institution restricts access to a person's identity documents or finances, which would enable them to travel,³³ where a person is returned—for example, by the police—when they leave,³⁴ or where it is clear that a person would be prevented from leaving if they tried or returned to the institution if they did.³⁵

(3) Irish State knowledge of deprivation of liberty, institutionalisation and coercion in Direct Provision and social care settings

Direct Provision centres

The ICCL believes that there is a strong argument to be made that Direct Provision accommodation amounts, in some if not all instances, to *de facto* deprivation of liberty. Our understanding of this is

informed by discussion with [Doras Luimni](#), solicitors with experience of working with people living in Direct Provision, and the [Movement of Asylum Seekers in Ireland](#) (MASI) among others. Due to the nature of the Direct Provision and international protection system in Ireland:

- (a) People seeking international protection are in practice **not free to leave** Direct Provision because:
- It is the only source of state provision for a person's basic needs (food, shelter, medical assistance) while they await determination of their international protection application.
 - It is generally not possible to choose which Direct Provision Centre one lives in, or even one's roommates, and transfers are extremely difficult to obtain.
 - People living in Direct Provision are not provided with a travel pass, and it is not generally possible for people living in Direct Provision to obtain an Irish driver's licence. Outside of strictly and sparsely provided bus transport to and from, for example, the closest town, people living in Direct Provision generally do not have access to the means to leave the accommodation centres except for on foot.
 - If a person stays away from the Direct Provision centre for a certain number of nights, they are at risk of losing their place in the system.
- (b) People living in Direct Provision are **socially isolated** because:
- It is difficult if not sometimes impossible for outsiders (friends, organisations) to visit.
 - Numerous centres are located outside of towns and villages.
 - Education and work are inaccessible for many people living in Direct Provision.
- (c) People living in Direct Provision are under **constant supervision and control** because:
- In many Direct Provision centres people are not at liberty to cook for themselves or eat anywhere other than the designated canteen, and meals are provided within strict timeframes.
 - There is a severe lack of privacy. There is widespread CCTV in Direct Provision Centres, bedrooms are frequently shared, there are few if any spaces for private/family enjoyment, and although signing in procedures are forbidden by the revised house rules, there are reports that managers of Direct Provision centres use post-boxes to monitor people's presence.
 - People living in Direct Provision are routinely required to inform management of their plans if they wish to stay away from the Centre overnight.

The risk of dignity violations amounting to inhuman or degrading treatment, and the need for independent and robust supervision under OPCAT, are demonstrated in the following excerpts from an interview that ICCL carried out this summer with Lucky Khambule, organiser with the Movement of Asylum Seekers in Ireland (MASI). Mr Khambule spent 3 years and 4 months living in Direct Provision centres from January 2013 onwards. He states:

One of his [the manager's] phrases was 'you don't get this in your country, go back to your country'. He had something especially with Africans, that manager.

...There was a situation where they supply toilet paper, soaps, tissue papers, shampoos at a specific time during the month. They would give you 2 bars of soap which must last you for the month. We lived on 19 euro, within a week you have finished that soap – the second week it's gone, and you want to go back to them to say you need soap. And they won't give you soap, they will never give you soap. They won't give you that.

When you ask for extra toilet paper you get a shouting at: 'No, you can't get it because it's past the time you're supposed to get it', and they tick for you. As you take, they tick, so you

can't come back for the extra. When it's finished you go back, and that's where you're getting – you know, when you feel empty? You feel empty when a person talks to you in a demeaning way, in a way that puts you down. So people respond differently to those kind of things, you know? People ignore, some will argue, but arguing also doesn't take you anywhere. And it's an ongoing thing. When we're told 'You don't get this in your country'. I come from South Africa, we come from everywhere, and people are there for protection. And when you get told, 'Go back to your country, you won't get this in your country' – and we're talking a mere soap or shampoo. So, the main aim was to make sure we are scared, so we don't challenge things. It's their word, their word is final. And it's something they've been doing, even the staff were conditioned to treat people like that.

...It freezes you. You know when someone throws a word to you, that sinks, that lowers your self-esteem, it changes you. Because a person is a person of power, and uses words that are strong to you. Some people – I don't know if I'm explaining properly – but the words that are said to you personally, that are a personal way of saying things that attack your personality, and that makes a person feel empty. You know? It makes you feel empty, that this is the person that is supposed to give you the service that you need, but when you get there, you had to change your tune, had to be in a begging kind of mood for you to be on the right side of the staff in the office. You've got to show that you need them. OK? By conforming to the oppression that you get and trying to be nice - to smile even if you don't want to smile just because you need that service. People ended up doing that in order for them to be able to get some kind of a service or some kind of a smile back.

Where I was, there were 3 metres of trees planted around the centre. They will put wire, in some cases – in my case there was wire and long trees. You won't see anything. Others have walls. You won't see inside. It's for the people who are outside not to know what's going on there. When we closed that centre [in Kinsale Road, Cork] in 2014 – we closed the centre and started moving to the gate to be visible during our protest – people who were passing by stopped and said 'We have been passing every day going to work and didn't know there were people in this place here. We didn't know because it's trees.' It's a way of separating people from the people who are in Direct Provision. It's the way of separating.

But more than physical structures separating people, there is actually – it's very hard to get in. You can't – for instance, say you want to go and talk to somebody in Direct Provision as you. You will never get inside. You will never get inside. First you'll get the attitude – 'Who are you, why are you here?' You'll get that attitude. It's a non-welcoming attitude. It's always something. You'll say, 'Why are you hiding so much?' They don't want people to be speaking with people about what is happening there.

... You would say it's house detention. As I said earlier, the fact you know there's times they stipulate – they work on you. You are trapped. There are chains around you even if you don't have physical chains. There are mental chains put on you with the system. It promotes dependency. It promotes dependency. Once a person is dependent on something it's very hard for that person to be himself or herself again.

Health and social care settings

The State is on notice that people in need of care are routinely experiencing deprivations of liberty which are unauthorised by law. The settings where arbitrary deprivations of liberty are occurring include not just nursing homes but also hospitals, community-based settings and people's homes. It

is important to highlight that the Law Reform Commission recommended in 2012 that professional home care should be regulated and monitored by HIQA.³⁶ That sector continues to operate unsupervised.

Residential care

Although there is no legislation permitting deprivation of liberty in nursing homes or social care institutions, Sage Support and Advocacy Service states that, in their experience, 'many residential care settings for vulnerable adults and older people are commonly secured by key code locks as a safety mechanism, requiring residents to ask permission to leave the premises'.³⁷ Sage adds that '*de facto* detention can extend as far as limiting people's access to recreational grounds outside of the building, justified by an assessment that the resident is a "fall risk" or likely to "escape"'.³⁸ Sage's experience is similar to that reported internationally.³⁹

A recent University College Dublin (UCD) study of the experiences of 38 social workers supporting 788 older people in Ireland found that 'many older people with a mental health issue and/or cognitive impairment/dementia were excluded from the decision-making process [about their care] regardless of their level of functional capacity'.⁴⁰ The social workers reported that older people with dementia were particularly likely to be excluded due to '[a] status approach to dementia, where people were deemed to lack capacity', because their 'family didn't want them involved', because they had 'communication difficulties which impacted on their involvement' and/or because they had 'no opportunity to be involved'.⁴¹ Sage Support and Advocacy Service reports, likewise, that 'In Sage's experience it is not uncommon for a third party, often a next of kin, to be asked to sign the contract for care to consent to care although they may have no legal authority to make decisions for that person'.⁴²

The same UCD study found that the government's neglect of home care services means that older people who require assistance with basic needs are frequently forced to enter long-term residential care settings unnecessarily and prematurely.⁴³ One of the social workers interviewed by Donnelly et al is reported as stating: 'I could count on one hand the number of people who want to be in the facility. Many people eventually accept their situation—they see it as having no other choice'.⁴⁴ HIQA has reported, in relation to residential care settings, that 'many residents expressed a wish to be cared for in their own homes'.⁴⁵ This research echoes the finding of the UN Independent Expert on older persons' human rights, that institutional care 'can often take the form of forced institutionalization and compulsory placements, especially when no other form of care is available for the individual or when relatives are unable or unwilling to provide care'.⁴⁶

In addition to deprivation of liberty in long-term care settings, there are reports of older people in Ireland being detained in hospital and prevented from leaving because care professionals believe detention to be in the older person's best interests.⁴⁷ In July 2018, the Court of Appeal ruled that there was no power in Irish law for a hospital to detain an older woman experiencing dementia.⁴⁸

Restraint

Internationally, it is acknowledged that older people with dementia are frequently chemically restrained in care contexts.⁴⁹ It appears that Ireland is no different; Sage Support and Advocacy Service states that it 'has observed the use of sedation to manage behaviours for the convenience of staff and benefit of other people in congregated settings'⁵⁰ and that it believes that 'for a variety of reasons, some based on a lack of skill in addressing behaviours which are challenging, some based on ignorance of basic human rights and some based on expediency, it would seem that a culture has developed in which the use of chemical restraint has become normalised, i.e. it is being used as a first rather than a last resort'.⁵¹ Sage has also reported the use of sedating medication to encourage an older woman in hospital to 'adapt' to incontinence pads.⁵²

Chemical restraint is generally understood to involve the use of medication (usually anti-psychotic medication) as sedation or otherwise to control a person's behaviour.⁵³ According to Feng et al, the prevalence of anti-psychotic medication use to control the behaviour of older persons in nursing homes ranged in 2009 from 38% of nursing home residents in Finland, to 34% in Switzerland, to 27% in the United States to 11% in Hong Kong.⁵⁴ In the English context, Banerjee estimated in 2009 that between 30% and 50% of English residential and nursing home residents with dementia may have been receiving antipsychotic medication.⁵⁵ Banerjee notes that older people in England are also frequently chemically restrained in hospital⁵⁶ and by doctors in the community.⁵⁷

Banerjee states that anti-psychotic medication is prescribed mostly unlicensed (or 'off-label') to older people with dementia,⁵⁸ and he has estimated that at least 80% of people with dementia who are treated with anti-psychotic medication in England do not derive any benefit from it.⁵⁹ Banerjee also highlights substantial evidence that the use of such medication significantly increases the incidence of death and stroke.⁶⁰

Harding and Peel, Banerjee and the Austrian Ombudsman Board report that sedating medication is routinely administered to older people with dementia without their consent and often without providing information to relatives, representatives or carers.⁶¹ Banerjee and the Austrian Ombudsman Board note that prescribing physicians frequently fail to demonstrate that they have considered alternatives to anti-psychotic medication or that they have planned for reduction and cessation of the use of such medication on their patients.⁶² Feng et al argue that '[t]he persistent use of physical restraints and antipsychotics warrants additional monitoring and research' and that '[a] number of studies have demonstrated that a substantial reduction in restraint use, combined with meaningful alternatives, could result in no adverse outcomes or even in possible benefits'.⁶³

Regarding physical restraint in older people's nursing homes, Drennan et al note that '[t]he excessive use of restraints to control residents has been reported as the most frequently-occurring type of physical abuse in a number of studies undertaken in the US and Europe'.⁶⁴ In 2009, using a measurement common to 20 countries, Feng et al found the prevalence of physical restraint use in nursing homes to vary from 6% of residents in Switzerland, to 20% in Hong Kong, to over 31% in Canada.⁶⁵

Measures of physical restraint may be applied to older people in hospital, too. In a 2011 report on hospital care of older adults in English and Welsh hospitals, Tadd et al stated that 'throughout our observations on the acute wards...concerns for patient safety, particularly for confused patients or those with dementia, mean that staff spend a great deal of time preventing patients from moving out of their chairs'.⁶⁶ The report stated, further, that '[d]ue to concerns of potential risks to the system, of falls and other untoward incidents, the culture of acute care practice encourages patients to remain in their chairs and use bedpans or commodes rather than being helped to a toilet'⁶⁷ and that '[s]taff are also more likely to adopt habits of using bed rails when perhaps they are not necessary'.⁶⁸

(4) International practice

Several NPMs recognise older people's care homes as places of detention that require monitoring pursuant to OPCAT. The Austrian Ombudsman Board routinely inspects retirement and nursing homes and has made detailed recommendations in response to those visits.⁶⁹ The Dutch,⁷⁰ Kyrgyz,⁷¹ Serbian,⁷² Czech Republic⁷³ and Slovenian⁷⁴ NPMs have also carried out visits to institutions providing care to older persons. The Czech Republic's NPM has reported 'typical' practices of clients being prevented from leaving the facility or their room, the use of restraints, identity cards and insurance cards being taken away, and a requirement that clients give all of their income to the facility.⁷⁵ The Slovenian NPM, which has prioritised visits to retirement homes with 'secure' wards, has cited the use of electronic locks on wards, locks on corridors, rules that residents may only leave the premises if escorted, and the use of restraints.⁷⁶ Meanwhile the German National Agency for the Prevention of Torture states

that it considers residential care homes and nursing homes for older people to meet the definition of ‘places of detention’ under Article 4 OPCAT, but that its financial capacities are insufficient to allow it to visit these institutions.⁷⁷ The New Zealand NPMs have highlighted the need for community-based care settings to be recognised as loci of deprivations of liberty because older people may be prevented from leaving these premises.⁷⁸

In 2015, the UN Working Group on Arbitrary Detention highlighted in its report on New Zealand that it had met ‘older persons, some of them suffering from dementia, who were deprived of their liberty in rest homes and secure facilities’.⁷⁹ The Working Group called for a legal framework to protect older people from arbitrary detention in care settings.⁸⁰

The Law Commission of England and Wales, in its recent Consultation on Mental Capacity and Deprivation of Liberty, recognised that older people may experience deprivations of liberty in ‘supported living’ arrangements in the community,⁸¹ as well as in care homes. In the case of *Cheshire West*,⁸² the Supreme Court of the United Kingdom considered whether a deprivation of liberty could occur where an individual was being looked after by carers in a home-like environment in the community, in the absence of ECtHR jurisprudence on the point. The Supreme Court found that deprivations of liberty had occurred in both an individual foster home and in an assisted-living bungalow housing three residents, applying the ECtHR deprivation of liberty test.⁸³

¹ Rachel Murray and Elina Steinerte, *Ireland and the Optional Protocol to the UN Convention against Torture* (Irish Human Rights and Equality Commission 2017) 7.

² Rachel Murray and Elina Steinerte, *Ireland and the Optional Protocol to the UN Convention against Torture* (Irish Human Rights and Equality Commission 2017) 8.

³ Eoin O’Sullivan and Ian O’Donnell, *Coercive confinement in Ireland: Patients, prisoners and penitents* (Manchester University Press 2012) 7.

⁴ Ibid.

⁵ Article 1 OPCAT: The objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 10.

⁷ CAT General Comment No 2, ‘Implementation of article 2 by States Parties’ (23 November 2007) UN Doc CAT/C/GC/2 para 15.

⁸ SPT ‘Response to the Human Rights Commission’s request for interpretative guidance on Article 4.2 of the OPCAT’ (2015), cited in White, *He Ara Tika / A Pathway Forward: The scope and role of the Optional Protocol to the Convention against Torture (OPCAT) in relation to Aged care and disability residences and facilities* (New Zealand Human Rights Commission 2016),

https://www.hrc.co.nz/files/9314/7251/4226/He_Ara_Tika_Report_2016.pdf 19–20.

⁹ SPT, ‘Response to the Human Rights Commission’s request’ *ibid.*

¹⁰ Rachel Murray and Elina Steinerte, *Ireland and the Optional Protocol to the UN Convention against Torture* (Irish Human Rights and Equality Commission 2017) 21, citing Subcommittee on Prevention of Torture. Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. UN Doc CAT/OP/C/57/4 (2016) Annex, at para 3.

¹¹ Policy Paper ‘Deprivation of liberty’ as per Article 4 of OPCAT: the scope’, Human Rights Implementation Centre, Bristol, 2011. Available at: <http://www.bristol.ac.uk/law/research/centres-themes/hric/centreinformation/publications/policypapers.html>.

¹² See: Report on the Visit of the Subcommittee on Prevention of Torture to the Maldives; UN Doc CAT/OP/MDV/1 of 26 February 2009, Annex I.

¹³ Report on the Visit of the Subcommittee on Prevention of Torture to Mexico; UN Doc CAT/OP/MEX/1 of 31 May 2010, Annex I; also Report on the Visit of the Subcommittee on Prevention of Torture to Paraguay; UN Doc CAT/OP/PRY/1, Annex II.

¹⁴ Subcommittee on Prevention of Torture. Report on the visit to New Zealand, UN Doc CAT/OP/NZL/1 (2014), Annex II.

¹⁵ Ibid.

¹⁶ Ibid.

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- ¹⁷ Report on the Visit of the Subcommittee on Prevention of Torture to the Maldives; UN Doc CAT/OP/MDV/1 of 26 February 2009, Annex I.
- ¹⁸ UNGA, Report of the Special Rapporteur on torture, Nils Melzer, on extra-custodial use of force and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/72/178 (20 July 2017), <http://undocs.org/A/72/178> para 71.
- ¹⁹ Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) (2003) 42 ILM 26 (OPCAT) art 4(2).
- ²⁰ IACmHR, Inter-American Commission on Human Rights (IACmHR), Principles and Best Practices on the Protection of Persons Deprived of their Liberty in the Americas (13 March 2008) IACmHR Res 1/08, OEA/Ser/L/V/II.131 doc 26 para 38.
- ²¹ See *HL v United Kingdom* (2005) 40 EHRR 32 para 91; *DD v Lithuania*, App no 13469/06 (ECtHR, 14 February 2012) para 146.
- ²² United Nations Human Rights Committee, General Comment No 35, 'Article 9 (Liberty and security of person)' (16 December 2014) UN Doc CCPR/C/GC/35, para 6.
- ²³ See, for example, *Gillan and Quinton v United Kingdom* (2010) 50 EHRR 1105. Although the Court did not ultimately make a finding in relation to Article 5 in this case, it stated at para 57 that being stopped and searched for 30 minutes was 'indicative of a deprivation of liberty'. In *Novotka v Slovakia*, App no 47244/99 (ECtHR, 4 November 2004), the ECtHR found a deprivation of liberty where a person was 'brought to a police station against his will and was held there in a cell' for less than an hour (p7). See also *DD v Lithuania* App no 13469/06 (ECtHR, 14 February 2012) para 149; *Krupko and Others v Russia*, App no 26587/07 (ECtHR, 26 June 2014) para 36; *Foka v Turkey*, App no 28940/95 (ECtHR, 24 June 2008) para 78.
- ²⁴ See *Guzzardi v Italy* (1981) 3 EHRR 333 para 93.
- ²⁵ See *Guzzardi v Italy*, *ibid*; *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1 para 314; *Stanev v Bulgaria* (2012) 55 EHRR 22 para 115.
- ²⁶ See *Guzzardi v Italy*, *ibid* para 92; *Medvedyev and Others v France*, App no 3394/03 (ECtHR, 29 March 2010) para 73; *Creangă v Romania* (2013) 56 EHRR 11 para 91.
- ²⁷ See Harris and others, Law of the European Convention on Human Rights, *ibid* 290–91, citing *Guzzardi v Italy* (n 73); *HM v Switzerland* (n 52) para 45; *Storck v Germany* (2006) 43 EHRR 6 para 73.
- ²⁸ *HL v United Kingdom* (2005) 40 EHRR 32 para 92, citing *Ashingdane v the United Kingdom* (1985) 7 EHRR 528 para 41.
- ²⁹ *Stanev v Bulgaria* (2012) 55 EHRR 22.
- ³⁰ *ibid* paras 124–126.
- ³¹ *Kedzior v Poland*, App no 45026/07 (ECtHR, 16 October 2012) para 57. The Court referred also to *Stanev v Bulgaria* (2012) 55 EHRR 22 para 128.
- ³² *Stanev v Bulgaria* (2012) 55 EHRR 22 para 124.
- ³³ *ibid* para 125–26.
- ³⁴ *ibid* para 127; *DD v Lithuania* App no 13469/06 (ECtHR, 14 February 2012) para 146.
- ³⁵ *HL v United Kingdom* (2005) 40 EHRR 32.
- ³⁶ See <http://www.lawreform.ie/2012/law-reform-commission-publishes-report-on-professional-home-care.358.html>
- ³⁷ Sage Support and Advocacy service, 'Submission as part of the Consultation on Deprivation of Liberty: Safeguard Proposals' (9 March 2018), 7, http://sageadvocacy.ie/wp-content/uploads/2018/03/Sage_Submission-DOL-Safeguards-Proposals_09032018.pdf
- ³⁸ *Ibid*.
- ³⁹ See The Law Society of England and Wales, *Identifying a Deprivation of Liberty: A Practical Guide* (London, 2015) 73, 103–04; Northern Ireland Human Rights Commission (NIHRC), *In Defence of Dignity: The Human Rights of Older People in Nursing Homes* (Belfast, 2012) 62. See also See Michelle H Y Shum and others, 'Protecting the rights of Chinese older persons in need of residential care: the social justice and health equity dilemma in the People's Republic of China' in Helen Meenan, Nicola Rees and Israel Doron (eds), *Towards Human Rights in Residential Care for Older Persons: International Perspectives* (Routledge 2016) 79. Michael J V White, *A Pathway Forward: The Scope and Role of the Optional Protocol to the Convention Against Torture (OPCAT) in Relation to Aged Day Care and Disability Residences and Facilities* (New Zealand Human Rights Commission 2016) 22
- ⁴⁰ Sarah Donnelly and others, "'I'd Prefer to Stay at Home but I Don't Have a Choice" Meeting Older People's Preference for Care: Policy, but what about practice?' (University College Dublin 2016) 6.
- ⁴¹ *ibid*.
- ⁴² Sage Support and Advocacy service, 'Submission as part of the Consultation on Deprivation of Liberty: Safeguard Proposals' (9 March 2018), 5, http://sageadvocacy.ie/wp-content/uploads/2018/03/Sage_Submission-DOL-Safeguards-Proposals_09032018.pdf
- ⁴³ *ibid* 5.
- ⁴⁴ *ibid* 17.
- ⁴⁵ Health Information and Quality Authority, *Overview of 2016 HIQA regulation of social care and healthcare services* (2017) 31.
- ⁴⁶ UNHRC, 'Report of the Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte' (13 August 2015) UN Doc A/HRC/30/43 para 74, citing UN Economic and Social Council (ECOSOC), 'Report of the United Nations High Commissioner for Human Rights on the human rights situation of older persons' (20 April 2012) UN Doc E/2012/51 para 25. See also a 2012 study of 1,300 nursing home staff in Ireland (one of the largest studies undertaken internationally) that found that 73.4% of staff had been involved in arguments with residents about leaving the institution

setting: Jonathan Drennan and others, *Older People in Residential Care Settings: Results of a National Survey of Staff-Resident Interactions and Conflicts* (National Centre for the Protection of Older People, University College Dublin, 2012) x

⁴⁷ See, for example, Mary Carolan, 'Hospital acted unlawfully preventing elderly woman with dementia from leaving' *The Irish Times* (2 July 2018), <https://www.irishtimes.com/news/crime-and-law/courts/high-court/hospital-acted-unlawfully-preventing-elderly-woman-with-dementia-from-leaving-1.3551490>; Ann O'Loughlin, 'Supreme Court to hear appeal on whether woman, 93, is lawfully detained in hospital' *Irish Examiner* (3 October 2018), <https://www.irishexaminer.com/breakingnews/ireland/supreme-court-to-hear-appeal-on-whether-woman-93-is-lawfully-detained-in-hospital-873265.html>

⁴⁸ Mary Carolan, 'Hospital acted unlawfully preventing elderly woman with dementia from leaving' *The Irish Times* (2 July 2018), <https://www.irishtimes.com/news/crime-and-law/courts/high-court/hospital-acted-unlawfully-preventing-elderly-woman-with-dementia-from-leaving-1.3551490>.

⁴⁹ See Sube Banerjee, *The Use of Antipsychotic Medication for People with Dementia: Time for Action* (An independent report commissioned and funded by the United Kingdom Department of Health, 2009) 5–6. See also UNHRC, 'Report of the Independent Expert on the enjoyment of all human rights by older persons' (8 July 2016) UN Doc A/HRC/33/44 para 48.

⁵⁰ Sage Support and Advocacy service, 'Submission as part of the Consultation on Deprivation of Liberty: Safeguard Proposals' (9 March 2018), 8, http://sageadvocacy.ie/wp-content/uploads/2018/03/Sage_Submission-DOL-Safeguards-Proposals_09032018.pdf

⁵¹ Ibid.

⁵² See Sage Support and Advocacy Service, 'Older people being sedated for "convenience", senior consultant warns', Press Statement (28 July 2016) <www.thirdageireland.ie/sage/latest-news/press-releases/older-people-being-sedated-for-convenience-senior-consultant-warns> accessed 1 September 2017.

⁵³ See Sube Banerjee, *The Use of Antipsychotic Medication for People with Dementia: Time for Action* (An independent report commissioned and funded by the United Kingdom Department of Health, 2009) 11-13.

⁵⁴ Zhanlian Feng and others, 'Use of physical restraints and antipsychotic medications in nursing homes: a cross-national study' (2009) 24 *International Journal of Geriatric Psychiatry* 1110, 1113.

⁵⁵ Banerjee, *The use of antipsychotic medication for people with dementia* (n 28) 19, cited in Rosie Harding and Elizabeth Peel, "'He was like a zombie": Off-label Prescription of Antipsychotic Drugs in Dementia' (2013) 21 *Medical Law Review* 243.

⁵⁶ Banerjee, *The use of antipsychotic medication for people with dementia* (n 28) 35.

⁵⁷ *ibid* 30, 31, 35.

⁵⁸ *ibid* 18.

⁵⁹ *ibid* 6.

⁶⁰ *ibid* 25–28. See also Rosie Harding and Elizabeth Peel, "'He was like a zombie": Off-label Prescription of Antipsychotic Drugs in Dementia' (2013) 21 *Medical Law Review* 243, 245, citing Lon S Schneider and others, 'Risk of Death with Atypical Anti-psychotic Drug Treatment for Dementia: Meta-analysis of Randomized Placebo-controlled Trials' (2005) 294 *Journal of the American Medical Association* 1934.

⁶¹ See Austrian Ombudsman Board, 'Annual Report on the activities of the National Preventive Mechanism (International Version)' (2014) 84: 'The commission have uncovered cases where drugs were prescribed in the case of "restlessness" without a traceable diagnosis. In almost all of the incidents monitored in detail, the documentation in the nursing homes did not contain any indication whatsoever of a medical briefing or explanation or the patient's consent. In many cases, the staff did not even realise that giving sedatives with the purpose of tranquilising or immobilizing the person affected could be a measure depriving them of their liberty, that there were drugs with fewer side effects, etc. Accordingly, there were also no reports made to the residents 'representatives'. See also Banerjee, *The Use of Antipsychotic Medication for People with Dementia: Time for Action* (An independent report commissioned and funded by the United Kingdom Department of Health, 2009) 265; Harding and Elizabeth Peel, "'He was like a zombie": Off-label Prescription of Antipsychotic Drugs in Dementia' (2013) 21 *Medical Law Review* 265: 'In summary, the qualitative findings from these research projects highlight that carers overwhelmingly report negative experiences of the prescription of antipsychotic medication to people with dementia. In contrast to the severe adverse effects (e.g., stroke, death) of these drugs highlighted in clinical research, carers described a range of other harms experienced by the person with dementia that they care for. They described sedative effects of antipsychotics, leaving people with dementia like 'zombies' or 'catatonic'. Informal carers, including those with power of attorney, reported not being consulted prior to the use of antipsychotic medication nor given any information about the risk/benefit profile of the drugs prescribed. Several carers reported removing people with dementia from formal care settings because of failures of care associated with the prescription of antipsychotics' (citation omitted).

⁶² Banerjee, *The Use of Antipsychotic Medication for People with Dementia: Time for Action* (An independent report commissioned and funded by the United Kingdom Department of Health, 2009) 35; Austrian Ombudsman Board, 'Annual Report on the activities of the National Preventive Mechanism (International Version)' (2014) 83

⁶³ Zhanlian Feng and others, 'Use of physical restraints and antipsychotic medications in nursing homes: a cross national study' (2009) 24 *International Journal of Geriatric Psychiatry* 1117. Citing Elizabeth Capezuti and others, 'The Relationship Between Physical Restraint Removal and Falls and Injuries Among Nursing Home Residents (1998) 53(1) *Journal of Gerontology Series A Biological Sciences and Medical Sciences* M47; Richard R Neufeld and others, 'Restraint Reduction Reduces Serious Injuries Among Nursing Home Residents' (1999) 47(10) *Journal of the American Geriatrics Society* 1202; Laura Palmer and others, 'Reducing Inappropriate Restraint Use in Colorado's Long-term Care Facilities' (1999) 25(2) *Joint Commission Journal on Quality and Patient Safety* 78; Anna R Huizing and others, 'Short-term Effects of an Educational

Intervention on Physical Restraint Use: A Cluster Randomized Trial' (2006) 6(17) BMC Geriatrics
<<https://bmgeriatr.biomedcentral.com/articles/10.1186/1471-2318-6-17>> accessed 26 September 2017

⁶⁴ Jonathan Drennan and others, *Older People in Residential Care Settings: Results of a National Survey of Staff-Resident Interactions and Conflicts* (National Centre for the Protection of Older People, University College Dublin, 2012) 73, citing K Pillemer and D W Moore, 'Abuse of patients in nursing homes: Findings from a survey of staff (1989) 29(3) The Gerontologist 314; Thomas Goergen, 'A multi-method study on elder abuse and neglect in nursing homes' (2004) 6(3) Journal of Adult Protection 15; Radka Buzgová and Katerina Ivanová, 'Elder abuse and mistreatment in residential settings' (2009) 16(1) Nursing Ethics 110

⁶⁵ Zhanlian Feng and others, 'Use of physical restraints and antipsychotic medications in nursing homes: a cross national study' (2009) 24 international Journal of Geriatric Psychiatry 1110, 1113

⁶⁶ Win Tadd and others, *Dignity in Practice: An exploration of the care of older adults in acute NHS Trusts* (Cardiff University, University of Kent, 2011) 90-91

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ See, for example, Austrian Ombudsman Board, 'Annual Report on the activities of the National Preventive Mechanism (International Version)' (2014) 27.

⁷⁰ See, for example, The Netherlands, National Preventive Mechanisms, 'Second Annual Report: Monitoring Places of Detention' (2002) 17.

⁷¹ See, for example, Kyrgyz Republic, National Centre of the Kyrgyz Republic on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, '2014 Annual Report' (Bishkek, 2015) 5, 14, 17.

⁷² See, for example, Republic of Serbia, National Mechanism for Prevention of Torture, 'Annual Report' (Belgrade, 2016) 22, 23.

⁷³ See, for example, Czech Republic, Public Defender of Rights (Ombudsman), *Protection against ill-treatment: Report on the Activities of the Public Defender of Rights as the National Preventive Mechanism in 2014* (Brno, 2015) 17.

⁷⁴ See, for example, Republic of Slovenia, Human Rights Ombudsman of the Republic of Slovenia, 'Report of the Human Rights Ombudsman of the Republic of Slovenia on the Implementation of Duties and Powers of the National Preventive Mechanism in 2014' (Ljubljana, May 2015) 95–109.

⁷⁵ Czech Republic, *Protection against ill-treatment* (n 73).

⁷⁶ Republic of Slovenia, 'Report of the Human Rights Ombudsman' (n 74).

⁷⁷ Germany, National Agency for the Prevention of Torture, *Annual Report of the Federal Agency and the Joint Commission, 2013* (2014) 15; Germany, National Agency for the Prevention of Torture, *Annual Report 2014* (2015) 10.

⁷⁸ New Zealand Human Rights Commission (NZHRC), *Monitoring Places of Detention, Annual Report of activities under the Optional Protocol to the Convention against Torture (OPCAT), 1 July 2013 to 30 June 2014* (December 2014) 29.

⁷⁹ UNHRC, 'Report of the Working Group on Arbitrary Detention, Addendum, Mission to New Zealand' (6 July 2015) UN Doc A/HRC/30/36/Add.2 para 87. See also Michael J V White, *A Pathway Forward: The Scope and Role of the Optional Protocol to the Convention against Torture (OPCAT) in relation to Aged Care and Disability Residences and Facilities* (New Zealand Human Rights Commission 2016) 23:

The United Nations Working Group on Arbitrary Detention noted, following its visit to New Zealand, that '...despite the increasing phenomenon of older people staying in residential care, there is very little protection available to ensure that they are not arbitrarily deprived of their liberty'. The Working Group recommended that the Government develop a comprehensive human rights-based legal framework to govern the provision of services to older persons' (citing Working Group on Arbitrary Detention, 'Statement at the conclusion of its visit to New Zealand' (24 March–7 April 2014) <www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14563&LangID=E> accessed 31 August 2017).

⁸⁰ Ibid.

⁸¹ Law Commission of England and Wales (Law Commission), *Mental Capacity and Deprivation of Liberty: A Consultation Paper* (Law Comm No 372, 2015) paras 2.25-2.28.

⁸² *P v Cheshire West and Chester Council and P v Surrey County Council* [2014] UKSC 19; [2014] AC 896.

⁸³ Ibid. Hale LJ applied what she saw as the ECtHR test for deprivation of liberty—'whether a person is under the complete supervision and control of those caring for her and is not free to leave the place where she lives'—and relied, in respect of the woman in a foster home, on the fact that she 'would not be allowed out without supervision, or to see anyone whom they did not wish her to see, or to do things which they did not wish her to do' (para 52). Regarding the man living in the bungalow, Hale LJ viewed as determinative the trial judge's finding that he 'cannot go anywhere or do anything without ... support and assistance' and that his behavior necessitated 'at time physical restraint, and, when necessary, the intrusive procedure of inserting fingers into his mouth whilst he is being restrained' (para 51). The question of consent did not trouble Hale LJ; she concluded that it was 'probably the case' that the woman in foster care fell into the category of people whom the 'Strasbourg court accepts... are not capable of expressing a view either way' (para 55).

APPENDIX 2:

**ICCL Submission to the Department of Health for its Consultation on the
Deprivation of Liberty Safeguard Proposals**

16 March 2018



Submission to the Department of Health for its Consultation on the Deprivation of Liberty Safeguard Proposals

16 March 2018

Author: Maeve O'Rourke, Senior Research and Policy Officer, Irish Council for Civil Liberties

Contact: maeve.orourke@iccl.ie

SUMMARY

The ICCL welcomes the State's long-overdue effort to establish legal safeguards to protect the rights of individuals who are or may be deprived of their liberty in care settings. Ireland has a long history of failing to prevent widespread arbitrary detention and mistreatment of people who depend on others and/or the State for care. The past few decades have been marked by repeated investigations into, and political and public expressions of alarm about, the State's practice of supporting and allowing the care of adults and children in systems that are inadequately regulated, and in which there are weak or non-existent mechanisms for respecting individual rights and ensuring that complaints are heard and responded to. Successive governments have been pleaded with to provide sufficient alternatives to institutional care so that people are enabled to live independently and included in the community.

The Department of Health's [preliminary draft Heads of Bill on deprivation of liberty](#), which are intended to form Part 13 of the [Assisted Decision-Making \(Capacity\) Act 2015](#), are unfortunately seriously inadequate to ensure protection from arbitrary detention and mistreatment in care settings. The draft Heads of Bill fail to provide a number of safeguards which are necessary in order to comply with Ireland's obligations under numerous human rights instruments, including the Irish Constitution, the European Convention on Human Rights (ECHR), the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and other international treaties. In particular:

1. The draft Heads of Bill do not cover numerous care settings where people are routinely deprived of their liberty, including hospitals, community-based settings and the home.
2. In applying only to people deemed to lack capacity to make a decision about where to live, the draft Heads of Bill offer no protection from arbitrary detention to people who are deemed capable of making care-related decisions.
3. There are wholesale exemptions from the requirement for deprivations of liberty to be authorised by law, including for wards of court and where the person in charge of an institution 'reasonably believes' that a person's capacity is 'fluctuating' or that the person will die within a 'short period'.
4. The grounds for triggering an application to court to authorise a deprivation of liberty do not comply fully with the Assisted Decision-Making (Capacity) Act 2015 or the CRPD, and therefore allow for arbitrary detention.

5. There is no statutory right to the alternatives to institutional care or restraint which are required in order to avoid unnecessary (and therefore arbitrary) deprivations of liberty. These alternatives include home care, community-based services and psychology services.
6. There are no requirements in the draft legislation for care providers to obtain informed consent (with supported decision-making where necessary) to all restricting forms of care, which is a necessary safeguard to prevent arbitrary detention of all people in the care context.
7. There is no statutory right to the independent advocacy services which are necessary to ensure that the procedures intended to prevent arbitrary detention are in fact accessible to people who require care and effective.
8. Despite signing the instrument, Ireland still has not ratified the Optional Protocol to the United Nations Convention against Torture (OPCAT), which requires states to establish a National Preventive Mechanism to inspect and monitor all places of deprivation of liberty in order to prevent arbitrary detention or torture or ill-treatment.

The remainder of this submission supports these arguments by setting out the relevant human rights law that applies to the State in this area and relevant factual evidence.

A. The State is obliged to protect from arbitrary deprivation of liberty in the care context.

The right to liberty, otherwise understood as the right to freedom from arbitrary or unlawful detention, is enshrined in Article 40.4.1 of the Irish Constitution, which states:

'No citizen shall be deprived of his personal liberty save in accordance with law'.

The right to liberty and freedom from arbitrary detention is also enshrined in the ECHR,¹ the International Covenant on Civil and Political Rights (ICCPR),² the EU Charter of Fundamental Rights³ and the CRPD.⁴ The prohibition of arbitrary detention is of such importance that it is a universally binding rule of customary international law (meaning that it binds states even when they have not ratified a particular Convention outlawing it).⁵ According to numerous international treaties and customary international law, the prohibition of arbitrary detention does not allow for any exceptions. Thus, as the UN Working Group on Arbitrary Detention explains, 'a State can never claim that illegal, unjust, or unpredictable deprivation of liberty is necessary for the protection of a vital interest or proportionate to that end.'⁶

Not only is the State obliged to refrain from arbitrarily detaining people itself, but the State also has positive obligations to protect from arbitrary detention by non-State actors. In *Storck v Germany*, the European Court of Human Rights (ECtHR) held that states must 'take reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge'.⁷ In *Storck*, this meant the regulation of all public and private psychiatric institutions. The ECtHR explained that '[t]he State cannot completely absolve itself from its responsibility by delegating its obligations in this sphere to private bodies or individuals', and that 'private psychiatric institutions...in particular those where persons are held without a court order, need not only a licence, but a competent supervision on a regular basis of the justification of the confinement and medical treatment'.⁸

Due to the power imbalances that exist in the healthcare context (where people are dependent on others), the State's obligations to protect and defend human rights take on extra significance in this

arena. Care settings are places of heightened risk of arbitrary deprivation of liberty, torture or other ill-treatment, lack of respect for legal capacity and the right to informed decision-making, and unlawful interferences with privacy. These risks are even greater for people who fall into groups that have traditionally experienced discrimination and negative stereotyping.

A key aspect of ensuring that individuals are not arbitrarily deprived of their liberty in care settings is protection of the right to recognition of one's legal capacity, and the right to informed consent to care. The UN Special Rapporteur on torture and the UN Special Rapporteur on health have both highlighted that 'while informed consent is commonly enshrined in the legal framework at the national level, it is frequently compromised in the health-care setting. Structural inequalities, such as the power imbalance between doctors and patients, exacerbated by stigma and discrimination, result in individuals from certain groups being disproportionately vulnerable to having informed consent compromised'.⁹ The UN Committee on the Rights of Persons with Disabilities has stated that 'The denial of legal capacity to persons with disabilities has, in many cases, led to their being deprived of many fundamental rights, including...the right to liberty.'¹⁰

The UN Independent Expert on the enjoyment of all human rights by older persons has explained that 'Legal capacity has particular relevance for older persons regarding making fundamental decisions regarding their social and health care, in particular medical treatment. The respect for and the strengthening of older persons' autonomy in care settings means that they must be able to give consent to, refuse or choose an alternative medical intervention.'¹¹ Noting that 'Ageist attitudes still persist throughout the world, leading to discriminatory practices towards older persons, including in care settings',¹² the Independent Expert has stated that 'Safeguards to free and informed consent should be adopted through legislation, policies and administrative procedures in conformity with international and regional standards.'¹³

B. The State is on notice of arbitrary deprivation of liberty in a wide range of care settings.

There is evidence to show that arbitrary deprivation of liberty is widespread in care settings in Ireland and abroad, as explained below. The State is on notice that people are routinely experiencing deprivations of liberty which are unauthorised by law, and the State is therefore failing in its positive obligations under the human rights instruments mentioned above to prevent and protect from arbitrary detention. The settings where arbitrary deprivations of liberty are occurring go beyond those covered in the draft Heads of Bill and include hospitals, community-based settings and people's homes. It is important to highlight that the Law Reform Commission recommended in 2012 that professional home care should be regulated and monitored by HIQA.¹⁴ These heads of Bill fail to address the area of home care, continuing to leave that sector unsupervised in violation of the State's positive obligations to protect the human rights of those receiving care.

Residential care

Although there is no legislation permitting deprivation of liberty in nursing homes or social care institutions, Sage Support and Advocacy Service states that, in their experience, 'many residential care settings for vulnerable adults and older people are commonly secured by key code locks as a safety mechanism, requiring residents to ask permission to leave the premises'.¹⁵ Sage adds that '*de facto* detention can extend as far as limiting people's access to recreational grounds outside of the building,

justified by an assessment that the resident is a “fall risk” or likely to “escape”.¹⁶ Sage’s experience is similar to that reported internationally.¹⁷

A recent University College Dublin (UCD) study of the experiences of 38 social workers supporting 788 older people in Ireland found that ‘many older people with a mental health issue and/or cognitive impairment/dementia were excluded from the decision-making process [about their care] regardless of their level of functional capacity’.¹⁸ The social workers reported that older people with dementia were particularly likely to be excluded due to ‘[a] status approach to dementia, where people were deemed to lack capacity’, because their ‘family didn’t want them involved’, because they had ‘communication difficulties which impacted on their involvement’ and/or because they had ‘no opportunity to be involved’.¹⁹ Sage Support and Advocacy Service reports, likewise, that ‘In Sage’s experience it is not uncommon for a third party, often a next of kin, to be asked to sign the contract for care to consent to care although they may have no legal authority to make decisions for that person.’²⁰

The same UCD study found that the government’s neglect of home care services means that older people who require assistance with basic needs are frequently forced to enter long-term residential care settings unnecessarily and prematurely.²¹ One of the social workers interviewed by Donnelly et al is reported as stating: ‘I could count on one hand the number of people who want to be in the facility. Many people eventually accept their situation—they see it as having no other choice’.²² HIQA has reported, in relation to residential care settings, that ‘many residents expressed a wish to be cared for in their own homes.’²³ This research echoes the finding of the UN Independent Expert on older persons’ human rights, that institutional care ‘can often take the form of forced institutionalization and compulsory placements, especially when no other form of care is available for the individual or when relatives are unable or unwilling to provide care’.²⁴

Restraint

Internationally, it is acknowledged that older people with dementia are frequently chemically restrained in care contexts.²⁵ It appears that Ireland is no different; Sage Support and Advocacy Service states that it ‘has observed the use of sedation to manage behaviours for the convenience of staff and benefit of other people in congregated settings’²⁶ and that it believes that ‘for a variety of reasons, some based on a lack of skill in addressing behaviours which are challenging, some based on ignorance of basic human rights and some based on expediency, it would seem that a culture has developed in which the use of chemical restraint has become normalised, i.e. it is being used as a first rather than a last resort’.²⁷ Sage has also reported the use of sedating medication to encourage an older woman in hospital to ‘adapt’ to incontinence pads.²⁸

Chemical restraint is generally understood to involve the use of medication (usually anti-psychotic medication) as sedation or otherwise to control a person’s behaviour.²⁹ According to Feng et al, the prevalence of anti-psychotic medication use to control the behaviour of older persons in nursing homes ranged in 2009 from 38% of nursing home residents in Finland, to 34% in Switzerland, to 27% in the United States to 11% in Hong Kong.³⁰ In the English context, Banerjee estimated in 2009 that between 30% and 50% of English residential and nursing home residents with dementia may have been receiving antipsychotic medication.³¹ Banerjee notes that older people in England are also frequently chemically restrained in hospital³² and by doctors in the community.³³

Banerjee states that anti-psychotic medication is prescribed mostly unlicensed (or 'off-label') to older people with dementia,³⁴ and he has estimated that at least 80% of people with dementia who are treated with anti-psychotic medication in England do not derive any benefit from it.³⁵ Banerjee also highlights substantial evidence that the use of such medication significantly increases the incidence of death and stroke.³⁶

Harding and Peel, Banerjee and the Austrian Ombudsman Board report that sedating medication is routinely administered to older people with dementia without their consent and often without providing information to relatives, representatives or carers.³⁷ Banerjee and the Austrian Ombudsman Board note that prescribing physicians frequently fail to demonstrate that they have considered alternatives to anti-psychotic medication or that they have planned for reduction and cessation of the use of such medication on their patients.³⁸ Feng et al argue that '[t]he persistent use of physical restraints and antipsychotics warrants additional monitoring and research' and that '[a] number of studies have demonstrated that a substantial reduction in restraint use, combined with meaningful alternatives, could result in no adverse outcomes or even in possible benefits'.³⁹

Regarding physical restraint in older people's nursing homes, Drennan et al note that '[t]he excessive use of restraints to control residents has been reported as the most frequently-occurring type of physical abuse in a number of studies undertaken in the US and Europe'.⁴⁰ In 2009, using a measurement common to 20 countries, Feng et al found the prevalence of physical restraint use in nursing homes to vary from 6% of residents in Switzerland, to 20% in Hong Kong, to over 31% in Canada.⁴¹

Measures of physical restraint may be applied to older people in hospital, too. In a 2011 report on hospital care of older adults in English and Welsh hospitals, Tadd et al stated that 'throughout our observations on the acute wards...concerns for patient safety, particularly for confused patients or those with dementia, mean that staff spend a great deal of time preventing patients from moving out of their chairs'.⁴² The report stated, further, that '[d]ue to concerns of potential risks to the system, of falls and other untoward incidents, the culture of acute care practice encourages patients to remain in their chairs and use bedpans or commodes rather than being helped to a toilet'⁴³ and that '[s]taff are also more likely to adopt habits of using bed rails when perhaps they are not necessary'.⁴⁴

C. The definition of deprivation of liberty under human rights law is broader than the draft Heads of Bill recognise.

The definition of deprivation of liberty under human rights instruments is broad and does not, in principle, exclude any particular form of detention or restraint.

It is important to highlight that deprivation of liberty need not be caused by physical force. A person's inability to leave a place or escape a situation may also arise due to non-physical forms of coercion, including the exercise of power over a person who is dependent on another for care. The denial of a person's right to make decisions about how they are cared for may lead to them being deprived of their liberty if it means that a restricting or isolating form of care is imposed on them without their informed consent.

The draft Heads of Bill only cover a fraction of the forms of deprivation of liberty that are occurring in care settings in Ireland.

First, the draft legislation applies only to ‘relevant facilities’, which are explained to be nursing homes and care/residential accommodation in addition to approved centres under the Mental Health Act 2001.⁴⁵ In contravention of the State’s obligation to protect against arbitrary deprivation of liberty wherever it knows or ought to know of its occurrence, the Heads of Bill explicitly exclude institutions in which ‘the majority of persons being cared for and maintained are being treated for acute illness or provided with palliative care’ and institutions ‘primarily used for the provision of educational, cultural, recreational, leisure, social or physical activities’.⁴⁶ There is a need to recognise and protect against arbitrary deprivations of liberty in hospitals, step-down facilities, respite facilities, supported living accommodation and community/voluntary housing associations, and through home care provision and the administration of sedating medication in the community.

Second, the draft legislation excludes whole categories of people who are or may be arbitrarily deprived of their liberty from its remit. The Heads of Bill are explicitly stated not to apply to wards of court.⁴⁷ The Heads of Bill do not apply at all to people who are *not* ‘reasonably believed’ to ‘lack capacity to make a decision to live in the relevant facility’.⁴⁸ Furthermore, the Heads of Bill contain exemptions from the requirement to authorise deprivations of liberty where the person in charge of a relevant facility ‘reasonably believes’ that a person’s capacity is ‘fluctuating’⁴⁹ or that ‘there is a high probability of the person’s demise within a short period’.⁵⁰

Physical confinement

In some Article 5 ECHR jurisprudence, the ECtHR defines deprivation of liberty as ‘confinement in a particular restricted space for a length of time which is more than negligible’.⁵¹ The UN Human Rights Committee’s (HRC) definition under Article 9 ICCPR is similar: ‘more severe restriction of motion within a narrower space than mere interference with liberty of movement under article 12’.⁵² The HRC explains that ‘[l]iberty of person concerns freedom from confinement of the body’.⁵³ These definitions are particularly relevant to restraint practices.

A related, common definition of deprivation of liberty under international human rights law is lack of freedom to leave a place at will. Article 4(2) OPCAT defines deprivation of liberty as ‘any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority’.⁵⁴ According to the Inter-American Commission on Human Rights, ‘the concept of “deprivation of liberty” encompasses: [a]ny form of detention, imprisonment, institutionalization, or custody of a person in a public or private institution which that person is not permitted to leave at will’.⁵⁵ The ECtHR finds the objective aspect of a deprivation of liberty to exist where a person is ‘under continuous supervision and control and not free to leave’.⁵⁶ The HRC, meanwhile, has held that a person will not be deprived of their liberty if they ‘know that they are free to leave at any time’.⁵⁷

Coercion

Physical confinement or lack of physical freedom to leave a place at will is not the only established conception of deprivation of liberty in international human rights law. The ECtHR has held that an ‘element of coercion’ is indicative of a deprivation of liberty.⁵⁸ The Court rejects the notion that deprivation of liberty must take any particular form.⁵⁹ It holds that what matters is the ‘degree or intensity’ of the restriction on movement⁶⁰ and the ‘concrete situation’ of the person concerned having regard to the ‘type, duration, effects and manner of implementation of the measure in question’, among other factors.⁶¹

The ECtHR has found deprivations of liberty to exist in the mental health care context even where premises are unlocked⁶² and where a person has previously gone on outings or visits away from the institution.⁶³ Individuals have been found to be ‘not free to leave’ where permission to leave the premises is required,⁶⁴ where a person’s guardian is required to consent to the person leaving,⁶⁵ where there are restrictions as to the length of time and destination to which a person may go,⁶⁶ where an institution restricts access to a person’s identity documents or finances, which would enable them to travel,⁶⁷ where a person is returned—for example, by the police—when they leave,⁶⁸ or where it is clear that a person would be prevented from leaving if they tried or returned to the institution if they did.⁶⁹

The ICCL argues that a deprivation of liberty can occur where a person who is dependent on others for care is unable to avoid or escape a form of restricting or isolating care because they have been denied the opportunity to make their own decisions about the care that they receive. The former United Nations Special Rapporteur on torture, Manfred Nowak, highlighted in a 2008 report to the UN Human Rights Council that people with disabilities are often rendered ‘powerless’ when their ‘exercise of decision-making and legal capacity is taken away by discriminatory laws or practices and given to others’.⁷⁰

D. Deprivations of liberty are not permissible on the basis of a disability, and people with disabilities must be enabled to exercise their legal capacity.

The Heads of Bill fail to meet the State’s requirement under the CRPD to protect against arbitrary detention because the grounds upon which a person may be deprived of their liberty do not fully correspond to Articles 12 and 14 CRPD, nor indeed the Assisted Decision-Making (Capacity) Act 2015 (ADM Act). The draft legislation evinces a medical, substitute decision-making approach to determining whether a person has sufficient capacity to decide where to live, where a decision about their living arrangements has not already been made through the full and informed consent of the person or in accordance with the ADM Act.

Under the draft legislation, the trigger for the process of authorising (or not) a deprivation of liberty where a decision has not already been made through the full and informed consent of a person or through the ADM Act is that a healthcare professional or the person in charge of an institution ‘reasonably believes’ that the person lacks sufficient capacity to decide where to live. As Sage highlight in their submission on the draft Heads of Bill, the draft legislation ‘does not enable a process of capacity building with the person and supported decision-making in accordance with the ADM Act 2015 prior to the healthcare professional determining the person lacks capacity and triggering an application to court if an appointed decision-making role is not in place’.⁷¹

Disability cannot justify a deprivation of liberty and legal capacity must be respected

Article 14 CRPD provides that ‘the existence of a disability shall in no case justify a deprivation of liberty’. Article 14 CRPD corresponds with a well-established principle under Article 9 ICCPR and customary international law that detention on discriminatory grounds is in principle arbitrary.⁷²

Article 14 CRPD requires, according to the UN Office of the High Commissioner for Human Rights (OHCHR), that ‘the legal grounds upon which restriction of liberty is determined must be de-linked from the disability and neutrally defined so as to apply to all persons on an equal basis.’⁷³

In relation to people who have or are perceived to have a disability, Article 12 CRPD requires States to recognise that ‘persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life’. States are required by Article 12 to ‘take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity’. The CRPD Committee has explained that where a person is detained in a care context without their consent and on the basis of substitute or ‘best interests’ decision-making (rather than making their own decision, with support where necessary to express their will and preferences), this amounts to arbitrary detention.⁷⁴

E. Detention will be arbitrary where the law does not contain sufficient safeguards to protect individuals’ rights.

A deprivation of liberty, including a measure of restraint, will only be lawful if it happens in accordance with procedures established in domestic law which are fair and protect against arbitrariness.⁷⁵

Regarding the first criterion – that a deprivation of liberty must be ‘in accordance with a procedure prescribed by law’ – the ECtHR has held that:

- (1) There must be a clear and precise legal basis in domestic law for the deprivation of liberty, over the entire period of detention;⁷⁶ and
- (2) The grounds and conditions for depriving people of their liberty must be clearly defined, and the law must be foreseeable in its application.⁷⁷

Regarding the second criterion – that the law must protect against arbitrariness – this criterion has been described as being ‘broader than unlawfulness, concerning as it does avoidance of abuse of power and the requirement of compliance with the rule of law broadly defined.’⁷⁸ International courts and other human rights actors have clarified some of the basic elements of laws that adequately protect against arbitrariness. The ICCL argues that the draft Heads of Bill fail to meet several of these basic standards, for the following reasons.

The law does not sufficiently provide for independent and impartial authorisation and review of deprivations of liberty

In order to avoid arbitrariness, the law must provide for independent authorisation and review of deprivations of liberty. As mentioned above, the draft Heads of Bill exempt whole categories of people who are or may be deprived of their liberty in care settings from the protection of the law, thereby depriving them of the opportunity of independent authorisation or review of their detention. Even where the draft legislation appears to provide protection, much of it is dependent upon the initiative of the person in charge of a care institution who cannot be considered independent.

The UN Subcommittee on Prevention of Torture (UN SPT) states that ‘Involuntary confinement of any person is a form of arbitrary detention unless it is ordered by a competent and independent judicial authority through due process, which must include close and constant review.’⁷⁹ The ECtHR jurisprudence, on the other hand, suggests that a deprivation of liberty need not have been ordered by a Court.⁸⁰ The CPT accepts this, although it notes that the Council of Europe Parliamentary Assembly recommended in 1994 that decisions regarding involuntary placement in care settings be taken by a

judge.⁸¹ Regardless of the decision-maker, the CPT states that ‘the procedure by which involuntary placement is decided should offer guarantees of independence and impartiality’.⁸²

Article 5 ECHR requires that everyone who is deprived of their liberty is informed promptly of the reasons for the action taken. Those reasons must clarify for the person concerned the legal and factual grounds for the deprivation of liberty, so that the person can apply to a court to challenge the lawfulness of the arrest or detention.⁸³

Regarding restraint, the CPT requires that ‘every single case of resort to means of restraint be authorised by a doctor or, at least, brought without delay to a doctor’s attention in order to seek approval for the measure.’⁸⁴ The CPT contrasts this to the frequent practice of ‘prior blanket consent [being] given by the doctor, instead of decisions being taken on a case by case (situation by situation) basis.’⁸⁵ The CPT stresses the importance of ‘detailed and accurate recording of instances of restraint’⁸⁶ and recommends that a specific register be established for this purpose, which individuals should have access to along with their medical file.⁸⁷

The UN SPT states: ‘Restrains, physical or pharmacological, are forms of deprivation of liberty and, subject to all the safeguards and procedures applicable to deprivation of liberty, should be considered only as measures of last resort for safety reasons. The State must take into account, however, that there is an inherently high potential for abuse of such restraints and as such these must be applied, if at all, within a strict framework that sets out the criteria and duration for their use, as well as procedures related to supervision, monitoring, review and appeal. Restraints must never be used for the convenience of staff, next of kin or others. Any restraint must be recorded precisely and be subject to administrative accountability, including through independent complaint mechanisms and judicial review.’⁸⁸

Article 9 ICCPR, Article 5 ECHR and the Irish Constitution guarantee the right of habeas corpus for any person deprived of their liberty – that is, the right to prompt judicial review of the procedural and substantive lawfulness of detention and release if such detention is found to be unlawful or arbitrary.⁸⁹ The HRC states that those deprived of liberty in health and social care contexts ‘must be assisted in obtaining access to... initial and periodic judicial review of the lawfulness of the detention, and to prevent conditions incompatible with the Covenant’.⁹⁰ The ECtHR, likewise, has held that those deprived of liberty in care institutions are entitled ‘to take proceedings at reasonable intervals before a court to put in issue the ‘lawfulness’ – within the meaning of the Convention – of his detention’.⁹¹ The ECtHR has refrained from specifying the form(s) of judicial review which would satisfy Article 5(4) ECHR,⁹² but has held that persons deprived of their liberty must actually have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation.⁹³

HRC and ECtHR jurisprudence, and the CPT Standards, provide that persons deprived of their liberty in the health and social care context also have a right to automatic, regular review of the necessity (and proportionality) of their detention.⁹⁴

The law provides inadequate safeguards to ensure that only necessary and proportionate deprivations of liberty are authorised

The law must ensure that any deprivation of liberty for care purposes is only imposed where strictly necessary and proportionate. It is now well recognised that international human rights law prohibits

deprivation of liberty for reasons of treatment or ongoing care in relation to a mental illness or disability. Furthermore, the ECtHR prohibits deprivation of liberty for the purpose of providing physical care.

The State's failure to create statutory rights to community-based forms of care gives rise to a real risk of unnecessary and disproportionate deprivations of liberty in care settings. As discussed above, it appears that people in Ireland are frequently being forced into institutions against their will due to the unavailability of home- and other community-based forms of care. It also appears that chemical restraint and other forms of restraint are being practised due to a lack of staff training and resources in institutional settings, and due to a lack of investment in non-pharmacological, positive behaviour support services (e.g. for people experiencing behavioural symptoms of dementia).

As a result of Article 14 CRPD, the UN Human Rights Committee's General Comment 35 states that '[t]he existence of a disability shall not in itself justify a deprivation of liberty but rather any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the individual in question from serious harm or preventing injury to others.'⁹⁵ This formulation has been echoed by the former UN Special Rapporteur on Torture, who contends that, pursuant to Article 14 CRPD, deprivation of liberty can only be justified when the person is 'a danger to him or herself or others' or 'in emergency circumstances', and 'in both cases for a limited time and with limited means, strictly sufficient only to prevent the risk of major harm'.⁹⁶

As to the question of what is necessary and proportionate for the purpose of protecting from serious or major harm to self or injury to others, the HRC states that the deprivation of liberty must involve 'programmes of treatment and rehabilitation that serve the purposes that are asserted to justify the detention',⁹⁷ that it 'must be applied only as a measure of last resort and for the shortest appropriate period of time',⁹⁸ that the procedures surrounding it 'should ensure respect for the views of the individual and ensure that any representative genuinely represents and defends the wishes and interests of the individual',⁹⁹ and that 'States parties should make available adequate community-based or alternative social-care services for persons with...disabilities, in order to provide less restrictive alternatives to confinement'.¹⁰⁰ The UN Subcommittee on Prevention of Torture explains that 'States should develop and make available alternatives to confinement such as community-based treatment programmes, which are particularly appropriate for avoiding hospitalization and for providing care for persons upon their discharge from hospitals.'¹⁰¹

The law does not adequately protect the right of all adults to make decisions regarding restricting forms of care

As discussed above, it is widely recognised that denial of the right to make one's own decisions about care can easily lead to arbitrary detention. Article 12 CRPD explicitly requires States to ensure that the right to legal capacity is respected. The UN Special Rapporteur on Torture,¹⁰² the UN Subcommittee on Prevention of Torture (UN SPT)¹⁰³ and UN Independent Expert on older persons' human rights¹⁰⁴ (among others) have all recognised the particular obligation on States to ensure that legal capacity is respected in the care context.

The draft Heads of Bill fail to require informed consent to all forms of restricting or isolating care as a mechanism of preventing arbitrary detention. The draft legislation is silent on the procedures that should apply *whenever* a person enters institutional care or experiences another form of care that will

limit their freedom of movement. The ICCL argues that this gap in the draft Heads of Bill constitutes a failure to ensure that the law effectively protects against arbitrary detention.

The UN SPT explains that it 'has observed situations in which State agents represent confinement as voluntary and present registries or legal decisions to that effect. It is concerned that in some of those instances those safeguards were practised as a mere formality. Confinement and institutionalization are voluntary only when the person concerned has decided on it upon informed consent and retains the ability to exit the institution or facility.'¹⁰⁵ The UN SPT adds: 'Informed consent is a decision made voluntarily on the basis of comprehensible and sufficient information regarding potential effects and side effects of treatment and the likely results of refraining from treatment. Informed consent is fundamental to respecting an individuals' autonomy, self-determination and human dignity.'¹⁰⁶

The UN Independent Expert on older persons' human rights points out that 'Ageist attitudes still persist throughout the world, leading to discriminatory practices towards older persons, including in care settings.'¹⁰⁷ She states that 'Legal capacity has particular relevance for older persons regarding making fundamental decisions regarding their social and health care, in particular medical treatment. The respect for and the strengthening of older persons' autonomy in care settings means that they must be able to give consent to, refuse or choose an alternative medical intervention.'¹⁰⁸ The Independent Expert adds:

The institutionalization of care, while it can be the result of an autonomous decision of a person as he or she becomes older, can often take the form of forced institutionalization and compulsory placements, especially when no other forms of care are available for the individual or when relatives are unable or unwilling to provide care...¹⁰⁹ When proper legal and institutional mechanisms and procedures are in place in care settings, thus ensuring freedom of choice and informed consent, older persons in need of care can lead a life with dignity. It is therefore crucial to ensure older persons' autonomy, in particular when it comes to any decision-making affecting their care.¹¹⁰

The law fails to provide a right to independent advocacy services, which are necessary in order to make any safeguards accessible and effective

Due to the vulnerabilities that people experience when they are in need of care, there is a clear need for statutory rights to independent advocacy services in the care context in Ireland. Independent advocacy is one means of ensuring that all of the safeguards that in principle protect from arbitrary detention are in fact accessible to people who are in need of care, and are effective.

The CRPD requires that independent advocacy support is available where necessary to ensure that people with disabilities are in a position to exercise their rights. States are required by Article 12 CRPD to 'take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity'. The CRPD Committee has explained that "'Support" is a broad term that encompasses both informal and formal support arrangements, of varying types and intensity. For example, persons with disabilities may choose one or more trusted support persons to assist them in exercising their legal capacity for certain types of decisions, or may call on other forms of support, such as peer support, advocacy (including self-advocacy support), or assistance with communication.'¹¹¹ The CRPD Committee has also explained that 'All persons with disabilities have the right to engage in advance planning and should be given the opportunity to do so on an equal basis

with others...Support should be provided to a person, where desired, to complete an advance planning process.¹¹²

Regarding older people who do not have disabilities, access to independent advocacy services is also crucial to ensuring that their rights are respected in the care context. The UN Independent Expert on older persons' human rights states that 'Effective safeguards for ensuring the autonomy of older persons should be developed and implemented to ensure the respect of the rights, wishes and preferences of older persons and to avoid undue interference.'¹¹³ Harding argues that formal complaints mechanisms in older people's care settings have proven ineffective, because they do not respond, for example, to informal carers' inability to pursue complaints at the same time as caring for a relative, or older people's worries about retribution by those upon whom they are dependent.¹¹⁴ In this vein, Charpentier and Soulières argue that, instead of formal and impersonal complaints systems, monitoring needs to be based on 'meaningful social relationships that exist in a context of proximity'.¹¹⁵ Meanwhile, the former Special Rapporteur on health, Anand Grover, has stated that ensuring that older people's right to informed consent requires a 'customized, individualized' approach, that could be assisted 'possibly through peer networks'.¹¹⁶

F. Ireland needs to ratify the Optional Protocol to the Convention against Torture (OPCAT)

Along with the Irish Human Rights and Equality Commission¹¹⁷ and numerous other organisations,¹¹⁸ the ICCL has been calling for many years for Ireland to ratify the Optional Protocol to the UN Convention against Torture (OPCAT). Ireland signed the OPCAT on 2 October 2007 but never ratified the instrument. The OPCAT requires member states to establish a National Preventive Mechanism, which is an independent body that conducts inspections (which may be unannounced) and reports on the conditions in any institution where people may be deprived of their liberty in the state.

It is an internationally recognised fact that people who are deprived of their liberty, including in care institutions, are at heightened risk of experiencing torture or other cruel, inhuman or degrading treatment due to the imbalance of power in the situation. The State is obliged under the rule against torture and ill-treatment (which is protected by the Irish Constitution, the ECHR and numerous other international human rights treaties to which Ireland is a party) to ensure that individuals who are deprived of their liberty receive respectful treatment and the basic resources necessary to protect their dignity. The work of a National Preventive Mechanism is essential to ensure that the human rights of people who are deprived of their liberty are protected and fulfilled. The vast majority of countries in Europe have ratified the OPCAT and established a National Preventive Mechanism, and Ireland's continuing failure to do so increases the risk of violations of the rights of people in vulnerable situations.

It is essential that the State ratifies the OPCAT immediately and sets about establishing a National Preventive Mechanism that encompasses all places where individuals may be, and are, deprived of their liberty. The text of OPCAT makes clear that the State does not need to have its National Preventive Mechanism in place before ratifying the instrument, but can seek advice and assistance from the UN Subcommittee for the Prevention of Torture in establishing the NPM thereafter.¹¹⁹ The development of an NPM should be informed by inclusive consultation with civil society and all those involved in and affected by deprivation of liberty.

In 2017, the UN Committee against Torture noted that 'existing bodies (the Inspector of Prisons, the Prison Visiting Committees, HIQA and the Inspector of Mental Health) do not systematically carry out

visits to all places of deprivation of liberty such as Garda stations, residential care centres for people with disabilities, nursing homes for the elderly and other care settings'.¹²⁰ The Committee recommended that Ireland should '(a) Immediately ratify the Optional Protocol and establish a national preventive mechanism, ensuring that this body has access to all places of deprivation of liberty in all settings; (b) Ensure that existing bodies which currently monitor places of detention as well as civil society organizations are allowed to make repeated and unannounced visits to all places of deprivation of liberty, publish reports and have the State party act on their recommendations.'¹²¹

CONCLUSION

The ICCL looks forward to engaging with the Department of Health further as this legislation is revised and, if necessary, further legislation is drafted in order to ensure that people who are receiving care are effectively protected from arbitrary detention and from the additional mistreatment that stems from it.

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- Many thanks are also due to Aoife Masterson for her research assistance.

¹ Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 United Nations Treaty Series 222 (ECHR), Article 5.

² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 9.

³ Charter of Fundamental Rights of the European Union 2000 OJ (C 364) 1 (EU Charter), Article 6.

⁴ Convention on the Rights of Persons with Disabilities (adopted 24 January 2007, entered into force 3 May 2008) (2007) 46 ILM 441 (CRPD), Article 14.

⁵ See United Nations General Assembly, Report of the Working Group on Arbitrary Detention, UN Doc A/HRC/22/44 (24 December 2012), paras 41 – 52, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/189/35/PDF/G1218935.pdf?OpenElement>

⁶ Ibid, para 48.

⁷ *Storck v Germany* (2006) 43 EHRR 6, para 102.

⁸ Ibid para 103.

⁹ UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E Mendez, UN Doc A/HRC/22/53 (1 February 2013), para 29, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf

¹⁰ UN Committee on the Rights of Persons with Disabilities, General Comment No 1 (2014): Equal recognition before the law, UN Doc CRPD/C/GC/1 (19 May 2014), para 8, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>

¹¹ UN Human Rights Council, Report of the Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte, UN Doc A/HRC/30/43 (13 August 2015), para 51.

¹² Ibid para 18.

¹³ Ibid para 101.

¹⁴ See <http://www.lawreform.ie/2012/law-reform-commission-publishes-report-on-professional-home-care.358.html>

¹⁵ Sage Support and Advocacy service, 'Submission as part of the Consultation on Deprivation of Liberty: Safeguard Proposals' (9 March 2018), 7, http://sageadvocacy.ie/wp-content/uploads/2018/03/Sage_Submission-DOL-Safeguards-Proposals_09032018.pdf

¹⁶ Ibid.

¹⁷ See The Law Society of England and Wales, *Identifying a Deprivation of Liberty: A Practical Guide* (London, 2015) 73, 103 – 04; Northern Ireland Human Rights Commission (NIHRC), *In Defence of Dignity: The Human Rights of Older People in Nursing Homes* (Belfast, 2012) 62. See also See Michelle H Y Shum and others, 'Protecting the rights of Chinese older persons in need of residential care: the social justice and health equity dilemma in the People's Republic of China' in Helen Meenan, Nicola Rees and Israel Doron (eds), *Towards Human Rights in Residential Care for Older Persons: International Perspectives* (Routledge 2016) 79. Michael J V White, *A Pathway Forward: The Scope and Role of the Optional Protocol to the Convention Against Torture (OPCAT) in Relation to Aged Day Care and Disability Residences and Facilities* (New Zealand Human Rights Commission 2016) 22

¹⁸ Sarah Donnelly and others, "'I'd Prefer to Stay at Home but I Don't Have a Choice" Meeting Older People's Preference for Care: Policy, but what about practice?' (University College Dublin 2016) 6.

¹⁹ *ibid.*

²⁰ Sage Support and Advocacy service, 'Submission as part of the Consultation on Deprivation of Liberty: Safeguard Proposals' (9 March 2018), 5, http://sageadvocacy.ie/wp-content/uploads/2018/03/Sage_Submission-DOL-Safeguards-Proposals_09032018.pdf

²¹ *ibid.* 5.

²² *ibid.* 17.

²³ Health Information and Quality Authority, *Overview of 2016 HIQA regulation of social care and healthcare services* (2017) 31.

²⁴ UNHRC, 'Report of the Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte' (13 August 2015) UN Doc A/HRC/30/43 para 74, citing UN Economic and Social Council (ECOSOC), 'Report of the United Nations High Commissioner for Human Rights on the human rights situation of older persons' (20 April 2012) UN Doc E/2012/51 para 25. See also a 2012 study of 1,300 nursing home staff in Ireland (one of the largest studies undertaken internationally) that found that 73.4% of staff had been involved in arguments with residents about leaving the institution setting: Jonathan Drennan and others, *Older People in Residential Care Settings: Results of a National Survey of Staff-Resident Interactions and Conflicts* (National Centre for the Protection of Older People, University College Dublin, 2012) x

²⁵ See Sube Banerjee, *The Use of Antipsychotic Medication for People with Dementia: Time for Action* (An independent report commissioned and funded by the United Kingdom Department of Health, 2009) 5–6. See also UNHRC, 'Report of the Independent Expert on the enjoyment of all human rights by older persons' (8 July 2016) UN Doc A/HRC/33/44 para 48.

²⁶ Sage Support and Advocacy service, 'Submission as part of the Consultation on Deprivation of Liberty: Safeguard Proposals' (9 March 2018), 8, http://sageadvocacy.ie/wp-content/uploads/2018/03/Sage_Submission-DOL-Safeguards-Proposals_09032018.pdf

²⁷ *Ibid.*

²⁸ See Sage Support and Advocacy Service, 'Older people being sedated for "convenience", senior consultant warns', Press Statement (28 July 2016) <www.thirdageireland.ie/sage/latest-news/press-releases/older-people-being-sedated-for-convenience-senior-consultant-warns> accessed 1 September 2017.

²⁹ See Sube Banerjee, *The Use of Antipsychotic Medication for People with Dementia: Time for Action* (An independent report commissioned and funded by the United Kingdom Department of Health, 2009) 11-13.

³⁰ Feng and others, 'Use of physical restraints and antipsychotic medications in nursing homes' (n **Error! Bookmark not defined.**) 1113.

³¹ Banerjee, *The use of antipsychotic medication for people with dementia* (n 28) 19, cited in Rosie Harding and Elizabeth Peel, "'He was like a zombie": Off-label Prescription of Antipsychotic Drugs in Dementia' (2013) 21 *Medical Law Review* 243.

³² Banerjee, *The use of antipsychotic medication for people with dementia* (n 28) 35.

³³ *ibid.* 30, 31, 35.

³⁴ *ibid.* 18.

³⁵ *ibid.* 6.

³⁶ *ibid.* 25–28. See also Rosie Harding and Elizabeth Peel, "'He was like a zombie": Off-label Prescription of Antipsychotic Drugs in Dementia' (2013) 21 *Medical Law Review* 243, 245, citing Lon S Schneider and others, 'Risk of Death with Atypical Anti-psychotic Drug Treatment for Dementia: Meta-analysis of Randomized Placebo-controlled Trials' (2005) 294 *Journal of the American Medical Association* 1934.

³⁷ See Austrian Ombudsman Board, 'Annual Report on the activities of the National Preventive Mechanism (International Version)' (2014) 84: 'The commission have uncovered cases where drugs were prescribed in the case of "restlessness" without a traceable diagnosis. In almost all of the incidents monitored in detail, the documentation in the nursing homes did not contain any indication whatsoever of a medical briefing or explanation or the patient's consent. In many cases, the staff did not even realise that giving sedatives with the purpose of tranquilising or immobilizing the person affected could be a measure depriving them of their liberty, that there were drugs with fewer side effects, etc. Accordingly, there were also no reports made to the residents 'representatives'. See also Banerjee, *The Use of Antipsychotic Medication for People with Dementia: Time for Action* (An independent report commissioned and funded by the United Kingdom Department of Health, 2009) 265; Harding and Elizabeth Peel, "'He was like a zombie": Off-label Prescription of Antipsychotic Drugs in Dementia' (2013) 21 *Medical Law Review* 265: 'In summary, the qualitative findings from these research projects highlight that carers overwhelmingly report negative experiences of the prescription of antipsychotic medication to people with dementia. In contrast to the severe adverse effects (e.g., stroke, death) of these drugs highlighted in clinical research, carers described a range of other harms experienced by the person with dementia that they care for. They described sedative effects of antipsychotics, leaving people with dementia like 'zombies' or 'catatonic'. Informal carers, including those with power of attorney, reported not being consulted prior to the use of antipsychotic medication nor given any information about the risk/benefit profile of the drugs prescribed. Several carers reported removing people with dementia from formal care settings because of failures of care associated with the prescription of antipsychotics' (citation omitted).

³⁸ Banerjee, *The Use of Antipsychotic Medication for People with Dementia: Time for Action* (An independent report commissioned and funded by the United Kingdom Department of Health, 2009) 35; Austrian Ombudsman Board, 'Annual Report on the activities of the National Preventive Mechanism (International Version)' (2014) 83

³⁹ Zhanlian Feng and others, 'Use of physical restraints and antipsychotic medications in nursing homes: a cross national study' (2009) 24 *International Journal of Geriatric Psychiatry* 1117. Citing Elizabeth Capezuti and others, 'The Relationship Between Physical Restraint Removal and Falls and Injuries Among Nursing Home Residents (1998) 53(1) *Journal of*

Gerontology Series A Biological Sciences and Medical Sciences M47; Richard R Neufeld and others, 'Restraint Reduction Reduces Serious Injuries Among Nursing Home Residents' (1999) 47(10) *Journal of the American Geriatrics Society* 1202; Laura Palmer and others, 'Reducing Inappropriate Restraint Use in Colorado's Long-term Care Facilities' (1999) 25(2) *Joint Commission Journal on Quality and Patient Safety* 78; Anna R Huizing and others, 'Short-term Effects of an Educational Intervention on Physical Restraint Use: A Cluster Randomized Trial' (2006) 6(17) *BMC Geriatrics*

<<https://bmcgeriatr.biomedcentral.com/articles/10.1186/1471-2318-6-17>> accessed 26 September 2017

⁴⁰ Jonathan Drennan and others, *Older People in Residential Care Settings: Results of a National Survey of Staff-Resident Interactions and Conflicts* (National Centre for the Protection of Older People, University College Dublin, 2012) 73, citing K Pillemer and D W Moore, 'Abuse of patients in nursing homes: Findings from a survey of staff (1989) 29(3) *The Gerontologist* 314; Thomas Goergen, 'A multi-method study on elder abuse and neglect in nursing homes' (2004) 6(3) *Journal of Adult Protection* 15; Radka Buzgová and Katerina Ivanová, 'Elder abuse and mistreatment in residential settings' (2009) 16(1) *Nursing Ethics* 110

⁴¹ Zhanlian Feng and others, 'Use of physical restraints and antipsychotic medications in nursing homes: a cross national study' (2009) 24 *international Journal of Geriatric Psychiatry* 1110, 1113

⁴² Win Tadd and others, *Dignity in Practice: An exploration of the care of older adults in acute NHS Trusts* (Cardiff University, University of Kent, 2011) 90-91

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ See Head 1 and accompanying Explanatory Note.

⁴⁶ See Head 1.

⁴⁷ See Head 2.

⁴⁸ Head 2.

⁴⁹ Heads 7 and 8

⁵⁰ Heads 7 and 8.

⁵¹ See, for example, *Kędzior v Poland*, App no 45026/07 (ECtHR, 16 January 2013) para 55.

⁵² See HRC General Comment No 35, 'Article 9 (Liberty and security of person)' (16 December 2014) UN Doc CCPR/C/GC/35 para 5 citing HRC, *González del Río v Peru*, Communication No 263/1987 (28 October 1992) UN Doc CCPR/C/46/D/263/1987 para 5.1; HRC, *Karker v France*, Communication No 833/1998 (26 October 2000) UN Doc CCPR/C/70/D/833/1998 para 8.5.

⁵³ HRC General Comment No 35 (*ibid.*) para 3.

⁵⁴ Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) (2003) 42 ILM 26 (OPCAT) art 4(2).

⁵⁵ IACmHR, Inter-American Commission on Human Rights (IACmHR), Principles and Best Practices on the Protection of Persons Deprived of their Liberty in the Americas (13 March 2008) IACmHR Res 1/08, OEA/Ser/L/V/II.131 doc 26 para 38.

⁵⁶ See *HL v United Kingdom* (2005) 40 EHRR 32 para 91; *DD v Lithuania*, App no 13469/06 (ECtHR, 14 February 2012) para 146.

⁵⁷ United Nations Human Rights Committee, General Comment No 35, 'Article 9 (Liberty and security of person)' (16 December 2014) UN Doc CCPR/C/GC/35, para 6.

⁵⁸ See, for example, *Gillan and Quinton v United Kingdom* (2010) 50 EHRR 1105. Although the Court did not ultimately make a finding in relation to Article 5 in this case, it stated at para 57 that being stopped and searched for 30 minutes was 'indicative of a deprivation of liberty'. In *Novotka v Slovakia*, App no 47244/99 (ECtHR, 4 November 2004), the ECtHR found a deprivation of liberty where a person was 'brought to a police station against his will and was held there in a cell' for less than an hour (p7). See also *DD v Lithuania* App no 13469/06 (ECtHR, 14 February 2012) para 149;

Krupko and Others v Russia, App no 26587/07 (ECtHR, 26 June 2014) para 36; *Foka v Turkey*, App no 28940/95 (ECtHR, 24 June 2008) para 78.

⁵⁹ See *Guzzardi v Italy* (1981) 3 EHRR 333 para 93.

⁶⁰ See *Guzzardi v Italy*, *ibid.*; *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1 para 314; *Stanev v Bulgaria* (2012) 55 EHRR 22 para 115.

⁶¹ See *Guzzardi v Italy*, *ibid.* para 92; *Medvedyev and Others v France*, App no 3394/03 (ECtHR, 29 March 2010) para 73; *Creangă v Romania* (2013) 56 EHRR 11 para 91.

⁶² *HL v United Kingdom* (2005) 40 EHRR 32 para 92, citing *Ashingdane v the United Kingdom* (1985) 7 EHRR 528 para 41.

⁶³ *Stanev v Bulgaria* (2012) 55 EHRR 22.

⁶⁴ *ibid.* paras 124- 126.

⁶⁵ *Kedzior v Poland*, App no 45026/07 (ECtHR, 16 October 2012) para 57. The Court referred also to *Stanev v Bulgaria* (2012) 55 EHRR 22 para 128.

⁶⁶ *Stanev v Bulgaria* (2012) 55 EHRR 22 para 124.

⁶⁷ *ibid.* para 125-26.

⁶⁸ *ibid.* para 127; *DD v Lithuania* App no 13469/06 (ECtHR, 14 February 2012) para 146.

⁶⁹ *HL v United Kingdom* (2005) 40 EHRR 32.

⁷⁰ *ibid.*

⁷¹ Sage Support and Advocacy service, 'Submission as part of the Consultation on Deprivation of Liberty: Safeguard Proposals' (9 March 2018), 12, http://sageadvocacy.ie/wp-content/uploads/2018/03/Sage_Submission-DOL-Safeguards-Proposals_09032018.pdf

⁷² Human Rights Committee: “[D]etention on discriminatory grounds in violation of article 2, paragraph 1, article 3 or article 26 is also in principle arbitrary. (1314/2004, *O’Neill and Quinn v. Ireland*, para. 8.5 (finding no violation); see concluding observations: Honduras (CCPR/C/HND/CO/1, 2006), para. 13 (detention on the basis of sexual orientation), and Cameroon (CCPR/C/CMR/CO/4, 2010), para. 12 (imprisonment for consensual same-sex activities of adults) See also Human Rights Council, Report of the Working Group on Arbitrary Detention, Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law UN Doc A/HRC/22/44 (24 December 2012)³⁸. The Working Group regards cases of deprivation of liberty as arbitrary under customary international law in cases where:

...

(e) The deprivation of liberty constitutes a violation of the international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; disability or other status, and which aims towards or can result in ignoring the equality of human rights. 51. Consequently, the prohibition of arbitrary deprivation of liberty is part of treaty law, customary international law and constitutes a *jus cogens* norm.

⁷³ Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities (29 January 2009) UN Doc A/HRC/10/48

⁷⁴ General Comment No 1, ‘Article 12: Equal recognition before the law’ (19 May 2014) UN Doc CRPD/C/GC/1 para 40. Although they note that Council of Europe Member States entered no reservations to the CRPD in this respect, Fennell and Khaliq argue that Article 14 CRPD is incompatible with Article 5 ECHR, because Art 5(1) ECHR allows for deprivation of liberty on the basis of ‘unsoundness of mind’. (Philip Fennell & Urfan Khaliq, “Conflicting or complementary obligations? The UN Disability Rights Convention, the European Convention on Human Rights and English Law”, 2011 EHRLR 662). The European Court of Human Rights is showing evidence of moving towards compliance with the CRPD requirements, however. In the 2013 decision of a 7-judge ECtHR chamber in *Plesó v Hungary* (hudoc 2 October 2012, App No 41242/08) the ECtHR took a restrictive approach to the unsoundness of mind justification, applying great scrutiny to the claim that deprivation of liberty was necessary to prevent a person’s health deteriorating, as opposed to preventing imminent harm to others or to one’s own life or limb. (para 66)

In *Plesó*, the Court held that where the deprivation of liberty was for the purpose of improving a person’s condition or avoiding a deterioration, ‘involuntary hospitalisation may indeed be used only as a last resort for want of a less invasive alternative, and only if it carries true health benefits without imposing a disproportionate burden on the person concerned’. (para 66) The Court further held that the proportionality assessment must consider the person’s own views and their ‘inalienable right to self-determination’ (para 66) and that ‘the core Convention right of personal liberty being at stake, the Contracting States’ margin of appreciation cannot be construed as wide in this field’. (para 66) In *Stanev v Bulgaria*, too, the Grand Chamber of the ECtHR held that ‘any protective measure should reflect as far as possible the wishes of persons capable of expressing their will’ and that ‘[f]ailure to seek their opinion could give rise to situations of abuse and hamper the exercise of the rights of vulnerable persons.’ (para 153)

⁷⁵ See for example, *M v Ukraine* App no 2452/04 (ECtHR, 19 April 2012) para 58; *Kedzior v Poland* App no 45026/07 (ECtHR, 16 October 2012) para 63; Human Rights Committee, General Comment No 35, ‘Article 9 (Liberty and security of person)’ (16 December 2014) UN Doc CCPR/C/GC/35. Regarding restraint, see for example, European Prison Rules; *Extract from the 16th General Report [CPT/Inf (2006) 35]*, published in 2006, para 51, referring to restraint in psychiatric hospital settings: ‘Every psychiatric establishment should have a comprehensive, carefully developed, policy on restraint. The involvement and support of both staff and management in elaborating the policy is essential. Such a policy should make clear which means of restraint may be used, under what circumstances they may be applied, the practical means of their application, the supervision required and the action to be taken once the measure is terminated. The policy should also contain sections on other important issues such as: staff training; complaints policy; internal and external reporting mechanisms; and debriefing. In the CPT’s opinion, such a comprehensive policy is not only a major support for staff, but is also helpful in ensuring that patients and their guardians or proxies understand the rationale behind a measure of restraint that may be imposed.

⁷⁶ See for example *Quinn v France* (App No 18580/91) Judgment of 22 March 1995; *Labita v Italy* (App No 26772/95) Judgment of 6 April 2000; Irish Human Rights Commission, *Follow-Up Report on State Involvement with Magdalen Laundries* (June 2013), Chapter 3, <https://www.ihrec.ie/app/uploads/download/pdf/20130618164449.pdf>

⁷⁷ See for example, *Creanga v Romania* (App No 29226/03) Judgment of 23 February 2012; *Medvedyev and Others v France* (App No 3394/03) Judgment of 29 March 2010,

⁷⁸ Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights* (3rd edn) (Oxford University Press 2014) 304.

⁷⁹ United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ‘Approach of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment regarding the rights of persons institutionalized and treated medically without informed consent’, UN Doc CAT/OP/27/2 (26 January 2016), para 5, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/011/96/PDF/G1601196.pdf?OpenElement>

⁸⁰ *DD v Lithuania* App no 13469/06 (ECtHR, 14 February 2012), para 157.

⁸¹ CPT Standards 2015, *Extract from the 8th General Report [CPT/Inf (98) 12]*, published in 1998, para 52, referring to Recommendation 1235 (1994) on psychiatry and human rights.

⁸² CPT Standards 2015, *Extract from the 8th General Report [CPT/Inf (98) 12]*, published in 1998, para 52. See also See, for example, regarding the psychiatric detention context: CPT Standards 2015, *Extract from the 8th General Report [CPT/Inf (98) 12]*, published in 1998, para 52; Human Rights Committee, General Comment No 35, 'Article 9 (Liberty and security of person)' (16 December 2014) UN Doc CCPR/C/GC/35 para 19, citing 1061/2002, *Fijalkowska v. Poland*, paras. 8.3–8.4; 754/1997, *A. v. New Zealand*, para. 7.3; general comment No. 31, para. 15

⁸³ See *Fox, Campbell and Hartley v United Kingdom* (App Nos 12244/86; 12245/86; 12383/86) Judgment of 30 August 1990; see also IHRC Follow-Up Report on Magdalen Laundries Chapter 3; see also *M v Ukraine* (App No 2452/04) 19 April 2012, paras 55-67.

⁸⁴ CPT Standards 2015, *Extract from the 16th General Report [CPT/Inf (2006) 35]*, published in 2006, para 44.

⁸⁵ CPT Standards 2015, *Extract from the 16th General Report [CPT/Inf (2006) 35]*, published in 2006, para 44. See also para 45 where the CPT recommends that "[p]sychiatric establishments...consider adopting a rule whereby the authorisation of the use of a mechanical restraint lapses after a certain period of time, unless explicitly extended by a doctor".

⁸⁶ CPT Standards 2015, *Extract from the 16th General Report [CPT/Inf (2006) 35]*, published in 2006, para 52

⁸⁷ CPT Standards 2015, *Extract from the 16th General Report [CPT/Inf (2006) 35]*, published in 2006, para 52: "...Preferably, a specific register should be established to record all instances of recourse to means of restraint. This would be in addition to the records contained within the patient's personal medical file. The entries in the register should include the time at which the measure began and ended; the circumstances of the case; the reasons for resorting to the measure; the name of the doctor who ordered or approved it; and an account of any injuries sustained by patients or staff. Patients should be entitled to attach comments to the register, and should be informed of this; at their request, they should receive a copy of the full entry." The CPT further suggests, at para 53: "Regular reporting to an outside monitoring body, for instance a Health-Care Inspectorate, might be considered as well. The obvious advantage of such a reporting mechanism is that it would facilitate a national or regional overview of restraint practices, thus facilitating efforts to better understand and, consequently, manage their use."

⁸⁸ United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 'Approach of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment regarding the rights of persons institutionalized and treated medically without informed consent', UN Doc CAT/OP/27/2 (26 January 2016), para 9, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/011/96/PDF/G1601196.pdf?OpenElement>

⁸⁹ *Mihailovs v Latvia* App no 35939/10 (ECtHR, 22 January 2013) para 155; *Stanev v Bulgaria* (2012) 55 EHRR 22 para 168.

⁹⁰ Human Rights Committee, General Comment No 35, 'Article 9 (Liberty and security of person)' (16 December 2014) UN Doc CCPR/C/GC/35 para 19.

⁹¹ *Shtukaturov v Russia* (2012) 54 E.H.R.R. 27, para 121, citing *Winterwerp (1983) 5 E.H.R.R. CD305* at [55]; and *Luberti v Italy (1984) 6 E.H.R.R. 440* at [31]; see also *Rakevich v Russia* (58973/00) October 28, 2003 at [43] et seq.

⁹² See *Stanev v Bulgaria*, para 169, citing *Shtukaturov (2012) 54 E.H.R.R. 27* at [123].

⁹³ *Stanev v Bulgaria*, para 171(c), citing *Meqyeri v Germany (1993) 15 E.H.R.R. 584* at [22].)

See further *Stanev*, para 170: "...In the case of detention on the ground of mental illness, special procedural safeguards may be called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves. (See, among other authorities, *Winterwerp (1979–80) 2 E.H.R.R. 387* at [60].)

⁹⁴ *Kedzior v Poland* App no 45026/07 (ECtHR, 16 October 2012) paras 69, 70; Human Rights Committee, General Comment No 35, 'Article 9 (Liberty and security of person)' (16 December 2014) UN Doc CCPR/C/GC/35 para 19: Deprivation of liberty must be re-evaluated at appropriate intervals with regard to its continuing necessity (citing 754/1997, *A. v. New Zealand*, para. 7.2; see Committee on the Rights of the Child, general comment No. 9, para. 50.)

See also CPT Standards 2015, *Extract from the 8th General Report [CPT/Inf (98) 12]*, published in 1998, para 40. Regular reviews of a patient's state of health and of any medication prescribed is another basic requirement. This will inter alia enable informed decisions to be taken as regards a possible dehospitalisation or transfer to a less restrictive environment.

⁹⁵ Human Rights Committee, General Comment No 35, 'Article 9 (Liberty and security of person)' (16 December 2014) UN Doc CCPR/C/GC/35 para 19, citing 1061/2002, *Fijalkowska v. Poland*, para. 8.3; 1629/2007, *Fardon v. Australia*, para. 7.3; see concluding observations: Russian Federation (CCPR/C/RUS/CO/6, 2009), para. 19; Convention on the Rights of Persons with Disabilities, art. 14, para. 1 (b).

⁹⁶ See Juan E Méndez, 'Introduction', in American University, Washington College of Law, *Torture in Healthcare Settings: Reflections on the Special Rapporteur on Torture's 2013 Thematic Report*, explaining his 2013 UN Report [REF]. See SR on Torture 2013, para 69: The Special Rapporteur believes that the severity of the mental illness is not by itself sufficient to justify detention; the State must also show that detention is necessary to protect the safety of the person or of others.

⁹⁷ Human Rights Committee, General Comment No 35, 'Article 9 (Liberty and security of person)' (16 December 2014) UN Doc CCPR/C/GC/35 para 19, citing concluding observations: Bulgaria (CCPR/C/BGR/CO/3, 2011), para. 10.

⁹⁸ Human Rights Committee, General Comment No 35, 'Article 9 (Liberty and security of person)' (16 December 2014) UN Doc CCPR/C/GC/35, para 19

⁹⁹ Human Rights Committee, General Comment No 35, 'Article 9 (Liberty and security of person)' (16 December 2014) UN Doc CCPR/C/GC/35 para 19, citing concluding observations: Czech Republic (CCPR/C/CZE/CO/2, 2007), para. 14; see also Committee on the Rights of the Child, general comment No. 9, para. 48.

¹⁰⁰ Human Rights Committee, General Comment No 35, 'Article 9 (Liberty and security of person)' (16 December 2014) UN Doc CCPR/C/GC/35 para 19 citing concluding observations: Latvia (CCPR/C/LVA/CO/3, 2014), para. 16. The Human Rights Committee specifically focuses on 'psychosocial disabilities' in this paragraph but it can surely be applied to all deprivations of liberty in the care context.

See also CPT Standards 2015, *Extract from the 8th General Report [CPT/Inf (98) 12], published in 1998*

57. Although no longer requiring involuntary placement, a patient may nevertheless still need treatment and/or a protected environment in the outside community. In this connection, the CPT has found, in a number of countries, that patients whose mental state no longer required them to be detained in a psychiatric establishment nevertheless remained in such establishments, due to a lack of adequate care/accommodation in the outside community. For persons to remain deprived of their liberty as a result of the absence of appropriate external facilities is a highly questionable state of affairs.

¹⁰¹ United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 'Approach of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment regarding the rights of persons institutionalized and treated medically without informed consent', UN Doc CAT/OP/27/2 (26 January 2016), para 5, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/011/96/PDF/G1601196.pdf?OpenElement>

¹⁰² UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E Mendez, UN Doc A/HRC/22/53 (1 February 2013), http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf

¹⁰³ United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 'Approach of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment regarding the rights of persons institutionalized and treated medically without informed consent', UN Doc CAT/OP/27/2 (26 January 2016), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/011/96/PDF/G1601196.pdf?OpenElement>

¹⁰⁴ UN Human Rights Council, Report of the Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte, UN Doc A/HRC/30/43 (13 August 2015), <http://www.ohchr.org/EN/Issues/OlderPersons/IE/Pages/Reports.aspx>

¹⁰⁵ United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 'Approach of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment regarding the rights of persons institutionalized and treated medically without informed consent', UN Doc CAT/OP/27/2 (26 January 2016), para 6, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/011/96/PDF/G1601196.pdf?OpenElement>

¹⁰⁶ United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 'Approach of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment regarding the rights of persons institutionalized and treated medically without informed consent', UN Doc CAT/OP/27/2 (26 January 2016), para 12, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/011/96/PDF/G1601196.pdf?OpenElement>

¹⁰⁷ UN Human Rights Council, Report of the Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte, UN Doc A/HRC/30/43 (13 August 2015), para 18, <http://www.ohchr.org/EN/Issues/OlderPersons/IE/Pages/Reports.aspx>

¹⁰⁸ Ibid para 51

¹⁰⁹ Ibid para 25.

¹¹⁰ Ibid para 74.

¹¹¹ UN Committee on the Rights of Persons with Disabilities, General Comment No 1, 'Article 12: Equal recognition before the law' (19 May 2014) UN Doc CRPD/C/GC/1 para 17

¹¹² Ibid.

¹¹³ UN Human Rights Council, Report of the Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte, UN Doc A/HRC/30/43 (13 August 2015), para 50

¹¹⁴ Ibid.

¹¹⁵ Michèle Charpentier and Maryse Soulières, 'Elder Abuse and Neglect in Institutional Settings: The Resident's Perspective' (2013) 25(4) Journal of Elder Abuse and Neglect 339, 351.

¹¹⁶ UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E Mendez, UN Doc A/HRC/22/53 (1 February 2013), http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf para 63.

¹¹⁷ Irish Human Rights and Equality Commission, *Ireland and the Optional Protocol to the UN Convention Against Torture* (2017) <https://www.ihrec.ie/our-work/cat/opcat/>

¹¹⁸ Irish Penal Reform Trust, OPCAT ratification campaign: <http://www.iprt.ie/opcat>

¹¹⁹ See Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) (2003) 42 ILM 26, Arts 11 and 24.

¹²⁰ Committee Against Torture, Concluding Observations on the second periodic report of Ireland (31 August 2017) UN Doc CAT/C/IRL/CO/2, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fIRL%2fCO%2f2&Lang=en, para 7.

¹²¹ Ibid para 8.

APPENDIX 3:

**Letter from ICCL, Justice for Magdalenes Research, NWCi, Sage and Amnesty International Ireland
to Charlie Flanagan TD, Minister for Justice and Equality**

11 January 2018



Irish Council for
Civil Liberties



sage

Support & Advocacy Service



Mr Charlie Flanagan TD, Minister for Justice and Equality
Department of Justice and Equality
51 St Stephen's Green
Dublin 2
D02 HK52

By post and by email to charlie.flanagan@oireachtas.ie, info@justice.ie
Cc: Peter Tyndall, Ombudsman
Please direct return correspondence to maeve.orourke@iccl.ie

11 January 2018

Dear Minister,

We write regarding your Department's administration of the Magdalene 'restorative justice' scheme. The report of the Ombudsman, 'Opportunity Lost', confirmed what we have been highlighting for several years: that Magdalene survivors have been treated unfairly under the scheme and that the scheme has operated in a manner unbecoming of the sentiments expressed by the former Taoiseach, on behalf of the State, in his apology to the women on 19 February 2013.

All of our organisations have advocated for several years on behalf of Magdalene survivors, including in dialogue with your Department, to elected representatives and before United Nations human rights treaty bodies. A number of us are in regular contact with women who were incarcerated in Magdalene Laundries and who have been unable to obtain the redress recommended by Mr Justice John Quirke and promised by the government when it publicly accepted all of Mr Justice Quirke's recommendations 'in full' in 2013.

We are asking you to use your authority as Minister to immediately remedy a number of serious failings in the scheme's administration, which include and go beyond the matters addressed in the Ombudsman's report. We write having considered your response to our statement of 23 November 2017, which your Private Secretary sent by email to the Irish Council for Civil Liberties on 13 December 2017. A full explanation of our requests is contained in the attached memorandum. In summary they are as follows:

First, we request that you fund and support a consultation of all of the women who applied to the scheme so that they can meet each other and discuss the question of memorialisation. As you may be aware, former Magdalene sites in Dublin (Sean McDermott Street and Donnybrook) and Cork (Sunday's Well) are currently subject to plans for redevelopment. Yet, the promise made under the scheme to support the

women to meet each other and to consult on memorialisation has not been met. The women are therefore being disempowered from participating in the planning processes and silenced once again.

Second, we request that you implement all of the Ombudsman's recommendations, and we urge you to take a number of specific steps in so doing:

- a) We request that you ensure that all women who are still living in the custody or care of religious congregations, and all women who have been deemed to lack capacity to manage their financial affairs (whether or not they have yet been made a ward of court), are provided with access to independent advocacy services through the scheme.
- b) We request that you ensure that the Department writes to *all* women who received a payment under the scheme reflecting a shorter duration of stay than stated in their original application, to inform them of their right to have their application re-assessed and of the forms of evidence that the Department will consider and how such evidence may be obtained.
- c) As to the Ombudsman's recommendation regarding women who were forced to work as children in Magdalene institutions while registered on the rolls of other institutions, we urge you to explicitly accept this recommendation.
- d) Regarding the development of guidance for future schemes, we insist that this process must focus on the experiences and voices of Magdalene survivors and others who have attempted to access governmental 'redress' or 'restorative justice' schemes. We request that you announce a public consultation which will support those affected to make their views known.

Third, we request that you rectify the health and community care, pensions and advertising aspects of the scheme:

- a) We request that you ensure that the health and community care provision under the scheme is equivalent to the standard of care provided to HAA cardholders. This recommendation by Judge Quirke – his very first recommendation – has not been complied with to date.
- b) We request that you take the necessary steps to backdate the women's pension payments under the scheme to the date of retirement age, rather than to the scheme's start date as at present.
- c) We request that you send a revised information note regarding the scheme to all embassies and consulates and that you ask them to periodically send this information to any and all sources of immigrant support and information abroad.

Bearing in mind that the originally estimated cost of the scheme was €58m, and that €25.7m has been spent to date, we sincerely hope that you will see fit to take the measures we outline. It is important to recognise that Magdalene survivors signed waivers of all of their rights of action against the State in return for the scheme recommended by Judge Quirke.

Women who spent months, years and even decades incarcerated and forced into unpaid labour in Magdalene Laundries have waited too long to be treated with the respect and dignity that they are due. Those of us in regular contact with survivors know that the delays and gaps in the scheme's implementation are causing severe distress to many. Each death of a survivor is a particularly painful

reminder of the shortcomings in how we as a society have attempted to atone for the injustices perpetrated.

We look forward to your written responses and we would welcome the opportunity to meet with you and your officials to discuss these urgent issues further.


Yours sincerely,



Liam Herrick
Executive Director
Irish Council for Civil Liberties



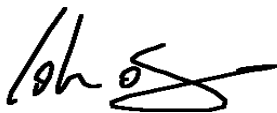
Orla O'Connor
Director
National Women's Council of Ireland



Claire McGettrick
Advisory Committee
Justice for Magdalenes Research



Mary Condell
Legal Advisor
Sage Support and Advocacy Service



Colm O'Gorman
Executive Director
Amnesty International Ireland



Irish Council for
Civil Liberties



sage

Support & Advocacy Service



MEMORANDUM

Requests of the Minister for Justice regarding the Magdalene scheme

11 January 2018

1. Funding and support for the women to meet and consult on memorialisation

We are asking the Minister to immediately fund and support a consultation with all women who applied to the Magdalene scheme so that they can meet each other and discuss the issue of memorialisation. Justice for Magdalenes Research (JFMR) wrote to Minister Frances Fitzgerald in April 2017 and to the Taoiseach in May 2017 with this request and with the information that both Dublin City Council and Respond!, which manages housing units at the former Magdalene site in High Park, Drumcondra, are willing to participate in the consultative process. Dublin City Councillors have since agreed to contribute €50,000 towards such the consultation process. We are requesting that the Minister commits to funding the remainder and to contacting all of the women who applied to the scheme to inform them of the consultation process. It is important to note that the Department holds the contact details of the women who have applied the scheme, and it was the women's expectation that they would be contacted regarding the aspects of the Dedicated Unit promised by Judge Quirke.

The following aspects of the 'Dedicated Unit' recommended by Mr Justice Quirke have not been implemented:

- (a) Practical, and if necessary professional, assistance to enable those women who wish to do so to meet with those members of the Religious Orders who have similar wishes to meet and interact;
- (b) similar practical assistance to meet and interact with other Magdalen women; and
- (c) the acquisition, maintenance and administration of any garden, museum or other form of memorial which the Scheme's administrator, after consultation with an advisory body or committee, has decided to construct or establish.¹

While the Department is failing to implement the above aspects of the scheme, several former Magdalene buildings and sites have been the subject of planning permission applications and plans for commercial sale. Because the Department has not supported the women to meet each other or to consult on memorialisation, the women have been disempowered from participating in the planning application processes and their experiences in the institutions and wishes regarding memorialisation have been ignored.

¹ Magdalen Commission Report, pp 11-12.

Last month, Dublin City Council announced its intention to sell the former Magdalene building on Sean McDermott Street to a budget hotel chain mostly staffed by women.² An archaeological assessment of the site carried out for Dublin City Council in 2017 states that ‘it is impossible to state with certainty that there are no burials located within the site under assessment’.³ Also last month, Cork City Council announced its intention to grant planning permission for the partial demolition and redevelopment of the former Magdalene buildings at Sunday’s Well, Cork. JFMR made a submission to Cork City Council earlier this year informing it that not all of the women buried at the site are identified.⁴ In 2016 a commercial property developer sought planning permission (which appears not yet to have been granted) to demolish the former Magdalene Laundry building in Donnybrook, Dublin 4. Recent video footage of the interior of the Donnybrook Magdalene Laundry building⁵ suggests that a large volume of paperwork remains inside, alongside artefacts from its time as a Magdalene Laundry before the Religious Sisters of Charity sold the building in 1992. The archaeological assessment accompanying the planning permission application cautions that women’s remains may be buried, unmarked, on the site. It further notes the heritage significance of the laundry site, including the building’s internal features and machinery relevant to its past use.⁶

Both Cork City Council and the elected Councillors of Dublin City Council have recognised the need for consultation with Magdalene survivors prior to the development of former Magdalene sites. In its decision of 13 December 2017 regarding the Sunday’s Well site, Cork City Council states that planning permission depends (inter alia) on receipt of proposals for the ‘interpretation and memorialisation of the site...in consultation with relevant representative groups associated with the history of the Good Shepherd Convent’. In March 2017, Dublin City Councillors agreed a motion requesting ‘that Dublin City Council commits to convening and consulting with a committee of Magdalene survivors, with a view to establishing a memorial at the site of the council owned Sean McDermott Street convent, as recommended by the Quirke Commission and promised by the Government as part of the Magdalene restorative justice scheme.’⁷

² Patsy McGarry, ‘Meeting to be held over sale of Magdalene laundry to hotel group’ *The Irish Times* (15 December 2017), <https://www.irishtimes.com/news/social-affairs/religion-and-beliefs/meeting-to-be-held-over-sale-of-magdalene-laundry-to-hotel-group-1.3328679>

³ David Bayley and Faith Bailey, ‘Archaeological Assessment at Sean MacDermott Street and Railway Street, Dublin 1, July 2017, <file:///C:/Users/maeve.orourke/Downloads/20171206122517507.pdf>

⁴ Justice for Magdalenes Research, ‘Submission to Cork City Council regarding the proposed property development at the former Magdalene Laundry at Sundays Well’, 20 March 2017, <http://jfmresearch.com/wp-content/uploads/2017/06/JFMR-Submission-to-Cork-City-Council-Re-Sundays-Well.pdf>

⁵ <https://www.youtube.com/watch?v=YETH7W0yCBg&t=165s>

⁶ Faith Bailey & Brenda Fuller, Irish Archaeological Consultancy Ltd., *Archaeological Assessment at The Crescent, Donnybrook, Dublin 4, on behalf of Pembroke Partnership* (July 2016), Email: archaeology@iac.ie

⁷ <https://socialdemocrats.ie/2017/03/07/cllr-gary-gannon-calls-halt-magdalene-laundry-redevelopment-seanmcdermott-st/>

2. Implementation of the Ombudsman's Recommendations

a) Women deemed to lack capacity: the need for independent advocates

We welcome the Minister's intention to consider 'whether any further measures can be taken' in respect of women deemed to lack capacity to manage their financial affairs. To this end, we request that the Department provides access under the scheme to independent advocates for (i) all women still in the care of the religious congregations *and* (ii) all women deemed to lack capacity to manage their financial affairs.

JFMR has been requesting for several years that the Department ensure that independent advocacy services are provided to all Magdalene survivors who still live in the care of the religious congregations, including women deemed to lack capacity to manage their financial affairs (whether or not they have been made wards of court already). The Ombudsman's report notes that women deemed to lack capacity were 'effectively forgotten' by the Department, and this is indeed the experience of all of our organisations. The most vulnerable survivors of the Magdalene Laundries, while being deprived of the financial aspects of the scheme, were also denied any other form of assistance under the scheme to make their lives more comfortable.

Independent advocacy is of the utmost importance to ensuring that the women's will and preferences are known and acted upon. Many if not all of the women still living in the care of the religious congregations have few family members or friends to assist them in using their entitlements under the scheme in the way that they wish, and generally to assist them in making their wishes and needs known. We are aware that a number of Magdalene survivors have been living in a nursing home which was found on inspection by HIQA earlier last year to have no daily activities except for morning mass, and to have insufficient staff to ensure safe, appropriate and consistent levels of care.

b) Women whose 'duration of stay' was disputed: need to write to all women affected

We welcome the Minister's intention to review all cases where there has been a dispute over length of stay. The Ombudsman's report describes 'a flawed administrative process', whereby 'there was an over reliance on the records of the congregations and it is not apparent what weight if any was afforded to the testimony of the women and/or their relatives'. Newspaper reports from 2014⁸ and 2015⁹ attest to the powerlessness that many women felt in the face of the Department's flawed practice, leading to the women's acceptance of financial payments reflecting less time than they spent in the institutions.

The Minister must ensure that the Department writes to *all* women who stated a duration of stay in their application which was longer than that reflected in their eventual payment, to advise them of their right to have their application re-assessed. The Department should inform the women of the various forms of evidence that the Department will consider and how the women may go about obtaining such evidence,

⁸ Niall O'Sullivan, 'Only 67 British-based Magdalene survivors seek redress despite 'majority' claim', *Irish Post* (21 July 2014), <http://irishpost.co.uk/only-67-british-based-magdalene-survivors-seek-redress-despite-majority-claim/>

⁹ Sorcha Pollak, 'Magdalene survivor: They're ignoring my basic human rights', *Irish Times* (19 January 2015), <https://www.irishtimes.com/news/social-affairs/magdalene-survivor-they-re-ignoring-my-basic-human-rights-1.2071627>

bearing in mind that the women do not have access to legal representation under the scheme (e.g. the women should be informed if the Department will accept affidavits, including from corroborating witnesses, and how to obtain these).

c) Women denied access to the scheme although they worked in the Laundries as children

We are deeply disappointed that the Minister has not yet explicitly agreed to implement the Ombudsman's first recommendation – that where there is evidence that a woman worked as a girl in a Magdalene Laundry while registered on the rolls of another institution, the Department should reconsider her application with a view to admitting her into the scheme. We urge the Minister to recognise the unfairness and re-traumatising nature of refusing admission to the scheme to women whom the Department admits were forced to work as children in Magdalene Laundries while the State was responsible for their care, education and welfare.

We are aware of the previously-expressed opinions of departmental officials that implementing this recommendation would amount to 'adding' institutions to the scheme, and/or would involve 'double recovery' by the women. Neither of these positions is tenable for the following reasons:

First, the recommendation requires the Department to admit women to the scheme on the basis that they were forced to work as children *in the very institutions listed* under the scheme. Therefore the recommendation cannot reasonably be argued to require the addition of institutions to the scheme.

Second, it is not possible for the Department to know and therefore it is not fair to state that admitting to the scheme women who worked in Magdalene Laundries while registered on the rolls of other institutions would 'doubly pay' them for the abuse they suffered in Magdalene Laundries. We are aware that a significant number of women who were eligible to claim awards from the RIRB, including women who have applied to the Magdalene scheme, did not in fact receive awards because they did not realise in time that the RIRB applied to them. In addition, we urge the Minister to consider Judge Quirke's conclusion in the Magdalen Commission report that it would be difficult if not impossible to determine from transcripts and other documentation whether and to what extent any award from the RIRB actually took into account the harm caused by time spent performing forced labour in a Magdalene Laundry. Judge Quirke explicitly recommended that the Magdalene scheme 'should not seek to investigate or consider' the question of previous RIRB awards.

d) Need for consultation regarding future 'restorative justice' or 'redress' schemes

We welcome with some caution the Minister's commitment to implementing the Ombudsman's recommendation that guidance should be developed centrally regarding the operation of future 'restorative justice' or 'redress' schemes. We are concerned that any process of developing guidance should place the experiences and viewpoints of individuals who participated in previous schemes at its centre. We say this bearing in mind the Ombudsman's conclusion that in many instances the Department effectively ignored the testimony of Magdalene survivors when assessing their applications to the scheme.

We expect that the Minister will put in place a public consultation process which will support women who spent time in Magdalene Laundries and other individuals who have attempted to access governmental 'restorative justice' and 'redress' schemes to participate. We are eager to know when such a consultation process will be initiated.

3. Further shortcomings in the Department's administration of the Magdalene scheme

a) Health and community care

We request that the Minister immediately initiates a process to bring the provision of health and community care under the scheme fully into line with the HAA card entitlements. We further request that the Minister establishes the fund for complementary therapies promised by former Minister Frances Fitzgerald.

The women have not received the full health and community care package recommended by Judge Quirke. This has had devastating effects on some women known to us, including those in urgent need of comprehensive mental health care or home care.

Judge Quirke's very first recommendation was that 'Magdalen women should have access to the full range of services currently enjoyed by holders of the Health (Amendment) Act 1996 Card ("the HAA card")'. The HAA card was created in 1996 for those who contracted Hepatitis C through State-provided blood products. It gives access to numerous private (as well as public) healthcare services and wide-ranging access to medicines, drugs and appliances. Judge Quirke included a guide to the full range of services available to HAA cardholders at Appendix G of his report. His first recommendation states: '*Details of the range, extent and diversity of the community services to be provided to the Magdalen women are described within Appendix G*'.¹⁰

The NWCI, Amnesty International Ireland and JFMR voiced our concern at the time that the *Redress for Women Resident in Certain Institutions Act 2015* ('RWRCI Act') was being debated in the Dáil and Seanad that it did not provide for healthcare equivalent to the HAA card standard, as recommended by Mr Justice Quirke. It was clear that the RWRCI card for Magdalene women was almost identical to an ordinary medical card, which the majority of the women resident in Ireland already hold.

In August 2015, several dentists confirmed publicly that instead of receiving HAA-standard services as recommended by Judge Quirke and agreed by the government in 2013, Magdalene survivors were given a card that entitles them only to the 'limited and incomplete treatment...for most medical card holders.' The dentists called on the Council of the Irish Dental Association 'to publicly disassociate itself from this

¹⁰ Report of Mr Justice John Quirke on the establishment of an ex gratia Scheme and related matters for the benefit of those women who were admitted to and worked in the Magdalen Laundries (May 2013) ('Magdalen Commission Report'), <http://www.justice.ie/en/JELR/2.%20THE%20MAGDALEN%20COMMISSION%20REPORT.pdf/Files/2.%20THE%20MAGDALEN%20COMMISSION%20REPORT.pdf> p7

act by the Government and to speak out publicly on behalf of its members who do not accept the injustice we are expected to support.’¹¹

JFMR wrote to the National Director of Primary Care at the HSE on 25 February 2016 to ask for clarification regarding all ways in which the women’s entitlements under the RWRCI card differ from those already available under the standard medical card, as many women in contact with JFMR – and indeed our organisations – are still struggling to understand this. JFMR asked for a written response so that the information could be easily disseminated to survivors and also for a meeting with the National Director. JFMR has received no substantive response to date.

In 2015, the former Minister for Justice, Frances Fitzgerald TD, promised to establish a fund separate to the RWRCI card to provide access to complementary therapies under the scheme (the HAA card recommended by Judge Quirke provides access to massage, reflexology, acupuncture, aromatherapy and hydrotherapy). This fund has not been established to date.¹²

b) Back-dating of pension payments

We request that the Minister takes the necessary steps to ensure that the women’s pension entitlements under the scheme are backdated to retirement age, rather than to the scheme’s start date as is currently the case.

Mr Justice Quirke recommended that, under the scheme, Magdalene survivors should be ‘put...in the position that they would have occupied had they acquired sufficient stamps to qualify for the State Contributory Pension’.¹³ It is our position that the Department should have read this recommendation as requiring the backdating of pension payments to retirement age, rather than simply to the beginning of the Scheme’s administration.

c) Advertising of the Scheme abroad

We appreciate the Minister’s statement on 5 December 2017 in response to a parliamentary question from Jim O’Callaghan TD that the scheme remains open to new applications. We request that the Minister sends a revised information note about the scheme to all Irish embassies and consulates with an explicit request that they periodically circulate the information to all immigrant centres and information and support networks known to them.

It appears to us that the scheme has been insufficiently advertised outside of Ireland. We draw the Minister’s attention to the experience of Prof James Smith of JFMR who lives in Boston: in mid-2016 Prof Smith was invited to speak about the Magdalene Laundries to the Coalition of Irish Immigration Centers’

¹¹ Letter to the Editor, Journal of the Irish Dental Association, Aug/Sept 2015: Vol 61(4), p 164

¹² Written Reply from Frances Fitzgerald, TD, Minister for Justice, to Joan Collins, TD, 24 March 2015, <https://www.kildarestreet.com/wrans/?id=2015-03-24a.951&s=magdalen+complementary+therapies+frances+fitzgerald#g953.r> ; See also <http://www.rte.ie/news/2015/0219/681413-magdalone-women/>

¹³ Magdalen Commission Report, p40.

(CIIC) social services committee, comprised of social workers with vast experience serving Irish immigrant communities in Chicago, San Francisco, Boston and New York. None of the participants in the meeting knew about the Magdalene scheme. Prof Smith subsequently wrote in *The Irish Times* that 'They had received no instructions, no guide explaining benefits, no application procedures...The group refuted the idea that the 11 US-residents who had applied to the scheme at the time (out of a total of 802 applicants) was the sum-total of Magdalen survivors living in the US. How would survivors know about it, they asked? Why wasn't the scheme advertised here in the US?'¹⁴

In summary

We are hopeful that the Minister will take the opportunity that the Ombudsman's report presents to revise the approach of the Department of Justice and Equality to the administration of the Magdalene scheme as a whole. While we do not doubt that departmental officials have acted with good intentions and worked hard on administering the scheme, it is imperative for the Department to now reflect on the ways in which the scheme has fallen short and to rectify those shortcomings. The facts acknowledged and the sentiments conveyed in the apologies of the Taoiseach and Tanaiste on 19 February 2013 should not be forgotten:

In the laundries themselves some women spent weeks, others months, more of them years, but the thread that ran through their many stories was a palpable sense of suffocation, not just physical in that they were incarcerated but psychological, spiritual and social.

... I say to all of those women, some of whom are with us today: We have heard you, we believe you and we are profoundly sorry for what was done to you, and that what happened to you, as children or as adults.

... Nowhere in any of this did the word or concept of citizenship, personal rights and personal freedoms appear.

¹⁴ James Smith, 'Will Mother and Baby Homes Commission advertise to the hidden Irish diaspora?' *Irish Times* (9 November 2016), <https://www.irishtimes.com/life-and-style/abroad/will-mother-and-baby-homes-commission-advertise-to-the-hidden-irish-diaspora-1.2859793>