



Shadow Report to the Third Periodic Report of Ireland under the **International Covenant on Civil and Political Rights**

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Endorsement List

This report is endorsed by a broad range of non-governmental organisations (NGOs), religious and educational institutions. All of the views expressed in the report do not necessarily reflect the policies and positions of each endorsing organisation.

Age Action

AkiDwA - African Women's Network

Centre for Criminal Justice and Human Rights, Faculty of Law and Business, University College Cork

Dominican Justice Office

European Anti-Poverty Network (EAPN)

Free Legal Advice Centre (FLAC)

Gay and Lesbian Equality Network (GLEN)

Immigrant Council of Ireland (ICI)

Integrating Ireland

Irish Centre for Human Rights, National University of Ireland, Galway

Irish Council for Civil Liberties (ICCL)

Irish Family Planning Association (IFPA)

Irish Penal Reform Trust (IPRT)

Irish Refugee Council (IRC)

Marriage Equality Campaign

Migrant Rights Centre of Ireland (MRCI)

National Traveller Women's Forum

One Family

OPEN – Representing Lone Parents in Ireland

Pavee Point

Rape Crisis Network of Ireland (RCNI)

UCD School of Social Justice

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Glossary of Terms

CEDAW	United Nations Convention on the Elimination of All Forms of Discrimination Against Women
CMH	Central Mental Hospital
CPT	European Committee for the Prevention of Torture
Dáil Éireann	Lower House of the Irish Parliament
DPP	Director of Public Prosecutions
ECHR	European Convention on Human Rights
EU	European Union
Garda Síochána	Irish Police Service
Gardaí	Members of the Irish Police Service
GSOC	Garda Síochána Ombudsman Commission
HSE	Health Service Executive
HRC	Human Rights Committee – also referred to as the CCPR
ICCPR	International Covenant on Civil and Political Rights
ICERD	United Nations Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
IHRC	Irish Human Rights Commission
NGO	Non-governmental organisation
NWS	National Women’s Strategy
The Oireachtas	Houses of Parliament
PPSN	Personal Public Service Number
Seanad Éireann	Upper House of the Irish Parliament
Tánaiste	Irish Deputy Prime Minister
Taoiseach	Irish Prime Minister
UNCAT	United Nations Convention Against Torture

Summary of Recommendations

Article 1 – Right to Self-Determination

- > No recommendation is made.

Article 2 – Right to an Effective Remedy

- > The ICCPR should be given full effect in Irish law.
- > Ireland’s equality legislation should include all state functions and the State should consider introducing more preventative measures in dealing with underlying inequalities i.e. equality proofing of practices.
- > Funding for the Equality Tribunal should be substantially increased to allow it to deal with anti-discrimination cases in a speedy manner.
- > Funding for the Equality Authority should be increased to allow it to undertake equality impact statements.
- > The State as a matter of urgency should review and enhance remedies protecting against domestic violence as well as increasing supports.
- > Funding and support for the Irish Human Rights Commission should be increased substantially and the Government should consider making the Commission directly accountable to the Irish Parliament.

Article 3 – Equality between Men and Women

- > The National Women’s Strategy should be reviewed and updated with a specific time-frame and targets for achievements.
- > Multiple discriminations faced by minority ethnic women should be adequately dealt with by the Strategy.
- > The Irish Government should organise a referendum to amend the Constitution to include the gender-neutral form of Article 41.2 which also recognises the life of carers in the home. This should also include an explicit provision guaranteeing that women and men be treated equally.
- > The Government should increase the level of support available for childcare.

Article 4 – Derogation in States of Emergency

- > Given that a state of emergency does not exist in Ireland, the Special Criminal Court should no longer be in operation.

Article 5 – Limited Right of Derogation

- > No recommendation is made.

Article 6 – Right to Life

- > The State should provide a legislative framework for the provision of safe and legal abortions in Ireland.
- > An independent inquiry, capable of leading to the identification and, if appropriate, the punishment of those responsible for the death of Brian Rossiter in Garda custody should be carried out without any further delay. Brian Rossiter’s family should be allowed to be involved in that inquiry to the extent necessary to safeguard their legitimate interests.
- > The Gardaí must human rights proof its policy on barricade incidents and the detailed guidance provided to on scene commanders in respect of such incidents.

Article 7 – Freedom from Torture, Cruel, Inhuman or Degrading Treatment or Punishment

- > The Government should set up an independent inquiry into the illegal transfer of detainees through Irish airports and the Gardaí should set up an investigations mechanism to regularly monitor and perform spot checks on CIA planes and CIA chartered flights.
- > Garda policies on detention and use of force should be human rights proofed and they should receive regular and up-to-date training on their human rights obligations.
- > Free and informed consent to medical treatment should be a central tenet to mental health treatment. There is a need to develop a human rights-compliant test of capacity integrated into the Mental Health Act 2001 and to empower the Mental Health Review Tribunals or other independent bodies to review capacity where a person appears unable or unwilling to consent to treatment.
- > The independent inspections mechanism which has been set up under the Health Information Quality Authority should be kept under careful review by the Government.

Article 8 – Freedom from Slavery, Servitude and Forced Labour

- > The Government should set up an independent inquiry, as a matter of urgency, to examine the disappearance of separated children in the care of the HSE and subsequent Garda or otherwise investigations.
- > The Criminal Law (Human Trafficking) Bill 2007 should be amended to allow for protection for victims of trafficking who are too afraid or unable to participate in a Garda inquiry.
- > The Government should move towards developing a National Action Plan on Anti-Trafficking strategies with key targets to allow it to ratify the Council of Europe treaty.
- > All separated children should be placed on a proper national register when they enter the country.
- > Separated children should receive equitable treatment in care and should be formally placed with legal guardians where appropriate. Moreover, better monitoring should take place of hostels and residence homes and the Ombudsman for Children should not be excluded from dealing with complaints from asylum seeking and migrant children.

Article 9 – Liberty and Security of the Person

- > Certain offences, of lesser seriousness, could be dealt with more effectively by imposing stringent conditions of bail, such as a requirement to report daily to the Gardaí or by imposing residence requirements, rather than introducing restrictions on bail.
- > The situation of children in mental health institutions and psychiatric care needs to be reviewed for its compatibility with standards in the UN Convention on the Rights of the Child, particularly with regard to the issue of consent.
- > Detention for immigration purposes should be used as a last resort and should be subject to judicial oversight.
- > Increased powers of detention under the Criminal Justice Act 2007 and those which already exist under the Criminal Justice (Drug Trafficking) Act 1996 are excessive, unnecessary for the administration of justice and contrary to Article 9 and should be reviewed.
- > Persons arrested by the Gardaí should have a formal legal right to have a lawyer present during questioning.
- > The Government should make available the resources necessary to enable the Garda Síochána Ombudsman Commission (GSOC) to independently investigate all complaints about members of the Garda. As an immediate measure, the resources required to enable the GSOC independently to investigate all complaints involving possible criminal conduct by Garda members must be made available. There should be no dilution of the GSOC's current statutory powers.

Article 10 – Rights of Prisoners

- > All persons detained following refusal to land, asylum seekers detained for a number of reasons¹ and persons detained pending deportation² should be formally notified of their right to challenge their detention, their right to inform a person of their choice of their detention, the right to have access to a lawyer and the right to have access to medical care.
- > A concerted effort is required to address the needs of prisoners from black or ethnic minority backgrounds, including those detained for immigration-related reasons.
- > The current poor physical conditions in many of our prisons must be addressed as a matter of urgency. In particular, the Government should make a firm commitment to provide in-cell sanitation to all prisoners by a fixed date.
- > Serious concerns about the levels of violence in Irish prisons have been expressed by, among others, the European Committee for the Prevention of Torture. The Government must take urgent steps to address this problem.
- > Many concerns have been expressed about the proposed building of a new prison at Thornton Hall in north County Dublin. Among the main concerns are the proposals to significantly increase prison capacity; proposals to continue the practice of detaining children in adult prisons; proposals to transfer women prisoners to this remote location; proposals for a large-scale immigration detention centre; and proposals to co-locate the prison with the Central Mental Hospital. In all of these regards, the proposed plan may have negative impacts on these groups of potential detainees.

Article 11 – The Right Not to be Imprisoned for Failure to Fulfil a Contractual Obligation

- > The Government should amend the law of contempt to ensure that it cannot be used to imprison an individual for failing to fulfil a contractual obligation or who is unable to pay a civil debt.

Article 12 – Freedom of Movement

- > The implementation of the Housing (Miscellaneous Provisions) Act 2002 should be closely monitored to ensure that certain groups such as Travellers are not disproportionately and negatively impacted, particularly where such impact will have a negative affect on children.
- > A fair, transparent and inclusive system for mediation should be put in place to deal with grievances for asylum seekers in direct provision.
- > The Ombudsman and the Ombudsman for Children should not be excluded from hearing complaints relating to asylum seekers in direct provision accommodation.

Article 13 - Procedural Rights for Migrants

- > The State should introduce an independent appeals procedure to review all immigration related decisions.
- > Provisions to allow for summary removal in the Immigration, Residence and Protection Bill 2008 are incompatible with the State's obligations under the ICCPR and should be removed.

¹ Pursuant to section 9(8) and 9(13) of the Refugee Act 1996.

² Pursuant to section 5 of the Immigration Act 1999.

Article 14 - The Right to Fair and Equal Treatment before the Law

- > There should be clear and transparent guidelines for the Director of Public Prosecutions, with the delegated authority of the Attorney General, to make his decision as to what circumstances he “thinks proper” for a person to be tried before the Special Criminal Court as held by the Human Rights Committee in their view in *Kavanagh v Ireland*.
- > All members of the new Protection Review Tribunal should be appointed independently through the Public Service Appointments Commission and not by the Minister for Justice, Equality and Law Reform.
- > The Government should introduce Regulations to provide for a new form of Garda caution which would clearly inform people of their right to silence and the possible consequences of remaining silent.
- > Relevant guidance should be developed for judges on the proper instruction of juries against drawing improper inferences from silence.

Article 15 - Protection against Retrospective Criminal Sanctions

- > Section 9(4) of the International Criminal Court Act 2006 should be amended to exempt war crimes and crimes against humanity.

Article 16 – Recognition of the Person before the Law

- > The State should recognise the rights of transgendered persons in all aspects of the law.

Article 17 – The Right to Privacy

- > The Government should extend the remit of the Data Protection Commissioner to deal with all complaints relating to infringements of bodily and territorial privacy.
- > The DNA of innocent people should not be held on a database indefinitely and should be deleted within a reasonable timeframe.
- > The Government must review and enhance safeguards relating to the management and operation of the PPS system.
- > The Immigration, Residence and Protection Bill 2008 should not allow for the stop-and-search of black and ethnic minority people by ordinary members of the Gardaí on the suspicion that they are an illegal immigrant.
- > The Immigration, Residence and Protection Bill should be amended to require the consideration of the constitutional and convention rights of any person who is subject to removal and arrest and/or detention for that purpose prior to their removal to ensure that, in line with the Supreme Court’s judgment in *Dimbo and Oguekwe v The Minister for Justice, Equality and Law Reform* removals only take place after a substantial reason to do so has been identified.

Article 18 – Freedom of Thought, Conscience and Religion

- > Judges should not be required to take a religious oath before joining the bench.
- > The State must increase its provision for the establishment of non-denominational education at primary and post-primary levels.

Article 19 – Freedom of Expression

- > The State needs to review its legislation governing freedom of information, access to abortion information and defamation to ensure that it is compatible with its obligations under Article 19.
- > New restrictions on freedom of expression for organisations in the Electoral (Amendment) Act 2001 are incompatible with the State’s obligations under Article 19 and should be removed.

Article 20 - The Prohibition of Propaganda for War and Incitement to Hatred

- > The State should amend the Incitement to Hatred Act to make it effective in addressing incitement to hatred.
- > The State should encourage national media outlets to promote diversity and intercultural strategies.

Article 21 – The Right to Peaceful Assembly

- > The operation of the Criminal Justice (Public Order) Act 1994 should be independently reviewed to assess its compatibility with Ireland’s international human rights obligations under the ICCPR.
- > The Garda Síochána Ombudsman Commission should be permitted to review public order policies pursuant to section 106 of the Garda Síochána Act 2005.

Article 22 - Freedom of Association

- > Legislation governing charities should recognise the advancement of human rights, social justice and equality as charitable purposes.

Article 23 – The Rights of the Family

- > The Irish Constitutional provisions on the family should protect all forms of family and not just the family based on marriage.
- > Same-sex couples should not be discriminated against in relation to their intimate relationships. The right to marry should be extended and no difference in treatment should exist between opposite-sex and same-sex couples.
- > The State should develop and protect the family unity for all migrants legally working in the State.
- > Proposed restrictions in the Immigration, Residence and Protection Bill 2008 on the right to marry for people seeking asylum, migrants and unlawfully resident migrants offends Article 23(2) of the ICCPR and should be removed.
- > The Prison Service should review its policies for compatibility with Article 23 of the ICCPR.

Article 24 – Rights of the Child

- > Measures should be taken to make the decisions of the Social Welfare Appeals Tribunal more transparent and Child Benefit should be restored for all children.
- > The State should amend the Constitution to insert express rights for children in order to ensure that the best interests of the child are protected in all circumstances.
- > The State must radically increase funding and support for child protection in Ireland.

Article 25 – The Right to Participate in Public Affairs

- > Special measures should be introduced to increase minorities’ participation in the public life and political affairs, in particular, the State should fund a programme to encourage and support voting among Travellers and people with disabilities.
- > The State should review its current restrictions on jury participation with a view to removing all forms of unreasonable and irrational discrimination.
- > People with disabilities should not be discriminated against in regard to voting and the State should remove all barriers to participation.

Article 26 - Equality before the Law

- > Restrictions on judicial review for refugees and migrants should be removed and the 14 day time limit should be extended to at least 28 days.
- > The continued discretion of the DPP to send accused persons for non-jury trial before the Special Criminal Court is in breach of Article 26 of the ICCPR and should be addressed.
- > The Government should introduce legislation to recognise the change of gender for transgendered persons.

Article 27 - Minority Rights

- > In public policy initiatives concerning Travellers, representatives from the Traveller Community should always be effectively represented.
- > The Government should recognise Travellers as a formal ethnic group.
- > The Government should devise and provide significant funding for a national policy strategy to protect minority languages.
- > The Government should recognise Irish Sign Language as a formal national language.

Introduction

1. FLAC (Free Legal Advice Centres), the Irish Council for Civil Liberties (ICCL) and the Irish Penal Reform Trust (IPRT) welcome the Third Report of Ireland under the International Covenant on Civil and Political Rights (ICCPR), required under Article 40 of the Covenant. However, while the State's Third Report was due to be submitted by 31 July 2005,³ it was more than eighteen months overdue on submission.
2. Although the State did consult with non-governmental organisations (NGOs) in November 2006 in preparation of its Third Report, many of the concerns raised by groups are not reflected in the final document. The State's timeframe for this consultation was too short for many NGOs to make meaningful contributions, as it only allowed four weeks from receipt of the State's draft report to the deadline for submissions.⁴
3. The State Report contains little of the information required by the Human Rights Committee's (HRC)'s Reporting Guidelines⁵ on any "factors and difficulties" that may exist which affect the implementation of the Covenant, including the "nature and extent of, and reasons for every such factor and difficulty" as well as provide details of the steps being taken to overcome these under Article 40. There is a serious lack of hard targets and statistical data in general in the State's Third Periodic Report to allow developments to be monitored and no attention is paid to the observations made by the Committee on the Elimination of Racial Discrimination (CERD),⁶ the Committee on the Elimination of Discrimination Against Women (CEDAW)⁷ and the Committee on the Rights of the Child (CRC)⁸ on Ireland since 2000 which also serves to illustrate the shortcomings in the protection of certain rights under the ICCPR.
4. Ireland has failed to withdraw any of its four remaining reservations to the ICCPR since its second periodic review in 2000 and we urge the State to adopt measures to enable it to withdraw these reservations.
5. Article 2(2) of the Covenant requires State Parties to adopt laws and other measures to give effect to the ICCPR rights in line with constitutional processes. However, the HRC has expressed concern that not all of the Covenant rights are guaranteed in the State's domestic law, and subsequently, the power of the Irish Human Rights Commission (IHRC) to take action in the courts to protect ICCPR rights is limited.⁹ FLAC, the ICCL and the IPRT welcome the fact that aspects of the UN Convention Against Torture 1984 and the European Convention on Human Rights (ECHR) were given further effect in Irish law in 2000 and 2003 respectively.¹⁰ However, the State rarely gives further effect in Irish law to international human rights conventions and it was the last Council of Europe Member State to give further effect to the ECHR.
6. This shadow report is a joint project¹¹ undertaken by three organisations, FLAC, the ICCL and the IPRT. It was researched and written in 2007 and 2008.

³ Concluding Observations of the Human Rights Committee: Ireland, 24 July 2000, para. 30, UN Doc.: A/55/40.

⁴ Correspondence from the Head of the Human Rights Unit, Department of Foreign Affairs to ICCL dated 26 October 2006 notes deadline of 15 November 2006 for written submissions on the draft State report. The deadline was then extended until 29 November 2006.

⁵ Section C.4, Consolidated Guidelines for State Reports under ICCPR: 26/02/2001m.

⁶ CERD/C/IRL/CO/2, 10 March 2005.

⁷ CEDAW/C/IRL/CO/4-5, 22 July 2005.

⁸ CRC/C/IRL/CO/2, 29 September 2006.

⁹ Concluding Observations of the Human Rights Committee: Ireland, 24 July 2000, para. 11.

¹⁰ The Criminal Justice (United Nations Convention Against Torture) Act 2000 and the European Convention on Human Rights Act 2003. Irish legislation can be sourced from the following locations: www.oireachtas.ie and www.bailii.org

¹¹ A number of interviews were conducted and focus groups undertaken as part of this project. They included focus groups with unaccompanied minors seeking asylum (16 April 2007); migrants and people seeking asylum (20 April 2007); two focus groups with Travellers (both held on 19 April 2007); former female prisoners (17 April 2007); former male prisoners (17 May 2007); persons facing familial inequalities such as same-sex couples (23 April 2007), lone parents (25 April 2007) and transgendered persons (23 and 26 April 2007).

Article 1

- 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.**
- 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.**
- 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.**

The Right to Self-Determination

7. There is nothing to report under this article.

Article 2

- 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.**
- 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant.**
- 3. Each State Party to the present Covenant undertakes:**
 - (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;**
 - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;**
 - (c) To ensure that the competent authorities shall enforce such remedies when granted.**

Ireland's Anti-Discrimination Legislation

8. The Equal Status Acts 2000- 2004 and the Employment Equality Acts 1998- 2004 are the central tenets of Ireland's equality legislation. An objectionable practice must occur in order for the legislation to be operable. Consequently, cases of discrimination may go unchallenged unless an individual takes a case and therefore this law is not preventative. However, paragraph 17 of General Comment 31 on Nature of the General Legal Obligations imposed on States Parties to the Covenant states that there is an obligation on the State to prevent a recurrence of a violation of the Covenant.¹² These discrepancies leave certain groups and individuals even more vulnerable by placing an unrealistic burden on persons to be proactive when they may not even be aware of their rights. In addition, the Acts do not cover all grounds of discrimination such as social origin, membership of a trade union or status as an ex-offender and the ground of "age" does not allow children to claim discrimination under that heading.¹³ This blanket exemption is not consistent with the UN Convention on the Rights of the Child and is not conducive to the principle of non-discrimination against children under Article 24. Furthermore, equality legislation in Ireland does not protect against discrimination on the grounds of political opinion.¹⁴
9. Since the introduction of the equality legislation a number of issues have arisen in relation to its implementation:
- > First, the Equality Authority is under-resourced. For example, in 2006 the Equality Authority only received an extra 1.5% in funding¹⁵ with the result that it cannot perform all of its functions, in particular, equality impact assessments for service providers and bodies;
 - > Second, funding also appears to be adversely affecting the work of the Equality Tribunal, as there is currently a three-year waiting in order to take a case;¹⁶
 - > Third, the Government has amended the legislation three times to include new exemptions¹⁷ and to move jurisdiction from the Equality Tribunal to the District Court for complaints in relation to publicans and hoteliers.¹⁸ As a result, it is more difficult for vulnerable people to challenge discrimination in these areas;
 - > Fourth, the legislation does not cover all state functions, activities and controlling duties, an issue which has been acknowledged by CERD.¹⁹
10. The State does not adequately implement gender and equality proofing which remains weak at present. The lack of gender and equality proofing of Government policy has a specific and direct effect on the marginalised groups of Irish society. Equality proofing requires decision makers to recognise the importance of assessing the likely impact of policies on socially excluded persons at policy development stage. Broad-reaching policy or plans for Government spending such as the budget are not equality proofed. Extra funding should be provided to the Equality Authority in order to ensure that decisions, policy and legislation are equality proofed. A report commissioned by the IHRC notes that the enactment of a statutory duty to equality proof legislation would "go some way" to ensuring that the State complies with its international human rights obligations, in particular with regard to equality.²⁰ Section 75 of the United Kingdom (UK)'s Northern Ireland Act 1998 imposes a positive duty on public bodies to equality proof government policies and practices.

¹² UN Doc: CCPR/C/21/Rev. 1/ Add. 13 of 26 May 2004.

¹³ Section 3(3), Equal Status Acts 2000-2004.

¹⁴ Report of the European Committee of Social Rights, Conclusions 2006 (Ireland), page 4. Accessible at www.coe.int

¹⁵ The Equality Authority received 5,451,000 in grant aid for 2005 and 5,531,000 in 2006. Source: Department of Justice, Equality and Law Reform (June 2006).

¹⁶ Equality Authority *Annual Report 2004*, at page 54, Equality Authority *Annual Report 2005*, at page 15 and Equality Authority *Annual Report 2006* at page 19.

¹⁷ Section 50 of the Equality Act 2004 amended Section 7 of the Equal Status Act 2000 to allow the Minister for Education and Science to discriminate on the basis of nationality when providing further and higher education grants. This section is in response to a decision from the Equality Tribunal in 2003. The Tribunal decided that further and higher education grants are a service and that 'non-nationals' who are denied access to this service are being directly discriminated against. In its decision, the Tribunal advised the Minister for Education and Science, Noel Dempsey TD, that his current scheme was discriminatory and should be amended accordingly. Instead of taking on board the Tribunal's recommendation, the Government decided to amend the Equal Status Act instead; Section 19 of the Social Welfare (Miscellaneous Provisions) Act 2004 was introduced to amend the principal Social Welfare Act to restrict the definition of 'spouse' or 'couple' to a married couple and to opposite sex cohabiting couples for state welfare schemes. This amendment was included by the Department of Social and Family Affairs to reverse the outcome of a successful Equal Status case and has the effect of restoring discrimination against persons in same-sex couples.

¹⁸ Section 25, Intoxicating Liquor Act 2003.

¹⁹ UN Doc.: CERD/C/IRL/CO/2, 10 March 2005, para. 19.

²⁰ Walsh, J. and Ryan, F. (2006) *The Rights of de facto Couples*, IHRC: Dublin, page 138.

11. The Equality Authority is due to be relocated to a site in Roscrea, County Tipperary as part of the Government's decentralisation scheme.²¹ An advance office has already been opened there in May 2007. The European Commission against Racism and Intolerance (ECRI) has expressed fears that this location change may be problematic with regard to access in particular for minority groups who mainly live in Dublin. Staff retention was also of concern to the ECRI as it may lead to the loss of important institutional knowledge.²²

Failure to Fully Transpose European Union Directives

12. The European Union (EU) Race Directive²³ has been transposed into domestic law by means of the Equality Act 2004 but not in its entirety. For example, the European Commission recently issued a "reasoned opinion" indicating that the Government failed to implement sections of the Directive correctly. Problem areas in Ireland identified by the Commission include:

- > An incorrect definition of indirect discrimination;
- > The exclusion from protection against discrimination for certain 'private' types of employment;
- > The limitation of the right of interested parties to initiate proceedings to defend the victims of discrimination;
- > The limit to compensation for victims of discrimination;
- > The exclusion from protection against discrimination regarding certain types of housing.

Disability

13. Despite previous pledges from the State, the language of the Disability Act 2005²⁴ is not based on the human rights of the individual. The 2005 Act lacks any mechanism to ensure persons with disabilities are provided with basic standards of services as a right. With regard to the provision of accessible public buildings and services, referred to by the State in paragraph 32 of their report, Section 25(4)(c) of the 2005 Act permits a Minister to declare that public buildings need not be brought into compliance with certain standards²⁵ if he or she is satisfied that: "making the building accessible to persons with disabilities would not be justified on the basis of cost, having regard to the use to which the building is put." The definition of disability espoused by the 2005 Act²⁶ is narrower than that of the Equal Status Acts 2000-2004²⁷ and is not in line with international human rights standards. The IHRC has also expressed a number of concerns with regard to the assessment of needs and complaints procedures under the 2005 Act.²⁸ The IHRC²⁹ and the United Nations Committee on Economic, Social and Cultural Rights³⁰ have expressed concern at the omission from the 2005 Act of the right of people with disabilities to seek judicial remedies where any of the provisions of the Act are not carried out.
14. With regard to employment by public bodies as referred to by the State in paragraph 32 of their Report, Section 47(1) of the 2005 Act states that a public body should "take all reasonable measures to promote and support the employment by it of persons with disabilities" but this requirement is only "in so far as practicable". More importantly, there is no mechanism in place to monitor this which leaves a wide margin of discretion to public authorities. The provision is too vague to provide adequate assurance that persons with disabilities have the opportunity to be employed by public bodies.

²¹ The Government website on decentralisation is accessible at the following website www.decentralisation.gov.ie

²² *Third Report of the European Commission against Racism and Intolerance on Ireland*, 24 May 2007, para. 40.

²³ EU Race Directive, Council Directive 2000/43/EC of 29 June 2000.

²⁴ Hereinafter referred to as the "2005 Act".

²⁵ The Act states that the buildings must be brought into compliance with part M of the Building Regulations 1997 (SI 497/1997)(as amended).

²⁶ "Disability in relation to a person, means a substantial restriction in the capacity of the person to carry on a profession, business or occupation in the State or to participate in social or cultural life in the State by reason of an enduring physical, sensory, mental health or intellectual impairment", section 2, Disability Act 2005.

²⁷ "Disability means (a) the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body, (b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness, (c) the malfunction, malformation or disfigurement of a part of a person's body, (d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or (e) a condition, disease or illness which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour;" Section 2, Equal Status Acts 2000-2004.

²⁸ Irish Human Rights Commission (2004) *Observations on the Disability Bill 2004*, IHRC: Dublin.

²⁹ *Ibid.*

³⁰ Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland, 5 June 2002, UN Doc.: E/C.12/1/Add.77, para. 14.

Human Rights Education

15. In its Report the State outlines some areas in the primary and secondary school curricula in which human rights are considered to some extent. While these developments are welcome, nonetheless there is need for a dedicated, integrated, comprehensive human rights education programme as a fixed part of the school curriculum rather than the current *ad-hoc* approach.
16. Research into the extent to which human rights education is currently being taught in Irish schools and by service providers is also necessary. The IHRC is planning to carry-out a study to map the extent of human rights education and training in the formal, non-formal and continuing professional training of teachers, the judiciary, legal professions and civil and public servants, with a view to identifying needs and gaps, which will inform its own human rights education strategy and assist in making recommendations to the State. This project should go some way in highlighting current gaps and issues relating to human rights education.

Refer to State Report, paras. 83-99

The Status of the ICCPR in Domestic Law

18. In its Concluding Comments in relation to Ireland's First and Second Periodic Reports,³² the HRC noted that Ireland has not given full effect to the Covenant in the State's domestic law. This remains the case to date. In its second review, the Committee noted that this would limit the IHRC's power to take action in the courts to protect Covenant rights. The State has claimed that the dualist nature of the legal system in Ireland precludes the incorporation of international treaties into domestic law.³³ Unless the ICCPR is given full effect in Irish law through the Constitution or statutory law, the approach of the courts will vary in the weight to be attached to the Covenant in domestic law.

At present the ICCPR only has persuasive effect meaning that the judiciary may utilise the Covenant as an aid to interpretation but may also ignore it if they wish, the latter being the general practice of Irish courts with regard to international human rights treaties.

International Criminal Court Act 2006

17. The International Criminal Court Act 2006 fails to provide for universal jurisdiction for all grave crimes under international criminal law. Crimes of genocide, crimes against humanity, extrajudicial executions and disappearances and other crimes under international law over which all states have a responsibility to exercise universal jurisdiction should have been included under the 2006 Act. Article 29.8 of the Constitution of Ireland provides that Irish courts may exercise universal jurisdiction over such crimes but only to the extent that legislation expressly authorises them to do so.³¹
19. It is generally accepted that Articles 29.3³⁴ and 29.6 of the Constitution³⁵ precluded international treaties such as the ICCPR from being given full direct effect in Irish law unless they have been incorporated into legislation by Parliament. At present the ICCPR only has persuasive effect meaning that the judiciary may utilise the Covenant as an aid to interpretation but may also ignore it if they wish, the latter being the general practice of Irish courts with regard to international human rights treaties. For example, in *Kavanagh v Governor of Mountjoy Prison*, Fennelly CJ asked how the ICCPR and the HRC's views could prevail over the legal effect of a conviction by a duly constituted Irish court,³⁶ and indeed concluded that the proposition that the views of the Committee could "prevail against the concluded decision of a properly constituted court is patently unacceptable."³⁷

³¹ Article 29.8 of the Irish Constitution states that: "[t]he State may exercise extraterritorial jurisdiction in accordance with the generally recognised principles of international law."

³² Para. 11, Concluding Observations of the Human Rights Committee: Ireland 24/07/2000, UN Doc.: A/55/40 and para. 9, Concluding Observations of the Human Rights Committee: Ireland 03/08/93, UN Doc.: CCPR/C/79/Add.21.

³³ Second Periodic Report by Ireland under both the International Covenant on Civil and Political Rights, paras. 13-17. UN Doc.: CCPR/C/IRL/98/2 and the International Covenant on Economic, Social and Cultural Rights, UN Doc.: E/1990/Add.29. Also Ireland's Core Document submitted to the Human Rights Committee in July 1998, UN Doc.: HRI/CORE/1Add.15/Rev/1.

³⁴ In *Re O'Leighleis* [1960] IR 93, the Supreme Court ruled that article 29.3 of the Irish Constitution confers no rights on the individual; it refers only to relations between States.

³⁵ Article 29.3 of the Irish Constitution 1937 states that "Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States". Article 29.6 states that "No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas."

³⁶ Fennelly J., *Kavanagh v. Governor of Mountjoy Prison* [2002] 3 IR 385; [2002] ILRM 81, page 36.

³⁷ *Ibid* at 42.

He continued that:

The obligation of Ireland to respect the invoked principles [of international law] is expressed only in the sense that it is to be “its rule of conduct in its relations with other States”. It is patent that this provision confers no rights on individuals. No single word [in Article 29.3] even arguably expresses an intention to confer rights capable of being invoked by individuals.³⁸

Irish Human Rights Commission (IHRC)

20. The IHRC was established in July 2001 as a result of the Good Friday (Belfast) Agreement 1998.³⁹ While its establishment is a welcome development, there are a number of outstanding issues of concern. One of the central functions of the Commission is to examine legislative proposals to ensure that they are in conformity with the Constitution and the State’s international human rights obligations.⁴⁰ It is of concern that significant amendments to legislation are often introduced at a late stage and EU sourced legislation is generally referred to the Commission late in the parliamentary process. As a result, sometimes there is neither the time nor the opportunity to review the legislation in detail. Moreover, with regard to EU legislation, by the time it is referred to the Commission, much of the detail and the principles will already have been settled and there is little chance of recommendations for amendment by the Commission being taken on board.⁴¹

21. The largest number of submissions on Bills made by the IHRC in any year was in 2004 where eleven submissions were made although a total of fifty-eight Bills were introduced that year by the Government. In 2005, just one submission was made out of forty-one Bills, while in 2006 five submissions were produced out of a total of seventy Bills. In 2007, fifty-five Bills have been introduced with just four submissions from the IHRC. In addition, the Commission is not always given

a proper opportunity to respond and there is a lack of referred legislation from Departments other than the Department of Justice, Equality and Law Reform.⁴² The Commission also struggles with inadequate funding which limits its capacity to perform its functions to the highest standards.⁴³

22. The Commission was established through the Human Rights Commission Act 2000. This Act states that the Commission is to be independent in the performance of its functions.⁴⁴ Given this underlying principle, it would be more appropriate if the Commission was accountable directly to the Irish Parliament. Currently it is accountable to the Minister for Justice, Equality and Law Reform and he plays a role in setting the budget of the Commission and appointing members to the Commission.

Remedies for Domestic Violence

23. The HRC recommended in its previous observations on Ireland that the State should improve remedies for victims of domestic violence.⁴⁵ The Domestic Violence Acts 1996 and 2002⁴⁶ made considerable advances in reforming the law with regard to remedies for domestic violence. However in 2005, CEDAW expressed concern at the “prevalence of violence against women and girls in Ireland” and at the “low prosecution and conviction rates of perpetrators” when compared internationally and the “high withdrawal rates of complaints”. It further criticised the “inadequate funding for organisations that provide support and services to victims”.⁴⁷ General Comment No. 31 notes that effective remedies should be “appropriately adapted so as to take account of the special vulnerability of certain categories of person”.⁴⁸

24. Under Irish law, a “barring order” requires a violent person to leave the family home for a set period. This is only available to some victims of domestic violence. People in same sex relationships cannot get a barring order. It is available to a person against his or her spouse. It is available to a parent against an adult non-dependent child. A co-habitant may

Refer to State Report, paras. 68-77

Refer to State Report, paras. 64-67

³⁸ *Ibid* at 31.

³⁹ Paragraph 9, Chapter 6 of the Good Friday (Belfast) Agreement 1998.

⁴⁰ Human Rights Commission Act 2000.

⁴¹ Speech given by the President of the Irish Human Rights Commission at the launch of the *IHRC Annual Report 2006* on 11 September 2007, Royal Irish Academy, Dublin 2.

⁴² Irish Human Rights Commission, *Annual Report 2004*, page 5.

⁴³ Irish Human Rights Commission, *Promoting and Protecting Human Rights in Ireland: Strategic Plan 2007-2011*, page 30.

⁴⁴ Section 4(2) of the Human Rights Commission Act 2000.

⁴⁵ Paragraph 29 (f) Concluding Observations of the Human Rights Committee: Ireland 24/07/2000, A/55/40.

⁴⁶ Domestic Violence Act 1996 and the Domestic Violence (Amendment) Act 2002.

⁴⁷ UN Doc.: CEDAW/C/IRL/CO/4-5, Para 28, 22nd July 2005.

⁴⁸ General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant: 26/05/2004, UN Doc: CCPR/C/21/Rev.1/Add.13 (General Comments).



The Supreme Court in session Source: Irish Times

only obtain a barring order if they have lived together as husband and wife for six of the previous nine months. Co-habitants or parents seeking protection must further show that they have an equal or greater interest in the property than the perpetrator.⁴⁹ Neither the time limit, nor the property restriction applies to a married couple. If one person in a same sex couple sought to remove a violent partner from the family home, they would have to use the normal assault/injunction procedure where the case would be heard outside the family court system in open court. The applicant would be without the preventive, interim protection of a protection order and be placed in a position where they may have to disclose their sexuality.

25. The same family groups and same sex couples may apply for a “safety order”.⁵⁰ This order does not remove the aggressor from the family home, but directs the person to discontinue the violent behaviour or threats. This is available to married spouses without time restriction, to heterosexual cohabitants who have lived together for six of the previous twelve months and to same sex couples on the basis that they are in a “relationship the basis of which is not primarily contractual”.⁵¹
26. There are currently no dedicated refuges for men who are victims of domestic abuse in Ireland; in particular for those who need to find shelter together with their children. A 2005 report by the National Crime Council and the Economic and Social Research Institute recommended the establishment of a refuge for male victims of abuse.⁵² Under-resourcing of both male and female refuges is a fundamental problem and there remains a paucity of “move-on” facilities for women who would otherwise leave emergency refuge housing. The Irish Office for the Prevention of Domestic Violence (COSC) was established in April 2007 as an executive office as part of the Department of Justice, Equality and Law Reform. NGOs that work in the area of domestic violence stated that they would not work with the office if established in its proposed form. Concerns included the limitation of COSC to prevention of violence, its failure to hold perpetrators accountable

within the criminal justice system, its failure to recognise all forms of violence against women such as rape and trafficking and the fact that it excludes the involvement (and thereby the knowledge-base) of NGOs in its work.⁵³

Remedies under the European Convention on Human Rights Act 2003

27. Remedies under the European Convention on Human Rights Act 2003 are inadequate. For example, where the action carried out by a public institution has been declared incompatible with the Convention, there is no obligation to pay compensation. Referring to the Act, the IHRC has noted that “it is unacceptable to place the courts in a position where they can identify a breach of human rights and not be in position to give an effective remedy”.⁵⁴ The Commission recommended that the scope of the remedies under the Bill be “radically expanded” including compensation as a right. This did not occur and the result does not equate to provision of an effective remedy under Article 2 paragraph 3 of the Covenant.

Remedies for Discrimination other than Sex Discrimination

28. In relation to remedies, the pre-established upper limit on compensation that may be awarded in discrimination cases, other than sex discrimination, may lead to the awarding of damages which do not adequately reflect the severity of the discrimination and the loss caused and thereby do not constitute an effective remedy. The maximum limit amounts to just €6,350 under the Equal Status Acts 2000-2004 and €12,700 under the Employment Equality Acts 1998-2004.⁵⁵

⁴⁹ Section 3 (4) (a) Domestic Violence Act 1996.

⁵⁰ Section 2(1)(a) and (b), Domestic Violence Act 1996.

⁵¹ Section 2(1)(a)(iv), Domestic Violence Act 1996.

⁵² National Crime Council and the Economic and Social Research Institute (2005), *Domestic Abuse of Women and Men in Ireland: Report on the National Study of Domestic Abuse*, National Crime Council/ERSI: Dublin.

⁵³ See for example, the “Open letter to Minister Frank Fahey rejecting the announcement of COSC Irish Office for the Prevention of Domestic Violence” by groups such as National Women’s Council of Ireland, Women’s Aid, Amnesty International (Irish Section), Ruhama, Dublin Rape Crisis Centre, National Network of Women’s Refuges and Support Services, Pavee Point Violence against Women Programme, Rape Crisis Network Ireland, Freedom From Pornography Campaign, 16 May 2007.

⁵⁴ Irish Human Rights Commission (2002) *Submission on the European Convention on Human Rights Bill 2001 to the Joint Oireachtas Committee on Justice, Defence and Women’s Rights*, IHRC: Dublin, page 5.

⁵⁵ Section 27 of the Equal Status Acts 2000-2004.

BOX 1: *Kavanagh v Ireland*⁵⁶

In 1998, the HRC heard a complaint by an Irish applicant and found that the State had breached the applicant's right to equality before the law under Article 26 by failing to provide a reasonable and objective justification for denying the applicant his right to a trial by jury. The Committee required the State to provide the applicant with an "effective remedy" within 90 days and that Ireland was "also under an obligation to ensure that similar violations do not occur in the future; it should ensure that persons are not tried before the Special Criminal Court unless reasonable and objective criteria for the decision are provided" and it required Ireland to outline the steps it was taking to ensure this.⁵⁷ On foot of this in 2002, Kavanagh went before the Irish courts to seek leave for judicial review but this was rejected.⁵⁸ The Minister for Justice, Equality and Law Reform offered the applicant €1,000 (€1270)⁵⁹ in acknowledgement of the Committee's views. The cheque was returned to the Minister notifying him that this was entirely inadequate and that it did not constitute an effective remedy.

In July 2002, Kavanagh was again before the Committee, attempting to claim a violation under Article 2(3) of the Covenant due to the State's failure to provide an effective remedy. This was deemed inadmissible by the Committee because of a lack of any new factual developments, and because he had "no claim under the Covenant that would go beyond what the Committee has already decided in the author's initial communication to it."⁶⁰

While the Committee found that Kavanagh had been discriminated against under Article 26 of the Covenant, he has not been given an effective remedy to date and he served his twelve year sentence in full.

Recommendations

- > The ICCPR should be given full effect in Irish law.
- > Ireland's equality legislation should include all state functions and the State should consider introducing more preventative measures in dealing with underlying inequalities i.e. equality proofing of practices.
- > Funding for the Equality Tribunal should be substantially increased to allow it to deal with anti-discrimination cases in a speedy manner.
- > Funding for the Equality Authority should be increased to allow it to undertake equality impact statements.
- > The State as a matter of urgency should review and enhance remedies protecting against domestic violence as well as increasing supports.
- > Funding and support for the IHRC should be increased substantially and the Government should consider making the Commission directly accountable to the Irish Parliament.



⁵⁶ Communication No 819/1998: Ireland 26/04/2001, UN Doc. CCPR/C/71/D/819/1998.

⁵⁷ Paras. 12-13, Communication No: 819/1998.

⁵⁸ *Kavanagh v. Governor of Mountjoy Prison* [2002] 3 IR 385; [2002] ILRM 81.

⁵⁹ To contextualise this sum, the gross national income per capita in Ireland in 2000 was 25,970 and in 2003 it was €30,910. Source: United Nations Environmental Programme.

⁶⁰ Para. 4.2, Communication 1114/2002.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.



Female Representation in Decision-Making and Public Life

29. In its Concluding Observations on Ireland in 2000, the HRC urged the Irish Government to “intensify its efforts to ensure equality of women in all spheres, particularly in public and political life and in decision-making bodies”.⁶¹ However, apart from a number of small changes adopted in relation to women’s representation on state boards, the State has failed to introduce any positive actions or measures to increase women’s participation in politics or any other areas of public life.⁶² The major political parties do not have an effective mandatory quota system in order to ensure that women are adequately represented. Women candidates won only twenty two of one hundred and sixty-six seats in Dáil Éireann⁶³ in the general elections held on 24 May 2007, a decrease on the seats filled by women in the previous government.
30. Men account for more than 80% of decision makers at local and regional level while women account for only 13.7% and 17.1% of regional and local representative bodies.⁶⁴ In spite of the fact that Ireland has had two female presidents, the office of President is largely ceremonial with actual power being held by the office of the Taoiseach (Prime Minister).
31. In 2004, the Council of Europe suspended the voting rights of Ireland for two months for not complying with a resolution⁶⁵ on gender-balanced representation in the Parliamentary Assembly.⁶⁶ The minimum requirement was one woman on a Member State’s delegation and Ireland failed to ensure this base quota by electing an all-male delegation.

National Women’s Strategy (NWS)⁶⁷

32. The National Women’s Strategy 2007-2013 was launched in April 2007. The National Women’s Council of Ireland⁶⁸ (NWCI) has pointed out that it lacks a basic framework of achievable set targets and timeframes and the NWS fails to include details or objectives *inter alia* on how it will make childcare more affordable for women.⁶⁹ The funding allocated to achieve the considerable objectives of the NWS by the State for the six year period amounts to less than 0.01% GDP.⁷⁰ Short-term and sporadic funding measures, for which no specific government department has responsibility, means that gender mainstreaming in Ireland remains lacking in substantive development. Statistical data on long-term and sustained funding for gender equality initiatives should be available and effective mechanisms should be put in place to ensure the review and monitoring of the Strategy according to precise targets.
33. The National Development Plan 2007-2013, the National Anti-Poverty Strategy 2007-2016 and the Programme for Government 2007 do not adequately address gender inequalities and refer to the NWS as the central mechanism for the creation of gender equality.⁷¹ This weakens efforts to promote gender mainstreaming which is a prerequisite for the achievement of equality between men and women.

Men account for more than 80% of decision makers at local and regional level while women account for only 13.7% and 17.1% of regional and local representative bodies

Refer to State Report, paras. 103-104

Refer to State Report, paras. 108-109

⁶¹ Concluding Observations on Ireland, UN Human Rights Committee, 24 July 2000, at para. 20, A/55/40, paras.422-451.

⁶² In their 2007 Election Manifestoes, a number of political parties (Sinn Féin and the Labour Party) alluded to their intentions to set gender targets but these parties were not elected to Government.

⁶³ Dáil Éireann is the House of Representatives (or lower house) in the Irish National Parliament.

⁶⁴ *National Women’s Strategy 2007-2016*, page 94.

⁶⁵ Council of Europe, Parliamentary Assembly Resolution 1348(2003) on Gender-balanced representation in the Parliamentary Assembly.

⁶⁶ Parliamentary Assembly of the Council of Europe, *Contested Credentials of the parliamentary delegations of Ireland and Malta*, 24 January 2004, Doc. 10051.

⁶⁷ Department of Justice, Equality and Law Reform under the Direction of an Interdepartmental Committee (2007) *National Women’s Strategy, 2007-2013*, Government Stationary Office: Dublin.

⁶⁸ The National Women’s Council of Ireland is a national NGO, founded in 1973.

⁶⁹ National Women’s Council of Ireland (2007) *Critique of the National Women’s Strategy*, NWCI: Dublin.

⁷⁰ National Women’s Council of Ireland (2007) *National Women’s Strategy, Breadth of Women’s Inequalities Acknowledged: Mechanisms to Remove them Absent*, NWCI: Dublin.

⁷¹ *National Development Plan 2007-2013*, page 268.

The Constitution and the Role of Women

34. In its previous Concluding Observations in 2000, the HRC indicated its concern about references to women in Article 41.2 of the Constitution.⁷² This has not been addressed since Ireland's last examination. Indeed, CEDAW observed that the sexist language in Article 41.2.1° and 41.2.2° of the Constitution⁷³ serves as a barrier to equality between women and men.⁷⁴ The All-Party Oireachtas Committee on the Constitution also recommended alternative language to replace the outdated language, which perpetuates an anachronistic view of the role of women in the home, with gender-neutral language.⁷⁵ However, it would appear that there is no political will to change the Constitution. As yet, the State has not indicated any intention to hold a referendum on women in the Constitution and this issue is clearly absent from the current Programme for Government (2007-2012).

Refer to State Report, paras. 120-127

Lack of Statistical Information

35. The State has not included sufficient information on gender-disaggregated data on public and political life and in decision-making bodies. It has only submitted the relevant data with regard to State Boards. It refers to a target set for gender balance in direct appointments to State Boards in 1993, which it failed to achieve.⁷⁶

Additional info not incl in the State Report

Table 2: Women in An Garda Síochána 2007

Rank	Percentage of Female Officers
Assistant Commissioner	16%
Chief Superintendent	6%
Superintendent	5%
Inspector	7%
Sergeant	9%
Garda	23%

Source: Garda Records, 15 June 2007

Employment

36. Girls and women now outperform boys and men academically in the country's schools and third level institutions, with almost 60% of Higher Education Authority places now being taken by women.⁷⁸ Yet this trend is not reflected in the transition of women to the labour market with women earning less than men in all labour sectors. Women earn just an average of 88.5% of the amount earned by men.⁷⁹ Women hold just 4% of Chief Executive Positions in the "top 500" companies in the State.⁸⁰ In spite of Ireland's recent economic success, 23% of women lived at risk of poverty in Ireland and Ireland has the highest reported risk of poverty rate after social transfers for women and the joint third highest for men among EU States in 2004.⁸¹

Table 1: Women as judges

Court	Total Judges	Female (22%)	Head of Court
Supreme	8	2	Male
High	38	5	Male
Circuit	38	11	Male
District	61	14	Male ⁷⁷

Source: Judicial Gender Balance Report 1996, Courts Service, 13 June 2007

⁷² Concluding Observations, HRC, at para. 20.

⁷³ Article 41.2.1° and 41.2.2° of the Constitution state the following:

"1. In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

2. The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home."

⁷⁴ Committee on the Elimination of All Forms of Discrimination Against Women, Concluding Observations: Ireland, 22 July 2005, UN Doc.: CEDAW/C/IRL/CO/4-5.

⁷⁵ All-Party Oireachtas Committee (2006) *Tenth Progress Report, The Family*, All-Party Oireachtas Committee: Dublin, page 127.

⁷⁶ Paras. 103-104, *Third Report by Ireland on the Measures Adopted to Give Effect to the Provisions of the Covenant*, 2007.

⁷⁷ In June 2007, Ms. Miriam Malone was appointed President of the District Court.

⁷⁸ Central Statistics Offices, *Students' Corner: Education*, 2003/2004.

⁷⁹ Central Statistics Office, *National Employment Survey 2006*, accessible at www.cso.ie

⁸⁰ *National Women's Strategy 2007-2016*, page 92.

⁸¹ Central Statistics Office, *Men and Women in Ireland 2006*, page 16, accessible at www.cso.ie



Childcare

37. Childcare in Ireland is expensive and is a serious obstacle to the participation of women in the work place.⁸² In 2005 childcare costs in Ireland averaged over €120 per week,⁸³ with prices ranging from €180 to €205 for one pre-school child per week in full time private care. This causes particular difficulties for one parent and low to middle incomes families and those with more than one child in need of day-care.⁸⁴ There is also a lack of part-time places in crèches for those who may prefer to work part-time or job share because by working full-time they may lose certain state benefits to which they would otherwise have been entitled.⁸⁵ Approximately, 80% of part-time workers in Ireland are women and the majority of unpaid⁸⁶ care work is undertaken by women. Parental leave in Ireland is unpaid and in comparison with its European counterparts, uptake of paternity leave is low, with men participating at less than half the rate of women.⁸⁷
38. There is also a lack of part-time childcare places for parents who work in that capacity.⁸⁸ This can be an obstacle to full equal participation. In addition, the childcare sector is not properly regulated nor is there any control over the quality of childcare services. The lack of places means that parents are under pressure to take what is available rather than the best quality of service for their children.
39. Currently, 99% of unpaid care workers in the State are women⁸⁹ and this group is largely neglected by the State despite the benefit that their work brings to the State through their care of dependent children, parents or older relatives. They receive a means-tested allowance of €200 per week for the care of one person, except if they are already in receipt of social welfare payments in which case they are not eligible for the allowance.⁹⁰

Ethnic Minority Women

40. Minority ethnic women are a particularly vulnerable group in Ireland given the multiple discriminations that they face. Not only are they under-represented at every level, the NWS fails to recognise multiple discrimination as a barrier to integration. Nor does the NWS address specifically the inequalities faced by ethnic minority women who are disadvantaged with regard to access to health, education and employment. Forty-nine percent of admittances to women's refuges are Traveller women⁹¹ even though the Traveller community represents only 0.6% of the population.

Recommendations

- > The NWS should be reviewed and updated with a specific time-frame and targets for achievements.
- > Multiple discriminations faced by minority ethnic women should be adequately dealt with by the NWS.
- > The Irish Government should organise a referendum to amend the Constitution to include the gender-neutral form of Article 41.2 which also recognises the life of carers in the home. This should also include an explicit provision guaranteeing that women and men be treated equally.
- > The Government should increase the level of support available for childcare.

⁸² EU Expert Group on Gender, Social Inclusion and Employment (2005) *Reconciliation between Work and Private Life: A Comparative Review of Thirty European Countries*, page 28.

⁸³ Central Statistics Office, Quarterly National Household Survey, Quarter 1, 2006, Module on Childcare, Quarter 1, 2005.

⁸⁴ Report by Irish Business and Employers Confederation and Irish Congress of Trade Unions Sub-Committee Prepared in the Context of Sustaining Progress: *Quality Childcare: From a Social Partnership Perspective*, November 2005, para. 2.4.

⁸⁵ For example, where a person is in full-time employment (working over 30 hours per week), they no longer qualify for rent supplement, Citizens Information, Employment and Rent Supplement Information Leaflet.

⁸⁶ Citizen's Information Public Service Information, Employment Rights While On Parental Leave.

⁸⁷ EU Expert Group on Gender, *ibid*, page 49.

⁸⁸ EU Expert Group on Gender, *ibid*, pages 38-42.

⁸⁹ National Women's Council of Ireland Information Leaflet on Care Work.

⁹⁰ Department of Social and Family Affairs, Carer's Allowance SW14 leaflet and Carer's Allowance Rates 2007.

⁹¹ National Crime Council/Economic and Social Research Council (2005) *Domestic Abuse of Woman and Men in Ireland: Report on the National Study of Domestic Abuse*, National Crime Council/ERSI, page 99.

Article 4

- 1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.**
- 2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.**
- 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.**



Derogation in States of Emergency

41. In its previous Concluding Observations in 2000, the HRC recommended that the State consider its obligations under Article 4 of the Covenant when reviewing the Constitution, and in particular, with regard to permitted derogations.⁹² By retaining the Special Criminal Court⁹³ and allowing it to deal with non-subversive crime, there is a danger that the rights protected by Article 14 (fair trial) are being restricted. The current retention of the Special Criminal Court is not associated with any public emergency that would justify derogation under Article 4, and indeed, the State has entered no such derogation.

Recommendation

- > Given that a state of emergency does not exist in Ireland, the Special Criminal Court should no longer be in operation.

⁹² Concluding Comments on Ireland, para. 19.

⁹³ The Special Criminal Court was established under the Offences against the State Act 1939. It sits with three judges and without a jury. It was established to deal with terrorism and offences against the State listed as Scheduled Offences, and also Non-Scheduled Offences where a case may be forwarded to its jurisdiction if the DPP certifies that the ordinary courts are inadequate. The Special Criminal Court is dealt with further under Article 14.

Article 5

- 1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the present Covenant.**
- 2. There shall be no restriction upon or derogation from any of the fundamental human rights recognised or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognise such rights or that it recognises them to a lesser extent.**

Limited Right of Derogation

42. There is nothing to report under this article.

Article 6

- 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.**
- 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.**
- 3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorise any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.**
- 4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.**
- 5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.**
- 6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.**

The Right to Life and Abortion

43. There have been no developments to clarify the law as regards the right to life and abortion in Ireland since 1992. Approximately 6,000 women travel to the UK from Ireland every year to avail of abortion services⁹⁴ without medical and other pre and post-operative support.⁹⁵ Article 40.3.3° of the Irish Constitution states that the right to life of a mother and that of her unborn child have equal status, though the meaning of the word “unborn” remains undefined. The *X Case*⁹⁶ involved a pregnant 14-year-old victim of rape who wished to leave the State to have an abortion. In this case, the Supreme Court ruled that:

[...] if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such termination is permissible....⁹⁷

44. This includes a risk to the life of the mother including that arising from the threat of suicide of the mother. However, as yet there is no legislative framework in place to reflect this decision with the result that medical practitioners are reluctant to perform abortions in these circumstances.
45. In March 2002, the Government held a referendum on the right to an abortion, in which a majority of people voted against a constitutional amendment linked to the enactment of the Protection of Human Life in Pregnancy Bill 2002. If passed, this would have resulted in the reversal of the Supreme Court decision in the *X Case* and the criminalisation of women for up to twelve years for the procurement of an abortion within the State or for aiding, abetting or procuring another person to do so.⁹⁸
46. In 2005, CEDAW expressed concern about the consequences of the “very restrictive abortion

laws” in Ireland.⁹⁹ In its 1996 Concluding Comments on Peru, the Committee stated its concern that abortion gives rise to a criminal penalty even for women who are pregnant as a result of rape and that clandestine abortions are a central cause of maternal mortality.¹⁰⁰ It went on to state that these provisions mean that women are subject to inhuman treatment under Article 7 and could possibly be contrary to Articles 3 and 6 of the Covenant. Abortion in the case of rape or incest is not allowed in Ireland nor is it permissible where the foetus is suffering a fatal abnormality.¹⁰¹

In 2005, CEDAW expressed concern about the consequences of the “very restrictive abortion laws” in Ireland.

47. Successive governments have neglected their duties with regard to the health of women in Ireland by failing to put legislation before the Oireachtas aimed at clarifying the legal implications of the various constitutional referenda held on the issue to date even though the courts have requested that this be done.¹⁰² CEDAW has urged the State “to continue to facilitate a national dialogue on women’s right to reproductive health, including on the very restrictive abortion laws”.¹⁰³ Women are still forced to travel to a foreign country if they seek to terminate their pregnancy.
48. Procuring an abortion can be particularly difficult for asylum seeking and migrant women from outside of the European Union as a result of their legal status, which requires a travel document from the State to leave or re-enter the State. From 2000-2004, more than 60 people seeking asylum and living in the State were granted permission to travel to the UK for the procedure.¹⁰⁴ What is of particular concern is that women seeking asylum (who live on €19.10 per week), undocumented migrant workers and other groups of vulnerable women may undergo a potentially

⁹⁴ 6,320 women in 2003 and 5,585 women in 2005 provided Irish addresses for terminations in the UK Department of Health, Abortion statistics 2005, published 4 July 2006 Statistical Bulletin 2006/01.

⁹⁵ Over 110,000 women made the journey to the UK in the 23 year period from 1980 to 2003. In 2006, 5,042 Irish women travelled to the UK for an abortion, accounting for 67.8% of all non-UK resident abortions in 2006. The 2006 figure for Irish women who had an abortion in the UK is a decrease of approx. 500 on the 2005 figure. These figures have been compiled by comparison of the 2005 and 2006 Abortion Statistics Reports from the UK Department of Health.

⁹⁶ *A.G. v. X* [1992] 1 IR 1, page 37.

⁹⁷ Page 37, *A.G. v. X* [1992] 1 IR 1.

⁹⁸ Section 2(1) and 2(3) of the Protection of Human Life in Pregnancy Act 2002, Referendum Commission Information Booklet.

⁹⁹ UN Committee on the Elimination of Discrimination Against Women, Concluding Comments on Ireland paras. 38-39, 22 July 2005, UN Doc: CEDAW/C/IRL/CO/4-5.

¹⁰⁰ Concluding Comments of the Human Rights Committee: Peru, para. 15, 18 November 1996, UN Doc.: CCPR/C/79/Add.72.

¹⁰¹ Art. 40.3.3° of the Irish Constitution 1937. Other countries such as Togo, Columbia, Greece, Spain and the UK allow abortion in cases of rape and incest.

¹⁰² See for example, *Attorney General v X* [1992] 1 IR 1 page 147, Per McCarthy J: “In the context of the eight years that have passed since the [Eighth] Amendment was adopted... the failure by the legislature to enact the appropriate legislation is no longer just unfortunate: it is inexcusable.”

¹⁰³ Para. 39, UN Committee on the Elimination of Discrimination against Women: Concluding Comments on Ireland, UN Doc.: CEDAW/C/IRL/4-5/CO, 22 July 2005.

¹⁰⁴ 17 September (2004) “60 asylum seekers left State to seek abortion in UK”, *Irish Times*.

life-threatening back-street abortion¹⁰⁵ because they are not permitted to access a termination within the State. Notwithstanding these concerns, the State report simply concludes that the 2002 referendum was “closely defeated”.¹⁰⁶ No information is provided about any further steps that are to be taken to clarify the law in this area.

Procuring an abortion can be particularly difficult for asylum seeking and migrant women from outside of the European Union as a result of their legal status, which requires a travel document from the State to leave or re-enter the State.

BOX 2: The D Case

In this case, D. was pregnant with twins and soon discovered that neither foetus would survive. One stopped developing at eight weeks, and the other had a fatal chromosomal abnormality. She decided to have a therapeutic abortion and travelled to the UK and had the procedure in 2002. She had to return to Ireland quickly to care for her two other children and she secretly carried the foetuses into the country in a small coffin for burial. On requiring medical attention on her return to Ireland, she lied and told her local hospital and family doctor that she had had a miscarriage.¹⁰⁷ She noted that the “devastating impact” of the experience was exacerbated by restrictions on access to information on abortion in Ireland and having to travel abroad for a therapeutic abortion.¹⁰⁸ In 2006, D. took her case against Ireland to the European Court of Human Rights to complain about unavailability of the necessary facilities in Ireland.¹⁰⁹ In deciding that the case was inadmissible, the Court ruled that in these circumstances, the procurement of an abortion might have been compatible with the Constitution and therefore she could have pursued a remedy in the State, by way of Constitutional challenge.

BOX 3: The Miss D Case 2007

The Miss D. case¹¹⁰ involved a pregnant 17-year-old girl in the care of the State whose foetus was diagnosed with a major brain defect. She was advised that it was unlikely the foetus would survive until birth and if it did, it would not survive more than a few days. She sought to travel to the UK to have an abortion. The Health Service Executive¹¹¹ insisted that a court order was required to allow her to leave the country for that purpose. However, on 9 May 2007, the High Court ruled that there was no statutory or constitutional impediment to prevent her from travelling for that purpose.



Campaigning around the 2001 abortion referendum

Investigation of Deaths in State Custody or Care

49. There is an obligation on the State to “prevent and punish deprivation of life by criminal acts...to prevent arbitrary killing by their own security forces”.¹¹² Concerns arise in relation to a number of categories of persons in the care/custody of the State in this context. Despite this, Ireland has no child death review mechanism to ensure that deaths of children are investigated promptly by an independent body; this is particularly important with respect to children who die in the care of state

¹⁰⁵ Reports in the media suggest that the Gardaí are investigating allegations of back-street abortions among the asylum and immigrant communities. Source: Walsh, Jimmy (9 July 2004), *Irish Times* and Seanad Report: *O’Meara appalled by back-street abortions*, 9 July 2004

¹⁰⁶ At paragraph 139 of the State’s Third Periodic Report, 2007.

¹⁰⁷ (6 September 2005) “European court hears Irish abortion case”, *Irish Times*.

¹⁰⁸ *Ibid.*

¹⁰⁹ *D v Ireland*, Decision as to inadmissibility of application no. 26499/02, paras. 86-104, 27 June 2006.

¹¹⁰ Judge Liam MacKechnie, 9 May 2007.

¹¹¹ Established by the Health Act 2004, the Health Service Executive is responsible for providing Health and Personal Social Services to everyone living in Ireland. “[T]he objective of the Executive is to use the resources available to it in the most beneficial, effective and efficient manner to improve, promote and protect the health and welfare of the public.”

¹¹² General Comment 6 adopted by the UN Human Rights Committee, 16th session, 1982, para. 3.

agencies. Since Ireland's last examination by the HRC, there have been a number of high profile incidents involving death (one was that of a 14-year-old child) in Garda custody where there have been allegations of ill-treatment. Independent investigation into the deaths has been delayed or has not occurred in all circumstances.¹¹³ The Committee has previously recommended that Ireland ensure that allegations of death resulting from action by the Gardaí be investigated by an independent and public process.¹¹⁴

50. The Garda Síochána Ombudsman Commission (GSOC) was introduced as an independent investigative mechanism and became operational in May 2007.¹¹⁵ This may help to ensure that in future, deaths in Garda custody are promptly and thoroughly investigated. However, there is still no other independent body or entity in place to investigate deaths to other forms of state custody or care i.e. prisons, psychiatric institutions or homes accommodating people with intellectual disabilities. A residual concern is that the possibility remains for complaints to be dealt with by Gardaí, where the complaint is lodged with a member of the Gardaí that does not involve a matter of death or serious bodily harm to a person.¹¹⁶
51. The Coroner's Bill 2007 provides not only for the reform of the Coroner's Service but also for the duty of the coroner to report and investigate certain deaths and to investigate the finding of a body plus the powers required to carry out these functions. The IHRC recommended the inclusion of a number of provisions in the Bill among which should be the establishment of categories of deaths which will be regarded as reportable to the coroner and the disclosure of witness statements to victims' families and legal representatives. The IHRC also recommended that in the case of deaths which occur in Garda custody or as a result of Garda operations, the Coroner should have the assistance of coroner's officers who are not members of An Garda Síochána in order to break the institutional connection between those investigating and those being investigated.¹¹⁷ At present, legal aid or legal assistance for the next-of-kin of those who die in state custody is granted on an ad hoc basis, for one member of the next-of-kin only and at the discretion of the Minister for Justice, Equality and Law Reform.¹¹⁸

BOX 4: The Death of Brian Rossiter

14-year-old Brian Rossiter was arrested on suspicion of public order offences in Clonmel, County Tipperary on 10 September 2002 and was held overnight in a cell on his own, with the consent of his parents. The next morning he was found to be in a coma and he died later in hospital having never regained consciousness. A boy who was arrested with him made a formal statement that Brian had been assaulted by a Garda in his cell after being arrested. His parents' solicitor, who claims to have seen a copy of the autopsy, said that it reported that he died from bleeding between the skull and the brain lining due to blunt-force trauma to the head.¹¹⁹ The only investigation which took place at the time of his death was conducted by a Chief Superintendent.

After a delay of three years, in September 2005, the Minister of Justice, Equality and Law Reform announced that an independent inquiry would be set up to investigate the arrest and detention of Brian Rossiter. The inquiry has reported to the Minister for Justice, Equality and Law Reform though there is no indication that the full findings will be released to the boy's family.

The Minister published a summary of findings from this inquiry on 11 April 2008. Hugh Harnett SC found that there was no independent investigation of the allegations regarding Rossiter's death and that the investigating Superintendent failed to take all reasonable steps to secure evidence concerning the alleged Garda assault, eyewitness testimony and forensic evidence. To date, no one has been held accountable for Brian Rossiter's death.

¹¹³ See for example Boxes 4 and 5.

¹¹⁴ Concluding Comments of the UN Human Rights Committee on Ireland, 2000, para. 14

¹¹⁵ Under the Garda Síochána Act 2005.

¹¹⁶ CPT 2007, para. 12.

¹¹⁷ Irish Human Rights Commission (2006) *Observations of the Irish Human Rights Commission on the General Scheme of the Coroners Bill 2005*, IHRC: Dublin, page 16.

¹¹⁸ Section 86 of the Coroner's Bill 2007, if passed, would allow for this to be put on a statutory basis.

¹¹⁹ Roche, Barry (25 June 2005) "Still searching for answers", *Irish Times*.

BOX 5: The Death of Terence Wheelock

On 2 June 2005, 20-year-old Terence Wheelock was found unconscious in a cell at Store Street Garda Station, Dublin with a ligature tied round his neck. He was immediately transported to hospital. Press reports at the time suggested that he had other, unexplained injuries on his body, although an official Garda statement indicated that no such injuries had been noticed by them. Hospital photographs show bruising on his arms, legs and torso as well as cuts on his knuckles and the ligature mark on his neck. The Wheelock family was not granted access to the man's clothes until a year after his death. A forensic investigation commissioned by his family found that the clothes he wore on the night of his death were extensively soiled by both blood and vomit.¹²⁰ He spent three months in a coma and died in September 2005.

An internal Garda inquiry into the circumstances of his death was carried out but the findings of this inquiry have not been released. This apparently formed the basis for a decision by the Director of Public Prosecutions (DPP) that no criminal charges should be brought in connection with his death. The inquest into Terence Wheelock's death opened in Dublin in 17 February 2006 and, on 13 July 2007, the inquest recorded a verdict of death by suicide. On 27 July 2007, the newly-created GSOC opened its first "public interest" inquiry into the circumstances surrounding the death of Terence Wheelock.¹²¹

Abbeylara

52. On 20 July 2006, a tribunal¹²² established to investigate the circumstances surrounding the fatal shooting of Mr John Carthy at Abbeylara, County Longford on 20 April 2000, published its final report. Mr Carthy was shot when he emerged from his home with a gun after a siege, which lasted several days. In examining how Mr Carthy was shot, Mr Justice Barr found that there were a series of command failures at the Garda scene and that officers had minimal training for or experience of the situation.¹²³ A Garda Inspectorate report 2007 has reviewed the Practices and Procedures for Barricade Incidents by An Garda Síochána.¹²⁴ The report recommended that the An Garda Síochána create an implementation plan for the recommendations, with specific emphasis on the areas of initial response, on-scene command and equipment but also negotiation, dealing with mental health professionals, an emergency response unit, training, logistics and equipment and the media.

Recommendations

- > The State should provide a legislative framework for the provision of safe and legal abortions in Ireland.
- > An independent inquiry, capable of leading to the identification and, if appropriate, the punishment of those responsible for the death of Brian Rossiter in Garda custody should be carried out without any further delay. Brian Rossiter's family should be allowed to be involved in that inquiry to the extent necessary to safeguard their legitimate interests.
- > The Gardaí must human rights proof its policy on barricade incidents and the detailed guidance provided to on scene commanders in respect of such incidents.

¹²⁰ Holland, Kitty (17 February 2007) "Clothes worn by Wheelock soiled by blood, vomit", *Irish Times*.

¹²¹ Garda Síochána Ombudsman Commission (27 July 2007) "Press Release: Garda Síochána Ombudsman Commission launches first "public interest" investigation", www.gardaombudsman.ie

¹²² The Barr Tribunal is accessible at www.barrtribunal.ie

¹²³ Barr Tribunal (2006) *Report of the Tribunal of Inquiry into the Facts and Circumstances Surrounding the Fatal Shooting of John Carthy at Abbeylara, County Longford on 20 April, 2000*, Government Stationary Office: Dublin.

¹²⁴ Garda Inspectorate Report (2007) No. 2: *Review of the Practices and Procedures for Barricade Incidents by An Garda Síochána*, Department of Justice, Equality and Law Reform.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.



UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

53. Only certain provisions of the UNCAT have been given full effect in Irish law.¹²⁵ While this partial incorporation of UNCAT is welcome, Articles 8, 9, 10, 13, 14 and 15 are not justiciable in Irish courts. It would appear that only the negative obligations under CAT have been given full effect in domestic law. Ireland's first periodic report under UNCAT is five years overdue.
54. The Optional Protocol to the Convention against Torture (OPCAT) was signed in October 2007. Work by the Criminal Law Division of the Department of Justice, Equality and Law Reform is underway to draft legislation to enable ratification of the OPCAT. At the time of writing, the Department were preparing proposals for a draft Bill to establish a national monitoring mechanism.
55. The Criminal Justice Act 2006 amends the definition of torture under Section 1 of the Criminal Justice (United Nations Convention against Torture) Act 2000, limiting torture under the Act to refer only to those acts or omissions which are related to the actions of a public official. This was not the case under the 2000 Act.¹²⁶ The limited definition may deny an effective remedy to individuals who make complaints of torture and may also inhibit the investigating and prosecuting of incidents of torture. The 2000 Act does not set out the manner in which a victim of torture can make a complaint and have that complaint investigated. In particular, there is no effective access to an independent complaints mechanism for vulnerable persons such as prisoners, those in immigration-related detention (except those held on Garda premises) and those in closed institutions such as residential mental health care institutions. This is particularly important for those detained on immigration grounds due to the short-term nature of immigration detention and given that they may be deported before any complaint is dealt with satisfactorily.

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Extraordinary Rendition¹²⁷

56. Reports by both the European Parliament and the Council of Europe have expressed serious concern about the use of Irish airspace and Irish airports as part of a CIA "rendition circuit" of unlawful detentions and illegal prisoner transfers.¹²⁸
57. The Report by the European Parliament names a number of people who were transferred through Irish airports for this purpose. According to the Council of Europe Report, Ireland could be held responsible for "active or passive collusion (in the sense of having tolerated or having been negligent in fulfilling the duty to supervise) - involving secret detention and unlawful inter-state transfers of a non specified number of persons whose identity so far remains unknown".¹²⁹ In August 2007, the HRC expressed its concern about allegations of Czech airports being used for rendition flights and recommended that the State investigate these allegations and establish an inspection system to ensure its airports were not used for such purposes.¹³⁰

¹²⁵ See Criminal Justice (United Nations Convention Against Torture) Act 2000.

¹²⁶ Section 186, Criminal Justice Act 2006.

¹²⁷ The practice of rendition involves the transfer of persons from one country to another, using means that purposely circumvent the safeguards of judicial and administrative due process. "The term "extraordinary rendition" appears to be used when there is little or no doubt that the obtaining of custody over a person is not in accordance with the existing legal procedures applying in the State where the person was situated at the time." European Commission for Democracy through Law (Venice Commission), Opinion on the international legal obligations of Council of Europe Member States in respect of secret detention facilities and inter-state transport of prisoners. Opinion 363/2005, CDL-AD (2006) 009, para. 31, [http://www.venice.coe.int/docs/2006/CDL-AD\(2006\)009-e.asp#_Toc130704767](http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.asp#_Toc130704767)

¹²⁸ European Parliament Report: RR\382246EN.doc of 30 January 2007, paras. 121-126.

¹²⁹ Council of Europe, Committee on Legal Affairs and Human Rights: Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states AS/Jur (2006) 16 Part II, 7 June 2006, para. 289.

¹³⁰ Concluding observations of the Human Rights Committee on Czech Republic, 9 August 2007, UN Doc.: CCRP/C/CZE/CO/2.



58. There have been no searches of flights by Irish authorities and no independent inquiry has been initiated to establish whether Irish airports assisted in the rendition process. The State argues that it is entitled to rely on diplomatic assurances from the United States that Irish airports have not been used to facilitate rendition.¹³¹ The IHRC has stated that mere acceptance of the diplomatic assurances is not adequate to discharge Ireland's positive obligations to actively ensure that torture, inhuman or degrading treatment or punishment is not facilitated by the State¹³² under Article 7 and paragraph 9 of General Comment 20 of the Committee¹³³ and under section 4 of the Criminal Justice (United Nations Convention Against Torture) Act 2000.¹³⁴ Having conveyed their concerns to the State in late 2005, the IHRC received a letter on 5 April 2006 from the Minister for Foreign Affairs stating that he had rejected their advice regarding the impermissibility of diplomatic assurances in this context. The letter did not address the Commission's concerns with regard to the State's obligation to investigate allegations of rendition.¹³⁵
59. On 22 November 2007, during a visit to Ireland, the United Nations High Commissioner for Human Rights, Louise Arbour affirmed that the Irish Government should search US military planes landing at Shannon airport to confirm that they are not being used for rendition flights.¹³⁶ A few days later, during his own on-site visit to Ireland, the Council of Europe's Commissioner for Human Rights, Thomas Hammarberg reiterated that there was "an obligation" on the Government to investigate if prisoners were being carried on these aircraft. He added: "I don't think that the response that we are getting now from the Irish and other governments is satisfactory".¹³⁷ The Commissioner's concerns were reiterated in his April 2008 Report on Ireland, in which he recommended that the Irish Government "review the current inspection and monitoring arrangements in Ireland with a view to ensuring that effective and independent investigations are carried out into any serious allegation of extraordinary rendition."¹³⁸ In response the Irish Government indicated that it "remains confident that under international law, it is fully entitled to rely on the categoric

¹³¹ Department of An Taoiseach, Speech by Noel Treacy TD, Minister for Europe: Seanad Private Members' Motion: 31 January 2007.

¹³² Irish Human Rights Commission (2005) *Resolution in Relation to Claims of US Aircraft carrying Detainees*, IHRC: Dublin.

¹³³ General Comment 20: Replaces General Comment 7 concerning prohibition on torture, inhuman and degrading treatment or punishment (Article 7), 10 March 1992.

¹³⁴ Section 4(1) Criminal Justice (United Nations Convention Against Torture) Act 2000.

¹³⁵ Irish Human Rights Commission (2006) *Submission to the European Parliament's Temporary Committee on Rendition*, page 2.

¹³⁶ (23 November 2007) "Defender of Human Rights Goes on the Offensive", *Irish Times*.

¹³⁷ (27 November 2007) "Rights Watchdog Slates Inaction Over Rendition", *Irish Times*.

¹³⁸ Recommendation 34, *Report by the Commissioner for Human Rights Mr Thomas Hammarberg on Ireland 26-30 November 2007*, COE: Strasbourg.

The State argues that it is entitled to rely on diplomatic assurances from the United States that Irish airports have not been used to facilitate rendition.

and absolute assurances secured from the United States Government that they have not engaged in extraordinary rendition through Ireland.”¹³⁹ It also indicated that it does not intend to commission any review of current inspection monitoring arrangements.

Inhuman and Degrading Treatment of Older and Vulnerable Adults at Residential Care Homes

60. A report by the IHRC states that the law and policy in Ireland with regard to long stay residential care is unclear in a number of areas, including a resident’s liability to contribute to his or her care, and through admissions procedures that may result in an “unacceptable

risk of arbitrary decision making”.¹⁴⁰ It found that there was no specific legislation on the quality of care and rights for older people. The Health Service Executive, as the provider of care was not subject to independent assessment and the complaints/appeals procedures were inadequate.¹⁴¹

61. In March 2008, new standards of care and welfare for residents in nursing homes were published.¹⁴² Under these new standards all public and private nursing homes will be subject to independent inspections by designated teams attached to the Health Information Quality Authority (HIQA).¹⁴³ While this is a welcome development, given the seriousness of the abuses which have taken place, the effectiveness of this new investigations mechanism must be kept under careful review.

¹³⁹ *Ibid.* Irish Government’s response to the Commissioner’s Recommendation no. 34.

¹⁴⁰ Irish Human Rights Commission (2003) *Older People in Long Stay Care*, IHRC: Dublin, page 4.

¹⁴¹ *Ibid.*, pages 4-5.

¹⁴² HIQA (2008) *National Standards for Residential Care Settings for Older People in Ireland*, accessible at http://www.hiqa.ie/media/pdfs/HIQA_Residential_Care_Standards_2008.pdf

¹⁴³ Established under the Health Act 2007. Accessible at: <http://www.hiqa.ie/>

BOX 6: Leas Cross Residential Care Home for Older Persons, Co. Dublin¹⁴⁴

A 2006 report on behalf of the Health Service Executive (HSE) into patient care and deaths at a residential care home for older people at Leas Cross, Co. Dublin found that the care at this nursing home was deficient in a number of ways and consistent with institutional abuse.¹⁴⁵ Patients at the home were harassed, bullied, taunted and threatened. Patients were frequently neglected to the point where they developed bed pressure sores. They were forced to take medicine against their will and unnecessary restraints were used in some cases. Older and vulnerable people were insufficiently supervised and left to wander outdoors. This amounts to inhuman and degrading treatment of older and vulnerable adults in residential care homes.

The report stated that there was a failure by the State at policy, legislative and regulatory level to adequately articulate and address the complex needs of the elderly who comprise a vulnerable and frail section of the Irish population. A major cause of the abuse was the inadequate or non-existent training of staff.¹⁴⁶ There were 105 deaths at the care home between 2002 and 2004.¹⁴⁷ The HSE report found that there were inadequate numbers of staff with insufficient training at the nursing home and that the standard of care provided raised “grave concerns”.¹⁴⁸ The 2006 report found that conditions at Leas Cross were not isolated.¹⁴⁹

BOX 7: Peter Mc Kenna’s Experience at Leas Cross

One case involved a disabled patient, Peter McKenna (58) who died having been at the home for less than two weeks. As a ward of court, he was transferred against his family’s wishes from a home for persons with disabilities to Leas Cross. Staff at Leas Cross failed to allow him to keep an important hospital appointment soon after he arrived at the home. When he was admitted to hospital as an emergency shortly afterwards, hospital staff noted that his hygiene was poor, that he had not been hydrated for 2-3 days and that he had septicaemia (blood poisoning) from which he died.



Mr. Peter McKenna
Photo kindly provided by the family of Mr. McKenna

Return at Ports of Entry

62. Approximately 4,477 persons were refused leave to land at Ireland’s ports of entry in 2004 with 2,931 of these were refused entry at Dublin airport.¹⁵⁰ It is not known how many of these were persons seeking asylum. The Minister for Justice, Equality and Law Reform has stated that records are not maintained in such a manner that would allow for the reasons for such refusals to be objectively quantified.¹⁵¹

63. Immigration officials and An Garda Síochána require a sustained, systematic programme of training in order to be able to recognise those who may be in need of the State’s protection such as people seeking asylum or leave to remain. The State Report provides no evidence of human rights monitoring at ports of entry or a human rights or other assessment to safeguard against persons being returned during deportation to States where they may be at risk of torture, inhuman

¹⁴⁴ See RTE’s *Prime Time Investigates: Home Truths*, 30 May 2005, www.rte.ie/news/2005/0530/primetime.html

¹⁴⁵ *Leas Cross Review* by Prof. Des O’Neill, 10 November 2006, p. 16 where institutional abuse is understood as meaning “poor care standards, lack of a positive response to complex needs, rigid routines, inadequate staffing and an insufficient knowledge base within the service,” <http://www.hse.ie/en/Publications/HSEPublications/LeasCrossReport/FiletoUpload,4094,en.pdf>

¹⁴⁶ RTE Prime Time, *Prime Time Investigates: Home Truths*, 30 May 2005, <http://www.rte.ie/news/2005/0530/primetime.html>

¹⁴⁷ *Leas Cross Review*, page 45.

¹⁴⁸ *Leas Cross Review*, page 33.

¹⁴⁹ *Leas Cross Review*, page 3.

¹⁵⁰ Parliamentary Question 246, 9654/05, Mr. Cuffe to the Minister for Justice, Equality and Law Reform, Dáil Debates, Vol. 599, No. 6, 2005.

¹⁵¹ Parliamentary Question 246, 9654/05, Mr. Cuffe to the Minister for Justice, Equality and Law Reform, Dáil Debates, Vol. 599, No. 6, 2005.

or degrading treatment or punishment as required under the principle of *non-refoulement* and the UN Convention Against Torture.

enormous importance of the availability of accurate recordings of interviews in the administration of justice, that the admissibility in evidence of unrecorded admissions made by persons in custody should not be tolerated.¹⁵⁷

Use of Force by Gardaí

64. Irish law is clear that ill-treatment by persons detained is not acceptable.¹⁵² However, in 2006, the European Committee for the Prevention of Torture, Inhuman and Degrading Treatment or Punishment (CPT)¹⁵³ found that a considerable number of people claimed to have been verbally and/or physically ill-treated by Gardaí.¹⁵⁴ A number of incidents regarding alleged use of excessive physical force by Gardaí are detailed in the CPT's Report, which medical doctors confirmed were consistent with injuries or scars displayed by the persons involved.¹⁵⁵ This abuse was said to have occurred at the time of arrest, including after having been brought under control, *en route* to Garda stations in police transport and in cells or detention areas in Garda stations. In its previous Report in 2002, the CPT made reference to the alleged use of excessive force by Gardaí during a demonstration in Dublin on 6 May 2002.¹⁵⁶

65. In its most recent Report, the Morris Tribunal of Inquiry indicated that it was:

...satisfied, having regard to the statutory regulation of the electronic recording of interviews, the enormous investment in resources made by the State in training An Garda Síochána and supplying the equipment necessary throughout the country to ensure its implementation, the extensive time afforded to An Garda Síochána to adapt a new regime, and the

While it is a positive step to have interviews recorded as specified in the Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997, the IHRC has recommended that the 1997 Regulations be amended to require all interviews with suspects by An Garda Síochána to be recorded.¹⁵⁸ In its latest Report, the CPT has reiterated this recommendation.¹⁵⁹

66. Interviewees do not have a legal right to have a lawyer present during Garda questioning. This removes an important safeguard against ill-treatment by the Gardaí in circumstances which cannot be adequately covered by audio-video recording of interviews. Moreover, recent legislative changes allowing inferences to be drawn from a suspect's silence during Garda questioning render it imperative that a lawyer be present when a person is questioned by Gardaí.¹⁶⁰ Audio-video recording should be seen as supplementary safeguard, which should not replace the presence of a lawyer during interrogation.

67. Members of An Garda Síochána are not provided with sufficient human rights judgemental-based training in the use of weapons. Garda Síochána Inspectorate Report No. 2 states that scenario-based training should be put in place in order to assist Gardaí in making the best judgement with regard to the proportionate use of force.¹⁶¹

¹⁵² Regulation 20, paras. 3 to 7, and Regulation 21, para. 1 of the Criminal Justice Act 1984. (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987 (SI 119/1987).

¹⁵³ Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 2 to 13 October 2006, Document CPT/Inf(2007) 40.

¹⁵⁴ CPT 2007 Report, para. 15.

¹⁵⁵ CPT 2007 Report, paras. 15-16.

¹⁵⁶ CPT 2002 Report, page 11.

¹⁵⁷ Para 15.93, Morris Tribunal of Inquiry (2008) *Report of the Tribunal of Inquiry Set Up Pursuant to The Tribunal of Inquiry (Evidence) Acts 1921-2002 into certain Gardaí in the Donegal Division – Report on the Detention of 'Suspects' Following the Death of the Late Richard Barron on the 14th of October 1996 and Related Detentions and Issues Vol 3*, accessible at: www.morristribunal.ie

¹⁵⁸ Irish Human Rights Commission, *Immediate action required by Government to address serious deficiencies in places of detention*, Press Release, 4 November 2004. The CPT notes that persons who are arrested and interviewed under legislation other than the Offences Against the State Act 1939, Criminal Justice Act 1984 and the Criminal Justice (Drug Trafficking) Act 1996 and whose interviews are not automatically audio-video recorded, are at a higher risk of ill-treatment by members of An Garda Síochána, in particular if that person is a drug addict or foreign, CPT 2007 Report, para. 19.

¹⁵⁹ CPT 2007 Report, para. 19.

¹⁶⁰ Sections 28 and 30(4)(b), Criminal Justice Act, 2007.

¹⁶¹ An Garda Síochána Inspectorate Report (No. 2), *Review of Garda Síochána Practices and Procedures for Barricade Incidents*, February 2007, pages 16-17.

Free Consent to Medical Treatment

68. Free and informed consent to medical treatment should be a central tenet to mental health treatment. The grounds on which it can be decided when and how a person can legitimately be found to lack the capacity to make an informed decision does not form part of legislation. The right of a personal representative or family member to act on behalf of the person deemed to lack the capacity to make an informed decision or the person themselves, to appeal to a review body, tribunal or court against the imposition of involuntary treatment, is required. The Law Reform Commission has made extensive proposals for strengthening Irish law on capacity, guardianship and informed consent.¹⁶² There is a need to develop a human rights-compliant test of capacity integrated into the Mental Health Act 2001 and to empower the Mental Health Review Tribunals or other independent bodies to review capacity where a person appears unable or unwilling to consent to treatment.

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Corporal Punishment within Irish Families

69. Corporal punishment by parents and other family members is not prohibited by law in Ireland. The UN Committee on the Rights of the Child expressed its “deep concern” in this regard in 2006.¹⁶³ In 2005, the Council of Europe found that the State’s common law “reasonable chastisement”¹⁶⁴ defence is in violation of Article 17 of the Revised European Social Charter¹⁶⁵ as the State failed to protect children and young persons against “violence”. In his April 2008 Report on his 2007 Irish visit, the Council of Europe Commissioner for Human Rights recommended that corporal punishment of children be prohibited “in a comprehensive way”.¹⁶⁶ In its response, the Government merely indicates that “research already underway will inform further consideration of this issue”.¹⁶⁷

Recommendations

- > The Government should set up an independent inquiry into the illegal transfer of detainees through Irish airports and the Gardaí should set up an investigations mechanism to regularly monitor and perform spot checks on CIA planes and CIA chartered flights.
- > Garda policies on detention and use of force should be human rights proofed and they should receive regular and up-to-date training on their human rights obligations.
- > Free and informed consent to medical treatment should be a central tenet to mental health treatment. There is a need to develop a human rights-compliant test of capacity to be integrated into the Mental Health Act 2001 and to empower the Mental Health Review Tribunals or other independent bodies to review capacity where a person appears unable or unwilling to consent to treatment.
- > The independent inspections mechanism which has been set up under the HIQA should be kept under careful review by the Government.

¹⁶² Law Reform Commission (2006) *Vulnerable Adults and the Law*, Law Reform Commission: Dublin.

¹⁶³ *Concluding Comments of the UN Committee on the Rights of the Child*, 29 September 2006, paras. 39 and 40, UN Doc.: CRC/C/IRL/CO/2.

¹⁶⁴ The Children Act 2001 repealed the statutory confirmation of the common law defence of reasonable chastisement which existed in section 37 of the Children Act 1908. This does not have an effect on the residual common law defence.

¹⁶⁵ *World Organisation against Torture v. Ireland* No. 18/2003.

¹⁶⁶ Commissioner for Human Rights (2008), *ibid*, recommendation 10.

¹⁶⁷ *Ibid*. Government’s response to the Commissioner’s recommendation 10.

Article 8

- 1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.**

- 2. No one shall be held in servitude.**

- 3. (a) No one shall be required to perform forced or compulsory labour;**
 - (b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;**
 - (c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:**
 - (i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;**
 - (ii) Any service of a military character and, in countries where conscientious objection is recognised, any national service required by law of conscientious objectors;**
 - (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;**
 - (iv) Any work or service which forms part of normal civil obligations.**

Trafficking in Human Beings

70. Ireland is a transit country to the UK and a destination country in the international trafficking in human beings for all forms of exploitation. While the Minister for Justice, Equality and Law Reform has stated that there is “no evidence”¹⁶⁸ that the phenomenon is widespread, at national level there is sparse research or data collection being conducted. Indeed, there is a lack of a planned and structured response to the phenomenon of human trafficking in Ireland. The US State Department’s 2006 Report on trafficking notes that organisations in Ireland who have contact with potential victims reported between 14 and 200 victims of trafficking between 2001 and 2005 while NGOs estimate there the numbers vary from 14 to 35 per annum,¹⁶⁹ including up to forty children a year.¹⁷⁰
71. Though it has signed the UN Trafficking Protocol¹⁷¹ and the Council of Europe Convention on Action Against Trafficking in Human Beings 2005, Ireland has failed to ratify and transpose these international instruments into national law. It has yet to incorporate two EU Framework Decisions into law: the EU Framework Decision on combating trafficking in human beings¹⁷² and that on combating the sexual exploitation of children and child pornography.¹⁷³ Ireland is one of just three EU Members States to have opted out of the 2004 EU Directive on residence permits which directs States to issue residence permits to victims of trafficking that cooperate with authorities and also allows for a minimum “period of reflection” during which time a victim can consider how they should proceed.¹⁷⁴ The Ombudsman for Children has however stated that while reflection periods and temporary residence in primary legislation are central to child protection, assistance to victims of trafficking should “never be contingent on their participation in criminal proceedings”.¹⁷⁵ At present, a victim of trafficking has no right of temporary leave to remain, is not provided with the option of a witness-protection programme and there is no specialised Garda unit outside of Dublin to deal with them. Any support or protection given is *ad hoc* and provided by NGOs for the most part. There is no co-ordinated multi-agency response for victims. There have been reports that women have been trafficked into Ireland to provide sexual services to the ethnic communities in the State.¹⁷⁶ Given that certain Eastern European countries are countries of origin for victims of trafficking, and are also now part of the European Union, there is little protection for women from these countries of origin as they now have the legal rights to move freely from their country of origin to Ireland as EU freedom of movement rights are deemed to provide enough protection. The Immigration, Residence and Protection Bill 2008, for example, applies only to those from outside the EU leaving victims of trafficking from the other twenty-six Member States of the Union without its protections.
72. The Child Trafficking and Pornography Act 1998¹⁷⁷ deals with trafficking but does not directly address the issue of trafficking of women for sexual exploitation. It establishes an offence of trafficking into, through or out of the State for the purposes of sexual exploitation with regard to persons under the age of seventeen.¹⁷⁸ The Illegal Immigrants (Trafficking) Act 2000 has resulted in few successful prosecutions for the crime of trafficking.¹⁷⁹ The latter provides that it is an offence to organise or knowingly facilitate the entry into Ireland of a person who is reasonably believed to be an illegal immigrant or who intends to seek asylum.¹⁸⁰

¹⁶⁸ Parliamentary question by Mr. Cuffe on Human Rights Issues, 10 May 2006, <http://debates.oireachtas.ie/Xml/29/DAL20060510.PDF>

¹⁶⁹ US State Department, *Trafficking in Persons Report* issued by the Office to Monitor and Combat Trafficking in Persons, 5 June 2006.

¹⁷⁰ Conroy, Pauline (2003) *Trafficking in Unaccompanied Minors in the European Union Member States—Ireland: Research Summary*, research report prepared for the International Organization for Migration, Ralaheen Ltd., Dublin.

¹⁷¹ Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organised Crime 2000.

¹⁷² European Council Framework Decision 2002/629/JHA on Combating Trafficking in Human Beings (due to have been ratified by 2002).

¹⁷³ European Council Framework Decision on combating the sexual exploitation of children and child pornography 2004/68/JHA of 22 December 2003.

¹⁷⁴ European Union Council Directive 2004/81/EC on the residence permit issued to third country nationals who are victims of trafficking in human beings or who have been subject of an action to facilitate illegal migration, who cooperate with the competent authorities.

¹⁷⁵ Ombudsman for Children Office, *Advice on the General Scheme of the Criminal Law (Trafficking in Persons and Sexual Offences)* Bill 2006, page 21, 31 May 2007.

¹⁷⁶ Report of the Department of Justice, Equality and Law Reform and An Garda Síochána Working Group on Trafficking in Human Beings, May 2006, page 7.

¹⁷⁷ Child Trafficking and Pornography Act 1998.

¹⁷⁸ Section 3, Child Trafficking and Pornography Act 1998.

¹⁷⁹ (26 July 2007) “Man jailed for human trafficking”, RTE News.

¹⁸⁰ Section 2, Illegal Immigrants (Trafficking) Act 2000.

73. There is a lack of victim-centred comprehensive legislation to deal with the phenomenon of human trafficking in Ireland as it addresses the issue as one of immigration rather than one of violence against women and girls who require the State's protection against perpetrators. At present, Ireland is the only EU State not to have a specific offence for trafficking for sexual exploitation in the State and there is no sufficient legal definition of trafficking of adults in Irish legislation. CEDAW drew attention to the lack of information, legislation or a comprehensive strategy to deal with trafficking by the Irish State in its last review of Ireland in 2005.¹⁸¹ This was echoed by the CRC.¹⁸²

74. The Criminal Law (Human Trafficking) Bill 2007 and the Immigration, Residence and Protection Bill 2008, discussed below, relate to these issues though the legislation is currently only in the initial stages of the legislative process. The former Minister for Justice, Equality and Law Reform has stated that issues of trafficking would be dealt with through policy statements.¹⁸³ Indirect piecemeal protection through other pieces of legislation regarding immigration controls, employment or rape and prostitution, does not amount to comprehensive or adequate protection.¹⁸⁴ Victims may be treated as criminals and may be deported back to their country of origin, perhaps without being fully aware of their options and the possibility of applying for asylum. The UNHCR guidelines on international protection state that women and children who have been trafficked may fulfil the "well-founded fear of persecution" requirement for gender-related persecution under the 1951 Refugee Convention.¹⁸⁵

Criminal Law (Human Trafficking) Bill 2007

75. The definition of trafficking and exploitation under the Bill is not fully in line with that of the UN Trafficking Protocol¹⁸⁶ and that established by the Council of Europe and the European Union. The Bill fails to address the protection and support needs of victims of trafficking for sexual exploitation, in particular to the standards required by international law under this legislation.¹⁸⁷ It does not ensure that victims of trafficking will not be prosecuted for offences committed as a result of being trafficked into the State.¹⁸⁸ Particular concern has been raised with regard to the distinction between adult and child sexual exploitation, which should be eliminated given that individuals may be trafficked as children and remain victimised into adulthood.¹⁸⁹ Other criticisms relate to the lack of effective enforcement mechanisms, lack of a social support programme, a protection programme specifically for children and a focus on prevention.

At present, Ireland is the only EU State not to have a specific offence for trafficking for sexual exploitation in the State and there is no sufficient legal definition of trafficking of adults in Irish legislation.

76. The Criminal Law (Human Trafficking) Bill 2007 does not contain provision for the protection of victims of trafficking and a minimalist approach to the issue is taken under the Immigration, Residence and Protection Bill 2008.¹⁹⁰ For example while the Bill does allow for a reflection period and forty-five days recovery,¹⁹¹ this provision can only be extended when the victim cooperates with the Gardaí and thereby fails to protect victims of trafficking in all situations.

¹⁸¹ Concluding Comments: Ireland at the 693rd and 694th meeting of the Committee on the Elimination of Discrimination against Women on 13 July 2005. UN Doc.: CEDAW/C/IRL/4-5.

¹⁸² Concluding Comments: Ireland at the forty-third session of the Committee on the Rights of the Child at para. 76-77, UN Doc.: CRC/C/IRL/CO/2, 29 September 2006.

¹⁸³ Dáil Debates, Vol. 633, No. 4, pages 1366-1367.

¹⁸⁴ The Minister for Justice, Equality and Law Reform in response to a parliamentary question on trafficking, stated that a person cannot be trafficked into the State without the commission of some offence. Parliamentary question by Mr. Cuffe on Human Rights Issues, 10 May 2006, <http://debates.oireachtas.ie/Xml/29/DAL20060510.PDF>

¹⁸⁵ UNHCR (2002) *Guidelines on International Protection: Gender-related Persecution within the context of article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, Para. 18, UN Doc.: HCR/GIP/02/01.

¹⁸⁶ Article 3(a) UN Trafficking Protocol. The Irish Human Rights Commission has noted that in order to fully reflect the UN standards, the Bill needs to further address the issue of consent, which is not a necessary element of the offence where the victim of trafficking is either a child or is an adult victim, where any improper means of coercion are present. This is important to strengthen the distinction between trafficking and smuggling. Observations on the Scheme of the Criminal Justice (Trafficking in Persons and Sexual Offences) Bill 2007, page 54.

¹⁸⁷ Immigrant Council of Ireland (7 February 2008) Press Release: *Legislation lets down Victims of Trafficking*.

¹⁸⁸ *Ibid.*

¹⁸⁹ Ruhama (2006) *Submission on the Criminal Justice (Trafficking in Persons and Sexual Offences) Bill 2006*, Ruhama: Dublin, page 14.

¹⁹⁰ *Report of the Department of Justice, Equality and Law Reform and An Garda Síochána Working Group on Trafficking in Human Beings*, May 2006 at paragraph 2, page 26.

¹⁹¹ Section 124, the Immigration, Residence and Protection Bill 2008.

Child Trafficking in Ireland

77. Information on child trafficking or child smuggling is not publicly available, though the information is collected under the Child Trafficking and Pornography Act 1998.¹⁹² It is estimated that every week, one migrant child goes missing in Ireland.¹⁹³ 328 children went missing from care between 2001 and 2005.¹⁹⁴ There has been at least one reported case of a migrant child being found working in a brothel and another being held and abused at a private house.¹⁹⁵ An independent review of the process by which a child is reunited with his or her family or guardian states that the process is "rushed", "inadequately validated" and "undeveloped".¹⁹⁶ A further report states that where children were reunited with adults, these adults were "unsatisfactory" as guardians or "not suitable".¹⁹⁷ No follow-up procedure exists for family reunification despite evidence of children being trafficked into the country.¹⁹⁸ The Ombudsman for Children has expressed concern that child victims of trafficking are placed in privately-run hostels that are not subject to inspection by the Social Services Inspectorate, resulting in a lack of sufficient security and care.¹⁹⁹ In one case a fifteen-year-old Somali girl who had been rescued from a brothel having been trafficked into Ireland disappeared the next day from a privately-run hostel after staff requested an extra social care worker to mind the child.²⁰⁰

Recommendations

- > The Government should set up an independent inquiry, as a matter of urgency, to examine the disappearance of separated children in the care of the HSE and subsequent Garda or otherwise investigations.
- > The Criminal Law (Human Trafficking) Bill 2007 should be amended to allow for protection for victims of trafficking who are too afraid or unable to participate in a Garda inquiry.
- > The Government should move towards developing a National Action Plan on Anti-Trafficking strategies with key targets to allow it to ratify the Council of Europe treaty.
- > All separated children should be placed on a proper national register when they enter the country.
- > Separated children should receive equitable treatment in care and should be formally placed with legal guardians where appropriate. Moreover, better monitoring should take place of hostels and residence homes and the Ombudsman for Children should not be excluded from dealing with complaints from asylum seeking and migrant children.



Recent newspaper coverage on missing separated children

¹⁹² Section 3, Child Trafficking and Pornography Act 1998.

¹⁹³ O'Brien, Jason (26 May 2007) "Fear for Missing Migrant Children", *Irish Independent*.

¹⁹⁴ Irish Refugee Council (25 May 2007) Press Release on International Missing Children's Day.

¹⁹⁵ (26 May 2007) "Migrant Child Missing Every Week", *Irish Times* and Cullen, Paul (12 September 2005) "Burundian Girl may be Linked to Sex Slavery", *Irish Times*.

¹⁹⁶ A review of services provided through the HSE – ECA region to separated children seeking asylum/unaccompanied minors, July 2005, page 6.

¹⁹⁷ McDonagh, S. (2005) "Assessing the Refugee Appeals Tribunal: The Case for the Publication of Decisions", 10 (2) *Bar Review* 43, page 46.

¹⁹⁸ A review of services provided through the HSE – ECA region to separated children seeking asylum/unaccompanied minors, July 2005, pages 39- 40.

¹⁹⁹ Ombudsman for Children's Office (2007), *Advice on the General Scheme of the Criminal Law (Trafficking in Persons and Sexual Offences) Bill 2006*, OCO: Dublin, page 21.

²⁰⁰ O'Brien, Carl (3 July 2007) "Failings of hostels for trafficked children raised", *Irish Times*.

Article 9

- 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.**
- 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.**
- 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.**
- 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.**
- 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.**

Periods of Detention

78. Arbitrary detention is prohibited under Article 40.4.1° of the Irish Constitution. However, the HRC has previously expressed concern that periods of detention without charge were increased under an amendment to Section 30(4A) of the Offences against the State Act 1939 by the Offences against the State (Amendment) Act 1998.²⁰¹ The Criminal Justice Act 2007 extends the categories of offences for which a person may be held in Garda custody without charge for up to seven days. There is already provision for such an extension under the Criminal Justice (Drug Trafficking) Act 1996, which allows for additional powers of detention of persons suspected of drug trafficking by the Gardaí, following arrest.²⁰² However, this provision under the Criminal Justice (Drug Trafficking) Act 1996 is rarely used²⁰³ and it is questionable whether the provision of prolonged periods of detention has any real impact on crime. There has been no conclusive research to prove that the existing power of the Gardaí was inadequate or to justify an increase in that power.
79. Section 50 of the Criminal Justice Act 2007 provides that an individual may be detained for a total period of seven days without being charged, on the authority of a Garda Officer of the rank of Chief Superintendent or above if he or she has “reasonable grounds for believing that such further detention is necessary for the proper investigation of an offence”. The initial period of detention of six hours can be extended up to four times by various periods from 18-72 hours culminating in a total of a week. The Act also broadens the categories of offences to which this power of prolonged detention by the Gardaí applies. An individual may be detained for forty-eight hours before the Gardaí are required to apply to a judge to extend the period.²⁰⁴

Refer to State Report, paras. 182-186

Refer to State Report, para. 187

80. The CPT has highlighted that “seven days in police custody without charge is a long period of time” and that “prolonged periods of detention of criminal suspects on police premises can lead to high-risk situations”.²⁰⁵ The CPT has also observed that some persons being detained by Gardaí were not being informed of their rights at all. Up to 40% of detainees in some Garda stations “refused to sign a form attesting that they had been informed of their rights.”²⁰⁶

The Right to Bail

81. The Bail Act 1997 places further restrictions on the right to bail. Under the Act, the Court may refuse bail on the basis that the accused person is likely to commit a serious offence while on bail.²⁰⁷ Provision for compensation for a person acquitted of all charges or against whom charges have been dropped, having spent time in custody, is not included in the Act. The introduction of the Bail Act 1997 has had a “substantial impact” on the increasing number of persons received into custody each year, with the remand population highly contributing to the growth in the prison population in recent years.²⁰⁸

The CPT has highlighted that “seven days in police custody without charge is a long period of time” and that “prolonged periods of detention of criminal suspects on police premises can lead to high-risk situations”.

²⁰¹ Concluding Observations of the Human Rights Committee: Ireland, 24 July 2000, para. 15. UN Doc.: A/55/40, paras.422-451.

²⁰² The Criminal Justice (Drug Trafficking) Act 1996 also makes provision for the issuance of search warrants by certain members of An Garda Síochána in the case of suspected drug trafficking offences. It further allows for the attendance of customs and excise officers at, and the participation of such officers in, the questioning of certain persons by arrested An Garda Síochána and to provide for related matters.

²⁰³ Parliamentary Question, Dáil Debates - Volume 632 - 22 February, 2007, Written Answers. - Proposed Legislation.

²⁰⁴ Section 50(3)(g) and (h), Criminal Justice Act 2007.

²⁰⁵ Report to the Irish Government on the visit to Ireland carried out by the European Committee for the Prevention of Torture, Inhuman and Degrading Treatment or Punishment, 31 August - 9 September 1998, para. 9, <http://www.cpt.coe.int/documents/irl/1999-15-inf-eng.htm>

²⁰⁶ CPT 2007 Report, para. 23.

²⁰⁷ Section 2(1), Bail Act 1997.

²⁰⁸ Kilcommins, O'Donnell, O'Sullivan and Vaughan, *Crime, Punishment and the Search for Order in Ireland*, 2004, page 246-247. Ireland also has a proportionately higher use of custody per crimes committed than Canada, England and Wales, Scotland, Australia, France and a number of other European states, page 251.

Mental Health

Refer to State Report, paras. 188-194

82. Ireland's mental health law and policy does not meet all international human rights standards. Part 2 of the Mental Health Act 2001 came into force in November 2006 and provides for better protection for the rights of persons who are detained in mental health in-patient facilities or detained involuntarily. The 2001 Act established the Mental Health Tribunal in order to review *inter alia* the continued involuntary detention of patients. Though it is too soon to draw conclusions on the operation of Part 2 of the Act, there have been reports of a significant reduction in the rate of involuntary admissions. The Mental Health Commission²⁰⁹ has noted that there is an unnecessarily high rate of in-patient treatment and of involuntary admissions.²¹⁰ There has been no substantial review of decisions taken by the Mental Health Tribunal to date, to determine how terms such as "serious likelihood", "immediate and serious harm" and "serious deterioration in his or her condition" have been interpreted. A system of reporting of the decisions of the Tribunal would ensure transparency and consistency in the process. In as far as possible, patients should be treated in the least restrictive environment and manner and if possible, mental health services should be delivered in the community.
83. There are conflicting definitions of whether a person under the age of eighteen constitutes a person with capacity to make decisions relating to their health in Irish law. The Mental Health Act 2001 defines children as persons under eighteen years in line with the UN Convention on the Rights of the Child. Children over sixteen years are entitled to consent to medical treatment.²¹¹ It is not clear from the Mental Health Act 2001 at what age a child may give consent to admission or treatment. Children under eighteen years who are involuntarily detained under the Act appear not to have that right. Article 12(1) of the UN Convention on the Rights of the Child provides that a child should have such a right.

84. The voluntary admission of a child also appears to be the sole responsibility of parents or persons acting in *loco parentis*. This could result in children being admitted to institutions and detained against their will under the Mental Health Act 2001, despite being competent to make their own decisions. Section 25 of the Act encompasses circumstances where the HSE may make an application to the District Court for an order to refer a child to an in-patient facility. The court order required under this section is for a period of twenty-one days, reviewable by the Court. This twenty-one day period is excessive also with regard to Article 37 paragraph d of the UN Convention on the Rights of the Child.
85. It is not open to children to have admission and detention decisions, which affect them reviewed by the Mental Health Review Tribunals. They are also excluded from the right to voluntary status following a period of involuntary admission.

Immigration-Related Detention

86. Under the Refugee Act 1996²¹² and the Immigration Acts 1999,²¹³ 2003²¹⁴ and 2004²¹⁵ people may be detained for a variety of immigration-related reasons. These include detention upon their arrival, during the asylum process or before deportation. Communication and translation is a major difficulty for foreign nationals in the justice and prison systems, and other prisoners are often relied on for communication purposes.²¹⁶ During a focus group conducted for research purposes for this Report, a 23-year-old was interviewed who had arrived in Ireland as an unaccompanied minor aged 17 and was sent to Cloverhill Prison aged 20 for deportation. He spent a number of days sharing a cell with a suspected drug dealer and a man being held on suspicion of violent assault. In August 2007, there were 14 inmates on immigration-related grounds in Cloverhill Prison.²¹⁷

Refer to State Report, paras. 195-202

²⁰⁹ The Mental Health Commission was established under the Mental Health Act 2001 to ensure high standards and good practices in the delivery of mental health services and to take all reasonable steps to protect the interests of persons detained in approved centres under the Act.

²¹⁰ Mental Health Commission *Annual Report 2004*, including the Report of the Inspector of Mental Health Services, page 30-34 and the *Mental Health Commission Annual Report 2006*, including the Report of the Inspector of Mental Health Services, pages 46-47.

²¹¹ Section 23 of the Non-Fatal Offences Against the Person Act 1997.

²¹² Section 9, Refugee Act 1996.

²¹³ Section 5(1).

²¹⁴ Section 5.

²¹⁵ Section 7.

²¹⁶ Cloverhill Prison Visiting Committee 2006 Report, page 3.

²¹⁷ Information accurate on 1 August 2007, received by telephone call to Irish Prison Service on that date.



87. Section 55 and 56 of the Immigration, Residence and Protection Bill 2008 provides for the arrest and detention of a foreign national pending his or her removal from the State.²¹⁸ This arrest of a foreign national may take place under warrant by a member of An Garda Síochána subject to removal from the State, to a prescribed place of detention.²¹⁹ The person may be detained until removal but may not be detained for a period longer than 8 weeks in aggregate.²²⁰ Under Article 9 paragraph 4 of the Covenant, a person is entitled to be “brought before a court, in order that the court may decide without delay on the lawfulness of his detention...”. There is also provision for the detention of foreign nationals on their entry into the State where it is not practicable to issue the person with a protection application entry permit.²²¹ However, this section fails to guarantee that a detained foreign national will have the right to be informed, in a language that he or she understands, of his right to challenge the lawfulness of his or her detention and also the decision to remove him or her from the State.

Places and Conditions of Detention of Migrants

88. Persons refused asylum or individuals awaiting deportation are often held in ordinary prisons before removal. While imprisoned they are subjected to prison rules and are accommodated with convicted/remand prisoners. For a person who has been refused leave to land, the detention period could be up to a week while a person who failed to comply with a deportation order could be detained for several weeks.²²²

Persons refused asylum or individuals awaiting deportation are often held in ordinary prisons before removal

89. Immigration-related detention is an increasing phenomenon in Ireland. It may occur under section 5(1) of the Immigration Act 1999²²³ or Section 7 of the Immigration Act 2004. In the

year 2003-2004, 2,798 people were detained on immigration related grounds. There are no special facilities for those detained on immigration-related grounds nor are the regime, staff or conditions appropriate to their legal status. Ninety percent of these detainees are held at Cloverhill Prison (for males) or the Dóchas Centre (for females) where they are held with remand and convicted prisoners. The conditions of detention at Cloverhill Prison are overcrowded with three men often sharing a cell designated for two.²²⁴ Inmates are subjected to a restricted regime, being held in their cells for seventeen hours a day and have the same visiting entitlements as remand prisoners, as do women at the Dóchas Centre.²²⁵ In the Dóchas Centre, immigrant women awaiting detention often bear the brunt of overcrowding by being placed in overcrowded accommodation²²⁶ or being required to sleep on the mattresses in disused offices or on the floor of offices and cells.²²⁷ There are also concerns with regard to access to information for these detainees. In the Report of its 2006 visit to Ireland, the CPT²²⁸ stated that a prison is an unsuitable place to detain those such as immigrants awaiting deportation, who are neither suspected nor convicted of a criminal offence.

Sections 29 and 30 of the Offences Against the State Act 1939

90. In paragraph 15 of its previous Concluding Observations on Ireland²²⁹, the Committee expressed concern that Section 30(1) of the Offences Against the State Act 1939, which allows a person to be arrested on suspicion of being about to commit an offence, is compatible with neither Article 9 or 14(3)(g). The Hederman Committee also expressed concern in this regard, pointing out that the majority of people arrested under these powers are not charged with any crime. Adequate safeguards are not in place to ensure that this power is not abused by members of An Garda Síochána. In its Report, the Hederman Committee recommended the deletion of the words “about to commit” to be replaced by language “largely drawn” from Article 5(1)(c) of the European Convention on Human Rights.²³⁰

Refer to State Report, paras. 203-204

Additional info not included in State Report

²¹⁸ Article 5 of the Immigration Act 1999 also provides for this.

²¹⁹ Art. 52 (2) and (4), Immigration, Residence and Protection Bill 2008.

²²⁰ Art. 52(5).

²²¹ Section 70, Immigration Residence and Protection Bill 2008.

²²² CPT 2007 Report, para. 86.

²²³ Immigration Act 1999.

²²⁴ Kelly, Mark (2004) *Immigration Related Detention*, A report commissioned by the Immigrant Council of Ireland, the Irish Penal Reform Trust and the Irish Refugee Council: Dublin, page 49.

²²⁵ *Ibid*, page 53.

²²⁶ *Ibid*, page 50.

²²⁷ Researcher’s visit to Dóchas Centre on 21 May 2007 and female prisoner focus group

²²⁸ CPT 2007 Report, para. 86.

²²⁹ Concluding Observations of the Human Rights Committee: Ireland, 24 July 2000, UN Doc.: A/55/40.

²³⁰ Article 5(1)(c) of the ECHR provides for the “lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so”.

91. Under Section 29 of the 1939 Act, an officer of An Garda Síochána not lower in rank than a Chief Superintendent can - on his or her own authority - issue a search warrant for gathering evidence relating to offences against the State by suspected paramilitaries or in more recent cases, criminal gangs.²³¹ In ordinary criminal investigations, judicial scrutiny is necessary in order for a search warrant to be issued.

No Right to Have a Lawyer Present During Questioning

92. There is no legal right for a person to have a lawyer present during police interrogation. The Committee has expressed regret²³² that this is not the case and the CPT has expressed its opinion "that the right of access to a lawyer should include the right to have a lawyer present during police interrogations."²³³ This practice is standard in neighbouring jurisdictions such as the United Kingdom. In light of the provisions of the new Criminal Justice Act 2007, which encroaches upon the right to silence²³⁴ and allows for inferences to be drawn in certain circumstances,²³⁵ the need for an individual being questioned to have a lawyer present has become even more acute. The right to have a lawyer present during questioning is also an important protection against miscarriages of justice.²³⁶

There is no legal right for a person to have a lawyer present during police interrogation.

Garda Síochána Ombudsman Commission (GSOC)

93. The Garda Síochána Act 2005 provides for the establishment of the new GSOC which became operational in May 2007. This is a welcome development and offers the potential for genuinely independent investigation of complaints against the police.²³⁷

94. GSOC issued its second Annual Report on 9 May 2008 and it reveals that it has received 2,905 complaints and 294 referrals from the Garda Commissioner. The Report also indicates that GSOC has sent nine files to the DPP and that over 750 investigations of criminal conduct are ongoing. On the same day, GSOC also released a "Two Year Report" reviewing its own effectiveness, and the adequacy of its powers under the 2005 Act. That Report indicates that given the volume of complaints which GSOC has received it is now considering 'leasing back' the investigation of a number of complaints involving potentially criminal conduct by Gardaí to the Garda Commissioner.²³⁸ This represents a retrograde step as it would result in some complaints of potentially criminal and discriminatory conduct not being investigated independently.

BOX 8: Dean Lyons Case²³⁹

On 1 September 2006, the then Minister for Justice, Equality and Law Reform published the Report of the Commission of Investigation into the Dean Lyons case.²⁴⁰ The Commission had originally been set up to investigate how Mr Dean Lyons, who was a drug addict and homeless, had confessed to and been charged with double murder in 1997. After charges were brought against Mr Lyons, it emerged that another man had confessed in considerable detail to the same murders. Charges against Mr Lyons were later dropped and in January 1998, the Gardaí admitted that he was innocent.

The Commission's Report into the incident identified problems with the manner in which Mr Lyons was questioned. Further concerns were expressed that the case was referred to the Director for Public Prosecutions when there was some doubt among investigating officers as to the guilt of Mr Lyons.

²³¹ The Morris Tribunal of Inquiry, discussed further under Article 14, was "disturbed" by the power of a Superintendent to issue search warrants and recommended that this power under Section 29 of the Offences Against the State Act 1939 be vested in judges of the District or Circuit Courts. Para. 6.17-6.24, *Report on the Arrest and Detention of Seven People at Burnfoot, County Donegal on 23 May 1998 and investigation into same*, <http://www.justice.ie/en/JELR/Morris5thRpt.pdf/Files/Morris5thRpt.pdf>

²³² Concluding Comments on Ireland: 2000, at para. 15.

²³³ *Report of the European Committee on the Prevention of Torture, Inhuman and Degrading Treatment (CPT)* from 20 to 28 May 2002, para. 22 and again in its 2007 report, the CPT considered that detained persons should "in principle" be entitled to a lawyer present during any such interrogations, at para. 24.

²³⁴ Sections 28 and 30(4)(b), Criminal Justice Act 2007.

²³⁵ Part 4, Sections 28-30, Criminal Justice Act, 2007.

²³⁶ *People (DPP) v Pringle* [1981] 2 Frewen 57 (CCA).

²³⁷ Refer to para. 266 under Article 20 for further details on how the GSOC's first request to the Minister to examine public order practices was refused.

²³⁸ GSOC *Annual Report 2006-2007*, available from www.gardaombudsman.ie

²³⁹ Coulter, Carol (14 November 2005) "Senior Counsel to head Dean Lyons investigation", *Irish Times*.

²⁴⁰ Report of the Commission of Investigation (Dean Lyons Case) (2006), accessible on www.justice.ie

Recommendations

- > Certain offences, of lesser seriousness, could be dealt with more effectively by imposing stringent conditions of bail, such as a requirement to report daily to the Gardaí or by imposing residence requirements, rather than introducing restrictions on bail.
- > The situation of children in mental health institutions and psychiatric care needs to be reviewed for its compatibility with standards in the UN Convention on the Rights of the Child, particularly with regard to the issue of consent.
- > Detention for immigration purposes should be used as a last resort and should be subject to judicial oversight.
- > Increased powers of detention under the Criminal Justice Act 2007 and those which already exist under the Criminal Justice (Drug Trafficking) Act 1996 are excessive, unnecessary for the administration of justice and contrary to Article 9 and should be reviewed.
- > Persons arrested by the Gardaí should have a formal legal right to have a lawyer present during questioning.
- > The Government should make available the resources necessary to enable the GSOC to independently investigate all complaints about members of the Garda. As an immediate measure, the resources required to enable the GSOC independently to investigate all complaints involving possible criminal conduct by Garda members must be made available. There should be no dilution of the GSOC's current statutory powers.

Article 10

- 1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.**

- 2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;**
(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

- 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.**

10

Refer to State Report, para. 206

95. New prison rules were introduced under the Prisons Act 2007 replacing the Prison Rules 1947.²⁴¹ The 2007 Act places the Inspector of Prisons on a statutory basis. However, it also empowers the Minister to pre-screen and censor the reports of the Inspector prior to their publication.²⁴² It does not create an independent Prison Ombudsman empowered to investigate individual complaints from prisoners. In November 2007, a new Inspector of Prisons (a District Court judge) was directly appointed by the Minister for Justice, Equality and Law Reform without any transparent public appointments process.

Physical Conditions of Prisoner Accommodation

Refer to State Report, paras. 211-214

96. General Comment 21 on Article 10 states that persons deprived of their liberty may not be subjected “to any hardship or constraint other than that resulting from the deprivation of liberty”.²⁴³ In four Irish prisons, (Mountjoy, Cork, Limerick and Portlaoise prisons²⁴⁴) sanitation facilities are inadequate and prisoners are still required to “slop-out” every morning.²⁴⁵ They eat in proximity to the chamber pots, a practice that is particularly degrading in shared cells. In other prisons, prisoners have to eat in proximity to a toilet that is not adequately partitioned. A group of prisoners from Cork, Mountjoy and Portlaoise prisons launched an unsuccessful legal challenge over the lack of adequate in-cell sanitation.²⁴⁶ The prisoners claimed the conditions were in breach of their rights to privacy and bodily integrity. Prisoners on protection are often kept locked in their cells for 23 hours a day.²⁴⁷

97. While current plans to build a new prison to replace Mountjoy at an alternative site may be underway, this is not expected until the end of 2010 at the earliest.²⁴⁸ As yet there appears to be no exact timeframe for a new Cork prison, though reports suggest it will take “a number of years”..²⁴⁹ There are grave misgivings that a large prison, such as that proposed, would present difficulties in addressing issues such as safety. Penal reform groups have also

expressed concern at plans to increase the prison stock at a time when there is no demonstrable need for such an increase.

The assertion in the State’s report that “a small number of prisons operate in excess of capacity” and that overcrowding has been “largely eliminated” are incorrect.

Overcrowding in Prisons

98. The assertion in the State’s report that “a small number of prisons operate in excess of capacity” and that overcrowding has been “largely eliminated”²⁵⁰ are incorrect. For example, officially the State’s Report records that the current bed capacity of Mountjoy is 540. However, the actual capacity was 561 on 6 February 2008.²⁵¹

Table 3: Overcrowding in Irish Prisons on a Given Day 2008

Institution	Design Capacity	Bed Capacity	No. in Custody	Total Prisoners in System
Mountjoy (m)	547	540	584	635
Mountjoy (f)	80	85	105	138
St. Patrick’s	220	213	199	202
Cork	150	272	269	308
Limerick (m)	133	275	262	281
Limerick (f)	12	20	17	19
Castlereaa	183	228	230	240
Cloverhill	400	431	433	433
Wheatfield	320	390	386	390
Portlaoise	205	210	104	104
Arbour Hill	138	148	147	147
Training Unit	96	96	91	94
Midlands	515	469	461	491
Loughan House	85	130	124	160
Shelton Abbey	58	90	82	87
Total	3,142	3,597	3,494	3,729

Source: O’Keefe, C. (13.05.08) “Life behind bars: A cycle of violence, despair and drugs”, *Irish Examiner*.

²⁴¹ Statutory Instrument No. 320/1947 Rules for the Government of Prisons 1947 (SI 320/1947) replaced by Prison Rules 2007 (SI 252/2007).

²⁴² Section 31(4) of the Prisons Act 2007.

²⁴³ General Comment No. 21, para. 3: Replaces general comment 9 concerning humane treatment of persons deprived of liberty (Art. 10): 10/04/92.

²⁴⁴ Irish Penal Reform Trust (2006) *Submission of the Irish Penal Reform Trust to the European Committee for the Prevention of Torture, Inhuman or Degrading Treatment or Punishment (CPT) in preparation for the 2006 CPT visit to Ireland*, IPRT: Dublin, page 4.

²⁴⁵ The process of “slopping out” is required in cells which do not have sanitary facilities and prisoners are required to use chamber pots which they then have to empty.

²⁴⁶ O’Brien, Carl (17 August 2004) “Prisoners who have to slop out claim rights violation”, *Irish Times*.

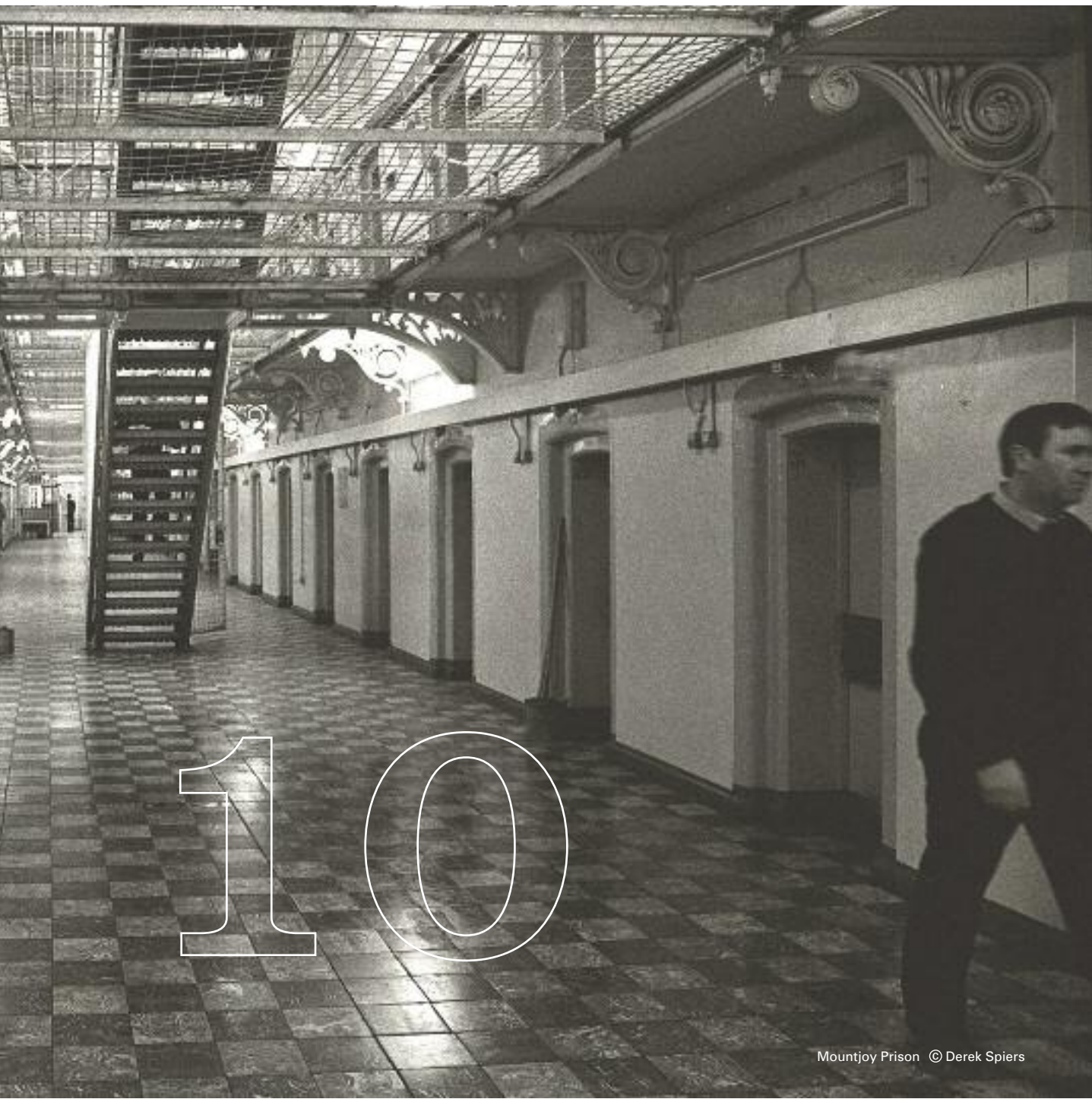
²⁴⁷ CPT 2007 Report, para. 63.

²⁴⁸ Hancock, Ciaran (11 April 2007) “McNamara wins new prison contract”, *Irish Times*.

²⁴⁹ Roche, Barry (25 January 2007) “North Cork expected location for new prison”, *Irish Times*.

²⁵⁰ *Third Report by Ireland on the Measures Adopted to Give Effect to the Provisions of the Covenant, 2007*, Paras. 210 and 211.

²⁵¹ O’Keefe, Cormac (14 May 2008) “Prison staff fear bunk bed syndrome undoing potential for good work”, *Irish Examiner*.



10

Mountjoy Prison © Derek Spiers

99. The original capacity of Mountjoy Prison was 464.²⁵² The extra “prison places” are accounted for by doubling up with bunk beds and by placing mattresses on the floors. There have been occasions where there have not been enough mattresses, duvets or pillows due to chronic levels of overcrowding.²⁵³ The State has included mattresses on floors as “prison places” in its statistics and report. The women’s prison at Mountjoy (Dóchas Centre) has a design capacity of 77²⁵⁴ yet the daily average population has not been less than 80 prisoners on an average day from 2001 to 2004.²⁵⁵

BOX 9: Quote from Mountjoy Prison Visiting Committee and the Minister for Justice, Equality and Law Reform

“...in August there were 515 inmates, resulting in prisoners sleeping on mattresses on the floors of the cells and the [Visiting Committee] ²⁵⁶ finds this unacceptable in 2006” ²⁵⁷
 Mountjoy Visiting Committee, 2006.

“...I have to be very frank and say that since its opening in 1999 there has been a serious issue with overcrowding there.” ²⁵⁸

Referring to the Dóchas Centre, Minister for Justice, Equality and Law Reform, Mr. Brian Lenihan, 25 July 2007.

100. Many prisoners in Mountjoy are being housed with two to a 9.5m2 cell designed for single occupancy, as are many prisoners in Cork Prison.²⁵⁹ In 2006, the Castlereagh Prison Visiting Committee raised concerns about overcrowding amongst remand prisoners there, the numbers of which have reached 46, although the prison only has space to hold 20 inmates awaiting trial. This Committee also observed that the official capacity of the prison is 202, with a population peaking at 238²⁶⁰

whereas official numbers are recorded at 228. In their most recent annual reports, the Visiting Committees of Mountjoy, Dóchas Centre, Arbour Hill, Castlereagh, Cork, Cloverhill (three prisoners in a cell for two)²⁶¹ have all highlighted overcrowding as a continuous and major concern. Even in newer prisons, overcrowding can result in prisoners being forced to use the toilet in view of others.

101. Although the holding cells in “B” basement in Mountjoy male prison are no longer in use, on 16 February 2006, the two holding cells held over 20 prisoners. The cells are approximately 3 x 4 metres in size. Prisoners had one toilet with minimal ventilation and they were not provided with enough space for all prisoners to sit down or sleep. Some were transferred to different cells to sleep on mattresses and were returned in the morning. They were also required to eat in these cells and some had to do so sitting on the floor. Although these premises have been taken out of service, it is unclear whether Mountjoy Prison is now in a position to accommodate newly arrived prisoners in better conditions.



An overcrowded cell in Mountjoy Prison. Photo from a confidential source.

²⁵² *Fourth Annual Report of the Inspector of Prisons and Places of Detention for the Year 2004-2005*, page 16. Overcrowding became “officially sanctioned” in the 1983 when the Prison Rules 1947 (which were in operation at the time) were amended to allow prison governors to accommodate more than one person per cell. Kilcommins, O’Donnell, O’Sullivan and Vaughan (2004) *Crime, Punishment and the Search for Order in Ireland*, IPA: Dublin, page 237.

²⁵³ *Third Report by Ireland on the Measures Adopted to Give Effect to the Provisions of the Covenant, 2007*, paras. 211 and 213.

²⁵⁴ *Report of the European Committee on the Prevention of Torture, Inhuman and Degrading Treatment (CPT) from 20 to 28 May 2002*, page 18.

²⁵⁵ Irish Prison Service, Statistics, Daily average number of prisoners by institution 1999-2004, <http://www.irishprisons.ie/stats.asp>

²⁵⁶ A Visiting Committee is appointed to each prison under the Prison (Visiting Committees) Act 1925 and the Prison (Visiting Committees) Order 1925. Their function is to visit their appointed prison at intervals to hear complaints from prisoners or to report any abuses to the Minister for Justice, Equality and Law Reform. Prison (Visiting Committee) Act 1925.

²⁵⁷ Mountjoy Prison Visiting Committee *Annual Report 2006*, page 1.

²⁵⁸ Minister for Justice, Equality and Law Reform, Mr. Brian Lenihan, addressing the launch of the *Whitaker Report 20 Years On, Lessons Learned or Lessons Forgotten?*, 25 July 2007.

²⁵⁹ *Report of the European Committee on the Prevention of Torture, Inhuman and Degrading Treatment (CPT) from 20 to 28 May 2002*, pages 22-23.

²⁶⁰ Castlereagh Prison Visiting Committee *Annual Report 2006*, page 1.

²⁶¹ Cloverhill Prison Visiting Committee *Annual Report 2006*, page 3.

102. The Cork Prison Visiting Committee believes there is a “consistent link between overcrowding and prisoner tension”. They further note that prisoners often have to be released in order to make spaces for incoming prisoners.²⁶² It has been reported that “a culture which is conducive to inter-prisoner intimidation and violence” exists in Ireland’s prisons with at least three prisons considered unsafe for prisoners and prison staff alike, that is Limerick, Mountjoy and St. Patrick’s Institution. Violence among prisoners is “worrying”; this is reflected in the increasing numbers of prisoners requesting protection from prison management.²⁶³ The CPT has observed the harsh regime for prisoners who request protection in Irish prisons.

BOX 10: The Death of Gary Douch (21) at Mountjoy Prison

On 1st August 2006, Gary Douch was beaten to death and had excrement smeared on his body by another prisoner in a holding cell. There were five other prisoners present in the cell at the time of the murder but they were threatened not to call for help. The prisoner who has now been charged with the killing had been assessed by the Central Mental Hospital after spending time in Cloverhill Prison but was placed in the holding cell in Mountjoy Prison, because there was no other cell available for him. Mr. Douch had been placed in the holding cell after requesting protection from other prisoners calling into question the adequacy of protection available to prisoners.

An independent inquiry into the death of Mr. Douch, chaired by Gráinne McMorrough SC was launched on 23 April 2007. It has yet to report.

The murder of Mr. Douch under the circumstances outlined above was described by the CPT as “a tragic illustration of the unsafe nature of certain prisons in Ireland”.²⁶⁴

Segregation of Remand Prisoners

103. Ireland’s reservation to article 10(2) of the Covenant remains in place to date.²⁶⁵ The reservation reads as follows:

Ireland accepts the principles referred to in paragraph 2 of article 10 and implements them as far as practically possible. It reserves the right to regard full implementation of these principles as objectives to be achieved progressively.

A remand prison has been built at Cloverhill (in Dublin) but it does not provide segregated accommodation for the convicted and unconvicted prisoners or for those held on immigration-related grounds. There is no provision for a separate remand prison for women or children in the State. The women are held with convicted female prisoners at the Dóchas Centre while children are often detained on remand at St. Patrick’s Institution.

Youth Detention Facilities

104. Current arrangements are that children under sixteen years of age are detained in Children Detention Schools, under the auspices of the Irish Youth Justice Service, while those over sixteen are detained in or near St Patrick’s Institution run by the Irish Prison Service. Calls for the closure of St. Patrick’s Institution have frequently been made.²⁶⁶ From the perspective of the welfare and best interests of children, conditions in St. Patrick’s are poor. Juveniles are locked in their cells on their own for up to nineteen hours a day.²⁶⁷ Psychology and counselling services are inadequate to deal with the various problems – mental health and addiction – with which children present, and the buildings are antiquated and unsuitable for modern prison life, they lack open green spaces for example. Due to a lack of resources the number of recreational and vocational programmes and workshops have been severely reduced and only recently have a limited number been reintroduced after two years with little or no activities. Access to and the quality of these programmes and workshops remains insufficient. A new

Refer to State Report, paras. 215-218

Refer to State Report, paras. 219-240

²⁶² Cork Prison Visiting Committee *Annual Report 2006*, 16/03/2007, page 1.

²⁶³ CPT Report 2007, paras. 33, 62-68.

²⁶⁴ *Report of the European Committee on the Prevention of Torture, Inhuman and Degrading Treatment (CPT) from 2 to 13 October 2006*, para. 40.

²⁶⁵ The reservation reads as follows: “Ireland accepts the principles referred to in paragraph 2 of article 10 and implements them as far as practically possible. It reserves the right to regard full implementation of these principles as objectives to be achieved progressively.”

²⁶⁶ See the *Report of the Committee of Inquiry into the Penal System*, (the “Whitaker” Report”), Government Stationery Office, 1985.

²⁶⁷ McVerry, Peter (2006) *Rehabilitation – Are we for real?* Jesuit Centre for Faith and Justice: Dublin.

educational facility, which was completed in April 2003, partially opened in March 2007.²⁶⁸ Both literacy levels and participation in education rates are poor, even compared with adult prisons. Serious concerns remain with regard to rehabilitation. Contact with family members for these children is limited to one half hour visit per week. All correspondence is censored. Efforts to reduce the chronic drug problem in the institution have led to an increase in bullying of boys into receiving drugs for others through their visits and, while measures have been taken, such as the introduction of controlled visitation arrangements to improve the situation, personal assaults continue.²⁶⁹

There is no independent complaints mechanism available to young people in St. Patrick's and the mandate of the Ombudsman for Children excludes children detained here and in other adult places of detention (including Garda stations).

105. In the opinion of the CPT, St. Patrick's Institution is "unsafe".²⁷⁰ There is no independent complaints mechanism available to young people in St. Patrick's and the mandate of the Ombudsman for Children excludes children detained here and in other adult places of detention (including Garda stations²⁷¹). With the closure of the prisons at Fort Mitchell and Shanganagh, young people from all over Ireland are now sent to St. Patrick's Institution, meaning that visits from family members are extremely costly in terms of time and money. The closure of St. Patrick's Institution has been recommended by many groups and bodies including the Inspector of Prisons and Places of Detention.²⁷² Although it is proposed to move all children under eighteen years of age out of St. Patrick's Institution into the Children Detention Schools (which currently accommodate those under sixteen years of age), there is no timescale in place for this development. Moreover, provision is being made to accommodate the young people currently in St. Patrick's Institution in a temporary unit on the new

adult prison estate in Thornton Hall until the new detention facility for children is ready.²⁷³

BOX 11: "The place was a training ground for criminality. Young men aged seventeen to twenty-one were locked up in practical terms for 17 to 18 hours per day. Then they had access to dreary yards, inadequate schooling and no workshops at all. There used to be eighteen different workshops, 20 years earlier when the Inspector was on the Visiting Committee of that institution. Dr. Whitaker's report over 20 years ago said that St. Patrick's should be closed immediately and no more money wasted on it."

Mr. Justice Kinlen, Irish Prison Inspectorate²⁷⁴

106. Section 52(2) of the Criminal Justice Act 2006 provides that children over ten can be prosecuted for serious offences such as murder, manslaughter and sexual assault. The age of criminal responsibility for other offences is twelve years. The Central Criminal Court, where serious offences are tried, has not to date been adapted to ensure that procedures and approaches are age appropriate.

Refer to State Report, para. 230

Children Detained in Garda Stations

107. There is no system to undertake effective and independent inspection of Garda stations where children may be detained. The mandate of the Ombudsman for Children²⁷⁵ specifically excludes the inspection of Garda stations.²⁷⁶ The CPT has reported that, on occasion, children are detained in Garda stations due to a lack of a more appropriate "specialised" detention facility.²⁷⁷ The CPT has highlighted that in the period immediately following deprivation of liberty, children are at a higher risk of ill-treatment.

²⁶⁸ (30 March 2007) "Education unit at St Patrick's Institute to open", *Irish Times*.

²⁶⁹ Inspector of Prisons (2005) *Report of the Inspection of St. Patrick's Institution 2004-2005*, Department of Justice, Equality and Law Reform, Dublin: Dublin, pages 11, 65, 76.

²⁷⁰ CPT 2007 Report, para. 38.

²⁷¹ Section 11(e)(iii) Ombudsman for Children Act 2002.

²⁷² Inspector for Prisons, *ibid*, para. 9.3.

²⁷³ Minister for Justice, Equality and Law Reform's response to Parliamentary Question on detention centres on 9 October 2007.

²⁷⁴ Inspector for Prisons, *ibid*, p. 5.

²⁷⁵ Ombudsman for Children Office was established by the Ombudsman for Children Act 2002, in order to conduct research and policy documents on children, ensure participation of children in matters which affect them and to handle independent complaints.

²⁷⁶ Section 11(e)(iii) Ombudsman for Children Act 2002.

²⁷⁷ *Report of the European Committee on the Prevention of Torture, Inhuman and Degrading Treatment (CPT) from 20 to 28 May 2002*, paras. 107.

Mental Health Facilities

Refer to
State
Report,
paras.
244-250

108. The Central Mental Hospital in Dublin is the only forensic psychiatric hospital in Ireland, with only 74 beds for males and 7 beds for females to deal with a population of four million.²⁷⁸ As a result, there are often long waiting lists for admission to the hospital resulting in persons, prisoners in particular, not receiving timely treatment.²⁷⁹ The CPT reported that while conditions at the Central Mental Hospital have gradually improved over the years, most of the rooms were prison-like, and patients had limited access to natural light and ventilation, with rooms being in a “mediocre state of repair”.²⁸⁰ Sanitation facilities were not of an adequate standard and were poorly maintained offering little privacy. Patients are locked into their rooms all night, regardless of the level of risk they pose.²⁸¹ They often have to wait in a locked bedroom when needing to use the toilet since the practice of “slopping out” has ceased. The Inspector of Mental Hospitals has described the living conditions in the older parts of the hospital as unsatisfactory.²⁸² The use of seclusion was cited as a “chief” issue of concern by the Mental Health Commission in its response to a 2006 report.²⁸³

109. The Inspector of Mental Health Services has noted that there is an almost complete absence of in-patient facilities for persons with an intellectual disability and a mental disorder who require in-patient treatment.²⁸⁴ These people may not be protected by the Mental Health Act 2001. The Inspector noted with concern that vulnerable patients in “long-stay” wards were living in unacceptable conditions in institutional environments. The conditions were often drab and bare and in some cases dirty, with no opportunity for patients to develop their interests or leisure pursuits. They were sometimes locked into wards.²⁸⁵

110. Removal of a patient to the Central Mental Hospital under Section 208 of the Mental Treatment Act 1945 was strongly criticised by the Inspector who said that it was “reprehensible [to send] persons neither charged with nor sentenced for any offence to a forensic facility. It was simply a pragmatic solution to a problem for which no adequate services existed in the State”.²⁸⁶ 233 people were inappropriately placed in psychiatric hospitals in 2005 and were identified as in need of transfer to community settings.²⁸⁷ 117 of these do not have an appropriate day service.²⁸⁸ From November 2006 to September 2007, 166 children were admitted to adult psychiatric centres.²⁸⁹ These children were held in adult facilities due to the absence of sufficient suitable psychiatric places. Under the Mental Health Act 2001, children who are detained on foot of a court order can be treated with medication for three months before the hospital authorities are required to seek a second opinion.

111. While the State’s commitment to replace the Central Mental Hospital is welcome, it is a retrograde step to place the new facility on the grounds of a prison site, at Thornton Hall, Dublin. Apart from this remote location, this will serve to further stigmatise those suffering from serious mental health problems through association with the prison estate.

Mental Health in Prisons

112. Prisoners with serious mental health problems can suffer delays accessing treatment in the Central Mental Hospital. One prisoner in Arbour Hill prison was on a waiting list for the hospital for forty-three days.²⁹⁰ It is wholly unacceptable that a prisoner deemed in need of psychiatric care is kept waiting for such a protracted period. The Castlerea Visiting Committee also raised concerns about people with psychiatric needs being sent to prison.²⁹¹ In spite of the high prevalence of prisoners with mental health

Refer to
State
Report,
paras.
254-260

²⁷⁸ Mental Health Commission (2007) *Report of the Committee of Inquiry into current care and treatment practices in the Central Mental Hospital 2006, Mental Health Commission Response to Inquiry Report*, Mental Health Commission: Dublin, at page 14.

²⁷⁹ One case involved a twenty five year old man who was placed in emergency accommodation on foot of a court order and was moved between Limerick prison, a Garda station and a hotel during the week that he was waiting for admission to the Central Mental Hospital. Source: (31 January 2008) “Lack of mental hospital facility”, *Irish Times*.

²⁸⁰ CPT 2007 Report para. 111.

²⁸¹ Mental Health Commission, *ibid*, pages 2, 37 and 43.

²⁸² Inspector of Mental Hospitals (2004) *Report of the Inspector of Mental Hospitals for year ending 31st December 2003*, Inspector for Mental Hospitals: Dublin, page 43.

²⁸³ Mental Health Commission, *ibid*, page 2.

²⁸⁴ Mental Health Commission *Annual Report 2006*, page 154.

²⁸⁵ *Ibid*, page 83.

²⁸⁶ Inspector of Mental Hospitals, *Report of the Inspector of Mental Hospitals for year ending 31st December 2003*, page 47.

²⁸⁷ National Intellectual Disability Database *Annual Report 2006*, page 13.

²⁸⁸ *Ibid*, page 87.

²⁸⁹ Mental Health Commission, Notifications of the Admission of Children to Approved Centres for Adults, Summary of Notifications received by the Commission in compliance with Section 2.5(m) of the Mental Health Commission, Code of Practice Relating to the Admission of Children under the Mental Health Act 2001, Reference number COP-S33(3)(e)/01/2006.

²⁹⁰ Arbour Hill Visiting Committee *Annual Report 2006*, page 3.

²⁹¹ Castlerea Prison Visiting Committee *Annual Report 2006*, page 1.

problems in Irish prisons, psychiatric services are inadequate. The availability and quality of psychiatric and psychological services has been identified as a concern in almost all of Ireland's prisons. There was no psychologist at Portlaoise prison at the end of 2006.²⁹² Other prisons where concern was raised with regard to psychiatric services include Arbour Hill,²⁹³ Limerick,²⁹⁴ Midlands,²⁹⁵ Castlerea,²⁹⁶ Cloverhill,²⁹⁷ and Wheatfield.²⁹⁸ A former prisoner from a focus group for this Report who spent his life in-and-out of the country's prisons said that his access to a psychiatrist in Castlerea prison was so inadequate that his family paid for a private doctor to visit him in prison.



The Central Mental Hospital, Dundrum, Dublin (Leon Farrell, Photocall Ireland)

113. The IPRT is currently pursuing a legal challenge against the State seeking a declaration that the State has failed in its constitutional obligation to provide adequate psychiatric care to people in Ireland's prisons. The High Court ruled in September 2005 that the IPRT has standing to represent mentally ill prisoners in the proceedings.²⁹⁹ The case is now due to be heard before the High Court later in 2008.

114. An official report on Mental Illness in Irish Prisoners³⁰⁰ in 2003 yielded the following results:

Table 4: Mental Illness in Prisons

	Male Committals	Males on Remand	Sentenced Males	Female Committals	Sentenced Females
Mental Illnesses	16%	-	27%	41%	60%
Severe mental illnesses: Psychosis	3.9%	7.6%	2.7%	-	5.4%
Major depressive disorder	5.4%	10%	5%	8.5%	16%
Should be diverted to psychiatric services	3.7%	7.5%	2.7%	-	5.4%

²⁹² Portlaoise Prison Visiting Committee *Annual Report 2006*, page 2.

²⁹³ Arbour Hill Visiting Committee *Annual Report 2006*, page 3.

²⁹⁴ Limerick Prison Visiting Committee *Annual Report 2006*, page 6.

²⁹⁵ Midlands Prison Visiting Committee *Annual Report 2006*, page 2.

²⁹⁶ Castlerea Prison Visiting Committee *Annual Report 2006*, page 1.

²⁹⁷ Cloverhill Prison Visiting Committee *Annual Report 2006*, page 2.

²⁹⁸ Wheatfield Prison Visiting Committee *Annual Report 2006*, page 4.

²⁹⁹ *Irish Penal Reform Trust Ltd., Sefton and Carroll v Governor of Mountjoy, the Minister for Justice, Equality and Law Reform and Ireland*, [2005] IEHC 305, unreported.

³⁰⁰ National Forensic Mental Health Service (2003) *Mental Illness in Irish Prisoners: Psychiatric morbidity in sentenced, remanded and newly committed prisoners*, page 1.

The Report also found that 20% of male committals and 32% of female committals needed to be seen by a psychiatrist. Were all of those who needed psychiatric care diverted to psychiatric services, an extra 150 new beds would be required in addition to the extra mental health in-reach clinics.³⁰¹

115. The rate of serious mental illness among sentenced prisoners is thirteen times higher than among the general population and for prisoners on remand, it stands at 38 times higher.³⁰² A report by the Probation and Welfare Service on the relationship between incarceration and homelessness showed that 35% of persons homeless at the time of committal said they had been diagnosed with a mental illness with two-thirds having been hospitalised in a psychiatric institution.³⁰³

116. While the State is phasing out the use of padded cells, a form of "cladded" cell continues to be used in some Irish prisons. Most have been replaced by new Close Supervision and Special Observation Cells, which raise a number of concerns. The Visiting Committee at St. Patrick's Institution has requested information on the procedures with regard to the use and detention of prisoners in these cells and has not yet been supplied with answers. It has suggested that clear guidelines be established and that a log or record of the use of the cells be kept.³⁰⁴ The Inspectorate of Prisons has confirmed that in Castlerea prison, a prisoner was detained in a Close Supervision and Special Observation cell for twenty-six days.³⁰⁵

Recommendations

- > All persons detained following refusal to land,³⁰⁶ asylum seekers detained for a number of reasons³⁰⁷ and people detained pending deportation³⁰⁸ should be formally notified of their right to challenge their detention, their right to inform a person of their choice of their detention, the right to have access to a lawyer and the right to have access to medical care.
- > A concerted effort is required to address the needs of prisoners from black or ethnic minority backgrounds, including those detained for immigration-related reasons.
- > The current poor physical conditions in many of our prisons must be addressed as a matter of urgency. In particular, the Government should make a firm commitment to provide in-cell sanitation to all prisoners by a fixed date.
- > Serious concerns about the levels of violence in Irish prisons have been expressed by, among others, the CPT. The Government must take urgent steps to address this problem.
- > Many concerns have been expressed about the proposed building of a new prison at Thornton Hall in north County Dublin. Among the main concerns are the proposals to significantly increase prison capacity; proposals to continue the practice of detaining children in adult prisons; proposals to transfer women prisoners to this remote location; proposals for a large-scale immigration detention centre; and proposals to co-locate the prison with the Central Mental Hospital. In all of these regards, the proposed plan may have negative impacts on these groups of potential detainees.

³⁰¹ National Forensic Mental Health Service, *ibid*, page 1.

³⁰² O'Brien, Carl (6 December 2005) "Mentally ill end up in jail due to glaring gaps", *Irish Times*.

³⁰³ Seymour, M. and Costello, L. (2005) *A study of the number, profiles and progression routes of homeless persons appearing before the courts and in custody*, Centre for Social and Education Research: Dublin.

³⁰⁴ St. Patrick's Institution Visiting Committee *Annual Report 2006*, page 3.

³⁰⁵ Inspector for Prisons, *ibid*, page 106.

³⁰⁶ Pursuant to section 5(2) of the Immigration Act 2003.

³⁰⁷ Pursuant to sections 9(8) and 9(13) of the Refugee Act 1996.

³⁰⁸ Pursuant to section 5 of the Immigration Act 1999.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

11

Imprisonment for Failure to Fulfil a Contractual Obligation

117. The Committee has expressed concern on a number of occasions about the use of imprisonment for failure to pay a debt in Ireland.³⁰⁹ In 1993, the Irish Attorney General on behalf of the State told the Committee that no one was imprisoned simply for inability to pay money due. He explained that where a debt had to be enforced, there was a thorough examination of the person's means. After that a person might be ordered to pay by one or more instalments. There was provision for appeal thereafter. Imprisonment, he said, only arose after a court had satisfied itself that the debtor had a capacity to pay. At that stage the imprisonment resulted from failure to obey a court order, not failure to pay the debt.³¹⁰

118. However, the debt enforcement system does not oblige a debtor to attend or to provide a full financial statement. In the vast majority of cases, debtors do not attend enforcement hearings. The fact that these hearings take place in public in the debtor's local court is a substantial barrier to participation, together with the stress and lack of understanding of legal procedures affecting people in debt. Debt enforcement legislation is complex and is primarily based on the Enforcement of Court Orders Acts 1926-1940. Few debtors are legally represented. Instalment orders are frequently made by judges without any actual knowledge of the debtor's financial circumstances.

119. Imprisonment can thus be ordered without a judge hearing from the debtor in relation to either the debt that gives rise to the original judgment, the financial ability of the debtor to pay that judgment or the reason why the debt or regular instalments were not paid.

120. In its response to the Committee in 1999, the State announced that legislative proposals to end imprisonment where practicable for civil debt and inability to pay fines were then being prepared in the Department of Justice, Equality and Law Reform'.³¹¹ No legislation has been introduced or passed in this area. From January 2002 to September 2006, almost one thousand people were imprisoned for periods of up to three months for 'offences related to debt' with ninety four people committed more than once for the same debt.³¹² The State insists that there is no remission for those imprisoned for debt who may only obtain early release by paying their debt or "purging their contempt"³¹³ which is only possible by paying the debt.

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Recommendations

- > The Government should amend the law of contempt to ensure that it cannot be used to imprison an individual for failing to fulfil a contractual obligation or for inability to pay a civil debt.

³⁰⁹ UN Doc.: CCPR/C/IRL/98/2 pages 44 – 45 April 28th, 1999.

³¹⁰ Summary Record of 1239th Meeting - Ireland CCPR/C/SR, 20/7/1993, Paragraph 24.

³¹¹ UN Doc.: CCPR/C/IRL/98/2 pages 44 – 45 April 28th, 1999.

³¹² Figures provided to FLAC by the Irish Prison Service, October 2006.

³¹³ *Second Periodic Report by Ireland*, 1998 para.196.

Article 12

- 1. Everyone lawfully within the territory of the State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.**
- 2. Everyone shall be free to leave any country, including his own.**
- 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant.**
- 4. No one shall be arbitrarily deprived of the right to enter his own country.**



Traveller Community

121. A number of difficulties have arisen under the Housing (Miscellaneous Provisions) Act 2002,³¹⁴ which impacts negatively on Travellers in general and women of that community in particular. Under the Act, entering private land or public land without consent is a criminal offence where it had previously been a civil offence. The owner of a caravan may be charged with trespass before the District Court, thereby allowing for the criminalisation of Travellers. The Housing (Miscellaneous Provisions) Act 2002 also increased the power of the An Garda Síochána. For example, under the Act, Gardaí are permitted to remove the homes (i.e. the impounding of caravans) of Travellers from the land in question³¹⁵ or families may be evicted.³¹⁶
122. The Act was intended to be directed at large encampments of Travellers on unsuitable land but it has been reported that the Act has been used to move on small groups of families including those on local authority housing waiting lists.³¹⁷ This Act creates a situation where Travellers can be kept constantly on the move. The European Committee against Racism and Intolerance (ECRI) has expressed concern about the effect this is having on the schooling of Traveller children.³¹⁸ The Traveller community was not consulted on this legislation, which was rushed through the Irish Parliament shortly before a general election in 2002.

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Residence of People Seeking Asylum

123. In its previous Concluding Comments on Ireland, the Committee highlighted its concern that residence requirements on persons seeking asylum may infringe their right to freedom of movement. The State introduced a policy of direct provision for persons seeking asylum in April 2000.³¹⁹ The Reception and Integration Agency (RIA)³²⁰ is responsible for the dispersal of people seeking asylum to designated accommodation units around the country as part of this policy of direct provision. Asylum seekers are not notified as to which centre or town they will be sent, nor are their needs, such as support services, languages or religious needs, assessed before a decision³²¹ is made. They are not permitted to move from the stipulated accommodation without the permission of the RIA, and are required to stay there until their application for asylum has been processed. If they are put out of this accommodation by the managers, or choose to leave it, they are not entitled to access the social welfare system. At the end of December 2006, direct provision centres in Ireland were at 82% occupancy with 6,673 residents;³²² from a high of 8,000 in April 2005.³²³ Those who fail to follow all of the rules of the centres may be deprived of accommodation and all other provision. This is a disproportionate response, in particular as direct provision is the only accommodation available to people seeking asylum, without which they would be destitute. It is without a legislative basis and there is no independent appeals process.

Refer to State Report, paras. 304-306

Additional info not included in State Report

³¹⁴ Housing (Miscellaneous Provisions) Act 2002.

³¹⁵ Section 19F, Housing (Miscellaneous Provisions) Act 2002.

³¹⁶ Section 19, Housing Act 2002.

³¹⁷ This has been reported both anecdotally at Focus Groups with Travellers at Pavee Point, 19 April 2007 and by Ryan, Áine (14 August 2002) "Travellers move from car park to roadside", the *Irish Times*.

³¹⁸ European Commission against Racism and Intolerance (2006) *Third Report on Ireland*, page 27.

³¹⁹ The policy of Direct Provision was introduced by Supplementary Welfare Allowance Circulars 04/00 and 05/00 on 10 April 2000, and instructed the Department of Social, Community and Family Affairs to provide for people seeking asylum by means of Direct Provision rather than by cash payment of Supplementary Welfare Allowance. This policy involves providing the basic food and shelter requirements of people seeking asylum in designated shared accommodation which is often away from major population centres. There are fifty-eight of these designated accommodation centres.

³²⁰ The Reception and Integration Agency is an executive agency of the Department of Justice, Equality and Law Reform established. It is responsible for coordinating the provision of services to both asylum seekers and refugees, coordinating the implementation of integration policy for all refugees and persons granted leave to remain in the State and responding to crisis situations which result in large numbers of refugees arriving in Ireland within a short period of time. On foot of a Government Decision of 2nd March 2004, the RIA was also assigned responsibility for supporting the repatriation, on an ongoing basis for the Department of Social and Family Affairs of nationals of the ten new EU Member States who fail the Habitual Residency Condition attaching to Social Assistance Payments.

³²¹ The Reception and Integration Agency, *Coming to Ireland as an Asylum Seeker*, http://www.ria.gov.ie/coming_to_ireland_as_an_asylum_seeker/

³²² Information received by Reception and Integration Agency, Email, 4 July 2007.

³²³ Department of Justice, Equality and Law Reform (2007) *Agreed Programme for Government Progress Report*, Chapter 7.

124. CERD expressed concern about the possible implications of dispersal and direct provision on asylum seekers. It encouraged the State to take all necessary steps to reduce the negative consequences for individual asylum seekers and to adopt measures promoting their full participation in society.³²⁴ However, since CERD made its recommendation there is no discernable improvement in reception conditions or inclusion measures aimed at asylum seekers. Moreover, there is no complaints mechanism for asylum seekers in direct provision and the Ombudsman³²⁵ and the Ombudsman for Children³²⁶ are excluded from considering issues raised by asylum seekers.

Recommendations

- > The implementation of the Housing (Miscellaneous Provisions) Act 2002 should be closely monitored to ensure that certain groups such as Travellers are not disproportionately and negatively impacted, particularly where such impact will have a negative effect on children.
- > A fair, transparent and inclusive system for mediation should be put in place to deal with grievances for asylum seekers in direct provision.
- > The Ombudsman and the Ombudsman for Children should not be excluded from hearing complaints relating to asylum seekers in direct provision accommodation.

³²⁴ At para 13, CERD/C/IRL/CO/2.

³²⁵ The Ombudsman provides an independent review of decisions relating to the right of access of members of the public to information held by public bodies. Refer to www.ombudsman.gov.ie

³²⁶ The Ombudsman for Children reviews complaints made by children (or adults on their behalf) against public organisations, schools and hospitals. www.oco.ie Section 11(e)(i) of the Ombudsman for Children Act 2002 excludes the Ombudsman from reviewing complaints on an action where it is taken in the administration of the law relating to asylum, immigration, naturalisation and citizenship.



Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

13

Removal and Deportation of People Seeking Asylum

125. While the State notes in its Report the dramatic increases in the numbers of applications for asylum in the State in the late 1990s through to 2002, it fails to place emphasis on the equally dramatic drop in the numbers of applications for asylum received between the 2002 figure of 11,634 and 2006 when a total of 4,314 applications were received.³²⁷ Of these, just 397 were successful at first instance. In 2006 90 per cent of applications were refused initially. Those cases are now either pending an appeal, were withdrawn or the applicants were asked to apply in another State under the Dublin Convention.³²⁸ The State Report does not indicate the numbers of applications which were refused since it last came before the Committee in 2000. In 2004 and 2005, 6.2 per cent and 8.7 per cent of asylum applicants were granted asylum respectively. In 2006, 1,566 Deportation Orders were signed but only 302 were given effect.³²⁹ For those who have been refused asylum and have applied for leave to remain under subsidiary protection or who require protection³³⁰ under international human rights treaties or rights, only an administrative scheme is in place to assess these applications. Applicants can wait for many years for a response to their applications. During this time, they have no right to work and are only eligible to receive welfare provision under direct provision as outlined above.

Deportation

126. Article 3(2) of the Immigration Act 1999 allows a wide discretion to the Minister for Justice, Equality and Law Reform with regard to making of deportation orders. Such decisions should only be made based on transparent and clear grounds rather than on an individual interpretation. There is no independent appeals mechanism other than judicial review, which can only challenge the decision making process, not the decision itself. Section 3(3)(b) of the Immigration Act 1999 states that an individual who has been notified of a proposal to make a deportation order has just fifteen

working days to make representations in writing to the Minister for Justice, Equality and Law Reform against that proposal to make a deportation order. Under the Immigration Act 2003 a person detained pending removal having being refused leave to land, may only challenge the detention and removal by instituting expensive judicial review proceedings in the High Court to challenge the validity of their proposed removal from the State.³³¹ There is also no provision for a bridging period for a non-national to re-establish him or herself if for whatever reason, he or she has lost a permission to remain, whether based on a permission to work, or otherwise.

127. Under Section 3(2)(b) of the 1999 Act, a person may be deported having been "indicted for or charged with any crime or offence". Mere suspicion that a foreign national has transgressed the law may allow for their arrest, detention and subsequent deportation. Section 5 of the same Act provides for the arrest, detention and removal by immigration officers and members of An Garda Síochána of persons against whom it is suspected that a deportation order is in force and who has failed to comply with this order. It is not necessary for the immigration officers or members of An Garda Síochána to confirm that a deportation order exists.

128. There are no safeguards in place as to the level of force which is acceptable for the immigration officers and Gardaí to use during such arrest, detention and removal. A warrant is not necessary for an arrest under Section 5 and the 1999 Act does not make provision for regulations to govern the deportation of applicants who have been refused asylum to create a standard procedure for all deportations.

129. The Immigration Act 1999³³² stipulates that the Minister for Justice, Equality and Law Reform may make regulations to allow for him to request payment for costs incurred in relation to the applicant's deportation. This can have a particularly negative effect on asylum seekers, given that they are not permitted to work during their time as applicants for asylum and are dependent on social welfare.

³²⁷ Office of the Refugee Applications Commissioner *Annual Report 2006*, page 12.

³²⁸ Dublin Convention 1997 and Dublin II Regulation.

³²⁹ Department of Justice, Equality and Law Reform (2007) *Agreed Programme for Government Progress Report*, Chapter 7.

³³⁰ Under EU Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

³³¹ Section 5(4) of the Immigration Act 2003.

³³² Section 7(1)(b) of the Immigration Act 1999.



13

Summary Removal of Unauthorised Migrants

130. The Immigration, Residence and Protection Bill 2008³³³ was introduced on 29 January 2008 with the purpose of consolidating and updating the legislative framework for dealing with inward migration. Section 4(3)(a) of the new Bill provides that a foreign national who is present in or enters the State unlawfully shall be guilty of an offence. A foreign national who is unlawfully present is under an obligation to leave the State [section 4(4)(a)] and is liable for removal in accordance with the provisions of the Act. Section 4(5) makes it clear that a foreign national may be removed without notice and arrested/detained for the purposes of removal [section 4(6)]. In addition, section 44(1) states that where the Minister decides to revoke an entry permission or non-renewable residence permission, the foreign national will be notified "where necessary and practicable in a language that the foreign national understands". The notification will indicate reasons why the permission is being revoked [section 44(2)(a)] and if it includes a non-return order, the notice will specify the reasons for removal [section 44(2)(b)(i)]. Consequently, a foreign national issued with a non-return order will be:

- > For all purposes unlawfully in the State [section 44(3)(a)];
- > Under an obligation to remove himself or herself from the State [section 44(3)(b)];
- > Liable to be removed without notice, if necessary against his or her will, from the State and to be detained for the purposes of securing his or her removal [section 44(3)(c)].

131. This is a significant change. Currently if the Minister for Justice, Equality and Law Reform wishes to remove an individual then that person is given notice and 15 working days to make representations.³³⁴

Section 4(5) makes it clear that a foreign national may be removed without notice and arrested/detained for the purposes of removal [section 4(6)].

Recommendations

- > The State should introduce an independent appeals procedure to review all immigration-related decisions.
- > Provisions to allow for summary removal in the Immigration, Residence and Protection Bill 2008 are incompatible with the State's obligations under the ICCPR and should be removed.

³³³ The Immigration, Residence and Protection Bill 2008 is accessible at: www.oireachtas.ie

³³⁴ Refer to section 3(6) of the Immigration Act 1999.

Article 14

- 1. All persons shall be equal before the courts and tribunals. In determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or proceedings concern matrimonial disputes or the guardianship of children.**
- 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.**
- 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:**

 - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;**
 - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;**
 - (c) To be tried without undue delay;**
 - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal**

assistance of his right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

- (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;**
- (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;**
- (g) Not to be compelled to testify against himself or to confess guilt.**

- 4. In the case of juvenile persons, the procedures shall be such as will take account of their age and the desirability of promoting their rehabilitation.**
- 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.**
- 6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered the punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown facts in time is wholly or partly attributable to him.**
- 7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.**

Reservation to Article 14

132. On ratification, Ireland made the following reservation:

Refer to State Report, paras. 334-337

Ireland reserves the right to have minor offences against military law dealt with summarily in accordance with current procedures which may not, in all respects conform to the requirements of Article 14 of the Covenant.

In its Report the State notes³³⁵ that it will review its status with regard to its reservation under Article 14 with a view to withdrawal after the enactment of the Defence (Amendment) Act 2007, which was enacted on April 21st 2007.

Offences against the State Acts

133. A provision of the Belfast Agreement 1998³³⁶ provided for a review by the Irish State of the Offences against the State Acts 1939-1998, however these Acts remain in force today. Section 35(2) of the Offences against the State Acts relates to the Special Criminal Court, the establishment of which is provided for under Article 38.3 of the Irish Constitution.³³⁷ Trial in such a court is for cases where, as determined by law, the ordinary courts are "inadequate to secure the effective administration of justice, and the preservation of public peace and order."³³⁸ The Special Criminal Court has different procedures from the ordinary courts in Ireland. It is a non-jury court of three judges who reach their decision by majority vote. A second distinction as compared to the ordinary courts is that an accused may not avail of preliminary examination procedures concerning the evidence of certain witnesses.

Refer to State Report, paras. 338-342

134. The Committee has previously expressed concern with regard to the Offences against the State Acts on the basis that the Acts do not clearly stipulate the grounds on which a case is assigned to the Court.³³⁹ This decision is left to the discretion of the DPP³⁴⁰ whose decisions

are not made public. This system lacks clarity, transparency, consistency and accountability. Section 47(1) of the Offences Against the State Acts states that the Court has jurisdiction over a "scheduled offence" where the Attorney General "thinks proper" that a person charged with such an offence should be tried before the Special Criminal Court as opposed to the ordinary courts.³⁴¹

135. In its decision in *Kavanagh v Ireland*, a minority of the HRC found a breach of equality in the judicial system under article 14 paragraph 1 of the Covenant. It was noted that:

The principle of equality is violated where all persons accused of committing the very same offence are not tried by the normal courts having jurisdiction in the matter, but are tried by a special court at the direction of the Executive. This remains so whether the exercise of discretion by the Executive is or is not reviewable by the courts.³⁴²

136. In that case the HRC found that section 47 of the Offences against the State Act 1939 was in violation of Article 26, paragraph 1 of the Covenant.³⁴³ The Committee based its view on the fact that the DPP may refer a case for trial to the Special Criminal Court, thereby denying the defendant the safeguard normally available to accused persons of a trial by jury, without making public his reasons for so doing in line with reasonable and objective criteria.

Special Criminal Court and the Hederman Review

137. The Hederman Committee was established to carry out a review of the Offences Against the State Acts in May 1999. The Committee's mandate included a review of Ireland's compliance with international law with regard to the view expressed by the HRC in *Kavanagh v Ireland* above.

Refer to State Report, paras. 343-359

³³⁵ *Third Report by Ireland on the Measures Adopted to Give Effect to the Provisions of the Covenant*, 2007, para. 335-337.

³³⁶ Chapter 8, "Security," the *Good Friday (Belfast) Agreement 1998*, page 41.

³³⁷ Article 38.3, the Irish Constitution, 1937:

1° Special courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order.

2° The constitution, powers, jurisdiction and procedure of such special courts shall be prescribed by law.

³³⁸ Article 38.3.1° of the Irish Constitution 1937.

³³⁹ Concluding Comments of the UN Human Rights Committee, 2000, para. 15.

³⁴⁰ Section 14(3)(b) and (c) of the Offences against the State (Amendment) Act 1998; the DPP is independent in the performance of his functions.

³⁴¹ A Scheduled Offence refers to offences which are specified in the appendices to the Offences Against the State Acts, including those specified for example under the Offences against the State (Amendment) Act 1998.

³⁴² Individual opinion of Committee members Louis Henkin, Rajsoomer Lallah, Cecilia Medina Quiroga, Ahmed Tawfik Khalil and Patrick Vella in Communication No. 819/1998: Ireland, 26 April 2001, *Kavanagh v Ireland*, para 2.

³⁴³ Communication No 819/1998: Ireland 26 April 2001, *Kavanagh v Ireland*, UN Doc.: CCRP/C/71/D/819/1998.



138. A majority of the Hederman Committee supported the retention of the Special Criminal Court, though a minority, including the Chair and a number of leading constitutional and criminal lawyers, dissented on this recommendation. The Hederman Committee recommended the retention of the Special Criminal Court on the grounds of security with regard to the continued threat from the operation of subversive organisations and/or that posed by organised criminal gangs. It further said that in such circumstances the ordinary courts would be inadequate to respond to and secure the effective administration of justice and the preservation of public peace and order.³⁴⁴

139. The Hederman Committee recommended that the retention of the Court be kept under regular review, that certain aspects of the Offences against the State Acts be removed and that judges' traditional guarantees with regard to tenure, salary and independence be assured.³⁴⁵

140. A recent amendment to the Offences Against the State Acts allows for the creation of further Special Criminal Courts.³⁴⁶ This is contrary to the Concluding Comment of the HRC to end the jurisdiction of the Special Criminal Court and creates the possibility of further such courts.³⁴⁷ In consideration of its second periodic review under ICCPR, the HRC recommended that the jurisdiction of the Special Criminal Court be ended and that all criminal procedures be aligned with Article 9 and Article 14 ICCPR.³⁴⁸

Periods of Detention³⁴⁹

141. The HRC has previously expressed concern that periods of detention without charge were increased under an amendment to Section 30(4A) of the Offences against the State Act 1939 by the Offences against the State (Amendment) Act 1998. This provision allows a person to be detained without charge for up to seventy-two hours by order of the District Court, an extension of twenty-four hours.³⁵⁰ Prolonged periods of detention without charge can increase the pressure on an accused to

make a statement, which may infringe upon their right to silence under Article 14(3)(g) of the Covenant. This issue of periods of detention without charge is further examined under Article 9.

International Terrorism

142. Firm measures must be taken against international terrorism; however, any such measures must be proportionate and maintain the principles of international human rights law. The Criminal Justice (Terrorist Offences) Act 2005 was enacted to give effect to a number of international agreements with regard to international terrorism such as the European Union Framework Decision on Combating Terrorism³⁵¹ and United Nations Security Council Resolution 1373. The List of Scheduled Offences in Part 2 of the Act includes offences such as murder but also lesser offences such as criminal damage and forgery. The definition of "terrorist activity" under Section 4 of the Criminal Justice (Terrorist Offences) Act 2005³⁵² is so broad that it could apply to groups who are committing less serious offences, such as protestors.

143. Section 5 of the 2005 Act provides that "any terrorist group that engages in, promotes, encourages or advocates the commission, in or outside the State, of a terrorist activity" is an unlawful organisation for the purposes of the OAS Acts 1939-1998. Under the OAS Acts, membership of such a group is a criminal offence which could lead to up to seven years in prison.³⁵³ (Please see our submission under article 21 for further discussion on this issue).

Independent Refugee Appeals

144. The Refugee Appeals Tribunal³⁵⁴ has been plagued by allegations of non-transparency, unfairness and bias. This may be partly due to the fact that as an institution, it lacks the basic hallmarks of independence (security of tenure for members, a transparent appointments system, rules on case allocation).

Refer to State Report, paras. 360-368

Refer to State Report, paras. 382-389

³⁴⁴ Para. 9.28-9.29, *Report of the Committee to review the Offences against the State Acts 1939-1998 and Related Matters*, 2002.

³⁴⁵ Para. 9.39, *Report of the Committee to review the Offences against the State Acts 1939-1998 and Related Matters*, 2002.

³⁴⁶ Section 53 of the Criminal Justice (Terrorist Offences) Act 2005 amends section 49 of the 1939 Act.

³⁴⁷ Concluding Comments of the Human Rights Committee on Ireland: para. 16.

³⁴⁸ Concluding Observations of the Human Rights Committee: Ireland: 24/07/2000, UN Doc: A/55/40 paras. 422-451, para. 16.

³⁴⁹ See Article 9 for further submission on periods of detention.

³⁵⁰ Concluding Observations of the Human Rights Committee: Ireland: 24/07/2000, UN Doc: A/55/40 paras. 422-451, para. 15.

³⁵¹ Council Framework Decision of 13 June 2002 on combating terrorism.

³⁵² Section 4(b) of the Criminal Justice (Terrorist Offences) Act 2005 defines "terrorist activity" as that which would constitute an offence under Irish law and which are committed with the intention of:

- i. "seriously intimidating a population
- ii. unduly compelling a government or an international organisation to perform or abstain from performing an act, or
- iii. seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a state or an international organisation".

³⁵³ Section 21 of the Offences Against the State Acts 1939, Section 2(6) of the Criminal Law Act 1976 extends the penalty from up to two to up to seven years.

³⁵⁴ <http://www.refappeal.ie/>

The Refugee Appeals Tribunal has been plagued by allegations of non-transparency, unfairness and bias.

145. The Refugee Appeals Tribunal was established as an *independent* body to process asylum appeals from the Office of the Refugee Applications Commissioner (ORAC).³⁵⁵ For many years, the Tribunal refused to publish its own decisions and when this practice was challenged before the High Court, McMenamin J held that it did not accord with “the principles of natural and constitutional justice, fairness of procedure or equality of arms”.³⁵⁶
146. A member of the Tribunal has also been accused of bias against asylum applicants. Tribunal members have been appointed at the discretion of the Minister for Justice, Equality and Law Reform. The only professional requirement for the post is that they must be a practising lawyer of five years standing and they have no security of tenure once appointed. With no regulations on the allocation of cases by the Tribunal, and members paid by the number of cases they process, statistics obtained by media sources revealed that one member earned 10 per cent of the total earned by 33 members.³⁵⁷ This led to the suspicion that work was being allocated with the rate of affirmation of ORAC decisions.³⁵⁸
147. In *Nyembo v Refugee Appeals Tribunal* [2006] IEHC 388, unreported, a refugee applicant sought an order preventing a Refugee Appeals Tribunal member, Mr Jim Nicholson, from hearing his appeal, on the basis that there is a reasonable apprehension of bias. In this case, the applicant cited Mr Nicholson’s reputation among immigration and asylum lawyers, together with statistics compiled by two leading legal practitioners in the area of refugee law which led one of them to advise clients that there was no prospect of success for an applicant appearing before Mr Nicholson in an oral hearing. According to the evidence relied on by the applicant, Mr Nicholson did not find in favour of an applicant in an oral hearing in 2002, 2003 and 2004 despite the fact that he determined hundreds of cases in those three years. The Refugee Appeals Tribunal settled this case and two other identical cases in December 2007.

148. Sections 91(1) and 91(2) provide for the establishment of a Protection Review Tribunal (PRT) to independently review decisions made by the Minister in relation to protection applicants. Section 91(3) makes clear that the PRT will be (a) inquisitorial in nature and (b) independent in the performance of its functions.
149. It is of major concern that provisions establishing the PRT are still imprecise enough to ensure that the problems which plagued the Refugee Appeals Tribunal will not be repeated again. For example, section 91(3) states that the PRT will be independent in the performance of its functions and that the Chairperson will establish rules and procedures for the conduct of appeals which take account of “need to preserve fair procedures” [section 93(2)]. However, no real detail is provided as to what these rules will entail.
150. While section 92(5) of the Bill provides that the Chairperson of the Tribunal or full-time Tribunal member will be appointed through the Public Appointments Service, section 92(4) allows the Minister to personally appoint part-time Tribunal members. The PRT is being set up to independently review decisions made by the Minister and yet section 92(4) would allow the Minister to decide who some of those decision-makers are. Moreover, there is nothing in the Bill to stop the Minister from ensuring that the majority of Tribunal members are part-time as it does not specify how many full-time members will be appointed.

Civil Legal Aid

151. Unlike criminal legal aid, civil legal aid is not free. Nor is it allocated on the basis of the applicant’s need for legal aid as assessed by a judge. Instead, it is administered through a centralised Legal Aid Board, which employs 89 solicitors in 30 centres around the country to deliver the service. Most part-time centres open one day per month.³⁵⁹ Some family law and asylum work is sub-contracted out to solicitors in private practice if retaining the work in house will result in delays exceeding 4 months. In June 2007, 10 of the State’s 30 centres had waiting lists of 3 months.³⁶⁰

Refer to State Report, paras. 395-396

³⁵⁵ <http://www.orac.ie/>

³⁵⁶ McGarry, P. (31 March 2006) “Refugee Appeals Tribunal to publish important decisions”, *Irish Times*.

³⁵⁷ Coulter, Carol (2005) “Looking for fairness and consistency in a secretive refugee appeals system”, *Irish Times*.

³⁵⁸ Coulter, Carol (20 September 2006) “Strife proceeded refugee body’s demise”, *Irish Times*.

³⁵⁹ Of the 12 part time law centres, 8 will open 1 day per month, four will open 2 days per month and two will open approximately 4 days per month. www.legalaidboard.ie/lab/publishing.nsf/content 17 July 2007.

³⁶⁰ Source, FLAC July 2007 based on figures received from the Legal Aid Board.

152. Although the service is supposed to cover all areas of law other than those excluded in legislation, it caters mainly for family law, with over 90% of its cases being in this category.³⁶¹ A number of areas are excluded by law from the Legal Aid Scheme. These include defamation, most housing cases, landlord and tenant and eviction proceedings, representation at unfair dismissal claims of employees before the Employment Appeals Tribunal and Social Welfare Appeals.³⁶² Criminal law is covered by a separate scheme. The Legal Aid Board states that legal aid is only available to victims of rape and certain sexual assaults at trial where the matter of the prior sexual history of the victim is raised by the accused.³⁶³ This denies vulnerable people access to the legal representation required for a fair trial.



153. The means test is strict and done without reference to a person's ability to have a fair trial without civil legal aid. In addition, all those entitled to civil legal aid or assistance must pay a contribution determined by their income and assets which may be as little as €10 for advice and €50 for representation. However, some will pay much more. Even though those who qualify are, by definition, people of limited means, applicants may even become liable for the full costs of a case, with the Board's solicitor charging their time at an hourly rate.³⁶⁴

154. In order to qualify for civil legal aid, an individual must also prove that the case has merit. The merits test is based on reasonableness in the view of the provider, the Legal Aid Board, and often is also based on the chances of the success of the case. There is no express requirement that an individual's need for legal services and access to justice be a first priority for the Legal Aid Board in determining the merits of a case.³⁶⁵

156. With regard to membership of an unlawful organisation, Section 2 of the Offences Against the State Act 1998 allows for such inferences as "appear proper" to be drawn by the court, from the failure of an accused to answer questions which are material to the investigation of an offence. However the accused may not be convicted solely on the inference drawn from such a failure. Allowing inferences to be drawn from the silence of an accused potentially contravenes Article 14 paragraph 2.

157. Section 7(1) of the Criminal Justice (Drug Trafficking) Act 1996 also allows for inferences to be drawn from the failure of an accused to mention any fact relied on in his or her defence in proceedings, which at the time he or she could reasonably have been expected to mention when questioned, charged or informed.

158. Part 4 of the Criminal Justice Act 2007 introduced provisions that allow inferences from silence to be drawn in certain circumstances. The inferences are considered to be corroborative evidence and there are a number of instances in which inferences may be drawn. These include when a person is being questioned in relation to the offence, is being charged or on being informed that he or

The Right to Silence and Inferences

155. The fundamental right to silence and the privilege against self-incrimination are Constitutional rights in Ireland.³⁶⁶ However, the Irish State has enacted several laws which seek to erode this right.

³⁶¹ Family law cases amount to 80% of legal advice and 95% of court representation – FLAC (2005) *Access to Justice: a Right or a Privilege?: A Blueprint for Civil Legal Aid in Ireland*, FLAC: Dublin, page 35.

³⁶² Section 28(9)(a) of the Civil Legal Aid Act 1995.

³⁶³ Legal Aid Board, *Civil Legal Aid for Complainants in Rape and Certain Sexual Assault Cases*, Leaflet No. 14, page 3.

³⁶⁴ Family law cases amount to 80% of legal advice and 95% of court representation - FLAC, *Access to Justice: a Right or a Privilege?: A Blueprint for Civil Legal Aid in Ireland*, 2005, page 3.

³⁶⁵ FLAC, *ibid*, page 41.

³⁶⁶ The right to silence is protected under the right to trial in due course under Article 38.1 of the Constitution. Page 18, *Balance in the Criminal Law Review Group, Final Report on 23 March 2007 and on self-incrimination*, Department of Justice, Equality and Law Reform: Dublin; Hogan and Whyte (2004) *J.M. Kelly: The Irish Constitution*, 4th ed., Lexis-Nexis Butterworths: Dublin, at section 6.5.94.

she might be prosecuted. The provisions do state that the accused must be informed in “ordinary language” of the possible effect of his silence or lack of explanation when asked in these circumstances and that the accused be afforded reasonable opportunity to seek legal advice.

159. Under section 32, the Minister for Justice, Equality and Law Reform has the power to make Regulations providing for the type of caution that might be given to a person before the inference drawing provisions apply; however, these Regulations have yet to be made.³⁶⁷

The Morris Tribunal

160. On 9 March 2003 the Irish State set up a Tribunal of Inquiry (Morris Tribunal) to investigate allegations of police misconduct concerning certain police officers in the Donegal Division.³⁶⁸ Over the course of five reports, the Morris Tribunal has reported on the “scandalous conduct”³⁶⁹ of certain Gardaí (Irish police officers) operating in the Donegal Division.

161. In August 2006, the Morris Tribunal published three volumes of its investigations.³⁷⁰ In report 5, or ‘Burnfoot Module’, the Tribunal found that a certain number of Gardaí had been responsible for wrongful arrests and ill-treating suspects in custody, planting hoax explosives evidence and relying on informers to prop up fraudulent investigations for career advancement. Furthermore, Mr Justice Morris found that some Garda members had planted a gun at a Traveller encampment and subsequently falsely accused and arrested Travellers from the site.

Recommendations

- > There should be clear and transparent guidelines for the DPP, with the delegated authority of the Attorney General, to make his decision as to what circumstances he “thinks proper” for a person to be tried before the Special Criminal Court as held by the HRC in their view in *Kavanagh v Ireland*.³⁷¹
- > All members of the new Protection Review Tribunal should be appointed independently through the Public Service Appointments Commission and not by the Minister for Justice, Equality and Law Reform.
- > The Government should introduce Regulations to provide for a new form of Garda caution which would clearly inform people of their right to silence and the possible consequences of remaining silent.
- > Relevant guidance should be developed for judges on the proper instruction of juries against drawing improper inferences from silence.

³⁶⁷ Sections 18(3)(a) and (b), 19(3)(a) and (b) and 19A(3)(a) and (b) of the Criminal Justice Act 1984 as amended by sections 28, 29 and 30 of the Criminal Justice Act 2007.

³⁶⁸ www.morristribunal.ie

³⁶⁹ Morris Tribunal of Inquiry (2005) *Report on the Investigation into the Death of Richard Barron and the Extortion Calls to Michael and Charlotte Peoples*, Government Stationery Office, page 507.

³⁷⁰ All Morris Reports are available from the www.morristribunal.ie

³⁷¹ Communication No 819/1998: Ireland 26 April 2001, *Kavanagh v Ireland*, UN Doc.: CCPR/C/71/D/819/1998.

Article 15

- 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.**
- 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations.**

15

The International Criminal Court Act 2006

162. With the exception of acts of genocide covered by the Genocide Act 1973, section 9(4) of the International Criminal Court Act 2006 expressly does not provide for investigations and prosecutions of crimes against humanity and war crimes which occurred before the enactment of the 2006 Act. However, given that crimes against humanity and war crimes are a staple part of customary international law this Act should have specifically made clear the law could be retrospectively applied. It would not have offended the principle of *nullum crimen sine lege*. As a result the 2006 Act fails to enable Irish courts to exercise universal criminal jurisdiction over all heinous crimes.

Additional
info not
included
in State's
Report

Recommendations

- > Section 9(4) of the International Criminal Court Act 2006 should be amended to exempt war crimes and crimes against humanity.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

16

Legal Recognition of New Gender Identity

163. Irish law does not currently provide any legal recognition to persons in their 'new' or realigned gender. While there is some administrative recognition, e.g. provision of passports³⁷² and driving licences, there is no consistency and it is not possible for individuals to obtain birth certificates reflecting their realigned gender. They cannot marry or enter into civil partnerships in their new gender.
164. The High Court on 19 October 2007 held that the failure to provide official recognition of a woman in her realigned gender and to issue her with a new birth certificate was in breach of her rights under the European Convention on Human Rights.³⁷³ The Court made a declaration under Section 5 of the European Convention on Human Rights Act 2003 to the effect that Irish law on the issue was in breach of the European Convention. The Government is appealing this decision.



Recommendations

- > The State should recognise the rights of transgendered persons in all aspects of the law.

³⁷² The Passport Bill 2007 does propose to provide recognition of the right to change one's gender on a passport, though this is not yet law.

³⁷³ [2007] IEHC 470, unreported.

Article 17

- 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.**
- 2. Everyone has the right to the protection of the law against such interference or attacks.**

17

Privacy

165. Privacy is recognised as an unenumerated right under Article 40.3.1° of the Irish Constitution.³⁷⁴ The exact definition of the right remains unclear and the Constitutional Review Group has recommended that an express and specific right to respect for privacy be introduced.³⁷⁵ Current provisions in relation to privacy in Ireland lack clarity and effectiveness and do not reach the standards set in the ECHR. The Working Group on Privacy concluded that a clear statutory cause of action on privacy is preferable to the lack of clarity and unpredictability in the law.³⁷⁶ A 2007 Report by Privacy International noted that there was a systematic failure in Ireland to uphold privacy safeguards in particular in the area of communication data retention.³⁷⁷

Effective Deportation of Irish Children

166. Until February 2003, migrant parents from outside the European Union (EU) could apply for residency in Ireland on the basis of their parentage of an Irish citizen. This followed a judgment of the Supreme Court³⁷⁸ to the effect that the Irish citizen child did not have a constitutional right to the care and company of its parents in the State unless there were exceptional circumstances to deny them residency. By 2003, approximately 10,145 migrant parents had been granted residency on this basis. In fact, many parents were encouraged during this period to withdraw their asylum claims on the basis of a guaranteed right of residency as parents of an Irish child.

167. On 19 February 2003, following a second Supreme Court ruling,³⁷⁹ which accepted that the State could also consider the need to preserve the integrity of the asylum and immigration system as a ground for refusing residency to migrant parents, the State abolished the *ad hoc* process by which foreign national parents could apply for residency on the basis of the birth of an Irish child. The Department of Justice, Equality and Law Reform stopped processing any outstanding residency applications. Consequently, 10,497 applications remained pending.

168. In July 2003, the Minister for Justice announced that all applications which had not been processed by 19 February 2004 would not be considered, and that all families would be sent letters indicating his intention to deport them, in accordance with Section 3(6) of the Immigration Act 1999. On receipt of these letters, it is open to the families to apply for leave to remain on different grounds, including on the basis of humanitarian and family relationships. The state funded legal aid service for asylum seekers, the Refugee Legal Service was not funded to provide legal advice and representations to families making their submission for leave to remain. Moreover, most families do not have sufficient funds to obtain the services of a private lawyer. By late 2003, up to 700 deportation notices had been issued to parents of Irish children.³⁸⁰

169. From 18 January to 31 March 2005, the Irish Born Child Administrative Scheme 2005³⁸¹ (IBC/05) allowed parents of Irish citizen children to make applications for residency in the State by the Department of Justice, Equality and Law Reform. Non-European Economic Area national parents who had children born in Ireland before 1 January 2005 were eligible to apply. While the vast majority of the applicants were successful and were granted residency for an initial period of two years, 1,119³⁸² were refused. Refusals were primarily based on the ground of a child's parents not having been continuously resident in the State since the birth of their Irish citizen child. A lesser number were refused because of parents' identity not being adequately proven or because a parent was not present in Ireland at the time of the application as well as refusals relating to applications where the applicant had a criminal conviction or submitted a late application.

³⁷⁴ Article 40.3.1° reads as follows: "The State guarantees in its laws to respect and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen." Cases which have involved findings of privacy include: *McGee v Attorney General* [1974] IR 284 (marital privacy); *Kennedy v Ireland*, [1987] IR 587; [1988] ILRM 472 (telephone conversations); *Re Ward* (No. 2) [1996] 2 IR 79.

³⁷⁵ Constitution Review Group (1996) *Report of the Constitution Review Group*, Government Stationery Office: Dublin, pages 245-265.

³⁷⁶ *Report of the Working Group on Privacy*, 31 March 2006, pages 8-9.

³⁷⁷ Privacy International (2007) *Leading surveillance societies in the EU and the World 2007*, Privacy International: London.

³⁷⁸ *Fajujonu v. Minister for Justice*, [1990] 2 IR 151.

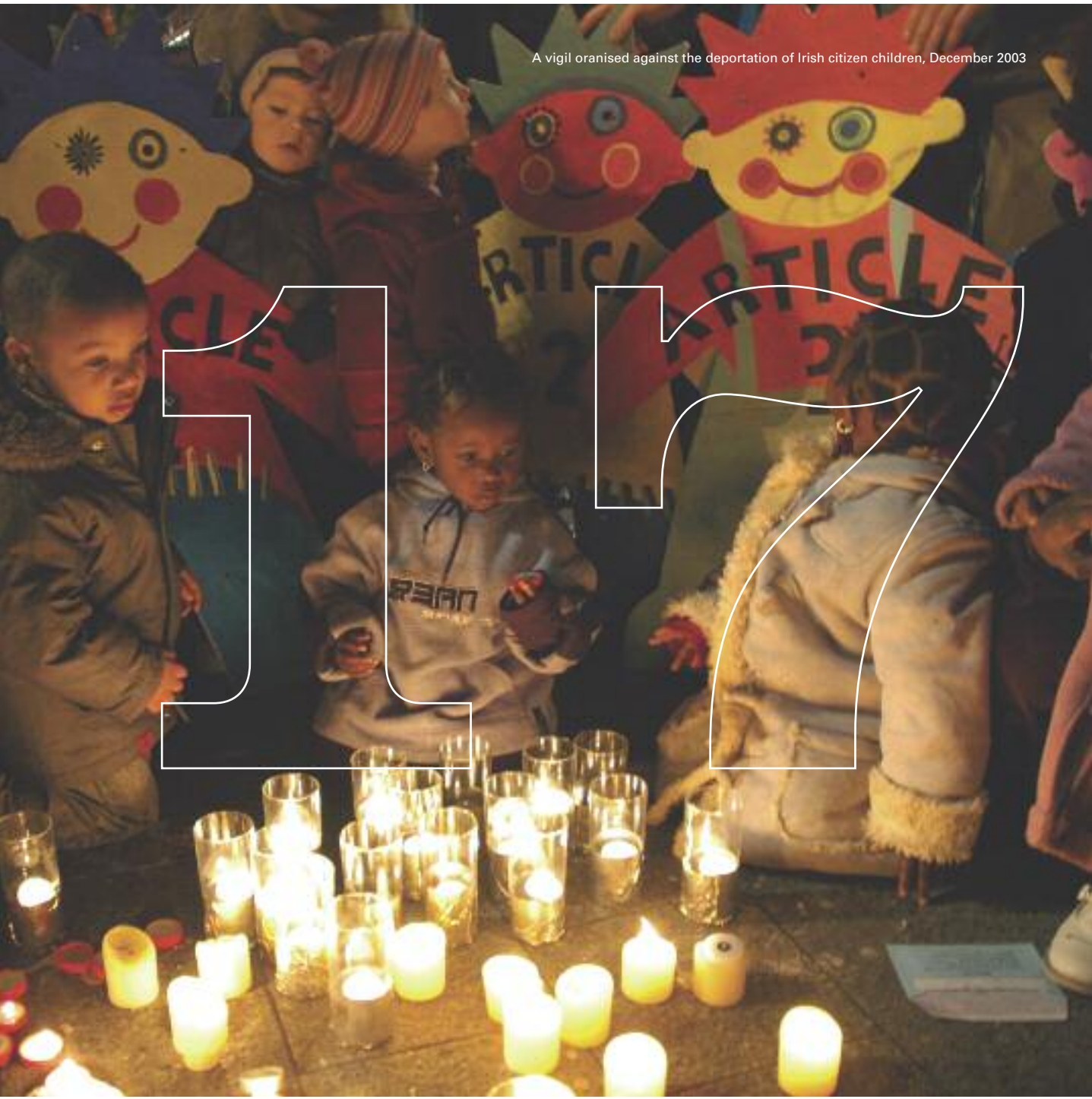
³⁷⁹ *L and O v. Minister for Justice, Equality and Law Reform*, [2003] 1 IR 1.

³⁸⁰ Coakley, L. and Healy, C. (2007), *Looking forward, looking back – Experiences of Irish Citizen Child Families*, CADIC: Dublin.

³⁸¹ Information on making an application for renewal of permission to remain in the State on the basis of parentage of an Irish born child born before 1 January 2005, which was granted under the IBC/05 Scheme, available from the Irish Nationalisation and Immigration Service www.inis.gov.ie

³⁸² Department of Justice, Equality and Law Reform figures, April 2006.

A vigil organised against the deportation of Irish citizen children, December 2003



170. By the end of 2005, at least thirty-eight Irish children had been effectively deported with their families from Ireland despite the fact that they possess rights by citizenship. There is no comprehensive or exact statistical evidence available on the number of Irish children who have left the State with parents issued with deportation orders, or who have been left in the State by parents with deportation orders.³⁸³

171. The Coalition Against the Deportation of Irish Children (CADIC)³⁸⁴ estimates that 16 family units with Irish children have been removed from the State to Nigeria and Romania. In some circumstances the Minister for Justice, Equality and Law Reform has sought Irish passports for Irish children and visas from the Nigerian Embassy against the wishes of parents to allow the children in question to enter Nigeria.³⁸⁵ This policy affects children who are Irish citizens but whose parents are of other nationalities. This is a violation of Article 2 of the UN Convention on the Rights of the Child, 1989, which provides that all children should be treated equally, irrespective of their parents' legal status.

172. On 14 November 2006, the High Court found that by not considering the rights and entitlements of Irish citizen children when refusing the application of their parents for permission to remain in Ireland under the IBC/05 scheme the Minister unlawfully breached the rights of these Irish citizen children. The Minister appealed this decision to the Irish Supreme Court. It was overturned in December 2007 as the Supreme Court found that the IBC/05 Scheme was an exercise of executive power by the Minister that neither addressed nor purported to address rights in the Constitution or ECHR.³⁸⁶ However, the Supreme Court did stress that the IBC/05 Scheme is entirely separate from the Minister's functions under the Immigration Act, 1999 (as amended) where a decision may be made as to whether or not a deportation order should be made in respect of a foreign national.

173. More recently, the Supreme Court quashed deportation orders issued in respect of migrant parents of Irish children citizen in *Dimbo and Oguekwe v The Minister for Justice, Equality and Law Reform* [2008] IESC 26. In these cases, the Supreme Court upheld

an earlier decision by the High Court. The Supreme Court went on to consider whether the Minister had exercised his power to issue deportation orders in these cases "in a manner which is consistent with and not in breach of the constitutionally protected rights of persons affected by the order". The Court also recognised that "the power of the Minister is further constrained by the provisions of [...] the European Convention on Human Rights Act 2003". Denham J delivering the unanimous judgment of the Supreme Court held that:

The decision making process should identify a substantial reason which requires the deportation of a foreign national parent of an Irish born citizen. The test is whether a substantial reason has been identified requiring a deportation order.

The judge further held that: "the Minister is required to make a reasonable and proportionate decision". Furthermore, the Court specified that:

The Minister should deal expressly with the rights of the child in any decision. Specific reference to the position of an Irish born child of a foreign national parent is required in decisions and documents relating to any decision to deport such foreign national parent.

174. It is of utmost concern that the Government now proposes to abolish the procedure of notification of intention to deport pursuant to section 3 of the Immigration Act 1999 (as amended), which has been identified by the Supreme Court as the appropriate place for the consideration whether there is a substantial reason for making of a deportation order (refer to para. 128 of the present Report).

³⁸³ "As Irish children are not subject to deportation orders, statistics are not available in respect of the numbers of such children who accompanied their non-national parents when they were being deported or indeed the number of such children left behind in the State following the deportation of their parents." Parliamentary Reply by the Minister for Justice, Equality and Law Reform, 5 October 2004.

³⁸⁴ Formed in 2003, the CADIC Coalition is a narrowly targeted coalition of several Irish NGOs with remits including migrant support, asylum seekers and refugees, legal aid, children's rights and church based immigrant support. Its mission is to secure the right of all Irish citizen children to reside in Ireland with their family members and to ensure the constitutional and human rights of all Irish citizen children and their family members are fully protected and respected in accordance with the fundamental principles of equality and non-discrimination.

³⁸⁵ This was noted in the High Court in *Igbijonu v the Minister for Justice, Equality and Law Reform*, June 2004 who was refused leave for judicial review.

³⁸⁶ *Bode (A Minor) and Ors v Minister for Justice, Equality and Law Reform* [2007] IESC 62.

Family Reunification for Refugees

175. Rights to family reunification for refugees are recognised in section 18 of the Refugee Act 1996 (as amended). However, naturalised Irish citizens who formerly had refugee status lose the statutory entitlement to family reunification which is granted to refugees under Section 18 of the Refugee Act 1996. The IHRC has been critical of this by noting that the distinction based on citizenship is without objective justification and is a disproportionate interference with the rights of Irish citizens. Moreover, it notes that the rights of citizens should “in no circumstances” be less than the rights of non-citizens resident in the State.³⁸⁷ This also raises issues of discrimination under Article 26.
176. Though they may be recognised as refugees for reasons of protection³⁸⁸, same-sex couples are not entitled to family reunification. Resettled/programme refugees who are in Ireland without their spouses or family members are a further group affected by the lack of a statutory right to family reunification. They also have the additional worry and difficulties of deciphering the demands of the initial integration process without their close relatives. A Report by an Irish-Finnish committee recognises that family reunification is an essential component of the integration process and that it is common for delays to be experienced in the application process for family reunification.³⁸⁹
177. In spite of these recommendations from a Committee made up of members of the State Reception and Integration Agency, no information has been included in the State Report on action planned or taken with regard to family reunification for resettled/programme refugees. Clear information is required to inform those in need of family reunification of the requirements involved and the processes they must follow to achieve that aim. In similar jurisdictions such as the UK, legislation has been passed to allow an unmarried partner to enter or remain in the UK.³⁹⁰

Family Reunification for Migrants

178. There is no statutory scheme dealing with family reunification for migrants other than persons with refugee status and EU/EEA nationals and Ireland has opted out of the EU Directive on the right to family reunification of third country nationals legally established in a EU Member State (2003/86/EC). Moreover, the Immigration, Residence and Protection Bill 2008 fails to outline conditions and procedures for family reunification for migrants.
179. Irish citizens with family members from non-EU States are in a similar situation with no clear system through which they can apply for family reunification. The lack of a dedicated scheme affects in particular (i) Irish citizens with non-EU nationals making up part of their family unit, (ii) naturalized Irish citizens with non-Irish nationals making up part of their family unit, (iii) Irish citizen children who have non-Irish national family members.
180. EU-nationals in Ireland are entitled to have their non-EU national family members join them in Ireland.³⁹¹ Similar rules apply to citizens of EEA member states. However, it is a requirement that the family member of an EU citizen who is applying for a residence permit in Ireland must have previously had a residence permit in another Member State.³⁹² This requirement is currently the subject of legal challenge and an appeal is pending before the Supreme Court in *Kumar and Tatjanina v Minister for Justice, Equality and Law Reform*. Furthermore, a reference from the Irish High Court to the European Court of Justice,³⁹³ seeking clarification of this matter is due to be heard on 3 June 2008.³⁹⁴
181. It remains stated government policy not to grant family reunification to persons granted permission to remain in the State following an application under the so-called IBC/05 Scheme. Individual challenges to this policy have largely led to settlements in the High Court. Meanwhile, the policy remains in place.

³⁸⁷ Irish Human Rights Commission (2005) *Policy Paper on Family Reunification*, page 7.

³⁸⁸ Section 1, Refugee Act 1996.

³⁸⁹ MORE Project (2005) *Shaping Our Future: A Practical Guide to the Selection, Reception and Integration of Resettled Refugees*, RIA: Dublin, page 99.

³⁹⁰ Border and Immigration Agency, Home Office, *Law and Policy on family members immigration rules*, para. 295A, accessible at: www.ind.homeoffice.gov.uk/

³⁹¹ EC Directive 2004/58/EC on the rights of citizens of the union and their family members to move and reside freely within the territory of Member States, amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

³⁹² Regulation 3(2) European Communities (Free Movement of Persons) Regulations 2006 (SI 226/2006).

³⁹³ *Metock & Ors v Minister for Justice, Equality and Law Reform* [2008] IEHC 77.

³⁹⁴ *Metock & Ors v Minister for Justice, Equality and Law Reform* Case C-127/08.

182. The One Parent Family Payment³⁹⁵ is not open to parents who are geographically separated from their partner.³⁹⁶ To be eligible for this payment, the applicant must prove that their marriage has broken down, if this cannot be proved, it is open to them to apply for supplementary welfare. Seeking a divorce, for example, would constitute evidence of a marriage breakdown.

Data Protection Acts 1988 and 2003

183. The Data Protection Acts do not apply to matters of territorial or bodily privacy. This includes searching of employees, unauthorised use of search and seizure powers and the surveillance of individuals. Neither does the Act apply to personal data, which in the opinion of the Minister for Justice, Equality and Law Reform or the Minister for Defence, should be retained in the interests of protecting the security of the State.³⁹⁷ This results in the Data Protection Acts being subordinate to other legislation in the case of a conflict between them.³⁹⁸

184. Mobile phone records are retained in Ireland for a period of three years, the longest in the EU.³⁹⁹ While it may be important for An Garda Síochána to access certain information as part of their investigation of crime, it is disproportionate and unnecessary to retain information belonging to *everyone*. It has also been reported that information from emails, internet chat messages and web usage will be retained for three years under an EU data retention directive.⁴⁰⁰ The Data Protection Commissioner has noted that the potential for the retention of information for a period of three years and the consequent access to knowledge of where a person is and when they were at a location, who they spoke to or left messages for and the content of this communication is disproportionate to the purpose of the information retention.⁴⁰¹

Adequate safeguards are not in place to ensure this information is only used for its designated purpose and there should be judicial control over who has access to the information. The number of complaints made to the Data Protection Commissioner more than doubled over the past year from 2005 to 2006 to 658 though there were no convictions under the Data Protection legislation in 2005 and only one in 2006.⁴⁰²

185. Under section 2(A)(1)(a) and 2(B)(1)(b) of the Act, consent of the individual is required in order for their personal information to be processed. However, individuals may find it difficult to refuse their consent if it is requested by an employer or a financial institution, where they would prefer not to give their consent. This could occur for example in circumstances where they are seeking financial assistance or wishing to secure employment.

186. The Acts do not apply to information retained by private individuals or political parties.⁴⁰³ These Acts do not provide for any measures to protect against the sharing of data between state departments or invasive activities established by legislation.

DNA Database and Biometric Information

187. The Law Reform Commission recommended the establishment of a DNA database for the purposes of criminal investigations or proceedings⁴⁰⁴ and this has been provided for under the Criminal Justice (Forensic Sampling and Evidence) Bill 2007. The IHRC has criticised certain sections of the Bill, in particular, the indefinite retention of samples from all persons arrested but not charged or convicted. It recommends that the indefinite retention of DNA samples provided for under the proposed legislation be amended and that

Refer to State Report, paras. 400-401

Refer to State Report, paras. 400-401

³⁹⁵ The One Parent Family Payment is open to those who, for a number of reasons, are bringing up children without the support of their partner. For more information on this payment, see <http://www.welfare.ie/schemes/families/opfp.html>

³⁹⁶ Document received by email in answer to query by Candy Murphy, OPEN, to the Department of Social and Family Affairs on 2 November 2007 setting out the background criteria used in establishing whether a "couple are geographically separated only and that it would not appear that the marriage is over and therefore the claimant could not be considered to be a separated person for the purposes of the One-Parent Family Scheme".

³⁹⁷ Section 1(4)(a) Data Protection Acts 1988 and 2003.

³⁹⁸ For example, restrictions on data processing can be avoided through legislation such as inter alia the Statistics Act 1993 and the Private Residential Tenancies Act 2004.

³⁹⁹ Section 63 (1) Criminal Justice (Terrorist Offences) Act 2005.

⁴⁰⁰ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/2006. (19 January 2008) "Email and chat data to be stored "within a month"", *Irish Times*.

⁴⁰¹ Data Protection Commissioner, Mr. Billy Hawkes on *This Week* radio programme, 15 July 2007, <http://www.rte.ie/news/2007/0715/thisweek.html>

⁴⁰² The Data Protection Commissioner's website is accessible at www.dataprotection.ie

⁴⁰³ Section 2(B)(1)(ix), Data Protection Act 1988.

⁴⁰⁴ Law Reform Commission (2005) *Report on the Establishment of a DNA Database*, Law Reform Commission: Dublin, pages 105-106. The legislation concerned is certain provisions of the Offences Against the State Acts 1939-1998, Criminal Justice Act 1984 or the Criminal Justice (Drug Trafficking) Act 1996.

such samples be destroyed “as soon as practicable once legal proceedings have been discontinued or concluded and the person has been discharged or acquitted.”⁴⁰⁵

Stop-and-Search of Black and Minority Ethnic Persons

188. Section 115 of the Immigration, Residence and Protection Bill 2008 deals with powers of immigration officers. Section 115(1)(e) empowers immigration officers to: “Require, at any reasonable time, any person in a place to produce to the officer any documents which are in the control of that person.” Section 115(1)(g) requires any person to give to the officer any other information which the officer may reasonably require. It is an offence for an individual not to comply with an order given by an immigration officer under the section 115(1) [section 115(2)]. Looking at the overall purpose of the Bill, this provision would appear to be aimed at detecting the presence of unlawful migrants. This power is also broader in scope than section 12 of the Immigration Act 2004, which enables members of the Gardaí to require any “non-national” to produce on demand (a) a valid passport/travel document and (b) a registration certification where the person has registered with the National Garda Immigration Bureau. As with section 12 of the Immigration Act 2004, the main difficulty with section 115(1)(e) is that it will empower the police to stop black and minority ethnic persons on the suspicion that they are unlawfully resident migrant and potentially lead to the detention of black and minority ethnic persons on suspicion that they are an unlawfully resident migrant if they do not have identity documents on their person.

189. Section 115(1)(e) is potentially incompatible with Articles 17 and 26 of the Covenant. Empowering police officers to single out and stop a black and minority ethnic person on suspicion that they are an unlawfully resident migrant essentially alters the relationship with the police. Recalling that under the present Bill, the police can remove a foreign national from the State when “it appears” to them that he or she is unlawfully present in the State or at the frontier of the State [section 54(1)], black and minority ethnic persons will be forced to carry their identity documents for fear of being detained for removal. This provision is invasive and discriminatory and is neither necessary nor proportionate.



Safety, Health and Welfare At Work Act 2005

190. Section 13(c) of the Safety, Health and Welfare At Work Act 2005 provides that an employee should submit to testing for intoxicants at the request of an employer. Both the act of testing for drugs and alcohol and the retention or use of this data may amount to arbitrary interference under article 17 paragraph 1 of the Covenant. The employer is granted a broad discretion without adequate information to employees as to why they may be subject to mandatory drug and alcohol testing as a matter of law. While the qualifications of “appropriate, reasonable and proportionate” are welcome, the section does not establish the circumstances under which such testing may be lawfully required.

Personal Public Service Numbers (PPSN)

191. A PPSN is a personal reference number issued on the basis of birth or it can be applied for on arrival in the State on the production of certain documents. It was introduced by the 1998 Social Welfare Act.⁴⁰⁶ This number is required in order to function as a citizen of the State, in order to access social welfare benefits, public services such as driver licence, medical card, housing grants and this information can be used by Government Ministers, the Revenue Commissioners and the Health Service Executive, Garda National Immigration Bureau, Pensions Board, Civil Service Commissioners among others. Certain educational institutions have a limited access to this data.

⁴⁰⁵ Irish Human Rights Commission (2007) *Observations on the General Scheme of the Criminal Justice (Forensic Sampling and Evidence) Bill 2007*, IHRC: Dublin, page 7.

⁴⁰⁶ Section 14(1) Social Welfare Act 1998, as amended and expanded by Social Welfare Consolidation Act 2005.

192. Civil servants have access to the personal information stored with the PPSN and there are no safeguards to ensure this privilege is not abused. When the scheme was being debated, it was criticised by the Data Protection Commissioner who stated that "the proposed sharing of personal data, obtained and kept by legally separate entities, for such diverse purposes is fundamentally incompatible with...the basic tenets of data protection law".⁴⁰⁷ Its use has been expanded in a non-systematic manner though there has been no clear policy from the State on the use of the PPSN.

Criminal Justice (Terrorist Offences) Act 2005

193. Part 7 of the Criminal Justice (Terrorist Offences) Act 2005 provides for the retention of telecommunications data by telecommunications service providers⁴⁰⁸ for fixed line and mobile phone services providers for a period of three years. Call data can also provide information as to a person's location and activities. Section 64(2) allows Gardaí to access telephone, mobile and fax data which may have been retained for up to three years.

Surveillance Technology

194. The increased presence of closed circuit television cameras on the streets of Ireland for use by An Garda Síochána has resulted in a sizeable impact of the right to privacy of the general public.⁴⁰⁹ The use of CCTV by private individuals is not regulated under section 4(1) of the Data Protection Acts. A Law Reform Commission report released in 1998 recommended the need for legislative safeguards against the abuse of the use of closed circuit television and other surveillance technology in tracking the movements of and invading the privacy of individuals.⁴¹⁰ The Privacy Bill 2006 as published would not have addressed this issue.

Prisoner Correspondence

195. The correspondence of prisoners continues to be censored and opened by prison authorities in Ireland.⁴¹¹ The CPT observed this in their correspondence with Irish prisoners in their 2006 visit.⁴¹² There are no guarantees that a prisoner's privileged correspondence such as that between him and his lawyer will not be intercepted. Further, no remedy exists if this does occur.

Recommendations

- > The Government should extend the remit of the Data Protection Commissioner to deal with all complaints relating to infringements of bodily and territorial privacy.
- > The DNA of innocent people should not be held on a database indefinitely and should be deleted within a reasonable timeframe.
- > The Government must review and enhance safeguards relating to the management and operation of the PPS system.
- > The Immigration, Residence and Protection Bill 2008 should not allow for the stop-and-search of black and ethnic minority people by ordinary members of the Gardaí on the suspicion that they are an illegal immigrant.
- > The Immigration, Residence and Protection Bill 2008 should be amended to require the consideration of the constitutional and convention rights of any person who is subject to removal and arrest and/or detention for that purpose prior to their removal to ensure that, in line with the Supreme Court's judgment in *Dimbo*, removals only take place after a substantial reason to do so has been identified.

⁴⁰⁷ Data Protection Commissioner, *Annual Report 1996*, page 35.

⁴⁰⁸ Criminal Justice (Terrorist Offences) Act 2005 Part 7, section 61-67.

⁴⁰⁹ (14 March 2007) "More Camera Surveillance for Town Centres", *Irish Daily Mail* and "Towns target in CCTV blitz", *Irish Daily Mirror*.

⁴¹⁰ Law Reform Commission (1998) *Report on Privacy: Surveillance and Interception of Communication*, 1998, page 10-12, 101, recommended a tort to protect the rights of privacy against the threat posed by surveillance.

⁴¹¹ Prison Rules 2007 (SI 252/2007), para. 45 provides for the examination and confiscation of letters to be sent and those received by prisoners, by the Governor of the prison provided that the Governor is of the opinion that the letter for example, could give rise to a legal action against the Governor or the Minister for Justice, Equality and Law Reform.

⁴¹² *Report to the Government of Ireland on the visit to Ireland carried out by the Committee for the Prevention of Torture Punishment*, CPT from 2 to 13 October 2006, CPT/Inf (2007) 40, para. 5.

Article 18

- 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.**
- 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.**
- 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.**
- 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.**

Religious Oaths

196. In the HRC’s Concluding Comments of 24/07/2000,⁴¹³ it was recommended that Ireland reform the constitutional provisions of Article 34.5.1° which requires judges to take a religious oath thereby excluding certain persons from taking such offices. The President is also required to make such a declaration under Article 12.8 of the Constitution. Both provisions remain in place despite the HRC’s previous observations.

Proliferation of Religious Schools in Ireland

197. Most primary and secondary schools in Ireland are denominational and the boards of management of these schools remain at least partially controlled by religious bodies. Of the approximately 3,150 primary schools within the State, 99% of these have a stated religious ethos with a high number of these belonging to one religious denomination. The 2006 Census indicates that there is an increasing proportion of the population holding minority religious beliefs, the largest single minority being “no religion”.⁴¹⁴ This predominance of religious schools means that parents who do not wish their children to be educated in a religious environment cannot access secular schooling for their children and have little option but to send their children to a religious school. This creates obstacles for children of different faiths or no faith and for gay, lesbian and bisexual parents and pupils because the religious teachings of the school may not conform with the lifestyle of the child’s family. As the State becomes more diverse, the education system is clearly failing to meet the needs of non-Catholic or non-religious families wishing to educate their children in Ireland by not providing alternatives to religious schooling. Staff members who may not hold religious views of a school may also be discriminated against.

198. In September 2007, a number of Catholic schools across the State operated a Catholics-first enrolment policy resulting in many children from non-Catholic families facing a crisis in obtaining places in primary schools. This was as a result of the dominance of Catholic run schools in Ireland. This is leading to *de facto* segregated primary school provision affecting in particular Black and minority ethnic children. It further highlights the lack of provision of schools for the diverse range of children who now require in Ireland. The Equality Authority has warned that schools operating such policies could be in breach of EU and Irish anti-discrimination legislation.⁴¹⁵

199. In recognising the “intersectionality” of racial and religious discrimination, the UN Committee on the Elimination of Racial Discrimination has previously recommended that the Irish State support the establishment of non-denominational or multi-denominational schools and revise existing legislation which may allow for discrimination with regard to the admission of pupils of all religions to schools.⁴¹⁶ This concern was reiterated by the UN Committee on the Rights of the Child.⁴¹⁷

Religious Exemption under the Equal Status Acts 2000-2004

Table 5: Religion in Ireland

Religion in Ireland	Percentage of Population ⁴¹⁸
Roman Catholic	91.98%
Church of Ireland (including Protestant)	2.34%
Other Christian religion	0.43%
Muslim (Islamic)	0.26%
Presbyterian	0.37%
Orthodox	0.076%
Methodist	0.135%
Other religion	0.59%
None	2.8%

Additional info not included in State Report

⁴¹³ UN Doc.: A/55/40, paras. 422-451.

⁴¹⁴ CSO Ireland, population classified by religion and nationality, 2006.

⁴¹⁵ Written Opinion of the Equality Authority to Education Minister Mary Hanafin and Archbishop of Dublin Dr. Diarmuid Martin, 13 September 2007 (received by email from the Equality Authority).

⁴¹⁶ Concluding Observations of the Committee on the Elimination of Racial Discrimination on Ireland: UN Doc: CERD/C/IRL/CO/2, para. 18.

⁴¹⁷ Concluding Observations of the Committee on the Rights of the Child: Ireland, 29 September 2006, UN Doc.: CRC/C/IRL/CO/2, para. 60.

⁴¹⁸ These figures represent those who chose to state their religion in the 2006 census. CSO Ireland, Population classified by religion and nationality, 2006.



200. An exemption under section 7 of the Equal Status Acts 2000-2004⁴¹⁹ enables schools managed by religious groups in Ireland to legally give preference to children, families and teachers of their religion. The majority of primary schools are privately-owned, with religious trustees yet they are State-funded.⁴²⁰ The exemption also extends to the right to discriminate in favour of a particular religion in teacher recruitment. Given the paucity of any inclusive secular alternatives, this has a serious impact with regard to employment equality for religious minorities and persons to who not ascribe to any religion in the State.

Recommendations

- > Judges should not be required to take a religious oath before joining the bench.
- > The State must increase its provision for the establishment of non-denominational education primary and post-primary levels.

⁴¹⁹ Section 7, Equal Status Acts 2000-2004.

⁴²⁰ Educate Together (2005) *Shadow Report on the Second Report under the Framework Convention for the Protection of National Minorities*, Educate Together: Dublin.

Article 19

- 1. Everyone shall have the right to hold opinions without interference.**
- 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.**
- 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:**
 - (a) For respect of the rights or reputations of others;**
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.**

Reservation to Article 19 Paragraph 2

201. Ireland lodged the following reservation which, as is the case with its other three reservations under the Covenant, the State has not acted to withdraw since its previous examination by the Committee: "Ireland reserves the right to confer a monopoly on or require the licensing of broadcasting enterprises."

Refer to State Report, paras. 412-416

Freedom of Expression and Defamation

202. Defamation law in Ireland is regulated by outdated and outmoded legislation, the Defamation Act 1961. This legislation has imposed restrictions on freedom of expression and has had a chilling effect on investigative and political journalism. This Act lacks a clear definition of defamation creating difficulty for litigants. Section 6 of the current legislation offers a limited defence with regard to truth which requires the defendants to prove that the material was published for the public benefit and that the material is true. The burden of proof with regard to truth rests with the defendant, rather than the plaintiff having to prove that the content is libellous. Another criticism is the inclination of the courts to award very high levels of damages in libel cases leading the media to operate in an environment of self-censorship.

Refer to State Report, para. 417

203. Proposed new legislation, the Defamation Bill 2006, fell on the recent dissolution of Parliament. It has been restored and is currently under discussion. The Press Ombudsman and Press Council were established - on a non-statutory basis - in December 2006.⁴²¹ While these are important means by which complaints may be recorded with regard to newspapers and magazines, the powers of the Ombudsman is limited to requesting the offending newspaper or magazine to offer an apology or to publish their decision with regard to a breach of the Code of Practice⁴²² or to refer the issue to the Press Council. However, neither the Press Council nor the Ombudsman can impose sanctions on persistent offenders.

204. The Committee has previously expressed concern about the use of custodial penalties for defamation⁴²³ and this remains a possibility in Ireland today. Criminal punishment for defamatory statements was included in the Defamation Bill and should be removed from any future Bill. The UK-based NGO Article 19 has also highlighted this.⁴²⁴ This included provision of a summary conviction for "minor" cases of "publication of gravely harmful statements" which may result in up to twelve months imprisonment. Section 35(1) of the Defamation Bill also would have established a new offence of "publication of gravely harmful statements" which is punishable by up to five years' imprisonment.⁴²⁵ The provision applies to statements which affect reputation, which cause grave injury and is limited in its application to statements which incite violence. The defence of truth for a defamation action is provided for in Section 14 of the Bill. The burden of proof is on the defendant to prove the thrust of the statement in all material respects. The Law Reform Commission has recommended the abolition of the common law presumption of falsity⁴²⁶ yet this has been retained in the Bill and raises concerns in relation to protection and promotion of the right to freedom of expression.

Restrictions upon the Freedom of Expression

205. The Electoral (Amendment) Act 2001 introduced a requirement that groups - described as 'third parties' - register with the Standards in Public Office Commission (SIPOC) before raising donations for, or spending monies on, any type of campaigning that could be viewed as 'political'. A cap was placed on any individual donations groups could receive for 'political' campaigning, and, combined with the onerous accounting procedures for such third parties, results in the possibility of such groups being effectively debarred from any 'political' campaigning, at any time. SIPOC interprets 'political' as any criticism of government policy; the legislation is limited specifically to those groups who take donations. The legislation is so badly drafted that SIPOC acknowledge it is applicable 365 days of the year.

⁴²¹ Office of the Press Ombudsman and the Press Council, Ireland are accessible at the following address: www.presscouncil.ie/

⁴²² The Code of Practice is accessible at the following web address www.presscouncil.ie/v1/codeofpractice.php

⁴²³ See the Concluding Comments of the Committee on Azerbaijan (2001) at para. 22 UN Doc.: CCPR/C/73/AZE and Serbia and Montenegro (2004) para. 22 UN Doc.: CCPR/CO/81/SEMO.

⁴²⁴ Article 19 (2006) *Memorandum on the Defamation Bill 2006 and the Privacy Bill 2006 of the Republic of Ireland*, Article 19: London, page 1.

⁴²⁵ Section 35(5), the Defamation Bill 2006.

⁴²⁶ The Law Reform Commission (2001) *Report on the Civil Law of Defamation*, paras. 7.28-7.35.



206. The purpose of the legislation was to prevent a wealthy group/individual using its resources to unfairly distort the electoral or referendum process. However, the resulting situation is that commercial profit-driven entities can legally take out full-page newspaper adverts in which they lambaste government for perceived failures, since they do not receive 'donations'. Their motivation is profit, and they are entitled to pursue it. Yet voluntary organisations who depend on donations to exist, whose *raison d'être* is often to monitor government policy and implementation, and who in many cases deliver the very services that the State itself should be providing, cannot do so. The dividing line is where a group "accepts, in a particular year, a donation the value of which exceeds £100".⁴²⁷

207. The SIPOC itself has appealed to Government - unsuccessfully - over the past four years to amend the legislation. Meanwhile, it says, it faces the real prospect of recommending that the DPP prosecute organisations like St. Vincent de Paul, Simon, Focus, Trocaire, Concern, Goal, Amnesty International, Tidy Town Committees, community groups, Irish Congress of Trade Unions (ICTU), Irish Business and Employers Congress (IBEC) or the Irish Farmers Association (IFA), basically any group that is in receipt of donations and engages in criticism of any aspect of government policy at any time of the year. This is not just a theoretical danger. SIPOC is obliged to act on receipt of a complaint. The complainant can remain anonymous. Prosecutions have indeed been threatened.

208. Similarly the Broadcasting Act 2001, which prohibits advertising directed towards a political end, can restrict the ability of NGOs, charities etc. to advertise events on the basis that the purpose of the organisation, and therefore the event is to be construed as political. Under international human rights law, freedom of expression can only be restricted when it is in the public interest and only to the extent necessary to meet a legitimate aim.

Access to Information on Abortion

209. Article 40.3.3° of the Irish Constitution⁴²⁸ states that subject to the conditions laid down by law, the freedom to obtain or make available information regarding services lawfully available in another state will not be limited. The Regulation of Information (Termination of Pregnancy Outside the State) Act 1995 applies to information which "is likely to be required by a woman for the purpose of availing herself of services provided outside the State for the termination of pregnancies and relates to such services or persons who provide them." Information regarding abortion or the procurement of such in a book, newspaper, leaflet, in a film, radio, television, by any other means has been banned by the 1995 Act.⁴²⁹ This is the case unless the information refers to services in a particular place provided for by law and that the information is truthful, objective and does not promote abortion. The Act stipulates that advice can only be imparted in non-directive counselling sessions. It prohibits the dissemination to the public of information if it advocates or promotes abortion.

210. Concerns have been expressed about the existence of certain crisis pregnancy agencies in the State on the basis that they misinform and intimidate women. These are not medical or counselling facilities and their works discourage women from accessing abortion.⁴³⁰ Part II of the Register of Prohibited Publications 2007 includes in the list of banned publications those that "...advocate the procurement of abortion or miscarriage or the use of any method, treatment or appliance for the purpose of such procurement."⁴³¹

Concerns have been expressed about the existence of certain crisis pregnancy agencies in the State on the basis that they misinform and intimidate women.

Additional info not included in State Report

⁴²⁷ Section 49(b)(iii), the Electoral (Amendment) Act 2001.

⁴²⁸ Article 40.3.3° of the Irish Constitution states:

"3° The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.

This subsection shall not limit freedom to travel between the State and another state.

This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state."

⁴²⁹ Section 3, Regulation of Information (Services outside the State for Termination of Pregnancies) Act 1995.

⁴³⁰ Irish Family Planning Association (2007) *Factsheet on Rogue Crisis Pregnancy Agencies*, IFPA: Dublin, page 1.

⁴³¹ Censorship of Publications Acts 1929-1967, Registration of Prohibited Publications 2007.

Freedom of Information Acts

211. The Freedom of Information (Amendment) Act 2003 amends the Freedom of Information Act 1997. The purpose of the 1997 Act is to “enable members of the public to obtain access, to the greatest extent possible...to information in possession of public bodies...”⁴³² In 2003, this right was restricted by the increase of the time period for withholding of Cabinet Documents from five to ten years and the expansion of the coverage of the exemption.⁴³³ The Act allows public servants to issue unappealable certificates notifying applicants that deliberative processes are ongoing. The ‘public interest’ test was weakened as was the ‘harm test’ for security, defence and international relations. Finally, the 2003 Act allowed the State to impose a new fee structure for the information sought.

212. An Garda Síochána is currently excluded from the ambit of the Freedom of Information Acts. Police forces in similar jurisdictions such as the United Kingdom are subject to their freedom of information legislation. A number of other prominent organisations are excluded from the Act such as the Financial Services Authority, the Central Bank, the Irish Financial Regulatory Authority, the Adoption Board and the Refugee Appeals Tribunal. School inspection reports are also excluded. The Act is non-retrospective in nature, excluding documents which existed before April 1998 unless they contain personal information or are necessary in order to understand other documents covered under the Act.

213. A report by the Information Commissioner in June 2004 found that the overall usage of the Act had declined by over 50% since the introduction of the 2003 Amendment Act and the introduction of fees and requests for non-personal information declined by 75%.⁴³⁴ Requests to public bodies fell by almost 20% in 2006.⁴³⁵ The State continues to make changes to the Acts without notifying or consulting the Information Commissioner.⁴³⁶

Recommendations

- > The State needs to review its legislation governing freedom of information, access to abortion information and defamation to ensure that it is compatible with its obligations under Article 19.
- > New restrictions on freedom of expression for organisations in the Electoral (Amendment) Act 2001 are incompatible with the State’s obligations under Article 19 and should be removed.

⁴³² Title of the Freedom of Information Act 1997.

⁴³³ Office of the Information Commission, *Review of the Operation of the Freedom of Information (Amendment) Act 2003*, June 2004.

⁴³⁴ Office of the Information Commissioner, *Annual Report 2004*, page 1.

⁴³⁵ Office of the Information Commissioner, *Annual Report 2006*, page 9.

⁴³⁶ Cullen, Paul (31 May 2007) “FOI Act should apply to Garda, says O’Reilly”, *Irish Times*.

Article 20

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

20

Reservation to Article 20 paragraph 1

214. On ratification of the ICCPR, Ireland made the following reservation:

Ireland accepts the principle in paragraph 1 of article 20 and implements it as far as is practicable. Having regard to the difficulties in formulating a specific offence capable of adjudication at a national level in such a form as to reflect the general principles of law recognised by the community of nations as well as the right to freedom of expression, Ireland reserves the right to postpone consideration of the possibility of introducing some legislative addition to, or variation of, existing law until such time as it may consider that such is necessary for the attainment of the objective of paragraph 1 of article 20.

215. The Committee on the Elimination of Racial Discrimination expressed concern in relation to the lack of provision in criminal law for an offence with a racist motivation or aim that constitutes aggravating circumstances which would allow for a more severe punishment.⁴³⁷

Prohibition of Incitement to Hatred Act 1989

216. The Prohibition of Incitement to Hatred Act 1989 was passed to prohibit incitement based on race, colour, nationality, religion, ethnic or national origins, membership of the Traveller community or sexual orientation. It is submitted in the State Report that this legislation is ineffective with very few⁴³⁸ prosecutions being brought since its introduction. While the State notes that a review of this legislation was expected in early 2007,⁴³⁹ the final results of this research have yet to be published. In 2003, the State consulted with groups and individuals which advised that the review of the Prohibition on Incitement to Hatred Act 1989 should take place as a matter of urgency.⁴⁴⁰ They further advised that the review include consideration of the public dissemination of written or pictorial images that may not be covered by the present Act.

The Privilege of Journalists to Protect their Sources

217. In a 2007 High Court ruling, the privilege of journalists not to reveal their sources was deemed to have been outweighed by the need for public confidence in a Tribunal of Inquiry investigating payments to certain politicians and planning matters. On foot of this an order was granted that the journalist and newspaper editor involved in the case were compelled to comply with an order to attend the Tribunal and answer questions in relation to the source and whereabouts of documents which the journalists claimed to have destroyed.⁴⁴¹ In a separate case a month later, the European Court of Human Rights reiterated the essential role played by the press in a democratic society and the importance of the protection of the sources of journalists for press freedom, the Court held that a journalist's right not to reveal his or her sources was part of the right to information and not just a mere privilege, to be granted or taken away depending on whether or not their sources are lawful.⁴⁴²

The Role of the Media

218. Certain media in Ireland continue to promote negative stereotypes of particular groups such as Travellers, people seeking asylum, migrants and one-parent families. These groups are often portrayed as criminals and "spongers" by stories based on speculation, misinformation and exaggeration particularly in the tabloid press. One survey of research on refugees, people seeking asylum and immigrants calls for the "ongoing monitoring of media coverage of immigrant and asylum issues".⁴⁴³ In 2006, the Council of Europe Framework Committee for the Protection of National Minorities found that there was

Certain media in Ireland continue to promote negative stereotypes of particular groups such as Travellers, people seeking asylum, migrants and one-parent families

⁴³⁷ Concluding observations of the Committee on the Elimination of Racial Discrimination: Ireland. 14/04/2005. CERD/C/IRL/CO/2 at paragraph 11.

⁴³⁸ Department of Foreign Affairs (2007) *Third Report by Ireland on the Measures Adopted to Give Effect to the Provisions of the Covenant*, para. 419.

⁴³⁹ *Ibid*, para. 421.

⁴⁴⁰ Department of Justice, Equality and Law Reform (2003) *Diverse Voices*, accessible from www.justice.ie

⁴⁴¹ *In the matter of an application pursuant to section 4 the Tribunals of Inquiry (Evidence) (Amendment) Act 1997, as amended by section 3 of the Tribunals of Inquiry (Evidence) (Amendment) Act 2004 between his honourable Judge Alan P. Mahon, her honourable Judge Mary Faherty, his honourable Judge Gerald B. Keys, members of the Tribunal of Inquiry into certain planning matters and payments and Colm Keena and Geraldine Kennedy*, [2007] IEHC 348, unreported.

⁴⁴² *Tillack v. Belgium*, application no. 20477/05, 27 November 2007.

⁴⁴³ Cotter, Gertrude (2004) *A Guide to Published Research on Refugees, Asylum-Seekers and Immigrants in Ireland*, Integrating Ireland: Dublin. The study also highlighted the need for research on policy itself e.g. immigration policy, and the need for specifically targeted research to cover specific groups.

“negative reporting and under-reporting on minorities,” and called for improved access to the media by minorities and for the establishment of an effective complaints procedure.”⁴⁴⁴

“Manhunt for the Traveller gang chief terrorising southside homes”.⁴⁵⁰ One-parent families have been described as “the unmotivated, the confused, the backward, the lazy”⁴⁵¹ in the Irish media.

219. As part of the research conducted for this Shadow Report, a number of groups were consulted such as people seeking asylum, migrants, Travellers, former prisoners, lone parents and members of the gay community and people with gender identification disorder. Without exception, all groups noted that the media had a significant role to play in vilifying the groups in the press with misinformation and misleading stories, or by exclusively highlighting the negative incidents which involve these communities in Ireland.

220. The entitlements of people seeking asylum are often inaccurately reported. An example used by the RAXEN3 study on racist violence, is of a Cork radio station which gave substantial airtime to outraged listeners complaining about:

- > An asylum seeker said to have bought a car using a cheque made out in his name by the local health board;
- > A woman reported as being in a shop laden with sweets and food for a child’s birthday supposedly paid for by the immigration authorities;
- > Speculation about the potential health risks posed by the children of people seeking asylum attending local schools.⁴⁴⁵

221. With regard to Travellers, one newspaper columnist described “‘Traveller life’ as unhealthy, highly alcoholic, illiterate, often violently misogynistic and low achieving.”⁴⁴⁶ Travellers are often criminalised in the press, when their ethnicity, regardless of their innocence, is in no way related to the alleged offence with headlines such as these for example, “Travellers’ blackmail bid fails”⁴⁴⁷, “Rampage: Vicious Travellers force one publican out of business while another is prosecuted for firing his shotgun”⁴⁴⁸, “Travellers in hospital rampage”⁴⁴⁹ and

Recommendations

- > The State should amend the Prohibition of Incitement to Hatred Act 1989 to make it effective in addressing incitement to hatred.
- > The State should encourage national media outlets to promote diversity and intercultural strategies.

⁴⁴⁴ Council of Europe, Advisory Committee for the Protection of National Minorities, *Second Opinion on Ireland, adopted 6 October 2006*, para. 81.

⁴⁴⁵ *Analytical study on racist violence: RAXEN3*, page 31. *op. cit.* RAXEN is the European Network on Racism and Xenophobia. It is one of the key tools of the EU Monitoring Centre on Racism and Xenophobia (EUMC) to provide the European Union and its Member States with information and research on the phenomena of racism, xenophobia and anti-semitism. The network is composed of 25 National Focal Points (NFP). The Equality Authority and the NCCRI are the Irish National Point (NFP).

⁴⁴⁶ Myers, Kevin (13 October 2004) “An Irishman’s Diary”, *Irish Times*.

⁴⁴⁷ 21 July 2005, *The Star*.

⁴⁴⁸ 18 June 2006, *Sunday World*.

⁴⁴⁹ 8 June 2004, *Irish Daily Mirror*.

⁴⁵⁰ 9 October 2006, *Evening Herald*.

⁴⁵¹ Myers, Kevin (8 February 2005) “An Irishman’s Diary”, *Irish Times*.

Article 21

The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

21

Criminal Justice (Public Order) Act 1994

222. The Criminal Justice (Public Order) Act 1994 introduced a broad range of public order offences which the Gardaí rely upon when policing demonstrations and public events. The main difficulty with this Act is that its wording is extremely vague and it empowers the police with too much discretion. In addition, a number of sections go further by providing for strict liability offences⁴⁵² and fines for intoxication in a public place (section 4) and disorderly conduct in a public place (section 5).

Protesting in Ireland

223. In 2004, Dublin City Council began to refuse permission for organisations and groups to put up posters around the city advertising their events, activities and issues.⁴⁵³ Advertising of events – in particular, meetings and fundraising events for anti-war and human rights groups – is now confined exclusively to commercially available bill boards/formal advertising spaces and only political parties may put up posters around the city during election time. This has had a negative impact on freedom of association as it makes mobilizing public support more difficult.

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224. The police mounted a major security operation on 1 May 2004 to deal with anti-globalisation protests organised in Dublin city. Water canons were used on a group of protesters,⁴⁵⁴ several of whom were allegedly injured.⁴⁵⁵ Twenty-three people were arrested

and charged with minor offences.⁴⁵⁶ Seven Gardaí faced assault charges after television footage⁴⁵⁷ emerged of the excessive use of force by Gardaí at a rally in 2002. None was convicted.

225. Another major police operation involving 4,000 officers was mounted in June 2004 for an official visit to Ireland by the president of the United States, George Bush. Approximately 1,200 anti-war protesters were permitted to march within three miles of Dromoland Castle, County Clare, where President Bush was staying. The ICCL received reports from local people and anti-war protesters that local police officers carried out house searches in the area prior to the visit. Several protesters were arrested for public order offences and offences under the Offences Against the State Act.

226. More recently, allegations have been made of the excessive use of force by police officers at the ongoing “Shell to Sea” protest at Bellanaboy in Rosspoint, County Mayo⁴⁵⁸ and a number of complaints about the policing of this protest have been submitted to the Garda Síochána Ombudsman Commission.⁴⁵⁹

227. In April 2008, a Commissioner from the Garda Síochána Ombudsman Commission, Conor Brady revealed that pursuant to section 106⁴⁶⁰ of the Garda Síochána Act 2005, the Commission requested permission from the Minister for Justice, Equality and Law Reform to examine public order laws and practice in Ireland.⁴⁶¹ This point was confirmed in the Garda Síochána Ombudsman Commission 2007 Annual Report:

In July 2007, GSOC wrote to the Minister concerning a possible examination under section 106 of the management of incidents of crowd protest or civil disobedience by groups or persons. The Minister, following discussions with GSOC, did not feel that it was appropriate at that time for him to request such an examination.⁴⁶²

However, it is of serious concern that the Minister refused to allow this examination to take place.

⁴⁵² Strict liability for a crime is imposed without the necessity of proving *mens rea* with respect to one or more elements of the crime. *Mens rea* refers to the guilty state of mind that the prosecution must prove a defendant to have had at the time of committing a crime in order to secure a conviction. Definitions are from the (2006) *Oxford Dictionary of Law*, Oxford University Press, pages 339 and 516.

⁴⁵³ Section 19 of the Environment (Amendment) Act 2003 allows councils to pass local byelaws to combat litter.

⁴⁵⁴ Parliamentary Question, Vol. 584, No. 6, 5 May 2004.

⁴⁵⁵ Friemann, Gretchen (7 May 2005) “Excessive Force caused ‘Severe’ Injuries, DGN says”, *Irish Times*.

⁴⁵⁶ Parliamentary Question, Vol. 584, No. 6, 5 May 2004.

⁴⁵⁷ This footage is viewable on www.youtube.ie

⁴⁵⁸ (21 November 2006) “Shell to Sea cancels rally to protect supporters’ safety”, *Irish Times*.

⁴⁵⁹ (5 May 2007) “Gardaí criticised over Corrib dispute”, *Irish Times*.

⁴⁶⁰ This section empowers the Garda Síochána Ombudsman Commission to examine certain practices, policies and procedures.

⁴⁶¹ Waterford Institute of Technology Policing Conference, Tuesday, 22 April 2008.

⁴⁶² Garda Síochána Ombudsman Commission 2007, at section 1.7, page 23. Available from: www.gardaombudsman.ie



The Right to Protest and the definition of Terrorism

228. The Criminal Justice (Terrorist Offences) Act 2005 provides for a broad definition of terrorist activity. Section 4 (b) defines terrorist activity as that which constitutes an offence in Irish law and is committed with the intention of:

- i. seriously intimidating a population
- ii. unduly compelling a government or an international organisation to perform or abstain from performing an act, or
- iii. seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a state or an international organisation.

This creates the possibility of groups such as protestors or peace activists being included under this legislation.⁴⁶³ The offences that may qualify under Irish law are listed under Schedule 2 of the Act and include obstruction to railways and telegraphs,⁴⁶⁴ deliberately endangering traffic⁴⁶⁵ and unlawfully and recklessly damaging property.⁴⁶⁶

Additional info not included in State Report

Recommendations

- > The operation of the Criminal Justice (Public Order) Act 1994 should be independently reviewed to assess its compatibility with Ireland's international human rights obligations under the ICCPR.
- > The Garda Síochána Ombudsman Commission should be permitted to review public order policies pursuant to section 106 of the Garda Síochána Act 2005.

⁴⁶³ Irish Human Rights Commission (2002) *Comment on the Criminal Justice (Terrorist Offences) Bill 2002*, IHRC: Dublin.

⁴⁶⁴ Subsections 35-37, Malicious Damage Act 1861.

⁴⁶⁵ Section 14, Non-Fatal Offences against the Person Act 1997.

⁴⁶⁶ Section 2, Criminal Damage Act 1991.

Article 22

- 1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.**
- 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.**
- 3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.**

22

Charities Bill 2007

229. The Charities Bill 2007 is currently being considered by the Oireachtas (Irish Parliament) and is designed to reform the regulation of the charities sector. The current version of the Bill does not make clear that promotion of human rights, equality and social justice will be deemed to be a charitable purpose under the new system. The Department of Community, Rural and Gaeltacht Affairs issued a consultation paper on the proposed regulatory framework for charities and included specific recognition of the advancement of human rights, social justice and equality in the initial draft Bill.⁴⁶⁷ However, in the Bill which was presented to the Oireachtas in April 2007, this explicit reference to human rights, social justice and equality has been deleted. There is concern that this omission could result in a denial of charitable status for some human rights and equality organisations. There is further concern that the lack of express reference in the legislation could damage the public image of such organisations. In previous Concluding Observations on Belarus and Lithuania, the HRC emphasised the importance of the establishment and free operation of non-governmental organisations and that limitations on the operation of such organisations should not exceed those permitted under Article 22.⁴⁶⁸



Exercising freedom of association: a gay and lesbian equal rights protest outside the Dáil

Recommendation

- > Legislation governing charities should recognise the advancement of human rights, social justice and equality as charitable purposes.

⁴⁶⁷ Head 3 of the General Scheme for the Charities Regulation Bill 2006, March 2006.

⁴⁶⁸ Concluding Comments: Belarus, para. 19, UN Doc.: CCPR/C/79/Add.86, Concluding Comments: Lithuania, para. 20, UN Doc.: CCPR/C/79/Add.87 both of 19 November 1997.

Article 23

- 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.**
- 2. The right of men and women of marriageable age to marry and to found a family shall be recognised.**
- 3. No marriage shall be entered into without the free and full consent of the intending spouses.**
- 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.**



Legal Developments with regard to the Family

230. Irish law and policy provides special protection for the family unit based on marriage. According to recent figures from the Central Statistics Office, this family form is declining in major cities since 2002.⁴⁶⁹ Unmarried cohabiting couples are the fastest growing family unit in the State rising by over 77,000 from 2002 to 2006.⁴⁷⁰ There are over 189,200 lone parent families with lone mothers representing nearly 86% of these.⁴⁷¹ Given that Irish Constitutional provisions on the family have been interpreted as only protecting the married family, Irish law is not fully compliant with the State's obligations under Article 23.⁴⁷²

231. The equal right to respect for family life of opposite sex cohabiting couples⁴⁷³, their children and one-parent families⁴⁷⁴ as protected by Article 8 of the ECHR is not provided for in Irish law. Parent-child relationships in non-marital families are not given equal status in Irish legislation, specifically between children and their unmarried fathers.⁴⁷⁵ In a situation where a child is born outside of marriage, the biological mother obtains automatic sole guardianship of the child. The biological father does not possess such rights and there is no means by which a non-biological parent in a *de facto* relationship can be appointed as the child's guardian.

232. The constitutional presumption that the welfare of the child is best met within the marital family is created in Articles 41 and 42 of the Constitution. Where the marital family does not exist or where the presumption in its favour has been rebutted, the Court must have regard to the interests or rights of a child.⁴⁷⁶ As a result, it is constitutionally impermissible for the welfare of a child to be considered first and paramount in a dispute as to the child's

upbringing or custody without first having regard to the constitutional rights of the family.⁴⁷⁷ In such cases, the rights of the family supersede those of the child.⁴⁷⁸

233. The primacy of the marital family also creates a discrepancy leading to different treatment of children of marital and non-marital families. This occurs because children of non-marital families have, in certain circumstances, greater legal protection than children of marital families, since it is presumed that the interests of children of marital families are best catered for within the family itself whereas children of non-marital families can have their best interests considered from the outset.⁴⁷⁹

Unmarried Fathers in Irish Law

234. Unmarried fathers do not have an automatic natural right to the care and upbringing of their children and they have no constitutional rights in relation to guardianship of their children. Rights of contact are generally also determined with reference to the mother's agreement⁴⁸⁰ and rights for fathers have not been provided for in legislation. This omission is contrary to the principle of a right to family life as espoused by Article 23 of the Covenant as unmarried mothers are automatic guardians of their children from birth. This can result in a negative effect on the child's right to contact with his or her father and on the relationship between a father and his child. There is also no statutory paid parental leave for fathers in Ireland.⁴⁸¹

Unmarried fathers do not have an automatic natural right to the care and upbringing of their children and they have no constitutional rights in relation to guardianship of their children.

⁴⁶⁹ Census 2002, family units in private households classified by type of family unit and number of children.

⁴⁷⁰ Census 2006, Commentary, page 21.

⁴⁷¹ Central Statistics Office, Census 2006, Commentary, page 20.

⁴⁷² General Comment No. 19: Protection of the family, the right to marriage and equality of the spouses (Article 23), para. 2.

⁴⁷³ *Johnston v Ireland* (1987) 9 EHRR 203, at the European Court of Human Rights, where that court found that sufficient informal heterosexual relationships of sufficient substance and stability can amount to family life under Article 8 of the Convention.

⁴⁷⁴ *Marckx v Belgium* (1979-80) 2 EHRR 330, at the European Court of Human Rights, relates to the protection of rights of children born outside of marriage under Article 8 of the Convention.

⁴⁷⁵ Section 2(1) and 6(4), Guardianship of Infants Act 1964.

⁴⁷⁶ See for example, the Guardianship of Infants Act 1964 with regard to a non-marital child, it is noted here that the welfare of the child shall be the first and paramount consideration. For the child of a marital family, the constitutional presumption in favour of the family supersedes the 1964 Act.

⁴⁷⁷ *Kilkenny Incest Investigation Report* presented by the South Eastern Health Board to Mr. Brendan Howlin T.D., Minister for Health in May 1993, page 31.

⁴⁷⁸ Kil Kelly, U and O'Mahony, C (2007) "The Proposed Children's Rights Amendment: Running to Stand Still?" (2007) 10(2) *Irish Journal of Family Law*, page 19.

⁴⁷⁹ Ombudsman for Children (2006) *Advice of the Ombudsman for Children on the proposed referendum on children's rights*, OCO: Dublin, page 9.

⁴⁸⁰ In the High Court case of *G v Attorney General* [2007] IEHC 326 it was held that, in the circumstances of this case, where a father has acted reasonably and dutifully towards his children, and his actions were indistinguishable from those of a married father, he has a right to custody of the children.

⁴⁸¹ Directorate General for Employment, Social Affairs and Equal Opportunities, European Commission (2005) *Reconciliation of work and private life: A comparative review of thirty European countries*, page 53.

Restrictions on the Right to Marry

235. The Immigration, Residence and Protection Bill 2008 includes new restrictions on the right to marry for foreign nationals which potentially breach Article 23(2)(the right of men and women to marry) of the ICCPR. For example, section 123(1) provides that the marriage of a foreign national and an Irish citizen does not confer a right on the foreign national to enter or be present in the State. Marriages contracted where one person is or both persons are foreign nationals are invalid unless, notification is given to the Minister within three months of solemnisation [section 123(2)(a)] and the foreign national at the time of the marriage, is the holder of an entry permit for the purpose of the marriage or a residence permission [section 123(2)(2)(b)].

The Immigration, Residence and Protection Bill 2008 includes new restrictions on the right to marry for foreign nationals which potentially breach Article 23(2)(the right of men and women to marry) of the ICCPR.

236. In practice this section will generally prevent protection seekers, individuals present in the country on non-renewable residence permits (tourists and students here for short term study) and unauthorised persons from contracting a marriage. A strict reading of the provision would also include EU nationals present within Ireland but who have not yet activated their residency rights by becoming economically active or otherwise entitled to establish themselves in the State.⁴⁸² However, the Minister may grant a discretionary exemption from the above subsection upon an application in the prescribed form [section 123(3)].

237. Section 123(4) of the Bill also provides the Minister with broad and somewhat subjective grounds to refuse an application under the section 123(3). So for example, the Minister can refuse an application if he or she considers that it would:

- > Adversely affect the implementation of an earlier decision under the Act [section 123(4)(a)];
- > Create a factor bearing on a decision yet to be taken under this Act relating to one or both of those parties [section 123(4)(b)];
- > Not be in the interests of public security, public policy or public order [section 123(4)(c)];
- > Adversely affect the implementation of a decision under the Irish Nationality and Citizenship Acts 1956 to 2004 or the European Communities (Free Movement of Persons (No. 2) Regulations 2006 (S.I. No. 656 2006) [section 123(4)(d)].

Section 123(7)(a) imposes criminal sanctions against anyone who solemnises or permits a form of marriage which is not valid under this provision. This section also criminalizes anyone who is party to [section 123(7)(b)] or who facilitates the marriage [section 123(7)(c)].

Irish law favours couples whose relationship is based on a heterosexual marriage.

238. As noted above, Irish law favours couples whose relationship is based on a heterosexual marriage. Same-sex couples and transgendered persons are not entitled to a marriage or civil partnership in the State under section 2(2)(e) of the Civil Registration Act 2004.⁴⁸³ Neither does the State currently recognise a marriage or civil partnership which was performed in another jurisdiction between same-sex couples. It could be argued that by not providing a civil partnership scheme, the State may be failing to comply with the principle of equivalence provided for in the Belfast Agreement.⁴⁸⁴ Civil partnership is available in Northern Ireland since December 2005. The Government has committed itself to legislating for civil partnership in its recent Programme for Government (2007-2012).⁴⁸⁵

⁴⁸² A foreign national is defined in section 2 of the Bill as a person who is neither (a) an Irish citizen or (b) a person who has established a right to enter and be present in the State under the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656/2006).

⁴⁸³ Civil Registration Act 2004.

⁴⁸⁴ Refer to Chapter 6 on Rights, Safeguards and Equality of Opportunity.

⁴⁸⁵ Programme for Government (2007-2012), page 52.

BOX 12: KAL Case⁴⁸⁶

This case involves a lesbian couple who sought the right to marry in Ireland or recognition of their valid Canadian marriage. The High Court found that though the Irish Constitution is a “living document”, marriage under the Constitution refers exclusively to the union of a man and a woman. The judge did accept that same-sex and unmarried heterosexual couples face particular difficulties not faced by married couples. At the time of writing, the couple is appealing to the Supreme Court.



Dr. Ann Louise Gilligan and Dr. Katherine Zappone

De Facto Couples

239. The Law Reform Commission has recommended that Article 41 of the Constitution does not prevent the Oireachtas legislating with regard to cohabitantes so long as this legislation would not grant more extensive rights than that provided for married couples.⁴⁸⁷ While opposite-sex cohabitant couples find themselves in a better position than same-sex couples, they possess limited rights when compared with married couples. The IHRC observes that by not according same-sex *de facto* couples equivalent rights to married couples results in indirect discrimination on the basis of sexual orientation.⁴⁸⁸

⁴⁸⁶ *Katherine Zappone and Ann Louise Gilligan v Revenue Commissioners, Ireland; the Attorney General and The Human Rights Commission*, [2006] IEHC 404.

⁴⁸⁷ Law Reform Commission (2004) *Consultation Paper on the Rights and Duties of Cohabitantes*, Law Reform Commission: Dublin, para. 11.03.

⁴⁸⁸ Walsh, Judy and Ryan, Fergus (2006) *The Rights of de facto Couples*, IHRC: Dublin, page 130.

⁴⁸⁹ Law Reform Commission (2004), *Consultation Paper on the Rights and Duties of Cohabitantes*, April 2004, para. 11.22.

⁴⁹⁰ Section 10, Adoption Act 1991.

⁴⁹¹ Working Group on Domestic Partnerships (2006) Option Paper for the the Tánaiste and Minister for Justice, Equality and Law Reform, para. 6.23.8 <http://www.justice.ie/en/JELR/OptionsPaper.pdf/Files/OptionsPaper.pdf>

⁴⁹² Under Section 59(c) of the Capital Acquisitions Tax Act 1976 as inserted by Section 151 of the Finance Act 2000, the family residence of cohabitantes may be exempt from inheritance tax in certain circumstances. Spouses and children enjoy fully a variety of tax exemptions such as property which passes absolutely to a spouse is not subject to probate tax. The term spouse is limited to a person who is lawfully married to the deceased at the time of the death.

⁴⁹³ Options Paper presented by the Working Group on Domestic Partnerships to the Tánaiste and Minister for Justice, Equality and Law Reform, November 2006, para. 6.23.2.

⁴⁹⁴ Section 111, Succession Act 1965.

⁴⁹⁵ Both of these pensions are based on a relationship of heterosexual marriage.

(1) Welfare

Section 19 of the Social Welfare (Miscellaneous Provisions) Act 2004, discussed further under Article 26 is a clear example of differential treatment based on sexual orientation. The Law Reform Commission recommended that same-sex cohabitantes be regarded as being capable of “cohabiting” for the purposes of social welfare.⁴⁸⁹

(2) Adoption

Cohabitantes are not permitted to adopt children as a *couple*⁴⁹⁰ as only married couples are afforded this right. In their 2006 Options Paper, the Working Group on Domestic Partnership observed that this should remain the case in their 2006 Options Paper, since unmarried couples can adopt as single people.⁴⁹¹

(3) Succession and Inheritance

De facto couples are not entitled to any tax advantages and inherited property is subject to full inheritance tax in most cases.⁴⁹² In the case of the death of one party to an unmarried couple, whether opposite or same-sex there are no protections with regard to provision for the surviving partner. The Working Group on Domestic Partnership has recommended the establishment of a discretionary relief allowing a bereaved qualified cohabitant to apply to the Court in order to argue that proper provision has not been made for him or her in the deceased’s will or testimony.⁴⁹³ Section 111 of the Succession Act 1965 only applies to married couples and in the event of a breakdown of a relationship; provision is only made with regard to property for married couples.⁴⁹⁴ The Family Home Protection Act 1976 provides protection for a spouse who does not legally own the family home and who may be financially dependent on his/her spouse in the event of the family home being sold, mortgaged or leased in that their consent in writing is required for the conveyance of an interest in the property. Opposite sex cohabiting couples also face exclusion from the Widow’s or Widower’s (Contributory) Pension⁴⁹⁵ and the Widowed Parents Bereavement Grant which is payable to those with dependent children where a spouse dies.

(4) Employment

To date, no comprehensive effort has been made to consolidate the legal status of *de facto* couples. The Employment Equality Acts 1998-2004 prohibits discrimination based on marital status. However, section 2(1) of this legislation does not include a non-marital cohabitant as a “member of the family”.⁴⁹⁶ Cohabiting partners are subjected, however, to a joint household income means test if one person applies for Unemployment Assistance which is payable to individuals who are fully or partially unemployed. An exemption also exists under the Employment Equality Acts which allows for an employer to grant certain benefits to employees based on their relationship or on an event related to an employee’s family members such as a marriage or a birth.⁴⁹⁷

Family Unity and Dependent Spouses of Non-Irish National Work Permit Holders

240. Dependent migrants whose spouses are employment permit holders are not entitled to residence or to work in their own right and as a result may face deportation if they separate from their spouses.⁴⁹⁸ Persons married to Irish nationals and other categories of legal residents may also be vulnerable. Women whose residence permits are based on the status of their spouse and who are subjected to domestic violence are in a particularly vulnerable position. Should a person leave his or her spouse, he or she would have ‘no legal status’ as immigration law, policy and procedures are silent as to the rights and entitlements of people who find themselves in this position. Applications for leave to remain in the State are made outside any formal legal process and the applicant is reliant on the inherent executive discretion of the Minister for Justice, Equality and Law Reform.

241. While the new Spousal Work Permit Scheme 2007 allows for access to employment to spouses and unmarried dependents of employment permit holders under the age of eighteen, their right of access to employment

remains dependent on the existing employment permit as does its duration⁴⁹⁹ and their ability to remain and be employed in this country is dependent on the success of their relationship with the original employment permit holder. Their mobility is equally restricted in that holders of their first Spousal or Dependent permit must remain with their initial employer for twelve months and may only move on application for a new spousal/dependent permit.⁵⁰⁰

Family Visits for Irish Prisoners

242. Irish prisoners have no rights to conjugal or family visits. In the case of *Murray and Murray v Ireland*, Finlay J. stated that the right to marry involves the Constitutional protection of certain rights but the right to marry is “not an unqualified one”. He went on to say that the right is suspended when one or both spouses are imprisoned and deprived of their liberty in accordance with the law.⁵⁰¹ The Council of Europe has recommended flexible and tolerant attitudes with regard to visits including conjugal visits for prisoners, in order to facilitate their social reintegration.⁵⁰²

Recommendations

- > The Irish Constitution’s provisions on the family should protect all forms of family and not just the family based on marriage.
- > Same-sex couples should not be discriminated against in relation to their intimate relationships. The right to marry should be extended and no difference in treatment should exist between opposite-sex and same-sex couples.
- > The State should develop and protect the family unity for all migrants legally working in the State.
- > Proposed restrictions in the Immigration, Residence and Protection Bill 2008 on the right to marry for people seeking asylum, migrants and unlawfully resident migrants offends Article 23(2) of the ICCPR and should be removed.
- > The Prison Service should review its policies for compatibility with Article 23 of the ICCPR.

⁴⁹⁶ Section 2(1) of the Employment Equality Acts 1998-2004 defines “member of the family” as a person related to the employee by blood, marriage or adoption.

⁴⁹⁷ Section 34, Employment Equality Acts 1998-2004.

⁴⁹⁸ One of the criteria to be met to qualify for the Spousal Work Permit Scheme 2007 is for the person to be legally resident in the State on the basis of being a dependent of the employment permit holder. Department of Enterprise, Trade and Employment, Employment Permits Arrangements, *Guide to Work Permits for Spouses and Dependents of Employment Permit Holders*, January 2007, pages 1-2.

⁴⁹⁹ Department of Enterprise, Trade and Employment, Employment Permits Arrangements (2007) *Guide to Work Permits for Spouses and Dependents of Employment Permit Holders*, pages 1-2.

⁵⁰⁰ Department of Enterprise, Trade and Employment (2007) *Guide to Work Permits for Spouses and Dependents of Employment Permit Holders*, Department of Enterprise, Trade and Employment, page 3.

⁵⁰¹ [1991] ILRM 465, pages 471-473.

⁵⁰² Council of Europe Recommendation 1741 (2006), *Report of the Social, Health and Family Affairs Committee*, Text adopted 11 April 2006 (11th Sitting).

Article 24

- 1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.**
- 2. Every child shall be registered immediately after birth and shall have a name.**
- 3. Every child has the right to acquire a nationality.**

24

Child Welfare

243. Certain social welfare payments are subject to a “habitual residence condition”. Introduced to discourage claims on Ireland’s social welfare system by EU workers from 10 new countries which joined the EU in 2004, its effect on EU workers was later reduced because of potential conflict with freedom of movement rights. Consequently, it adversely impacts on those who apply through Ireland’s immigration and asylum system for recognition as refugees, for subsidiary protection or for leave to remain. It has a particular impact on the children of people seeking asylum and those seeking subsidiary protection or leave to remain in Ireland, those who previously qualified for Child Benefit and whose children as a result are treated less favourably than others in the State.

244. Until 1 May 2004, Child Benefit was an anti-poverty payment and was paid equally to every child living in Ireland regardless of their parents’ status or income. Government policy on Child Benefit is the main instrument through which support is provided to parents with children. Irish constitutional jurisprudence has also recognised rights relating both to the welfare and health of the child and the duty of the State to fulfil these rights when the parent fails to do so.⁵⁰³

245. A person claiming Child Benefit in respect of a child has to prove a centre of interest in Ireland.⁵⁰⁴ An asylum seeker is not considered to have a sufficient interest in the State under any circumstances to qualify for the payment.⁵⁰⁵ Thus, unless they were receiving Child Benefit before 1 May 2004, the children of people seeking asylum, other protection or leave to remain in Ireland are denied child benefit until their status has been finally determined through the Irish immigration process. Those who do not qualify for Child Benefit may therefore include children who have been born in Ireland. There is no maximum time within which the claim for asylum or leave to remain must be determined.

246. Before the introduction of this new restriction, no assessment of the impact of this decision on the children affected was carried out, contrary to the principles of Ireland’s National Children’s Strategy.⁵⁰⁶ There are no public

figures on the number of children denied payment. However, based on the minimal statistics available, it appears that about 3,000 children, mostly living in direct provision, may be deprived and may suffer discrimination as a result.

247. This is a clear breach of Article 24.1 of the ICCPR, in particular, the obligation on the State to recognise the rights of children without discrimination and to provide social measures to eradicate malnutrition among children.⁵⁰⁸

This is a clear breach of Article 24.1 of the ICCPR, in particular, the obligation on the State to recognise the rights of children without discrimination and to provide social measures to eradicate malnutrition among children.

Law Reform

248. Paragraph 504 of the State Report asserts that the rights of children are “central in existing Irish statute family law which gives a particular emphasis to their interests.” However, the best interests of the child are not paramount except in the very limited circumstances meaning that Article 3 (best interests’ principle) of the United Nations Convention on the Rights of the Child is not being properly implemented by the State, together with Article 12 (obligation to take account of the views of the child).

249. Children’s voices in legal proceedings are commonly absent. Despite legal provision for the appointment of Guardian *ad Litem* in both private⁵⁰⁸ and public law proceedings, the absence of a national Guardian *ad Litem* service to ensure that children receive quality independent and separate representation has been frustrated by the lack of implementation of Children’s Act 1997. The result is that children’s voices and wishes are not always heard in a range of family law proceedings which directly affect them.⁵⁰⁹

Children’s voices in legal proceedings are commonly absent.

Refer to State Report paras. 461-466

Refer to State Report para. 504

⁵⁰³ In *G. v An Bord Uchtála* [1980] IR 32, Walsh J, p, 67.

⁵⁰⁴ Section 246 of the Social Welfare Consolidation Act 2005 as amended by section 30 Social Welfare and Pensions Act 2007.

⁵⁰⁵ Minister Seamus Brennan, Minister for Social and Family Affairs Parliamentary Question No.30936/05 (for oral answer on 27 October 2005).

⁵⁰⁶ *Children’s Rights Alliance Pre-Budget Submission 2005* to the Department of Social and Family Affairs October 2004 and *The National Children’s Strategy 2000-2010*, page 41.

⁵⁰⁷ General Comment No. 17: Rights of the child (Art. 24): 07/04/89, para 3.

⁵⁰⁸ The relevant provisions of the Children Act 1997 relating to private proceedings are quite limited in that the court must be satisfied that there are “special circumstances” necessitating the appointment of the Guardian *ad Litem*.

⁵⁰⁹ In 2006, the UN Committee on the Rights of the Child recommended that the State ensure that children are provided with “the opportunity to be heard in any judicial and administrative proceedings affecting them and that due weight is given to those views in accordance with...”, para. 25, Concluding Observations, 29 September 2006, UN Doc.: CRC/C/IRL/CO/2.



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250. In public law proceedings, there is legislative provision⁵¹⁰ for the appointment of a Guardian *ad Litem* for children in legal proceedings involving public authorities, such as care proceedings and child protection cases. However, the appointment of the Guardian is not automatic; it is at the discretion of the judge. Moreover, where it is deemed necessary to appoint a separate legal representative for the child, the court cannot retain the services of the Guardian *ad Litem* for that child. There is currently no statutory guidance as to the role and functions of the Guardian *ad Litem* in either public or private law to aid the court in deciding when to appoint a Guardian *ad Litem* or who may serve as one.

Referendum on the Rights of the Child

251. Children are practically invisible in the Irish Constitution as it does not include express and independent rights for children outside the context of the family.⁵¹¹ The UN Committee on the Rights of the Child recommended that the Constitution be amended to incorporate express rights for children.⁵¹²

252. The Twenty-Eighth Amendment to the Constitution Bill 2007 was introduced by the State in February 2007⁵¹³ ostensibly in order to address this concern. Provision 1 of the Bill provides that the State will acknowledge and affirm the “natural and imprescriptible rights of all children”. However, the language used is not rights-based and its effect upon Irish law would be unpredictable. There is no guarantee that the proposed amendments will improve the rights of children in Irish law, and at best, the working of this proposed amendment will have no impact at all on the rights of the child. This does not reflect a solid commitment on the part of the State to defend and vindicate the rights of the child.

253. A failure to amend the Constitutional articles relating to the family will allow discrimination against children born to non-marital families to continue in the State. In the case of *O’B v. S*,⁵¹⁴ the Supreme Court held that it was permissible to exclude children whose parents are not married to each other from certain succession rights, because of the constitutional provisions that protect the marital family.

Citizenship

254. The State points out in its report that a child will only be deprived of Irish citizenship “in very limited circumstances”.⁵¹⁵ However, until July 2004, all children born on the island of Ireland had a constitutional right to Irish citizenship. A referendum to amend the Constitution in relation to this issue was hastily organised in June 2004. Following this amendment, the automatic right to citizenship under the Constitution was restricted to children at least one of whose parents is Irish or from the EU. Citizenship for all children at birth was granted under the Irish Nationality and Citizenship Act 2001, but the Citizenship Act, 2004, changed the law so that only children born to non-Irish parents who have been resident in Ireland for a specified time will be entitled to citizenship.

Refer to State Report para. 545

Protection Issues for Irish Children

255. There is a paucity of dedicated supports and services for children needing protection.⁵¹⁶ Access to the services that do exist is difficult and structures are poorly resourced. Homeless children, children living in poverty, children in the criminal justice system, children in the mental health and general health systems, children in care, Traveller children, asylum seeking and immigrant children and children at risk of abuse and neglect are all in need of a more comprehensive protection scheme. The lack of dedicated children’s services, children’s advocacy services, lack of policy implementation, lack of express constitutional rights for children, lack of research and other data and the awareness of children’s rights, the lack of a rights-based approach and child-proofing to children’s issues all contribute to the lack of appropriate protection for children in Ireland.⁵¹⁷

Recommendations

- > Measures should be taken to make the decisions of the Social Welfare Appeals Tribunal more transparent and Child Benefit should be restored for all children.
- > The State should amend the Constitution to insert express rights for children in order to ensure that the best interests of the child are protected in all circumstances.
- > The State must radically increase funding and support for child protection in Ireland.

⁵¹⁰ Section 26, Child Care Act 1991.

⁵¹¹ Kilkelly, U. and O’Mahony, C. (2007) “The Proposed Children’s Rights Amendment: Running to Stand Still?” 2 *Irish Journal of Family Law*, page 19.

⁵¹² Concluding Observations: Ireland, 29 September 2006, para. 25(a), UN Doc: CRC/C/IRL/CO/2.

⁵¹³ The purpose of the Bill is to include a new section under Article 42 of Irish Constitution entitled “Children” which would include new sub-articles.

⁵¹⁴ *O’B v S* [1984] IR 316.

⁵¹⁵ *Third Periodic Report on Ireland 2007*, para. 545.

⁵¹⁶ Kilkelly, U. (2007) *Obstacles to the Realisation of Children’s Rights in Ireland*, OCO: Dublin, page 152.

⁵¹⁷ *Ibid.*

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;**
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;**
- (c) To have access, on general terms of equality, to public service in his country.**

25

Low Level Participation of Black and Minority Ethnic Groups in Politics

256. There are no representatives in the Oireachtas (Houses of Parliament) from ethnic or racial minority communities, including Travellers. Apart from EU nationals residing in Ireland, non-citizens cannot run in the Dáil (lower house) or Seanad (upper house) elections.

Low Level of Participation in Public Life

257. Low levels of literacy and negative perceptions of Garda stations⁵¹⁸ are seen as two reasons resulting in lack of voter participation in marginalised areas in Ireland.⁵¹⁹ A survey in 2005 found that only half of 15-24 year olds believed that "ordinary people could influence decisions when they made an effort",⁴²¹ which may explain why only half of those under 24 voted in the 2002 General Election.

258. According to the Central Statistics Office (CSO), there are almost 24,000 Travellers in Ireland.⁵²¹ To date this group has had minimal representation and that has been at the lower levels of power.⁵²² Lack of access to adequate education is seen as a central reason for the lack of public representative candidates among the Traveller Community.⁵²³

Restrictions on Jury Service

259. Persons with certain disabilities are excluded from having the right to participate in public affairs by being deemed unfit to serve on a jury.⁵²⁴ Persons with mental illnesses or intellectual disabilities are also excluded if they are resident in a hospital/institution or regularly receiving treatment from a medical practitioner.

260. A number of cases are currently in the courts relating to denial of participation in jury service. One involves the denial of participation to serve on a jury because the

person is deaf⁵²⁵ and another due to the fact that the person is over seventy years of age.⁵²⁶ In both cases, the excluded parties argue that as citizens of the State, they are entitled to full participation in the rights and responsibilities of citizenship and they consider it important to fulfil their civil duties. The deaf juror claims that appropriate arrangements should be made to accommodate her disability or deafness in order to facilitate her access to full participation in the administration of justice through jury service. The older juror states that as life expectancies have increased, there is no justification for the automatic exclusion of all persons aged seventy or over from jury service with no regard to their personal experience or interest, and negates the notion that juries should reflect a cross-section of the community at large, in so far as possible.

Voting and Persons with Disabilities

261. Persons with disabilities are under-represented as candidates for election in public life in Ireland at local, national and European levels. Political parties should ensure that persons with disabilities are encouraged to stand as candidates for election through affirmative action and to participate fully in the public life of the State.

Persons with disabilities are under-represented as candidates for election in public life in Ireland at local, national and European levels.

262. If a person with an intellectual disability attends the polling station and the presiding officer believes that the person lacks the capacity to vote then he or she could refuse the person access to vote. There are no guidelines on this and the decision appears to be at the discretion of the officer.⁵²⁷

⁵¹⁸ Attendance at a Garda station is necessary for authorisation for people who are too late to be included on the main electoral register but can still be included on a supplementary register.

⁵¹⁹ TASC (2007) *Power to the People? Assessing Democracy in Ireland*, Ashfield Press: Dublin, page 229.

⁵²⁰ TASC (2005) *Democracy Audit*, TASC: Dublin at page 142.

⁵²¹ Central Statistics Office, Census 2002, Vol. 8, Irish Travelling Community. Refer to www.cso.ie However, local authorities also carry out an annual census of the Traveller population which in 2002 reached 5,541 families. The CSO estimates that size of the average Traveller family is 5.5 persons which would give a population of 30,000 Travellers nationwide.

⁵²² For example, there have been a number of county councillors and a city mayor for example, Tom Stokes who was a Longford county councillor.

⁵²³ This is according to Travellers who participated in a focus group held on 19 April 2007.

⁵²⁴ Part 1, First Schedule of the Juries Act, 1976.

⁵²⁵ *Joan Clarke v County Registrar Galway, the Attorney General*, Case ref: 2006/1338JR.

⁵²⁶ *John Andrew Stratton Sharpe v. the Attorney General*, Record No. 2007/7907P.

⁵²⁷ Refer to information supplied by the Citizens Information Board on Voting at the following web address: www.citizensinformationboard.ie

263. People with intellectual disabilities have a right to a companion in order to assist them with literacy difficulties in voting. However, polling stations and polling procedures such as cards and ballot papers are not accessible or user friendly for people with disabilities, in particular people with visual impairments.⁵²⁸ Lack of audio output, tactile features and or the enlargement of texts has hindered the exercise by such persons of their right to vote and partake in the public life of the State.⁵²⁹

Recommendations

- > Special measures should be introduced to increase minorities' participation in public life and political affairs, in particular, the State should fund a programme to encourage and support voting among Travellers and people with disabilities.
- > The State should review its current restrictions on jury participation with a view to removing all forms of unreasonable and irrational discrimination.
- > People with disabilities should not be discriminated against in regard to voting and the State should remove all barriers to participation.

⁵²⁸ National Disability Authority (1996) *A Strategy for Equality - Political Rights*, NDA: Dublin.

⁵²⁹ National Disability Authority (2005) *Submission to the Democracy Commission*, NDA: Dublin.

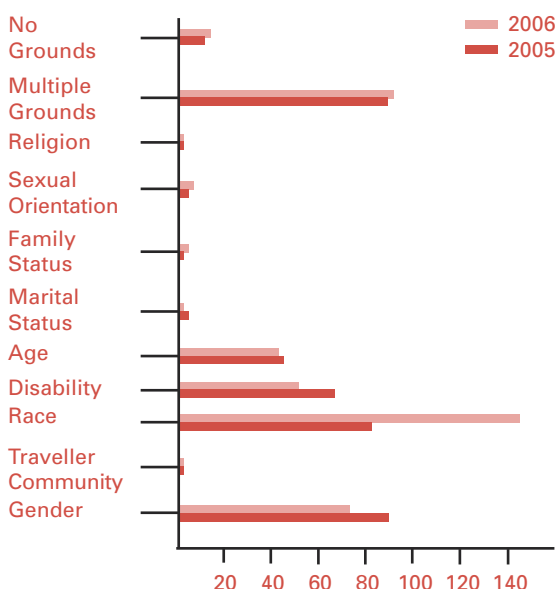
Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

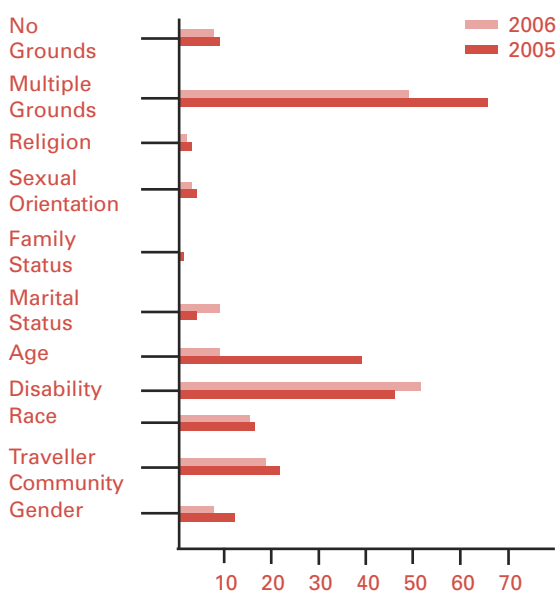
26

264. Discrimination remains a serious and persistent problem in Ireland. According to the Equality Tribunal's Annual Report (2006), there was a 78% rise in discrimination in employment on the grounds of race. There was also a 16% rise in disability cases in relation to accessing goods and services.⁵³⁰ This is evident from the two tables displayed below which appear in the Tribunal Annual Report.⁵³¹

EE Grounds for referral



ES Grounds for referral



Discrimination in Employment

265. In its Concluding Observations on Ireland in 2000, the HRC was concerned about exemptions under the Employment Equality Acts 1998-2004,⁵³² which allow religious schools and hospitals to discriminate in certain circumstances on the ground of religion when employing persons whose functions are not religious.⁵³³ This impacts negatively on religious minorities as Roman Catholicism is the dominant religion in Ireland and employees who are in unmarried opposite-sex and same-sex relationships can experience discrimination if their family home life is contrary to the religious ethos of the institution.

266. The State has not only retained this exemption since its last examination, it has amended Ireland's equality legislation on three occasions to reduce protection for vulnerable groups generally in response to cases where the Equality Tribunal finds in favour of the applicant.

(1) Reducing Protection Against Discrimination in Hotels and Pubs

There have been a significant number of complaints involving discrimination in relation to access to services particularly licensed premises lodged by Travellers and people with disabilities.⁵³⁴ On the basis of lobbying from the Vintners Association, the State amended the Equal Status Act 2000 by the Intoxicating Liquor Act 2003,⁵³⁵ to remove jurisdiction from the Equality Tribunal to investigate complaints of discrimination against publicans and hoteliers to the District Court which does not possess a broad right of audience or an investigatory role. The move to the District Court makes the equality legislation less accessible and user-friendly, and as a result, very few cases have been taken to the District Court. This issue was highlighted by members of the Traveller community who were consulted for the current report.

(2) Reducing Protection Against Racial Discrimination in Education

In 2003, the Equality Tribunal determined that restrictions on non-citizens accessing Further Education Grants was in breach of the Equal Status Act and recommended that the Department of Education and Science should

Refer to State Report paras. 592-596

Additional info not included in State Report

⁵³⁰ Equality Tribunal *Annual Report 2006*, Equality Tribunal: Portarlington, pages 6-12.

⁵³¹ Tables displayed with the kind permission of the Equality Tribunal. EE refers to employment equality and ES to equal status.

⁵³² Refer to section 37(1).

⁵³³ Concluding Observations on Ireland, UN Human Rights Committee, 2000, para. 22.

⁵³⁴ Equality Authority, *Annual Report 2005*, Case Work Activity, page 60, shows 32 out of 48 cases on Access to Licensed Premises being taken on the ground of membership of the Traveller Community and 116 out of 180 for same in recorded in the *2004 Annual Report*. There was 336% increase in cases on the ground of discrimination because of membership of Traveller community from 2005-2006, Equality Authority, *Annual Report 2006*, page 54.

⁵³⁵ Section 25, Intoxicating Liquor Act 2003.

amend its grant scheme accordingly.⁵³⁶ Instead of accepting this decision, the State used the Equality Act 2004, which partly transposed the EU Race Directive, to include a new exemption permitting the Minister for Education to discriminate on the basis of race (nationality) in relation to Further/Higher education grants.⁵³⁷

(3) Increasing Discrimination Against Older Same-Sex Couples

On foot of an Equal Status Act case, the State amended social welfare law to allow it to discriminate against same-sex couples in relation to social welfare payments and benefits. Section 19 of the Social Welfare (Miscellaneous) Provisions Act 2004 amends the principal Social Welfare Act to restrict the definition of 'spouse' or 'couple' to a married couple and to an opposite-sex cohabiting couple for state welfare schemes. The Equal Status Act case involved an older same-sex couple where one partner possesses a free travel pass but had been refused one for his partner. Usually both partners in married or opposite sex cohabiting couples are eligible for the pass when one of them becomes eligible. In settling the case, the Department of Social and Family Affairs accepted that it had unfairly discriminated against the couple on the basis of sexual orientation under the Equal Status Acts 2000-2004.

267. The latter amendment is particularly remarkable as it represents the first time in the State's history that it has specifically enacted legislation to discriminate against gay and lesbian people. Of course it affects a considerable number of people, for example, the 2006 population census showed that 2,090 same-sex couples live together in Ireland, two-thirds of whom are male.⁵³⁸ Given that same-sex couples do not have the possibility of marriage, they are on a materially different standing to heterosexual cohabitants.⁵³⁹ Other legislation also specifically excludes same-sex couples. The Residential Tenancies Act 2004 (with regard to succession to a tenancy) and the Civil Liability Amendment Act 1996 (with regard to the right to sue for wrongful death) extend rights to spouses and persons living together "as husband and wife" thereby including unmarried opposite sex cohabitant couples.

Sheltered Occupational Services

268. Approximately 4,000 people in Ireland work in Sheltered Occupational Services⁵⁴⁰ where they

are employed in a variety of low-skilled work e.g. shrink-wrapping products for supermarkets. There is serious concern in relation to their low pay which is often far below the minimum wage for such work. There have been reports of persons with intellectual disabilities being paid close to nothing for sheltered work in hospitals. There have also been issues raised about the conditions of work and lack of access to employment rights for those working in such services.

Unequal Access to Justice for Non-Citizens

269. Non-citizens are not treated equally before the law for the purposes of judicial review. Section 5(2)(a) of the Illegal Immigrants (Trafficking) Act 1999 currently imposes a 14 day limit (not working days) on persons intending to challenge the validity of an immigration or refugee related decision.⁵⁴¹ The High Court can extend this limit if there are good and sufficient reasons. This provision imposes a heavy burden on potential litigants who have to secure the services of a legal team and launch judicial review proceedings within this timeframe.

In 2005, the UN Committee Against Racism also expressed concern that a 14 day time limit had been introduced for immigration-related decisions and recommended that this restriction should be resolved in the forthcoming legislation on immigration.

270. In 2005, the UN Committee Against Racism also expressed concern that a 14 day time limit had been introduced for immigration-related decisions and recommended that this restriction should be resolved in the forthcoming legislation on immigration.⁵⁴² However, it appears that the State has ignored both the Law Reform Commission and UN Committee Against Racism in this regard. The Immigration, Residence and Protection Bill 2008 was introduced to reinstate and modify all existing immigration and refugee law. Section 118(2) of the Bill deals with special procedures for judicial review and retains the 14 day time limit.

⁵³⁶ *Two Complainants v the Department of Education and Science* (Dec 2003-042/043).

⁵³⁷ Section 50(b), Equal Status Acts 2000-2004.

⁵³⁸ Central Statistics Office, Census 2006 available at www.census.ie

⁵³⁹ *Danning v Netherlands*, Communication No. 180/1984, adoption of views on 9 April 1987, UN Doc. CCPR/C/OP/2, at para. 14

⁵⁴⁰ (28 August 2007) "Human Rights Body Inquiry into Sheltered Workshops", *Irish Times*.

⁵⁴¹ Order 84, rule 2(1) of the Rules of the Superior Courts Act 1986 covers time-limits for other litigation. It provides that judicial review actions should be issued promptly within three months of an actual decision being taken or six months where the relief sought is certiorari, unless the court considers there is good reason for extending the time limit.

⁵⁴² See 24, CERD/C/IRL/CO/2, 10 March 2005.

Discrimination Against Persons on the Basis of Gender Identity

271. The State currently fails to ensure equality before the law for transgendered persons as provided for by Article 16 of the ICCPR. There is no official legal recognition of gender change or realignment although it is possible to obtain some official documents such as passports, driving licences and medical cards in the realigned gender on an ad hoc basis. Such persons cannot marry or enter into civil partnerships in their “new” gender and are vulnerable to discrimination in relation to insurance, employment matters and the provision of services. A particular problem arises when persons with Gender Identity Disorder (GID) or who are in a transitional phase of the process are faced with custodial sentences or require medical treatment and a stay in hospital.

272. Pursuant to Article 2(1) of the ECHR Act 2003, the first declaration of incompatibility was issued by McKechnie J in *Lydia Foy v An t-Ard Chlaraitheor, Ireland v Attorney General* [2007] IEHC 470. This case was taken by a woman who had undergone gender reassignment and who was seeking to have her birth cert reissued. After the High Court initially found against Foy in 2002,⁵⁴³ McKechnie J held that the rights of Dr Foy under Article 8 of the ECHR had been breached, together with Article 12 (the right to marry), if she had been free to marry. Not only has the State failed to remedy this situation, it is now appealing this case to the Supreme Court.

Segregation of Travellers in Accessing Welfare

273. Prior to a decision of the Equality Tribunal in July 2007, Travellers were subjected to segregation when accessing social welfare payments. Travellers who applied for Supplementary Welfare Assistance (SWA) in Dublin were dealt with through a 'special' segregated service in one location.⁵⁴⁴ Prior to 1985 Travellers were entitled to use their local office like any other Irish citizen. After the centralisation of the Health Service Executive, they were forced to travel to one specific office in Dublin at Castle Street. Following the decision at the Equality Tribunal which ordered “with immediate effect, [to] arrange for payment of Supplementary Welfare

Allowance to Travellers at all outlets at which payment is available to non-Travellers”, it is hoped that this will effectively lead to the closure of the use of the office at Castle Street.

The Offences Against the State Act 1939

274. As outlined in detail under Article 2(3), Ireland was found to have violated the principle of equality before the law because the Director for Public Prosecutions had directed that Mr Kavanagh be tried before the Special Criminal Court, without providing objective and reasonable grounds to justify the selection of that trial procedure in his case.⁵⁴⁵ Kavanagh was denied a trial by jury which had been afforded to other persons accused of similar crimes.

275. In May 2002, the State established the Hederman Committee to carry out a review of the Offences against the State Acts 1939-1998 as part of its obligations under the Good Friday (Belfast) Agreement 1998. A majority of the Hederman Committee favoured the retention of the Special Criminal Court though they failed to offer a clear rationale for this decision. Their justifications for this decision included the “continuing threat” to state security by subversive groups and organised criminal gangs, concerns over safety of jurors and witnesses and the inadequacy of the ordinary courts to secure the effective administration of justice and the preservation of public peace and order. The minority of the Hederman Committee has put forward solid counter-arguments to these arguments.⁵⁴⁶

Recommendations

- > Restrictions on judicial review for refugees and migrants should be removed and the 14 day time limit should be extended to at least 28 days.
- > The continued discretion of the DPP to send accused persons for non-jury trial before the Special Criminal Court is in breach of Article 26 of the ICCPR and should be addressed.
- > The Government should introduce legislation to recognise the change of gender for transgendered persons.

⁵⁴³ This was prior to the judgment the European Court of Human Rights in *Goodwin v UK*, App No 28957/195 (11 July 2002). The Court held that the United Kingdom’s decision not to legally recognize a gender re-assignment of a British woman was in violation of Articles 8 and 12 of the ECHR.

⁵⁴⁴ The Travelling People Services Unit is located at Block 1, Upper Ground Floor, Civic Offices (near Christchurch Cathedral).

⁵⁴⁵ Communication No: 819/1998.

⁵⁴⁶ Hederman Committee (2002) *Report of the Committee to review the Offences against the State Acts 1939-1998 and related matters*, Government Stationery Office: Dublin, para. 9.97.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

27

High Level Working Group on Traveller Issues

276. The State Report indicates that it established a High Level Group on Traveller Issues in 2003 which produced a report with recommendations in 2006. In a retrograde step, the High Level Group excluded participation of Traveller NGOs and community groups. This is particularly significant as the Department of Environment, Heritage and Local Government issued a circular to all local authorities stating that the Report represents government policy on Traveller issues.⁵⁴⁷ This is of serious concern.

Traveller Accommodation

277. Travellers are forced to live in conditions which are below that which is acceptable to the majority of the population.⁵⁴⁸ When Ireland was examined by the UN Committee on Economic, Social and Cultural Rights in 2002, it found that 1,200 families were living on roadside encampments without adequate facilities and the Committee advised the State to address this issue "as early as possible".⁵⁴⁹ The Committee also recommended that the State should meet its own target of meeting the accommodation needs of Travellers by 2004.

Travellers are forced to live in conditions which are below that which is acceptable to the majority of the population.

278. According to Pavee Point,⁵⁵⁰ much of the thinking behind the provision of Traveller accommodation, particularly at local level, continues to be based on assimilationist approaches, whereby the favoured solution for local authorities is to 'settle' Travellers in houses which can be at odds with their nomadic cultural identity.⁵⁵¹ Despite the various initiatives which have been put in place, families continue to live in conditions in halting sites provided by local authorities which are poorly maintained and serviced or on the roadside.⁵⁵² A number of families have tried to address these issues. In *O'Donnell v South Dublin County Council*,⁵⁵³ Laffoy J ruled that South County Dublin Council had breached Article 8 of the ECHR by failing to provide a Traveller family with a caravan in conformity with their nomadic culture.⁵⁵⁴

Travellers and Legal Recognition

279. The State refuses to recognise Travellers as a distinct minority ethnic group and they continue to experience discrimination in many aspects of their lives. Failure to recognise Travellers as a minority ethnic group has serious implications for the protection of their rights. Travellers have identified themselves as a minority ethnic group which is supported by court decisions made on Traveller ethnicity in the UK.⁵⁵⁵ The IHRC⁵⁵⁶ and the Equality Authority also endorse this view.⁵⁵⁷

280. This issue has been reviewed by CERD. In his recent follow-up report on Ireland, Mr. Morten Kjarem recommended that a dialogue should continue between the State and Traveller groups with a view to recognition of Travellers as a minority ethnic group.⁵⁵⁸

⁵⁴⁷ Letter sent to all County Managers outlining local government policy (LG12-06).

⁵⁴⁸ Irish Traveller Movement 'Fact Sheet on Traveller Accommodation', accessible at www.itmtrav.com

⁵⁴⁹ Concluding Observations of ICESCR: Ireland, 5 June 2002, Para. 32. UN Doc.: E/C.12/1/Add/77.

⁵⁵⁰ Pavee Point is an Irish-based partnership of Irish Travellers and settled people working together to improve the lives of Irish Travellers through working towards social justice, solidarity, socio-economic development and human rights. Refer to www.paveepoint.ie

⁵⁵¹ Department of Health and Children (2002) *National Traveller Health Strategy 2002-2005*, Government Stationary Office: Dublin, para. 1.12.

⁵⁵² Pavee Point, *Accommodation and Living Conditions Factsheet*, page 1. Accessible at www.paveepoint.ie

⁵⁵³ *O'Donnell v South Dublin County Council*, [2007] IEHC 204.

⁵⁵⁴ Laffoy's decision is in opposition to earlier decision made by Charleton J in a very similar case, *Doherty v South Dublin County Council and Ors* [2007] 2 IR 696. Charleton J. decided that Article 8 did not offer absolute rights and considered that the Council did not have to provide special treatment for different groups.

⁵⁵⁵ See for example, *Mandla v Dowell Lee* [1983] 2 AC 548, HL (E).

⁵⁵⁶ IHRC (2004) *Travellers as an ethnic minority under the Convention on the Elimination of Racial Discrimination: A Discussion Paper*, IHRC: Dublin, page 17.

⁵⁵⁷ Equality Authority (2006) *Traveller Ethnicity: An Equality Authority Report*, Equality Authority: Dublin, page 67.

⁵⁵⁸ As noted in Visit of Coordinator on follow-up on CERD to Ireland, 21-23 June 2006, UN Doc.: CERD/C/69/Misc.9, paragraph 16.



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Linguistic Minorities

281. Apart from speakers of the Irish language, the State provides very poor supports for linguistic minorities. For example, Irish Sign Language (ISL)⁵⁵⁹ has not been given formal recognition even though it is an indigenous language with up to 40,000 users.⁵⁶⁰ Moreover, no formal mother tongue supports have been put in place despite the large presence of foreign national children in the State.⁵⁶¹ English language provision is based on an assimilationist model with the focus being on providing the child with enough English to participate.⁵⁶² Demonstrating the Government's lack of commitment to supporting linguistic diversity, its recently published policy document on integration makes no reference to support for minority languages.⁵⁶³ These issues should be addressed through the development of a formal national policy on the support and protection of minority languages.

Recommendations

- > In public policy initiatives concerning Travellers, representatives from the Traveller Community should always be effectively represented.
- > The Government should recognise Travellers as a formal ethnic group.
- > The Government should devise and provide significant funding for a national policy strategy to protect minority languages.
- > The Government should recognise Irish Sign Language (ISL) as a formal national language.

BOX 13: Government Perspective on Linguistic Diversity

"It's about being Irish, it's about us respecting their traditions but seeing them in the context of us being Irish and working as Irish people. We're too small a country to be able to have a Polish education system, and a Lithuanian one, we just can't do that and to be frank with you, the only way we can do it, with our resources...and the size of the population we have is by proper integration."

Former Taoiseach, Mr Bertie Ahern speaking on the topic of immigration, Interview with the Guardian Newspaper, 7 November 2007, live pod cast available on www.guardian.co.uk/international

⁵⁵⁹ Irish Sign Language (ISL) is the first or preferred language of deaf people in Ireland which has been passed down by many generations of deaf people. It is a visual, spatial language with its own distinct grammar using the hands, face and body. Refer to the Irish Sign Language Academy website for further information at www.deaf.ie

⁵⁶⁰ Irish Deaf Society: National Association for the Deaf (2005), *Irish Sign Language: "Reclaiming Our Language"* Report notes that there are 5,000 deaf users of ISL as a first or preferred language in Ireland with up to 40,000 users including family members, work colleagues who use ISL as an additional language, page 1.

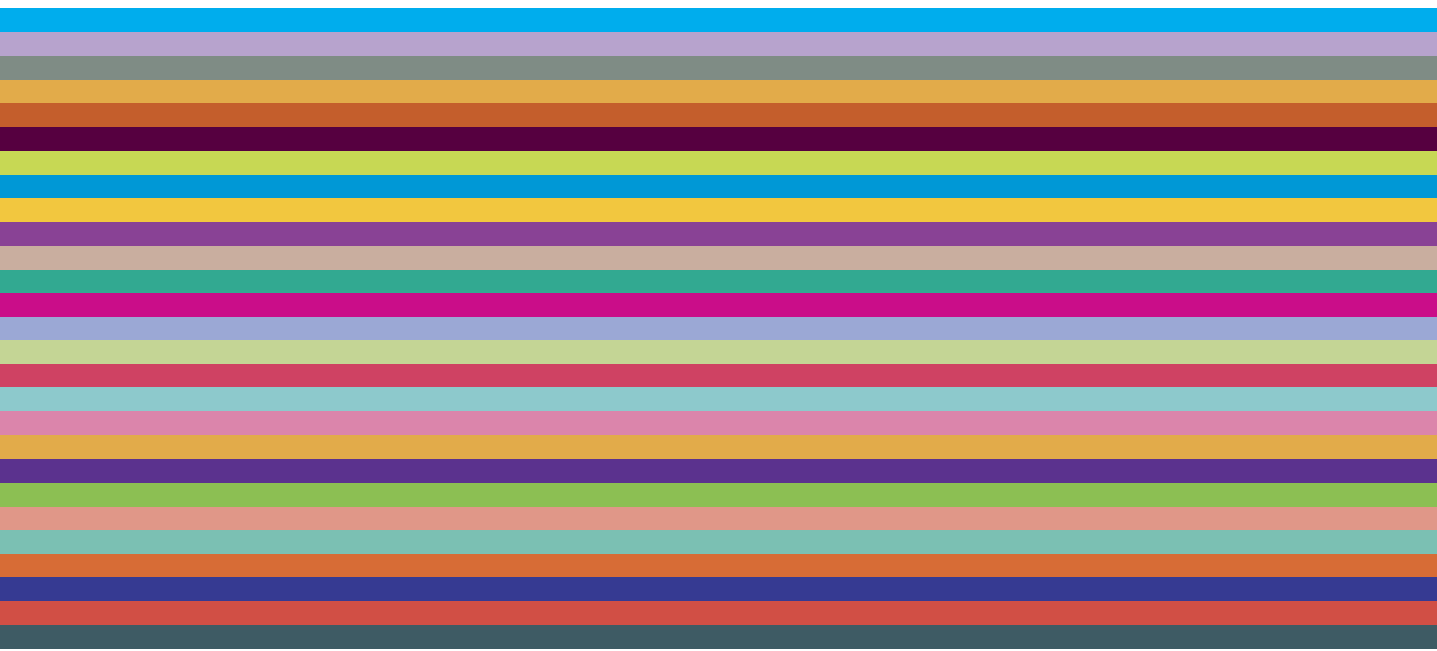
⁵⁶¹ *Second Periodic Report of Ireland under Article 9*, CERD, para. 359, UN Doc.: CERD/C/460/Add.1.

⁵⁶² Ward, Tanya (2005) *The Education and Language Needs of Separated Children in Ireland*, CDVEC/County Dublin VEC/Dun Laoghaire VEC: Dublin.

⁵⁶³ Minister for Integration (2008) *Migration Nation – Statement on Integration Strategy and Diversity Management*, Government Stationery Office: Dublin.

APPENDIX 1: NGOs in attendance at NGO Consultation on the draft Shadow Report, Dublin, 3 August 2007 and who submitted feedback

- > Amnesty International (Irish Section)
- > CADIC Coalition
- > Children's Rights Alliance (CRA)
- > European Anti-Poverty Network (EAPN)
- > FLAC (Free Legal Advice Centres)
- > Gay and Lesbian Equality Network (GLEN)
- > Gender Identity Disorder Ireland (GIDI)
- > Immigrant Council of Ireland (ICI)
- > Irish Bishops' Refugee and Migrant Project
- > Irish Council for Civil Liberties (ICCL)
- > Irish Family Planning Association (IFPA)
- > Irish Penal Reform Trust (IPRT)
- > Irish Refugee Council (IRC)
- > National Women's Council of Ireland (NWCII)
- > One Family
- > Pavee Point
- > Refugee Information Service (RIS)



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