

**Irish Human Rights and Equality Commission**

***Submission to the Committee on Economic, Social and Cultural Rights on the Examination of Ireland's Third Periodic Report under the International Covenant on Economic, Social and Cultural Rights***

**May 2015**



**Coimisiún na hÉireann um Chearta  
an Duine agus Comhionannas**  
Irish Human Rights and Equality Commission

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## Glossary

### Relevant Legal Instruments or Documents

|   |   |
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| <b>Bunreacht na hÉireann (Constitution of Ireland)</b>                              | The Constitution of Ireland which forms the fundamental law of the State. It came into force in December 1937. The Constitution can only be amended through a referendum.   |
| <b>European Convention on Human Rights (ECHR)</b>                                   | A Council of Europe human rights instrument which Ireland ratified in 1950 and incorporated into domestic law through the European Convention on Human Rights Act 2003.<br><br>A complaint can also be made to the European Court of Human Rights under the Convention if domestic remedies have been exhausted.  |
| <b>European Social Charter (Revised)</b>  | A Council of Europe human rights treaty which was first adopted in 1961 and revised in 1996. It mostly deals with socio-economic rights. Ireland ratified the Charter in 1964 and the Revised Charter in 2000. It has opted out of a number of provisions including:<br>Article 8(3) – time off for nursing/breastfeeding mothers for that purpose<br>Article 21 – the right to information and consultation for workers<br>Article 31 – the right to housing   |
| <b>General Comments of the UN Committee on Economic, Social and Cultural Rights</b> | These documents are agreed by Committee members and contain the Committee’s interpretation of the rights enshrined in the Covenant. They often elaborate on how the rights should be implemented in practice. Often general comments deal with specific substantive articles but may also deal with wider, cross-cutting issues, such as the role of national human rights institutions, the rights of persons with disabilities or the overarching principle of non-discrimination. While they are not binding in law they do have persuasive value. |

### Parliamentary Bodies

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| <b>Dáil Éireann</b>                     | The lower chamber of the Oireachtas made up of 166 members called TDs (Teachta Dála or member of parliament) who are directly elected.   |
| <b>Joint Oireachtas Committee (JOC)</b> | A parliamentary committee comprising members of both Houses: the Dáil and Seanad. These committees provide advice to Government on a wide range of legislative, social, economic and financial business. They also process proposals for legislation (Bills) at Committee Stage, review legislation before it is laid before the Oireachtas and issue reports and recommendations. They also examine Government expenditure by monitoring Estimates. |
| <b>Oireachtas</b>                       | The Irish Parliament comprising two chambers: Dáil Éireann (House of Representatives) and Seanad Éireann (Senate).   |
| <b>Seanad Éireann (Senate)</b>          | The upper House of the Irish Oireachtas or Parliament. There are 60 Senators. They are not directly elected.   |

## Relevant State Bodies or Services

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| <b>An Garda Síochána</b>                                   | The Irish Police Force.  |
| <b>Central Statistics Office (CSO)</b>                     | The body responsible for the 'collection, compilation, extraction and dissemination for statistical purposes of information relating to economic, social and general activities and conditions in the State'. It was established in 1949 and placed on a statutory footing in 1993.  |
| <b>Child and Family Agency (Tusla)</b>                     | A dedicated State agency responsible for improving wellbeing and outcomes for children. It represents a comprehensive reform of child protection, early intervention and family support comprising approximately 4000 staff members.   |
| <b>Equality Authority</b>                                  | The former independent body established by the Employment Equality Act 1998 and its powers were then extended under the Equal Status Acts 2000-2012 to provide information and legal assistance to members of the public who experience discrimination. The Equality Authority was merged with the Irish Human Rights Commission in 2014 to become the Irish Human Rights and Equality Commission (IHREC). |
| <b>Health Service Executive (HSE)</b>                      | A state-funded body responsible for the delivery of health and personal social services through medical professionals, hospitals and a network of Health Offices and health centres at community level. It is divided into four regions countrywide.   |
| <b>Health Information and Quality Authority (HIQA)</b>     | An independent authority responsible for driving quality, safety and accountability in residential services for children, older people and people with disabilities in Ireland. It carries out inspections, provides guidance and standards and monitors compliance of these standards by certain healthcare and social care bodies. It was established in 2007.   |
| <b>Irish Human Rights Commission (IHRC)</b>                | The IHRC was a public, state-funded and independent body established by legislation in 2000 following the Belfast (Good Friday) Agreement 1998 to promote and protect human rights. It was merged with the Equality Authority in 2014 to form the newly established Irish Human Rights and Equality Commission.  |
| <b>Irish Human Rights and Equality Commission (IHREC)</b>  | The IHREC was established on 1 November 2014 and has a statutory remit to protect and promote human rights and equality in Ireland, to promote a culture of respect for human rights, equality and intercultural understanding, to promote understanding and awareness of the importance of human rights and equality, and to work towards the elimination of human rights abuses and discrimination.      |
| <b>Irish Naturalisation and Immigration Service (INIS)</b> | INIS was established by the Department of Justice, Equality & Law Reform in 2005 as a 'one-stop shop' to administer asylum, immigration, citizenship and visa matters.   |
| <b>Legal Aid Board (LAB)</b>                               | The Board is responsible for the providing legal aid and advice on matters of civil law to persons unable to fund such services from their own resources.  |
| <b>Local Authority</b>                                     | The local branch of government consisting of a number of local and regional authorities and municipal districts.   |
| <b>Ombudsman</b>   | The office of the Ombudsman is an independent office which investigates complaints from members of the public who feel   |

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|   | they have been unfairly treated by certain public bodies that fall within its remit. The office was established by the Ombudsman Act 1980.   |
| <b>Ombudsman for Children</b>               | The office of the Ombudsman for Children is an independent quasi-judicial body established in 2002 to promote and safeguard the rights and welfare of children and young people up to 18 years of age and to investigate complaints made by children and young people or by adults on their behalf, about most types of schools and hospitals along with Government Departments and certain public bodies.   |
| <b>Social Welfare Appeals Office (SWAO)</b> | A quasi-judicial body established in 1991 to determine appeals against social welfare decisions.   |
| <b>Workplace Relations Commission (WRC)</b> | This will restructure and amalgamate the current bodies which deal with labour relations and employment rights. It will comprise the Labour Relations Commission (LRC), the National Employment Rights Authority (NERA), the Equality Tribunal, the first instance functions of the Employment Appeals Tribunal (EAT) and the first instance functions of the Labour Court while the appellate function of the EAT will transfer to a newly expanded Labour Court. The legislation has not yet been enacted. |

### Poverty Measures of References

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| <b>At-risk-of-poverty</b> | A measure which determines that people are at-risk-of-poverty if their income, adjusted to reflect the size and composition of their household, falls below 60 per cent of the median income.  |
| <b>Basic deprivation</b>  | This refers to people not being able to afford or buy at least 2 items of the following 11 basic indicators which are reflective of socio-economic as well as cultural rights: <ul style="list-style-type: none"> <li>• Two pairs of strong shoes;</li> <li>• A warm, waterproof coat;</li> <li>• New (not second-hand) clothes;</li> <li>• A meal with meat or fish or a vegetarian equivalent every second day;</li> <li>• A roast joint of meat or its equivalent once a week;</li> <li>• Heating at some stage in the last year;</li> <li>• Able to keep the home adequately warm;</li> <li>• Presents for family or friends at least once a year;</li> <li>• Replace any worn-out furniture;</li> <li>• Have family or friends for a drink or meal once a month; and</li> <li>• A morning, afternoon or evening out in the last two weeks for entertainment.</li> </ul> |
| <b>Combined poverty</b>   | This is a measure which combines consistent poverty, at-risk-of-poverty and basic deprivation measures. It is the preferred measure used by the EU. There are a number of technical differences between the national and the EU measures which often result in higher at-risk-of-poverty rate when the EU measure is used.   |
| <b>Consistent poverty</b> | This refers to a person having an income below 60 per cent of  |

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|  | the median or at-risk-of-poverty threshold and are deprived of at least 2 of the 11 items on the deprivation list. This is a measure of poverty used in the <i>National Action Plan for Social Inclusion 2007-2016</i> which takes into consideration the size, composition and income of a household as well as the household's living standards. |
| <b>Equivalised Income</b>  | This is household income received from all sources which is adjusted to reflect household size and composition.  |
| <b>European Union Statistics on Income and Living Conditions (EU-SILC)</b> | These statistics are based on a voluntary annual household survey conducted in a number of EU Member States to collate and compare statistics on income and living conditions. The Central Statistics Office (CSO) is responsible for conducting the survey in Ireland.  |
| <b>Social transfers</b>  | This refers to income which includes social security or social welfare payments as well as occupational pensions or income from sources other than earnings from the labour market.  |

### Other frequently used terms or references

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| <b>Convention on the Constitution</b>                | <p>The Convention on the Constitution was established in 2012 to consider eight key constitutional issues as determined by the Oireachtas including:</p> <ul style="list-style-type: none"> <li>• the reduction of the Presidential term of office to five years;</li> <li>• lowering the voting age to 17 years;</li> <li>• review of the Dáil electoral system;</li> <li>• extending the right to vote in Presidential elections to citizens resident outside the State;</li> <li>• provision for same-sex marriage;</li> <li>• amending the clause on the role of women in the home and encouraging greater participation of women in public life;</li> <li>• increasing the participation of women in politics; and</li> <li>• the removal of the offence of blasphemy from the Constitution.</li> </ul> <p>Following completion of these mandated considerations, the Convention also considered two additional issues: Dail reform and constitutional protection for economic, social and cultural rights. It comprised 100 members: 33 elected representatives, 66 citizens selected from the electoral register and an independent Chairperson.</p> |
| <b>Direct Provision</b>                              | The accommodation provided to persons without means who are seeking asylum and permission to remain in Ireland, whereby they receive shelter and full board in accommodation provided by the State. People indirect provision receive a weekly allowance of €19.10 per adult and €9.60 per child.   |
| <b>Economic and Social Research Institute (ESRI)</b> | An independent not-for-profit economic and social policy research institute which informs public policy making and civil society in Ireland.  |
| <b>Equality grounds</b>                              | There are nine equality grounds contained in legislation which prohibit discrimination in employment or in the provision of   |

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|   | <p>goods and services on the basis of:</p> <ul style="list-style-type: none"> <li>• Gender;</li> <li>• Civil status;</li> <li>• Family status;</li> <li>• Age;</li> <li>• Disability;</li> <li>• Sexual orientation;</li> <li>• Race;</li> <li>• Religion; and</li> <li>• Membership of the Traveller community</li> </ul>   |
| <b>Irish Traveller</b>                          | A member of the community of people who are commonly called Travellers and who are identified (both by themselves and others) as people with a shared history, culture and traditions including, historically, a nomadic way of life on the island of Ireland.   |
| <b>National Human Rights Institution (NHRI)</b> | The IHREC is the Irish National Human Rights Institution, a body established to protect or promote human rights at a national level.   |
| <b>Nevin Economic Research Institute (NERI)</b> | An independent think-tank established in 2012 to provide information, analysis and economic policy alternatives. It undertakes research relevant to the Trade Union movement and the general public across the island of Ireland. It has offices in Belfast and Dublin.  |
| <b>EU-IMF Bailout/Troika</b>                    | The Troika comprised the European Commission, the European Central Bank and the International Monetary Fund which oversaw Ireland's programme of financial assistance agreed in December 2010 which is often referred to as the EU-IMF bailout agreement. This provided €85 billion in financial assistance but imposed strict public expenditure conditions requiring €15 billion in savings by the Government. |



## 1. Introduction

The Irish Human Rights and Equality Commission ('the Commission') is Ireland's National Human Rights Institution ('NHRI'), as established by the Irish Human Rights and Equality Commission Act 2014 ('2014 Act').<sup>1</sup> The Commission has a statutory remit to protect and promote human rights and equality in Ireland, to promote a culture of respect for human rights, equality and intercultural understanding, to promote understanding and awareness of the importance of human rights and equality, and to work towards the elimination of human rights abuses and discrimination.<sup>2</sup> The Commission is tasked with reviewing the adequacy and effectiveness of law, policy and practice relating to the protection of human rights and equality in Ireland, and with making recommendations to Government on measures to strengthen, protect and uphold human rights and equality accordingly.<sup>3</sup> In accordance with section 10(2)(h) of the 2014 Act, the Commission is mandated to consult with international bodies or agencies with a knowledge or expertise in human rights or equality.

The Commission welcomes the opportunity to provide this, its first Submission as a new legal entity, to the United Nations Committee on Economic Social and Cultural Rights ('the Committee') in advance of its forthcoming examination of Ireland's compliance with the International Covenant on Economic, Social and Cultural Rights ('ICESCR').<sup>4</sup> This will be Ireland's third examination since it ratified ICESCR in 1989. In October 2014, the IHREC provided a submission to the Committee in advance of its Pre-Sessional Working Group at which the Committee prepared the List of Issues which it addressed to the Irish Government.<sup>5</sup> In December 2014, a delegation from the Commission presented before the Committee's Pre-Sessional Working Group in order to inform the Committee at this preliminary stage of the examination process. The IHREC makes this Submission in its capacity as Ireland's NHRI, noting the Committee's *General Comment No.10* which highlights the 'potentially crucial role' that national institutions play 'in promoting and ensuring the indivisibility and interdependence of all human rights'.<sup>6</sup> The Commission further notes the Committee's concern with regard to the neglect or low priority given to economic, social and cultural rights by NHRIs and to this end has included the indivisibility and interdependence of all human rights as a strategic goal in its first strategy statement.

The IHREC notes that 13 years have passed since the State was last examined by the Committee. The Commission welcomes the establishment of an Inter-Departmental Committee on Human Rights<sup>7</sup> as a useful tool in reviewing the State's obligations under the international reporting mechanisms.<sup>8</sup> **The IHREC**

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<sup>1</sup> The Irish Human Rights and Equality Commission Act 2014 merged the former Irish Human Rights Commission and the former Equality Authority into a single enhanced body.

<sup>2</sup> Section 10(1)(a)–(e) of the 2014 Act.

<sup>3</sup> Section 10(2)(b) and section 10(2)(d) of the 2014 Act.

<sup>4</sup> The information contained in this Submission covers the period up to 1 May 2015.

<sup>5</sup> IHREC (Designate) (2014) *Submission to the UN Committee on Economic, Social and Cultural Rights on Ireland's Third Periodic Report on the International Covenant on Economic, Social and Cultural Rights – List of Issues Stage*, Dublin: IHREC (Designate); UN Committee on Economic, Social and Cultural Rights (2014) *List of Issues: Ireland*, Geneva: OHCHR.

<sup>6</sup> UN Committee on Economic, Social and Cultural Rights (1998) *General Comment No. 10: The role of national human rights institutions in the protection of economic, social and cultural rights, E/C.12/1998/25* at para.3.

<sup>7</sup> Department of Foreign Affairs (DFA), 'Minister Sherlock chairs First Meeting of the Inter-Departmental Committee on Human Rights', [press release], 25 March 2015. The Committee comprises representatives from the Department of Justice and Equality, the Department of Social Protection, the Department of Finance, the Department of Jobs, Enterprise and Innovation, the Department of Transport, Tourism and Sport, the Department of Communications, Energy and Natural Resources, the Department of Arts, Heritage and the Gaeltacht and the Office of the Attorney General.

<sup>8</sup> The establishment of the Committee reflects the recommendation by former UN High Commissioner for Human Rights, Navi Pillay who encouraged States 'to establish or reinforce a standing national reporting and coordination mechanism' which she stated 'should aim at facilitating both timely reporting and improved coordination in follow-up to treaty bodies' recommendations and

**encourages the State to strengthen its engagement with the Treaty Body monitoring process by submitting its periodic reports on time to ensure that the Committee has the most up-to-date information available to it. The IHREC recommends the State take steps to promote awareness of its obligations under ICESCR at Departmental level, as well as at Parliamentary level, including through the newly established Oireachtas (Irish Parliament) Sub-Committee on Human Rights and Equality.<sup>9</sup>**

The IHREC notes that Ireland is being examined before diverse UN treaty monitoring Committees on a periodic basis and that numerous cross-cutting themes have emerged in the context of these examinations which the Commission brings to the attention of the Committee in this report.<sup>10</sup> Additionally, in 2011, Ireland's human rights record was examined under the Universal Periodic Review (UPR) process, following which the Irish Government accepted a number of key recommendations which the Commission draws the Committee's attention to throughout this report.<sup>11</sup> The IHREC recalls that following Universal Periodic Review the Irish Government has made a commitment to ratify the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and the Optional Protocol to the Convention Against Torture (OPCAT) at the earliest possible opportunity, as well as a number of other commitments.<sup>12</sup> The IHREC notes that the European Union (EU) ratified the CPRD in 2011. The Commission welcomes the stated role of the Inter-Departmental Committee on Human Rights to 'assist progress towards ratification by Ireland of key international human rights treaties and reporting to United Nations and Council of Europe human rights monitoring bodies'.<sup>13</sup> **The IHREC recommends that the Irish Government advance the commitments that it made in the context of the Universal Periodic Review Process as a matter of priority, in particular its commitments in relation to the ratification of the CRPD and OPCAT.**

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decisions'. See N. Pillay (2012) *Strengthening the United Nations human rights treaty body system: A report by the UN High Commissioner for Human Rights*, Geneva: OHCHR, p. 85.

<sup>9</sup> See [http://www.oireachtas.ie/parliament/oireachtasbusiness/committees\\_list/jde-committee/Sub-CommitteeonHumanRights/](http://www.oireachtas.ie/parliament/oireachtasbusiness/committees_list/jde-committee/Sub-CommitteeonHumanRights/) for more details. The Sub-Committee will examine how issues, themes and proposals take account of human rights provisions. The focused membership of the Committee intends to work to ensure that any new legislation is human rights 'proofed'. The sub-Committee will report back to the Joint Oireachtas Committee on Justice, Defence and Equality on such topics and the extent to which compliance with the human rights of persons within the State is enhanced.

<sup>10</sup> UN Human Rights Committee (2014) *Concluding Observations on Ireland's Fourth Periodic Report*, CCPR/C/IRL/CO/4; UN Committee on the Elimination of Discrimination against Women (2005) *Concluding Comments: Ireland*, CEDAW/C/IRL/CO/4-5, 2005;

<sup>11</sup> UN Human Rights Council (2011) *Report of the Working Group on the Universal Periodic Review: Ireland*, A/HRC/19/9. See also, IHREC Designate (2014) *Submission to the UN Human Rights Committee on the Examination of Ireland's Fourth Periodic Review under the International Covenant on Civil and Political Rights*; IHRC, *Submission to the Twelfth Session of the Working Group on the Universal Periodic Review: Ireland*, March 2011.

<sup>12</sup> UN Human Rights Committee (2014) *Concluding Observations on Ireland's Fourth Periodic Report*, CCPR/C/IRL/CO/4, paras. 106.1 – 106.5.

<sup>13</sup> Department of Foreign Affairs (DFA), 'Minister Sherlock chairs First Meeting of the Inter-Departmental Committee on Human Rights', [press release], 25 March 2015.

## Part I: General Information

### 2. ICESCR and Irish Domestic Law

#### 2.1 Incorporation of the Covenant and Recognition of ESC Rights in Domestic Law

Despite the Committee's prior Concluding Observations in 1999<sup>14</sup> and 2002,<sup>15</sup> the IHREC notes that the State has not fully incorporated the Covenant into domestic law. The Government's rationale for not engaging in an explicit legislative incorporation process is rooted in the State's dualist legal system. The Government outlines that the Oireachtas is required to enact legislation before any international treaties to which Ireland is a signatory can take effect in the domestic legal framework and it does not intend to 'alter current practice'.<sup>16</sup> The IHREC notes that the Law Reform Commission (LRC) is currently examining the application of international obligations in domestic law, with specific reference to Article 29.6 of the Constitution of Ireland, as well as assessing the 'monitoring of and accountability for state obligations', including those in relation to ICESCR, in this context.<sup>17</sup> Notably, Ireland has incorporated other international treaties into domestic law through legislative<sup>18</sup> and constitutional<sup>19</sup> means. **The IHREC awaits the LRC's recommendations in this regard to determine how best to ensure all relevant articles of ICESCR are adequately and fully incorporated into Irish law.**

In February 2011, the newly formed coalition Government agreed on a Programme for Government. Included in the Programme for Government was a commitment to Constitutional reform and the setting up of a Convention on the Constitution to consider a number of 'urgent issues.' It is of note that the Government did not name the inclusion of economic, social and cultural rights in the Constitution as an issue to be discussed by the Convention. In February 2014, the Convention<sup>20</sup> considered, of its own volition, a proposal to include a provision to explicitly recognise and protect economic, social and cultural rights in the Irish Constitution.<sup>21</sup> The Convention strongly recommended amending the Constitution to strengthen these rights and the majority favoured inserting a provision 'that the State shall progressively realise economic,

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<sup>14</sup> UN Committee on Economic, Social and Cultural Rights (1999) *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland*, Geneva: Office of the High Commissioner for Human Rights, para.9.

<sup>15</sup> UN Committee on Economic, Social and Cultural Rights (2002) *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland*, Geneva: Office of the High Commissioner for Human Rights, para.12.

<sup>16</sup> UN Human Rights Council (2011) *Report of the Working Group on the Universal Periodic Review: Ireland*, A/HRC/19/9, paras.27-28.

<sup>17</sup> See the website of the Law Reform Commission, <http://www.lawreform.ie/welcome/6-international-law.383.html> [accessed 27 February 2015].

<sup>18</sup> Instruments which have been incorporated through legislation include: the Vienna Convention on Diplomatic Relations incorporated through the Diplomatic Relations and Immunity Act 1967; certain articles of the UN Convention on the Prevention and Punishment of the Crime of Genocide through the Convention against Torture and Genocide Act 1973; the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children 1996 incorporated through enactment of the Protection of Children (Hague Convention) Act 2000; certain provisions of the UN Convention against Torture through the Criminal Justice (United Nations Convention Against Torture) Act 2000; and the European Convention on Human Rights (ECHR) through the ECHR Act 2003.

<sup>19</sup> The Twenty-First Amendment of the Constitution introduced a ban on the death penalty and removed textual references to capital punishment. It was approved by referendum on 7 June 2001 and signed into law on 27 March 2002.

<sup>20</sup> The Convention on the Constitution was established in 2012 to consider eight key constitutional issues as determined by the Oireachtas including the reduction of the Presidential term of office to five years; lowering the voting age to 17 years; review of the Dáil electoral system; extending the right to vote in Presidential elections to citizens resident outside the State; provision for same-sex marriage; amending the clause on the role of women in the home and encouraging greater participation of women in public life; increasing the participation of women in politics; and the removal of the offence of blasphemy from the Constitution. Following completion of these mandated considerations, the Convention also considered two additional issues: Dáil reform and constitutional protection for economic, social and cultural rights. It comprised 100 members: 33 elected representatives, 66 citizens randomly selected from the electoral register and an independent Chairperson.

<sup>21</sup> The Convention on the Constitution, 'Convention on the Constitution chooses (i) Dáil Reform and (ii) Economic, Social and Cultural rights for discussion at their final two meetings in February 2014', [press release], 17 December 2013.

social and cultural rights, subject to maximum available resources and that this duty is cognisable by the Courts<sup>22</sup> using language reflective of the Covenant. The IHREC notes the Government has not responded to that recommendation,<sup>23</sup> and the Taoiseach's indication in January 2015 that no further referenda would be held in the lifetime of this Government.<sup>24</sup> **The IHREC recommends the State consider the relevance of the recommendation of the Convention on the Constitution in its approach to the legal status of economic, social and cultural rights under Irish Law.**

## 2.2 Ireland's Reservations to the Covenant

The State retains two reservations to the Covenant: one in relation to Article 2(2) concerning the favourable consideration given to Irish language speakers for certain occupations; and the other in relation to Article 13(2)(a) concerning the right of parents to home-school their children.<sup>25</sup> The IHREC addresses the reservation in relation to home-schooling in this submission in detail. In its List of Issues, the Committee asked the State if the reservation on home-schooling continues to be relevant or whether it plans to withdraw it.<sup>26</sup> The IHREC notes that only a negligible number of children are home-schooled.<sup>27</sup> In its response to the list of issues, the State cites the constitutional protection afforded to parents in relation to the way in which their children are educated,<sup>28</sup> as well as the Education (Welfare) Act 2000, which 'requires that the State ensure that all children receive a certain minimum education, without prescribing the form of that education'.<sup>29</sup> The State has indicated that it does not intend to 'remove this reservation to the Covenant in the foreseeable future'.<sup>30</sup>

In its Common Core Document on International Human Rights Instruments, the State outlines that all existing reservations are 'actively under review, consistent with the Vienna Declaration and Program of Action' but it deems all current reservations to be 'necessary'.<sup>31</sup> However, it is not clear what process is in place to review these reservations. In so far as reservations diminish the effectiveness of treaties, and in order to ensure they do not defeat the purpose of the treaty in question, **the IHREC welcomes the State's commitment to keep these reservations under review and recommends that the State establish a mechanism to monitor and advise on withdrawing these reservations if there comes a time when they 'no longer serve their purpose'.**<sup>32</sup>

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<sup>22</sup> The Convention on the Constitution (2014) *Eighth Report of the Convention on the Constitution: Economic, Social and Cultural (ESC) Rights*, p.6. This option was favoured by 85 per cent of Convention members.

<sup>23</sup> The Terms of Reference of the Convention stated that the Government would respond to a recommendation of the Convention within four months of it being submitted. The Convention on the Constitution (2012) *Terms of Reference of the Constitutional Convention are detailed in the Resolution of the Houses of the Oireachtas of July 2012*.

<sup>24</sup> An Taoiseach, Enda Kenny TD, Dáil Debates: Order of Business, 14 January 2015.

<sup>25</sup> Notably, in relation to the constitutional protection for the right of parents to home school their child, the State has not entered a reservation to Article 28 of the UN Convention on the Rights of the Child which provides for the right to education.

<sup>26</sup> UN Committee on Economic, Social and Cultural Rights (2014) *List of Issues: Ireland*, Geneva: OHCHR, para. 2.

<sup>27</sup> IHRC (2011) *Amicus Brief in the European Court of Human Rights Application No. 3581009 Louise O'Keeffe v Ireland: Written Comments by the Irish Human Rights Commission*, para.27. The IHRC noted how in practice, a negligible number of children are home-schooled in Ireland. Home or private schooling is in the minority.

<sup>28</sup> Article 42 of the Irish Constitution recognises the family as the 'primary and natural educator of the child'. Article 42.2 explicitly states, 'Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State'.

<sup>29</sup> Government of Ireland (2015) *CESCR: Reply of Ireland to the List of Issues in relation to its third periodic report*, Geneva: OHCHR, para. 5.

<sup>30</sup> *Ibid.*, para. 5.

<sup>31</sup> Office of the High Commissioner for Human Rights (2014) *Common core document forming part of the reports of States parties: Ireland*, HRI/CORE/IRL2014, para.81.

<sup>32</sup> International Law Commission (2011) *Guide to Practice on Reservations to Treaties*, 'Periodic review of the usefulness of reservations' at para 2.5.3(1).

### 2.3 Ireland and the Optional Protocol to ICESCR

The IHREC welcomes Ireland's signature of the Optional Protocol (OP-CESCR) in 2012<sup>33</sup> but **recommends the State take steps to complete its ratification at the earliest opportunity**. The State should ensure that this mechanism is available as a potential remedy for people subject to violations of their economic, social and cultural rights who have exhausted domestic remedies.

### 2.4 Justiciability of ESC Rights under Irish Constitutional Law

In its General Comments and Concluding Observations, the Committee provides clear guidance on the importance of ensuring the justiciability of the rights enshrined in the Covenant in domestic law.<sup>34</sup> The Irish Government asserts that it meets its obligations to implement the Covenant 'through policies aimed at improving the enjoyment of economic, social and cultural rights' as in its view 'this differentiated approach affords the best means of implementing Ireland's obligations under the Covenant'.<sup>35</sup> A 'differentiated approach' towards economic, social and cultural rights at the domestic level does not appear to be fully in line with statements by the State on the international stage where it has reaffirmed that all rights are 'universal and interrelated'.<sup>36</sup>

A limited number of economic, social and cultural rights are explicitly protected in the Irish Constitution, including, for example, the right to free primary education and the right to property.<sup>37</sup> In the context of its development of the doctrine of unenumerated rights, the Irish Superior Courts have identified some personal rights which can be invoked as justiciable economic and social rights in a specific case including, for example, the right to earn a livelihood and the right to bodily integrity.<sup>38</sup> Article 45 of the Constitution of Ireland sets out 'Directive Principles of Social Policy', which include a commitment to 'safeguard with especial care the economic interests of the weaker sections of the community'. Article 45 stipulates the Directive Principles are 'intended for the general guidance of the Oireachtas' and 'the application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution'.<sup>39</sup>

Similar to a number of other common law jurisdictions, in much of its jurisprudence the Irish judiciary has expressed a reluctance to rule on matters related to economic, social and cultural rights due to the Executive's practice of administering these obligations, primarily through discretionary decision-making.<sup>40</sup> Specifically, in a line of decisions, it has been common for the Irish Superior Courts to invoke various elements of the doctrine of the separation of powers which they interpret as precluding the Courts' capacity to rule on matters that engage questions of the distribution of national resources.<sup>41</sup> For example, in *Sinnott*

<sup>33</sup> Department of Foreign Affairs, 'Ireland to Sign the Optional Protocol to the International Covenant', [press release], 6 March 2012.

<sup>34</sup> UN Committee on Economic, Social and Cultural Rights (1998) *General Comment No. 9: The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24, para.10.

<sup>35</sup> UN Committee on Economic, Social and Cultural Rights (2013) *Third periodic report of States parties due in 2007: Ireland*, E/C.12/IR/3, paras. 491 and 492.

<sup>36</sup> Department of Foreign Affairs (2014) *UN Human Rights Council 26<sup>th</sup> Session (10-26 June 2014): Statement by Ireland under agenda item 8 - Follow-up and implementation of the Vienna Declaration and Programme of Action*.

<sup>37</sup> Article 42.4 of the Irish Constitution provides that the State 'shall provide for free primary education'; Article 43 provides the State shall protect the right of private ownership or the general right to transfer, bequeath, and inherit property.

<sup>38</sup> *Ryan v. Attorney General* [1965] IR 294; *Murphy v. Stewart* [1973] IR 97. See however, *T.D. v. Minister for Education* [2001] 2 IR 259.

<sup>39</sup> See further *Murtagh Properties v. Cleary* [1972] IR 330.

<sup>40</sup> See *Sinnott v Minister for Education* [2001] 2 I.R. 545; *O'Donnell (a minor) & Others v South Dublin County Council* [2007] 1 IEHC 2014; *Jama v Minister for Social Protection* [2011] IEHC 379.

<sup>41</sup> See *O'Reilly v. Limerick Corporation* [1989] ILRM 181; *Sinnott v. Minister for Education* [2001] 2 I.R. 545; *O'Donnell (a minor) & Others v. South Dublin County Council* [2007] 1 IEHC 2014; *Jama v. Minister for Social Protection* [2011] IEHC 379.

*v. Minister for Education*, Hardiman J., summarised his views on why the courts should not assume what he considers is a policy making role in relation to social and economic issues as follows:

Firstly, to do so would offend the constitutional separation of powers. Secondly, it would lead the Courts into the taking of decisions in areas in which they have no special qualifications or experience. Thirdly, it would permit the Courts to take such decisions even though they are not, and cannot be, democratically responsible for them as the legislature and the executive are. Fourthly, the evidence based adversarial procedures of the Court, which are excellently adapted for the administrative of commutative justice, are too technical, too expensive, too focused on the individual issue to be an appropriate method for deciding on issues of policy.<sup>42</sup>

In a subsequent decision the Supreme Court observed that 'in a discrete case...the normal discretion of the Oireachtas in the distribution or spending of public monies could be constrained by a constitutional obligation to provide shelter and maintenance for those with exceptional needs'; suggesting that the Courts retain a role in exceptional cases.<sup>43</sup> In a recent case before the High Court challenging the elements of the direct provision system for the accommodation of asylum seekers, Mac Eochaidh J. stated that in relation to a breach of human rights caused by an action of the State, 'and where the only remedy is the expenditure of additional money, the Court, in my opinion, must be entitled to make an appropriate order, even if the consequence is that the State must spend money to meet the terms of the order'.<sup>44</sup> Nevertheless, generally in the context of remedies, the Irish Courts have demonstrated a reluctance to grant a remedy of *mandamus* requiring the Executive to expend resources to rectify a breach of socio-economic rights which could result in a wider application for the State,<sup>45</sup> or to condemn Executive inaction through the granting of the remedy of *certiorari* where it has failed to adequately fund a programme which would secure rights.<sup>46</sup> The Courts appear more willing to strike down legislation by declaring it incompatible with the Constitution.<sup>47</sup> However, in the 2015 Supreme Court judgment in *O'Donnell & Ors v. South Dublin County Council*, MacMeniman J. stated that 'in an exceptional case... [where] statutory powers are given to assist in the realisation of constitutionally protected rights or values, and if powers are given to relieve from the effects of deprivation of such constitutionally protected rights, and if there are no reasons, constitutional or otherwise, why such statutory powers should not be exercised, then I think such powers may be seen as being mandatory'.<sup>48</sup>

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<sup>42</sup> *Sinnott v. Minister for Education* [2001] 2 I.R. 545, p. 710.

<sup>43</sup> *Ibid.*

<sup>44</sup> *C.A. and T.A. (a minor) v. Minister for Justice and Equality, Minister for Social Protection, the Attorney General and Ireland* (Record No. 2013/751/JR).

<sup>45</sup> *Sinnott v. Minister for Education* [2001] 2 I.R. 545; *O'Donnell (a minor) & Others v. South Dublin County Council* [2007] 1 IEHC 2014; *Jama v. Minister for Social Protection* [2011] IEHC 379.

<sup>46</sup> *O'Donnell (a minor) & Others v. South Dublin County Council* [2007] 1 IEHC 2014.

<sup>47</sup> See for example *Re Article 26 of the Constitution and the Employment Equality Bill 1996* [1997] 2 IR 321; *Re Article 26 of the Constitution and the Equal Status Bill* [1997] 2 IR 387; *E.D. v Director of Public Prosecutions at the suit of Garda Thomas Morley*, High Court, Kearns P. (unreported, 25 March 2011) in which the IHRC submitted an amicus brief and *McGowan and Others v. The Labour Court* [2013] IESC 21.

<sup>48</sup> *O'Donnell & ors v. South Dublin County Council* [2015] IESC 28, para. 32.

### 3. Accountability in the Context of Economic, Social and Cultural Rights

#### 3.1 National Human Rights and Equality Infrastructure

Since the State's last examination by the Committee in 2002, Ireland's national human rights and equality framework has been subject to significant change. There is no doubt that the human rights and equality framework has been significantly undermined, in particular in 2008. However, the process for the development of the Irish Human Rights and Equality Act 2014, with the involvement of many key stakeholders, including civil society organisations has resulted in the merger of the former Irish Human Rights Commission and the former Equality Authority into a single enhanced entity with the enactment of the 2014 Act.<sup>49</sup> The IHREC welcomes the 2014 Act which underpins its establishment and which includes key provisions to enhance and ensure the institutional independence of the new Commission in full conformity with the *UN Paris Principles*.<sup>50</sup>

Confidence in the Commission's independent standing is bolstered by the rigorous and transparent process undertaken to recruit the Chief Commissioner, as well as the appointment of the other members of the Commission by an independent selection panel. The inclusion in the legislation of an appointment process, compliant with the *UN Paris Principles*, for the appointment of future members of the Commission will also ensure that this independence is maintained in the longer term.<sup>51</sup>

Following a resolution by both Houses of the Oireachtas all members of the Commission were appointed by our Head of State, President Michael D. Higgins on 31 October 2014. As explicitly provided for in the 2014 Act, the Commission is 'independent in its functions',<sup>52</sup> and as independent officers of the State, the Commission accounts directly to Parliament for the statutory functions outline in the 2014 Act. Of significance too is the new arrangement for financial accountability. This is achieved through the grant of a stand-alone 'vote' to the Commission in annual budget estimates, as well as direct parliamentary scrutiny of both its financial matters by the Oireachtas Public Accounts Committee (PAC), and the discharge of its statutory functions by the Oireachtas, the Commission is now accountable to the Oireachtas. Furthermore, the 2014 Act provides for prior consultation by the Minister for Justice and Equality with the Commission in advance of deciding its annual grant.<sup>53</sup>

The IHREC notes the definitions of human rights in the 2014 Act.<sup>54</sup> While the overall legislation provides a comprehensive definition of human rights, the sections pertaining to the IHREC's legal compliance and enforcement functions contain a different definition which restricts the applicable rights to those contained in the Constitution, the European Convention on Human Rights Act 2003 or to those contained in any 'agreement, treaty or convention to which the State is a party and which has been given the force of law in

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<sup>49</sup> Prior to this and following the onset of the recession, both bodies were subject to disproportionate funding cuts in their budgets for 2009 leading to a reduction in the capacity of both bodies.

<sup>50</sup> United Nations, *Principles relating to the Status of National Institutions (The Paris Principles)*, adopted by General Assembly Resolution 48134 of 20 December 1993. The Paris Principles provide 'The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence'.

<sup>51</sup> Section 13, Irish Human Rights and Equality Commission Act 2014.

<sup>52</sup> Section 9(2), Irish Human Rights and Equality Commission Act 2014.

<sup>53</sup> Section 26, Irish Human Rights and Equality Commission Act 2014.

<sup>54</sup> Irish Human Rights and Equality Commission (Designate) (2014) *Observations on the Irish Human Rights and Equality Commission Bill 2014 by IHREC (designate)*, Dublin: IHREC Designate.

the State'.<sup>55</sup> The IHREC notes that this differentiated definition may have particular implications for economic, social and cultural rights in light of the status of ICESCR under Irish law. As the Commission is in its first year of operation, it will keep this situation under review.

The IHREC notes that in the context of measures to reduce public spending a number of independent statutory agencies with mandates of relevance to the human rights and equality of vulnerable populations have had their remit ended or their roles have been absorbed into Government Departments. Two fundamental thematic issues of note are (a) poverty<sup>56</sup> and (b) racism and interculturalism.<sup>57</sup>

Under the 2014 Act, the Commission was granted a specific role in promoting intercultural understanding,<sup>58</sup> as well as encouraging non-discrimination and equality on grounds of race and ethnic minority status. This will go some way towards restoring the role played by the former body which had promoted interculturalism promoted intercultural activities.<sup>59</sup> However, the IHREC does not see itself as supplanting the State's role in this regard and notes and regrets the State's failure to renew the National Action Plan Against Racism (NAPAR) which lapsed in 2008.

**The IHREC recommends the State, as primary duty bearer, to put in place an appropriate mechanism to monitor incidents of racism and commit to put in place and implement a renewed National Action Plan Against Racism.**

In enacting the Charities Act 2009, the State excluded the 'promotion of human rights' as a charitable purpose as highlighted by the UN Special Rapporteur on the Situation of Human Rights Defenders during her 2012 visit to Ireland.<sup>60</sup> The IHREC welcomes that the newly established Oireachtas Sub-Committee on Human Rights relative to Justice and Equality Matters will review this legislative framework in its upcoming programme of work.<sup>61</sup>

The IHREC is concerned that since the onset of the recession in 2008, the community and voluntary sector, including key community development programmes, has been subject to funding cuts resulting in structural changes and significant staff losses, in particular affecting locally-based initiatives designed to respond to poverty and social exclusion.<sup>62</sup> The Local Government (Reform) Act 2014 introduced reforms that vest more power in local government structures, rather than the established community development programmes.<sup>63</sup>

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<sup>55</sup> The general definition of human rights is set out in s.2 of the Act and includes 'the rights, liberties or freedoms conferred on, or guaranteed to, persons by any agreement, treaty or convention to which the State is a party'. However, this definition does not apply to Part 3 which defines the functions of the IHREC and restricts the definition to human rights to exclude international human rights instruments which have not been incorporated into domestic law.

<sup>56</sup> The Combat Poverty Agency was established under the Combat Poverty Agency Act 1986 and had four general functions: policy advice, project support and innovation, research and public education. Some of its functions were subsumed into the Social Inclusion Office of the Department of Social Protection following its closure in 2009.

<sup>57</sup> The National Consultative Committee on Racism and Interculturalism (NCCRI) was an independent expert body established in 1998. Prior to its closure in 2008, it sought to provide advice and to develop initiatives to combat racism and to work towards a more inclusive, intercultural society in Ireland. It closed at the end of 2008 following a cut to its budget.

<sup>58</sup> Section 10(1), Irish Human Rights and Equality Commission Act 2014.

<sup>59</sup> The body referred to is the NCCRI described in footnote 57.

<sup>60</sup> Office of the High Commissioner for Human Rights (2012) *Statement by the United Nations Special Rapporteur on the Situation of Human Rights Defenders, Margaret Sekaggya, at the end of her visit to Ireland (19-23 November 2012)*, Geneva: OHCHR.

<sup>61</sup> Houses of the Oireachtas (2015) *Sub-Committee on Human Rights relative to Justice and Equality Matters: Work Programme March 2015*, Dublin: Houses of the Oireachtas.

<sup>62</sup> Department of Environment, Community & Local Government and Pobal (2014) *Local and Community Development Programme 2013 Progress Report: A Focus on LDC Activities*, Dublin: DECLG & Pobal.

<sup>63</sup> Office of Social Inclusion (2014) *Report of the Social Inclusion Forum 2014*, Dublin: Department of Social Protection, pp.25-28.



The IHREC considers that meaningful participation in decision-making at local level is essential when designing policies and the State has 'a legal obligation to implement inclusive, meaningful and non-discriminatory participatory processes and mechanisms, and to engage constructively with the outcomes'.<sup>64</sup>

**The IHREC recommends that the State take account of the *UN Guiding Principles on Extreme Poverty and Human Rights* when making further decisions on budget measures and structural changes which affect local and community development organisations which in turn impacts on the people from poorer socio-economic backgrounds. In particular, the guidelines encourage States to 'actively protect individuals, community-based organizations, social movements, groups and other non-governmental organizations that support and advocate the rights of those living in poverty'<sup>65</sup> as well as other organisations working in the community and voluntary sector who work with people across the nine equality grounds.**

### 3.2 Ombudsman Bodies and the Regulation of ESC Rights

In addition to the IHREC, there are a number of relevant redress and complaints bodies that can provide a potential administrative remedy where there may be a violation of economic, social or cultural rights. The Office of the Ombudsman,<sup>66</sup> a statutorily independent body, examines complaints in relation to the administrative action of all Government Departments and a range of public bodies. It can also examine complaints under the Disability Act 2005. In this context, the Office of the Ombudsman investigates complaints from people with disabilities who have had difficulty accessing public buildings, services and information.<sup>67</sup> The IHREC endorses the view of the Ombudsman that it is 'vitaly important that people with a disability are informed as to their rights on access to services and information and that they are aware of their right of recourse to [the] ... Ombudsman to examine their unresolved complaints'.<sup>68</sup> Since 2011, the Ombudsman has received more than 3000 complaints annually with almost half relating to Government Departments, with a particular focus on the Department of Social Protection which is responsible for social security payments.<sup>69</sup>

The Ombudsman for Children ('OCO')<sup>70</sup> examines complaints against public bodies made by or on behalf of children under 18 years. Complaints to this body have increased year-on-year from 94 in 2004 to almost 1,600 in 2013.<sup>71</sup> The vast majority of complaints received by the OCO relate to economic and social rights. In 2013, 43 per cent of complaints related to education; 26 per cent to family support, care or protection; 9 per cent to health; 6 per cent to finance or welfare and 3 per cent to housing or planning, while only 8 per cent related to justice issues, indicating the dominant issues for children fall within the remit of ICESCR.<sup>72</sup>

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<sup>64</sup> UN Human Rights Council (2013) *Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona*, 11 March 2013, A/HRC/23/36, para. 24.

<sup>65</sup> UN Human Rights Council, *Final draft of the guiding principles on extreme poverty and human rights, submitted by the Special Rapporteur on extreme poverty and human rights*, 18 July 2012, A/HRC/21/39, para. 41.

<sup>66</sup> Established by the Ombudsman Act 1980 and amended by the Ombudsman (Amendment) Act 2012.

<sup>67</sup> The Ombudsman (Amendment) Act 2012 extended the Ombudsman's remit to include a further 180 public bodies including publicly funded third level education institutions, regulatory bodies such as the Law Society, the Health and Information Quality Authority (HIQA), the Legal Aid Board and the National Treatment Purchase Fund.

<sup>68</sup> Office of the Ombudsman (2014) *Annual Report 2013*, Dublin: Office of the Ombudsman, p.21

<sup>69</sup> *Ibid.*, p.16.

<sup>70</sup> Established by the Ombudsman for Children Act 2002.

<sup>71</sup> Ombudsman for Children's Office (2014) *Annual Report 2013*, Dublin: Ombudsman for Children's Office, p.14.

<sup>72</sup> *Ibid.*

The IHREC notes that the administrative remedies presented by the Ombudsman bodies, although persuasive and adhered to in the majority of cases, are not legally binding.<sup>73</sup> Also, the IHREC notes that actions of certain Government Departments or public bodies are excluded from the remit of these oversight bodies. For example, both the Ombudsman<sup>74</sup> and the Ombudsman for Children<sup>75</sup> have expressed concern that the Department of Justice and Equality does not recognise the extension of their remit to the system of Direct Provision and dispersal for asylum seekers living in Ireland.<sup>76</sup> Given the largely discretionary nature of administrative decision-making in the field of economic, social and cultural rights, judicial review as a remedy against such decisions is often restricted and does not extend a right of appeal on the substantive issues, but is merely a review of the procedural steps invoked.<sup>77</sup> The IHREC notes the ‘effective exclusion of complaints regarding the asylum system and Direct Provision from the ambit of the Ombudsman and the Ombudsman for Children as being incompatible with the principle of non-discrimination’.<sup>78</sup> The IHREC reiterates its support for the ‘repeated calls from the Office of the Ombudsman and the Ombudsman for Children to extend their remit to include the investigation of issues relating to asylum processes (as against decisions of the asylum determination process)’.<sup>79</sup>

In the context of employment and labour rights, the IHREC notes the progression of the Workplace Relations Bill 2014 to restructure and consolidate the State’s employment and industrial relations bodies<sup>80</sup> and recommends that the Minister for Jobs, Enterprise and Innovation to ensure it complies with the principles of judicial independence.<sup>81</sup>

The restructure is expected to be completed in 2015 saving €2 million per annum. While there is likely to be a reduction in the number of staff employed by the new Workplace Relations Commission (WRC), the valuable expertise of Equality Officers has been acknowledged.<sup>82</sup> The IHREC previously highlighted the need

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<sup>73</sup> Section 6, the Ombudsman Act 1980 (‘1980 Act’) provides that the Ombudsman may make recommendations to Government Departments where he or she feels that an action adversely affected an individual but does not include any enforcement mechanism. Section 13 of the Ombudsman for Children Act 2002 (‘2002 Act’) contains a similar provision. In both cases, where it appears to the Ombudsman (Section 6(5) of the 1980 Act) or Ombudsman for Children (Section 13(5) of 2002 Act) that the measures taken or proposed to be taken on foot of a recommendation are not satisfactory, then he or she may make a special report to the Oireachtas but no further action can be taken.

<sup>74</sup> Office of the Ombudsman (2013) ‘*Dealing with Asylum Seekers: Why Have We Gone Wrong?*’ *Studies Magazine*, vol.102, no.406, July 2013. The Ombudsman Act 1980, section 5(1)(e) states, ‘The Ombudsman shall not investigate any action taken by or on behalf of a person [...] if the action is one [...] taken in the administration of the law relating to aliens or naturalisation.’

<sup>75</sup> Ombudsman for Children’s Office (2014) *Annual Report 2013*, Dublin: OCO, p.7. The Ombudsman for Children Act 2002, section 11(1)(e)(i), ‘The Ombudsman for Children shall not investigate any action taken by or on behalf of a public body [...] if the action is one [...] taken in the administration of the law relating to asylum, immigration, naturalisation or citizenship.’

<sup>76</sup> IHREC (2014) *Policy Statement on Direct Provision*, Dublin: IHREC, p.13.

<sup>77</sup> In *Efe v. Minister for Justice, Equality and Law Reform* [2011] IEHC 214, Hogan J. held that judicial review constituted an adequate remedy in line with Article 13 of the ECHR for securing fundamental rights. However, he emphasised that it was a review of administrative processes rather than an appeal on new evidence. In the Supreme Court judgment in *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3, Fennelly J on behalf of the majority held that administrative decisions must be proportionate but the reviewing court could not substitute its own view for that of the administrative body. Both decisions related to the asylum determination process.

<sup>78</sup> IHREC (2014) *Policy Statement on Direct Provision*, Dublin: IHREC, p. 19.

<sup>79</sup> *Ibid.*

<sup>80</sup> The new Workplace Relations Commission (WRC) will merge the Labour Relations Commission (LRC), the National Employment Rights Authority (NERA), the Equality Tribunal, the first instance functions of the Employment Appeals Tribunal (EAT) and the first instance functions of the Labour Court while the appellate function of the EAT will transfer to a newly expanded Labour Court. See *Workplace Relations Bill 2014: Explanatory Memorandum*, Dublin: Houses of the Oireachtas.

<sup>81</sup> IHREC Designate (2014) *Report on Ireland’s 4<sup>th</sup> Periodic Report under the International Covenant on Civil and Political Rights*, Dublin: IHREC Designate, p.8.

<sup>82</sup> Houses of the Oireachtas (2014) *Workplace Relations Bill 2014: Explanatory Memorandum*, Dublin: Houses of the Oireachtas, pp.2 and 9.

to ensure that both the WRC as the first instance body, and the expanded Labour Court as the appellate body, must be independent in their functions, operate in a fully transparent manner and make their decisions available to the public.<sup>83</sup> In this regard, the IHREC welcomes the assurances given by Government that complaints under equality legislation will be treated with 'equal priority'<sup>84</sup> and the Government's legislative amendment clarifying the right of the complainant to representation.<sup>85</sup> Furthermore, **the IHREC is of the view that the proposed provisions for the right of appeal in all cases,<sup>86</sup> as well as an explicit provision for the publication of anonymised decisions,<sup>87</sup> must be maintained in the final legislation as these will help to ensure due process in both equality cases and labour rights cases.**

While the Employment Appeals Tribunal will continue its work for a limited period following the establishment of the new bodies to allow it to dispose of pending cases before it,<sup>88</sup> it is not clear how the backlog of cases before the other bodies, in particular the Equality Tribunal,<sup>89</sup> will be dealt with once the WRC is established. Given that the Equality Tribunal had suffered a reduction in capacity and developed lengthy delays,<sup>90</sup> the IHREC reiterates its previous recommendation that this delay be immediately dealt with and, in the context of the merger of the structures, that the Minister for Jobs, Enterprise and Innovation ensure that the successor body to the Tribunal be allocated the necessary resources and have the required functional capacity for the specialised and timely adjudication of claims.<sup>91</sup>

### 3.3 Access to Justice and the Scope of Legal Aid

The IHREC recognises the important nexus between the right of access to justice and the individual's ability to effectively assert ESC rights and to enjoy redress mechanisms when these rights are violated. While the Legal Aid Board (LAB), in operation since 1979, provides civil legal aid to those on modest incomes in need of legal assistance, the service provided is not free of charge and the cost is dependent on the applicant's disposable income. The LAB, in its own 2011 *Value for Money Report* recommended that in 'light of the reduced value of property in particular and reduced incomes in general the eligibility limits need to be reviewed'.<sup>92</sup> This change has not taken place and the threshold for a person's annual disposable income remains fixed at the level decided at the time of the last review in 2006. In addition to its concern at the

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<sup>83</sup> IHREC Designate (2014) *Report on Ireland's 4<sup>th</sup> Periodic Report under the International Covenant on Civil and Political Rights*, Dublin: IHREC Designate, p.8.

<sup>84</sup> Minister for State with Responsibility for Small Businesses and Collective Bargaining, Gerald Nash TD, [Seanad Debates, Workplace Relations Bill 2015: Second Stage](#), 4 February 2015.

<sup>85</sup> Section 42(11) of the Workplace Relations Bill 2015 provides for representation of the complainant by a trade union official, an official of a body representing employers, a practising solicitor or barrister, a parent/guardian for a complainant under the age of 18 or any other person who is given permission by the Adjudication Officer or Labour Court.

<sup>86</sup> Minister for State with Responsibility for Small Businesses and Collective Bargaining, Gerald Nash TD, [Seanad Debates, Workplace Relations Bill 2015: Second Stage](#), 4 February 2015. The Minister for State clarified that the legislation will provide a right of appeal from the WRC to the Circuit Court for complaints under the Equal Status Act 2000, and to the Labour Court for all other matters including complaints made under the Employment Equality Acts 1998-2011. In both instances there will be an appeal to the High Court on a point of law and the option of Judicial Review for procedural issues.

<sup>87</sup> Section 42(10) of the Workplace Relations Bill 2015 provides that: 'The Commission shall publish on the internet in such form and in such manner as it considers appropriate every decision (other than information that would identify the parties in relation to whom the decision was made) of an adjudication officer under this section.'

<sup>88</sup> Minister for State with Responsibility for Small Businesses and Collective Bargaining, Gerald Nash TD, [Seanad Debates, Workplace Relations Bill 2015: Second Stage](#), 4 February 2015.

<sup>89</sup> Discrimination in employment is dealt with by the Tribunal under the Employment Equality Acts 1998 – 2011 while discrimination outside the workplace falls under the Equal Status Acts 2000 – 2012. Complaints under the Pensions Acts 1990 – 2008 also fall within the remit of the Tribunal.

<sup>90</sup> Equality Tribunal (2013) *Annual Report 2012*, Dublin: Equality Tribunal.

<sup>91</sup> IHREC Designate (2014) *Report on Ireland's 4<sup>th</sup> Periodic Report under the International Covenant on Civil and Political Rights*, Dublin: IHREC Designate, p.8.

<sup>92</sup> Department of Justice and Equality & Department of Public Expenditure and Reform (2011) *Value for Money and Policy Review of the Legal Aid Board*, Cahirciveen: Legal Aid Board, p. 97.

barriers in the availability of civil legal aid to those on low incomes, the IHREC is concerned about the potential negative effect of the significant increases in the minimum contributions for LAB services on people who may already face substantial outgoings.<sup>93</sup>

The LAB has highlighted the ongoing pressures on its services at a time of scarce resources compounded by 'greater domestic pressures and a consequent increase in the need for legal assistance'.<sup>94</sup> Given the expansion in its remit<sup>95</sup> coupled with the legislative limitation to provide services 'within the Board's resources' without the necessary funding the LAB will experience a lack of capacity resulting in longer waiting times for clients.<sup>96</sup> The IHREC calls on the State to ensure that as different schemes are transferred to the Legal Aid Board, a fair proportion of their respective operating budgets are also transferred.

The IHREC is concerned that the Civil Legal Aid Act 1995 excludes a number of key areas of law from the LAB's remit which are directly relevant to the ability to access an effective remedy where there is a potential violation of ESC rights.<sup>97</sup> During her 2011 visit to Ireland, the UN Independent Expert on Extreme Poverty and Human Rights expressed concern at these exclusions, in particular, the restrictions on representation before quasi-judicial tribunals, recommending that the Government should 'consider including these tribunals in the legal aid scheme, as legal representation before them is vital for those living in poverty'.<sup>98</sup> **The IHREC fully supports this recommendation, and recommends the State review these exclusions in order to ensure that representation is available to vulnerable people seeking redress where their socio-economic rights may have been breached.**

### 3.4 Regulatory Processes and ESC Rights

The IHREC regrets that the State's response to the financial crisis, resulting in the 2010 European Union (EU) – International Monetary Fund (IMF) financial assistance programme of €85 billion, did not encompass a human rights or equality assessment in advance of introducing a programme of austerity measures.<sup>99</sup> While the IHREC recognises the onus placed on the State in fulfilling the terms of the agreed programme,<sup>100</sup> it also

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<sup>93</sup> In 2013, the minimum contribution by a person receiving legal advice from the Legal Aid Board rose from €10 to €30 and a person can be charged up to a maximum of €150 while the minimum contribution for legal aid rose from €50 to €130 and people may also be liable for a capital contribution depending on the amount of his or her disposable income. These fees can be made in instalments over the course of 12 months only in limited circumstances where the applicant can demonstrate that it would cause unreasonable hardship to pay it all at once. The LAB solicitor will not be able to file proceedings until the contribution is paid in full. See Legal Aid Board online, *LAB FAQ – Frequently Asked Questions* for updated costs; see also Legal Aid Board (2014) *Annual Report 2013*, Cahirciveen: Legal Aid Board.

<sup>94</sup> Department of Justice and Equality & Department of Public Expenditure and Reform (2011) *Value for Money and Policy Review of the Legal Aid Board*, Cahirciveen: Legal Aid Board, p.27.

<sup>95</sup> The Civil Law (Miscellaneous Provisions) Act 2011 extended the Board's remit to include the Family Mediation Service.

<sup>96</sup> Section 5 of the Civil Legal Aid Act 1995. Other schemes transferred to LAB include the Garda Station Legal Advice Scheme in 2011; the Legal Aid - Custody Issues Scheme (formerly titled the Attorney General's Scheme) in 2012; and the administration of the Criminal Assets Bureau Ad hoc Legal Aid Scheme in 2014.

<sup>97</sup> Section 28(9)(a) of the Civil Legal Aid Act 1995 excludes a number of areas from the scope of the legislation: defamation; disputes concerning rights and interests in or over land; civil matters within the jurisdiction of the Small Claims Court; licensing; conveyancing (other than where it is connected to a matter in respect of which legal aid or advice has already been given); election petitions; claims made in a representative, fiduciary or official capacity; claims brought by a person on behalf of a group of persons to establish a precedent on a particular point of law and any other group or representative action.

<sup>98</sup> UN Office of the High Commissioner for Human Rights (OHCHR) (2011) *Report of the UN Independent Expert on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona: Mission to Ireland*, Geneva: OHCHR, p.4. The Independent Expert noted in particular that the Employment Appeals Tribunal and the Social Welfare Appeals Office were excluded but legal aid representation is also denied before all other similar appellate tribunals, with the exception of the Refugee Appeals Tribunal (RAT).

<sup>99</sup> IHRC (2013) *Address by Des Hogan, Acting Chief Executive of the IHRC – Human Rights and Austerity in Ireland: response to CESR paper*, 12-13 June 2013, Berlin/Brussels.

<sup>100</sup> The EU-IMF bailout agreement required the State to achieve savings of €15 billion through cuts to public expenditure and tax increases. It also required the State to seek to implement certain cost-saving measures such as increasing the pension age,

notes that in its *General Comment No. 3*, the Committee emphasises the obligation on the State to ensure that ‘even in times of severe resources [sic] constraints whether caused by a process of adjustment, of economic recession, or by other factors’ that the most vulnerable are protected.<sup>101</sup> In fact, the Committee has stressed that in these situations protection of basic economic, social and cultural rights becomes even more urgent.<sup>102</sup> Under ICESCR the State is required to maximise its resources for the protection of ESC rights, including those it receives through international assistance. However, the financial policies implemented by the State since 2009 have resulted in ‘substantial income losses at all income levels’ with those on the lowest incomes experiencing a 13 per cent reduction in income, second only to the highest earners.<sup>103</sup>

Although the State exited the bailout programme in December 2013, the IHREC is concerned at the State’s continued implementation of austerity measures despite the clear effect of these measures on groups already susceptible to poverty and social exclusion.<sup>104</sup> A 2014 analysis carried out by the Economic and Social Research Institute (ESRI)<sup>105</sup> found that Budget 2015 was regressive in nature.<sup>106</sup> Following the establishment of the Economic Management Council in 2011 to make decisions on the State’s budget and financial matters, it is not clear what consideration, if any, is given to human rights and equality at the Council’s private meetings.<sup>107</sup> The IHREC notes that the ICESCR offers useful principles for monitoring the progressive realisation of human rights: specifically an adequate budgetary governance process requires transparent and reasonable justification, examination of alternatives, genuine participation, a focus on discrimination, and on-going commitment to the sustained impact and realisation of rights and independent review mechanisms.<sup>108</sup> The Commission further notes that the principle of maximum available resources can guide decision-making towards applying a proportionate level of taxation to secure resources in order to restore some retrogression of rights which took place during the crisis.<sup>109</sup>

The IHREC notes that Poverty or Social Impact Assessment<sup>110</sup> guidelines provide a useful mechanism to assess the potential impact of policy or programme decisions ‘for their likely impact on poverty and on

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introducing multi-year expenditure ceilings, cutting the minimum wage (although this was later reversed) and the introduction of water charges.

<sup>101</sup> UN Committee on Economic, Social and Cultural Rights (1990) *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23, para.12.

<sup>102</sup> UN Committee on Economic, Social and Cultural Rights (1990) *General Comment No. 2: International Technical Assistance Measures (art. 22 of the Covenant)*, 2 February 1990, E/1990/23, para.9.

<sup>103</sup> C. Keane, T. Callan, M. Savage et al (2014) *Special Article – Distributional Impact of Tax, Welfare and Public Service Pay Policies: Budget 2015 and Budgets 2009-2015*, Dublin: ESRI, p.1. Those on the highest incomes experienced a 15 per cent reduction in income compared to those on the lowest incomes who experienced a 13 per cent reduction.

<sup>104</sup> F. McGinnity, H. Russell, D. Watson et al (2014) *Winners and Losers? The Equality Impact of the Great Recession in Ireland*, Equality Authority and ESRI, p.5.

<sup>105</sup> The ESRI is an independent not-for-profit economic and social policy research institute.

<sup>106</sup> C. Keane, T. Callan, M. Savage et al (2014) *Special Article - Distributional Impact of Tax, Welfare and Public Service Pay Policies: Budget 2015 and Budgets 2009-2015*, Dublin: ESRI, p.7.

<sup>107</sup> The Committee comprises four senior Government Ministers: the Taoiseach, Tanaiste (Deputy Prime Minister), the Minister for Finance and the Minister for Public Expenditure & Reform. The Taoiseach has stated that the Committee has Cabinet status and its deliberations are confidential and enjoy constitutional protection. An Taoiseach, Enda Kenny TD, *Parliamentary Questions: Written Answers [7939/15]*, 24 February 2015.

<sup>108</sup> UN Committee on Economic, Social and Cultural Rights (2007) *General Comment No. 19: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23, para.11

<sup>109</sup> R. Balakrishnan, D. Elson, J. Heintz and N. Lusiani (2011) *Maximum Available Resources & Human Rights: Analytical Report*, New Jersey: Center for Global Women’s Leadership.

<sup>110</sup> Poverty proofing was introduced in 1998 as a commitment in the National Anti-Poverty Strategy. Following a 2005 review by the Office for Social Inclusion (OSI) the process was renamed resulting in the adoption of Poverty Impact Assessments (PIA). It is now often referred to as a Social Impact Assessment which uses an evidence-based methodology to estimate ‘the likely effects of welfare and tax policies on households across income levels and social groups’.

inequalities which are likely to lead to poverty'.<sup>111</sup> The IHREC welcomes the current development of a new Social Impact Assessment policy tool 'to assess the impact of policy on poverty and related social inequalities, as a way of ensuring greater policy coordination'.<sup>112</sup> However, it regrets that although the obligation to carry out Poverty or Social Impact Assessments applies to all State and public bodies, the Department of Social Protection's annual assessment is one of the few examples made publicly available.<sup>113</sup> The publication of this assessment only after the Budget has been finalised 'despite an ex-ante and ex-post social impact assessment (SIA) of welfare budgetary policies',<sup>114</sup> prevents an informed consideration of the potential impact on different low income groups by legislators during the budgetary process. The IHREC is concerned that the State's aspiration to incorporate a range of impact assessments including 'health, housing, gender and equality' into the Social Impact Assessment policy tool will remain unimplemented due to budget constraints as the requirement 'is dependent on resources, data quality and capacity'.<sup>115</sup> In light of this qualifying statement, the IHREC wishes to remind the State of the Committee's clear position that 'obligations to monitor the extent of the realisation, or more especially of the non-realisation, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints'.<sup>116</sup> The fact that responsibility lies with each department means there is no oversight mechanism for ensuring that even where a Department conducts a relevant assessment, that the results will influence its ultimate decision. **The IHREC recommends the State to invest in, develop and promote the wider use and publication of Social Impact Assessments as an effective monitoring tool for the impact of budgetary decision-making on the socio-economic status of people living in poverty in a range of policy areas.**

An obligation to conduct a Regulatory Impact Assessment was first introduced in 2005 to determine the proportionality of proposed legislation or regulations for its potential economic, social or environmental impact generally, or on a particular socially excluded or vulnerable group. However, it is not clear to what extent these have been embedded in the pre-legislative drafting process, nor what actual influence they bear on final decisions. Revised 2009 guidelines indicate that consultations with stakeholders should form part of this process and that the completed assessments should be published.<sup>117</sup> The inclusion of a participatory process in the guidelines reflects best practice guidance in line with international human rights standards.<sup>118</sup> However, there is a lack of information on whether these consultations routinely take place. While Finance Bills are exempt from the assessment process, revised 2009 guidelines clearly state that other 'measures announced in the Budget which will be pursued through other legislation may be suited to the RIA process'.<sup>119</sup> The IHREC notes that these assessments 'are not ordinarily undertaken' or 'considered

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<sup>111</sup> Office for Social Inclusion (2008) *Guidelines for Poverty Impact Assessments*, Dublin: Department of Social Protection, p.3.

<sup>112</sup> Department of Social Protection (2014) *Ireland: National Social Report 2014*, Dublin: Department of Social Protection, para. 3.16.

<sup>113</sup> Social Impact Assessments were carried out by the Department of Social Protection for Budgets 2013, 2014 and 2015 available at [www.socialinclusion.ie](http://www.socialinclusion.ie).

<sup>114</sup> Government of Ireland (2015) *CESCR: Reply of Ireland to the List of Issues in relation to its third periodic report*, Geneva: OHCHR, para. 11.

<sup>115</sup> Department of Social Protection (2014) *Ireland: National Social Report 2014*, Dublin: Department of Social Protection, para. 3.16.

<sup>116</sup> UN Committee on Economic, Social and Cultural Rights (1990) *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23, para.11.

<sup>117</sup> Department of the Taoiseach (2009) *Revised RIA Guidelines: How to conduct a Regulatory Impact Analysis*, Dublin: Department of the Taoiseach, p. 78.

<sup>118</sup> UN Human Rights Council, *Final draft of the guiding principles on extreme poverty and human rights, submitted by the Special Rapporteur on extreme poverty and human rights*, 18 July 2012, A/HRC/21/39, Geneva: OHCHR.

<sup>119</sup> Department of the Taoiseach (2009) *Revised RIA Guidelines: How to conduct a Regulatory Impact Analysis*, Dublin: Department of the Taoiseach, p.37.

necessary' in relation to social welfare legislation implementing budget decisions.<sup>120</sup> **The IHREC recommends the State utilise the regulatory assessment process to make explicit how it is maximising available resources. This should include an assessment of proportionate levels of taxation and revenue mechanisms to ensure that the minimum core socio-economic rights is retained and the State continues to progressively realise these rights in line with the Covenant.**

**The IHREC considers the State should develop the guidelines for Regulatory Impact Assessments, to ensure a more transparent budgetary process and to ensure the participation of those whose socio-economic rights may be most impacted by these decisions through structured consultation.**

Parliamentary Committees also provide oversight in relation to legislation and financial measures relevant to different Government Departments.<sup>121</sup> While a Parliamentary Committee may examine and make recommendations on proposed legislation, amendments to legislation that 'could have the effect of imposing or increasing a charge upon the revenue may not be moved by any member, save a member of the Government or Minister of State' in line with Article 17.2 of the Irish Constitution.<sup>122</sup> This means that only members of the Executive can make decisions on resource allocations, thereby restricting the contribution that can be made by a Parliamentary Committee. Expenditure and financial plans of relevant Government Departments are also subject to review. While Committees may consult with human rights experts and civil society organisations in relation to specific issues, time constraints mean that a more thorough analysis is not always possible and Committees are not specifically mandated to review the human rights and equality implications of decisions or legislative matters. **The IHREC welcomes the incremental step of the establishment of an Oireachtas Sub-Committee on Human Rights which will provide scrutiny and oversee the State's compliance with its obligations under both domestic and international human rights law. It is essential that this Sub-Committee be given the power to review any matter with an underlying human rights component, including legislation and decision-making relating to economic, social and cultural rights.**

### 3.5 The National Action Plan on Business and Human Rights

The Commission notes its recent submission to the Department of Foreign Affairs and Trade as part of its development of a National Action Plan on Business and Human Rights ('the National Action Plan'),<sup>123</sup> aimed at implementing the *United Nations Guiding Principles on Business and Human Rights*.<sup>124</sup> The Commission considers that the proposed National Action Plan presents a significant opportunity for ensuring that human rights and equality are embedded in the activities of Irish businesses, both at home and abroad, and for the State to outline how it meets its obligations under international law to protect human rights from being infringed by third parties, including business enterprises.<sup>125</sup>

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<sup>120</sup> Minister for Social Protection, Joan Burton TD, [Parliamentary Questions: Written Answers \[55134/13\]](#), 19 December 2013.

<sup>121</sup> These Committees include the Public Accounts Committee and a number of Joint Committees on Finance, Public Expenditure and Reform; Health and Children; Education and Social Protection; Justice, Defence and Equality; Jobs, Enterprise and Innovation; Agriculture, Food and the Marine; Foreign Affairs and Trade; Inquiry into the Banking Crisis; the Implementation of the Good Friday Agreement; Environment, Culture and the Gaeltacht; and Transport and Communications.

<sup>122</sup> Dáil Éireann (2011) *Standing Orders Relevant to Public Business together with the Oireachtas Library & Research Service Rules*, Dublin: Houses of the Oireachtas.

<sup>123</sup> Department of Foreign Affairs and Trade, 'Business and Human Rights – DFAT Call for Input', [Press Release], 13 January 2015.

<sup>124</sup> United Nations (2011) *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, New York/Geneva: UN and UN Office of the High Commissioner for Human Rights on 30 April 2015.

<sup>125</sup> The Irish Human Rights and Equality Commission has made a submission to the Department of Foreign Affairs and Trade consultation process, which will be published in due course.

The Commission recommends the establishment of a National Committee on Business and Human Rights comprising representatives from across relevant Government Departments, statutory bodies, civil society and business, with responsibility for monitoring and evaluating progress as well as overseeing the implementation of the National Action Plan. The Commission considers that the ratification of the Optional Protocol to the ICESCR, along with a number of other key international instruments,<sup>126</sup> would strengthen any future National Action Plan on Business and Human Rights which must include a strong emphasis on equality and non-discrimination, in particular gender equality and the rights of women workers.

The need to ensure adequate remedies for victims is a fundamental aspect of the *United Nations Guiding Principles on Business and Human Rights* and a key component of a State's human rights obligations. **The Commission recommends that the National Action Plan provides clarification as to how Ireland guarantees an effective remedy for human rights harms involving Irish businesses, whether occurring in Ireland or outside the State. The Commission also recommends that the Irish Government undertakes a thorough review of existing legislation and the operation of State judicial and non-judicial mechanisms to ensure access to an effective remedy and to identify and address any legal, procedural or practical barriers which may exist.**

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<sup>126</sup> The Commission also considers relevant, in the context of a National Action Plan on Business and Human Rights, the ratification of the UN International Convention on the Protection of the Rights of Migrant Workers and Members of their Families, the UN Convention on the Rights of Persons with Disabilities, and the 2014 Protocol to the International Labour Organisation, Forced Labour Convention 1930.



## Part II - Issues Related to the General Provisions of ICESCR

### 4. Non-Discrimination and Equality (Article 2)

#### 4.1 Expanding the Scope of the Equality Grounds

The Employment Equality Acts 1998 – 2011 ('Employment Equality Acts') prohibit discrimination in employment and in vocational training. The Equal Status Acts 2000 – 2012 ('Equal Status Acts') prohibit discrimination in the provision of goods and services, of accommodation and by educational establishments. Both Acts cover the nine grounds of gender, civil status,<sup>127</sup> family status, age, disability, sexual orientation, race, religion and membership of the Traveller community. Both Acts also prohibit harassment and sexual harassment and require employers and service providers to provide reasonable accommodation for people with disabilities. The IHREC notes that the State does not intend to 'extend these grounds' as it considers that they 'already fully protect the rights recognised in ICESCR'.<sup>128</sup>

##### 4.1.1 Discrimination based on Socio-Economic Status

The IHREC notes that since equality legislation was first enacted in Ireland there have been repeated recommendations to expand the equality grounds to include a prohibition on discrimination based on a person's socio-economic status.<sup>129</sup> In 2002, the former Equality Authority indicated that there was 'a relatively large degree of socio-economic discrimination in the jobs market'.<sup>130</sup> Noting the State's international human rights obligations, in particular in relation to the right to work and the right to enjoy one's own culture, the former Equality Authority asserted that '[i]mplicit in these types of rights is the need to prohibit discrimination on the grounds of social origin'.<sup>131</sup>

A 2004 report stemming from a legislative obligation to review the legislation 'with a view to assessing whether there is a need to add to the discriminatory grounds',<sup>132</sup> found that despite frequent complaints about discrimination encountered on the basis of socio-economic status, 'these concerns rarely lead to an effective legal remedy'.<sup>133</sup> Section 30(1) of the 2014 Act requires the IHREC to keep under review the

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<sup>127</sup> Section 2(1) of the Equal Status Act 2000 has been amended to replace the term 'marital status' with 'civil status' following the enactment of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 ('the 2010 Act'). Civil status means being single, married, separated, divorced, widowed, in a civil partnership within the meaning of the 2010 Act or being a former civil partner in a civil partnership that has ended by death or been dissolved.

<sup>128</sup> Government of Ireland (2015) *CESCR: Reply of Ireland to the List of Issues in relation to its third periodic report*, Geneva: OHCHR, para. 13.

<sup>129</sup> The Equality Authority (2002) *Annual Report 2001*, p.8; The Equality Authority (2002) *Review of the Discriminatory Grounds Covered by the Employment Equality Act 1998: An Equality Authority Position*, Dublin: Equality Authority, [not published online], pp.5–6; The National Economic and Social Forum (NESF) (2002) *Forum Report No. 23 – A Strategic Policy Framework for Equality Issues*, pp.7–8; Irish Human Rights Commission (IHRC) (2005) *Extending the Scope of the Employment Equality Legislation*, Dublin: IHRC, pp. 4–6; and Combat Poverty Agency (2006) *Making Economic, Social and Cultural Rights Effective: Submission to the Human Rights Commission*, Dublin: Combat Poverty Agency, p.3.

<sup>130</sup> The Equality Authority (2002) *Review of the Discriminatory Grounds Covered by the Employment Equality Act 1998: An Equality Authority Position*, Dublin: Equality Authority, [not published online], p.5.

<sup>131</sup> *Ibid.*, p.6.

<sup>132</sup> Section 6(4) of the Equality Employment Act 1998.

<sup>133</sup> S. Kilcommins, E. McClean, M. McDonagh, S. Mullally and D. Whelan (2004) *Extending the Scope of the Employment Equality Legislation: Comparative Perspectives on the Prohibited Grounds of Discrimination*, Dublin: Stationery Office, Department of Justice, Equality and Law Reform, p.11. This report also explored the possible extension of the equality grounds to prohibit discrimination based on Trade Union membership; having a criminal conviction or being an ex-offender or ex-prisoner; and political opinion.

effectiveness of the working of the equality legislation and to make proposals to the Minister for Justice and Equality in relation to any amendments that it deems necessary.<sup>134</sup>

The Committee has expressly stated that ‘[i]ndividuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society’.<sup>135</sup> While the IHREC is aware of the potential difficulties in implementing this approach, it supports the view that the inclusion of such a provision ‘would serve the objectives underpinning the adoption of equality legislation’ and ‘promote a more sophisticated intersectional approach to discrimination, leading to greater recognition of the multiple forms of discrimination that many groups face’.<sup>136</sup> The apparent difficulties highlighted in defining discrimination based on social or socio-economic status in legislation could be overcome by assessing a number of key indicators, including: levels of education and literacy; homelessness; geographical location; source and level of income; and employment status, including type of work or profession.<sup>137</sup>

Notably, in interpreting Article 40.1 of the Constitution, Irish Courts have on occasion referred to the social or socio-economic background of a person, finding that classifications and differential treatment based on social or economic status may, in certain circumstances, contravene the protection of equality guaranteed by the Constitution when these interfere with a person’s fundamental rights.<sup>138</sup> In *Redmond v. Minister for the Environment*, the Court held that ‘discriminating between human persons on the basis of money is an attack upon the dignity of those persons as human beings who do not have money’.<sup>139</sup> Herbert J. went on to state that in his ‘judgment, this is exactly the type of discrimination for which the framers of the first sentence of Article 40, section 1 of the Constitution were providing’.<sup>140</sup>

**In this context, the IHREC recommends that the State review and revise the current scope of the equality grounds with a view to amending them to include discrimination on the basis of socio-economic status.**

## 4.2 Discrimination and Employment Rights

### 4.2.1 Section 37 of the Employment Equality Act

The current legislative provisions permit positive discrimination on the grounds of religion in certain ‘religious, educational or medical institutions’, or where the employer ‘takes action which is reasonably necessary to prevent an employee or a prospective employee from undermining the religious ethos of the institution’.<sup>141</sup> The current legislation does not define ‘religious, educational institutions’ nor ‘religious ethos’. The IHREC welcomes the State’s commitment to amend Section 37 of the Employment Equality Acts

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<sup>134</sup> In 2006, the former Equality Authority and the Northern Ireland Equality Commission examined the concept of equivalence in promoting equality under the Belfast/Good Friday Agreement and considered the possibility of extending the scope of the equality grounds to include socio-economic status. They noted that despite steps taken to address poverty and social exclusion in both jurisdictions, ‘doubts must exist as to whether they are capable of effecting change without the back-up of legal sanction’. C. O’Cinneide (2006) *Equivalence in Promoting Equality: the implications of the multi-party agreement for the further development of equality measures for Northern Ireland and Ireland*, Dublin: Equality Authority, p.69.

<sup>135</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para.35.

<sup>136</sup> S. Kilcommins, E. McClean, M. McDonagh, S. Mullally and D. Whelan (2004) *Extending the Scope of the Employment Equality Legislation: Comparative Perspectives on the Prohibited Grounds of Discrimination*, Dublin: Stationery Office, Department of Justice, Equality and Law Reform, p.13.

<sup>137</sup> *Ibid.*

<sup>138</sup> Irish Human Rights Commission (IHRC) (2005) *Extending the Scope of the Employment Equality Legislation*, Dublin: IHRC, pp. 4-6,

<sup>139</sup> *Redmond v. Minister for the Environment*, [2001] 4 I.R. 61, at para.65.

<sup>140</sup> *Ibid.*

<sup>141</sup> Section 37(1)(b), Employment Equality Acts 1998-2011.

to end discrimination against public sector workers based on their family status or sexual orientation.<sup>142</sup> In 2014, the IHREC Designate, following a public consultation initiated by the former Equality Authority in 2013,<sup>143</sup> made recommendations to the Government on amending the legislation, in particular highlighting its obligations under the *European Framework Directive on Equal Treatment in Employment and Occupations* ('Framework Directive').<sup>144</sup>

The Employment Equality (Amendment) Bill 2014, currently before the Houses of the Oireachtas, seeks to amend Section 37 of the Act. In the view of the IHREC, the legislative proposal requires further amendment to ensure that it is compliant with the EU Framework Directive.<sup>145</sup> The EU Framework Directive aims to achieve a balance between the right to respect for religious freedom and the right of equality of all individuals to a workplace free from discrimination. Section 37 cannot be removed in its entirety, as the right to religious freedom enjoys both the protection of Irish Constitutional law and European law.

**The IHREC echoes the UN Human Rights Committee's Concluding Observation in 2014 calling on the State to amend Section 37 of the Employment Equality Acts 1998–2011. In the context of reforming the legislation, the IHREC reiterates its recommendations that consideration be given to the following:**

- **An institution, whether religious, educational or medical, should be able to positively discriminate only where 'adherence to a particular religious belief is a genuine, legitimate and justified occupational requirement';**
- **The types of institutions covered should be clearly defined in legislation along with the concept of 'ethos';**
- **No discrimination should be permissible if it constitutes discrimination under another one of the equality grounds; and**
- **For the purposes of taking action under Section 37(1)(b), an employer must demonstrate that the employee has engaged in 'active and significant undermining' of the institution's ethos or religious belief.**<sup>146</sup>

### **4.3 National Mechanisms to Combat Racism and Discrimination against Ethnic Minorities**

Prior to the onset of the economic recession in 2008, the State had put in place a number of policy responses in the form of anti-racism and integration measures to ensure that migrants did not suffer discrimination on the basis of race or their membership of an ethnic minority community. These responses included the *National Action Plan Against Racism* (NPAR) and *Migration Nation: Statement on Integration Strategy and Diversity Management*. In this context, the IHREC regrets the State's failure to renew the NPAR following its conclusion in 2008, noting the final report on the NPAR was entitled *Not an End – Just a*

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<sup>142</sup> Government of Ireland (2011) *Programme for Government 2011-2016: Statement of Common Purpose*, Dublin: Government of Ireland, p.13; Department of Justice and Equality [online] [Opening Remarks by Ms Frances Fitzgerald TD, Minister for Justice and Equality: Ireland's appearance before the UN Human Rights Committee on International Covenant on Civil and Political Rights, 14–15 July 2014](#), Dublin: Department of Justice and Equality.

<sup>143</sup> The IHREC received 61 submissions from a range of stakeholders including individuals, representative organisations and Trade Unions.

<sup>144</sup> Article 4(2) of the Framework Directive provides that differences in treatment will not be deemed discriminatory if a person's faith or religion constitutes 'a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos'. Council Directive 2000/78/EC.

<sup>145</sup> Irish Human Rights and Equality Commission (Designate) (2014) *Recommendation Paper re section 37 amendment*, Dublin: IHREC (Designate), para. 28.

<sup>146</sup> For a full review of Section 37 and the full list of recommendations see Irish Human Rights and Equality Commission (Designate) (2014) *Recommendation Paper re section 37 amendment*, Dublin: IHREC (Designate).

*Beginning*.<sup>147</sup> The IHREC also regrets the State's failure to fulfil its commitment outlined in *Migration Nation*<sup>148</sup> in relation to the three new integration bodies, as it was no longer deemed appropriate in 'current circumstances when State bodies are being rationalised or abolished'.<sup>149</sup>

Under the 2014 Act, the IHREC is responsible for promoting interculturalism, as well as ensuring equal treatment under EU equality law.<sup>150</sup> However, it reaffirms its position that it does not consider itself to be the appropriate body to monitor racist incidents and calls for an appropriate mechanism to be established (see also Section 3.1 of this report). While the IHREC recognises that the Office for the Promotion of Migrant Integration (OPMI), with its cross-Departmental mandate, is tasked with monitoring 'trends in racially motivated incidents and to support measures to combat racism', it notes valid concerns that following the closure of the National Consultative Committee on Racism and Interculturalism (NCCRI) in 2008,<sup>151</sup> '[t]he expertise gathered by the NCCRI, the bridge between authorities and the civil society and the unique reporting system about racist incidents were lost'.<sup>152</sup> Without a clear strategy to underpin its activities and aside from publishing the statistics on its website, it is not clear how the OPMI uses the collated statistics to inform and influence State policy in combatting racism and xenophobia.

The IHREC welcomes the commitment in the *Programme for Government* to 'promote policies which integrate minority ethnic groups in Ireland, and which promote social inclusion, equality, diversity and the participation of immigrants in the economic, social, political and cultural life of their communities'.<sup>153</sup> In this context, it also welcomes the development of a new Integration Strategy and the public consultative process undertaken by the State in this regard.<sup>154</sup>

**The IHREC urges the State to ensure that the new Integration Strategy incorporates elements of both the NPAR and the previous Integration Strategy, in particular promoting positive social inclusion measures to combat racism, intolerance and xenophobia while at the same time nominating an appropriate body to monitor such incidents when they occur in order to formulate an evidence-based response.**

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<sup>147</sup> Steering Committee of the National Action Plan Against Racism (2009) *National Action Plan Against Racism (NPAR) 2005-2008: Not an End – Just a Beginning*, Dublin: Department of Justice, Equality and Law Reform.

<sup>148</sup> Office of the Minister for Integration (2008) *Migration Nation: Statement on Integration Strategy and Diversity Management*, Dublin: Office of the Minister for Integration. The strategy proposed the establishment of a standing Commission on Integration, a Ministerial Council on Integration and a Task Force to establish future policy needs.

<sup>149</sup> Information from the Department of Justice and Equality website at: <http://www.integration.ie/website/omi/omiwebv6.nsf/page/aboutus-structures-overview-en>. The Minister Council on Integration was established in 2010 by the Office of the Minister for the Promotion of Integration but it became defunct in 2011 on the election of the new Government.

<sup>150</sup> Section 10(1), Irish Human Rights and Equality Act 2014 sets out that the IHREC is the 'body designated for the purposes of Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers'.

<sup>151</sup> The NCCRI was an independent expert body established in 1998. It sought to provide advice and to develop initiatives to combat racism and to work towards a more inclusive, intercultural society in Ireland. It closed at the end of 2008 following a cut to its budget.

<sup>152</sup> European Commission against Racism and Intolerance (2013) *ECRI Report on Ireland (fourth monitoring cycle)*, Strasbourg: Council of Europe, p.7.

<sup>153</sup> Government of Ireland (2011) *Programme for Government 2011-2016: Statement of Common Purpose*, Dublin: Government of Ireland.

<sup>154</sup> A Cross-Departmental Group has been established and has already considered integration of migrants and new communities in a number of different contexts including: promoting intercultural awareness and combating racism and xenophobia; education; social inclusion and access to public services; employment and pathways to work; and active citizenship. See <http://www.integration.ie/website/omi/omiwebv6.nsf/page/NewIntegrationStrategy-en>.

#### 4.3.1 Anti-Discrimination Measures in relation to Traveller and Roma Communities

While Travellers<sup>155</sup> have not yet been officially recognised as a distinct ethnic minority,<sup>156</sup> they are specifically protected against discrimination under equality legislation. The IHREC welcomes the *National Traveller Roma Integration Strategy* under the *EU Framework for National Roma Strategies up to 2020* but notes that in its 2014 assessment the EU Commission called on the State to develop a ‘systematic approach to tackle prejudices against the Traveller and Roma communities’.<sup>157</sup> Prior to this in 2012, the State was criticised by the EU Commission for meeting only four out of its 22 targets to promote Roma and Traveller integration, in particular highlighting the lack of data in relation to housing, health, education and employment.<sup>158</sup>

The IHREC notes the transfer of discrimination claims relating to licensed premises from the Equality Tribunal to the District Court following legislative changes in the Intoxicating Liquor Act 2003.<sup>159</sup> Prior to the change in law, many of these discrimination cases related to the refusal to licensed premises on the Traveller ground.<sup>160</sup> A 2012 review of equality cases indicated that members of the Traveller community were particularly disadvantaged by this amendment due to ‘evidential difficulties’ requiring legal representation at the outset of the case, as well as the potential risk of an award of costs against the applicant.<sup>161</sup> The review suggests that the legislative change acted as a deterrent in bringing forward discrimination cases of this type. The review also demonstrated that the change resulted in unforeseen consequences, whereby, the provision was extended to cases involving refusal of entry to other facilities where they were linked to a licensed premises.<sup>162</sup>

The IHREC is concerned that discrimination against Roma people living in Ireland persists. In 2013, Emily Logan, then Ombudsman for Children, conducted a Special Inquiry into the removal of two Roma children from their families on the basis that the children did not physically resemble their respective parents as their appearance did not conform to racial stereotypes.<sup>163</sup> The Inquiry found that in the case of one of the Roma

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<sup>155</sup> Central Statistics Office (2012) *Profile 7: Religion, Ethnicity and Irish Travellers*, Dublin: Stationery Office, p.27. Almost 30,000 members of the Traveller community were recorded as resident in the State on Census night in 2011 but there are no official statistics on the number of Roma people residing in the State. It is estimated that between 3,000 and 5,000 Roma people reside in the State.

<sup>156</sup> In November 2014, Minister of State for Equality, New Communities and Culture, Aodhán Ó Riordáin TD, announced that the State would grant ethnic minority status to Travellers within six months. See Kitty Holland, *Traveller ethnicity will be reality in six months, says Ó Riordáin*, The Irish Times, 19 November 2014.

<sup>157</sup> European Commission, Directorate-General for Justice (2014) *Report on the implementation of the EU framework for National Roma Integration Strategies*, Brussels: European Union, p.31.

<sup>158</sup> European Commission (2013), *The European Union and Roma – Country Factsheet: Ireland*, Brussels: European Commission.

<sup>159</sup> Section 19 of the Intoxicating Liquor Act 2003 amended the law to transfer the jurisdiction of such cases from the Equality Tribunal to the District Court.

<sup>160</sup> The data shows that the reports of racism by Travellers were well-founded. In 2001, of the 650 legal case files, across the nine grounds of discrimination and across all types of service, 350 legal cases in which the Equality Authority provided legal assistance concerned claims of discrimination against members of the Traveller community by staff in pubs and nightclubs. See Equality Authority (2002) *Equality Authority Annual Report 2001*, Dublin: Equality Authority, p.29; D. Fennelly (2012) *Selected Issues in Irish Equality Case Law 2008 – 2011*, Dublin: Equality Authority, pp.17–19.

<sup>161</sup> D. Fennelly (2012) *Selected Issues in Irish Equality Case Law 2008 – 2011*, Dublin: Equality Authority, p.18.

<sup>162</sup> In *Dunne & Anor v. Planet Health Club*, DEC-S2011-018 the complainants’ gym membership was revoked after two months allegedly on the basis of their membership of the Traveller community. When they lodged a complaint of discrimination, the defendants informed the Equality Tribunal that the gym was part of an entertainment centre which included a licensed premises meaning that the complaint fell within the jurisdiction of the District Court rather than the Tribunal. See D. Fennelly (2012) *Selected Issues in Irish Equality Case Law 2008 – 2011*, Dublin: Equality Authority, p.18.

<sup>163</sup> E. Logan (2014) *Garda Síochána Act 2005 (Section 42) (Special Inquiries relating to Garda Síochána) Order 2013: Report of Ms Emily Logan*, Dublin: Department of Justice and Equality.

children affected, his 'ethnicity was so influential in determining the decision to remove him from the care of his parents, with no objective or reasonable justification' that it amounted to ethnic profiling.<sup>164</sup>

**The IHREC encourages the State to collate and collect statistics on the number of Traveller and Roma people resident in Ireland to inform tailored policies to address the discrimination faced by Traveller and Roma individuals and communities, particularly in accessing their economic, social and cultural rights under the Covenant.**

**The IHREC notes the lack of available data from the District Court on the number of alleged cases of discrimination under the Intoxicating Liquor Act and recommends the State carry out an analysis of these cases to determine whether the changes to the legislation have had a disproportionate impact on members of the Traveller community.**

**The IHREC reiterates the recommendations of the former Ombudsman for Children in the context of the Special Inquiry and calls on the State to ensure that protocols and cultural competence training for the Garda Síochána (police) are put in place.**

#### **4.4 The Rights of Persons with Disabilities in the Irish Context**

In its 2002 Concluding Observations the Committee noted its regret that the Disability Bill did 'not adopt a human rights based approach'.<sup>165</sup> The IHREC notes that the ensuing Disability Act 2005 ('the 2005 Act') was enacted providing for an assessment of need for persons with disabilities.<sup>166</sup> However, significant elements of the legislation have not yet been fully implemented.<sup>167</sup> Moreover, the more limited definition of disability in the 2005 Act, as distinct to that contained in the Employment Equality Acts, has been described as 'problematic in ensuring a holistic approach to the barriers faced by people with disabilities in accessing support to work in the open labour market'.<sup>168</sup>

The *National Disability Strategy* is considered the cornerstone of the State's response to upholding the rights of persons with disabilities. The Commission notes that this was developed in 2004 before the CPRD came into force in 2008 and should be updated to reflect the provisions of the CPRD.

**The IHREC recommends the State review the various definitions of disability in relevant statutory provisions to ensure they are not in conflict with each other. The commission further recommends that the State ratify the CPRD as a matter of priority and revise its National Disability Strategy to reflect the provisions of the Convention.**

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<sup>164</sup> E. Logan (2014) *Garda Síochána Act 2005 (Section 42) (Special Inquiries relating to Garda Síochána) Order 2013: Report of Ms Emily Logan*, Dublin: Department of Justice and Equality, p.66.

<sup>165</sup> UN Committee on Economic, Social and Cultural Rights (2002) *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland*, Geneva: Office of the High Commissioner for Human Rights, para. 14.

<sup>166</sup> Section 8, Disability Act 2005.

<sup>167</sup> Part 2 of the 2005 Act has not yet been fully implemented. See Inclusion Ireland (2013) *Implementing the National Disability Strategy: Inclusion Ireland Position Paper*, Dublin: Inclusion Ireland, p. 9. 'At present only children who were born after 01 June 2002 are entitled to apply for an assessment of needs under the Act (regardless of their age at time of application). The Act was to be commenced for those children aged 5-18 years in tandem with the implementation of the Education for Persons with Special Educational Needs (EPSEN) Act 2004. It is a requirement under the Disability Act that assessments of need are completed within six months of receipt of an application'.

<sup>168</sup> Centre for Disability Law and Policy (2010) *Submission to the Review of the Operation of the Disability Act 2005*, Galway: National University of Ireland Galway.

## 4.5 Equality Impacts of Austerity Measures

The Committee is unequivocal in its interpretation of Article 2(2) of the Covenant that the State should guarantee the enjoyment of economic, social and cultural rights without discrimination of any kind. This includes an obligation on the State to ensure that its economic and budgetary policies do not disproportionately impact on disadvantaged groups, and to ‘adopt appropriate preventive measures to avoid the emergence of new marginalised groups’.<sup>169</sup> In this context, the IHREC notes that while the recession and austerity measures have had a detrimental impact on a range of societal groups who are traditionally recognised as being disadvantaged, some groups have been hit harder or may be more susceptible to unemployment, lower incomes, or poorer living standards.<sup>170</sup>

### 4.5.1 Gender-Impact of Austerity Measures

The IHREC notes that research published by the ESRI and the former Equality Authority in 2014 found that the dramatic increase in unemployment displayed a ‘strong gender dimension’ as male-dominated industries, including the agriculture, manufacturing and the construction industries, were particularly impacted.<sup>171</sup> While the gap between employment rates for men and women has narrowed since the onset of the recession, this has been described as a ‘levelling down’ rather than signifying progress in achieving greater gender equality in the labour market.<sup>172</sup> Male unemployment rates were subject to a sharper decline than female unemployment rates while the long-term rise in female labour market participation rates effectively came to a standstill.<sup>173</sup> (See Section 5.2 below for further details.)

### 4.5.2 Effect of Recession on Young People

The IHREC notes that unemployment during the recession had a profound effect on young people seeking access to the labour market. Between 2006 and 2012, the youth unemployment rate more than tripled, rising from 9.9 to 33 per cent while the unemployment rate for the general population rose from 4.6 to 15 per cent in the same period.<sup>174</sup> While the high rate of youth unemployment has started to fall, the IHREC recognises that a number of factors are relevant including demographic changes, higher numbers of young people remaining in education rather than job-seeking and the impact of emigration.<sup>175</sup>

The IHREC is concerned that legislative amendments to introduce age-related reduced social security payments for jobseekers aged 26 years and under have resulted in differential treatment based solely on age.<sup>176</sup> The Committee is clear that ‘differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective’ and that ‘a lack of available resources’ cannot be used to justify such treatment ‘unless every effort has been made to use all resources that are at the State party’s disposition in an effort to address and eliminate the discrimination, as

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<sup>169</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para. 38.

<sup>170</sup> F. McGinnity, H. Russell, D. Watson, G. Kingston & E. Kelly (2014) *Winners and Losers? The Equality Impact of the Great Recession in Ireland*, Dublin: Equality Authority & Economic and Social Research Institute.

<sup>171</sup> *Ibid.*

<sup>172</sup> *Ibid.*, pp.7 and 14.

<sup>173</sup> *Ibid.*, p.17.

<sup>174</sup> E. Kelly, S. McGuinness, P.J. O’Connell, D. Haugh and A. Gonzalez Pandiella (2015) *ESRI Research Bulletin: Impact of the Great Recession on Unemployed Youth and NEET Individuals*, Dublin: Economic and Social Research Institute.

<sup>175</sup> Department of Social Protection (DSP) (2014) *Ireland: National Social Report*, Dublin: DSP, pp.3–4.

<sup>176</sup> Section 142A of the Social Welfare (Consolidation) Act 2005 as amended by Section 9 of the Social Welfare and Pensions Act 2013.

a matter of priority'.<sup>177</sup> The current rate of payment to people under the age of 26 falls below the weekly basic minimum income standard set by the State at €186.<sup>178</sup>

**The IHREC urges the State to take concrete measures to address the high youth unemployment rate and ensure that any of its measures do not impact disproportionately on this already disadvantaged societal group. In this context, the IHREC recommends the State reconsider its position on reduced rate jobseeker payments for people under the age of 26.**

#### **4.5.3 Impact of Recession in relation to Ethnicity and Nationality**

While unemployment levels for immigrants continue to be higher than those for Irish citizens, evidence suggests that this is due to the continuance of 'pre-recession disadvantages' rather than a direct cause of the recession.<sup>179</sup> However, the IHREC notes that migrants are more likely to be unemployed than Irish nationals and African nationals tend to experience higher levels of unemployment than other groups with an unemployment rate of 30 per cent in 2013 compared with an average unemployment rate of 13.1 per cent in the same year.<sup>180</sup> Migrant women, younger migrants and older migrants were also more likely to be unemployed.<sup>181</sup>

Moreover, members of the Black African ethnic group were seven times more likely to experience discrimination when seeking work than members of the White Irish group, regardless of age, gender and level of educational attainment.<sup>182</sup> Non-Irish EU migrants from ethnic minorities also reported higher levels of discrimination while job-hunting and in the workplace than both White Irish people and their White EU counterparts.<sup>183</sup> The experience of migrant jobseekers arriving in Ireland after the onset of the recession suggests that migrants continue to be at greater risk of facing discrimination than their Irish counterparts when looking for work in the Irish labour market.<sup>184</sup>

**The IHREC recommends the State to put in place a policy response to reduce the rate of discrimination faced by migrants, particularly Black Africans or people from ethnic minorities, when job-seeking or in the workplace.**

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<sup>177</sup> UN Committee on Economic, Social and Cultural Rights (CESCR) *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para.13.

<sup>178</sup> The State has set Supplementary Welfare Allowance, the basic minimum income standard payment which is based on a means-test for people who do not qualify for other social security payments.

<sup>179</sup> F. McGinnity, H. Russell, D. Watson, G. Kingston & E. Kelly (2014) *Winners and Losers? The Equality Impact of the Great Recession in Ireland*, Dublin: Equality Authority & Economic and Social Research Institute, p.13.

<sup>180</sup> F. McGinnity, E. Quinn, G. Kingston and P. O'Connell (2014) *Annual Monitoring Report on Integration 2013*, Dublin: Economic and Social Research Institute & the Integration Centre, p. 11.

<sup>181</sup> *Ibid.*

<sup>182</sup> G. Kingston, P.J. O'Connell and Elish Kelly (2012) *Ethnicity and Nationality in the Irish Labour Market: Evidence from the QNHS Equality Module 2010*, Dublin: Equality Authority & the Economic and Social Research Institute, p. 46.

<sup>183</sup> *Ibid.*, p.37.

<sup>184</sup> *Ibid.*, p.x.



## 5. The Equal Right of Men and Women to the Enjoyment of Economic and Social Rights (Article 3)

### 5.1 Constitutional Position of Women

The IHREC regrets that Article 41.2 of the Irish Constitution<sup>185</sup> continues to perpetuate stereotypical attitudes towards the role of women in Irish society despite repeated calls at both the national and international level to amend or remove it.<sup>186</sup> In February 2013, the Convention on the Constitution recommended amending Article 41 by inserting an explicit provision on gender equality and including gender-neutral language in Article 41.2.1. The IHREC welcomes these recommendations and welcomes the establishment by the Government of a dedicated Departmental Task Force within the Department of Justice and Equality to consider their implementation.<sup>187</sup> Although the Departmental Task Force submitted its report to Government in December 2014,<sup>188</sup> it has not yet been published and the IHREC considers it regrettable that a referendum on this issue is unlikely to take place during the lifetime of the current Government.<sup>189</sup>

**In this regard, the IHREC urges the State to publish the report of the Departmental Task Force as soon as possible to prevent further delay in progressing the repeated recommendations at the national and international level to amend or remove Article 41.2 of the Constitution.**

### 5.2 Gender Pay Gap and Equal Access to Employment

The IHREC notes that access to gender equality in employment continues to be an issue for women seeking to exercise their right to work and receive fair pay. There is a concern that ‘the dilution of gender mainstreaming approach to policy formation’ could mean that ‘austerity policies will undermine hard-won progress on gender equality and will aggravate gender differences in employment’.<sup>190</sup> The gender pay gap,

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<sup>185</sup> Article 41.2 of the Constitution of Ireland states:

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. 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.

<sup>186</sup> Recommendations have been made by the following bodies: Commission on the Status of Women (1993) *Report of the Second Commission on the Status of Women*, Dublin: Government Publications, p.27; Constitution Review Group (1996) *Report of the Constitution Review Group* Dublin: Government Publications, pp.333-334; The All-Party Oireachtas Committee on the Constitution (2006) *Tenth Progress Report: The Family*, Dublin: Government Publications, p.127; UN Human Rights Committee, *Concluding Observations on Ireland’s Third Periodic Report*, CCPR/C/IRL/CO/3, 2008, para.10; UN Human Rights Committee (2014) *Concluding Observations on Ireland’s Fourth Periodic Report*, CCPR/C/IRL/CO/4, para.7; Committee on the Elimination of Discrimination against Women (2005) *Concluding Comments: Ireland*, CEDAW/C/IRL/CO/4-5, 2005, paras 24–25; IHRC (2005) *Report to the UN Committee on the Elimination of Discrimination Against Women (CEDAW)*, Dublin: IHRC, p.2; IHRC (2014) *Submission to the UN Universal Periodic Review Mid-Term Report*, Dublin: IHRC, p.3; IHREC Designate (2014) *Submission to the UN Human Rights Committee on the Examination of Ireland’s Fourth Periodic Review under the International Covenant on Civil and Political Rights*, Dublin: IHREC Designate, paras.36-37.

<sup>187</sup> The need for a Departmental review is stated to be on the basis that the Convention’s recommendation for the amended text of Article 41.2 to make reference to carers is a ‘new element’ which requires consideration in consultation with relevant Government Departments. The IHREC notes, however, that the Constitution Review Group in its *Report* (1996) at pp. 311-312 suggested a revised form of Article 41.2 which would make reference to carers, in the following terms:

‘The State recognises that home and family life gives to society a support without which the common good cannot be achieved. The State shall endeavour to support persons caring for others within the home’.

<sup>188</sup> Minister for Justice and Equality, Frances Fitzgerald TD, *Parliamentary Questions: Written Answers [8060/15]*, 24 February 2015.

<sup>189</sup> The IHREC also notes the State’s national response to Beijing +20: Gender Equality Division, Department of Justice and Equality (2014) *Towards True Gender Equality in Ireland: Implementing the UN Beijing Platform for Action 1995 Periodic Report for Beijing +20*, Dublin: Department of Justice and Equality.

<sup>190</sup> Gender impact assessments were not carried out on the two agreements on pay and working conditions in the public service, the *Croke Park Agreement 2010 – 2014* and the *Haddington Road Agreement 2013 – 2016* despite the high number of women who would be affected by changes to their terms of employment. H. Russell, F. McGinnity and G. Kingston (2014) *Gender and the Quality of Work: From Boom to Recession*, Dublin: Equality Authority & the Economic and Social Research Institute, p.54.

gender segregation in different sectors and different working patterns all contribute to this lack of equality.<sup>191</sup>

Although a key objective of the *National Women's Strategy 2007-2016* is to reduce the gender pay gap, the IHREC is concerned that it has instead increased from 12.6 per cent in 2008 to 14.4 per cent in 2014.<sup>192</sup> Furthermore, the pension gender gap stands at 38.2 per cent, up almost 6 percentage points since 2008.<sup>193</sup> The pay differential for women in the public sector is much lower than in the private sector and while the IHREC notes that women form almost two-thirds of the civil service workforce, it is concerned that the vast majority of better-paid senior positions at the top four civil service grades are filled by men,<sup>194</sup> suggesting the continued existence of a glass ceiling in the public sector.

Between 2008 and 2013, female employment rates dropped from 64.1 to 60.3 per cent while male rates fell from 81.4 to 70.9 per cent.<sup>195</sup> In 2014, the European Commission, in its annual report on gender equality in the EU, noted that 'most of the countries with women's employment rates below the EU average have fallen further behind during the crisis' including Ireland.<sup>196</sup> The IHREC notes the UN Committee's interpretation of Article 3 of ICESCR in which it calls on States to ensure that 'in law and in practice, men and women have equal access to jobs at all levels and all occupations'<sup>197</sup> and obliges States to take measures, including the adoption of 'temporary special measures to accelerate women's equal enjoyment of their rights'.<sup>198</sup>

The IHREC is concerned that despite women being more educated than men, lower female employment participation rates persist and women continue to be employed in less senior positions than men.<sup>199</sup> While the gap in employment rates has reduced, as outlined above (see also section 4.5.1 of this report), this is due to a 'levelling down' of male employment rates rather than an increase in women's labour market participation.<sup>200</sup> Thirty-four per cent of women continue to work part-time compared with only 12.7 per cent of men. Women continue to be overrepresented in clerical roles while only a third of employees in management roles are women.<sup>201</sup> This inevitably leads to women being paid less due to the nature of the work. The IHREC notes the stagnation to female participation rates caused by the onset of the recession, particularly as significant progress had been made since the 1990s and this had been set to continue.<sup>202</sup>

**In this context, due to the fall in employment rates generally and the drop in female participation rates specifically, the IHREC recommends the State to adopt measures to equalise the participation of women**

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<sup>191</sup> *Ibid.*, pp. 50-54.

<sup>192</sup> Eurostat 'International Women's Day: 8 March 2015, Women earned on average 16% less than men in 2013 in the EU' [media release], 5 March 2015.

<sup>193</sup> European Commission (2015) *Report on Equality between Women and Men 2014*, Brussels: European Commission, p.58.

<sup>194</sup> Central Statistics Office (2014) *Men and Women in Ireland 2013: Civil Service general service grades*, [online statistics, accessed 18 March 2015].

<sup>195</sup> European Commission (2015) *Report on Equality between Women and Men 2014*, Brussels: European Commission, p.8.

<sup>196</sup> *Ibid.*, p.40.

<sup>197</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)*, 11 August 2005, E/C.12/2005/4, para.23.

<sup>198</sup> *Ibid.*, para.21.

<sup>199</sup> Department of Justice and Equality (2013) *Towards Gender Parity in Decision-Making in Ireland: An Initiative of the National Women's Strategy 2007-2016*, Dublin: Department of Justice and Equality, para.73.

<sup>200</sup> F. McGinnity, H. Russell, D. Watson, G. Kingston & E. Kelly (2014) *Winners and Losers? The Equality Impact of the Great Recession in Ireland*, Dublin: Equality Authority & Economic and Social Research Institute, pp. 7 and 14.

<sup>201</sup> Eurostat 'International Women's Day: 8 March 2015, Women earned on average 16% less than men in 2013 in the EU' [media release], 5 March 2015.

<sup>202</sup> F. McGinnity, H. Russell, D. Watson, G. Kingston & E. Kelly (2014) *Winners and Losers? The Equality Impact of the Great Recession in Ireland*, Dublin: Equality Authority & Economic and Social Research Institute, p.17.

and men in the labour force. The State should also take steps to close the gender pay gap and ensure that women receive equal pay for equal work.

In order to ensure effective equality monitoring, the IHREC recommends the State to put in place a system to collate 'gender disaggregated data on key indicators'<sup>203</sup> to inform policy-making aimed at improving gender disparities in employment.

### 5.3 The Gender Implications of Access to Affordable Child Care

The high cost of quality childcare in Ireland has detrimental consequences for women's enjoyment of the right to work as well as impeding their opportunities for promotion. In this context, the European Commission has identified 'limited access to affordable and quality childcare' as 'a barrier to increased female labour market participation'.<sup>204</sup> While the European Commission notes that the State has made 'limited progress' in addressing 'low intensity of households', it highlights that no progress has been made to improve access to 'affordable and full-time childcare'.<sup>205</sup> Notably, Ireland has the highest childcare costs in the European Union as a percentage of family income.<sup>206</sup> The State attributes the 'comparatively high cost of delivering childcare' to the requirement for a high staff ratio to ensure a good quality service,<sup>207</sup> but the childcare provided must be of an adequate standard, as well as accessible.

The State has an obligation under ICESCR to reduce barriers for working parents by 'promoting adequate policies for childcare'.<sup>208</sup> The IHREC recognises that the State has put in place some measures to address the deficiencies in the availability of affordable childcare, but considers these to be inadequate and limited in scope. The free pre-school year does not provide adequate childcare to facilitate women's greater participation in the labour force due to the part-time nature of the scheme,<sup>209</sup> resulting in only a partial reduction of costs for working parents who are required to pay additional costs.

The IHREC notes that the lack of affordable childcare affects women of all socio-economic backgrounds. Access to affordable childcare services would help to 'reduce labour-market inequality by promoting continuity of employment, particularly for low-qualified mothers' who are typically more reliant on support from relatives to provide childcare.<sup>210</sup> In relation to 'mothers who wish to engage in activities including the long hours culture associated with management, corporate and State Board commitments and politics',

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<sup>203</sup> H. Russell, F. McGinnity and G. Kingston (2014) *Gender and the Quality of Work: From Boom to Recession*, Dublin: Equality Authority & the Economic and Social Research Institute, p.vii.

<sup>204</sup> European Commission (2015) *Country Report Ireland Including an In-Depth Review on the Prevention and Correction of Macroeconomic Imbalances*, Brussels: European Commission, p.2.

<sup>205</sup> *Ibid.*

<sup>206</sup> For low income families including lone parents, childcare can cost up to 40 per cent of their total income compared to 24 per cent of the income of a family with two incomes; however, even this lower percentage is still double that of the EU average. See OECD (2014) *Benefits and Wages: Statistics* [online database accessed 18 March 2015].

<sup>207</sup> Department of Justice and Equality (2013) *Towards Gender Parity in Decision-Making in Ireland: An Initiative of the National Women's Strategy 2007-2016*, Dublin: Department of Justice and Equality, para.69.

<sup>208</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)*, 11 August 2005, E/C.12/2005/4, para.24.

<sup>209</sup> The free pre-school year is available to all children between the ages of 3 years and 2 months and 4 years and 7 months in September of the relevant year, entitling them to 15 hours of childcare services weekly for 38 weeks of the year.

<sup>210</sup> F. McGinnity, A. Murray and S. McNally (2013) *Growing up in Ireland: Mothers' Return to Work and Childcare Choices for Infants in Ireland – Infant Cohort Report 2*, Dublin: Department of Children and Youth Affairs, p.8.

there are concerns that they are impeded in advancing their careers by the lack of childcare arrangements to cover atypical hours.<sup>211</sup>

**The IHREC recommends that the State review the free pre-school year and take measures to supplement this initiative in order to ensure the provision of high quality, affordable and flexible childcare arrangements to facilitate the participation of more women in the labour force.**

#### 5.4 Women in Leadership Positions

The IHREC notes that one of the key aims of the *National Women's Strategy 2007 – 2016* (NWS) is to address the democratic deficit that the State recognises has economic, social and cultural impacts. Also the 2011 *Programme for Government* contains a commitment 'to strive to ensure that every one of our citizens has an effective right, free from discrimination, to contribute to the economic, social and cultural life of the nation'.<sup>212</sup> The IHREC is concerned that the significant reduction in public expenditure on gender equality initiatives since the beginning of the recession represents a regressive move on the part of the State which could negatively affect women's enjoyment of their socio-economic rights.<sup>213</sup> The establishment in 2010 of a Sub-Committee of the NWS Monitoring Committee to specifically address the low number of women in decision-making roles<sup>214</sup> was a welcome development but further implementation of its recommendations is required.

The IHREC welcomes the enactment of the Electoral (Amendment) Political Funding Act 2012 ('2012 Act') which provides that State funding received by a political party will be reduced by five per cent unless at least 30 per cent of its candidates at the preceding general election were women and at least 30 per cent were men. The 2012 Act also provides for a further increase to a minimum 40 per cent of candidates of each gender seven years after the general election where this provision first applies. Given the current situation where only 16 per cent of elected representatives in the Dáil (Lower House) and 27 per cent of Cabinet Ministers are women,<sup>215</sup> the IHREC regrets the delay in implementing an increase in gender quotas in subsequent elections.

Despite the State's commitment in 1993 to increase the proportion of women on corporate and State boards to 40 per cent,<sup>216</sup> this figure has remained static at 34 per cent for a number of years and women continue to be under-represented in economic portfolios. The announcement in 2014 of a 'pilot project to develop a talent bank of women who would be prepared to serve on State Boards, as a resource to be made

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<sup>211</sup> Department of Justice and Equality (2013) *Towards Gender Parity in Decision-Making in Ireland: An Initiative of the National Women's Strategy 2007 – 2016*, Dublin: Department of Justice and Equality, para.69.

<sup>214</sup> Government of Ireland (2011) *Programme for Government 2011-2016: Statement of Common Purpose*, Dublin: Government of Ireland, p.2

<sup>213</sup> In response to the unemployment crisis and to achieve further savings, funding for the Equality for Women's Measure was reduced from €31.75 million to less than €12 million for the period 2008 to 2013 resulting in 'more modest positive actions than had been envisaged originally'. For more information see Department of Justice and Equality (2013) *Towards Gender Parity in Decision-Making in Ireland: An Initiative of the National Women's Strategy 2007-2016*, Dublin: Department of Justice and Equality, para.13.

<sup>214</sup> Department of Justice and Equality (2011) *Implementing the National Women's Strategy 2007-2016: Progress 2010*, Dublin: Department of Justice and Equality, p.7. The Sub-Committee was chaired by the Minister of State for Equality and comprised representatives from the Departments of Justice and Equality; Education and Skills; Foreign Affairs and Trade; Public Expenditure and Reform as well as social partners including the Equality Authority; Community and Voluntary Pillar; Irish Congress of Trade Unions (ICTU); Irish Business and Employers Confederation (IBEC) and the National Women's Council of Ireland.

<sup>215</sup> European Commission (2015) *Report on Equality between Women and Men 2014*, Brussels: European Commission, p.59.

<sup>216</sup> Commission on the Status of Women (1993) *Report of the Second Commission on the Status of Women*, Dublin: Government Publications.

available to Ministers and other nominating bodies',<sup>217</sup> while long overdue, is a welcome development. However, the IHREC considers that more can be done to ensure more women are included in high-level decision-making. The IHREC notes that while women make up 45 per cent of the work force, less than one-third of them are employed in senior positions as managers, directors or senior officials<sup>218</sup> and less than one-fifth of Local Authority elected representatives are women.<sup>219</sup> Under the 2014 Act, the general membership of the IHREC must be made up of an equal number of men and women in addition to the Chief Commissioner.<sup>220</sup>

**In recognition of the State's obligation under ICESCR '[t]o promote equal representation of men and women in public office and decision-making bodies',<sup>221</sup> the IHREC recommends the State put in place further measures to strengthen the inclusion of more women in political decision-making.**

## 5.5 Historical Situations of ESC Rights Violations Against Women and Remedies

The IHREC notes that the crosscutting prohibition on gender-based discrimination, a right clearly defined in ICESCR and other relevant human rights instruments to which the State is a party, has been central to a number of controversies uncovered in recent years involving the State's treatment of women on the basis of stereotypical and discriminatory attitudes. While mostly related to past or historical events, as outlined below, the IHREC is concerned that this mistreatment of thousands of women has had long-lasting and continuing repercussions for their enjoyment of their socio-economic rights, including their rights to health, social security and education and their labour-related rights.

### 5.5.1 Magdalen Laundries

The IHREC is concerned that the rights of more than 11,000 women<sup>222</sup> were systematically violated while living in institutions known as Magdalen Laundries,<sup>223</sup> through the mistreatment to which they were subjected. The IHREC is of the view that these women and girls were victims of forced or compulsory labour in contravention of Ireland's obligations under the International Labour Organisation (ILO) Forced Labour

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<sup>217</sup> Minister of State for Equality, New Communities and Culture, Aodhán Ó Ríordáin TD, [press release] '[Government approves new measures to promote gender balance on State Boards](#)', 24 July 2014.

<sup>218</sup> Central Statistics Office (2015) *Quarterly National Household Survey: Quarter 4 2014*, Table 4.

<sup>219</sup> Central Statistics Office (2014) *Men and Women in Ireland 2013: Women and Men in Decision Making*, [online statistics, accessed 18 March 2015].

<sup>220</sup> Section 12(2), Irish Human Rights and Equality Commission Act 2014. Currently there are seven male and seven female members of the Commission with a female Chief Commissioner.

<sup>221</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)*, 11 August 2005, E/C.12/2005/4, para.21.

<sup>222</sup> M. McAleese (2013) *Report of the Inter-Departmental Committee to establish the facts of State involvement in Magdalen Laundries: Chapter 8 Findings of Statistical Analysis*, Dublin: Department of Justice and Equality.

<sup>223</sup> The following extract is taken from IHRC (2010) *Assessment of the Human Rights Issues Arising in Relation to the 'Magdalen Laundries'*, Dublin: IHRC, p.4:

'There is no established definition of what constitutes a Magdalen Laundry. The information available to the IHRC indicates that the origins of Ireland's Magdalen Laundries stretches back to 1767 when the first refuge for "fallen women" was opened in Dublin. The first Magdalen Laundries in Ireland were founded and run by members of Church of Ireland denominations before being taken over by Roman Catholic orders in the nineteenth century. The name adopted by the institutions was influenced by the biblical figure of the prostitute, Mary Magdalene, as a role model for repentance and spiritual regeneration. As the name denotes, during the twentieth century Magdalen Laundries operated as private-for-profit laundry enterprises in which the women and girls living in the institutions were expected to work in order to "earn their keep". Magdalen Laundries are not to be confused with State run, and religious order managed, institutions which also operated laundries in Ireland for much of the twentieth century and in which mainly children worked. Similarly, Magdalen Laundries should not be confused with the small numbers of Church of Ireland and Roman Catholic managed laundries which also operated in the State during this period but which do not appear to have been referred to as "Magdalen laundries".'

Convention and as a result were denied their basic rights to education, fair wages and social security,<sup>224</sup> all of which are enshrined in ICESCR.

While an Inter-Departmental Committee (IDC), was established in 2011 on foot of a recommendation by the UN Committee Against Torture,<sup>225</sup> it fell short of the full independent statutory mechanism to investigate the State's role in the Laundries as recommended by the former IHRC in its initial assessment of the system.<sup>226</sup> Notably, the IDC's fact-finding report did not specifically consider the State's responsibilities to the women or make any findings of liability in accordance with the requirements relating to the right to an effective remedy. In 2013, the former IHRC conducted a follow-up report to its 2010 human rights assessment as it had not been in a position to carry out a thorough analysis due to the lack of available information at that earlier time.<sup>227</sup>

The IDC's finding of significant State involvement in the Laundries and the Taoiseach's public apology in February 2013 were both welcome steps in recognising the mistreatment of women and girls placed in the Laundries. However, in the opinion of the IHREC, the subsequent establishment of the 'ex gratia' redress scheme under the supervision of Mr Justice John Quirke, as set out in the 2013 Magdalen Commission Report (the 'Quirke report'),<sup>228</sup> does not constitute an adequate remedy. Specifically it does not take into account the applicant's individual circumstances when assessing claims for compensation. Nor does it provide the full range of measures necessary 'to ensure to the greatest extent possible the restitution and rehabilitation of the women' as recommended by the IHRC in its 2013 report.<sup>229</sup>

The IHREC welcomes the Redress for Women in Certain Institutions Bill 2014 currently passing through the Houses of the Oireachtas, subject to certain amendments proposed by the Minister for Justice and Equality to implement in full the recommendations as set out in the Quirke Report. This provision for an enhanced medical card with no restrictions on the type of General Practitioner the holder can access.<sup>230</sup> Mr Justice Quirke's recognition of forced labour is a welcome development. However, the IHREC notes that while Magdalen Laundry survivors of pensionable age will receive a payment equivalent to the contributory state pension, the administrative scheme does not allow for the back-payment of arrears.<sup>231</sup> Thus, women who

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<sup>224</sup> IHRC (2013) *IHRC Follow-Up Report on State Involvement with Magdalen Laundries*, Dublin: IHRC.

<sup>225</sup> UN Committee Against Torture, *Concluding Observations on Ireland's Initial Report*, CAT/C/IRL/CO/1, 2011, at paras 21-22. The Committee expressed grave concerns 'at the failure by the State party to protect girls and women who were involuntarily confined between 1922 and 1996 in the Magdalen Laundries, by failing to regulate their operations and inspect them, where it is alleged that physical, emotional abuses and other ill-treatment were committed amounting to breaches of the Convention'. Concern was also expressed in respect of "the failure by the State party to institute prompt, independent and thorough investigation into the allegations of ill-treatment perpetrated on girls and women in the Magdalene Laundries". That Committee further recommended that the State 'institute prompt, independent, and thorough investigations into all allegations of torture, and other cruel, inhuman or degrading treatment or punishment that were allegedly committed in the Magdalen Laundries, and, in appropriate cases, prosecute and punish the perpetrators with penalties commensurate with the gravity of the offences committed, and ensure that all victims obtain redress and have an enforceable right to compensation including the means for as full rehabilitation as possible'.

<sup>226</sup> IHRC (2010) *Assessment of the Human Rights Issues Arising in Relation to the 'Magdalen Laundries'*, Dublin: IHRC.

<sup>227</sup> IHRC (2013) *IHRC Follow-Up Report on State Involvement with Magdalen Laundries*, Dublin: IHRC.

<sup>228</sup> J. Quirke (2013) *Magdalen Commission Report: Report of Mr Justice John Quirke on the establishment of an ex gratia Scheme and related matters for the benefit of those women who were admitted to and worked in the Magdalen Laundries*, Dublin: Department of Justice and Equality.

<sup>229</sup> IHRC (2013) *IHRC Follow-Up Report on State Involvement with Magdalen Laundries*, Dublin: IHRC, pp.125-6.

<sup>230</sup> See comments of Minister for Justice and Equality, Frances Fitzgerald TD to the Select Committee on Justice Defence and Equality during the *Committee Stage of the Redress for Women in Certain Institutions Bill 2014* on 4 February 2015.

<sup>231</sup> See J. Quirke (2013) *Magdalen Commission Report: Report of Mr Justice John Quirke on the establishment of an ex gratia Scheme and related matters for the benefit of those women who were admitted to and worked in the Magdalen Laundries*, Dublin: Department of Justice and Equality, p. 39 which states:

had already reached the eligible age of 66 years prior to the establishment of the scheme will not receive the equivalent of their full pension entitlements. Furthermore, it is regrettable that the State's approach to compensation is based on the amount of time a woman spent in the Laundries with graduated lump-sum payments granted up to a maximum of ten years, rather than on her individual experience of the Laundries,<sup>232</sup> particularly when it is well established that some women spent more than a decade in these institutions.<sup>233</sup>

The failure of the State to apply a human rights framework to the investigation and redress scheme has led to the further denial of the rights of former residents compounding the State's involvement in the Laundries.<sup>234</sup>

**The IHREC recommends that the State ensure that any investigation and redress scheme is human rights compliant, paying particular attention to the socio-economic rights of the Magdalen Laundry survivors.**

### **5.5.2 Mother and Baby Homes**

The IHREC welcomes the establishment of an independent statutory Commission of Investigation into revelations concerning Mother and Baby Homes operating in the State between 1922 and 1998.<sup>235</sup> The IHREC (and the former IHRC) has expressed grave concerns about the operation and oversight of these institutions and related issues involving the pathways between the Homes and the Magdalen Laundries.<sup>236</sup> In particular, the IHREC considers that the stigmatisation and treatment of unmarried mothers and their children was a direct result of gender-based discrimination by the State<sup>237</sup> in clear violation of Article 3 of the Covenant. The State operated some of the homes directly and there is significant evidence of State involvement in the operation and oversight of the homes required to register under the Maternity Homes Act 1934.<sup>238</sup>

The high infant mortality rate<sup>239</sup> is of particular concern as it indicates the occurrence of systemic violations of the right to an adequate standard of living, including access to adequate food; the right to access medical

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'... it is not possible to make a statutory amendment to extend the benefit of the State pension (contributory) scheme to persons who do not qualify on the basis of the legislative criteria ... However, it is possible to devise an administrative scheme, which would require authorisation by the Department of Finance, which could pay weekly sums equivalent to the top rate of the State pension (contributory) – €230.30 – for the benefit of a limited class of recipients, namely those women who were admitted to and worked in the Magdalen Laundries. Once such a scheme is established, it can operate on a prospective basis so that persons over the qualifying age will receive the full rate of income and other persons will receive the full rate of income on reaching the qualifying age'.

<sup>232</sup> IHREC Designate (2014) *Report on Ireland's 4th Periodic Report under the International Covenant on Civil and Political Rights*, Dublin: IHREC Designate, para. 68.

<sup>233</sup> According to the McAleese report, 7.7 per cent of known residents spent longer than ten years in the Magdalen Laundries. See M. McAleese (2013) *Report of the Inter-Departmental Committee to establish the facts of State involvement in Magdalen Laundries: Chapter 8 Findings of Statistical Analysis*, Dublin: Department of Justice and Equality, p.168.

<sup>234</sup> IHREC Designate (2014) *Report on Ireland's 4th Periodic Report under the International Covenant on Civil and Political Rights*, Dublin: IHREC Designate, para. 69.

<sup>235</sup> Mother and baby homes were institutions usually run by a religious order for unmarried mothers and their children.

<sup>236</sup> IHREC 'IHREC response to publication of the Terms of Reference of the Commission of Investigation into Mother and Baby Homes and Certain Related Matters', [press release], 9 January 2015.

<sup>237</sup> IHRC (2013) *IHRC Follow-Up Report on State Involvement with Magdalen Laundries*, Dublin: IHRC, p. 30.

<sup>238</sup> IHREC (Designate) (2014) *Proposed Commission of Investigation to Inquire into Mother and Baby Homes: Submission on behalf of the Irish Human Rights and Equality Commission (Designate)*, Dublin: IHREC (Designate), p. 4.

<sup>239</sup> Department of Children and Youth Affairs (2014) *Report of the Inter-Departmental Group on Mother and Baby Homes*, Dublin: DCYA, p. 7. The report states that, '[f]rom the figures presented it can be calculated that the infant mortality rate per 1,000 illegitimate births was at least 3.8 times that of other births. The mortality rate for illegitimate births was highest at 344 per 1,000 births in 1923 but it exceeded 200 per 1,000 births in 23 of the 28 years for which data is provided'.

treatment; and the general neglect of babies and young children.<sup>240</sup> Evidence suggests that children in the mother and baby homes were subject to medical vaccine trials thus interfering with their right to bodily integrity, and their right to health which includes the 'right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation'.<sup>241</sup> In its 2013 report on the Magdalen Laundries, the former IHRC noted that women were sent from the Mother and Baby Homes to the Magdalen Laundries for long periods of time.<sup>242</sup> The IHREC welcomes the extension of the Commission of Investigation's remit to investigate the exit pathways of the women leaving the Mother and Baby Homes.<sup>243</sup>

The IHREC welcomes the comprehensive terms of reference for the Inquiry including the explicit statement that the investigation must be 'prompt and thorough in accordance with the State's obligations under international human rights law', as well as the inclusion of a specific clause providing for the identification of any differential treatment of particular groups of women based on equality grounds including 'religion, race, traveller identity or disability'.<sup>244</sup> In the context of this submission to the Committee, the IHREC welcomes the proposed examination of the 'economic and social situation and experiences of single women and their children' in the historical context given that single mothers continue to experience some of the highest levels of poverty and deprivation.

**The IHREC recommends the State properly resource the Commission of Investigation into the Mother and Baby Homes, ensure that all Government Departments cooperate in full with the investigation and where further resources are necessitated by the widening of the Commission's remit, ensure that such resources are provided.**

### 5.5.3 Symphysiotomy

The IHREC notes the lack of an effective redress mechanism for survivors of symphysiotomy,<sup>245</sup> a practise used on some pregnant women in the State between the 1940s and the 1980s,<sup>246</sup> which had long-lasting consequences on their right to health.<sup>247</sup> The Department of Health commissioned a report in 2011 (the 'Walsh Report') to establish the facts about the use of the practice both in Ireland and overseas, and to determine whether the procedure was used appropriately.<sup>248</sup> The State also commissioned a review by Judge Yvonne Murphy (the 'Murphy Review') to consult with survivors and examine the liability of parties involved in the procedures, as well as examining the possibility of establishing an *ex gratia* scheme.<sup>249</sup> The

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<sup>240</sup> IHREC (Designate) (2014) *Proposed Commission of Investigation to Inquire into Mother and Baby Homes: Submission on behalf of the Irish Human Rights and Equality Commission (Designate)*, Dublin: IHREC (Designate), p. 3.

<sup>241</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 11 August 2000, E/C.12/2000/4, para. 8.

<sup>242</sup> IHRC (2013) *IHRC Follow-Up Report on State Involvement with Magdalen Laundries*, Dublin: IHRC, p. 65; IHREC (Designate) (2014) *Proposed Commission of Investigation to Inquire into Mother and Baby Homes: Submission on behalf of the Irish Human Rights and Equality Commission (Designate)*, Dublin: IHREC (Designate), p. 4.

<sup>243</sup> IHREC 'IHREC response to publication of the Terms of Reference of the Commission of Investigation into Mother and Baby Homes and Certain Related Matters', [press release], 9 January 2015.

<sup>244</sup> The Terms of Reference are contained in *Statutory Instrument No. 57 of 2015: Commission of Investigation (Mother and Baby Homes and Certain Related Matters) Order 2015*, p. 6.

<sup>245</sup> Symphysiotomy is an operation performed on a woman, usually under local anaesthetic, to enlarge her pelvis by cutting the fibres of the symphysis in order to facilitate childbirth.

<sup>246</sup> There are no accurate statistics as not all hospitals published or retained statistics on the procedure but it is estimated that 1,500 women underwent a symphysiotomy between 1944 and 1992, 350 of whom are still alive.

<sup>247</sup> While some women did not experience any lasting impacts others experience life-long consequences including incontinence, limited mobility, back problems as well as psychological difficulties.

<sup>248</sup> Professor O. Walsh (2014) *Report on Symphysiotomy in Ireland 1944-1984*, Dublin: Department of Health.

<sup>249</sup> Judge Y. Murphy (2014) *Independent Review of Issues relating to Symphysiotomy*, Dublin: Department of Health



Walsh review concluded that although the total number of surviving women affected is ‘relatively small’, given their advanced age, coupled with lengthy delays in the courts with uncertainty of success, it would be ‘appropriate for the government to establish an independent, specialist needs assessment team to evaluate the cases and advise on the care requirements of each woman’.<sup>250</sup> The Murphy Review proposed an *ex gratia* or redress scheme of compensation between €50,000 and €150,000 contingent on proving firstly that a claimant had undergone a symphysiotomy with higher amounts granted for women who were medically assessed as having ongoing injuries ‘directly attributable to the procedure’.<sup>251</sup>

The State announced the commencement of an *ex gratia* scheme in November 2014, but allowed 20 days for receipt of applications with an extension until mid-January in exceptional circumstances. The IHREC considers the State’s response to be inadequate as it fails to provide an effective remedy or accountability as recommended by the UN Human Rights Committee in July 2014,<sup>252</sup> namely, it does not address the need for a prompt, independent and thorough investigation into these cases, nor does it establish a process whereby perpetrators (including medical personnel) can be prosecuted and punished where violations of human rights occurred.<sup>253</sup> In the context of the ICESCR, it is clear that the State is obliged to protect women from harmful medical practices<sup>254</sup> and victims of any violations of the right to health are entitled to ‘effective judicial or other appropriate remedies at both national and international levels’, as well as ‘adequate reparation which may include ‘restitution, compensation, satisfaction or guarantees of non-repetition’.<sup>255</sup> In the opinion of the IHREC, the current administrative scheme does not meet this standard.

**The IHREC recommends the State to reconsider the terms of its redress scheme and provide a fair and effective remedy through the establishment of a statutory, independent and thorough investigation into cases of symphysiotomy.**

#### 5.5.4 The Marriage Bar

Older women who worked in the civil or public service prior to 1973 were required to retire upon their marriage due to the operation of the discriminatory ‘marriage bar’ which was lifted when Ireland became a member of the EU. While this may be considered a legacy issue, the IHREC notes that it may have real repercussions for women who are currently of pensionable age and interfere with their right to social security.<sup>256</sup> Women who were forced to leave employment may not have enough social insurance contributions to claim a pension in their own right and, depending on their circumstances, they may not satisfy the means test for a contributory payment. Older women were effectively forced to choose between their right to work and their family life, and the ‘lack of a definite pay-off in terms of living standards’ has

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<sup>250</sup> In the case of *Kearney v. McQuillan & North Eastern Health Board* [2012] IEHC 127, the plaintiff initiated proceedings in 2004 as she had only become aware of what had happened to her in 2002 despite the procedure taking place in 1969. The appeal was granted in 2012.

<sup>251</sup> Judge Y. Murphy (2014) *Independent Review of Issues relating to Symphysiotomy*, Dublin: Department of Health, p.53.

<sup>252</sup> UN Human Rights Committee (2014) *Concluding Observations on Ireland’s Fourth Periodic Report, CCPR/C/IRL/CO/4*, at para.11.

<sup>253</sup> IHREC, ‘[IHREC calls on Government to reconsider ex gratia Symphysiotomy Payment Scheme](#)’, [press release], 11 November 2014.

<sup>254</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, (11 August 2000), E/C.12/2000/4, para.51.

<sup>255</sup> *Ibid.*, para. 59.

<sup>256</sup> The marriage bar has been cited as a possible reason why older women were more likely to have been obliged to retire from their jobs, see H. Russell and T. Fahey (2004) *Ageing and Labour Market Participation*, Dublin: Economic and Social Research Institute, p.28; H. Russell, F. McGinnity, T. Callan and C. Keane (2009) *A Woman’s Place: Female Participation in the Irish Labour Market*, Dublin: Equality Authority & the Economic and Social Research Institute, p.16; D. Watson, P. Lunn, E. Quinn and H. Russell (2011) *Multiple Disadvantage in Ireland: An Equality Analysis of Census 2006*, Dublin: Equality Authority & the Economic and Social Research Institute, p.45.

been described as ‘a clear indictment of the continuing negative impact in women’s lives of this discriminatory policy of more than three decades ago’.<sup>257</sup>

The introduction of a Homemakers Scheme in 1994 to assist a person caring for a child under 12 years (or over 12 years if the child has a disability) to qualify for a contributory State pension was not extended to those in similar situations before 1994. While the State recognises that the marriage bar may have prevented women from accessing a contributory pension, it considers that it ‘cannot address shortcomings which have arisen from gaps in social insurance in the past’ and no action will be taken in this regard.<sup>258</sup>

**The IHREC recommends the State address the repercussions of the operation of the former marriage bar and ensure that older women forced to leave the workforce due to its operation, are not put at any further disadvantage by the lack of access to a pension caused by insufficient social insurance contributions.**

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<sup>257</sup> D. Watson, P. Lunn, E. Quinn and H. Russell (2011) *Multiple Disadvantage in Ireland: An Equality Analysis of Census 2006*, Dublin: Equality Authority & the Economic and Social Research Institute, p.45.

<sup>258</sup> Government of Ireland (2010) *National Pensions Framework*, Dublin: Stationery Office, p.25. The report states that, ‘It is estimated that 47,000 older people, mainly former public servants, self-employed people and their spouses or partners, are affected and as a result do not receive any income support through the State pension system’.

## Part III – Issues Relating to Specific Provisions of ICESCR

### 6. The Right to Work and Favourable Conditions of Work (Articles 6 – 8)

#### 6.1 Fair Conditions of Work

In the context of high unemployment, in particular youth unemployment, leading to high rates of emigration and continuing low participation rates for certain disadvantaged groups,<sup>259</sup> the IHREC is concerned that, in specific areas, the State is not taking all appropriate steps to advance the right to work and the right to just and favourable conditions of work enshrined in ICESCR as outlined below.

##### 6.1.1 The Minimum Wage and Low Pay Commission

The minimum wage is currently set at €8.65 per hour.<sup>260</sup> This amount continues to fall short of the ‘low pay threshold’ that Eurostat recommended should be set at an hourly rate of €12.20 in 2010.<sup>261</sup> Notably, 60 per cent of low paid workers are women<sup>262</sup> and women face a 34 per cent risk of earning below the ‘low pay threshold’, re-emphasising the need for the State to make a concerted effort to close the gender pay gap and to ensure equal pay for men and women in line with Article 7 of ICESCR. Furthermore, the minimum wage is set at a lower rate for younger workers, a situation which the European Committee of Social Rights has stated ‘does not constitute a decent remuneration within the meaning of Article 4§1’ of the Revised European Social Charter.<sup>263</sup>

According to the ESRI, the cumulative impact of austerity policies since 2009 has resulted in the poorest households experiencing a 12.5 per cent reduction in their disposable income.<sup>264</sup> This is also exacerbated by the fact that while direct taxation is progressive, indirect taxation continues to disproportionately affect the poorest in society.<sup>265</sup> The IHREC welcomes the State’s actions in successive budgets to ensure that approximately 410,000 low paid workers are no longer liable to pay the Universal Social Charge (USC), which is a tax applied to the gross incomes of all workers earning above certain annual income thresholds.<sup>266</sup> However, the Commission notes its concern that 12 per cent of workers are at risk of poverty, and of the total number of people living in poverty, five per cent are in work.<sup>267</sup> This further demonstrates that the cumulative impact of a low National Minimum Wage and various taxation measures does not, in many instances, provide for an adequate standard of living for those engaged in work. While the introduction of

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<sup>259</sup> Nevin Economic Research Institute (NERI) (2015) *Quarterly Economic Facts: Spring 2015*, Dublin: NERI, p.33.

<sup>260</sup> The minimum wage was increased from €8.30 to €8.65 in 2007. It was reduced by €1 in February 2011 and restored to €8.65 in July 2011 by the newly elected Fine Gael – Labour Party Coalition Government as part of its *Programme for Government: National Minimum Wage Act 2000 (Section 11) (No. 2) Order 2011 (S.I.331/2011)*.

<sup>261</sup> Eurostat Press Office, ‘[One out of six employees in the EU27 was a low-wage earner in 2010](#)’ [press release], 20 December 2012. These figures are based on the *Structure of Earnings Survey 2010 (SES 2010)* which covers enterprises with at least 10 employees in all economic activities except agriculture, forestry, fishing, public administration and defence, private households and extra-territorial organisations. This is the most recent survey in this series as it is carried out every four years. A Living Wage Technical Group was established in 2014 and calculated the ‘living wage’ at an hourly rate of €11.45 in 2011. The Technical Group comprises the Nevin Economic Research Institute (NERI), Services Industrial Professional and Technical Union (SIPTU), Social Justice Ireland, Think-tank for Action on Social Change (TASC), Unite Trade Union and Vincentian Partnership for Social Justice (VPSJ).

<sup>262</sup> Nevin Economic Research Institute (NERI) (2015) *Quarterly Economic Observer: Spring 2015*, Dublin: NERI, p.41.

<sup>263</sup> European Committee of Social Rights (2015) *European Social Charter (Revised): Conclusions 2014 Ireland*, Strasbourg: Council of Europe, p.12.

<sup>264</sup> T. Callan, C. Keane, M. Savage and J.R. Walsh (2013) *Distributional Impact of Tax, Welfare and Public Service Pay Policies: Budget 2014 and Budgets 2009 – 2014*, Dublin: Economic and Social Research Institute, p.8.

<sup>265</sup> M. Collins (2014) *Total Direct and Indirect Tax Contributions of Households in Ireland: Estimates and Policy Simulations*, Dublin: Nevin Economic Research Institute, p. 17.

<sup>266</sup> Minister of State with Special responsibility for small business and collective bargaining, Gerald Nash TD, [Parliamentary Questions: Written Answers \[12085/15\]](#), 26 March 2015. The threshold was increased from €4004 in 2011 to €12,012 in 2015.

<sup>267</sup> Nevin Economic Research Institute (NERI) (2015) *Quarterly Economic Facts: Spring 2015*, Dublin: NERI, p.90.

the Back to Work Family Dividend in the 2015 Budget to support individuals with families returning to work is another welcome development,<sup>268</sup> the continuing lack of affordable childcare and supports will continue to be a barrier for many parents considering a return to work.<sup>269</sup> Moreover, despite the introduction of the *Pathways to Work Strategy* and some progress in achieving further job creation, in 2014, there continues to be a lack of available employment with a ratio of 20 unemployed persons for each employment vacancy.<sup>270</sup>

The IHREC welcomes the establishment of the Low Pay Commission in 2015<sup>271</sup> which the State intends to place on a statutory footing,<sup>272</sup> to monitor the rate of the National Minimum Wage on an annual basis and make recommendations in relation to other relevant matters.<sup>273</sup> The IHREC also welcomes the recognition by the State that increases to the minimum wage cannot alleviate in-work poverty in isolation<sup>274</sup> and urges the State to implement further measures to address this pressing socio-economic issue. The State's actions should be informed by the advice of the Low Pay Commission, as well as by the final report of the Advisory Group on Tax and Social Welfare<sup>275</sup> in relation to supports for people of working age which was completed in 2014 but has yet to be published.

**The IHREC welcomes the initiative by the State to enact legislation underpinning the Low Pay Commission and recommends that it incorporate a human rights and equality dimension into both the Terms of Reference of the Commission, as well as the legislative framework which it should progress as a matter of priority. The IHREC recommends that the rate at which the National Minimum Wage is set is assessed to ensure that it represents fair remuneration for work carried out and affords an adequate standard of living for all.**

### 6.1.2 Zero Hour Contracts

Employment contracts with unspecified hours of work, more commonly referred to as 'zero hour' contracts, have become a feature of work for many individuals without a permanent or fixed-term work contract that

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<sup>268</sup> Budget 2015 introduced the Back to Work Family Dividend, aimed at incentivising long-term unemployed parents to return to work by allowing retention of certain social welfare payments including the Qualified Child Increase and Family Income Support for a period of up to two years for individuals returning to work, increasing their hours of work or becoming self-employed. For information see: <https://www.welfare.ie/en/Pages/BTWFD.aspx>.

<sup>269</sup> Indecon International Economic Consultants (2013) *Indecon Report on Support for Childcare for Working Families and Implications for Employment*, Donegal: Donegal County Childcare Committee, p. iii.

<sup>270</sup> Nevin Economic Research Institute (NERI) (2015) *Quarterly Economic Facts: Spring 2015*, Dublin: NERI, p.33.

<sup>271</sup> Department of Jobs, Enterprise and Innovation, 'Minister Nash appoints Donal de Buitléir as Chairperson of Low Pay Commission', [press release], 17 February 2015. The Minister of State with special responsibility for small business and collective bargaining appointed nine members to the Low Pay Commission in February 2015: Dr Donal de Buitléir, Director of Publicpolicy.ie, (Chairperson); Vincent Jennings, Chief Executive Officer, Convenience Stores and Newsagents Association; Patricia King, Vice President, SIPTU and incoming General Secretary of ICTU; Gerry Light, Assistant General Secretary, Mandate Trade Union; Caroline McEnery, Director, HR Suite, HR & Business Solutions; Edel McGinley, Director, Migrant Rights Centre Ireland (MRCI); Mary Mosse, Lecturer in Economics, Programme Director for Postgraduate Research, WIT Business School; Tom Noonan, Chief Executive, The Maxol Group and President of IBEC (2008–2010); and Prof Donal O'Neill, Dept. of Economics, NUI, Maynooth.

<sup>272</sup> The National Minimum Wage (Low Pay Commission) Bill 2015 was approved by Cabinet and underwent a pre-legislative scrutiny process by the Joint Oireachtas Committee on Jobs, Enterprise and Innovation in March 2015.

<sup>273</sup> For Terms of Reference of the Low Pay Commission see Minister for Jobs, Enterprise and Innovation, Richard Bruton TD, *Parliamentary Questions: Written Answers, [9272/15]*, 3 March 2015.

<sup>274</sup> Department of the Taoiseach, *Speech of the Taoiseach at the Launch of the Low Pay Commission*, 26 February 2015.

<sup>275</sup> The Advisory Group on Tax and Social Welfare was established by the Minister for Social Protection in June 2011 'to harness expert opinion and experience to address a number of specific issues around the operation and interaction of the tax and social protection systems, recommend cost-effective solutions as to how employment disincentives can be improved and better poverty outcomes, particularly child poverty outcomes, achieved and to identify the specific practical institutional and administrative improvements to their operation'. For more information see: <http://www.welfare.ie/en/pressoffice/Pages/Establishment-of-an-Advisory-Group-on-Tax-and-Social-Welfare.aspx>.

stipulates the number of hours they will be working per week.<sup>276</sup> The IHREC is concerned that the lack of specified and secure hours of work is leading to insecurity of income and uncertain employment situations for many employees working under these conditions,<sup>277</sup> many of whom are recorded as underemployed part-time workers.<sup>278</sup> The Nevin Economic Research Institute (NERI) has indicated that the ‘true impact of these conditions on employee weekly/annual income is likely to be more pronounced than that identified for the hourly data examined’.<sup>279</sup> In terms of ICESCR, the State is under an obligation to ensure that everyone has the right to ‘just and favourable conditions of work’, including ‘fair wages and equal remuneration for work of equal value’ which will allow them ‘a decent living for themselves and their families’.<sup>280</sup>

In the absence of comprehensive and up-to-date information on the prevalence and impact of zero hour contracts in Ireland, the Commission welcomes the State’s appointment of a research team to study the use of zero hours and low hours contracts in consultation with key stakeholders including employees, employers, Government Departments and Trade Unions.<sup>281</sup>

**The IHREC recommends that in examining the legislative provisions and policy surrounding these types of contracts, it should be ensured that all workers receive fair wages and can earn a decent living for themselves and their families.**

### 6.1.3 Collective Bargaining

The Commission welcomes the State’s commitment to legislate for collective bargaining through trade unions<sup>282</sup> and that the proposed legislation has been approved by the Cabinet.<sup>283</sup> The Commission notes that this right is not recognised in Irish law and in this context notes the decision of the Supreme Court in *McGowan & Ors v. Labour Court Ireland & Ors*<sup>284</sup> which held that the term ‘collective bargaining’ was not currently defined in domestic law. As a result, the Industrial Relations Act 2001 cannot currently be relied upon to facilitate an informal collective bargaining mechanism.

The Commission further notes the finding of the European Committee of Social Rights in the *European Confederation of Police (EuroCOP) v. Ireland*<sup>285</sup> that the prohibition on members of An Garda Síochána (Irish

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<sup>276</sup> Section 18(1) of the Organisation of Working Time Act 1997 allows for zero hour contracts, requiring a person to make himself or herself available to work for the employer for a certain number of hours per week, as and when the employer requires him or her to do so, or both a certain number of hours and otherwise as and when the employer requires him or her to do so.

<sup>277</sup> Mandate Trade Union which represents over 40,000 workers in the bar, retail and administrative work sector found in a 2012 behaviour and attitudes survey that only one third of respondents had stable working hours. Mandate Trade Union (2012) *Decent Work? The Impact of the Recession on Low-Paid Workers*, Mandate, p.4.

<sup>278</sup> In the Third Quarter of 2014, Ireland had the third highest rate of underemployed part-time workers of the EU Member States, at 5.7 per cent (EU average in the 28 Member States was 4 per cent). Eurostat, *Underemployment and potential additional labour force statistics, data from January 2015*.

<sup>279</sup> Nevin Economic Research Institute (NERI) (2015) *Quarterly Economic Observer: Spring 2015*, Dublin: NERI, p.47.

<sup>280</sup> A recent strike of up to 6,000 workers in 109 Dunnes Stores outlets attracted significant media and political attention due to a campaign organised by Mandate Trade Union calling on the company to provide decent working conditions for its employees. In particular the Trade Union and its members called for ‘secure hours and earnings; job security; fair pay for all Dunnes workers; and the right to trade union representation’. Minister for State with Responsibility for Small Businesses and Collective Bargaining, Gerald Nash TD, gave a commitment to the workers that collective bargaining legislation would be introduced in 2015. Mandate Trade Union, ‘[Minister gives Dunnes workers collective bargaining commitment](#)’, [press release], 3 April 2015.

<sup>281</sup> Department of Jobs, Innovation and Enterprise, ‘[Minister Nash appoints University of Limerick to carry out study on Zero Hours Contracts](#)’, [press release], 9 February 2015.

<sup>282</sup> Government of Ireland (2011) *Programme for Government 2011 – 2016: Statement of Common Purpose*, Dublin: Government of Ireland, p.53.

<sup>283</sup> Labour Party Press Office, ‘Collective bargaining legislation approved by government – Nash’, [press release], 16 December 2014.

<sup>284</sup> *McGowan & Ors v. Labour Court Ireland & Ors* [2013] IESC 21.

<sup>285</sup> *European Confederation of Police (EuroCOP) v. Ireland Complaint No. 83/2012*.

police force) to join national employee’s associations meant that Ireland was in breach of the Revised European Social Charter. Specifically, the CoE Committee found Ireland in breach of Article 5 (right to organise) ‘on grounds of the prohibition against police representative associations from joining national employees’ organisations’ and Article 6 (right to collective bargaining) as the State did not provide a ‘compelling justification’ for the prohibition on the right to strike ‘in the context of the regulation of the collective bargaining rights of police officers’.<sup>286</sup> It is not yet clear how the State intends to respond to the decision by the CoE Committee,<sup>287</sup> as the Minister for Justice and Equality expressed concerns about the ‘significant and sensitive issues’ pertaining to the right to strike for members of the Gardaí and the matter remains under consideration.<sup>288</sup>

**The IHREC recommends that the State publish and enact the proposed legislation on collective bargaining as a matter of priority.**

## 6.2 Barriers to the Right to Work for Specific Groups

### 6.2.1 Rights of Migrant Workers

The IHREC welcomes the reform of the employment permits system in 2014 through the enactment of the Employment Permits (Amendment) Act 2014. The legislation provides for nine types of permit.<sup>289</sup> This includes a Reactivation Employment Permit which allows migrant workers who previously held a valid employment permit but who subsequently became undocumented through no fault of their own, or who were subject to exploitation or poor working conditions, with the ability to re-enter the Employment Permit system. This is a welcome development arising from the High Court decision in *Hussein v. Labour Court and Another*,<sup>290</sup> whereby a migrant worker exploited by his employer for a period of several years was ineligible to receive the compensation awarded to him by the Labour Court as he did not hold a valid work permit for the entire duration of his employment.<sup>291</sup>

The number of employment permits issued to non-EEA workers has dropped significantly since the onset of the recession, although the primary industries for which permits were granted continue to be for medical and nursing jobs, the service industry and the catering industry.<sup>292</sup> The Commission notes that non-EEA workers are required to pay significant fees to access an employment permit<sup>293</sup> and this was the subject of an adverse finding by the European Committee of Social Rights which concluded that the fees are excessive

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<sup>286</sup> *European Confederation of Police (EuroCOP) v. Ireland* Complaint No. 83/2012, [Report to the Committee of Ministers](#), Strasbourg: Council of Europe.

<sup>287</sup> European Committee of Social Rights (2015) *European Social Charter (Revised): Conclusions 2014 Ireland*, Strasbourg: Council of Europe, p.23. The Committee reiterated that Ireland was not in conformity with Article 5 of the Charter partly due to the fact that ‘police representative associations are prohibited from joining national employees’ organisations’.

<sup>288</sup> Department of Justice and Equality, ‘*European Confederation of Police (EuroCOP) v. Ireland* Complaint No. 83/2012: Report to the Committee of Ministers of the Council of Europe’, [press release], 19 June 2014.

<sup>289</sup> The nine categories comprise a general employment permit; a critical skills employment permit; dependant/partner/spouse employment permit; a reactivation employment permit; a contract for services employment permit; an intra-company transfer employment permit; an internship employment permit; sport and cultural employment permit; and an exchange agreement employment permit.

<sup>290</sup> *Hussein v. Labour Court and Another* [2012] IEHC 364.

<sup>291</sup> Section 2B of the Employment Permits (Amendment) Act 2014 amending the Employment Permits Act 2003.

<sup>292</sup> In 2006, the total number of permits issued was 24,854 falling to a low of 1,311 in 2011. In 2014, fewer than 6,000 were granted. Statistics available at: <http://www.djei.ie/labour/workpermits/statistics.htm>.

<sup>293</sup> Fees range between €500 and €1500 depending on the type and duration of the permit.

and constitute a violation of the right to engage in gainful occupation as enshrined in Article 18 of the Revised European Social Charter.<sup>294</sup>

**In light of the finding of the European Committee of Social Rights, the IHREC recommends that the State review the fees applicable for employment permits to ensure that they do not place an undue financial burden on applicants or do not act as a disincentive for migrant workers seeking employment in Ireland.**

### **6.2.2 Rights of Persons with a Disability to Work**

The IHREC notes with concern the disproportionately higher rate of unemployment for people with disabilities, and in particular, it notes that those with a mental health disability are much more likely to be unemployed.<sup>295</sup> The unemployment rate for persons with disabilities ‘increased from 8 per cent in 2004 to 22 per cent in 2010’.<sup>296</sup> Low participation rates in the labour market are also a feature of the employment landscape for individuals with disabilities as part-time work is more prevalent and some people are not in a position to work at all thus are excluded from the general unemployment figures.<sup>297</sup> Moreover, given that the cost of living is approximately one-third higher for people with disabilities, and social security payments do not reflect this (see also section 7.2.1 of this report), it is essential that the new employment strategy addresses the issue of an adequate income for people falling within its remit.

In its 2002 Concluding Observations on Ireland’s Second Periodic Report, the Committee expressed concerns about the status of individuals with disabilities working in sheltered workshops without recognition or protection as an employee.<sup>298</sup> In this context, the IHREC welcomes the move away from sheltered workshops, but awaits the publication of the *Comprehensive Employment Strategy for People with a Disability* and the accompanying implementation plan in order to determine whether the State complies fully with Article 7 in terms of the right to work for people with disabilities.

**The IHREC recommends that the State publish the *Comprehensive Employment Strategy for People with a Disability* at the earliest opportunity. The strategy must take account of and reflect the higher cost of living for persons with disabilities.**

### **6.3 Forced Labour and Trafficking – The Legal Framework**

Forced labour is prohibited in Irish law under the Criminal Law (Human Trafficking) Act 2008 as amended by the Criminal Law (Human Trafficking) (Amendment) Act 2013.<sup>299</sup> The Commission welcomes the State’s ratification of the International Labour Organisation (ILO) Decent Work for Domestic Workers Convention<sup>300</sup> along with the issuance of guidelines for diplomatic staff living in Ireland who employ private domestic

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<sup>294</sup> European Committee on Social Rights (2013) *European Social Charter (Revised): Conclusions 2012 Ireland*, Strasbourg: Council of Europe, p.28.

<sup>295</sup> D. Watson, G. Kingston and F. McGinnity (2013) *Disability in the Irish Labour Market: Evidence from the QHNS Equality Module 2010*, Dublin: Equality Authority and ESRI, p. 19.

<sup>296</sup> *Ibid.*, p.18.

<sup>297</sup> F. McGinnity, H. Russell, D. Watson et al (2014) *Winners and Losers? The Equality Impact of the Great Recession in Ireland*, Equality Authority and ESRI, p.35.

<sup>298</sup> Individuals with disabilities working in sheltered workshops were not considered to be employees and were therefore not paid the minimum wage.

<sup>299</sup> Section 1, Criminal Law (Human Trafficking) Act 2008 as amended by the 2013 Act defines ‘forced labour’ as ‘work or service which is exacted from a person under the menace of any penalty and for which the person has not offered himself or herself voluntarily’ but includes a number of exemptions such as military service.

<sup>300</sup> International Labour Organisation (ILO) Convention on Decent Work for Domestic Workers (No. 189), 2011. Ireland is one of three EU States to have ratified the Convention. Department of Jobs, Enterprise and Innovation, ‘[Minister Bruton announces ratification of ILO Convention on Decent Work for Domestic Workers](#)’, [press release], 9 July 2014.

employees.<sup>301</sup> The IHREC welcomes the decision in a recent High Court case concerning the protection of an alleged victim of human trafficking, in which IHREC appeared as *amicus curiae* (friend of the Court).<sup>302</sup> O'Malley J. held that the current administrative scheme for the identification and protection of victims of human trafficking is 'inadequate in terms of the transposition of the EU Directive',<sup>303</sup> an issue which must now be addressed by the Executive. In addition to this ruling, the IHREC notes the recommendations of the Council of Europe's Group of Experts on Action against Trafficking in Human Beings (GRETA) that the Irish Government should place the protection of victims of trafficking on a statutory footing.<sup>304</sup> GRETA also highlighted the lack of access to adequate remedies for victims, including compensation and recommended that appropriate measures should be put in place. GRETA, as well as the UN Human Rights Committee, have expressed concern at the placement of victims of trafficking in Direct Provision centres where they may be placed at further risk of harm.<sup>305</sup>

The Commission remains concerned at the current system of recognition of suspected victims of trafficking which it considers to be 'too adversarial and places too heavy a burden of proof on the alleged victim'.<sup>306</sup> Moreover, the IHREC notes its concern at the low number of victims of labour exploitation identified since the relevant law was first enacted in 2008, as well as the failure on the part of the State to prosecute or convict traffickers under this legislation as outlined in the State's response to the Committee's List of Issues.<sup>307</sup>

**The IHREC calls on the State to take immediate action to rectify the inadequacies in the administrative system and put in place a statutory scheme for the identification and protection of alleged victims of trafficking in line with *EU Directive 2011/36/EU*. Furthermore, IHREC recommends the State consider and implement the recommendations of GRETA.**

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<sup>301</sup> Department of Foreign Affairs (DFA) (2014) *Guidelines Relating to the Employment of Private Domestic Employees by Accredited Members of the Mission*, Dublin: DFA.

<sup>304</sup> The judgment was handed down on 15 April 2015 and has not yet been published. See IHREC, 'IHREC calls for immediate action to protect victims of human trafficking following High Court Judgment', [press release], 15 April 2015 which sets out that the:

'Applicant in the case is a Vietnamese woman charged with certain drugs offences having been found by Gardaí in a cannabis grow house, where she was found locked in from the outside. She claimed that she was a victim of human trafficking and that the failure of the Gardaí to recognise her as a victim of trafficking denied her the opportunity to avail of the protection regime for such victims. The Applicant has spent almost three years in detention in the Dóchas Centre, much of that time waiting for a decision on her application to be recognised as a victim of human trafficking'.

<sup>303</sup> The EU Directive referred to is *Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims*.

<sup>304</sup> GRETA (2013) *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland: First Evaluation Round*, Strasbourg: Council of Europe, pp. 52–3.

<sup>305</sup> *Ibid.*, p.46; UN Human Rights Committee (2014) *Concluding Observations on Ireland's Fourth Periodic Report*, CCPR/C/IRL/CO/4, at para. 20. Note that Ireland has obligations of prevention and obligations to provide support services to victims under the Council of Europe Convention on Action against Trafficking and *EU Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combatting trafficking in human beings and protecting its victims*.

<sup>306</sup> IHREC, 'IHREC calls for immediate action to protect victims of human trafficking following High Court Judgment', [press release], 15 April 2015.

<sup>307</sup> Government of Ireland (2015) *CESCR: Reply of Ireland to the List of Issues in relation to its third periodic report*, Geneva: OHCHR, para. 40.



## 7. The Right to Social Security (Article 9)

While the Constitution of Ireland does not explicitly recognise a right to social security, Article 45 in providing ‘directive principles of social policy’, obliges the State ‘to safeguard with especial care the economic interests of the weaker sections of the community, and, where necessary, to contribute to the support of the infirm, the widow, the orphan, and the aged’. At the outset of Article 45, it is expressly stated that this provision is solely for the guidance of the Oireachtas and is ‘not cognisable by any court’.<sup>308</sup> However, the Courts have recognised that a statutory right to certain social security measures can be deemed to be a property right if a person meets the eligibility criteria and is entitled to assert his or her right to payment.<sup>309</sup>

### 7.1 The Effect of the Habitual Residence Condition (HRC) and the ‘Right to Reside’ Requirement on Vulnerable Groups

The Habitual Residence Condition (‘the HRC’) is an extra qualifying condition for means-tested social welfare payments which stipulates that a person satisfy a number of factors to demonstrate a connection to Ireland. These factors include, the length of time spent in Ireland or another country, the person’s employment pattern, his or her intentions to remain in the State, and where his or her ‘centre of interest’ is deemed to be, taking into consideration family ties, the person’s home and other relevant circumstances. This condition was introduced in 2004 in the context of EU enlargement.<sup>310</sup> It has been amended on a number of occasions since its introduction.<sup>311</sup> Most recently, the introduction of a ‘right to reside’ clause in Section 15 of the Social Welfare and Pensions Act 2009 stipulates that a person who does not have a right to reside in the State shall not be regarded as being habitually resident for the purposes of the HRC.<sup>312</sup>

In practice, the operation of the HRC can act as a barrier to many vulnerable groups seeking to access a social security payment. This has been noted by a number of international actors, including the European Commission against Racism and Intolerance (ECRI),<sup>313</sup> as well as the former UN Independent Expert on

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<sup>308</sup> In 2014, the Convention on the Constitution recommended that the right to social security should be listed as a specific additional right in the Constitution of Ireland. Convention on the Constitution (2014) *Eighth Report of the Convention on the Constitution: Economic, Social and Cultural Rights*, Dublin: Convention on the Constitution, p.6.

<sup>309</sup> In *Minister for Social, Community and Family Affairs v. Scanlon* [2001] 1 I.R. 64, the Supreme Court held that there was no constitutional right to a social security payment but it elaborated on this point in *In re Article 26 and the Health (Amendment) Bill 2004* [2005] IESC 3, stating that in the Scanlon case ‘there was no identifiable constitutional right to retain benefits which had been wrongly obtained’ (para. 110).

<sup>310</sup> Section 17, Schedule 1, Social Welfare (Miscellaneous Provisions) Act 2004 amending the Social Welfare Acts 1993–2004. It was effected through the Social Welfare (Miscellaneous Provisions) Act 2004 [Section 17] Commencement Order (S.I. 184/2004). The HRC was originally intended to prevent anticipated ‘welfare tourism’ from citizens moving to Ireland from the accession States, but the application of the Condition to EU citizens, along with the specification of a minimum timeframe for being deemed habitually resident, was found to be contrary to the EU freedom of movement for EU workers. The EU Commission issued Ireland with a Letter of Formal Notice on 22 December 2004 noting that the application of the HRC to EU workers was an indirect form of discrimination between Irish and EU citizens on the grounds of nationality as workers of a nationality other than Irish would be more likely to be affected by the Condition. The HRC was then amended to include five factors to be considered in deciding whether a person was habitually resident. The five conditions were taken from a decision of the European Court of Justice *Swaddling v. Adjudication Officer* [C-90/97] [1999] E.C.R. 1-1075.

<sup>311</sup> Section 246, Social Welfare Consolidation Act 2005, as amended by Section 30 of the Social Welfare and Pensions Act 2007, Section 15 of the Social Welfare and Pensions (No. 2) Act 2009 and Section 11 and 12 of the Social Welfare Pensions Bill 2014.

<sup>312</sup> A ‘right to reside’ test was introduced in December 2009. S15 of the Social Welfare and Pensions (No. 2) Act 2009 amends Section 246 of the Social Welfare Consolidation Act 2005 by inserting s.246(5), which provides that a person who does not have a right to reside in the State shall not be regarded as being habitually resident in the State.

<sup>313</sup> European Commission against Racism and Intolerance (2013) *ECRI Report on Ireland (fourth monitoring cycle)*, Strasbourg: Council of Europe, para. 130.

Human Rights and Extreme Poverty<sup>314</sup> following official visits to Ireland. Specifically, the Independent Expert noted her 'utmost concern' as she found the HRC to represent 'a considerable obstacle for members of vulnerable groups ... to access services to which they are entitled'.<sup>315</sup>

### 7.1.1 Migrants

The HRC may appear neutral in its application, but the criteria that it stipulates, in many instances, can disproportionately affect migrants. In particular, migrants will have more challenges in establishing a connection to the State through family ties, employment and the overall length of time spent in the country in order to satisfy the conditions of the HRC. The Social Welfare Appeals Office (SWAO) has previously highlighted the 'complexity of this issue and described the making of a decision based on this legislation as quite problematic', while more recently it has observed there is 'evidence of inconsistency and poor understanding of the legislation in decisions relating to the right to reside coming on appeal'.<sup>316</sup> The SWAO also noted that without a mechanism in place for EEA nationals to demonstrate his or her right to reside, it may be difficult to prove this in order to access a social welfare payment unless an application has been made for permanent residency after five years of residence.<sup>317</sup>

Amendments made in 2014 to s.246 of the Social Welfare Consolidation Act 2005, allow for an effective review of a person's habitual residence in the event that he or she loses the right to reside; this can only affect migrants, as Irish citizens will always be considered to have a right to reside.<sup>318</sup> As a result of this change, the IHREC notes that EU migrants who lose worker status or non-EU migrants subject to an immigration status which has not been renewed could find that they are no longer entitled to a social security payment, despite having previously been in receipt of it. This applies to payments such as Child Benefit, for example, as well as a range of other payments.

**The IHREC recommends that the State ensure that decision-makers are adequately trained in order to ensure that they make fair and correct decisions based on the legislation in place, in particular in relation to the right to reside clause. The IHREC considers the State should also review the 'right to reside' and the Habitual Residence Condition (HRC) clauses to ensure that they are not indirectly discriminatory.**

### 7.1.2 Asylum seekers

The introduction of the HRC in 2004, along with the right to reside requirement in 2009, has had a detrimental impact on asylum seekers who receive only a small weekly allowance.<sup>319</sup> Between 2004 and 2009, the Department of Social Protection had incorrectly applied an exclusion on all asylum seekers from being able to satisfy the HRC for the purposes of claiming means-tested social welfare payments and Child Benefit.<sup>320</sup> Prior to the HRC being introduced, asylum seekers had not been able to avail of jobseekers

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<sup>314</sup> UN Office of the High Commissioner for Human Rights (OHCHR) (2011) *Report of the UN Independent Expert on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona: Mission to Ireland*, Geneva: OHCHR, p.12.

<sup>315</sup> *Ibid.*

<sup>316</sup> Social Welfare Appeals Office (SWAO) (2015) *Annual Report 2014*, Dublin: SWAO, p.22.

<sup>317</sup> *Ibid.*

<sup>318</sup> Section 15, Social Welfare and Pensions (No. 2) Act 2009 amending s.246 of the Principal Act sets out that the following will have a right to reside: Irish citizens, EU workers and their dependents, refugees and their family members or anyone who has been granted immigration status by the Minister for Justice and Equality subject to certain conditions.

<sup>319</sup> Asylum seekers are granted a weekly allowance of €19.10 per adult and €9.60 per child, along with basic accommodation and meals. The Direct Provision Allowance is the only social security payment never to have increased since it was introduced in 2000.

<sup>320</sup> In a series of social welfare appeals supported by the Free Legal Advice Centres (FLAC), the Chief Social Welfare Appeals Officer determined in December 2009 that the legislation did not provide for a blanket exclusion of any category of person from being able to satisfy the HRC. On 21 December 2009, s.15 of the Social Welfare and Pensions Act 2009 amending s.246 of the Principal Act introduced the right to reside and listed a number of categories of person who could not be deemed to be capable of satisfying

payments, but were able to access disability and care-related payments while they awaited a decision on their asylum application where they satisfied the other qualifying criteria for those payments. As a result of the application of the 'right to reside' rule, asylum seekers cannot access any payment subject to the HRC until they are granted refugee status or another form of immigration status, which can often take several years.<sup>321</sup> Without access to any other payment and compounded by the prohibition on the right to work, the small Direct Provision Allowance is allocated to provide for a range of costs, including travel expenses, shopping for personal items and children's extracurricular activities.

**The IHREC recommends that the State should reconsider the application of the 'right to reside' test on asylum seekers and decide each application on the basis of the person's individual circumstances in the context of the long periods of time that a person may remain in the Direct Provision system. At a minimum, the IHREC reiterates its recommendation that the weekly allowance be increased to a realistic amount that ensures dignity, respect and autonomy for individuals.<sup>322</sup>**

### **7.1.3 Travellers and Roma**

While Travellers of Irish or British origin will always be deemed to have a right to reside, they may face difficulties in accessing a social security payment on the basis of the HRC due to difficulties in demonstrating their connection to one particular place in light of frequent movements within the Common Travel Area<sup>323</sup> and the nomadic tradition of many members of the community.<sup>324</sup> Furthermore, they may potentially face indirect discrimination based on grounds of race, ethnicity or membership of the Traveller community. Members of the Roma community encounter similar problems, however, given that many of them are not Irish or British citizens, and therefore not automatically exempt from the 'right to reside', they also face the additional challenge of having to prove this right of residence before being able to access a payment.<sup>325</sup>

**The IHREC recommends that the State review its guidelines on the application of the HRC and the right to reside to ensure that they do not disproportionately affect Travellers or Roma trying to access social security payments. In particular, the Operational Guidelines for Deciding Officers should take account of the nomadic tradition of some members of the Traveller and Roma communities when determining habitual residence.**

### **7.1.4 Victims of Domestic Violence**

As a result of the HRC, women who are both migrants and victims of domestic violence may face multiple barriers to accessing social security payments in their own right. Following its examination of Ireland in 2014, the UN Human Rights Committee expressed its concern 'at the existence of administrative and financial obstacles for marginalized women to access essential support services, particularly women whose

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the HRC. This list included asylum seekers. Child Benefit, still described as a 'universal payment', had previously been available to parents who were ordinarily resident with their child in Ireland regardless of immigration status. This changed when the HRC was introduced in 2004.

<sup>321</sup> According to official statistics, in January 2015 of the 4382 residents in Direct Provision, more than half had lived in Direct Provision for more than three years with 28 per cent of all residents living in the system for more than six years. The average length of stay in Direct Provision was four years. Statistics Unit, Reception and Integration Agency (2015) *Monthly Statistics: January 2015*, Dublin: Department of Justice and Equality, p.19.

<sup>322</sup> IHREC (2014) *Policy Statement on the System of Direct Provision in Ireland*, Dublin: IHREC, p.19.

<sup>323</sup> The Common Travel Area includes Ireland and the United Kingdom (including the Isle of Man and the Channel Islands) and due to an agreement between the two Governments, Irish and British citizens can freely travel between the two jurisdictions although airline and ferry companies may require a passport or identification.

<sup>324</sup> Pavee Point (2012) *Habitual Residence Condition: Briefing Paper*, Dublin: Pavee Point. Pavee Point is an NGO working to secure equality and justice for Travellers and Roma.

<sup>325</sup> *Ibid.*, p.2.

immigration status is dependent on their spouse or partner or who do not meet the habitual residence condition'.<sup>326</sup> The UN Human Rights Committee recommended that the State 'take further legislative as well as policy measures to ensure that all women ... have equal access to protection against perpetrators of violence'.<sup>327</sup> The IHREC notes that victims of domestic violence can apply for an independent immigration status under Section 4(7) of the Immigration Act 2004, and welcomes the publication of guidelines by the Irish Immigration and Naturalisation Service (INIS) in 2012. Notably the guidelines do not apply to women at risk who have become undocumented.<sup>328</sup> The Commission repeats its concerns that migrant women seeking to access support services for domestic violence that require the user to be receiving a social security payment, may encounter obstacles in securing their right to reside without which they cannot be deemed habitually resident. As a result of not being deemed eligible to satisfy the HRC and being without an independent right of residence, this vulnerable category of women may be forced to choose between remaining in a violent situation or being refused a payment on this basis resulting in potential destitution and homelessness.<sup>329</sup>

**The IHREC reiterates its previous recommendation that 'necessary welfare and support services should be provided to particularly vulnerable victims of domestic violence; and, where relevant, separate residence permits should be provided'.<sup>330</sup> (See also Section 8.2)**

## 7.2 Adequacy of Social Security for Groups experiencing Multiple Discrimination

### 7.2.1 Persons with Disabilities

The Committee, in its *General Comment No. 5*, highlights the 'particular importance' of 'social security and income maintenance schemes' for people with disabilities and states that 'such support should reflect the special needs for assistance and other expenses often associated with disability'.<sup>331</sup> The IHREC recognises the important role disability-related social security payments play in helping to alleviate poverty for this cohort given that '[o]ver half of the household income of adults with a disability comes from social transfers (54 per cent)',<sup>332</sup> although these payments appear to have had less impact in relieving poverty between 2004 and 2011.<sup>333</sup> The Commission further notes that the level at which disability-related payments is set is the same as for other unemployment assistance payments, thus failing to take account of the distinctive and additional costs of living with a disability – for example transport costs.<sup>334</sup>

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<sup>326</sup> UN Human Rights Committee (2014) *Concluding Observations on Ireland's Fourth Periodic Report*, CCPR/C/IRL/CO/4, para. 8.

<sup>327</sup> *Ibid.*

<sup>328</sup> Irish Immigration and Naturalisation Service (INIS) (2012) *Victims of Domestic Violence: Immigration Guidelines*, Dublin: Department of Justice and Equality. The guidelines state that they apply only to those who are legally resident in the State.

<sup>329</sup> IHREC Designate (2014) *Report on Ireland's 4th Periodic Report under the International Covenant on Civil and Political Rights*, Dublin: IHREC Designate, pp. 21-22. Significant barriers for migrant women may include not being an English-language speaker; a lack of resources for payment of a registration fee; a lack of information about the administrative processes; or a lack of support in making applications related to both her immigration status as well as her entitlement to a social security payment.

<sup>330</sup> *Ibid.*, p. 22.

<sup>331</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 5: Persons with Disabilities, 1994*, E/1995/22, para. 28.

<sup>332</sup> D. Watson and B. Maître (2013) *Social Transfers and Poverty Alleviation in Ireland: An Analysis of the Survey on Income and Living Conditions 2004 – 2011*, Dublin: Department of Social Protection and the Economic and Social Research Institute, p.55.

<sup>333</sup> *Ibid.*, p.64.

<sup>334</sup> The additional cost of living with a disability in 2010 was calculated to be 30 to 33 per cent of a person's average weekly income based on 2001 social security rates. J. Cullinan, B. Gannon and S. Lyons (2010) 'Estimating the Extra Cost of Living for People with Disabilities', Health Economics published online June 2010: doi: 10.1002/hec.1619 cited in D. Watson & B. Nolan (2011) *A Social Profile of People with Disabilities*, Dublin: ESRI and Department of Social Protection, p. 28.

The right to social security in terms of people with disabilities also extends to those who care for them, the vast majority of whom are women<sup>335</sup> and unpaid.<sup>336</sup> In light of this, the Commission notes that despite the higher percentage of people with disabilities increasing with age,<sup>337</sup> fewer than half of their carers are in receipt of a carer's payment, compared with the carers of children and younger people.<sup>338</sup> Furthermore, the Respite Care Grant was substantially cut in 2009 and subjected to further cuts in 2013, and it is regrettable that none of the cuts have been reversed as it is an important support for full-time carers.<sup>339</sup>

**The IHREC recommends that the State ensure that the cost of living with a disability is taken into consideration when reviewing rates for disability-related social welfare payments and that retrogressive measures reducing these payments be prohibited. The State should recognise the role of women and men in caring roles and ensure that they receive adequate payments and supports, including an adequate carer's grant, to support them in this work.**

### 7.2.2 Lone Parents

A series of changes to the eligibility criteria for the One Parent Family Payment (OPFP),<sup>340</sup> which is designed to support single parents on low incomes, has significantly affected these parents, the majority of whom are women.<sup>341</sup> In 2015, the Government is effectively ceasing access to the payment for lone parents whose youngest child is seven years or over. Lone parents with children whose youngest child is aged between seven and thirteen years will be placed on a Jobseekers Transition Allowance payment which is means-tested but will allow the applicant to seek part-time work (although they will be exempted from a requirement to obtain or seek full-time work). However, lone parents whose youngest child is fourteen or older will be required to seek and accept full-time work under the same condition and rules that apply to single people with no children.

The impetus for amending the qualifying criteria for the scheme appears to be in response to criticisms at EU level about the relatively low work participation rate of lone-parents in Ireland, particularly women. The European Commission has noted that in Ireland the proportion of children living in households with low work intensity is three times that of the EU average.<sup>342</sup> The Commission is concerned that in the absence of

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<sup>335</sup> National Economic and Social Council (NESCC) (2014) *Jobless Households: An Exploration of the Issues*, Dublin: NESCC, p.37. The study found that 4 out of 5 recipients of the Carer's Allowance payment were women. Census 2011 showed that of the total 187,112 persons providing unpaid assistance to others in April 2011, 61 per cent were women.

<sup>336</sup> Y. Kamiya, C. Murphy, G. Savva and V. Timonan (2012) *Profile of Community-Dwelling Older People with Disability and their Caregivers in Ireland*, Dublin: The Irish Longitudinal Study on Ageing, p. 18.

<sup>337</sup> Government of Ireland (2012) *Census 2011 Profile 8 – Our Bill of Health*, Dublin: Stationery Office, p.18.

<sup>338</sup> Y. Kamiya, C. Murphy, G. Savva and V. Timonan (2012) *Profile of Community-Dwelling Older People with Disability and their Caregivers in Ireland*, Dublin: The Irish Longitudinal Study on Ageing, p.19.

<sup>339</sup> The Carers Association, 'The Carers Association angry that cuts to family carers' Respite Care Grant not reversed in Budget 2015', [press release], 14 October 2014. The payment was cut by 19 per cent in the Budget announcements for 2013.

<sup>340</sup> OPFP is a means-tested payment for men and women under the age of 66 who are bringing up children without the support of a partner. Prior to the introduction of changes in 2012, a lone parent could qualify for the payment up until his or her youngest child reached the age of 18. Since the introduction of the amendments to the scheme, the age threshold for the youngest child of new applicants reduced from 18 to 14 years in 2012, 12 years in 2013, 10 years in 2014 and it is due to fall to 7 years in July 2015. At the end of January 2015 there were approximately 69,700 OPFP recipients and it is expected that 30,200 will lose entitlement to the payment in July 2015 although it is expected that the majority of them will transition onto another payment such as Family Income Supplement (FIS) paid to low income families or Jobseekers Allowance. For details see Minister for Social Protection, Joan Burton TD, *Parliamentary Questions: Written Answers*, [9291/15], 5 March 2015.

<sup>341</sup> Government of Ireland (2012) *Census 2011 Profile 5: Households and Families*, Dublin Stationery Office, p.22. Census 2011 recorded 215,315 single-parent families of which 186,284 were headed by mothers and 29,031 were headed by fathers.

<sup>342</sup> European Commission (2015) *Country Report Ireland Including an In-Depth Review on the Prevention and Correction of Macroeconomic Imbalances*, Brussels: European Commission, p.2.

adequate childcare arrangements to support many of these parents attempting to re-enter the workforce,<sup>343</sup> the stated objective of reducing ‘long-term dependence on social security’ will be undermined and will instead result in making it ‘harder for lone parents to engage in economic activity’ when faced with a choice ‘between low paid full-time work and full-time care’.<sup>344</sup> Experts in this field have argued that the lack of recognition of unpaid care work by women is a clear human rights issue.<sup>345</sup> However, analysis of the reforms shows that these changes will impact negatively on thousands of working lone-parents who will be financially worse off with some likely to give up part-time employment and with others experiencing loss of access to other care and education supports.<sup>346</sup> The IHREC considers these steps to be regressive in nature and the decision to implement these reforms undermines the standard required by the ICESCR to ensure the right to social security.<sup>347</sup>

**The IHREC recommends that the State reverse the reforms to the OPFP in the absence of an adequate and affordable childcare system being in place. While these reforms remain in place, their effect should be closely monitored by the State, in particular in relation to the poverty and deprivation rates for single-parent headed households. Any negative effects that are detected should be dealt with as a matter of priority and effectively remedied by the State.**

### 7.2.3 Older people

The IHREC notes the reliance of older people in Ireland on the social security system and notes that with an ageing population that this will continue to increase.<sup>348</sup> Notably, there is a gender dimension to the enjoyment of the right to social security for older people: while women over the age of 65 are more likely to depend on the social security system as their primary source of income in the form of a non-contributory pension,<sup>349</sup> they are less likely to be in receipt of either an occupational pension or a contributory State Pension due to the increased likelihood of career interruptions.<sup>350</sup> In its *General Comment No. 19* on the right to social security, the Committee calls on the State to take steps to eliminate gender discrimination in relation to pension schemes, and where there are differences between the entitlements of men and women based on contributions, it should take into account the circumstances and responsibilities for women ‘for example by considering child rearing periods or periods to take care of adult dependents in relation to pension entitlements’.<sup>351</sup> The IHREC notes that in 2012 the State doubled the number of contributions

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<sup>343</sup> A campaign entitled ‘Seven is too young’ opposing the reforms to the OPFP was established by three civil society organisations working with families and children: the One Parent Exchange Network (OPEN), the National Women’s Council of Ireland (NWC) and Barnardos. The Minister for Social Protection originally committed to postpone the implementation of the legislation to coincide with the introduction of a ‘Scandinavian model’ of childcare but this was reneged upon due to the estimated annual cost of the proposed model at €1 billion. Minister for Social Protection, Joan Burton TD, Parliamentary Questions: Written Answers, [51045/13], 27 November 2013.

<sup>344</sup> Dr M.P. Murphy and C. Loftus ‘A Gendered Right to Social Security and Decent Work: The Debate in the Context of Irish Austerity’ in *Women’s Rights to Social Security and Social Protection* (2014) edited by B. Goldblatt and L. Lamarche, UK: Hart Publishing, p.257.

<sup>345</sup> M. Sepúlveda Carmona and K. Donald, ‘What does care have to do with human rights? Analysing the impact on women’s rights and gender equality’, *Gender & Development*, Vol. 22, No. 3, 2014.

<sup>346</sup> Dr M.P. Murphy, ‘Ireland’s lone parents, social welfare and recession’, *The Irish Community Development Law Journal* Vol. 3 (2) 2014.

<sup>347</sup> *Ibid.*, p.18.

<sup>348</sup> The number of people over 65 is set to increase from 532,000 in 2011 to approximately 1.4 million by 2046. Central Statistics Office (CSO) (2013) *Population and Labour Force Projections 2016-2046*, Dublin: Stationery Office, p.33.

<sup>349</sup> Central Statistics Office (2013) *Survey on Income and Living Conditions (SILC): Thematic Report on the Elderly 2004, 2009, 2010 (revised) and 2011*, Cork: CSO, p.6.

<sup>350</sup> Organisation for Economic Cooperation and Development (OECD) (2014) *OECD Reviews of Pensions System: Ireland*, Paris OECD Publishing.

<sup>351</sup> UN Committee on Economic, Social and Cultural Rights (CESCR) (2008) *General Comment No. 19: The right to social security (art. 9)*, E/C.12/GC/19, Geneva: OHCHR, para. 32.

required to access the full contributory State Pension, which it notes may have a disproportionate effect on women who had previously experienced difficulties in qualifying for the full State Pension (contributory) under the less onerous arrangements.<sup>352</sup>

**The IHREC recommends that the State to take into account the circumstances and responsibilities for women for example by considering child rearing periods or periods to take care of adult dependents in relation to pension entitlements in line with *General Comment No. 19* of the Committee and to take concrete action to improve the situation of older women in accessing old-age pensions.**

### 7.3 Access to Social Security – Conditionality and Sanctions

Social security controls have intensified since 2011 with three specific changes targeting unemployed job-seekers, lone parents and young people.<sup>353</sup> The situation of lone parents is described in greater detail in Section 7.2.2. The Social Welfare Act 2010<sup>354</sup> provided that from April 2011 a person's jobseeker payment could be reduced by €44 per week if he or she refuses an appropriate offer of training, declines an intervention, does not attend a meeting or drops out of the process and fails to engage. Further sanctions were introduced in 2013, providing that a person on the reduced penalty rate of €144 per week for 21 days or more, can be disqualified from receiving a jobseekers payment for up to nine weeks or in some instance, a complete ban could apply.<sup>355</sup> Furthermore, a person could be disqualified from accessing Supplementary Welfare Allowance (SWA),<sup>356</sup> the State's own safety net payment for applicants who do not qualify for any other payment but who require social assistance. The rate of sanctions applied since the introduction of these measures has increased significantly from fewer than 400 in 2011 to more than 4000 in 2014.<sup>357</sup>

Young jobseekers under the age of 26 have also been subject to further conditionality in the form of age-related reductions; since January 2014, the weekly rate of jobseekers payments or SWA is €100 for a primary applicant aged between 18 and 24 or €144 for a person aged 25, still lower than the standard rate of €188 for applicants over 25.<sup>358</sup> The 2014 Youth Guarantee will increase sanctions for young people under 25, and from 2015 it is expected that the privatisation of public employment services will further increase the use of sanctions.<sup>359</sup>

**The IHREC recommends that the State implement social security sanctions in a transparent and accountable manner and regularly review their use to ensure that they are not causing increased poverty and exclusion for vulnerable groups.**

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<sup>352</sup> In 2011, prior to the changes, only 27 per cent of those in receipt of the maximum State Pension (Contributory) were women. N. Duvvury, A. Ní Léime, A. Callan, L. Price, M. Simpson (2012) Older women workers' access to pensions: vulnerabilities, perspectives and strategies, Galway: Irish Centre for Social Gerontology, National University Ireland Galway.

<sup>353</sup> J. P. Martin (2014) 'Activation and active labour market policies in OECD countries: stylised facts and evidence on their effectiveness', Geary Paper 6/2014 UCD Geary Institute Discussion Paper Series; WP2-14/09UCD.

<sup>354</sup> Sections 7 and 8, Social Welfare Act 2010 amending the Social Welfare (Consolidation) Act 2005.

<sup>355</sup> Sections 12 and 13, Social Welfare (Miscellaneous Provisions) Act 2013 amending the Social Welfare (Consolidation) Act 2005.

<sup>356</sup> Section 14, Social Welfare (Miscellaneous Provisions) Act 2013 amending the Social Welfare (Consolidation) Act 2005.

<sup>357</sup> M.P. Murphy (2015) *JobBridge Time to Start Again: A proposal to reframe, restrict and resize Irish Internship Policy*, Dublin: Mandate Trade Union, p. 26.

<sup>358</sup> Section 9, Social Welfare and Pensions Act 2013 amending the Social Welfare (Consolidation) Act 2005.

<sup>359</sup> S. Lowe (2014) 'JobPath: The Proposed Introduction of an Employment Programme in the Republic of Ireland', London School of Economics and Political Science.

## 7.4 Social Welfare Appeals – access to an effective remedy

Access to an effective remedy is clearly a key element of Article 9 of the Covenant. In circumstances where an individual's right to social security has been breached, the Committee is clear that he or she 'should be entitled to adequate reparation, including restitution, compensation, satisfaction or guarantees of non-repetition'.<sup>360</sup> The Social Welfare Appeals Office (SWAO), an office of the Department of Social Protection established to process and adjudicate on appeals, has been subject to severe pressure since the onset of the recession due to an unprecedented number of appeals submitted to it.<sup>361</sup> Although the Committee indicates that legal assistance should be provided to appellants within maximum available resources, social welfare appeals continue to be excluded from the remit of the Civil Legal Aid scheme.<sup>362</sup> The IHREC is concerned that the consistently high rate of successful appeals indicates that a high proportion of initial decisions are incorrect and result in needless appeals and unnecessary delays for the appellant who may be denied his or her payment in the interim thereby interfering with the enjoyment of his or her right to social security.<sup>363</sup>

**The Commission recommends the State review the initial decision-making processes by the Department of Social Protection to improve first instance decisions and reduce the number of unnecessary appeals while at the same time ensuring that applicants receive their entitlements in a fair and timely way. Where an appeal is necessary, the State should consider extending the remit of the Legal Aid Board to ensure that appellants can access legal assistance and representation if it is required. (See also section 3.3 of this report).**

## 8. The Protection of the Family, Mothers and Children (Article 10)

### 8.1 Constitutional Position of the Family and Diverse Family Forms

Article 41 of the Irish Constitution protects 'the family which is founded on the institution of marriage'. The Irish Superior Courts have interpreted this as referring to the family based on heterosexual marriage only,<sup>364</sup> thus excluding a diverse range of non-marital families from enjoying the full level of Constitutional protection. In this context, the IHREC welcomes the enactment of the Children and Family Relationships Act 2015 (the '2015 Act') which it considers will provide a 'modern legislative regime for the recognition and protection of the rights of children and the rights of people in diverse family forms which have not been adequately protected in Irish law before now' including 'children raised in families where the parents are unmarried, or are cohabiting, or do not live together, or are in a civil partnership, or are in a second relationship (and combinations of these)'.<sup>365</sup>

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<sup>360</sup> UN Committee on Economic, Social and Cultural Rights (CESCR) (2008) *General Comment No. 19: The right to social security (art. 9)*, E/C.12/GC/19, Geneva: OHCHR, para. 77.

<sup>361</sup> The number of appeals submitted rose dramatically from 14,070 in 2008 to a peak of 35,484 in 2012. The number of new appeals received in 2014 was 26,069 although the overall workload was almost 41,000 when the appeals that were ongoing in 2014 are included.

<sup>362</sup> Section 28(9)(a), Civil Legal Aid Act 1995. The former UN Independent Expert on Extreme Poverty and Human Rights also criticised the exclusion of social welfare appeals from the remit of the Legal Aid Board following her official visit to Ireland in 2011.

<sup>363</sup> Social Welfare Appeals Office (SWAO) *Annual Report 2014*, Dublin: SWAO. The SWAO indicates that in 2014, 17 per cent of appeals were allowed following a review by the original decision-maker. Of the 24,081 cases that were decided by an Appeals Officer, 12,330 (51 per cent) were successful or partially successful. The success rate rose to 65 per cent when an oral hearing was held but despite this fact, the majority of appeals were decided summarily based on written evidence only.

<sup>364</sup> See Denham J in *J. McD v. P.L.* [2009] IESC 81, [2010] 2 IR 199 (SC) 269.

<sup>365</sup> IHREC (2015) *Observations on the Children and Family Relationships Bill 2015*, Dublin: IHREC, p.3. The figures from the latest Census in 2011 indicate that there were 834,396 families with children, comprising 522,959 married couples; 54,911 unmarried cohabiting couples; 186,284 single-mother headed families and 29,031 single-father headed families. At that time there were an estimated 230 families headed by same-sex couples.



In its *Observations on the Children and Family Relationships Bill*, the IHREC noted that the inclusion of key children's rights principles is most welcome. However, the IHREC remains concerned about provisions related to the child's right to identity as children conceived through Donor Assisted Human Reproduction (DAHR) prior to the commencement of the legislation will not be included on the Donor Conceived Persons Register,<sup>366</sup> or those conceived outside of a clinical setting through informal donor-assisted reproduction, will not enjoy the protection of this legislation.<sup>367</sup> In addition, the Commission expressed its concern that automatic guardianship is not extended to unmarried fathers unless they have been living with the mother and child for a specified period around the time of the birth, contrary to previous recommendations by both the Law Reform Commission and the Ombudsman for Children.<sup>368</sup>

In the context of the right to equality and non-discrimination, the IHREC broadly welcomes the marriage equality referendum which is to be held on 22 May 2015 to determine whether to amend the Constitution and extend access to civil marriage to all 'persons without distinction as to their sex'.<sup>369</sup> The decision to hold a referendum follows a series of important legislative reforms,<sup>370</sup> consultative processes,<sup>371</sup> and Irish case-law that has considered the position of same-sex couples, including the recognition of civil marriage for persons under the Irish Constitution.<sup>372</sup> Civil partnership extended certain rights and entitlements to same-sex couples that are similar to those of married couples through the enactment of the Civil Partnerships and Certain Rights and Obligations of Cohabitants Act 2010. However, the IHREC notes that currently civil partners and/or their children do not enjoy the constitutional protection or 'special care' afforded to a marital family.<sup>373</sup>

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<sup>366</sup> Section 31(1) of the 2015 Act provides only that entries onto the register shall be in respect of a child born in the State as a result of donor-assisted human reproduction.

<sup>367</sup> The 2015 Bill is silent on the consequences of what might be called 'informal donor-assisted reproduction' – that is, donor-assisted human reproduction undertaken informally outside a medical setting.

<sup>368</sup> The 2015 Bill amends the Guardianship of Infants Act 1964 by, among other things, providing that where an unmarried (different-sex) couple has cohabited for 12 months, at least three of which both have lived with the child, the father shall, in effect, be automatically recognised as the father. The Law Reform Commission recommended that Irish law should provide for automatic joint guardianship of both the mother and father of any child and that this should be linked to compulsory joint registration of the birth of a child. Law Reform Commission (2010) *Report: Legal Aspects of Family Relationships* (LRC 101 – 2010), in Chapter 2. As noted by the Ombudsman for Children, human rights jurisprudence under the ECHR has established that family life can exist between parents and their children regardless of the parents' living arrangements. See Office of the Ombudsman for Children (OCO) (2014) *Advice of the Ombudsman for Children on the General Scheme of the Children and Family Relationships Bill*, Dublin: OCO, pp.9–10.

<sup>369</sup> Thirty-fourth Amendment to the Constitution (Marriage Equality) Bill 2015.

<sup>370</sup> The key legislation is the Civil Partnerships and Certain Rights and Obligations of Cohabitants Act 2010. Some protection for same-sex couples had been provided in earlier legislation, including the Domestic Violence Act 1996, although this was solely on the basis of the couple having a shared home and not because they were a same-sex couple. Similarly, Section 151 of the Finance Act 2000 exempted certain people from capital acquisitions tax that had previously applied to the inheritance of shared home.

<sup>371</sup> In 2004 and 2005, the All-Party Oireachtas Committee on the Constitution undertook a public consultation on the family, and in 2006 it concluded that '[p]rovision for same-sex marriage would bring practical benefits. But it would require a constitutional amendment', *Tenth Progress Report: The Family*, at p. 87. Also in 2006, the Government established the 'Colley Working Group' which undertook a public consultation on domestic partnership – see *Options Paper Presented by the Working Group on Domestic Partnership to the Tánaiste and Minister for Justice, Equality and Law Reform, Mr. Michael McDowell, T.D.* (2006). The third significant consultative exercise was undertaken in 2013 at the request of the Government by the Convention on the Constitution – see *Third Report of the Convention on the Constitution: Amending the Constitution to Provide for Same-sex Marriage* (2013).

<sup>372</sup> The primary jurisprudential development is the judgment of the High Court in 2006 in the case initiated by Dr Katherine Zappone and Dr Louise Gilligan seeking to have their Canadian marriage recognised in Ireland: *Zappone & anor v. Revenue Commissioners & ors.* [2006] IEHC 404, [2008] 2 IR 417. The Court found that it does not have the power to expand the legal definition of marriage in the way Drs Zappone and Gilligan sought. A further development in case law was the outcome of *J. Mc.D. v. P.L.* [2009] IESC 81, [2010] 2 IR 199, 242 in which long-standing jurisprudence was applied to the case of a lesbian couple raising a child, and they were found not to be a family for the purposes of the Constitution.

<sup>373</sup> Article 41.3.1 of the Constitution pledges the State 'to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack'.

The IHREC recommends that the State review the operation of the Children and Family Relationships Act 2015 in due course to ensure that it provides the most comprehensive protection possible to all children born through assisted reproduction, including where persons were born prior to the 2015 Act coming into force, or where conception occurs outside a DAHR facility.

## 8.2 Protection Against Domestic and Gender Based Violence

While the Domestic Violence Acts 1996 – 2002 (the ‘Domestic Violence Acts’) provide civil remedies for victims of domestic violence, there continues to be no specific criminal code dealing with the crime of domestic violence and no statutory definition of domestic violence in the Irish legal framework.<sup>374</sup> Perpetrators of domestic violence are prosecuted under other criminal legislative provisions.<sup>375</sup> Moreover, there is no single definition used by agencies, although the most widely accepted definition is that developed by the 1997 Taskforce on Violence against Women.<sup>376</sup> Notably, the *Garda Síochána Policy Statement on Domestic Violence* contains a different definition.<sup>377</sup> Neither of these definitions extends to women in dating relationships,<sup>378</sup> nor to coercive control by a partner.<sup>379</sup> The IHREC is concerned that despite the prevalence of domestic violence in Ireland,<sup>380</sup> the 2014 *Garda Inspectorate Report* found that crimes of domestic violence are not always correctly recorded and that there was a ‘high number of calls to domestic incidents with low volume of arrests recorded’.<sup>381</sup> Affordability remains an issue for women on little or no incomes who require legal assistance<sup>382</sup> as does a lack of consistency in relation to legal proceedings<sup>383</sup> despite amendments to the *in camera* rule which now allow for anonymised reporting by the of family law cases.<sup>384</sup> Furthermore, migrant women who are victims of domestic violence are still required to pay the normal €300 fee if their application for an independent residence visa is successful.<sup>385</sup>

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<sup>374</sup> Safe Ireland (2014) *‘The lawlessness of the home’: Women’s experiences of seeking legal remedies to domestic violence and abuse in the Irish legal system*, Athlone: Safe Ireland, p. 74. Safe Ireland is the national network of women’s refuges.

<sup>375</sup> Perpetrators may be prosecuted under the Criminal Law (Rape) Amendment Act 1990, Criminal Legal Public Order Act 1994, Non-Fatal Offences Against the Person Act 1997, Child Trafficking and Pornography Act 1998, Sex Offenders Act 2001, Criminal Law (Sexual Offences) Act 2006, Criminal Law (Human Trafficking) Act 2008 and Criminal Law (Defence and the Dwelling) Act 2012.

<sup>376</sup> The Taskforce defined domestic violence as: ‘the use of physical or emotional force or threat of physical force, including sexual violence, in close adult relationships. This includes violence perpetrated by spouse, partner, son, daughter or any other person who is a close blood relation to the victim’.

<sup>377</sup> ‘The physical, sexual, emotional, or mental abuse of one partner by another partner in a relationship which may or may not be based on marriage or cohabitation and includes abuse by any family member against whom a safety order or a barring order may be obtained by another family member’.

<sup>378</sup> Women’s Aid, *‘Women’s Aid urges government action on stalking and abuse of young women’*, [press release], 13 February 2014. Safety orders are not currently available to victims in dating relationships where they have never cohabited with the alleged perpetrator.

<sup>379</sup> Safe Ireland (2014) *‘The lawlessness of the home’: Women’s experiences of seeking legal remedies to domestic violence and abuse in the Irish legal system*, Athlone: Safe Ireland, p.90.

<sup>380</sup> The EU Fundamental Rights Agency (FRA) in an EU-wide survey found that in Ireland 26 per cent of women over 15 indicated that they had experienced physical or sexual abuse by a partner or ex-partner and 12 per cent had been subject to stalking. In Ireland only 28 per cent of serious incidents involving violence perpetrated by a current partner came to the attention of the police while only 24 per cent of these cases perpetrated by a non-partner received police attention. EU FRA (2014) *Violence against women: an EU-wide survey, Main Results*, Vienna: EUFRA, pp.28, 61 and 83.

<sup>381</sup> Garda Síochána Inspectorate (2014) *Report of the Garda Síochána Inspectorate: Crime Investigation Report*, Dublin Garda Síochána Inspectorate, p.17.

<sup>382</sup> Civil legal aid is available on a means-tested basis and in cases of domestic violence this is prioritised. However, long waiting lists for law centres may cause delays in relation to other family-related proceedings. See Safe Ireland (2014) *‘The lawlessness of the home’: Women’s experiences of seeking legal remedies to domestic violence and abuse in the Irish legal system*, Athlone: Safe Ireland, p.85.

<sup>383</sup> *Ibid.*, Chapter 3.

<sup>384</sup> The Minister for Justice and Equality, Frances Fitzgerald TD, in her *Dáil Statement on opposing domestic violence* in December 2014, stated: ‘Media reporting has the potential to support more consistent approaches by different courts to the difficult issue of

Funding for domestic violence support services has been severely reduced during the recession with refuges reporting a lack of spaces despite an increase for demand.<sup>386</sup> The IHREC regrets that the number of spaces that are currently available in the State is less than a third of the number that the Council of Europe Taskforce to Combat Violence Against Women recommended be made available.<sup>387</sup>

The IHREC welcomes the progress made by the State on addressing the key issue of domestic and gender-based violence<sup>388</sup> but recognises that more needs to be done. The Commission further welcomes the commitment by the Minister for Justice and Equality to take a number of important steps during 2015 including to introduce consolidated and reformed domestic violence legislation: to ratify the Council of Europe's Convention on preventing and combating violence against women and domestic violence (the 'Istanbul Convention'); to finalise a second National Strategy for tackling domestic, sexual and gender-based violence; and to transpose and implement EU Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime (the 'Victims' Directive').<sup>389</sup>

**The IHREC recommends that the State prioritise the consolidation and reform of domestic violence legislation and put in place the updated *National Strategy for Tackling Domestic, Sexual and Gender-based violence* with the appropriate necessary supports in the form of the recommended number of spaces in refuges for victims of domestic violence. The Commission also recommends that the State ratify the Istanbul Convention as a matter of priority.**

### 8.3 Adequacy of Maternity Leave and Parental Leave

Although there is currently a statutory right to paid maternity leave for 26 weeks with a further entitlement to 16 weeks unpaid leave,<sup>390</sup> the IHREC notes that Ireland is one of several EU countries that does not have any statutory entitlement to paid paternity leave,<sup>391</sup> although some employers do grant it.<sup>392</sup> The IHREC welcomes the increase in the length of parental leave to which each parent is entitled, from 14 to 18 weeks in line with the EU (Parental Leave) Regulations 2013,<sup>393</sup> but notes that the State opted for unpaid rather than paid leave meaning that 'many parents cannot afford to avail of leave, and also that men are less likely

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domestic violence, not only in relation to the various hearings concerning domestic violence orders, but in family law hearings generally'.

<sup>385</sup> Irish Immigration and Naturalisation Service (INIS) (2012) *Victims of Domestic Violence: Immigration Guidelines*, Dublin: Department of Justice and Equality, p.2. The guidelines state that while there is no application fee, '[i]n the event of the application being successful the normal registration fee will be applied'.

<sup>386</sup> Safe Ireland (2014) *Safety in a time of crisis: Priorities for protection women and children impacted by domestic violence*, Athlone: Safe Ireland, p.6. Demand for services in 2012 increased by 36 per cent since the onset of the recession in 2008 while State funding was reduced by 14 per cent overall.

<sup>387</sup> Women Against Violence Europe (WAVE) (2014) *Country Report 2014: Ireland*, Vienna: WAVE. In 2014 there were 21 women's shelters and 141 family spaces/units in the State.

<sup>388</sup> A number of key developments have taken place: the establishment in 2007 of Cosc, the National Office for the Prevention of Domestic, Sexual and Gender-based Violence to 'ensure the delivery of a well-coordinated 'whole of Government' response to domestic, sexual and gender-based violence'; the publication of a *National Strategy for tackling domestic, sexual and gender-based violence 2010 – 2014*; and the enactment of the Child and Family Agency Act 2014 which included in its functions the provision of 'care and protection for victims of domestic, sexual or gender-based violence, whether in the context of family or otherwise'.

<sup>389</sup> These commitments were all made by the Minister for Justice and Equality, Frances Fitzgerald TD, in a [Dáil Statement on opposing domestic violence](#), 18 December 2014.

<sup>390</sup> Maternity Protection Acts 1994 and 2004.

<sup>391</sup> European Commission (2015) *Report on Equality between Women and Men 2014*, Brussels: European Commission, pp.45 – 53.

<sup>392</sup> The Civil Service provides three days.

<sup>393</sup> The Parental Leave Act 1998 as amended by the Parental Leave (Amendment) Act 2006 are collectively referred to as the Parental Leave Acts giving effect to *Council Directive No. 2010/18/EU* of 8 March 2010.

to avail of it'.<sup>394</sup> The IHREC welcomes the indication from the State that a Family Leave Bill is expected in late 2015<sup>395</sup> to 'provide for the consolidation into one piece of legislation of the current provisions regarding maternity, adoptive, parental and carer's leave'.<sup>396</sup>

In the context of maternity supports, in the period prior to the recession, the vast majority of women availed of their paid maternity leave entitlements,<sup>397</sup> but the IHREC notes that in a regressive step the State has since reduced access to financial supports for mothers of new-born children which could make it more difficult for women to stay at home. In 2013, Maternity Benefit became subject to tax,<sup>398</sup> while a further regressive step standardised the rate of payment to the lower rate for all mothers of new-born children.<sup>399</sup> Evidence from the Government's longitudinal study for infants, *Growing up in Ireland*, while not conclusive, points to the efficacy of paid maternity leave 'in influencing the duration of sole maternal care in the first year of an infant's life' and it highlights that with six months paid maternity leave at the time of the survey, few mothers took up paid employment earlier than this point'.<sup>400</sup> As the most frequent reason cited for a return to work was financial,<sup>401</sup> there is a concern that cuts to financial supports for new mothers may result in women feeling financial pressure to return to the workplace earlier than was previously the case.<sup>402</sup>

**The IHREC recommends that the State publish and enact as soon as possible the Family Leave Bill to consolidate legislative provisions relating to maternity, adoptive, parental and carer's leave. The Commission also recommends the State monitor the potential impact of the overall reductions in Maternity Benefit for new mothers to assess whether these cuts will require them to return to work at an earlier stage following the birth of their child.**

#### 8.4 Corporal Punishment

Corporal punishment in a home or care setting is not statutorily prohibited in Ireland and despite repeated recommendations by both national and international human rights actors to introduce a legislative ban,<sup>403</sup> a common law defence of 'reasonable and moderate chastisement' for parents who physically discipline their children remains in place.<sup>404</sup> Ireland has twice been found in breach of Article 17 of the Revised European

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<sup>394</sup> F. McGinnity, A. Murray and S. McNally (2013) *Growing up in Ireland: Mothers' Return to Work and Childcare Choices for Infants in Ireland – Infant Cohort Report 2*, Dublin: Department of Children and Youth Affairs, p.21.

<sup>395</sup> Government of Ireland (2015) *Government Legislation Programme Spring/Summer 2015*, Dublin: Department of the Taoiseach.

<sup>396</sup> Minister of State for New Communities, Culture and Equality, Aodhán Ó Riordáin TD, *Parliamentary Questions: Written Answers*, [13279/15], 31 March 2015.

<sup>397</sup> H. Russell, D. Watson & J. Banks (2011) *Pregnancy at Work: A National Survey*, Dublin/Roscrea: Health Service Executive Crisis Pregnancy Programme and the Equality Authority.

<sup>398</sup> Department of Finance (2012) *Budget 2013 Income Tax Measures*, [presentation], Dublin: Department of Finance, p.2

<sup>399</sup> Department of Social Protection (DSP) (2013) *Budget Factsheet: Main Social Welfare Changes and Rates of Payments Budget 2014*, Dublin: DSP, p.3.

<sup>400</sup> F. McGinnity, A. Murray and S. McNally (2013) *Growing Up in Ireland: Mothers' Return to Work and Childcare Choices for Infants in Ireland, Report 2*, Dublin: Department of Children and Youth Affairs, p.8.

<sup>401</sup> *Ibid.*, p.7.

<sup>402</sup> Children's Rights Alliance (2013) *Analysis of Budget 2014 and its Impact on Children*, Dublin: Children's Rights Alliance, pp.3-4.

<sup>403</sup> UN Committee on the Rights of the Child (2006) *Concluding Observations of the UN Committee on the Rights of the Child: Ireland*, Geneva: OHCHR, para. 40; UN Human Rights Council (2011) *Report of the Working Group on the Universal Periodic Review: Ireland*, A/HRC/19/9, para. 107.41; Council of Europe Commissioner for Human Rights, Thomas Hammarberg (2008) *Report by the Commissioner for Human Rights Mr Thomas Hammarberg on his visit to Ireland, 26-30 November 2007*, Strasbourg: Council of Europe; UN Human Rights Committee (2014) *Concluding Observations on Ireland's Fourth Periodic Report*, CCPR/C/IRL/CO/4, para. 14; G. Shannon (2013) *Sixth Report of the Special Rapporteur on Child Protection*, Dublin: Department of Children and Youth Affairs, pp.34-5; Ombudsman for Children's Office (OCO) (2011) *Submission for the 12<sup>th</sup> Session of the Working Group on Universal Periodic Review*, Dublin: OCO, para.18

<sup>404</sup> This defence was explicitly provided for in section 37 of the Children Act (1908), which was subsequently repealed by the Children Act 2001 however, the common law defence still exists.

Social Charter by the European Committee of Social Rights in relation to its stance on corporal punishment, most recently in 2015.<sup>405</sup> The State has indicated that the issue is under review but apart from conducting research as to the prevalence of the issue,<sup>406</sup> no concrete measures have yet been taken to provide for a complete ban.

**The IHREC recommends that the State should repeal the defence of reasonable chastisement with immediate effect and put in place adequate resources for parenting supports and courses through Tusla, the Child and Family Agency.**

## 8.5 Children in the Care of the State

Following the publication in 2009 of the *Report of the Commission to Inquire into Child Abuse* (the 'Ryan Report'), an implementation plan was put in place to address many of the particular issues in relation to children in the care of the State.<sup>407</sup> A referendum was held in October 2012 to insert a children's rights provision into the Constitution which would ensure that the State could intervene when necessary in order to act in the best interest of the child.<sup>408</sup> Although the amendment was carried,<sup>409</sup> a legal challenge appealing the outcome of the positive result<sup>410</sup> which was dismissed by the Supreme Court in April 2015,<sup>411</sup> further delayed the final outcome. The IHREC welcomes proposed legislative steps by the State in order to further protect children, particularly those at risk of harm, but regrets that a number of these significant legislative reforms have been delayed, including the placing of *Children First Guidelines*<sup>412</sup> on a statutory footing.<sup>413</sup> In addition, the commencement of updated Garda Vetting legislation enacted in 2012, has been the subject of delay.<sup>414</sup> The establishment of Tusla, the Child and Family Agency in 2014, underpinned by children's rights,<sup>415</sup> was a significant step forward, but the IHREC notes its concern at the apparent lack of resources available to it.<sup>416</sup>

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<sup>405</sup> The most recent decision has not yet been published as it is currently with the State for review and response. C. O'Brien, 'Call to change law on smacking in wake of council findings', the Irish Times, 10 March 2015. The previous decision: *OMCT v Ireland*, Decision on the merits 7 December 2004. See also European Committee of Social Rights, Conclusions on Ireland 2011.

<sup>406</sup> Office of the Minister for Children and Youth Affairs (2010) *Parenting Styles and Discipline: Parent's and Children's Perspectives in 2010*, Dublin: Department of Health and Children, p.2. According to the report, 'Approximately one-quarter of all parents reported using physical punishment with their child in the past year. The most common forms of physical punishment reported were slapping a child on the bottom or on the hands, legs or arms, and shaking, grabbing or pushing a child'.

<sup>407</sup> Office of the Minister for Children (2009) *Report of the Commission to Inquire into Child Abuse, 2009: Implementation Plan*, Dublin: Department of Health and Children.

<sup>408</sup> The Thirty-First Amendment to the Constitution sought to insert Article 42A into the Constitution.

<sup>409</sup> The result was 58 per cent in favour of the amendment.

<sup>410</sup> A legal challenge was taken immediately after the Referendum in November 2012. The High Court held against the complainant in two separate judgments: *Jordan v. Minister for Children and Youth Affairs & Ors* [2013] IEHC 625 and *Jordan v. Minister for Children and Youth Affairs & Ors* [2014] IEHC 327. Leave was granted to appeal the decision to the Supreme Court which heard arguments in 2014.

<sup>411</sup> *Re: Referendum Act & re: Jordan and Jordan v. Minister for Children and Youth Affairs & ors* [2015] IESC 33.

<sup>412</sup> Department of Children and Youth Affairs (DCYA) (2011) *Children First: National Guidance for the Protection and Welfare of Children*, Dublin: DCYA.

<sup>413</sup> Government of Ireland (2011) *Programme for Government 2011 – 2016: Statement of Common Purpose*, Dublin: Government of Ireland, p.55.

<sup>414</sup> Minister for Justice and Equality, Frances Fitzgerald TD, *Parliamentary Questions: Written Answers, [6972/15]*, 19 February 2015. The National Vetting Bureau (Children and Vulnerable Persons) Act 2012 had to be reviewed following a UK Court of Appeal judgment in 2013. An amended draft is due before the Oireachtas by summer 2015.

<sup>415</sup> The Agency was established on 1 January 2014 following the enactment of the Child and Family Agency Act 2013. Section 9 of the Act provides for the 'best interests and views of the child'.

<sup>416</sup> C. O'Brien, 'Children's services under threat, warns agency chief', *The Irish Times*, 16 September 2014. Gordon Jeyes, Chief Executive of Tusla, the Child and Family Agency, estimated that in 2014, the Agency had overrun its budget by €25 million and would require €45 million to maintain services at the current level.

**The IHREC recommends that the State take immediate steps to ensure that the Constitutional amendment is enforced through the enactment of accompanying legislation along with the aforementioned pending legislation to ensure the protection and welfare of children. In particular, the Commission considers Tusla, the Child and Family Agency, must be adequately resourced in order to fulfil its mandate.**

### **8.5.1 Separated Children and Unaccompanied Minor Children**

Following a report by the Ombudsman for Children in 2009 noting the substantial number of separated asylum-seeking children who had gone missing from State care,<sup>417</sup> together with a recommendation in the Ryan Report implementation plan to ‘end the use of separately run hostels for separated children seeking asylum’,<sup>418</sup> the State closed specialised hostels for these children and instead placed them in foster care or in supported lodgings under the Child Care Act 1991. The IHREC recognises that the number of children arriving alone in the State has greatly declined in recent years, but notes that the majority of children arriving alone are placed in State care.<sup>419</sup> It also notes that a number of children continue to go missing; between 2009 and 2014, 78 children went missing of whom 52 have not been found.<sup>420</sup>

While the IHREC welcomes the positive reforms that have been made to date, it calls on the State to ensure that an individualised care plan is developed for each child in consultation with him or her, and that he or she is enabled to maintain his or her cultural, ethnic or linguistic identity while in State care.<sup>421</sup> The IHREC is concerned that aftercare is not routinely available for separated children who are instead usually transferred to direct provision accommodation on turning 18. The Commission welcomes the introduction of an agreed Health Service Executive and Reception and Integration Agency policy<sup>422</sup> which helps to ensure that ‘aged-out’ unaccompanied minors are not discharged from care during an academic year.<sup>423</sup>

**The IHREC recommends that the State ensure that each separated child is consulted and provided with an individual care plan which enables him or her to maintain his or her cultural, ethnic or linguistic identity. The State should consider extending aftercare provision for separated children who ‘age-out’ but who are still in need of State support. The IHREC while noting the reduction in the number of separated children missing from State care, echoes the recommendation of the OCO that the ‘Joint Protocol between An Garda Síochána and the Health Service Executive should be kept under review and adapted to take account of the particular circumstances of separated children who go missing’.**<sup>424</sup>

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<sup>417</sup> Ombudsman for Children (2009), *Separated Children Living in Ireland: A Report by the Ombudsman for Children’s Office*, Dublin: Ombudsman for Children’s Office, p.42. Between 2000 and 2008, 454 children went missing from care and of these, only 58 were found.

<sup>418</sup> Office of the Minister for Children (2009) *Report of the Commission to Inquire into Child Abuse, 2009: Implementation Plan*, Dublin: Department of Health and Children, p. 37.

<sup>419</sup> The number of separated children referred to the HSE’s Team for Separated Children Seeking Asylum (TSCSA) fell from more than 1000 in 2001 to 78 between January and October 2014. However, of these it is not known how many sought asylum. See Separated Children in Europe Programme (2014) *Newsletter No. 42 – Winter 2014*, Netherlands: Defence for Children, p. 58.

<sup>420</sup> E. Quinn, C. Joyce and E. Gusciute (2014) *Policies and Practices for Unaccompanied Minors in Ireland*, Economic and Social Research Institute, p. 61.

<sup>421</sup> M. Ní Raghallaigh (2013) *Foster Care and Supported Lodgings for Separated Asylum Seeking Young People in Ireland*, Dublin: Barnardos and the Health Service Executive.

<sup>422</sup> Health Service Executive and Reception and Integration Agency (2011) *Accommodation of Aged Out Minors in RIA Accommodation Centres*, Dublin: Department of Justice and Equality.

<sup>423</sup> E. Quinn, C. Joyce and E. Gusciute (2014) *Policies and Practices for Unaccompanied Minors in Ireland*, Economic and Social Research Institute, p.71.

<sup>424</sup> Ombudsman for Children (2009), *Separated Children Living in Ireland: A Report by the Ombudsman for Children’s Office*, Dublin: Ombudsman for Children’s Office, p. 53.

### 8.5.2 Aftercare

The IHREC welcomes the State's intention to enact legislation which will amend the Child Care Act 1991 to include a statutory right to an aftercare plan for children leaving State care. The IHREC echoes the concerns raised by the Special Rapporteur on Child Protection in his 2014 report in which he noted the *ad hoc* nature of the current after-care system and the lack of a mandatory provision of after-care services.<sup>425</sup> Notably, in its 2014 report on the General Scheme of the Aftercare Bill 2014, the Joint Oireachtas Committee on Health and Children considered the issues affecting young people leaving care, including the prospect of homelessness in the absence of available and appropriate accommodation, inconsistency of available services and the scarcity of resources.<sup>426</sup> It recommended the inclusion of a clearer definition of an aftercare plan, the inclusion of a review mechanism and called on the Minister for Children and Youth Affairs to consider broadening the eligibility criteria.<sup>427</sup> In addition to children exiting State care, given that 25 to 30 per cent of children in detention in the juvenile justice system are already known to the Child and Family Agency and have been allocated a social worker,<sup>428</sup> this group of young people should also be considered for inclusion in any extended aftercare provision, as recommended by the Oireachtas Committee.

**The IHREC endorses the recommendations of the Special Rapporteur on Child Protection and the Joint Oireachtas Committee on Health and Children and calls on the State to consider expanding the eligibility criteria for young adults in need of aftercare provision.**

## 9. The Right to an Adequate Standard of Living (Article 11)

### 9.1 Adequacy of Strategies to Reduce Consistent Poverty and Deprivation

The State's *National Action Plan for Social Inclusion 2007 – 2016* (NAPinclusion) was introduced prior to the onset of the recession and in this context in 2012, the State revised downwards the national poverty target for reducing consistent poverty<sup>429</sup> rate to 4 per cent by 2016 and to 2 per cent or less by 2020 in line with the Government's commitments under the *EU 2020 Strategy*.<sup>430</sup> The IHREC welcomes the State's decision to review the NAPinclusion and extend it to 2017,<sup>431</sup> particularly in light of the rise in consistent poverty rates for both adults and children in recent years.<sup>432</sup> However, the Commission is concerned that the current strategy does not adequately address specific poverty issues affecting low-paid workers,<sup>433</sup> lone parents<sup>434</sup>

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<sup>425</sup> G. Shannon (2014) *Seventh Report of the Special Rapporteur on Child Protection: A Report Submitted to the Oireachtas*, Dublin: Department of Children and Youth Affairs, pp. 109 – 110.

<sup>426</sup> Joint Oireachtas Committee on Health and Children (2014) *Report on General Scheme of the Aftercare Bill 2014*, Dublin: Houses of the Oireachtas, pp.39 – 44.

<sup>427</sup> *Ibid.*, p.12.

<sup>428</sup> *Ibid.*, p.28.

<sup>429</sup> Consistent poverty is a measure of poverty used in the NAPinclusion that takes account of the household's living standards as well as the household size, composition and total income. Persons are regarded as being in consistent poverty if their income is below 60 per cent of the median income (i.e. at-risk-of-poverty) and are deprived of at least 2 of the 11 items on the basic deprivation list.

<sup>430</sup> Department of Social Protection (2012) *National Social Target for Poverty Reduction: Policy Briefing on the Review of the National Poverty Target*, Dublin: Department of Social Protection, p.3.

<sup>431</sup> Minister for Social Protection, Joan Burton TD, Parliamentary Questions: Written Answers [11262/15], 24 March 2015.

<sup>432</sup> The rate of consistent poverty for adults rose from 5.4 per cent in 2010 to 7 per cent in 2013. Child consistent poverty rose from 8.8 per cent to 11.7 per cent in the same period. Figures taken from Department of Social Protection (2015) *Social Inclusion Monitor 2013*, Dublin: Department of Social Protection, p.31.

<sup>433</sup> One in four workers earn less than €11.45 per hour which has been calculated to be a living wage. See Nevin Economic Research Institute (2015) *Quarterly Economic Observer: Spring 2015*, Dublin: NERI, p.39.

<sup>434</sup> Lone parents continue to experience the highest rate of consistent poverty. The 2013 statistics from the EU Survey on Income and Living Conditions (SILC) indicate that 'individuals living in households where there was one adult and one or more children had the highest consistent poverty rate at 23.0 per cent'. Central Statistics Office, *Survey on Income and Living Conditions: 2013 Results*, [statistical release], 21 January 2015.

and migrants,<sup>435</sup> all of whom experience higher levels of poverty. The emphasis on reducing the number of jobless households, while important, needs to be combined with adequate supports to ensure that people can engage in quality employment.

In its 2002 Concluding Observations, the Committee reminded the State of its 'legal obligation to integrate economic, social and cultural rights into NAPS [sic]' and recommended that it utilise a rights-based approach.<sup>436</sup> While the State has based its current strategy on the lifecycle approach,<sup>437</sup> which includes some rights-based language, the Commission notes that it does not make specific reference to the ICESCR.<sup>438</sup>

The IHREC welcomes the specific child poverty target and the State's commitment in the *National Policy Framework for Children and Young People 2014-2020* to reduce the number of children living in consistent poverty by at least two thirds from the 2011 level.<sup>439</sup> However, the IHREC regrets the increase in the rate of consistent child poverty which means that 101,000 children will now need to be lifted out of consistent poverty in order to meet this target, an increase of more than 30,000 children from the 2011 baseline figure.<sup>440</sup>

**The IHREC recommends that the State when undertaking the current review of the strategy, to underpin it using human rights standards, making specific reference to ICESCR. The State should ensure that lower socio-economic groups are specifically named and adequately protected by the strategy and it must address issues of multiple disadvantage. The IHREC also recommends the State ensure that a detailed action plan is in place to ensure that the State meets its anti-poverty and social inclusion targets within a specified timeframe.**

### 9.1.1 The Right to Food

Food poverty is not a new issue in Ireland<sup>441</sup> but has undoubtedly been exacerbated by the recession. Since 2010, the percentage of people experiencing food poverty in Ireland has risen from 10 to 13.2 per cent.<sup>442</sup> The State has developed a definition and measurement to monitor food poverty,<sup>443</sup> but it has not yet put in

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<sup>435</sup> The rate of poverty for migrants is generally higher than that of the general population. In 2014, the consistent poverty rate was '12 per cent among non-EU nationals – over twice the rate for Irish nationals – and this gap has increased since 2009'. Consistent poverty combines at risk of poverty with enforced deprivation of a range of items. See F. McGinitty, E. Quinn, P. O'Connell and G. Kingston (2014) *Submission on Integration Policy: Monitoring Migrant Integration in Ireland*, Dublin: Economic and Social Research Institute (ESRI) and the UCD Geary Institute, p.4.

<sup>436</sup> UN Committee on Economic, Social and Cultural Rights (2002) *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland*, Geneva: Office of the High Commissioner for Human Rights, para. 31.

<sup>437</sup> The lifecycle approach includes a focus on children, people of working age, older people and people with disabilities.

<sup>438</sup> The NAPinclusion refers specifically to the UN Convention on the Rights of the Child (CRC).

<sup>439</sup> Department of Children and Youth Affairs (DCYA) (2014) *Better Outcomes, Brighter Futures: The National Policy Framework for Children and Young People 2014-2020*, Dublin: DCYA, p.93.

<sup>440</sup> Department of Social Protection (2015) *Social Inclusion Monitor 2013*, Dublin: Department of Social Protection, p.30.

<sup>441</sup> S. Friel and C. Conlon (2004) *Food Poverty and Policy*, Dublin: Combat Poverty Agency. This report raised many of the concerns which are still relevant today.

<sup>442</sup> Department of Social Protection (2015) *Social Inclusion Monitor 2013*, Dublin: Department of Social Protection, p.39. See also Organisation for Economic Development and Co-operation (OECD) (2014) *Society at a Glance 2014 Highlights: Ireland the crisis and its aftermath*, Paris: OECD, p.3. See also Safe Food (2012) *Measuring Food Poverty in Ireland – the indicator and its implications*, a briefing document based on research by C. Carney and B. Maître (2012) *Social Inclusion Technical Paper No. 3: Constructing a Food Poverty Indicator for Ireland using the Survey on Income and Living Conditions*, Dublin: Department of Social Protection.

<sup>443</sup> Department of Social Protection (2015) *Social Inclusion Monitor 2013*, Dublin: Department of Social Protection, p.46. Food poverty is defined as 'the inability to have an adequate and nutritious diet due to issues of affordability or accessibility. It is measured by the percentage of individuals experiencing one or more of the following: unable to afford a meal with meat, or vegetarian equivalent, every second day; unable to afford a weekly roast dinner (or vegetarian equivalent) and; missing one substantial meal in the last fortnight due to lack of money'.



place a specific strategy to tackle the growing issue. The Commission acknowledges the funding made available to healthy food initiatives and to the school meals programme<sup>444</sup> but notes that the increasing levels of food poverty may indicate that these targeted programmes have not reduced the number of people experiencing food poverty.<sup>445</sup> The IHREC welcomes the State's commitment in 2014 to develop a Nutrition Action Plan for Ireland<sup>446</sup> but notes the need for an implementation plan to accompany it.

**The IHREC recommends the State publish its Nutrition Action Plan at the earliest opportunity taking account of the increase in food poverty rates and considering alternative ways to address the growing issue.**

### 9.1.2 *The Right to Water*

The State agreed to the introduction of domestic water charges as part of the EU–IMF bailout conditions in 2010<sup>447</sup> and they will come into force in 2015.<sup>448</sup> Although not explicitly named in ICESCR, in its *General Comment No. 15*, the Committee confirmed that the 'right to water clearly falls within the category of guarantees essential for securing an adequate standard of living'.<sup>449</sup> While the Covenant does not require water to be provided free of charge, the Committee emphasises that '[a]ny payment for water services has to be based on the principle of equity, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups'.<sup>450</sup> The State has put in place a Water Conservation Grant of €100 for each household registered with Irish Water,<sup>451</sup> but as this grant is available to all households, regardless of income, the IHREC expresses its concern that the measure does not fully reflect the principle of equity because it does not specifically target low income households who are most likely to be disproportionately impacted by an additional utility bill.<sup>452</sup>

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<sup>444</sup> See details at: <http://www.welfare.ie/en/Pages/Healthy-Food-for-All.aspx>.

<sup>445</sup> OECD (2014) *Society at a Glance 2014 Highlights: Ireland the crisis and its aftermath*, Paris: OECD, p.3.

<sup>446</sup> Department of Health, 'Varadkar confirms Nutrition Action Plan for Ireland as WHO re-commits to address global hunger', [press release], 20 November 2014.

<sup>447</sup> Government of Ireland (2010) *Letter of Intent, Memorandum of Economic and Financial Policies and Technical Memorandum of Understanding*, Dublin: Government of Ireland, p.30.

<sup>448</sup> Customers registered with Irish Water will begin to receive quarterly bills between April and June 2015 for water used from 1 January 2015. If a water meter is installed, the bill will be based on the exact usage of drinking and waste water up to a maximum of €160 for a household with one adult and €260 for a household with more than one adult. Where only one part of the service is provided (either water supplied or wastewater removed) the maximum charge will be halved to reflect this. If a house is unmetered then the household is liable to pay the maximum charge. There is also an annual water allowance of 21,000 litres per child per service. For information on water charges see: <http://www.water.ie/billing-and-charges/charges/>. The introduction of water charges has sparked a wave of mass protests although recent research indicates that the application of austerity measures was the principal reason motivating many people to protest. C. Ó Fátharta, 'Water charges inspired new type of action', *The Irish Examiner*, 21 April 2015.

<sup>449</sup> UN Committee on Economic, Social and Cultural Rights (2002) *General Comment No. 15: The right to water (arts. 11 and 12 of the Covenant on Economic, Social and Cultural Rights)* E/C.12/2002/11, para. 3.

<sup>450</sup> *Ibid.*, para. 27.

<sup>451</sup> Payment of the grant will begin in September 2015 and will be an annual payment for all principal, private residences which are registered with Irish Water by June 2015. See <http://www.watergrant.ie/> for further details.

<sup>452</sup> In 2013, the CSO published an analysis of the *Effect on Households of the Economic Downturn* using data from the Quarter 3, 2012 Quarterly National Household Survey. The analysis indicated that 43 per cent of respondents were experiencing difficulty in paying bills or debts and of these households, 90 per cent mentioned higher or additional utility bills as a reason for financial difficulty. Central Statistics Office (CSO) (2013) *Quarterly National Household Survey: Effect on Households of the Economic Downturn, Quarter 3, 2012*, Dublin/Cork: CSO, p.2.

The Commission further notes that the right to water encompasses the right to access water of sufficient quality and quantity.<sup>453</sup> However, in 2013, areas in the rural Western part of Ireland were subject to a high number of boil notices and water restrictions which affected more than 30,000 people who live in the region.<sup>454</sup> The IHREC welcomes the Irish Water's *Drinking Water Safety Plan: Implementation Plan 2014 – 2016* as well as the development of Water Safety Plans for each public water supply facility as the Environmental Protection Agency deems it 'the most effective approach to securing and safeguarding Ireland's water services'.<sup>455</sup> The Commission notes that at the end of 2014, 43 per cent of facilities had not yet completed or started to prepare a Water Safety Plan.<sup>456</sup>

Notably, the Committee has explicitly stated that for 'Nomadic and traveller communities' there should be 'access to adequate water at traditional and designated halting sites'.<sup>457</sup> In this context, the IHREC notes the statistics provided by Census 2011 demonstrate that one-third of Traveller households living in mobile or temporary accommodation had no access to sewage facilities while a fifth had no access to piped water.<sup>458</sup>

**The IHREC recommends that the State review its policy to introduce water charges for all households in order to ensure that it complies with its international human rights obligations under ICESCR, in particular ensuring that the charges do not disproportionately affect low-income households. Furthermore, the State must ensure that everyone has access to clean and safe drinking water.**

### **9.1.3 Direct Provision and an Adequate Standard of Living for Asylum Seekers**

The system of 'Direct Provision' was established in the year 2000 to provide direct support to asylum seekers<sup>459</sup> by way of accommodation, food and a weekly allowance while their applications for protection are processed.<sup>460</sup> The Reception and Integration Agency (RIA), a unit in the Department of Justice and Equality, co-ordinates accommodation in a number of Direct Provision accommodation centres around Ireland.<sup>461</sup> The Government originally envisaged that a person would remain in the Direct Provision system on 'a short-term basis (not more than six months)'.<sup>462</sup> The system of Direct Provision has been criticised by several international human rights bodies and experts for not respecting the rights of residents.<sup>463</sup> In her

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<sup>453</sup> Since 2014, Irish Water is the responsible body for providing public drinking water but the Environmental Protection Agency has supervisory powers to ensure quality of drinking water under Statutory Instrument 106 of 2007, updated by Statutory Instrument 122 of 2014. Local Authorities continue to be responsible for supervising private supplies such as private wells.

<sup>454</sup> Y. Doris et al (2015) *Drinking Water Report 2013*, Wexford: Environmental Protection Agency, pp.9–10.

<sup>455</sup> *Ibid.*, p.12.

<sup>456</sup> *Ibid.*

<sup>457</sup> UN Committee on Economic, Social and Cultural Rights (2002) *General Comment No. 15: The right to water (arts. 11 and 12 of the Covenant on Economic, Social and Cultural Rights)* E/C.12/2002/11, para. 16.

<sup>458</sup> Government of Ireland (2012) *Census 2011 Profile 7 – Religion, Ethnicity and Irish Travellers*, Dublin: Stationery Office, p. 37. In real terms, 886 people were without sewerage facilities and 556 did not have piped water.

<sup>459</sup> For the purposes of this report an asylum seeker is a person who seeks refugee status, subsidiary protection or leave to remain. See IHREC (2014) *Policy Statement on the System of Direct Provision in Ireland*, Dublin: IHREC.

<sup>460</sup> The system of Direct Provision commenced on 10 April, 2000 from which time asylum seekers have received full board accommodation and personal allowances of €19.10 per adult and €9.60 per child per week. See website of Reception and Integration Agency at [http://www.ria.gov.ie/en/RIA/Pages/Direct\\_Provision\\_FAQs](http://www.ria.gov.ie/en/RIA/Pages/Direct_Provision_FAQs) last accessed on 29 April 2015.

<sup>461</sup> The Reception and Integration Agency currently lists a total of 34 centres, located throughout 16 counties in Ireland: Baleskin Reception Centre (located in Dublin), 31 Direct Provision Accommodation Centres (seven of which are State-owned) and two Self-catering Accommodation Centres (located in Dublin and Louth). See

[http://www.ria.gov.ie/en/RIA/Pages/Reception\\_Dispersal\\_Accommodation](http://www.ria.gov.ie/en/RIA/Pages/Reception_Dispersal_Accommodation). Protection applicants or asylum seekers form the main body of those accommodated in Direct Provision but victims of trafficking may also be placed in this system.

<sup>462</sup> Press release issued by then Minister for Justice, Equality and Law Reform, John O'Donoghue. Reported in Irish Times, 28 March 2008.

<sup>463</sup> IHREC (2014) *Policy Statement on the System of Direct Provision in Ireland*, Dublin: IHREC. The Policy Statement provides an overview of the various criticisms and recommendations made about the Direct Provision system by both international and national human rights experts including the UN Committee on the Elimination of all forms of Racial Discrimination (2011)

2011 report on Ireland, the UN Independent Expert on the Question of Human Rights and Extreme Poverty, Magdalena Sepúlveda Carmona, noted the Direct Provision system in Ireland limits the autonomy of asylum seekers and impedes their family life, as most accommodation centres have not been designed for long term reception of asylum seekers and are not conducive to family life.<sup>464</sup> In 2013, the European Commission against Racism and Intolerance (ECRI) in its fourth report on Ireland, noted with concern that residents of the Direct Provision centres have little control over their everyday life, which impacts negatively on their family life:

ECRI notes that it has been reported that 90% of asylum seekers suffer from depression after 6 months in the Direct Provision system and that they are 5 times more likely than an Irish citizen to be diagnosed with a psychiatric illness.<sup>465</sup>

In this context, the IHREC welcomes the establishment in October 2014 of a Working Group which has been tasked with identifying actions and making recommendations to improve existing arrangements for asylum seekers to ensure 'greater respect for the dignity of persons in the system and improving their quality of life by enhancing the support and services currently available'.<sup>466</sup> The IHREC notes that the Working Group is financially restrained in terms of its recommendations to Government as these must be cost-neutral.<sup>467</sup> As stated in the Committee's *General Comment No.3: the Nature of States Parties' Obligations under the Covenant*, the rights of all persons in the State, particularly those who are vulnerable, must be respected regardless of resource constraints.<sup>468</sup> While the Commission respects the State's entitlement to establish a system of material support for the protection of asylum seekers, it also has concerns that the current system does not respect the economic, social and cultural rights of asylum seekers.<sup>469</sup> The lack of autonomy in food

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*Concluding Observations of the Committee on the Elimination of all forms of Racial Discrimination: Ireland*, CERD/C/IRL/CO/3-4; former UN Office of the High Commissioner for Human Rights (OHCHR) (2011) *Report of the UN Independent Expert on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona: Mission to Ireland*, Geneva: OHCHR; former Council of Europe Commissioner for Human Rights, Thomas Hammarberg, 2008 and 2011 Reports on his visits to Ireland, Strasbourg: Council of Europe; current Council of Europe Commissioner for Human Rights, Nils Mužnieks, 2012 letter to the Minister for Justice and Equality, Strasbourg: Council of Europe; European Commission against Racism and Intolerance (2013) *ECRI Report on Ireland (fourth monitoring cycle)*, Strasbourg: Council of Europe; and the UN Human Rights Committee (2014) *Concluding Observations on Ireland's Fourth Periodic Report*, CCPR/C/IRL/CO/4, Geneva: OHCHR.

<sup>464</sup> UN Office of the High Commissioner for Human Rights (OHCHR) (2011) *Report of the UN Independent Expert on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona: Mission to Ireland*, Geneva: OHCHR, para. 90. The independent expert reminds Ireland that asylum seekers and refugees must be guaranteed the enjoyment of all human rights, including the right to privacy and family life, an adequate standard of living, and adequate standards of physical and mental health rights that complement the provisions of the 1951 Convention relating to the Status of Refugees, at para. 91.

<sup>465</sup> Council of Europe: European Commission Against Racism and Intolerance (ECRI) (2013) *ECRI Report on Ireland (fourth monitoring cycle)*, Strasbourg: Council of Europe, para. 115.

<sup>466</sup> Department of Justice and Equality (2014) *Working Group to report to Government on improvements to the protection process, including Direct Provision and supports to asylum seekers: Terms of Reference*, Dublin: Department of Justice and Equality. The Working Group is chaired by former High Court Judge Bryan McMahon and members include representatives from the following Government Departments: Children & Youth Affairs; Education & Skills; Environment, Community & Local Government; Justice & Equality; Public Expenditure and Reform; Social Protection; the Health Service Executive; Office of the Refugee Applications Commissioner; Office of the Attorney General; Refugee Appeals Tribunal and Tusla, the Child and Family Agency. Civil society representatives appointed to the group include the Children's Rights Alliance; Irish Refugee Council (IRC); IRC Core Group of Asylum Seekers and Refugees; Jesuit Refugee Service; Nasc, the Irish Immigrant Support Centre; Spirasi and UNHCR Ireland. Individuals nominated to the group include Dr Ciara Smyth, Lecturer in Law; Tim Dalton, retired Secretary General of the Department of Justice; and Dan Murphy, former General Secretary of the Public Service Executive Union and former President of the Irish Congress of Trade Unions. In March 2015, the Irish Refugee Council resigned from the Working Group.

<sup>467</sup> Department of Justice and Equality (2014) *Working Group to report to Government on improvements to the protection process, including Direct Provision and supports to asylum seekers: Terms of Reference*, Dublin: Department of Justice and Equality.

<sup>468</sup> UN Committee on Economic, Social and Cultural Rights (1990) *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23, para.12.

<sup>469</sup> IHREC (2014) *Policy Statement on the System of Direct Provision in Ireland*, Dublin: IHREC.

choices, coupled with the residents' inability to prepare food in the majority of accommodation centres,<sup>470</sup> affects directly the right of residents in Direct Provision centres to enjoy an adequate standard of living. Furthermore, the decision of the Reception and Integration Agency (RIA) to reduce the number of self-catering centres<sup>471</sup> is a regressive step in facilitating asylum seekers' access to food, as the Committee has made it clear that people should be able to avail of adequate, culturally appropriate and affordable food regardless of their status.<sup>472</sup>

Direct Provision residents are also denied the right to work<sup>473</sup> and do not receive regular social security payments due to the application of the 'right to reside principle' which means that they cannot satisfy the Habitual Residence Condition for social security payments to supplement their diet (see also section 7.1.2). Concerns have also been raised about the adequacy of the accommodation,<sup>474</sup> and in particular whether the space provided conforms to standards set out in Section 63 of the Housing Act 1966 or constitutes overcrowding.<sup>475</sup> While the State acknowledges that temporary overcrowding may 'occur when the family profile has changed on the basis of age or newly arrived family member' and where a family declines a transfer to another centre, it outlines that this may be because some families prefer 'the current arrangement or... want to await a better offer'.<sup>476</sup> The Commission notes that the reasons behind such a refusal to transfer to alternative accommodation may be varied, including, for example, access to medical appointments or not wishing to interrupt a child's schooling.<sup>477</sup> In its *Policy Statement on Direct Provision*, the Commission referred to the pending recommendations on this issue of the Working Group on Direct Provision and strongly recommended that the weekly allowance be increased to a realistic amount that ensures dignity, respect and autonomy for individuals.<sup>478</sup>

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<sup>470</sup> K. Barry (2014) *What's Food Got To Do With It: Food Experiences of Asylum Seekers in Direct Provision*, Cork: Nasc, the Irish Immigrant Support Centre, p.7.

<sup>471</sup> The number of self-catering centres was reduced from six in 2009 to two by 2011. See details on [RIA's website](#).

<sup>472</sup> UN Committee on Economic, Social and Cultural Rights (CESCR)(1999) *General Comment 12: The right to adequate food (art. 11)*, E/C.12/1999/5.

<sup>473</sup> Ireland opted out of both the *EU Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers* or the *Recast Reception Conditions Directive 2013/33/EU*. The *Recast Reception Conditions Directive* specifically requires that asylum seekers be granted a limited right to work where first-instance decisions have not been made within nine months.

<sup>474</sup> E. Quinn and C. Joyce (2014) *The Organisation of Reception Centres for Asylum Seekers in Ireland*, Dublin: European Migration Network; G. Shannon (2012), *Fifth Report of the Rapporteur on Child Protection*, Dublin: Department of Children and Youth Affairs, pp. 31–32; Free Legal Advice Centres (FLAC) (2009) *One Size Doesn't Fit All: A legal analysis of the direct provision and dispersal system in Ireland, 10 years on*, Dublin: FLAC, pp. 89–92; Nasc, the Irish Immigrant Support Centre (2008) *Hidden Cork: The Perspectives of Asylum Seekers on Direct Provision and the Asylum Legal System*, Cork: Nasc, p.22; C. Breen (2008) 'The Policy of Direct Provision in Ireland: A Violation of Asylum Seekers' Right to an Adequate Standard of Housing', *International Journal of Refugee Law*, 20, no.4: 611–636.

<sup>475</sup> Section 63 of the Housing Act 1966 provides:

A house shall for the purposes of this Act be deemed to be overcrowded at any time when the number of persons ordinarily sleeping in the house and the number of rooms therein either—

(a) are such that any two of those persons, being persons of ten years of age or more of opposite sexes and not being persons living together as husband and wife, must sleep in the same room, or

(b) are such that the free air space in any room used as a sleeping apartment, for any person is less than four hundred cubic feet (the height of the room, if it exceeds eight feet, being taken to be eight feet, for the purpose of calculating free air space), and "overcrowding" shall be construed accordingly.

<sup>476</sup> Minister for Justice and Equality, Frances Fitzgerald TD, Parliamentary Questions: Written Answers, [27901/14], 2 July 2014.

<sup>477</sup> See generally E. Quinn and C. Joyce (2014) *The Organisation of Reception Centres for Asylum Seekers in Ireland*, Dublin: European Migration Network; Doras Luimní (2011) *Impact of the Transfer System in Direct Provision*, Limerick: Doras Luimní; S.K. Arnold (2012) *State Sanctioned Child Poverty and Exclusion*, Dublin: Irish Refugee Council.

<sup>478</sup> IHREC (2014) *Policy Statement on the System of Direct Provision in Ireland*, Dublin: IHREC, p. 19.

The IHREC welcomes the publication of the General Scheme of the International Protection Bill 2015 which it hopes will address the delays in the asylum determination procedure by introducing a single procedure<sup>479</sup> and therefore, reduce the prolonged periods of time people have to spend in the Direct Provision system.<sup>480</sup>

**The IHREC welcomes and supports the introduction of a ‘single protection procedure’. However, while the system remains in place, the IHREC reiterates its recommendation that the basis for Direct Provision be placed on a statutory footing and recommends the introduction of a time limited period between 6 and 9 months after which any person who has not yet received a decision, on either first instance or appeal, should be able to leave Direct Provision, live independently, access relevant social security payments and employment.**

**The IHREC regrets the delay in the publication of the Working Group’s report and calls for its immediate publication with a timeline for the implementation of its recommendations.**

**The IHREC further recommends that families be moved out of Direct Provision centres and enabled to access self-catering accommodation at the earliest possible opportunity, and any new families not be accommodated in Direct Provision.**

**The State should respect the residents’ right to access and prepare food appropriate to their culture, diet and individual needs.**

## 9.2 The Right to Adequate Housing

There is no comprehensive right to housing enshrined in Irish law, but specific entitlements to social housing and housing supports are set out in legislation and regulations.<sup>481</sup>

### 9.2.1 Access and Availability of Affordable Housing

In 2002, the Committee was concerned that ‘many new households cannot secure adequate and affordable housing’.<sup>482</sup> However, in the current environment of reduced incomes,<sup>483</sup> over-indebtedness,<sup>484</sup> increased

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<sup>479</sup> Under the current arrangements, in order to gain international protection in Ireland a person has to make claim asylum under the Refugee Act 1996 and if that claim is unsuccessful, he or she has to apply for subsidiary protection afterwards. Ireland is the only EU Member State without a single procedure to determine claims for refugee status and subsidiary protection at the same time in order to issue one single decision on a person’s claim for protection. See UNCHR Ireland, ‘UNHCR welcomes Single Procedure Scheme’ [press release], 25 March 2015.

<sup>480</sup> According to official statistics, in January 2015 of the 4382 residents in Direct Provision, more than half had lived in Direct Provision for more than three years with 28 per cent of all residents living in the system for more than six years. The average length of stay in Direct Provision was four years. Statistics Unit, Reception and Integration Agency (2015) *Monthly Statistics: January 2015*, Dublin: Department of Justice and Equality, p.19.

<sup>481</sup> For example: Section 10 of Housing Act 1988 provides for the provision of accommodation by housing authorities for those who are homeless and Part 4 of the Housing (Miscellaneous Provisions) Act 2014 provides for the administration of the Housing Assistance Payment (HAP). In February 2014, the Convention on the Constitution recommended that the right to housing be inserted into the Constitution of Ireland. See Convention on the Constitution (2014) *Eighth Report of the Convention on the Constitution: Economic, Social and Cultural Rights*, Dublin: Convention on the Constitution, p.6. Also the State has opted-out of the right to housing provision of the Revised European Social Charter, see Department of the European Social Charter Directorate General Human rights and the Rule of Law, ‘Ireland and the European Social Charter: Factsheet’, January 2015, Strasbourg: Council of Europe.

<sup>482</sup> UN Committee on Economic, Social and Cultural Rights (2002) *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland*, Geneva: Office of the High Commissioner for Human Rights, para. 20.

<sup>483</sup> Central Statistics Office (CSO) (2013) *Quarterly National Household Survey: Effect on Households of the Economic Downturn, Quarter 3 2012*, Dublin and Cork: CSO, p.2; B. Maître, H. Russell and C.T. Whelan (2014) *Trends in Economic Stress and the Great Recession in Ireland – An Analysis of the CSO Survey on Living and Income Conditions, Social Inclusion Technical Paper No. 5*, Dublin: Department of Social Protection, pp.1–2.

housing costs<sup>485</sup> and housing shortages,<sup>486</sup> the Commission notes that many different types of households are currently finding it difficult to access housing for reasons of economic stress as defined by the Department of Social Protection.<sup>487</sup> The IHREC notes with concern the rise in homelessness<sup>488</sup> and in particular, the growing phenomenon of family homelessness.<sup>489</sup> While it notes the State's decision to assist families and people experiencing homelessness as a matter of urgency through temporary housing units,<sup>490</sup> the Commission emphasises that accommodation of sufficient quality must be provided.<sup>491</sup>

Rent Supplement is a social security payment that was designed to supplement income in order to assist individuals in meeting short-term housing needs. This payment has become a default housing support payment with more than two-thirds of recipients at the end of 2014 'deemed to be long term dependent for their housing on the scheme'.<sup>492</sup> In March 2015, Rent Supplement limits were reviewed and maintained at the 2013 rate,<sup>493</sup> despite a recognition by the State that there had been an increase in rents since the last review.<sup>494</sup> The Commission considers that the State's position that 'increasing rent limits at this time could potentially add to further rental inflation in an already distressed market',<sup>495</sup> does not adequately address the immediate need of many people requiring accommodation and according to organisations working with homeless people on the ground, the failure to increase Rent Supplement has contributed to the homeless

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<sup>484</sup> B. Maître, H. Russell and C.T. Whelan (2014) *Trends in Economic Stress and the Great Recession in Ireland – An Analysis of the CSO Survey on Living and Income Conditions, Social Inclusion Technical Paper No. 5*, Dublin: Department of Social Protection, pp.4-5.

<sup>485</sup> Private Residential and Tenancies Board (PRTB) (2014) *The PRTB Rent Index – Quarter 4*, Dublin: PRTB. The report shows that there was an annual 5.8 per cent increase in rents nationally between 2013 and 2014 while rents in Dublin rose by 9.6 per cent in the same period. B. Maître, H. Russell and C.T. Whelan (2014) *Trends in Economic Stress and the Great Recession in Ireland – An Analysis of the CSO Survey on Living and Income Conditions, Social Inclusion Technical Paper No. 5*, Dublin: Department of Social Protection, p. 14. In 2004, 23 per cent of people considered 'housing costs a heavy burden' but by 2011, this had risen to almost 35 per cent.

<sup>486</sup> Housing Agency (2014) *Housing Supply Requirements in Ireland's Urban Settlements 2014 – 2018: Overview*, Dublin: Housing Agency & Future Analytics, p.3. This report estimates that between 2014 and 2018, almost 80,000 residential units in total will be required to meet demand.

<sup>487</sup> In its *Social Inclusion Monitor 2013*, the Department of Social Protection defines economic stress as a measure that 'captures the change in economic fortunes of Irish households by going beyond income to include items such as debt, housing costs, and the difficulties and stresses of managing on reduced household incomes. Specifically, it combines five identified economic stress items: difficulty making ends meet; arrears; housing costs that are a heavy burden; inability to save; and going into debt to meet ordinary living expenses'.

<sup>488</sup> Homeless Agency (2014) *Dublin Region Winter Count on Rough Sleeping: The night of 11<sup>th</sup> November 2014*, Dublin: Homeless Agency. In November 2014, the number of people sleeping rough on the streets was at least 168 rough sleepers, almost double the number recorded two years previously.

<sup>489</sup> Minister for the Environment, Community and Local Government, Alan Kelly TD, *Parliamentary Questions: Written Answers*, [12382/15], 26 March 2015. In March 2015, official statistics recorded that there were 371 families living in emergency accommodation in the Dublin region alone. The Homeless Agency has estimated that 32 families become homeless each month.

<sup>490</sup> *Ibid.* The Minister proposed to refurbish 64 family units, on a temporary basis, in an area awaiting the implementation of a regeneration scheme.

<sup>491</sup> In 2014, FIDH (the International Federation of Human Rights) submitted a Collective Complaint under the Revised European Social Charter (RESC) which the European Committee of Social Rights deemed admissible in February 2015. Specifically the Complainants allege violations of the following provisions of the Revised European Social Charter: the right to protection of health (Article 11); the right of the family to social, legal and economic protection (Article 16); the right of children and young people to social, legal and economic protection (Article 17); the right to protection against poverty and social exclusion (Article 30); and the right to non-discrimination (Article E). However, the European Committee of Social Rights notes that Ireland has not accepted Article 31 of the Charter in relation to the right to housing so it will not examine alleged violations under this Article.

<sup>492</sup> Department of Social Protection (DSP) (2015) *Maximum Rent Limit Analysis and Findings Report: February 2015*, Dublin: DSP, p.2. Out of 71,500 Rent Supplement recipients, 48,000 were long-term recipients.

<sup>493</sup> *Ibid.*

<sup>494</sup> *Ibid.*, p.5. The Department noted that since 2013 rents had increased by 10 per cent in the Dublin region and by four per cent outside Dublin.

<sup>495</sup> Department of Social Protection, 'Department of Social Protection publishes review of maximum rent limits', [press release], 27 March 2015.

crisis.<sup>496</sup> At the same time, the Commission notes and welcomes the Government's announcement of its intention to take legislative steps to end the discrimination faced by many tenants seeking rented accommodation, by prohibiting landlords from refusing to take tenants in receipt of Rent Supplement.<sup>497</sup>

The State's commitment to deliver 35,000 social housing units and 75,000 long-term housing units by 2020,<sup>498</sup> will not address the current shortfall for those without housing in the absence of other available housing and supports. The social housing budget has fallen significantly since the onset of the recession from €1.7 billion in 2008 to €597 million in 2014.<sup>499</sup> The IHREC considers that the introduction of a Housing Assistance Payment (HAP)<sup>500</sup> to provide a more sustainable housing support for people on low incomes will go some way to addressing the affordability issue, but in a climate of rising rents and house prices, more must be done as the lack of available housing in both the social housing and private rented sectors<sup>501</sup> remains an obstacle to the State's aim to achieve its objectives under its *Social Housing Strategy 2020*.

**The IHREC recommends that the State monitor the efficacy of the Housing Assistance Payment and ensure that it is achieving its objective in ensuring that people on low incomes can access appropriate housing in the longer-term. The State should consider the introduction of rent limits to reduce the financial pressure on low income individuals and families in need of private rented accommodation. In addition, the IHREC recommends the State should reconsider increasing Rent Supplement limits. The IHREC further recommends that the State take measures to ensure that affordable housing is available and is of sufficient quality in order to fully comply with its obligations under the ICESCR.**

### 9.2.2 Security of Tenure for Local Authority Tenants (s.62 Housing Acts)

The IHREC notes the 2012 decision of the Supreme Court in *Donegan v. Dublin City Council*<sup>502</sup> which found that the lack of an effective complaints remedy for local authority tenants, evicted under section 62 of the Housing Act 1966 ('section 62') for anti-social behaviour,<sup>503</sup> was incompatible with the European Convention on Human Rights (ECHR) Act 2003.

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<sup>496</sup> The Simon Communities of Ireland, 'No change to rent supplement levels will mean more homelessness', [press release], 27 March 2015; Focus Ireland, 'More than 1,000 children in emergency homeless accommodation in Ireland', [press release], 20 April 2015.

<sup>497</sup> Department of Justice and Equality, 'Minister Ó Ríordáin announces Government approval to prohibit discrimination against tenants in receipt of rent supplement' [press release], 19 February 2015.

<sup>498</sup> Department of Environment, Community and Local Government (DECLG) (2014) *Social Housing Strategy 2020*, Dublin: DECLG. However, the 2014 Housing Agency report, *Housing Supply Requirements in Ireland's Urban Settlements 2014 – 2018: Overview*, estimates that between 2014 and 2018, almost 80,000 residential units in total will be required to meet demand.

<sup>499</sup> *Ibid.*, p.vii.

<sup>500</sup> Part 4, Housing (Miscellaneous Provisions) Act 2014.

<sup>501</sup> Department of Social Protection (DSP) (2015) *Maximum Rent Limit Analysis and Findings Report: February 2015*, Dublin: DSP.

<sup>502</sup> *Donegan v. Dublin City Council* [2008] IEHC 288.

<sup>503</sup> Anti-social behaviour is defined in s.1 of the Housing (Miscellaneous Provisions) Act 1997 as amended by s.19(1)(c) of the Housing (Miscellaneous Provisions) Act 2014 as including either or both of the following:

- a) the manufacture, production, preparation, importation, exportation, sale, supply, possession for the purposes of sale or supply, or distribution of a controlled drug (within the meaning of the Misuse of Drugs Acts 1977 to 2007),
- (b) any behaviour which causes or is likely to cause any significant or persistent danger, injury, damage, alarm, loss or fear to any person living, working or otherwise lawfully in or in the vicinity of a house provided by a housing authority under the Housing Acts 1966 to 2014 or Part V of the Planning and Development Act 2000 or a housing estate in which the house is situate and, without prejudice to the foregoing, includes—
  - (i) violence, threats, intimidation, coercion, harassment or serious obstruction of any person,
  - (ii) behaviour which causes any significant or persistent impairment of a person's use or enjoyment of his or her home, or
  - (iii) damage to or defacement by writing or other marks of any property, including a person's home;”

The Commission welcomes the enactment of the Housing (Miscellaneous Provisions) Act 2014 which repeals section 62<sup>504</sup> and provides for a review mechanism for local authority tenants who are subject to a tenancy warning where the ‘tenant does not accept that a breach of a tenancy agreement or rent-related obligation has occurred’.<sup>505</sup> This goes some way towards meeting previous recommendations made by the Commission although it falls short of the recommendations to extend the remit of the Private Residential and Tenancies Board (PRTB) or allowing the District Court to hear and determine the substance of the case.<sup>506</sup> However, the IHREC remains concerned that despite the introduction of a review request, without a further right of appeal if the review is denied, the mechanism may not be sufficiently independent to comply with Article 6 of the ECHR.<sup>507</sup> Furthermore, the revised legislative framework may not fully comply with the legal protections to ensure security of tenure under Article 11 of ICESCR. The amended legislation does not adequately address the issue of the impact on the future entitlements of a local authority tenant who is subject to a tenancy warning on the basis of alleged anti-social behaviour. In particular, the local authority can take the warning into consideration for up to three years and as a result it can defer, refuse to sell or refuse to allocate accommodation to the tenant or person identified as having caused the breach of the agreement.<sup>508</sup>

**The IHREC recommends that the State review the operation of the recently enacted Housing (Miscellaneous Provisions) Act 2014 to ensure Section 10 of the 2014 Act provides a sufficiently independent review mechanism for local authority tenants and that people in need of local authority housing are not subject to unfair evictions in line with the requirements surrounding security of tenure contained in ICESCR.**

### 9.3 Appropriate Accommodation and Housing for Members of the Traveller Community

The Committee, in its *General Comment 4* on the right to adequate housing, has clarified that the obligation on the State to ensure that housing and supporting policies are adequate, extends to ensuring that accommodation is culturally adequate and ‘appropriately enable[s] the expression of cultural identity’.<sup>509</sup> The Housing (Traveller Accommodation) Act, 1998 requires each local authority to conduct an assessment of the housing needs of Travellers who qualify for housing support in the local authority area and to adopt a five-year Traveller Accommodation Programme on the basis of this assessment. In this context, the IHREC notes the significant reduction in capital funding allocated to Traveller specific housing since 2010,<sup>510</sup> as well as the fall in the target number of units to be delivered each year although there has been an increase in the number of void units which were refurbished during the same period.<sup>511</sup> However, it is unfortunate that

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<sup>504</sup> Section 18(2), Housing (Miscellaneous Provisions) Act 2014.

<sup>505</sup> Section 10, Housing (Miscellaneous Provisions) Act 2014.

<sup>506</sup> Irish Human Rights Commission (IHRC) (2009) *IHRC Policy Statement on Section 62 of the Housing Act 1966 for the Recovery of Possession of a Local Authority Dwelling*, Dublin: IHRC, p. 12.

<sup>507</sup> Local Authority tenants do not have recourse to the Ombudsman nor do they have a parallel mechanism analogous to the Private Residential Tenancies Board (PRTB). Section 10(6) of the Housing (Miscellaneous Provisions) Act 2014 provides for the chief executive of the local authority concerned to appoint a more senior ‘officer or employee of a local authority who was not involved in the decision’ to review the decision to issue a tenancy warning.

<sup>508</sup> Section 7, Housing (Miscellaneous Provisions) Act 2014. See also previous concerns of the Irish Human Rights Commission in its 2009 *IHRC Policy Statement on Section 62 of the Housing Act 1966 for the Recovery of Possession of a Local Authority Dwelling*, Dublin: IHRC.

<sup>509</sup> UN Committee on Economic, Social and Cultural Rights (CESCR) (1991) *General Comment No. 4: The right to adequate housing (Art. 11(1) of the Covenant)*, E/1992/23, para. 8(g).

<sup>510</sup> Capital funding for Traveller accommodation has fallen from €35 million in 2010 to €3 million in 2014. Minister of State for Housing, Jan O’Sullivan TD, *Parliamentary Questions: Written Answers [25088/14]*, 12 June 2014.

<sup>511</sup> Government of Ireland (2014) *2015 Revised Estimates for Public Services*, Dublin: Stationery Office, p. 152. The 2015 Revised Estimates for Public Services indicated that the number of households in need of Traveller accommodation whose needs were met fell from 140 in 2010 to 44 in 2013. The target number of units to be provided in 2015 was 55. At the same time the number of units which were worked on and brought back into circulation rose from 917 in 2010 to 1,173 in 2013.



there has been a consistent underspend or failure to draw down the full amount of the funding allocated to Traveller housing at local level.<sup>512</sup>

In the State's examination in 2002, the Committee expressed concern at the number of Traveller families living by the roadside without access to basic facilities and at risk of eviction.<sup>513</sup> The IHREC notes that little progress has been made to amend legislation to meet the specific accommodation requirements of Traveller families and that the criminalisation of trespassing on land in the Housing (Miscellaneous Provisions) Act 2002 continues to disproportionately affect Travellers.<sup>514</sup> In its submission to the UN Human Rights Committee at the time of Ireland's Fourth Periodic Examination under the International Covenant on Civil Rights, the IHREC expressed concern that not enough good quality or culturally appropriate accommodation is being provided to Travellers by Local Authorities.<sup>515</sup> Under the Housing (Miscellaneous Provisions) Act 2002, some Traveller families continue to be at risk of eviction without recourse to legal protection, contrary to the Committee's stated position in its *General Comment No. 7* on forced evictions.<sup>516</sup> While the Committee states that 'the prohibition on forced evictions does not, however, apply to evictions carried out by force in accordance with the law',<sup>517</sup> nevertheless the eviction must be compatible with international human rights law.

In the absence of sufficient appropriate accommodation being made available, the IHREC considers that the Traveller community's right to culturally appropriate housing is not being progressively realised by the State under the ICESCR.<sup>518</sup> A recent study has demonstrated that the recent uptake of private rented accommodation by Traveller families may be attributed to the lack of available culturally appropriate accommodation by members of the Traveller community, rather than being linked to a preference for that type of accommodation.<sup>519</sup>

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<sup>512</sup> Minister of State for Housing, Jan O'Sullivan TD, [Parliamentary Questions: Written Answers, \[43690/13-43692/13\]](#), 16 October 2013. Between 2002 and 2012, there was an under-spend of almost €71 million in relation to Traveller housing.

<sup>513</sup> UN Committee on Economic, Social and Cultural Rights (2014) *List of Issues: Ireland*, Geneva: OHCHR

<sup>514</sup> See UN Human Rights Committee (2008) *Concluding Observations on Ireland's Third Periodic Report*, CCPR/C/IRL/CO/3, para. 23. See IHRC, *Submission on behalf of the Human Rights Commission: Lawrence and Others v Ballina Town Council and Others*, High Court 5813P/2003 at pp. 46–7.

<sup>515</sup> IHREC Designate (2014) *Submission to the UN Human Rights Committee on the Examination of Ireland's Fourth Periodic Report under the International Covenant on Civil and Political Rights*, Dublin: IHREC Designate, pp.86–7. See also Irish Human Rights Commission (IHRC) (2013) *Submission to the Human Rights Committee on Ireland's Fourth Periodic Report under the ICCPR – List of Issues Stage*, Dublin: IHRC, para. 45; IHRC (2011) *Submission for the Twelfth Session of the Working Group on the Universal Periodic Review: Ireland*, Dublin: IHRC, para. 31. In 2013, according to the Department of Environment, Community and Local Government's [annual count](#) there were 361 Traveller families living in what are termed as 'unauthorised sites' out of a total of 9,899 families accommodated by or with the assistance of the local authority and on unauthorised sites, Department of the Environment, Community and Local Government (DECLG) (2013) *Annual Count 2013: Traveller Families in LA and LA Assisted Accommodation and on Unauthorised Halting Sites*, Dublin: DECLG. The HSE has noted that living in 'unauthorised sites' is characterised by the absence of electricity, running water, toilet facilities and refuse collection: HSE (2008) *National Intercultural Health Strategy 2007-2012*, Dublin: HSE, p. 49.

<sup>516</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 7: The right to adequate housing (Art. 11(1) of the Covenant): Forced Evictions*, 1997, E/1998/22, annex IV, para. 3 defines a forced eviction 'as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection. The prohibition on forced evictions does not, however, apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights'.

<sup>517</sup> *Ibid.*

<sup>518</sup> In 2013, 361 families were recorded as living on unauthorised sites, see Department of the Environment, Community and Local Government (DECLG) (2013) *Annual Count 2013: Traveller Families in LA and LA Assisted Accommodation and on Unauthorised Halting Sites*, Dublin: DECLG.

<sup>519</sup> K.W. Research & Associates (with data analysis by Simon Williams) *Why Travellers leave Traveller-specific accommodation? A research report*, Dublin: National Traveller Accommodation Consultative Committee & the Housing Agency. See also *ERRC v.*

The IHREC notes the recent Supreme Court decision in *O'Donnell v South Dublin County Council* in which MacMenamin J. held that in the case of a young woman with cerebral palsy living in a caravan occupied by eight of her family members, the Local Authority was not obliged under Article 8 (right to family and private life) of the ECHR to provide alternative caravan or mobile home accommodation.<sup>520</sup> However, the Supreme Court confirmed that s.13 of the Housing Act 1988, as amended by s.29 of the Housing (Traveller Accommodation) Act 1998, imposed a statutory duty on the Authority to provide the young woman with a serviced halting site. The Supreme Court awarded damages to the young woman as it found that her rights had been violated by the Local Authority's actions, but refused to make an order to oblige the Local Authority to provide caravan accommodation.

**The IHREC recommends that the State should take further steps to progressively realise the right to culturally appropriate housing for Traveller families in consultation with each individual family. In particular, Local Authorities should be adequately penalised or sanctioned if they do not invest the total money allocated for Traveller housing in a given year.**

**The IHREC recommends that the relevant provisions of the Housing (Miscellaneous Provisions) Act 2002 be amended and repealed.**

## 9.4 Appropriate Housing for Persons with Disabilities

### 9.4.1 Housing Strategy and Supports for Persons with Disabilities

The *National Housing Strategy for People with Disabilities 2011 – 2016* aims to address the specific housing needs of people with physical, sensory, mental or intellectual disabilities who make up four per cent of people in need of housing.<sup>521</sup> It forms part of a wider framework to address the housing situation, particularly for those with a specific need and it is complemented by the *Social Housing Strategy 2020* (the '2020 Strategy') published in 2014.<sup>522</sup> The IHREC welcomes the Government's commitment in the 2020 Strategy to provide a range of housing options to each individual with a disability and the recent announcement of the State's intention to invest €71 million in social housing for people with special housing needs, which includes those with a disability.<sup>523</sup> However, it is unclear how much of this budget will be allocated to persons with disabilities. The reduction in the allocation to Housing Adaptation Grants is also of concern.<sup>524</sup>

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*Ireland (No.100/2013)* a Collective Complaint under the Revised European Social Charter for failing to fulfil its statutory obligations under the Housing (Traveller Accommodation) Act 1998 to provide Traveller-specific accommodation and implementing regressive evictions legislation.

<sup>520</sup> *O'Donnell & ors v. South Dublin County Council* [2015] IESC 28.

<sup>521</sup> Department of the Environment, Community and Local Government (2011) *National Housing Strategy for People with Disabilities 2011 – 2016*, Dublin: Department of the Environment, Community and Local Government.

<sup>522</sup> Department of the Environment, Community and Local Government (2014) *Social Housing Strategy 2020: Support, Supply and Reform*, Dublin: Department of the Environment, Community and Local Government.

<sup>523</sup> Department of the Environment, Community and Local Government, 'Minister Alan Kelly invites proposals for social housing accommodation for people with special housing needs', [press release], 16 March 2015.

<sup>524</sup> The Disability Federation of Ireland (DFI) has calculated that between 2010 and 2014, Housing Adaptation Grant Schemes were cut by 42 per cent. These schemes include Housing Adaptation Grant for People with a Disability (HAG), Housing Aid for Older People (HOP) and Mobility Aids Grant (MAG). DFI (2013) *Pre Budget Submission 2014*, Dublin: DFI, p.6.

One of the key issues facing a significant number of individuals with a physical disability is the inability to leave their home without assistance.<sup>525</sup> In this context, the IHREC notes the lack of access to private transport for more than 24 per cent of people with disabilities,<sup>526</sup> as well as the HSE's decision in 2013 to discontinue transport-related monthly payments following a recommendation by the Ombudsman to remove the upper age restriction.<sup>527</sup> The Committee is clear that the right to housing incorporates an element of accessibility, which refers not only to the physical structure of the house but is also related to location and access to basic facilities generally.<sup>528</sup>

**The IHREC reminds the State that location and accessibility to facilities are essential elements of the right to housing for people with disabilities and must be borne in mind when policy decisions related to housing and transport are made by the State. The State should clarify how much of the €71 million budget allocated to people with special housing needs will be allocated to housing designed for persons with disabilities.**

#### **9.4.2 Transitions from Residential Centres for Persons with Intellectual Disability**

The State has signed but not yet ratified the UN Convention on the Rights of Persons with Disabilities (CPRD) of which Article 19 expressly provides for the right to live independently and be included in the community.<sup>529</sup> The ICESCR also provides for the right to housing for persons with disabilities, thereby promoting independence and ensuring accessibility to housing.<sup>530</sup> While some progress has been made at a policy level in relation to a transition from congregated settings to community-based living for persons with intellectual disabilities, the IHREC regrets that the number of people living in residential settings is almost the same as it was in 2004.<sup>531</sup>

A Working Group on Congregated Settings was established in 2008, and in its final report acknowledged that '[n]either the model of congregated provision nor the reality is in line with our obligations under UN Conventions',<sup>532</sup> however, it decided that all of its 'proposals would be guided by the principles enshrined in

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<sup>525</sup> Government of Ireland (2012) *Census 2011 Profile 8 – Our Bill of Health*, Dublin: Stationery Office, p.21. In 2011, 121,490 people with a physical disability indicated that they had difficulty going outside alone.

<sup>526</sup> *Ibid.*, p.16.

<sup>527</sup> *Ibid.*, p.11. There are more than 100,000 people with a disability living alone in the State, the majority of whom are over the age of 65. See Office of the Ombudsman (2012) *Too Old to be Equal? A Follow-up: A Follow-up Investigation by the Ombudsman into the Illegal Refusal by the Department of Health of Mobility Allowance for People over 66 Years of Age*, Dublin: Office of the Ombudsman.

<sup>528</sup> UN Committee on Economic, Social and Cultural Rights (CESCR) (1991) *General Comment No. 4: The right to adequate housing (Art. 11(1) of the Covenant)*, E/1992/23, para. 8(e) and (f). See also UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 5: Persons with Disabilities*, 1994, E/1995/22, para. 23.

<sup>529</sup> Article 19 of the UN Convention on the Rights of Persons with Disabilities states:

States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

- a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
- b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
- c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

<sup>530</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 5: Persons with Disabilities*, 1994, E/1995/22, para.33.

<sup>531</sup> Department of Health (2014) *Health in Ireland: Key Trends 2014*, Dublin: Department of Health, p.50.

<sup>532</sup> Health Service Executive (2011) *Report of the Working Group on Congregated Settings: Time to Move on From Congregated Settings, A Strategy for Community Inclusion*, Dublin: Health Service Executive, p.80.

the UN Convention on the Rights of People with Disabilities'.<sup>533</sup> A *Value for Money and Policy Review* in 2012 reiterated that a new model of community-based supports for persons moving from congregated settings should be prioritised while admissions to existing or new settings should be discontinued.<sup>534</sup> The Commission welcomes the Health Service Executive's (HSE) social care strategic reform and change agenda<sup>535</sup> and will continue to monitor how this is rolled-out over the course of 2015. While the HSE emphasises a greater move towards community-based services, it also highlights the need for a cost-effective approach<sup>536</sup> but this must not be achieved at the expense of providing high quality and adequate services for those who require them. This transition must take place in tandem with *the National Housing Strategy for Persons with Disabilities* which aims to address the future housing needs of some 4,000 people moving from congregated settings to community-based or independent living by 2019.<sup>537</sup>

Despite the extension of Health Information Quality Authority's (HIQA) remit in 2013 to inspect along with the development of *National Standards for Residential Services for Persons with Disabilities*,<sup>538</sup> the IHREC echoes HIQA's concern at the continuing poor quality service provided in certain of these centres.<sup>539</sup> The IHREC welcomes the HSE's commitment to carry out evaluation and quality monitoring in residential centres for persons with disabilities to ensure that adequate care is provided.<sup>540</sup> The Commission also notes the appointment in December 2014 of a 'Confidential Recipient for Vulnerable Persons' in response to the disclosure of abuse in a particular residential centre<sup>541</sup> which it considers to be a positive step by the HSE.

**The IHREC, as the national human rights institution, recommends that the State move away from institutional living and ensure that people with disabilities are adequately supported to live in the community.**

## 10. The Right to the Highest Attainable Standard of Physical and Mental Health (Article 12)

The right to health is not clearly defined in Irish law. The IHREC notes that in the context of its consultative process the Convention on the Constitution made a recommendation to enumerate a right to essential healthcare in the Constitution of Ireland.<sup>542</sup>

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<sup>533</sup> *Ibid*, p.27.

<sup>534</sup> Department of Health (2012) *Value for Money and Policy Review of Disability Services in Ireland: Final Report*, Dublin: Department of Health, p.145.

<sup>535</sup> Health Service Executive (2014) *2015 National Service Plan*, Dublin: HSE,

<sup>536</sup> Health Service Executive (2014) *2015 National Service Plan*, Dublin: HSE, p.51

<sup>537</sup> Department of the Environment, Community and Local Government (DECLG) (2011) *National Housing Policy for People with Disabilities*, Dublin: DECLG; DECLG (2014) *Social Housing Strategy 2020*, Dublin: DECLG, p.16.

<sup>538</sup> Health and Information Quality Authority (HIQA) (2013) *National Standards for Residential Services for Persons with Disabilities*, Dublin: HIQA.

<sup>539</sup> In an address to the National Disability Summit, Phelim Quinn, CEO of HIQA stated that '[i]t is disturbing and chilling to have to say that the sorts of issues we have seen in recent weeks and months resonate with care practices and culture that were thought to have been confined to the past and not in line with best practice in the care and support for children and adults with intellectual disabilities. Our recent inspection findings across differing provider organisations indicate fundamental breaches in regulations and standards but more strikingly in the human rights of individuals. They most definitely run contrary to the UN Convention on the Rights of People with a Disability'. See *Speaking notes*, Phelim Quinn, CEO of HIQA, at the National Disability Summit, 9 April 2015.

<sup>540</sup> Health Service Executive (2014) *2015 National Service Plan*, Dublin: HSE, p. 53; HIQA (2015) *Assessment Framework for Designated Centres for Persons (Children and Adults) with Disabilities*, Dublin: HIQA.

<sup>541</sup> Details of the Confidential Recipient can be found at: <http://www.hse.ie/confidential/>.

<sup>542</sup> Convention on the Constitution (2014) *Eighth Report of the Convention on the Constitution: Economic, Social and Cultural Rights*, Dublin: Convention on the Constitution, p.6.

## 10.1 Availability

In its 2002 Concluding Observations on Ireland, the Committee called on the State to establish a ‘common waiting list for treatment in publicly funded hospitals for privately and publicly insured patients’ but this recommendation has not yet been implemented.<sup>543</sup> In contrast, the IHREC notes its concern at the reduction in the availability of hospital services indicated by the number of bed closures in acute public hospitals at a time of increased demand.<sup>544</sup> Since 2007, there has been a 63 per cent increase in the number of patients waiting on hospital trolleys rather than being assigned a hospital bed while awaiting or receiving treatment.<sup>545</sup> Moreover, the IHREC notes that hospital waiting lists for inpatient or day cases have grown considerably between 2014 and 2015, with almost 16,000 more people waiting in February 2015 than in the same month in the previous year.<sup>546</sup> It is of particular concern that of the almost 400,000 people waiting for an outpatient appointment in February 2015, 45 per cent had been waiting for longer than six months.<sup>547</sup>

Since 2009, there has been a 16 per cent reduction in the Irish healthcare budget<sup>548</sup> and this has primarily been achieved through reductions in staff numbers, salary cuts and addressing inefficiencies<sup>549</sup> yet the IHREC notes this budget has had to be supplemented to ensure that the system can continue to function.<sup>550</sup> It also notes that the health service faces significant financial challenges given the ageing demographic, the high fertility rate and the high proportion of the population in possession of a medical card or free General Practitioner (GP) card.<sup>551</sup>

**The IHREC recommends the State introduce a common waiting list for treatment in publicly funded hospitals as recommended by the Committee in 2002.**

## 10.2 Accessibility

The Committee has explicitly stated that under Article 12 of ICESCR, the State has a ‘special obligation to provide those who do not have sufficient means with the necessary health insurance and health-care facilities’.<sup>552</sup> The IHREC notes that the State’s plan to introduce a system of free GP care by 2015 and Universal Health Insurance (UHI) by 2019 has been subject to delays and priority has been given to introduce initial ‘concrete steps’ while conducting a scoping exercise and initial costing analysis to inform further Government action.<sup>553</sup> The enactment of legislation introducing free GP care for children under the age of six

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<sup>543</sup> UN Committee on Economic, Social and Cultural Rights (2002) *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland*, Geneva: Office of the High Commissioner for Human Rights, para. 35.

<sup>544</sup> Department of Health (2014) *Health in Ireland: Key Trends 2014*, Dublin: Department of Health, p.32. Since the onset of the recession more people are relying on the medical card scheme and less people have private health insurance resulting in increased demand for public health services. See NESI (2013) *The Social Dimensions of the Crisis: The Evidence and its Implications*, Dublin: NESI, pp.100–1.

<sup>545</sup> The Irish Nurses and Midwives Organisation record and publish the number of patients waiting on trolleys on a daily basis. They also monitor the number of bed closures in public hospitals.

<sup>546</sup> The Patient Treatment Register, *Hospital Trend Analysis of Waiting Times – Inpatient and Day Cases* 26/02/2015, [published online], The National Treatment Purchase Fund.

<sup>547</sup> The Patient Treatment Register, *Outpatient Waiting List* published online and updated on a monthly basis].

<sup>548</sup> Department of Health (2015) *Health in Ireland Key Trends 2014*, Dublin: Department of Health, p.58.

<sup>549</sup> A. Nolan, S. Barry, S. Burke and S. Thomas (2014) *The impact of the financial crisis on the health system and health in Ireland*, World Health Organisation.

<sup>550</sup> Department of Health, Leo Varadkar TD, ‘Statement by Minister Varadkar on the Supplementary Budget for the Department of Health’, [press release], 4 December 2014.

<sup>551</sup> A. Nolan, S. Barry, S. Burke and S. Thomas (2014) *The impact of the financial crisis on the health system and health in Ireland*, World Health Organisation, p.8.

<sup>552</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, para.

<sup>553</sup> Department of Health (2015) *Profile Table of Priority Areas, Actions and Deliverables for the Period 2015 – 2017*, Dublin: Department of Health, p.4.

years is a welcome first step to implementing a system of universal healthcare<sup>554</sup> as is the proposed introduction of free GP care for people over the age of 70 in 2015.<sup>555</sup> These moves will bring the State one step closer to realising a system of universal healthcare which, if designed and implemented correctly, will be beneficial in ensuring access and affordability to healthcare while at the same time providing preventive healthcare services in line with the Covenant. Affordable primary healthcare for those on low incomes not only ensures equitable access to services but also proves more cost-effective in the long-term as patients will be less likely to postpone seeking treatment thus ensuring more positive health outcomes as well as less expensive treatment.<sup>556</sup>

The IHREC is conscious that despite structural changes made to improve the administration of the medical card system for those on low incomes,<sup>557</sup> the ‘combination of resource constraints, limits to changes in thinking and practices and high volumes of activity has typically resulted in continual reactive crisis management’ and has led to ‘a sense of poorer outcomes for a sizeable number of medical card applicants’.<sup>558</sup> As already noted, the Committee affirms that limited resources cannot be used as a reason to restrict a person’s access to health services or facilities, and therefore the State must address these issues in a constructive and efficient way.<sup>559</sup>

Moreover, the IHREC notes its concern that ‘Ireland is the only European country not to offer universal access to free or heavily subsidised GP care, and out-of-pocket GP costs are correspondingly much higher than in other countries’.<sup>560</sup> A variety of health-related charges have been transferred to the patient, including increases in hospital charges, outpatient fees and prescription charges which ‘impose a particularly large burden on the section of the population with the lowest income’.<sup>561</sup> In real terms, since 2008, increases have meant additional annual costs adding up to approximately €100 per person.<sup>562</sup> The significant increase in prescription charges for medical card holders,<sup>563</sup> as well as the continuing high cost of pharmaceuticals

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<sup>554</sup> Health (General Practitioner Service) Act 2014. The Government allocated €37 million in the 2015 Budget for this initiative which is estimated will cover 240,000 children under the age of six.

<sup>555</sup> Department of Health, ‘[The Government has today approved a new Bill to provide a universal GP service](#)’, [press release], 24 March 2015.

<sup>556</sup> Expert Panel On Effective Ways Of Investing In Health (2014) *Definition of a frame of reference in relation to primary care with a special emphasis on financing systems and referral systems Definition: Preliminary opinion*, Brussels: European Commission, p.41.

<sup>557</sup> The medical card system was centralised under the Primary Care Reimbursement Service (PCRS) in July 2011. A report by Prospectus and Deloitte estimated this has saved the Exchequer €80 million over three years and ‘made the administration of the process more equitable, transparent and consistent’. See Prospectus and Deloitte (2014) *Primary Care Reimbursement Service: Medical Card Process Review*, Dublin: Health Service Executive, p.3. Initially the Government proposed to carry out a review of eligibility for medical cards and removed approximately 97,000 cards. Following public outcry, this move was reversed and instead a review of the medical card scheme was commissioned and conducted, resulting in the reinstatement of discretionary medical cards. See Health Service Executive (2013), *HSE National Service Plan 2014*, Dublin: Health Service Executive, p.39; Department of Health, ‘[Government approves method for the return of medical cards lost in discretionary review](#)’, [press release], 17 June 2014.

<sup>558</sup> Prospectus and Deloitte (2014) *Primary Care Reimbursement Service: Medical Card Process Review*, Dublin: Health Service Executive, p.22.

<sup>559</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 11 August 2000, E/C.12/2000/4, para.18.

<sup>560</sup> A. Nolan, S. Barry, S. Burke and S. Thomas (2014) *The impact of the financial crisis on the health system and health in Ireland*, World Health Organisation.

<sup>561</sup> *Ibid.*, p.6.

<sup>562</sup> S. Thomas, S. Burke and S. Barry, ‘[The Irish health-care system and austerity: sharing the pain](#)’, *The Lancet*, 383 (3), 3 May 2014, p.1546.

<sup>563</sup> A. Nolan, S. Barry, S. Burke and S. Thomas (2014) *The impact of the financial crisis on the health system and health in Ireland*, World Health Organisation, p.13.

despite price reductions overall,<sup>564</sup> further interfere with access to medicine by people on low to moderate incomes.

**The IHREC welcomes the State's plan to introduce a system of Universal Health Insurance over time but calls on the State to ensure that people who require medical care and treatment can afford to access it in a timely way.**

### 10.3 Acceptability

#### 10.3.1 Gender-Specific Healthcare

Improving women's overall health, including their physical, mental and reproductive health, remains a key objective of the *National Women's Strategy*.<sup>565</sup> In this context, the IHREC regrets the dissolution in 2009 of two statutory bodies with a gender-specific health focus, namely the Women's Health Council, and the Crisis Pregnancy Agency.<sup>566</sup> Both bodies were subsumed into the general health service in 2009<sup>567</sup> and while the Crisis Pregnancy Programme has developed a Strategic Framework for 2012 – 2016, it continues to operate in a climate of funding restrictions and is contingent on maintaining 2011 staff levels.<sup>568</sup>

The IHREC welcomes significant initiatives to address the health issues caused by Female Genital Mutilation (FGM) in Ireland including the enactment in 2012 of legislation to prohibit the practice,<sup>569</sup> the development of a *National Plan of Action to Address Female Genital Mutilation* as well as the establishment in 2014 of a dedicated clinic to treat girls and women who have undergone the practice.

The IHREC also notes that Ireland is the only EU Member State to have had in place a National Men's Health Strategy which aimed to address health inequalities for men from lower socio-economic groups and took particular note of the high rate of male suicide.<sup>570</sup>

**The IHREC welcomes the development of the HSE Gender Mainstreaming Framework<sup>571</sup> in conjunction with the National Women's Council of Ireland (NWCi) and recommends the State adequately resource the initiative in order to ensure its effective rollout. The State should also publish an update on the implementation of the *National Men's Health Strategy* to consider whether it should be renewed.**

#### 10.3.2 Intercultural Health Strategy

The publication of the *National Intercultural Health Strategy 2007-2012* was a welcome development. Its primary aim was ensuring the availability of culturally appropriate healthcare for ethnic minorities, including

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<sup>564</sup> A. Brick, P. Gorecki and A. Nolan (2013) *Ireland: Pharmaceutical Prices, Prescribing Practices and Usage of Generics in a Comparative Context*, Dublin: Economic and Social Research Institute, p.70.

<sup>565</sup> Government of Ireland (2007) *National Women's Strategy 2007 – 2016*, Dublin: Stationery Office, p.vii.

<sup>566</sup> The Women's Health Council was a statutory body established in 1997 to advise the Minister for Health and Children on all aspects of women's health. The HSE Crisis Pregnancy Agency was established in 2001 to prepare and implement a strategy to address the issue of crisis pregnancy, in consultation with relevant Departments of State and with such other persons as are considered appropriate.

<sup>567</sup> Health (Miscellaneous Provisions) Act 2009.

<sup>568</sup> HSE Crisis Pregnancy Programme (2012) *National Strategy 2012-2016*, Dublin: HSE, p.32.

<sup>569</sup> The Criminal Justice (Female Genital Mutilation) Act 2012 makes it an offence to carry out FGM on a girl or woman in Ireland or to remove a girl or woman to a place outside the State for this purpose. It is estimated that there are more than 2,500 girls and women living in Ireland who have undergone an FGM procedure.

<sup>570</sup> Department of Health and Children (2008) *National Men's Health Policy 2008 – 2013: Working with men in Ireland to achieve optimum health & wellbeing*, Dublin: Stationery Office.

<sup>571</sup> HSE & National Women's Council of Ireland (2012) *Equal but different: A framework for integrating gender equality in Health Service Executive Policy, Planning and Service Delivery*, Dublin: HSE & NWCi.

Travellers and Roma, living in Ireland. While the Strategy was introduced at a time of increased economic pressure due to the onset of the recession, the IHREC notes that a number of its aims have been progressed including translation services, development of resources and funding of NGO projects. There are no plans to renew the strategy.<sup>572</sup> However, a HSE Intercultural Health Governance Group is now responsible for reviewing and implementing any outstanding recommendations.<sup>573</sup>

**The IHREC welcomes the continuing work of the HSE Intercultural Health Governance Group and encourages this group to ensure the introduction of an ethnic identifier in healthcare as it will be essential in order to plan adequate healthcare services for ethnic minorities.**

#### 10.4 Adequate Quality and Oversight

Regarding adequate facilities, the IHREC notes with concern that the existing children's hospital buildings are in poor structural condition and that the hospitals continue to provide care in substandard conditions.<sup>574</sup> This is despite the fact that a new National Paediatric or Children's Hospital, first recommended in 2006,<sup>575</sup> continues to be delayed due to planning disputes and concerns about the location of the site and the completion date, which is now set for 2019.<sup>576</sup> The IHREC welcomes the State's commitment of €150 million to relocate the National Maternity Hospital to a site alongside adult acute services as recommended by an independent review of services.<sup>577</sup>

The IHREC recognises the important work carried out by the Health Information and Quality Authority (HIQA) in providing oversight and guidance on standards for a range of healthcare services including public hospitals.<sup>578</sup> The Health Act 2007 grants HIQA the 'powers as are necessary or expedient for the performance by it of its functions' meaning it can take enforcement action and close centres where there is a serious breach of regulations or residents are at risk. In 2015, in a report of 54 inspections carried out in 49 acute hospitals, the cleanliness of patient equipment and hand hygiene was identified as a key issue, as were shortfalls in the standards of sanitation.<sup>579</sup> A particular concern has arisen in relation to a number of maternity services in the State, which has led to investigations by HIQA,<sup>580</sup> the Chief Medical Officer<sup>581</sup> and in

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<sup>572</sup> HSE (2013) 'HSE Update – Intercultural Health Governance Group', [correspondence], 3 September 2013.

<sup>573</sup> *Ibid.*

<sup>574</sup> Department of Public Expenditure and Reform (2011) *Infrastructure and Capital Development 2012-2016: Medium Term Exchequer Framework*, Dublin: Stationery Office, p.30.

<sup>575</sup> McKinsey & Co. (2006) *The New National Children's Hospital: Children's Health First*, Dublin: Health Service Executive.

<sup>576</sup> Minister for Health, Leo Varadkar TD, *Parliamentary Questions: Written Answers [41783/14]*, 4 November 2014.

<sup>577</sup> Department of Health, 'Minister for Health Announces Relocation of the National Maternity Hospital' [press release], 27 May 2013.

<sup>578</sup> The Health and Information Quality Authority (HIQA) is an independent body responsible for 'quality, safety and accountability in residential services for children, older people and people with disabilities in Ireland' as well as 'driving improvements in the quality and safety of healthcare on behalf of patients'. For further information see [www.hiqa.ie](http://www.hiqa.ie). The Authority develops standards of practice and monitors compliance with legislative obligations and agreed standards; it also has the power to carry out an investigation where it deems it necessary.

<sup>579</sup> HIQA (2015) *Overview of Inspections in Public Acute Hospital against the National Standards for the Prevention and Control of Healthcare Associated Infections*, Dublin: HIQA. See also HIQA (2015) *Summary Infographic*. See also the UN Committee on Economic, Social and Cultural Rights (CESCR) (2000) *General Comment 14: the right to the highest attainable standard of health*, E/C.12/2000/4, Geneva: OHCHR, para.12.

<sup>580</sup> See HIQA (2013) *Investigation into the safety, quality and standards of services provided by the Health Service Executive to patients, including pregnant women, at risk of clinical deterioration, including those provided in University Hospital Galway, and as reflected in the care and treatment provided to Savita Halappanavar*, Dublin: HIQA. In the case of Savita Halappanavar she died from an infection while pregnant following failures in basic patient care provided to her.

<sup>581</sup> Dr T. Holohan, Chief Medical Officer (2014) *HSE Midland Regional Hospital, Portlaoise Perinatal Deaths (2006 to date): Report to Dr James Reilly TD*, Dublin: Department of Health.



some cases internal reviews by hospital management.<sup>582</sup> The IHREC notes the case of one particular hospital which experienced a relatively high rate of perinatal deaths since 2006. The final independent investigation undertaken by HIQA has not yet been published by the HSE as a result of legal action that may be taken by the HSE.<sup>583</sup> The IHREC will continue to monitor this situation as it unfolds, particularly in light of the Committee's *General Comment No. 14* which highlights the need for the State to put in place measures to improve child and maternal health in line with Article 12(2) of the Covenant, which provides that the State should strive 'for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child'.<sup>584</sup>

The IHREC considers that the establishment of a National Healthcare Quality Reporting System in 2014 will help to ensure better quality and higher standards in healthcare by examining key performance indicators in 'preventative care, primary care, community care, and acute care'.<sup>585</sup>

The Ombudsman has expressed his concern about the low number of complaints relating to the health sector and is currently undertaking research to explore why this is the case. The commission is encouraged by the Ombudsman's expressed intent with regard to integrating human rights approaches in the work of his office.

**The IHREC welcomes the steps taken by the State to improve the quality of healthcare, address deficiencies in the system and develop indicators to monitor the provision of adequate services and programmes. The IHREC is encouraged by the expressed intent by HIQA to use a rights-based approach in developing its guidelines and carrying out its inspections.**

## 10.5 Right to Highest Attainable Standard of Mental Health

### 10.5.1 Adequacy of Community Based Services for Adults

The IHREC welcomes the considerable reduction in the number of adults admitted to psychiatric hospitals; admissions fell by 17.4 per cent between 2004 and 2013.<sup>586</sup> However, the Commission notes that the level of community mental health services continues to fall short of the targets set in the 2006 *Vision for Change* strategy. In particular, the Health Service Executive identifies that staffing levels in Community Mental Health Teams (CMHT) in 2014 were only 75 per cent of what was envisaged in 2006.<sup>587</sup> The IHREC welcomes the dedicated funding made available by the State to enhance the CMHTs through further recruitment of staff but notes that despite these additional resources, difficulties in finding suitable candidates, 'primarily for geographical and qualification reasons'<sup>588</sup> mean that staffing levels are not adequate to meet demand.

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<sup>582</sup> Saolta University Health Care Group 'Statement from Dr Patrick Nash, Clinical Director University Hospital Galway and Commissioner of the Enquiry into the Death of Ms Savita Halappanavar', 13 June 2013.

<sup>583</sup> In March 2015, the HSE published a series of correspondence sent to HIQA which alleged that HIQA had not followed fair procedures in its investigations.

<sup>584</sup> UN Committee on Economic, Social and Cultural Rights (CESCR) (2000) *General Comment 14: the right to the highest attainable standard of health*, E/C.12/2000/4, Geneva: OHCHR, para. 14.

<sup>585</sup> Department of Health (2015) *National Healthcare Quality Reporting System: First Annual Report*, Dublin: Department of Health, p.4.

<sup>586</sup> Department of Health (2015) *Health in Ireland Key Trends 2014*, Dublin: Department of Health, p.37.

<sup>587</sup> *A Vision for Change* (2006) recommended 10,657 full-time posts and this has since been adjusted to 12,240 to take account of population growth. See HSE (2014) *HSE National Service Plan 2015*, Dublin: HSE, p.47.

<sup>588</sup> Minister for State, Kathleen Lynch TD, *Parliamentary Questions: Written Answers [7812/15]*, 24 February 2015. The Minister highlights that approximately 1150 posts have been allocated between 2012 and 2015 but of these, only 66 per cent have been filled. The rest are in ongoing stages of recruitment.

The underpinning legislation for mental health care in Ireland, the Mental Health Act 2001 ('the 2001 Act'), is in need of reform. Specifically, an Expert Group established to review the 2001 Act has found that it does not adequately reflect the objectives set out in the *Vision for Change* strategy which include a move towards 'community based services, the adoption of a recovery approach in every aspect of service delivery and the involvement of service users as partners in their own care and in the development of the services'.<sup>589</sup> The IHREC welcomes the publication of the *Review by the Expert Group* of this legislation in March 2015 and in particular welcomes the Group's recommendation to extend the remit of the Mental Health Commission to community based services to provide adequate oversight for these important services.<sup>590</sup> However, the IHREC notes that the Mental Health Commission will require further funding in order to expand its remit and implement this recommendation.

**The IHREC recommends the State to prioritise the recruitment of staff for Community Mental Health Teams in line with targets set out in a *Vision for Change*. The IHREC also recommends the State amend the Mental Health Act 2001 on foot of the recommendations of the Expert Group's review and to ensure adequate oversight for these services.**

### **10.5.2 Children and Mental Health Services**

The IHREC notes the Committee's request in its List of Issues that the State provide further information on the impact of measures to address the shortage of capacity in mental healthcare facilities for children. Despite a commitment by the State to 'prioritise the provision of additional child and adolescent inpatient facilities' and steps taken to increase the number of Child and Adolescent Mental Health Services (CAMHS) beds since 2007, the rising demand for services continues to be unmet, often due to reduced capacity of staff.<sup>591</sup> While the State has committed to put in place a total of 106 publicly funded beds, many of these are still at the planning stage and will not be available for a number of years.<sup>592</sup>

The IHREC recognises the significant improvements made in relation to children and young people admitted to adult psychiatric wards since 2007, but remains concerned that despite a target set by the Mental Health Commission (MHC)<sup>593</sup> that no individual under 18 should be treated in an adult facility from 1 December 2011,<sup>594</sup> the practice persists. In 2013, the Inspectorate of Mental Health Services examined child admissions to adult wards and discovered that 83 young people were placed on adult wards on 91 occasions on the basis that there were no age-appropriate beds available.<sup>595</sup> However, on further examination the Inspectorate found that in 64 per cent of these cases, at least one CAMHS bed had been available on the same day as the child was admitted and in some cases more than 10 operational beds had been available.<sup>596</sup> Moreover, 60 per cent of these young patients remained in an adult facility for more than three days, while

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<sup>589</sup> Department of Health (2015) *Report of the Expert Group on the Review of the Mental Health Act 2001*, Dublin: Department of Health, p.7.

<sup>590</sup> *Ibid.*, p.101.

<sup>591</sup> HSE (2014) *December 2014 National Performance Assurance Report*, Dublin: HSE, p.12.

<sup>592</sup> Twenty of these spaces are planned as part of the National Paediatric Hospital due to be completed in 2019.

<sup>593</sup> The Mental Health Commission was established in 2002 under the Mental Health Act 2001.

<sup>594</sup> Mental Health Commission (2009) *Code of Practice Relating to Admission of Children under the Mental Health Act 2001: Addendum*, Dublin: Mental Health Commission, p.3.

<sup>595</sup> Inspectorate of Mental Health Services (2013) *Child and Mental Health Services 2013: Admission of Children to Adult Units 2013*, Dublin: Mental Health Commission, p.1.

<sup>596</sup> *Ibid.*, p.5. Notably there was an even regional distribution in the number of children and young people admitted to adult wards.

21 per cent were there for more than 10 days.<sup>597</sup> The IHREC regrets that the 2014 figures do not indicate any improvement.<sup>598</sup>

The IHREC notes with concern that the current number of CAMHS teams do not match the recommended number in the State's *Vision for Change* strategy<sup>599</sup> and difficulties persist in recruiting and retaining suitable staff.<sup>600</sup> Longer waiting lists and a failure to meet the HSE's own target for first-time appointments have also had a detrimental effect on the overall performance of CAMHS teams in some areas<sup>601</sup> meaning that children with mental health difficulties are denied timely access to adequate treatment.

**The IHREC regrets the placement of any child or adolescent in an adult facility and calls on the State to ensure that individuals under the age of 18 are placed in age-appropriate facilities. The completion of the full cohort of CAMHS beds must be prioritised. The IHREC recommends that greater efforts be made by the State to implement the consensus that exists on the strategy document *Vision for Change* and in particular the recommendations of the Expert Group's review of the Mental Health Act 2001 in respect of children and young people which will require legislative amendments.<sup>602</sup>**

## 10.6 Right to an Adequate Standard of Health for Groups Experiencing Discrimination

### 10.6.1 Transgender Persons

The IHREC notes with concern the limited provision of specialised health services for Transgender people in the State. There are no centres providing gender reassignment surgery in Ireland and instead people requiring the surgery are referred to facilities in other countries.<sup>603</sup> Moreover, the expense of having to travel abroad for surgery is compounded by the 'prohibitive cost' of non-surgical gender reassignment treatment such as electrolysis or hair removal for Transgender male to female persons.<sup>604</sup> Between 2005 and the beginning of 2014, 218 cases of suspected or confirmed Gender Dysphoria (GD) were referred to the only specialised endocrine service in the State for hormone therapy,<sup>605</sup> but this service is subject to resource constraints despite a year-on-year increase in the number of referrals.<sup>606</sup>

Many of the issues raised in a 2004 report by the former Equality Authority remain outstanding, including lack of access to services in Dublin due to geographical location, an information deficit for patients and healthcare providers around treatment as well as an absence of Government policy.<sup>607</sup> Notably, there is a high rate of mental health issues amongst the Trans community<sup>608</sup> although the 'true prevalence may be

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<sup>597</sup> *Ibid.*

<sup>598</sup> Health Service Executive (2015) *HSE December 2014 Performance Assurance Report*, Dublin: HSE, p.12. Figures for 2014 indicate that 89 children (31 per cent) of total child and adolescent admissions, were committed to adult mental health inpatient units.

<sup>599</sup> Department of Health (2006) *A Vision for Change*, Dublin: Stationery Office (revised as per Census 2011).

<sup>600</sup> Health Service Executive (2015) *HSE December 2014 Performance Assurance Report*, Dublin: HSE, p.12.

<sup>601</sup> In December 2014, there were 405 individuals (14 per cent of referrals) on the waiting list for 12 months or longer. Health Service Executive (2015) *HSE December 2014 Performance Assurance Report*, Dublin: HSE, pp.11-12.

<sup>602</sup> Department of Health (2015) *Report of the Expert Group on the Review of the Mental Health Act 2001*, Dublin: Department of Health, pp.99 – 100.

<sup>603</sup> C. Judge, et al. 'Gender Dysphoria – Prevalence and Co-Morbidities in an Irish Adult Population', *Frontiers in Endocrinology* 5 (2014): 87. *PMC*. Web. 27 Mar. 2015.

<sup>604</sup> HSE (2009) *LGBT Health: Towards meeting the needs of lesbian, gay, bisexual and transgender people*, Dublin: HSE, p.33.

<sup>605</sup> C. Judge, et al. 'Gender Dysphoria – Prevalence and Co-Morbidities in an Irish Adult Population', *Frontiers in Endocrinology* 5 (2014): 87. *PMC*. Web. 27 Mar. 2015.

<sup>606</sup> *Ibid.*

<sup>607</sup> E. Collins and B. Sheehan (2004) *Access to Health Services for Transsexual People*, Dublin: Equality Authority, p.47.

<sup>608</sup> HSE (2009) *LGBT Health: Towards meeting the needs of lesbian, gay, bisexual and transgender people*, Dublin: HSE, p. 32–3. A 2013 study carried out for the Transgender Equality Network Ireland (TENI) found that the 164 participants experienced high rates

difficult to assess due to patient worries regarding stigma and societal acceptance of the condition'.<sup>609</sup> The IHREC welcomes the commitment from the HSE's Primary Care Division to finalise the 'development and implementation of care pathways for members of the Transgender community' in 2015 and to conduct or support 'targeted training' to those working within the health service on Transgender issues.<sup>610</sup>

In relation to the legal position of Transgender persons, the IHREC welcomes the Gender Recognition Bill 2015, but reiterates its concern that 'despite the removal from the legislation of the specific requirement for a 'medical evaluation' by a psychiatrist or endocrinologist as a precondition to applying for recognition in a person's preferred gender', there is still a requirement for a medical practitioner 'to provide a certificate before a person can register in their preferred gender'.<sup>611</sup> The Commission also has reservations about the legal situation of young Transgender people who wish to apply to be recognised in their preferred gender.<sup>612</sup>

**The IHREC recommends the State put in place a strategy to adequately address the health concerns and needs of Transgender people to ensure that they can access any necessary treatment in a timely way without facing significant financial barriers or undergoing unnecessary psychological distress.**

### **10.6.2 Irish Travellers and the Right to Health**

The IHREC notes with concern that the Traveller population continues to experience poorer health conditions despite being identified as a priority group for investment in targeted actions.<sup>613</sup> The life expectancy gap between Irish Travellers and the general population has increased in recent years with Traveller men living on average 15 years less than the average Irish male.<sup>614</sup> A dedicated strategy addressing Traveller health issues was in place between 2002 and 2005 and the issue of Travellers' health was later addressed in the *National Intercultural Health Strategy 2007 – 2012* which recognised that the 'detrimental impact on physical and mental health of poor accommodation, coupled with conditions of cold, damp, lack of basic facilities and overcrowding is evident'.<sup>615</sup> The IHREC regrets that neither strategy was renewed and that some recommendations of the *National Intercultural Health Strategy* were not implemented due to resource constraints.<sup>616</sup> The IHREC is particularly concerned at the high rate of suicide amongst the Traveller population and the high rate of infant mortality.<sup>617</sup>

**The IHREC recommends the State address the disparities between Traveller health and that of the general population and to ensure that specific programmes aimed at Traveller healthcare are adequately**

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of stress, anxiety and depression and many participants admitted to having suicidal thoughts at some stage of their life. J. McNeil, L. Bailey, S. Ellis & M. Regan (2013) *Speaking from the Margins: Trans Mental Health and Wellbeing in Ireland*, Dublin: TENI.

<sup>609</sup> C. Judge, et al. 'Gender Dysphoria – Prevalence and Co-Morbidities in an Irish Adult Population', *Frontiers in Endocrinology* 5 (2014): 87. PMC. Web. 27 Mar. 2015.

<sup>610</sup> *Ibid.*

<sup>610</sup> HSE (2015) *HSE Primary Care Division: Operational Plan 2015*, Dublin: HSE, p.44.

<sup>611</sup> IHREC 'IHREC reiterates its call to further safeguard the rights of Transgender and Intersex people', [press release], 10 March 2015.

<sup>612</sup> *Ibid.*

<sup>613</sup> The Minister for Health cites a number of initiatives that have been put in place in order to improve inequalities in health for Travellers including the work of the HSE National Traveller Health Advisory Forum, the establishment of Traveller Health Units and peer-led education initiatives. See response from Minister of Health, Leo Varadkar TD, [Parliamentary Questions: Written Answers \[41970/14\]](#), 4 November 2014.

<sup>614</sup> Only 2.5 per cent of the Traveller population were recorded as being over the age of 65 in Census 2011.

<sup>615</sup> HSE (2007) *HSE National Intercultural Health Strategy 2007 – 2012*, Dublin: HSE, p.49.

<sup>616</sup> HSE (2012) *HSE National Intercultural Health Strategy 2007 – 2012: Update March 2012*, Dublin: HSE, p.1.

<sup>617</sup> O. Kelleher et al (2010) *Our Geels, All Ireland Traveller Health Study*, Dublin: University College Dublin & Department of Health & Children. Traveller men were found to be 6.6 times more likely to die by suicide while the infant mortality rate for Traveller children was 3.6 times that of the general population.

resourced and the outcomes monitored to ensure the most efficient and effective use of limited resources in this area.

### 10.7 Health Inequalities and Underlying Determinants of Health

Age, gender, membership of an ethnic minority and socio-economic status all have an effect on the right to health. The IHREC welcomes the priority given by the State in its *Healthy Ireland* strategy to reduce health inequalities between groups with different levels of income.<sup>618</sup> The State recognises that people from poorer socio-economic backgrounds may be more at risk of experiencing mental health difficulties in general and this risk is more widespread during times of recession.<sup>619</sup> Poorer socio-economic status may also dictate other health outcomes, including: an increase in child obesity; lower birthweights; higher rates of chronic diseases; and a reduction in healthy life expectancy for older people.<sup>620</sup>

**The IHREC recommends the State monitor trends in underlying determinants of health as part of its *Healthy Ireland Strategy* and ensure that people from lower socio-economic backgrounds are adequately supported in order to avail of healthcare services. The State must also ensure that healthcare policies are equality proofed to address the issue of discrimination in the provision of services.**

### 10.8 Right to Adequate Reproductive Health

The right to sexual and reproductive health services encompasses the same four key elements as the right to health generally: non-discrimination, accessibility, affordability and information.<sup>621</sup> In the context of its General Comment, the Committee has clearly outlined that Article 12 encompasses ‘the right to control one’s health and body, including sexual and reproductive freedom’<sup>622</sup> and encourages the State to put in place ‘policies to provide access to a full range of high quality and affordable health care, including sexual and reproductive services’.<sup>623</sup> The IHREC is concerned that the high cost of prescription and non-prescription contraceptive items interferes with the right of men and women on low incomes to access affordable contraception, thus interfering with their right to adequate sexual health.<sup>624</sup>

**The IHREC recommends that the State ensure affordable methods of contraception are available to women and men on low incomes.**

#### 10.8.1 Constitutional Position and Protection of Life During Pregnancy Act

Article 40.3.3 of the Irish Constitution recognises the right to life of the unborn and provides protection for that right ‘as far as practicable’ with ‘due regard to the equal right to life of the mother’. As previously stated in the Commission’s 2014 submission to the UN Human Rights Committee, under international instruments to which the State is a party (including ICESCR), the State’s margin of discretion in formulating its law as it

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<sup>618</sup> Department of Health (2013) *Healthy Ireland - a framework for improved health and wellbeing 2013 – 2025*, Dublin: Department of Health.

<sup>619</sup> *Ibid.*, p.10.

<sup>620</sup> *Ibid.*, p.35.

<sup>621</sup> J. Westeson (2012) *Sexual Health and Human Rights in the European Region*, Geneva: International Council on Human Rights Policy, p. 155.

<sup>622</sup> UN Committee on Economic, Social and Cultural Rights (2000) *General Comment 14: the right to the highest attainable standard of health*, E/C.12/2000/4, Geneva: OHCHR, para.8.

<sup>623</sup> *Ibid.*, para.21.

<sup>624</sup> O. McBride, K. Morgan and H. McGee (2012) *Irish Contraception and Crisis Pregnancy Study 2010 (ICCP-2010)*, Dublin: Crisis Pregnancy Agency and Health Service Executive, pp.71–8. The study found that the cost had deterred young adults under 25 from using contraception; in particular it noted the high cost of condoms relative to other European countries despite a reduction in VAT in 2008 and the need to access a GP for renewal of a prescription for a contraceptive pill acted as a ‘frequent barrier’.

considers appropriate on the issue of abortion is recognised.<sup>625</sup> Notwithstanding this margin of discretion, any restrictions relating to how a lawful abortion can be obtained should be justifiable and should not totally impair the woman's human rights, including her right to life and freedom from torture or cruel, inhuman or degrading treatment or punishment.<sup>626</sup> In the context of ICESCR, the IHREC notes the Committee's *General Comment No. 14* which reminds States that the 'realisation of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health.'<sup>627</sup>

The European Court of Human Rights ('the ECtHR') has considered Ireland's law on access to lawful terminations under the European Convention on Human Rights (ECHR). In line with its general approach on this issue, in the *A, B and C v. Ireland* case, the ECtHR afforded the State a wide 'margin of appreciation' in the balance it sought to strike between the constitutional protection for the unborn and in seeking to vindicate the personal rights of the mother.<sup>628</sup> The ECtHR found no violation of Article 8 (right to respect for private life) in respect of the first two applicants, A and B, who felt compelled to travel to the United Kingdom for a termination in reasons described by the ECtHR as pertaining to their health and well-being. However, the ECtHR found a violation in respect of Applicant C, who was in remission from cancer and who travelled to the United Kingdom for an abortion.<sup>629</sup> In relation to Applicant C, the ECtHR considered that in respect of Article 8 the legal framework in place allowing for abortions under certain restricted circumstances was unclear and lacked certainty from the perspectives of both pregnant women and medical practitioners.<sup>630</sup>

Following this judgment, in July 2013, the State legislated through the Protection of Life during Pregnancy Act 2013 ('2013 Act') to allow for terminations in limited circumstances where there was a real and substantial risk to the life of the mother including in circumstances where the mother is suicidal.<sup>631</sup> The 2013 Act was introduced to address the ruling of the ECtHR, while remaining within the constitutional parameters of Article 40.3.3 (concerning the right to life of the unborn). In its *Observations on the Protection of Life During Pregnancy Bill 2013* the Commission assessed the proposed legislation against the standards set out in the Constitution and international human rights standards, including the ICESCR.<sup>632</sup> The IHREC does not propose to reproduce in detail its Observations on the Bill, but rather it focuses on the main areas where there may continue to be deficits under the ICESCR. In doing so, it draws attention to the fact that if the State had introduced legislation which ran counter to the right to life of the unborn under Article 40.3.3, the legislation would not have survived scrutiny by the Irish courts. The State was thus constrained in its approach to the *A, B and C* judgment, and indeed calls from other international treaty bodies, in the absence

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<sup>625</sup> IHREC Designate (2014) *Submission to the UN Human Rights Committee on the Examination of Ireland's Fourth Periodic Review under the International Covenant on Civil and Political Rights*, Dublin: IHREC Designate, para. 83.

<sup>626</sup> See UN Human Rights Committee (2008) *Concluding Observations on Ireland's Third Periodic Report*, CCPR/C/ILR/CO/3, para.13; see UN Committee Against Torture (2011) *Concluding Observations on Ireland's Initial Report*, CAT/C/IRL/CO/1, para. 26. See also *LMR v Argentina*, Communication No.1608/2007, CCPR/C/101/D/1608/2007, 2011. See IHREC Designate (2014) *Submission to the UN Human Rights Committee on the Examination of Ireland's Fourth Periodic Review under the International Covenant on Civil and Political Rights*, Dublin: IHREC Designate, para. 83.

<sup>627</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 11 August 2000, E/C.12/2000/4, para. 21.

<sup>628</sup> *A, B and C v. Ireland* (2010), No. 25579/05 Eur. Ct. H.R., paras. 241–242.

<sup>629</sup> *Ibid.*, paras. 241–242.

<sup>630</sup> *Ibid.*, paras. 252–268.

<sup>631</sup> The Protection of Life During Pregnancy Act 2013.

<sup>632</sup> IHRC (2013) *Observations on the Protection of Life During Pregnancy Bill*, Dublin: IHRC.

of a constitutional amendment.<sup>633</sup> In this regard, the IHREC notes the State's response to the List of Issues that 'the Government does not intend to propose any amendments to the Act or Article 40.3.3 at present'.<sup>634</sup>

In its List of Issues the Committee has asked the State to provide further information on its progress in 'adopting comprehensive guidelines to clarify what constitutes "real and substantive risk" to the life, as opposed to the health, of a pregnant woman'.<sup>635</sup> The IHREC welcomes the enactment of the 2013 Act which provides some clarification on the circumstances under which a termination may be legally permitted.<sup>636</sup> The IHREC further notes the issuance of guidelines to health care professionals on the implementation of the 2013 Act by the Department of Health.<sup>637</sup> In its initial observations on the legislation, the IHREC (Designate), as it then was, highlighted its concern that the requirement for a woman at risk of suicide to undergo a number of assessments by different medical practitioners in order to demonstrate that her life was at risk could 'unduly increase her risk of mental anguish or suffering'.<sup>638</sup> This concern remains despite the issuance of guidelines for practitioners in September 2014.

The IHREC notes that in its List of Issues the Committee requests that the State provide information on whether the State party intends to revise its legislation criminalising abortion to provide for exceptions, including in cases of rape, incest and risks to the health of the mother. However, in the context of the Committee's clear interpretation of the right to reproductive and sexual health,<sup>639</sup> the IHREC reiterates its concern that the 2013 Act does not adequately protect the right to health of pregnant women. Specifically, as the IHREC Designate outlined in its submission to the UN Human Rights Committee, the 2013 Act does not take account of certain situations and provide for a lawful abortion where a pregnancy poses a risk to the health as opposed to the life of the pregnant woman, or situations where the pregnancy is the result of a crime, such as rape or incest.<sup>640</sup> Furthermore, in cases when there is an established fatal foetal abnormality or where it has been established that the foetus will not survive outside the womb, a woman cannot terminate the pregnancy in Ireland and instead has to travel abroad.<sup>641</sup> The IHREC notes that although the

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<sup>633</sup> IHREC Designate (2014) *Report on Ireland's 4th Periodic Report under the International Covenant on Civil and Political Rights*, Dublin: IHREC Designate, para. 86.

<sup>634</sup> Government of Ireland (2015) *CESCR: Reply of Ireland to the List of Issues in relation to its third periodic report*, Geneva: OHCHR, para. 121.

<sup>635</sup> UN Committee on Economic, Social and Cultural Rights (2014) *List of Issues: Ireland*, Geneva: OHCHR, para. 23.

<sup>636</sup> The Supreme Court handed down its judgment in the case of *Attorney General v. X* [1992] IESC 1; [1992] 1 IR 1 where it held that a young girl who became pregnant as a result of rape should not be prohibited from travelling abroad for a termination given that her life was at risk because of a threat of suicide. The European Court of Human Rights held in *A, B and C v. Ireland* (2010), No. 25579/05 Eur. Ct. H.R., that the State must legislate for cases where there was a 'real and substantial risk to the life of the pregnant woman'.

<sup>637</sup> Department of Health (2014) *Implementation of the Protection of Life During Pregnancy Act 2013: Guidance Document for Health Professionals*, Dublin: Department of Health

<sup>638</sup> IHRC (2013) *Observations on the Protection of Life During Pregnancy Bill*, Dublin: IHRC, p.52.

<sup>639</sup> UN Committee on Economic, Social and Cultural Rights (2000) *General Comment 14: the right to the highest attainable standard of health, E/C.12/2000/4*, Geneva: OHCHR, paras. 8 and 21 explicitly states that the right includes 'the right to control one's health and body, including sexual and reproductive freedom' and calls for the 'removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health'.

<sup>640</sup> IHREC Designate (2014) *Report on Ireland's 4th Periodic Report under the International Covenant on Civil and Political Rights*, Dublin: IHREC Designate, p.36.

<sup>641</sup> In February 2015 a proposed amendment by an independent TD to the Protection of Life During Pregnancy Act 2013 to legislate for termination in cases where there is an established fatal foetal abnormality was defeated. In March 2015, a Government TD proposed a similar amendment but postponed the vote until summer 2015 as the Joint Oireachtas Committee on Health and Children indicated that it will consider the issue in the near future. See *Dáil Debates: Protection of Life During Pregnancy (Amendment) (Fatal Foetal Abnormalities) Bill 2015: First Stage*, 5 March 2015.

2013 Act repealed Sections 58 and 59 of the Offences Against the Person Act 1861, a woman who undergoes an unlawful abortion in Ireland could face a fine or up to 14 years imprisonment or both.<sup>642</sup>

Overall, the IHREC is concerned that the current legal position not only puts in place barriers which impede a woman's right to bodily autonomy as outlined in the Committee's interpretation of the right to health, but also that it has a disproportionate impact on women from lower socio-economic backgrounds<sup>643</sup> and in particular, migrant women whose inability to travel may be circumscribed due to their immigration status.<sup>644</sup>

**The IHREC recommends that the Committee enter a dialogue with the State in relation to the provisions of the 2013 Act to ensure that they comply with a woman's right to reproductive health under the ICESCR. In particular, the IHREC recommends that the State consider the implications of the legislation on women with low incomes or migrant women who may have legal difficulties in travelling to terminate a pregnancy.**

**The IHREC reiterates its recommendation that the State ensure that clear, comprehensive and authoritative guidance as to what constitutes 'real and substantive risk' is provided to allow women and girls, particularly those from ethnic or non-English speaking backgrounds and with intellectual disabilities, to access medical services through appropriate supports.**

**The IHREC further recommends dialogue between the State and the Committee in relation to possible discrepancies between the 2013 Act and the provisions of the ICESCR in respect of situations where a pregnancy poses a risk to the health, as opposed to the life, of the pregnant woman, including where it may 'unduly increase her risk of mental anguish or suffering'. In particular, the Commission recommends that the State should consider the impact on the physical and mental health of a pregnant woman where a pregnancy is the result of a crime, such as rape or incest; where there is an established foetal fatal abnormality; or where it is established that the foetus will not survive outside the womb.**

## **11. Right to Education (Articles 13 and 14)**

### **11.1 Discrimination and the Right to Education**

The IHREC notes the Committee's clear statement that 'education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds'.<sup>645</sup> The Committee has also made clear that the State must take 'deliberate, concrete and targeted' steps to fully realise the right to education under Article 13 of the Covenant.<sup>646</sup>

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<sup>642</sup> Section 22, Protection of Life During Pregnancy Act 2013.

<sup>643</sup> UN Human Rights Committee (2014) *Concluding Observations on Ireland's Fourth Periodic Report*, CCPR/C/IRL/CO/4, Geneva: OHCHR. The Human Rights Committee highlighted its concern at 'the discriminatory impact of the Act on women who are unable to travel abroad to seek abortions' and the State during its examination under ICCPR could offer 'no solution' to this issue.

<sup>644</sup> In August 2014, media reports circulated about a young asylum seeking woman, a victim of rape in her country of origin, who despite asking for a termination of her unwanted pregnancy was told her only available option was to deliver the baby at 24 weeks by Caesarean section. She was reviewed by a panel of medical experts convened under the legislation and although deemed suicidal, was apparently refused a termination as the pregnancy was too far progressed. It is not yet clear what information was provided to the young woman about her right to access a termination under the legislation but the Health Service Executive has launched an investigation into the case. K. Holland and R. Mac Cormaic, 'Woman in abortion case tells of suicide attempt', *The Irish Times*, 19 August 2014 and K. Holland, 'Terms of inquiry set into care of woman in abortion case', *The Irish Times*, 22 August 2014.

<sup>645</sup> UN Committee on Economic, Social and Cultural Rights (CESCR) (1999) *General comment No. 13: The right to education (article 13 of the Covenant)*, (8 December 1999), E/C.12/1999/10, para.6.

<sup>646</sup> *Ibid.*, para.43.



Article 42 of the Irish Constitution provides for a certain minimum standard of education for children in the form of free primary education and parental choice in the manner of that education. The State's role has traditionally been to provide financial support to institutions run by religious bodies or other entities rather than directly provide education services.<sup>647</sup>

The Education Act 1998 ('the 1998 Act') governs individual school admissions policies. Section 6 of the 1998 Act outlines its objectives, namely, to promote equality of access and participation in education, to promote parental choice in education, and to enhance transparency in the making of decisions. The proposed Education (Admission to Schools) Bill, approved by the Government in 2014, aims to put in place a legislative and regulatory framework to guide school admission criteria and policies.

In its interpretation of the Covenant in its General Comments, the Committee calls on States to closely monitor 'all relevant policies, institutions, programmes, spending patterns and other practices' related to education 'so as to identify and take measures to redress any de facto discrimination', while also encouraging States to collect and collate disaggregated data related to the prohibited grounds of discrimination.<sup>648</sup> While the Equal Status Acts contain a general prohibition on discrimination in the provision of education, certain exceptions apply in relation to gender and religion.<sup>649</sup> The IHREC notes that a number of issues arise in the context of the right to non-discrimination in the field of education including, issues related to three of the nine specific equality grounds: religious status, membership of the Traveller community and disability.

### **11.1.1 Discrimination in Education on the Religion Ground**

As already noted, equality legislation prohibits both indirect and direct discrimination. Section 7 of the Equal Status Acts contains an exemption on the ground of religion, meaning that schools with a particular religious ethos may give preference to admission of students of that denomination over others who are not of the same religion. Also, the Acts allow a school to refuse admission to a student who is not of the same religious denomination promoted by the school if it can demonstrate that this is 'essential' to maintain the ethos of the school.

The Committee, in its *General Comment* on Article 13 of the Covenant, explicitly states that 'public education that includes instruction in a particular religion or belief is inconsistent with article 13(3), unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians'.<sup>650</sup> In this context, the IHREC notes that 96 per cent of the State's primary schools fall under religious patronage, with 90 per cent of these owned by the Roman Catholic Church; the remaining four per cent are described as multi-denominational.<sup>651</sup>

The IHREC welcomes commitments made by the State during the reporting period to divest patronage from Roman Catholic schools and establish more multi-denominational schools. While the final report of the

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<sup>647</sup> Irish Human Rights Commission (2011) *Religion and Education: A Human Rights Perspective*, Dublin: IHRC, para.9.

<sup>648</sup> UN Committee on Economic, Social and Cultural Rights (CESCR) (1999) *General comment No. 13: The right to education (article 13 of the Covenant)*, (8 December 1999), E/C.12/1999/10, para.13.

<sup>649</sup> Section 7(3)(a) and (c), Equal Status Acts 2000 – 2012.

<sup>650</sup> UN Committee on Economic, Social and Cultural Rights (CESCR) (1999) *General comment No. 13: The right to education (article 13 of the Covenant)*, (8 December 1999), E/C.12/1999/10, para.28.

<sup>651</sup> Department of Education and Skills (2014) *Forum on Patronage and Pluralism in the Primary Sector: Progress to Date and Future Directions*, Dublin: DES, pp.5–6.

Forum on Patronage and Pluralism in the Primary Sector<sup>652</sup> was published in 2012, resulting in the first transfers of patronage in a small number of primary schools in September 2014, IHREC regrets that the anticipated White Paper to implement its recommendations has not yet been published.<sup>653</sup> The IHREC echoes the concerns of the UN Human Rights Committee that progress in this area has been ‘slow’ to date.<sup>654</sup>

The IHREC welcomes the proposed legislative framework on school admissions that will prohibit discrimination on nine different grounds.<sup>655</sup> The IHREC is considering the proposed legislation and will provide its observations on the proposals in due course in accordance with Section 10(2)(c) of the Irish Human Rights and Equality Commission Act 2014.

**The IHREC reiterates its recommendation that the State ensure a diversity of provision of school type within all educational catchment areas reflecting the diversity of religious and non-religious convictions represented in the State.**<sup>656</sup>

## 11.2 Education and Membership of the Traveller Community

In the context of the recognised lower educational attainment within the Traveller community, the IHREC notes the improvement in the retention numbers of Irish Travellers in the secondary school system: in 2011, 22 per cent of Travellers were educated to lower secondary level compared with 15 per cent in 2002.<sup>657</sup> The percentage of Traveller children who completed upper secondary education rose from 3.6 per cent in 2006 to 8.2 per cent in 2011.<sup>658</sup> Notably, there is a higher concentration of Traveller children in schools that fall within the remit of the Delivering Equality of Opportunity in Schools (DEIS) programme.<sup>659</sup> The DEIS Action Plan developed in 2005, ‘focuses on addressing and prioritising the educational needs of children and young people from disadvantaged communities, from pre-school through second-level education’.<sup>660</sup> However, the IHREC notes the removal of supports for Traveller specific education supports and the move towards ‘mainstreaming’ Traveller children into mainstream schools.<sup>661</sup> The former National Education and Welfare Board also expressed concerns that the withdrawal of services ‘will impact on the tracking monitoring and addressing school attendance and consequently impact on educational outcomes’.<sup>662</sup>

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<sup>652</sup> In March 2011 the Minister for Education and Skills established a Forum on Patronage and Pluralism in the Primary Sector to receive and assess the various views and perspectives submitted including those of parents, patrons, teachers and the wider community on divesting patronage in primary schools and advise the Minister on how to achieve this.

<sup>653</sup> The State committed to publish a White Paper to set out the policy on the provision of a sufficiently diverse number of schools providing for all religions and none.

<sup>654</sup> UN Human Rights Committee (2014) *Concluding Observations on Ireland’s Fourth Periodic Report*, CCPR/C/IRL/CO/4, para. 21.

<sup>655</sup> Under Section 7 of the proposed Bill the admission policy of the school will have to include a statement affirming that the school will not discriminate against an applicant for admission on the grounds of disability or special educational needs; sexual orientation; family status; membership of the Traveller community; race; civil status; gender; religion.

<sup>656</sup> Irish Human Rights Commission (2011) *Religion and Education: A Human Rights Perspective*, Dublin: IHRC, p. 104.

<sup>657</sup> According to Census 2011 statistics, 17.7 per cent of the Traveller community had no formal education compared to 1.4 per cent of the general population and almost 70 per cent of Travellers were educated to primary level or lower including 507 young people aged 15-19. Government of Ireland (2012) *Census 2011 Profile 7 – Religion, Ethnicity and Irish Travellers*, Dublin: Stationery Office, p. 32.

<sup>658</sup> *Ibid.*

<sup>659</sup> E. Smyth, S. McCoy and G. Kingston (2015) *Learning from the Evaluation of DEIS*, Dublin: Economic and Social Research Institute, p. vii.

<sup>660</sup> Department of Education and Science (DES) (2005) *DEIS (Delivering Equality of Opportunity in Schools): An Action Plan for Educational Inclusion*, Dublin: DES, p.7.

<sup>661</sup> Minister for Education and Skills, Ruairi Quinn TD, *Parliamentary Questions: Written Answers, [53664-66/13]*, 17 December 2013.

<sup>662</sup> The National Education and Welfare Board (NEWB) was established in 2002 and has a statutory function to ensure that every child attends a recognised school or otherwise receives a certain minimum education. In 2014, it was transferred to the newly

The IHREC notes the judgment of the Supreme Court in the case of *Christian Brothers High School Clonmel v. Mary Stokes (on behalf of John Stokes, a minor)*<sup>663</sup> (the ‘Stokes case’).<sup>664</sup> Although the child at the centre of the case satisfied two of the three admission criteria used to prioritise applicants (being Catholic and having attended a certain named primary school) he failed to satisfy the third which required that his father or sibling have attended the school before him (often referred to as the ‘parent rule’).

In the first procedure in this case, the Equality Tribunal held that the ‘parent rule’ constituted indirect discrimination on the basis that the low enrolment rates of members of the Traveller community in second-level education placed Traveller children at a ‘particular disadvantage’ given they were much less likely to have had a parent or sibling previously enrolled in the school.<sup>665</sup> It also found that the third criterion was not objectively justified, and noted that it had a disproportionate impact on the Traveller community. Following a series of appeals, the Supreme Court held that there was insufficient evidence to demonstrate that the child had suffered a ‘particular disadvantage’ on the basis of the school’s admission policy and therefore, to demonstrate that the admission policy was indirectly discriminatory against Traveller children.<sup>666</sup>

The Education (Admission to Schools) Bill 2015 presents an important opportunity to ensure equality of access to all schools through legislative means. In 2014, the Joint Oireachtas Committee on Education and Social Protection, when examining the Draft General Scheme of the School Admissions Bill concluded that ‘a school should not be permitted to give priority to a student on the grounds that he or she is the son or daughter of a former student of the school’ although it did recommend that priority be given to an applicant who has a sibling currently attending the school.<sup>667</sup>

**The IHREC recommends the State consider the recommendation of the Joint Oireachtas Committee and provide for effective equality of access to schools across the nine equality grounds in the Education (Admission to Schools) Bill 2015.**

### 11.3 Education for Children and Young People with a Disability

More than half of the children with a disability have an intellectual or learning disability, and two thirds of children with a disability have multiple disabilities.<sup>668</sup> The majority of children with disabilities attend mainstream education, classes or schools, although the percentage of children attending special education settings increases as they move onto secondary education.<sup>669</sup> Recently published research from the Economic and Social Research Institute (ESRI) demonstrates that ‘children from socio-economically disadvantaged backgrounds are more likely to be placed in special education’ outside of mainstream

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established Tusla, the Child and Family Agency. NEWB (2011) *National Educational Welfare Board submission on the Department of Education and Skills Draft National Plan to Improve Literacy and Numeracy in Schools*, Dublin: NEWB, p.26.

<sup>663</sup> *Christian Brothers High School Clonmel v. Mary Stokes (on behalf of John Stokes, a minor)* [2015] IESC 13.

<sup>664</sup> The former Equality Authority (now the IHREC) acted as *amicus curiae* (or friend of the court) in the case before both the High Court, in 2011 and on appeal to the Supreme Court, in 2013.

<sup>665</sup> IHREC, ‘IHREC calls for admission to schools legislation to address equity of access following Supreme Court judgment’ [press release], 24 February 2015.

<sup>666</sup> *Ibid.*

<sup>667</sup> Joint Oireachtas Committee on Education and Social Protection (2014) *Report on the Draft General Scheme of an Education (Admission to Schools) Bill 2013 March 2014*, Dublin: Houses of the Oireachtas, p.55.

<sup>668</sup> J. Banks, B. Maître and S. McCoy (2015) *Insights into the Lives of Children with Disabilities: Findings from the 2006 NDA Survey*, Dublin: National Disability Authority and Economic and Social Research Institute, p.23.

<sup>669</sup> *Ibid.*, p.35.

educational institutions.<sup>670</sup> Furthermore, statistics indicate that there is a greater prevalence of children with learning or intellectual disabilities in Delivering Equality of Opportunity in Schools (DEIS) school: there are more than nine per cent in DEIS schools compared with five per cent in non-DEIS schools.<sup>671</sup> Notably, in a *National Survey of Public Attitudes to Disability in Ireland*, almost a quarter of parents said they would object to either a child with an intellectual disability or a child with a mental disability being in the same class as their child.<sup>672</sup>

The IHREC notes that in the ten years following the introduction of the Education for Persons with Special Educational Needs Act 2004 ('EPSEN Act') providing for children with a disability,<sup>673</sup> and despite a 2011 *Programme for Government* commitment to publish an implementation plan,<sup>674</sup> important sections of the Act have not yet been commenced. The National Council for Special Education (NCSE),<sup>675</sup> in a 2013 report found that while schools in general had reacted positively to the introduction of inclusive measures, some publicly funded schools put in place 'soft' barriers to discourage enrolment 'by advising parents that a different school is more 'suitable' for their child or has more resources for supporting students with special educational needs'.<sup>676</sup> The NCSE also expressed concerns at the lack of a regulatory framework for enrolment as some schools continue to exclude children with special educational needs on the basis of criteria contained in the school's admissions policy. In light of the lack of a regulatory framework in relation to school admissions, the school's refusal to admit the child cannot be overturned on appeal if the refusal complies with the school's admission policy, even if it is exclusionary.

The IHREC recalls the Committee's clear position that 'any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights' constitutes discrimination.<sup>677</sup> The IHREC regrets the State's rationale for the lack of implementation of the EPSEN Act on the basis of resource constraints. However, the Commission welcomes the Government's renewed commitment in the *National Policy Framework for Children and Young People 2014 – 2020* to implement aspects of the Act, including the preparation and implementation of individual education plans and reform of the resource allocation model for schools.<sup>678</sup>

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<sup>670</sup> *Ibid.*

<sup>671</sup> E. Smyth, S. McCoy and G. Kingston (2015) *Learning from the Evaluation of DEIS*, Dublin: Economic and Social Research Institute, p.63.

<sup>672</sup> National Disability Authority (NDA) (2011) *A National Survey of Public Attitudes to Disability in Ireland*, Dublin: NDA, p. 9.

<sup>673</sup> Section 52 of the EPSEN Act 2004 sets out: "disability' means, in relation to a person, a restriction in the capacity of the person to participate in and benefit from education on account of an enduring physical, sensory, mental health or learning disability, or any other condition which results in a person learning differently from a person without that condition and cognate words shall be construed accordingly'.

<sup>674</sup> Government of Ireland (2011) *Programme for Government 2011-2016: Statement of Common Purpose*, Dublin: Government of Ireland, p.41.

<sup>675</sup> The NCSE is a state agency established under Section 19 of the EPSEN Act to carry out a number of functions including the provision of information to schools, parents and students on special education as well as carrying out relevant research and advising the Minister for Education and Skills.

<sup>676</sup> National Council for Special Education (2013) *Supporting Children with Special Educational Needs in Schools: NCSE Policy Advice Paper No. 4*, Trim: NCSE, p.90.

<sup>677</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 5: Persons with Disabilities, 1994, E/1995/22*, para. 15.

<sup>678</sup> Department of Children and Youth Affairs (2014) *Better Outcomes, Brighter Futures: The National Policy Framework for Children and Young People 2014-2020*, Dublin: Department of Children and Youth Affairs, Commitment 2.21.

The IHREC notes that the Joint Oireachtas Committee on Education and Social Protection recommended that where a school is designated to enrol a child with special needs, the Department of Education and Skills should provide resources within a specified statutory timeframe.

**The IHREC recommends that the State utilise the opportunity of the pending Education (Admission to Schools) Bill 2015 to address the issue of school enrolments and eliminate any discriminatory practises on the basis of disability.**

**The IHREC calls on the State to put in place a regulatory framework to ensure that pupils with special educational needs can access mainstream schools and are allocated the necessary resources, as recommended by the NCSE, to ensure that they can fulfil their full right to education.**

#### 11.4 Education for Ethnic Minority Children and Young People

The Education Act 1998 aims to ensure that the education provided to all children living in the State ‘respects the diversity of values, beliefs, languages and traditions in Irish society and is conducted in a spirit of partnership’.<sup>679</sup> In the 2013–2014 academic year, 11 per cent of primary school students and 12 percent of post-primary school students were migrant children.<sup>680</sup> A Department of Education and Skills census carried out for the same academic year indicated that 80 per cent of migrant children were concentrated in fewer than 25 per cent of schools.<sup>681</sup> Moreover, migrant children are over-represented in urban disadvantaged schools ‘reflecting the impact of residential patterns and school enrolment criteria’.<sup>682</sup>

In this context, the IHREC welcomes that an *Intercultural Education Strategy 2010-2015*<sup>683</sup> was developed ‘in recognition of the recent significant demographic changes in Irish society, which are reflected in the education system’.<sup>684</sup> However, the IHREC is concerned that following the amalgamation of language supports and supports for special needs education,<sup>685</sup> the changes to the allocation of funding for English as an Additional Language (EAL) for children who are not native English speakers will have a negative impact on migrant children. This is particularly critical because migrant children have already been found to attain lower scores in reading tests.<sup>686</sup> The changes mean that schools can exercise discretion in how they allocate resources and it is no longer possible to adequately monitor progress on EAL in line with commitments in the *Intercultural Education Strategy*.<sup>687</sup>

**The IHREC recommends that the State assess and evaluate the current *Intercultural Education Strategy 2010 – 2015* which is due to end this year and ensure that a renewed strategy is put in place. This strategy should be reflective of the changes to language supports. It should also ensure that ethnic minority**

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<sup>679</sup> The Preamble of the Education Act 1998.

<sup>680</sup> Children’s Rights Alliance (2015) *Report Card 2015*, Dublin: Children’s Rights Alliance, p. 115. Information was provided to the Alliance by the Department of Education and Skills.

<sup>681</sup> P. Duncan, ‘We have allowed segregation to happen’, *The Irish Times*, 24 February 2015.

<sup>682</sup> E. Smyth, S. McCoy and G. Kingston (2015) *Learning from the Evaluation of DEIS*, Dublin: Economic and Social Research Institute, p. 61.

<sup>683</sup> Department of Education and Science & Office for the Promotion of Migrant Integration (2010) *Intercultural Education Strategy 2010-2015*, Dublin: DES & OPMI.

<sup>684</sup> Public Policy and Management Institute (2013) *Study on educational support for newly arrived migrant children: Final Report*, Luxembourg: Publications Office of the European Union, p. 75.

<sup>685</sup> <sup>685</sup> F. McGinnity, E. Quinn, G. Kingston and P. O’Connell (2014) *Annual Monitoring Report on Integration 2013*, Dublin: Economic and Social Research Institute & the Integration Centre, p. 31.

<sup>686</sup> *Ibid.*

<sup>687</sup> *Ibid.*, p. 34.

**children are not over-represented in schools in disadvantaged areas but are able to access a wider variety of schools that can cater for their particular education needs.**

## 11.5 Human Rights Education

Article 13 of the ICESCR explicitly provides that ‘education shall be directed to the full development of the human personality and the sense of its dignity and shall strengthen the respect of human rights and fundamental freedoms’. The Committee has interpreted this to mean that human rights education is a right in itself.<sup>688</sup> The First Plan of Action of the World Programme on Human Rights Education (WPHRE) made it clear that in order to achieve the successful integration of human rights education in the wider education system, it would have to be embedded in educational policy, including the curriculum, as well as in the learning environment and in teacher training and professional development.<sup>689</sup>

The IHREC notes that human rights education does not form part of the overall educational framework and the promotion of human rights was not included as an objective in the Education Act 1998.<sup>690</sup> The former Irish Human Rights Commission (IHRC) had identified CSPE as ‘the only explicit component of the curriculum that delivers on these human rights education commitments’ and SPHE as the ‘subject that makes the most contribution to human rights education in its aims and holistic approach’.<sup>691</sup> Notably, the reform of the Junior Cycle curriculum for secondary school students in 2014 means that they will not be required to study or being examined in either Social and Personal Health Education (SPHE) or Civic, Social and Political Education (CSPE) as these will become optional subjects.<sup>692</sup> Furthermore, incorporation of a human rights education component in teacher training and continuous professional development, at both primary and secondary level, is essential for the ‘development and sustainability’ of human rights education.<sup>693</sup>

**The IHREC reiterates its recommendation that human rights education should be explicitly included as a goal of education in any subsequent legislation, policies and implementation strategies. Furthermore, supports to realise human rights education in practice should be put in place. In particular SPHE and CSPE could provide a useful avenue for embedding human rights education at post-primary level.<sup>694</sup>**

## 12. Cultural rights

### 12.1 Traveller Ethnicity

The State has not yet formally recognised Irish Travellers as an ethnic minority despite consistent recommendations from international and national bodies to do so.<sup>695</sup> While the State has committed to take

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<sup>688</sup> Committee on Economic, Social and Cultural Rights, *General Day of Discussion on human rights education and public information activities relating to the International Covenant on Economic, Social and Cultural Rights*, 5 December 1994, E/1996/2 para. 37. The UN Committee on the Rights of the Child also advocates the provision of human rights education to children and young people.

<sup>689</sup> UNESCO and Office for the High Commissioner for Human Rights (2006) *Plan of Action World Programme on Human Rights Education: First Phase*, Paris: UNESCO, pp.3–4.

<sup>690</sup> Irish Human Rights Commission (IHRC) (2011) *Human Rights Education in Ireland: An Overview*, Dublin: IHRC, p.11.

<sup>691</sup> *Ibid.*, p.11.

<sup>692</sup> Department of Education and Skills (DES) (2012) *A Framework for Junior Cycle*, Dublin: DES, p.24.

<sup>693</sup> *Ibid.*, pp. 14-15.

<sup>694</sup> *Ibid.*, pp. 14-15.

<sup>695</sup> UN Committee on the Elimination of all forms of Racial Discrimination (2011) *Concluding Observations of the Committee on the Elimination of all forms of Racial Discrimination: Ireland*, CERD/C/IRL/CO/3-4; UN Office of the High Commissioner for Human Rights (OHCHR) (2011) *Report of the UN Independent Expert on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona: Mission to Ireland*, Geneva: OHCHR; former Council of Europe Commissioner for Human Rights, Thomas Hammarberg, 2008 and 2011 Reports on his visits to Ireland, Strasbourg: Council of Europe; European Commission against Racism and Intolerance (2013) *ECRI Report on Ireland (fourth monitoring cycle)*, Strasbourg: Council of Europe; and the UN Human Rights Committee (2014) *Concluding Observations on Ireland's Fourth Periodic Report*, CCPR/C/IRL/CO/4, Geneva: OHCHR.

this step as stated in its response to the Committee's List of Issues, it states that it has engaged in further consultation with Government Departments and Traveller representatives.<sup>696</sup> The IHREC welcomes the participation of representatives from the Traveller community in its deliberations and reiterates that recognition of the status is 'key to ensuring that the Traveller community is covered by the international human rights protections against discrimination, including under EU law, which apply to such an ethnic group'.<sup>697</sup>

**While the IHREC welcomes the commitment by the State to formally recognise Travellers as an ethnic minority, the Commission recommends the Government to do so as a matter of priority and ensure greater legal protection for this vulnerable group.**

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<sup>696</sup> Government of Ireland (2015) *CESCR: Reply of Ireland to the List of Issues in relation to its third periodic report*, Geneva: OHCHR, para. 139.

<sup>697</sup> IHRC & Equality Authority, 'IHRC and Equality Authority call for recognition of Traveller Ethnicity by the State in presentations to Oireachtas Joint Committee on Justice, Defence and Equality', [press release], 13 November 2013.

## Appendix - Table of cases

*Attorney General v. X* [1992] IESC 1

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*Christian Brothers High School Clonmel v. Mary Stokes (on behalf of John Stokes, a minor)* [2015] IESC 13

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*Dunne & Anor v. Planet Health Club*, DEC-S2011-018

*E.D. v. Director of Public Prosecutions at the suit of Garda Thomas Morley*, High Court, Kearns P. (unreported, 25 March 2011)

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*Hussein v. Labour Court and Another* [2012] IEHC 364

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*Murphy v. Stewart* [1973] IR 97

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#### **European Social Rights Committee**

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#### **Court of Justice of the European Union**

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