

Ireland and the Convention against Torture

Submission to the United Nations Committee
against Torture on Ireland's second periodic
report

July 2017



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

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The Irish Human Rights and Equality Commission (IHREC) was established under statute on 1 November 2014 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.

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GLOSSARY

AVFC	A Vision for Change (the 2006 policy framework for mental health services)
CCTV	Closed Circuit Television
CEDAW	UN Convention on the Elimination of all Forms of Discrimination against Women
CPT	Council of Europe Committee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CRC	UN Convention on the Rights of the Child
CRP	Community Return Programme
CRPD	UN Convention on the Rights of Persons with Disabilities
CSO	Central Statistics Office or Community Service Order
FGM	Female Genital Mutilation
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECT	Electro Convulsive Therapy
EU	European Union
FLAC	Free Legal Advice Centres
GRETA	Council of Europe Group of Experts on Action against Trafficking in Human Beings
GSI	Garda Síochána Inspectorate
GSOC	Garda Síochána Ombudsman Commission
HIQA	Health and Information Quality Authority
HSE	Health Service Executive
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IHRC	Irish Human Rights Commission (former body)
IHREC	Irish Human Rights and Equality Commission
IoP	Inspector of Prisons
IPRT	Irish Penal Reform Trust
IPS	Irish Prison Service
IRPP	Irish Refugee Protection Programme
MHC	Mental Health Commission
MHR	Mental Health Reform
NPM	National Preventive Mechanism
OPCAT	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
PA	Policing Authority
PULSE	Police Using Leading Systems Effectively
SPT	UN Subcommittee on Prevention of Torture
TD	Teachta Dála (Member of Parliament)
TUSLA	Child and Family Agency
UNCAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
US	United States

INTRODUCTION

The Irish Human Rights and Equality Commission ('the Commission' or 'IHREC') exercises a dual capacity as the 'A-Status' National Human Rights Institution ('NHRI')¹ and the National Equality Body for Ireland. The *Irish Human Rights and Equality Commission Act 2014* (the '2014 Act') merged the former Irish Human Rights Commission (the 'former IHRC') and the former Equality Authority.

The Commission welcomes the opportunity to submit a report to the UN Committee against Torture (the 'Committee'), in response to the Committee's List of issues prior to submission of the second periodic report of Ireland (the 'List of Issues').² In preparing this submission, the Commission has drawn on positions developed in the performance of its functions in *amicus curiae*, legislative observations, international reporting and responding to domestic consultations, amongst other work. This submission also draws on recent consultations and meetings the Commission has held with civil society³ and on the work of state agencies and non-governmental organisations which are active in this field.

The Commission would like to highlight here a number of thematic areas of particular concern in this report.

The ongoing **failure to ratify** the Optional Protocol to the UN Convention against Torture ('OPCAT') and the lack of progress in developing a National Preventive Mechanism ('NPM') are principal concerns in examining Ireland's capacity to prevent torture and ill-treatment. The delayed ratification of the UN Convention on the Rights of Persons with Disabilities (the 'CRPD') and the Council of Europe Convention on preventing and combating violence against women and domestic violence (the 'Istanbul Convention') also impact on Ireland's compliance with its obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the 'Convention' or 'UNCAT').

Austerity measures including the embargo on public sector recruitment have impacted the ability of key service providers to carry out their work in a human rights-compliant manner.

1 The Commission enjoys institutional accountability to the Houses of the Oireachtas (Parliament). The legislative framework establishing the Commission was drafted to ensure that it meets the requirements of the 'Principles relating to the status and functioning of national institutions for the protection and promotion of human rights' (the 'Paris Principles'). See UN Office of the High Commissioner for Human Rights *Principles relating to the Status of National Institutions* adopted by General Assembly resolution 48/134 of 20 December 1993 (available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>).

2 UN Committee against Torture (2013) *List of issues prior to submission of the second periodic report of Ireland*, 17 December 2013, CAT/C/IRL/QPR/2 (available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CAT%2fC%2fIRL%2fQPR%2f2&Lang=en).

3 In particular, the Commission refers to the extensive consultation carried out in 2016 in preparing to report to the UN Committee on the Elimination of Discrimination against Women on Ireland's combined sixth and seventh periodic reports (available at <https://www.ihrec.ie/cedaw-consultation-2016/>). Hereafter cited as IHREC (2016) *CEDAW Consultation*.

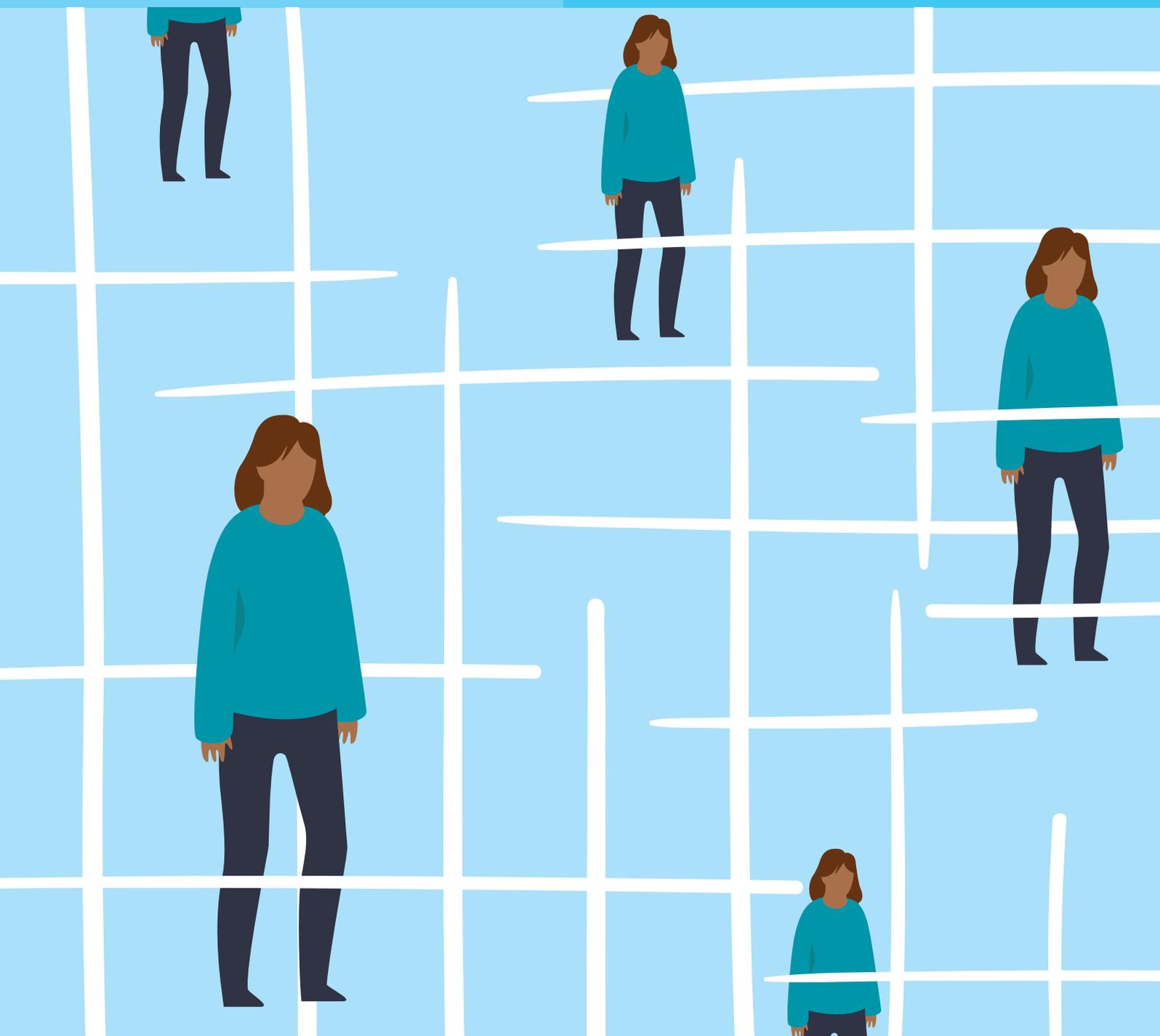
The education and training of new and existing staff and the effective use of resources are critical in this regard.

The rate of **implementation of reforms** is slow in many of the areas where individuals may be deprived of their liberty or may be vulnerable to torture or ill-treatment, including prisons, direct provision centres and various care settings.

The Commission highlights the need for **accountability in a rights-based environment** and to achieve the elimination of barriers towards accessing justice and securing effective remedies. This is particularly relevant in the context of addressing historical abuse.

LEGISLATIVE, ADMINISTRATIVE AND JUDICIAL FRAMEWORK TO PREVENT TORTURE (ARTICLE 2 UNCAT)

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In this section, the Commission focuses on specific gaps in Ireland's framework for the prevention of torture, highlighting in particular the ongoing need to ratify the Optional Protocol to the UN Convention against Torture (OPCAT). The Commission also points to ongoing gaps in protection, focussing on the areas of reproductive health, gender-based violence and the framework surrounding protection of victims of trafficking in human beings.

Ratification of OPCAT

Ireland signed OPCAT on 2 October 2007 but has yet to ratify it. The Commission notes the State's current position that it 'does not become party to treaties until it is first in a position to comply with the obligations imposed by the treaty in question, including by amending domestic law as necessary'.⁴ Nonetheless, the Commission is of the view that there is no impediment in law to immediate ratification of OPCAT.⁵

OPCAT was drafted to include provisions to assist states to ratify the convention before having everything in place to comply with the Protocol. Article 11(1)(b)(i) OPCAT provides that the UN Subcommittee on Prevention of Torture (SPT) shall 'advise and assist States Parties' on the establishment of national preventive mechanisms. Article 17 OPCAT requires the State Party to designate, maintain or establish a national preventive mechanism 'at the latest one year after the entry into force of the present Protocol'. Article 24 OPCAT affords States Parties the option to 'make a declaration postponing the implementation of their obligations...for a maximum of three years', with the possibility of a further

extension of two years.⁶

The Commission considers that immediate ratification of OPCAT would present a useful opportunity for the State to 'start the clock' on meeting the obligations of the Protocol, and provide the basis on which to outline a time-bound 'Roadmap' to implementation.

Recommendations:

The Commission recommends that the State ratify OPCAT without further delay, including, if absolutely necessary, a declaration under Article 24 postponing the implementation of obligations under part IV (National Preventive Mechanisms) of the Protocol.

The Commission recommends that the State set out a detailed, time-bound 'Roadmap to Implementation of OPCAT' outlining the legislative, policy and other reforms required to establish a National Preventive Mechanism.

4 Para 203 United Nations (2014) *Common core document forming part of the reports of States parties: Ireland*, 30 April 2014, HRI/CORE/IRL/2014 (available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=HRI%2fCORE%2fIRL%2f2014&Lang=en).

5 The UN Subcommittee on Prevention of Torture (SPT) has emphasised that 'the development of national preventive mechanisms (NPM) should be considered an ongoing obligation, with reinforcement of formal aspects and working methods refined and improved incrementally'. See para 3 United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2012) *Analytical self-assessment tool for National Prevention Mechanisms (NPM)*, 6 February 2012, CAT/OP/1.

6 Part V, Articles 24(1) – 24(2) OPCAT. This declaration can apply to either Part III (Mandate of the Subcommittee on Prevention) or Part IV (National Preventive Mechanisms) of OPCAT, or to both Parts.

Designation of a National Preventive Mechanism (NPM) under OPCAT

The State indicated at the time of its second Universal Periodic Review in 2016 that 'the key requirement' for ratification is provision for a NPM, and that the Department of Justice and Equality 'is working on the *Inspection of Places of Detention Bill* to allow for ratification'.⁷ The State is further engaged in consultation on a proposed 'Criminal Justice Inspectorate', and has linked this to OPCAT ratification.⁸

Research commissioned by the Commission raises concerns that a proposed Criminal Justice Inspectorate 'appears to have been conflated with OPCAT' to the neglect of considerations for OPCAT that fall outside the criminal justice sphere.⁹ Similar concerns regarding the suitability of a Criminal Justice Inspectorate as a locus for OPCAT-related inspection functions have been raised by civil society.¹⁰

While legislative and policy proposals currently being explored by Government in the criminal justice sphere have some relevance to OPCAT, the Commission emphasises that implementation must be achieved within a wider context of consultation, assessment and institutional reform.

7 See para 59 UN Human Rights Council Working Group in the Universal Periodic Review (2016) *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Ireland*, 9 February 2016, A/HRC/WG.6/25/IRL/1 (available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/021/22/PDF/G1602122.pdf?OpenElement>). Hereafter cited as UPR Working Group (2016) National Report.

8 See para 2.1.3 Department of Justice and Equality, 'Discussion Document on Proposals for a Criminal Justice Inspectorate'. The document indicates that the proposed inspectorate 'could provide for this [inspection] mechanism across the entire sector including Garda controlled places of detention' (available at: <http://www.justice.ie/en/JELR/Discussion%20Document-Proposals%20for%20a%20Criminal%20Justice%20Inspectorate.pdf/Files/Discussion%20Document-Proposals%20for%20a%20Criminal%20Justice%20Inspectorate.pdf>). The State made further reference to the Criminal Justice Inspectorate in the context of its Second Universal Periodic Review in 2016, see para 60 UPR Working Group (2016) National Report.

9 See p 7 Rachel Murray and Elina Steinerte (2017 - forthcoming) *OPCAT: Ireland and the Optional Protocol to the UN Convention against Torture*, University of Bristol and Irish Human Rights and Equality Commission. Hereafter cited as Murray and Steinerte (2017) *OPCAT Report*.

10 'Open Policy Debate on Proposals for a Criminal Justice Inspectorate', held by Department of Justice and Equality on 23 November 2015. Participants included representatives of the Irish Penal Reform Trust, the Inspector of Prisons, the Garda Inspectorate, the Probation Service, and the Northern Ireland Chief Inspector of Criminal Justice. See: <http://www.justice.ie/en/JELR/Pages/Open-Policy-Debate-Monday-23rd-November>. In particular, concerns were raised that an Inspectorate whose proposed focus is 'efficiency and effectiveness' may not be best placed to meet the objectives of OPCAT to prevent torture and other cruel, inhuman or degrading treatment or punishment. See Irish Penal Reform Trust (2015) *Preliminary Submission to the Consultation on the Proposals for a Criminal Justice Inspectorate*.

The Commission welcomes the acknowledgment by the Department of Justice and Equality of these concerns, and its recognition that the 'ambit of OPCAT extends beyond the Justice sector', requiring coordination across a range of Departments and agencies.¹¹

An extensive infrastructure of bodies and agencies in Ireland currently either undertake some form of visiting or inspection function at places of deprivation of liberty, or have a broader regulatory, preventative or human rights mandate relevant to OPCAT.¹² Such bodies include the Inspector of Prisons, the Health Information and Quality Authority (HIQA) and the Mental Health Commission, amongst others, as well as bodies such as the Ombudsman for Children and Ombudsman. Where OPCAT-type visits and inspections are carried out by some agencies, the legislative basis or policy underpinning such visits is not clear in some instances, nor is the linkage to international human rights standards always explicitly set out.¹³

Many gaps also exist in Ireland's monitoring regime for places of detention.¹⁴ Ireland does not have any form of independent inspection for Garda stations, prison transit, court detention, military detention, and certain *de facto* detention in voluntary settings, amongst others. These gaps will need to be addressed in order for any NPM infrastructure to be OPCAT compliant.

The Commission supports an independently-coordinated multi-agency approach – based on the collective work of relevant agencies, subject to independent oversight and coordination to ensure quality control and consistency of approach. This would require filling the monitoring and inspection gaps both

11 See p 1 Department of Justice and Equality (2016) 'Follow-up from the Department of Justice and Equality Open Policy Debate held on 23 November 2015 - Options for the ratification of OPCAT'.

12 See Chapter 5: 'The Existing Bodies in Ireland and their Potential Role in the NPM', Murray and Steinerte (2017) *OPCAT Report*.

13 See p 38 Murray and Steinerte (2017) *OPCAT Report*.

14 See Chapter 4: 'Places of Detention not Currently Monitored', Murray and Steinerte (2017) *OPCAT Report*.

through the expansion of current agencies' mandates, and where necessary through the creation of new specialist monitoring bodies where they are necessary to meet the requirements of the OPCAT as well as the designation of an independent coordination mechanism.

Given the likely necessity of changes to the mandates, legislative underpinnings and work practices of a range of state agencies and bodies, consultation with all agencies and institutions potentially affected will be required. An OPCAT-grounded inventory of all places of deprivation of liberty within the State, and the degree of oversight to which they are subject, may also be useful in this regard.

Recommendations:

The Commission recommends that the State enhance and, where necessary, expand its current monitoring and inspection infrastructure, with a view to the designation of an independently-coordinated range of bodies and agencies as the National Preventive Mechanism.

The Commission recommends that the State devise and implement an inventory of all places of deprivation of liberty within the State, including an assessment of the current degree of oversight to which they are subject, set against the requirements of OPCAT. The Commission recommends that this inventory be completed within 12 months.

The Commission recommends that the State devise and implement an extensive, OPCAT-grounded, consultation exercise with all agencies and bodies potentially affected by the ratification and implementation of the Protocol.

The Commission recommends that the State avail of the assistance of the Subcommittee on Prevention of Torture, as mandated in Article 11 OPCAT, in carrying out the work of making its inspection and monitoring regimes OPCAT-compliant and suitable for collective designation as the National Preventive Mechanism.

Gender-based violence

The Commission welcomes a number of recent initiatives on gender-based violence, including the launch of the *Second National Strategy on Domestic, Sexual and Gender-based violence 2016-2021*,¹⁵ the publication of the *Domestic Violence Bill 2017*,¹⁶ and the commitment to ratifying the Council of Europe *Convention on preventing and combating violence against women and domestic violence* (the Istanbul Convention).¹⁷

While the prevalence of gender-based violence in Ireland was a significant issue of concern raised during the Commission's public consultation on CEDAW in 2016,¹⁸ the Commission notes that there has not been a comprehensive assessment of gender-based violence in Ireland since the *Sexual Abuse and Violence in Ireland* (SAVI) report in 2002.¹⁹

The Commission's 2017 CEDAW report highlighted a number of significant obstacles that victims of gender-based violence experience in securing protection and supports. These include: women's immigration

status;²⁰ access to legal aid;²¹ the lack of available emergency accommodation²² and the eligibility criteria to access emergency accommodation and social housing.²³

The UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) published its Concluding Observations on Ireland on 3 March 2017 in which it recommended that the State: implement the "gold standard" for the collection of disaggregated data on gender-based violence; ensure adequate training of police and prosecutors in investigating and prosecuting violence against women; criminalise domestic violence and introduce a specific definition of domestic violence; provide adequate resources to service providers and expedite the ratification of the Istanbul Convention.²⁴

15 Cosc (2016) *Second National Strategy on Domestic, Sexual and Gender-based violence 2016-2021* (available at <http://www.cosc.ie/en/COSC/Second%20National%20Strategy.pdf/Files/Second%20National%20Strategy.pdf>).

16 The Commission welcomes the proposed introduction of emergency barring orders and the commitment to bring forward an amendment to protect individuals who are not in cohabiting relationships. However, the Bill, as published, does not include a definition of gender-based violence.

17 See Department of Justice and Equality (2016) *Istanbul Convention Action Plan* (available at <http://www.justice.ie/en/JELR/ActionPlanIstanbulConNovember.pdf/Files/ActionPlanIstanbulConNovember.pdf>).

18 See p 59 IHREC (2017) *Submission to the United Nations Committee on the Elimination of Discrimination Against Women on Ireland's combined sixth and seventh reports* (available at <https://www.ihrec.ie/documents/ireland-convention-elimination-forms-discrimination-women/>). Hereafter cited as IHREC (2017) *CEDAW Submission*.

19 Dublin Rape Crisis Centre (2002) *Sexual Abuse and Violence in Ireland Report*, The Liffey Press, Dublin. Ireland did feature in an EU-wide Survey on gender based violence in 2014. See EU Agency for Fundamental Rights (2014), *Violence against Women: An EU-Wide Survey* (available at <http://fra.europa.eu/en/publication/2014/violence-against-women-eu-wide-survey-main-results-report>). The resource implications of such research were recently outlined by the Minister for Children and Youth Affairs, Katherine Zappone TD, 'Written Answers: Strategy on Domestic, Sexual and Gender-Based Violence' (question no. 15), *Parliamentary Debates: Dáil Éireann*, 11 May 2017 (available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017051100043>).

20 The Department of Justice and Equality published a guidance note on the immigration status of victims of domestic violence, outlining the approach taken to immigration decisions for victims of domestic violence (available at <http://www.inis.gov.ie/en/INIS/Victims%20Of%20Domestic%20Violence%20-%20Note%20for%20Web.pdf/Files/Victims%20Of%20Domestic%20Violence%20-%20Note%20for%20Web.pdf>). The Minister has discretion and the arrangements do not apply to victims who do not have permission to be in the State. The Commission reiterates its concerns regarding the legal arrangements for undocumented women who are victims of domestic violence. See pp 60-61 IHREC (2017) *CEDAW Submission*.

21 The minimum contributions of: €130 (for civil legal aid) and €30 (for legal advice) are paid by the majority of applicants for legal aid who are seeking domestic violence relief (though the Legal Aid Board has discretion to waive contributions). The Commission notes current proposals by the Legal Aid Board that contributions be waived for vulnerable applicants, see Minister for Justice and Equality, Frances Fitzgerald TD, 'Written Answers: Domestic Violence' (question no. 46) *Parliamentary Debates: Dáil Éireann*, 23 May 2017 (available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017052300030>).

22 While funding has increased for service providers, the infrastructure shows serious inadequacies in terms of volume and geographical coverage, an issue which is exacerbated by the housing and homelessness crises, pp 62-64 IHREC (2017) *CEDAW Submission*.

23 The Habitual Residence Condition (which dictates eligibility for certain social security supports) is reported to be a barrier to migrant, Traveller and Roma victims of domestic violence in accessing emergency accommodation. Persons are considered ineligible for social housing if they have alternative accommodation to meet their needs and this criteria does not take account of domestic violence as a factor. See pp 63-64 IHREC (2017) *CEDAW Submission*.

24 See para 27 UN Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined sixth and seventh periodic reports of Ireland*, CEDAW/C/IRL/CO/6-7, 3 March 2017.

Recommendations:

The Commission recommends that the State integrate relevant concluding observations of the CEDAW Committee into the Second National Strategy on Domestic, Sexual and Gender-Based Violence 2016-2021.

The Commission recommends that the State commission and publish updated research on sexual abuse and violence in Ireland, and implement systematic, disaggregated data collection on gender-based violence, in line with the recommendations of the CEDAW Committee.

The Commission recommends that the State progress enactment of the *Domestic Violence Bill*, incorporating a clear definition of gender-based violence, and ratify the Istanbul Convention.

The Commission welcomes the criminalisation of female genital mutilation (FGM).²⁵ It notes concerns expressed during the Commission's CEDAW consultation that it is difficult to monitor the Act's implementation, particularly with regard to its extraterritorial application.²⁶ It further notes the State's intention to opt out of the *Istanbul Convention* requirement on the principle of dual criminality.²⁷ The Commission regrets that the State has not published a Second National Action Plan on

25 *The Criminal Justice (Female Genital Mutilation) Act 2012* criminalises the commission of FGM on a girl or woman in Ireland and also makes it an offence to remove a girl or woman from the State for the purpose of FGM.

26 See p 65 IHREC (2017) *CEDAW Submission* which recalls concerns raised by Action Aid. The absence of data on convictions for FGM is concerning, see Minister for Justice and Equality, Frances Fitzgerald TD, 'Written Answers: Female Genital Mutilation' (question no. 100) *Parliamentary Debates: Dáil Éireann*, 17 November 2016 (available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2016111700062>).

27 Article 44.3 of the Council of Europe Convention on preventing and combating violence against women and domestic violence (the 'Istanbul Convention') requires states parties to: 'take the necessary legislative or other measures to ensure that their jurisdiction is not subordinated to the condition that the acts [i.e. offences referred to in Articles 36-39 of the Convention] are criminalised in the territory where they were committed'. An Action Plan for the ratification of the Istanbul Convention reflects the intention not to be bound by the obligations of Article 44.3 of the Convention. See p 7 Department of Justice and Equality (2016) *Istanbul Convention Action Plan*.

FGM and highlights the need to incorporate key performance indicators.²⁸

The Commission welcomes the establishment of a dedicated treatment service in Dublin for those who have undergone FGM.²⁹ The Commission notes concerns raised during its CEDAW consultation that support may be required to assist women based outside the capital to access this service, with ongoing support for follow-up treatment including counselling services,³⁰ and also notes calls for an inter-agency approach to prevention of FGM and protection of women and girls.³¹

Recommendations:

The Commission recommends that the State prioritise the publication of a Second National Action Plan on FGM which includes key performance indicators and incorporates an inter-agency approach to prevention and protection of women and girls.

The Commission recommends that women living outside Dublin are provided with the necessary support and assistance on an ongoing basis to access FGM treatment services in the capital.

28 *The Irish National Plan of Action to Address Female Genital Mutilation 2008-2011* was not adopted by a government department or agency such that insufficient funding was allocated for implementation, see AkiDwA (2016) *Towards a National Action Plan to Combat Female Genital Mutilation* (available at <http://akidwa.ie/wp-content/uploads/2014/09/Towards-a-National-Action-Plan-to-Combat-FGM-2016-2019.pdf>). See also European Institute for Gender Equality (2012) *Current situation of female genital mutilation in Ireland* (available at http://eige.europa.eu/sites/default/files/documents/current_situation_and_trends_of_female_genital_mutilation_in_ireland_en.pdf).

29 The treatment service is operated by the Irish Family Planning Association in its Dublin city centre Clinic. See <https://www.ifpa.ie/Sexual-Health-Services/FGM-Treatment-Service>.

30 See p 65 IHREC (2017) *CEDAW Submission*.

31 As part of its CEDAW consultation, the Commission received a submission calling for immediate action across government departments to put in place proper protection and prevention measures in addition to the protections afforded under the *Criminal Justice (Female Genital Mutilation) Act 2012*. See *Irish Family Planning Association written submission to the Irish Human Rights and Equality Commission on CEDAW*.

Reproductive health

At present, legislation on termination of pregnancy in Ireland must be compliant with Article 40.3.3 of the Irish Constitution.³²

Within these constitutional constraints, the *Protection of Life During Pregnancy Act 2013* allows for terminations of pregnancy in limited circumstances and subject to a detailed clinical assessment and certification process³³ where there is a real and substantive risk to the life of the mother.³⁴ The Commission has raised concerns about the Act with regard to access to judicial reviews as well as regarding the potential impact of assessment and certification procedures on women and girls, particularly in the context of a risk of suicide.³⁵

The Commission has expressed concern that current barriers to accessing sexual and reproductive health impede a woman's right to bodily autonomy and have a disproportionate impact on women who face difficulties in travelling to seek a termination of pregnancy. These include women from lower socio-economic backgrounds, women living in detention and migrant women (such as undocumented migrants and asylum-seeking women whose inability to travel may be circumscribed due to their immigration status).³⁶

The Commission recalls that various UN treaty monitoring bodies have examined Ireland's legal framework in relation to termination of

pregnancy.³⁷ The Commission has endorsed the Concluding Observations arising from these examinations. In June 2016, the UN Human Rights Committee adopted a view finding the State in violation of article 7 ICCPR (prohibition on cruel, inhuman and degrading treatment), observing that 'by virtue of the existing legislative framework, the State party subjected the author to conditions of intense physical and mental suffering'.³⁸ The Commission also notes recent calls from the Council of Europe for Ireland to 'make progress towards a legislative regime that is more respectful of the human rights of women, including their right to be free from ill-treatment and recommended removing all legal provisions impeding access to safe and legal abortion'.³⁹

In 2016, a Citizens' Assembly was established to report and make a recommendation on Article 40.3.3° of the Irish Constitution.⁴⁰ On 23 April 2017 the Assembly voted to recommend that Article 40.3.3 of the Irish Constitution

37 Recommendations from UN treaty monitoring bodies include that of the Committee on Economic, Social and Cultural Rights that 'the State party take all necessary steps, including a referendum on abortion, to revise its legislation on abortion' (para 30, *Concluding Observations on the Third Periodic Report on Ireland*, E/C.12/IRL/CO/3, 19 June 2015); the recommendation of the Human Rights Committee that the State 'revise its legislation on abortion, including its Constitution' (para 9, *Concluding Observations on the Fourth Periodic Report on Ireland*, CCPR/IRL/CO/4, 19 August 2014); the recommendation of the Committee on the Rights of the Child that the State 'decriminalize abortion in all circumstances and review its legislation with a view to ensuring access by children to safe abortion and post-abortion care services' (para 58, *Concluding observations on the combined third and fourth periodic reports of Ireland*, CRC/IRL/CO/3-4, February 2016); and the recommendation of the Committee on the Elimination of Discrimination against Women that the State '[...] legalise the termination of pregnancy at least in cases of rape, incest, risk to the physical or mental health or life of the pregnant woman, and severe impairment of the foetus, and de-criminalize abortion in all other cases' (para 43, *Concluding observations on the combined sixth and seventh periodic reports of Ireland*, CEDAW/IRL/CO/6-7, 3 March 2017). For a summary of observations see pp 27-29 IHREC (2016) *Submission to the Citizens' Assembly in its consideration of Article 40.3.3° of the Irish Constitution* (available at <https://www.ihrec.ie/app/uploads/2016/12/IHREC-Submission-to-the-Citizens-Assembly-December-2016.pdf>).

38 See para 7.4 Human Rights Committee (2016) Views adopted by the Committee under article 5 (4) of the Optional Protocol, Concerning Communication No. 2324/2013. On foot of the adoption of these views, the Commission stated that the Citizens' Assembly (established to consider Article 40.3.3° of the Irish Constitution) should fully consider the views of the UN Human Rights Committee in its deliberations. See IHREC, 'Statement on the views of the UN Human Rights Committee' [press release] 10 June 2016 (available at <https://www.ihrec.ie/statement-on-the-views-of-the-un-human-rights-committee/>). See also the more recent decision: Human Rights Committee (2017) Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2425/2014 (available at http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/IRL/CCPR_C_119_D_2425_2014_25970_E.pdf).

39 See para 94 Nils Muižnieks (2017) Report by Commissioner for Human Rights of the Council of Europe following his visit to Ireland from 22 to 25 November 2016 (available at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2968549&SecMode=1&DocId=2399932&Usage=2>). Hereafter cited as Nils Muižnieks (2017) Report by Commissioner for Human Rights.

40 See <https://www.citizensassembly.ie/en/About-the-Citizens-Assembly/>.

32 Article 40.3.3° of the Irish Constitution provides that: 'The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right. This subsection shall not limit freedom to travel between the State and another state. This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state.'

33 This process is governed by sections 7-9 of the *Protection of Life During Pregnancy Act 2013*.

34 This legislation responded to findings of the European Court of Human Rights in the case of *A, B and C v Ireland* (App. 25579/05) 16 December 2010.

35 IHRC (2013) *Observations on the Protection of Life During Pregnancy July 2013* (available at: <https://www.ihrec.ie/ihrc-publishes-observations-on-the-protection-of-life-during-pregnancy-bill-2013/>).

36 See p 104 IHREC (2017) *CEDAW Submission*.

be amended and that abortion be permitted in a wider range of circumstances.⁴¹ These deliberations and recommendations will form the basis of a formal report to the Oireachtas (parliament) by the Citizens' Assembly Chair, Ms Justice Laffoy.⁴² At the time of writing, a Joint Committee of the Houses of the Oireachtas is being constituted to consider the Citizens' Assembly report and to make recommendations.

Recommendations:

The Commission reiterates its endorsement of recommendations by various UN treaty monitoring bodies during the reporting period that Ireland revise its legal framework on abortion.⁴³

The Commission recommends that the parliamentary committee tasked with considering the Citizens' Assembly's forthcoming report on Article 40.3.3 of the Constitution ensures that the relevant aspects of the Committee's concluding observations, as well as the findings of other UN treaty monitoring bodies, are given due consideration.

41 See website of the Citizens' Assembly, 'Citizens' Assembly Votes on Eighth Amendment - A Majority of Members Recommend That The Termination of Pregnancy Without Restriction Should Be Lawful' [press release] (available at <https://www.citizensassembly.ie/en/News/Citizens-Assembly-Votes-on-Eighth-Amendment-A-Majority-of-Members-Recommend-That-The-Termination-of-Pregnancy-Without-Restriction-Should-Be-Lawful.html>).

42 The Notice of Motion on the establishment of the Citizens' Assembly requires submission of the report within two months of the Citizens' Assembly completing its deliberations.

43 This is the majority view of the Irish Human Rights and Equality Commission.

Victims of trafficking in human beings

The Commission recalls its recent detailed recommendations relating to gaps in protection for victims of trafficking in human beings in Ireland, particularly regarding the necessary reform of the identification process, which has not been put on a statutory footing.⁴⁴ Sole competence for the identification of potential victims of trafficking lies with the police, An Garda Síochána, which does not represent good practice.⁴⁵ While the State's *Second National Action Plan to Prevent and Combat Human Trafficking in Ireland* commits to undertaking a fundamental review of the formal identification process,⁴⁶ this commitment is not subject to clear timelines indicating when the new identification process will be in place and any measures to be applied in the interim.

The Commission is concerned that victims of trafficking in human beings can be subject to secondary victimisation, for example in securing compensation.⁴⁷ Irish legislation focuses on the criminalisation of trafficking in human beings,⁴⁸ and does not expressly define 'victim of trafficking in human beings'.

Recommendation:

The Commission recommends that the State take the necessary legislative measures to place assistance and protection for victims of trafficking on a statutory basis.

44 See IHREC (2016) *IHREC Submission to GRETA in advance of its Second Evaluation Round of Ireland* (available at <https://www.ihrec.ie/app/uploads/2016/12/IHREC-Submission-to-GRETA-2016.pdf>) Hereafter cited as IHREC (2016) *GRETA Submission*. While the former Minister for Justice and Equality, Alan Shatter TD, stated in 2013 that the Administrative Immigration Arrangements would be put on a statutory footing under immigration reforms, the legislation ultimately enacted – the *International Protection Act 2015* – did not effect this reform. Minister for Justice and Equality, Alan Shatter TD, 'Criminal Law (Human Trafficking) (Amendment) Bill 2013 [Seanad]: Second Stage', *Parliamentary Debates: Dáil Éireann*, 28 June 2013, p. 3.

45 IHREC (2016) *GRETA Submission*.

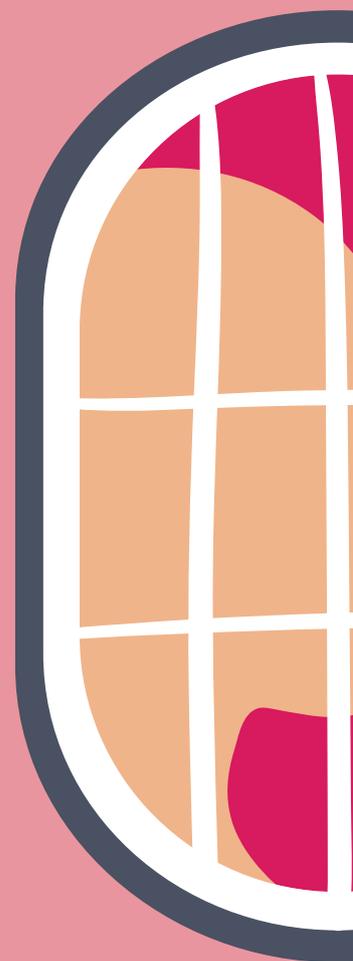
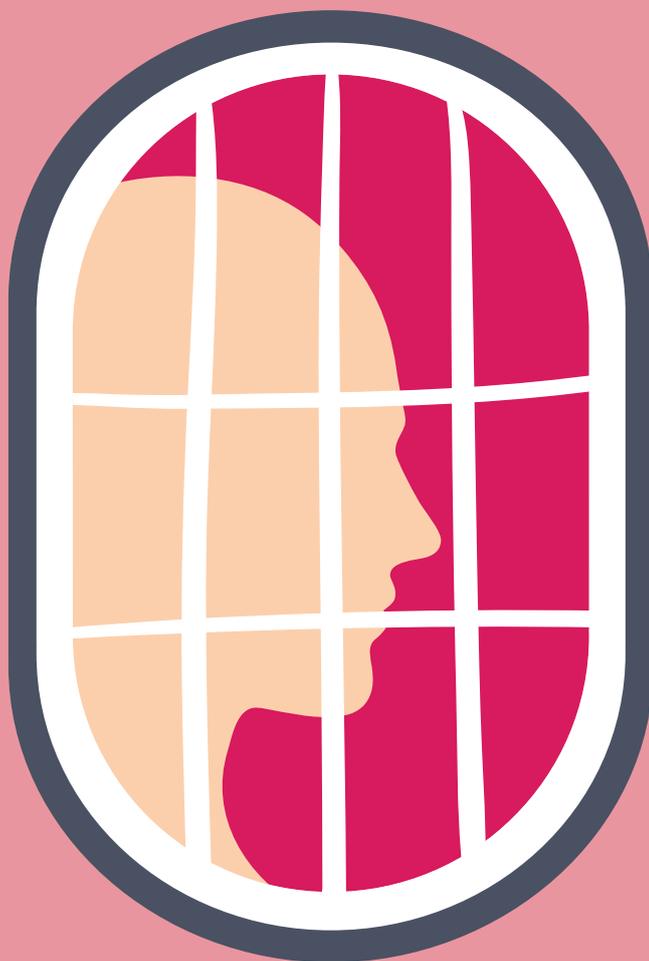
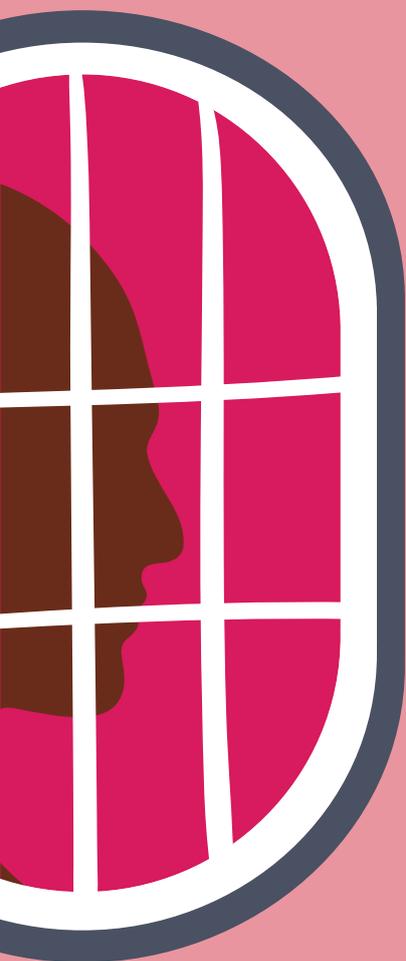
46 See p 47 Department of Justice and Equality (2016) *Second National Action Plan to Prevent and Combat Human Trafficking in Ireland* (available at: http://www.justice.ie/en/JELR/2nd_National_Action_Plan_to_Prevent_and_Combat_Human_Trafficking_in_Ireland.pdf/Files/2nd_National_Action_Plan_to_Prevent_and_Combat_Human_Trafficking_in_Ireland.pdf)

47 See pp 34–36 IHREC (2016) *GRETA Submission*.

48 The *Criminal Law (Human Trafficking) Act 2008* and the *Criminal Law (Human Trafficking) (Amendment) Act 2013* focus on penalising crimes related to trafficking in human beings and in setting out penalties.

INTERNATIONAL PROTECTION, *NON-REFOULEMENT* AND THE USE OF IRISH AIRPORTS (ARTICLES 3, 5, 7 & 8 UNCAT)

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This section provides updates on (1) the legislative framework governing international protection (2) initiatives taken by the State to address recent humanitarian crises (3) issues related to the prohibition on *refoulement* (4) the use of airports and 'extraordinary rendition' (4) immigration-related detention and (5) the treatment of persons seeking asylum in the State.

The *International Protection Act 2015* (the 2015 Act) was commenced to a substantial degree on 31 December 2016⁴⁹ and introduces a single application procedure for persons seeking asylum or subsidiary protection. The Commission welcomes the potential of this legislation to streamline the protection process and to reduce the very lengthy delays which, to date, have characterised applications for asylum in Ireland and led to prolonged periods of institutionalisation in centres of direct provision.

Recommendation:

The Commission recommends that the new single application procedure is adequately resourced with highly-trained personnel to address the legacy backlog and to ensure fair and high-quality decision-making, noting the high rate of refusals at the first instance, which has previously characterised the State's response to asylum applications.⁵⁰

49 At the time of writing, commencement of section 79 of the *International Protection Act 2015* is outstanding.

50 Of the applications finalised in 2010, the Office of the Refugee Applications Commissioner (ORAC) recommended granting refugee status at first instance in relation to only 1.1% of cases. In 2015 a recommendation to grant refugee status was made in relation to 9.8% of the applications. Annual statistics of ORAC are available at <http://www.orac.ie/website/orac/oracwebsite.nsf/page/orac-stats-en>.

The Commission has made various submissions to the State to improve the human rights and equality protections within the statutory framework.⁵¹ In particular, the Commission continues to raise concerns regarding the restrictive family reunification provisions under the 2015 Act which are likely to cause considerable hardship to asylum-seeking families.⁵²

Recommendation:

The Commission recommends that the State review the *International Protection Act 2015* to bring the legislation into line with the State's human rights obligations, including Article 8 European Convention on Human Rights.

51 See IHRC (2008) *General Observations on the Immigration, Residence and Protection Bill 2008* (available at <https://www.ihrec.ie/documents/observations-on-the-immigration-residence-and-protection-bill-2008/>). Subsequently, the international protection aspects of this Bill were progressed. See IHREC (2015) *Recommendations on the General Scheme of the International Protection Bill 2015* (available at https://www.ihrec.ie/download/pdf/ihrec_recs_general_scheme_international_protection_bill_26_june_2015.pdf).

In December 2015, the Commission wrote to members of the Lower House of Parliament reinforcing its proposals for a human rights-compliant framework for international protection. The proposed immigration and residency reforms required to address broader concerns of migrants do not appear on the Government's current legislative programme 2017.

52 The definition of 'member of family' who may enter and reside in the State is defined narrowly in s 56 of the 2015 Act and notably excludes dependents. Consideration should be given to the range of family relationships to which Article 8 of the ECHR can apply in the context of family reunification, see IHREC (2015) *Recommendations on the General Scheme of the International Protection Bill 2015*. See also NASC (2016) *The Loss of Family Reunification Rights in the International Protection Act, 2015* (available at <http://www.nascireland.org/wp-content/uploads/2016/12/The-Loss-of-Family-Reunification-Rights-in-the-International-Protection-Act.pdf>) and ESRI (2017) *Family Reunification of non-EU Nationals in Ireland* (available at <https://www.esri.ie/publications/family-reunification-of-non-eu-nationals-in-ireland/>) which highlights evidential issues experienced by family member applicants and the lack of targeted legal services to assist applicants.

Global migration crisis

The Commission welcomes initiatives taken by the State including the Syrian Humanitarian Admission Programme,⁵³ humanitarian assistance provision and Ireland's deployment of naval resources to life-saving missions in the Mediterranean.⁵⁴ Progress on implementing the Irish Refugee Protection Programme (IRPP) refugees however, has been slow.⁵⁵ Of the total 4,000 persons agreed to be accepted to the State under various programmes, fewer than 1,300 persons have been relocated/resettled at the time of writing.⁵⁶ The Commission notes calls for the State to plan and provide for the mental health needs of relocated refugees who are at higher risk of post-traumatic stress and where currently 'there is no strategy to meet their mental health needs'.⁵⁷

The Commission welcomes the State's commitments to relocate unaccompanied minors and the recognised good practice in placing minors in small residential centres

and foster care.⁵⁸ It is conscious however of recent reports regarding inadequate funding of Tusla (the agency tasked with referrals of unaccompanied minors) and a lack of inter-agency co-operation.⁵⁹ The Commission also reiterates its position on the limited application of the 'best interests of the child' principle under the 2015 Act⁶⁰ and its recommendations in relation to children who are victims of trafficking in human beings, particularly in relation to specific identification mechanisms.⁶¹ The Commission welcomes recent legislative reform to protect children from sexual exploitation.⁶²

Recommendation:

The Commission recommends that the State increase the rate of relocation of refugees under current programmes, ensure that Tusla is sufficiently resourced to manage referrals of unaccompanied minors and that a strategy is developed to meet refugees' mental health needs.

53 This programme allowed Syrian communities in Ireland to sponsor and support family members in need of protection.

54 Minister for Justice and Equality (2017) *Speech by Ms Frances Fitzgerald TD, IHREC Seminar on Ireland's Response to the Global Refugee and Migration Crisis*, 1 February 2017 (available at <https://www.ihrec.ie/events/international-protection-seminar/>).

55 This relocation programme was established on 10 September 2015 and is part of the EU Relocation Programme. Ireland does not currently relocate asylum seekers from Italy due to limitations on security assessments permitted in Italy, Minister for State for Justice, David Stanton TD, 'Written Answers: Refugee Resettlement Programme' (question no. 156) *Parliamentary Debates: Dáil Éireann*, 23 May 2017 (available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017052300061>).

56 The rate of progress as of May 2017 is summarised as follows:

- 459 of the 2,622 asylum seekers agreed to be under the EU relocation mechanism which relocates persons from hotspots in Greece and Italy (relocations from Italy have yet to commence),
- 779 of the 1,040 programme refugees under the Resettlement programme focussed on resettling refugees from Lebanon, and
- 21 of the 200 unaccompanied minors agreed to be relocated from the migrant camp at Calais.

Minister for State for Justice, David Stanton TD, 'Written Answers: Refugee Resettlement Programme' (question no. 156) *Parliamentary Debates: Dáil Éireann*, 23 May 2017 (available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017052300061>).

57 Since 2002, the College of Psychiatrists of Ireland has recognised the particular skills required to treat asylum seekers who have experienced torture. It notes that the current policy of dispersal may lead to social isolation and aggravate underlying mental health issues. It may impede the development of expertise in relation to the treatment of asylum seekers and inhibit the provision of consistent and continuous care. It refers to the work of SPIRASI in treating victims of torture which has identified a need for a network of interpreters and the training of personnel. See College of Psychiatrists of Ireland (2017) *The Mental Health Service Requirements for Asylum Seekers and Refugees in Ireland* (available at <https://www.irishpsychiatry.ie/wp-content/uploads/2017/04/CPsychI-MHS-requirements-Asylum-seekers-and-refugees-position-paper-09.pdf>).

58 See p 39 GRETA (2016) *Fifth General Report on GRETA's Activities* Strasbourg: Council of Europe (available at: <http://www.coe.int/en/web/anti-human-trafficking/general-reports>).

59 The Ombudsman for Children expressed concern at the number of complaints received by his office in relation to Tusla and drew attention to inconsistencies of practice across locations and also in terms of how issues are addressed. 'There is no doubt that more resources are needed to provide the best possible service for children', p 3 Ombudsman for Children (2017) *Annual Report 2016* (available at: <https://www.oco.ie/publications/annual-reports/financial-statements/>).

60 In its legislative observations, the Commission recommended that the 'best interests of the child' be articulated as a general principle governing all elements of the protection determination process for unaccompanied minors, p 10 IHREC (2015) *Recommendations on the General Scheme of the International Protection Bill 2015*.

61 See pp 18-20 IHREC (2016) *GRETA Submission*.

62 *The Criminal Law (Sexual Offences) Act 2017* was commenced in March 2017.

Non-refoulement

The Commission notes recent cases involving deportation orders and considerations of national security where the applicant argued a risk of being exposed to torture or ill-treatment.⁶³ The Commission recalls the absolute prohibition on deporting persons at risk of torture under the Convention⁶⁴ and welcomes the recent statement by the Minister for Justice and Equality that 'the question of not returning a person to a place where certain fundamental rights would be breached [...] is fully considered in every case when deciding whether or not to make a deportation order.'⁶⁵

The Commission is concerned at the increase in refusals of leave to land recorded in the State in recent years.⁶⁶ In addition, there was a 17% increase in deportations recorded for 2016.⁶⁷ In 2016, 4,127 individuals were refused leave to land (up from 3,450 in 2015 and 1,935 in 2013), including 178 from Afghanistan, 46 from Iran, 7 each from Eritrea, Libya and Yemen, 26 from Iraq and 37 from Syria. Of this 4,127 total, 396 persons were subsequently allowed to enter as asylum seekers.⁶⁸ The Commission is concerned that an effective remedy must be available to persons undergoing this process,⁶⁹ and that those subject to refusals of leave to land must

63 In June 2016, the High Court granted an order for deportation where the applicant had 'failed to persuade [...] of a real risk of future ill-treatment'. See para 168 of *XX v Minister for Justice and Equality* [2016] IEHC 377. See also Amnesty International (2016) *Ireland: Deportation to Jordan would risk backsliding on absolute ban on torture*, 6 July 2016.

64 The requirements of Article 3 of the Convention are incorporated into Irish law by section 4 of the *Criminal Justice (United Nations Convention against Torture) Act 2000*. See also section 50 *International Protection Act 2015*.

65 Minister for Justice and Equality, Frances Fitzgerald TD, 'Written Answers: Deportation Orders Data' (question no. 212) *Parliamentary Debate: Dáil Éireann*, 2 May 2017 (available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017050200070>).

66 Section 4(3) of the *Immigration Act 2004* (as amended by the 2015 Act) sets out the grounds for refusal of leave to land.

67 There were 1,196 deportation orders signed and 428 orders effected in 2016. See Minister for Justice and Equality, Frances Fitzgerald TD, 'Written Answers: Deportation Orders Data' (question no. 212) *Parliamentary Debate: Dáil Éireann*, 2 May 2017 (available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017050200070>).

68 Minister for Justice and Equality, Frances Fitzgerald TD, 'Written Answers: Immigration Data' (question no. 76), *Parliamentary Debates: Dáil Éireann*, 22 February 2017 (available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017022200074>).

69 See pp 24–25 IHREC (2016) *GRETA Submission*, which recommended that points of entry are resourced with adequately trained personnel to ensure that potential victims of trafficking are identified and that the State's obligations with regard to *non-refoulement* are respected at all times.

have adequate access to legal advice and interpretation services.⁷⁰

Recommendation:

The Commission recommends that, in light of the rising rate of refusals of leave to land, the State take all necessary steps (including provision of legal and interpretation services) to ensure that it fulfils its obligations under the prohibition on *refoulement*.

Use of Irish airports, pre-clearance and 'extraordinary rendition'

The Commission and former IHRC have expressed concern at reports that US aircraft landing frequently in Irish airports could have been used for transporting prisoners to destinations where they were at risk of torture, inhuman and degrading treatment.⁷¹ The former IHRC noted that diplomatic assurances (to the effect that no illegal transportation through Ireland has taken or will take place) are not sufficient to fulfil the State's positive obligations to prevent torture and ill-treatment, and sought legally enforceable guarantees at a minimum.⁷² In 2007, the former IHRC reviewed extraordinary rendition and concluded that the Irish State was failing to comply with its human rights obligations.⁷³ A reliable, independently verifiable system of inspection

70 Section 5 of the *Immigration Act 1999* (detention pending deportation) has been interpreted as allowing for access to legal advice.

71 See for example p 12 IHREC (Designate) (2014) *Submission on behalf of the Irish Human Rights and Equality Commission (Designate) to Representatives of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (available at https://www.ihrec.ie/download/pdf/ihrec_designate_report_to_cpt_7aug14.pdf). Hereafter cited as IHREC (Designate)(2014) *CPT Submission*.

72 In a letter dated 2006, the former IHRC recalled the UN High Commissioner's suggestion in 2006 that diplomatic assurances should not be accepted from any country that has not ratified OPCAT, including the United States. The former IHRC urged the State to secure agreement with US authorities to allow for the inspection of suspected aircraft. At that time, the former IHRC welcomed the stated powers of An Garda Síochána to require production of documentation and to enter and inspect aircraft at any time. See IHRC (2006) *Response to Minister for Foreign Affairs in relation to the transfer of persons to locations where they may be subjected to torture, inhuman and degrading treatment* (available at <https://www.ihrec.ie/documents/response-sent-to-minister-for-foreign-affairs-on-the-subject-of-rendition/>).

73 IHRC (2007) *'Extraordinary Rendition' A Review of Ireland's Human Rights Obligations* (available at https://www.ihrec.ie/download/pdf/ihrc_rendition_report_final.pdf). Hereafter cited as IHRC (2007) *Extraordinary Rendition Review*.

should be properly resourced and overseen by an independent body.⁷⁴ The Commission reiterates its view that a complaint-reactive mechanism⁷⁵ does not discharge the State's human rights obligations⁷⁶ and points to the gap in protection exposed by the State's failure to ratify the OPCAT.⁷⁷

The Commission notes that US pre-clearance procedures in Shannon and Dublin airports⁷⁸ have been the subject of a recent review following travel ban proposals under a US Executive Order.⁷⁹ The Commission recalls obligations under section 42 of the *Irish Human Rights and Equality Commission Act 2014* which requires public bodies (including An Garda Síochána and Customs Officers which play a role in the administration of pre-clearance) to have regard to human rights and equality obligations in the performance of their functions.

74 The former IHRC recommended that inspection would be facilitated by requiring relevant aircraft to provide detailed information about the purpose of the flight, its destination and the names of passengers on board. See pp 6-7 IHRC (2007) *Extraordinary Rendition Review*.

75 The State maintains that 'all credible complaints' are investigated by the police force and that individuals should continue to report any illegal activity: 'The Government has [...] responded to allegations linking rendition flights to Shannon Airport. A number of complaints concerning alleged unlawful activity at Shannon Airport have been investigated by An Garda Síochána. However, no evidence of rendition was disclosed in any of the investigations.' See Minister for Foreign Affairs and Trade, Charles Flanagan TD, 'Written Answers: UN Conventions' (question no. 154), *Parliamentary Debates: Dáil Éireann*, 29 January 2015, (available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2015012900062>).

76 See p 12 IHREC (Designate)(2014) CPT Submission. See also p 44 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* (available at <https://www.ihrec.ie/app/uploads/download/pdf/20140616113130.pdf>). Hereafter cited as IHREC (Designate) (2014) ICCPR Submission.

77 A monitoring and inspection regime would assist in seeking to ensure that no prisoner at risk of torture or ill-treatment is transported through Ireland, except in accordance with proper legal formalities and the highest observance of human rights standards. See p 12 IHREC (Designate)(2014) CPT Submission.

78 The US-Ireland Pre-clearance Agreement allows passengers to consent to United States authorities granting or refusing pre-clearance in Irish airports. The Agreement was given effect in Irish law under the *Aviation (Pre-clearance) Act 2009* and the Agreement is stated to be subject to rights under the Constitution and Irish law. See Minister for Foreign Affairs and Trade, Charles Flanagan TD, 'Written Answers: US Executive Order' (question no. 588), *Parliamentary Debates: Dáil Éireann* 21 March 2017 (available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017032100086>).

79 This review, chaired by the Department of Transport, Tourism and Sport, with input from Departments of An Taoiseach, Justice and Equality together with Foreign Affairs and Trade, was completed and discussed at Cabinet on 28 February 2017 and it was agreed that the system will remain in place, see Minister for Transport, Tourism and Sport, Shane Ross TD, 'Written Answers, Airport Security' (question no. 85), *Parliamentary Debates: Dáil Éireann*, 22 March 2017 (available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017032200062>).

Recommendation:

The Commission reiterates its position that the State should not rely on diplomatic assurances as a reliable basis for ensuring that individuals transiting through or deported from the State will not be subject to torture and other cruel, inhuman or degrading treatment.

Immigration-related detention

The Commission reiterates that refugees and asylum seekers have the right to liberty and security of person and the right not be subject to arbitrary arrest or detention.⁸⁰ A prison is by definition not a suitable place in which to detain someone who is neither suspected nor convicted of a criminal offence.⁸¹ Immigration detention should not be punitive in nature, and should only be utilised as an individual measure which is exceptional, proportionate and necessary in order to prevent unlawful immigration.⁸² While numbers are falling,⁸³ immigration-related detention in prisons and police stations is ongoing and Irish law makes provision for the detention of persons including: an applicant for international

80 See IHREC (Designate)(2014) CPT Submission.

81 See para 19 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (2015) *Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)* (available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680696c9a>). Hereafter cited as Council of Europe (2015) CPT Report.

82 See p 1 CPT (2017) *Factsheet on Immigration Detention* (available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680696c9a>).

83 In 2014 there were 390 immigration-related detainees, falling to 335 in 2015 but rising to 408 detainees in 2016, with the average daily number falling from 6 to 4 and rising to 5 over the years 2014-2016 respectively. See Irish Prison Service (2016) *Annual Report 2015* and Irish Prison Service (2017) *Annual Report 2016*. The former Office of the Refugee Applications Commissioner (ORAC) reported that 17 of the 335 detainees in 2015 were given interviews for asylum while still in detention, see ORAC (2016) *Annual Report 2015*. The Minister for Justice and Equality asserts that 'detention is used sparingly in immigration related matters' See 'Written Answers: Immigration Policy' (question no. 69) *Parliamentary Debates: Dáil Éireann*, 7 July 2016 (available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2016070700075>).

protection,⁸⁴ a person subject to transfer under the Dublin Regulation,⁸⁵ a person refused leave to land,⁸⁶ and a person in respect of whom a deportation order has been issued.⁸⁷ In relation to an applicant for international protection, the detained person must, as soon as possible, be brought before a judge of the District Court judge who can authorise detention for 21 days. Further periods of detention can then be authorised, without limitation.⁸⁸

Recommendation:

The Commission recommends that the *International Protection Act 2015* provide for a specified maximum period of detention of refugee and subsidiary protection applicants where they are detained as a measure of last resort in the limited circumstances prescribed.⁸⁹

The Commission raises concerns regarding the accommodation of detainees for immigration-related reasons in Cloverhill prison,⁹⁰ including those detained pending deportation following a negative decision on international protection.⁹¹ The State is developing a dedicated immigration detention facility at Dublin airport.⁹² According to guidance from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the CPT), detained irregular migrants should have access to legal aid and should, without delay, be expressly informed of their rights and the procedure applicable to them, in a language they understand. They should have the lawfulness of their deprivation of liberty decided speedily by a judicial body.⁹³

Recommendation:

The Commission recommends that the State ensure that any places in which persons may be deprived of their liberty for immigration-related reasons comply with the detailed guidance and recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

84 Section 20 of the 2015 Act provides (in summary) that an arrest can take place where an immigration officer or a member of An Garda Síochána, with reasonable cause, suspects that the applicant: poses a threat to public security or public order, has committed a serious non-political crime outside the State, has not made reasonable efforts to establish their identity or has destroyed or forged their identity documents, intends to leave the State and without lawful authority enter another state or has acted or intends to act in a manner that would undermine (i) the system for granting persons international protection in the State, or (ii) any arrangement relating to the Common Travel Area.

85 Section 22 of the *Refugee Act 1996* (as amended by s 7 of the *Immigration Act 2003*).

86 Section 78 of the 2015 Act provides that a person can be detained for up to 12 hours at a port of entry. According to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the CPT), there is an urgent need for a register of detainees at Dublin airport, para 18 Council of Europe (2015) *CPT Report*.

87 Section 5 of the *Immigration Act 1999* (as amended by section 78 of the 2015 Act) allows for the arrest without warrant of a person in respect of whom a deportation order is in force under certain circumstances.

88 Section 20(12) of the 2015 Act.

89 See p 33 IHREC (2015) *Recommendations on the General Scheme of the International Protection Bill 2015*.

90 The CPT visit in September 2014 showed that detainees in Cloverhill Prison are usually in mixed holding cells with remand and convicted prisoners and that anxieties were heightened due to the fact that detainees were not given information in a way that they could understand. According to the State Report to the CPT, every effort is made to use Cloverhill remand prison to the maximum in accordance with Rule 71 of the *Prison Rules 2007*. See para 18 Council of Europe (2015) *CPT Report*.

91 The fact that such persons could be detained for up to 8 weeks, reports of bullying by remand prisoners with whom they were sharing a cell and limited visiting arrangements were described as 'particularly worrying', Council of Europe (2015) *CPT Report*.

92 This will replace the Garda Station at Dublin airport currently used for this purpose.

93 See CPT (2017) *Factsheet on Immigration Detention* (available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806fbf12>).

Treatment of persons seeking asylum

The impact that long periods of residence⁹⁴ in centres of 'direct provision' has on asylum seekers is well documented and is of continuing concern to the Commission.⁹⁵ The Council of Europe has recently highlighted the 'multiple negative effects of the direct provision system on the rights of asylum seeker children'.⁹⁶ The Commission welcomes that the Ombudsman and Ombudsman for Children have gained a function in receiving complaints from residents of direct provision.⁹⁷

The Commission's CEDAW consultations heard accounts of harassment and sexual violence experienced by women who are living in direct provision centres and recommended that counselling and support services be provided, particularly to victims of gender-based violence (including harassment) and to victims of human trafficking. The Commission further raised concerns regarding the implementation of relevant guidelines of the Reception and Integration Agency.⁹⁸

Recommendation:

The Commission reiterates its recommendation that implementation of the Reception and Integration Agency's (RIA) guidelines on sexual violence be monitored as part of RIA inspections and that a statement of compliance be included in each inspection report.

Leaving direct provision is challenging.⁹⁹ While the Commission welcomes initiatives to assist persons 'making the transition to independent living',¹⁰⁰ the necessity of such a programme is testament to the institutionalising impact of long-term stays in direct provision. Research refers to the 'systemic infantilisation and loss of autonomy' in direct provision.¹⁰¹ Full implementation of the McMahon Report, which made 173 recommendations to reform direct provision, is outstanding.¹⁰²

94 As of March 2017, there were 564 persons who had been in direct provision for five years or more, an improvement from March 2016 when 998 persons had been in direct provision for over five years, Minister for Justice and Equality, Frances Fitzgerald TD, 'Written Answers: Direct Provision Data' (question no. 57) *Parliamentary Debates: Dáil Éireann*, 13 April 2017 (available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017041300051>).

95 IHREC (2014) *Policy Statement on the System of Direct Provision in Ireland* (available at https://www.ihrec.ie/app/uploads/download/pdf/ihrec_policy_statement_on_direct_provision_10dec14.pdf). 32 of the 34 reception centres are privately run and a recent Parliamentary Committee heard evidence that contracts for services in these centres do not set performance measures, there is limited provision for penalties for underperformance by suppliers and inspection findings are not collated to assess service delivery performance. See Mr Seamus McCarthy, Comptroller and Auditor General, 'Procurement and Management of Contracts for Direct Provision' *Committee of Public Accounts Debate*, 11 May 2017, (available at <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/committeetakes/ACC2017051100002>). The Commission recalls its recent recommendation that the Reception and Integration Agency (RIA) include a provision in its Service Level Agreements with commercial contractors in relation to compliance with section 42 of the *Irish Human Rights and Equality Commission Act 2014* and that the RIA's inspection reports refer to actions taken by such contractors to comply with this duty. See p 117-118 IHREC (2017) *CEDAW Submission*.

96 See para 165 Nils Muižnieks (2017) *Report by Commissioner for Human Rights*.

97 According to the Ombudsman for Children 'it is clear already that many find making a complaint very daunting. Understandably people in Direct Provision are fearful that a complaint of any kind, to any organisation, may affect their refugee status. That is not the case.' See Dr Niall Muldoon (2017) *Making a complaint is daunting for those living in Direct Provision – Ombudsman for Children* (available at <https://www.oco.ie/2017/05/making-a-complaint-is-daunting-for-those-living-in-direct-provision-ombudsman-for-children/>).

98 See pp 116-117 IHREC (2017) *CEDAW Submission*

99 In March 2017, over 400 individuals with status to remain in the State were still living in direct provision, see Minister for Justice and Equality, Frances Fitzgerald TD, 'Written Answers: Direct Provision Data' (question no. 57), *Parliamentary Debates: Dáil Éireann*, 13 April 2017 (available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017041300051>).

100 See Minister for Justice and Equality (2017) *Speech by Ms Frances Fitzgerald T.D., Tánaiste and Minister for Justice and Equality to IHREC Seminar on Ireland's Response to the Global Refugee and Migration Crisis* (available at <http://www.justice.ie/en/JELR/Pages/SP17000028>).

101 See Dr Muireann Ní Raghallaigh et al (2016) *Transition from Direct Provision to life in the community* (available at <http://www.irishrefugeecouncil.ie/campaigns-policy/publications>) which outlines the discrimination experienced in finding work and accommodation amongst other challenges, including difficulties in accessing social protection payments. See also Marie O'Halloran (2017) 'Accommodation issues force 400 to stay in direct provision' *Irish Times* 19 April 2017 (available at <http://www.irishtimes.com/news/politics/accommodation-issues-force-400-to-stay-in-direct-provision-1.3053263>).

102 At the time of writing, the Government reports that 92% of the McMahon report's 173 recommendations have been implemented, partially implemented or are in progress, see Minister of State for Justice, David Stanton TD, 'Topical Issue Debate: Supreme Court Rulings' *Parliamentary Debates: Dáil Éireann*, 31 May 2017 (available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017053100037>). However, NASC has raised concerns with the transparency of reporting on 'implemented' recommendations, which are argued to be insufficiently monitored or verified by the relevant authority. See NASC (2017) 'NASC seeks additional information on progress of implementing McMahon Report' [press release] (available at <http://www.nascireland.org/latest-news/nasc-seeks-additional-information-progress-implementing-mcmahon-report/>).

Recommendation:

The Commission reiterates its recommendation that direct provision be placed on a statutory footing together with the introduction of a time limited period (6-9 months) after which any person who has not yet received a first instance decision should be able to leave direct provision, live independently and access relevant social welfare payments.

Recommendation:

The Commission recommends that the State repeal the absolute prohibition on asylum seekers' right to seek employment without delay, following the Supreme Court decision on this issue and introduce a time limited period (6-9 months) following which a person who has not yet received a first instance decision should be able to seek employment.

The Commission welcomes the recent finding of the Irish Supreme Court on the right of asylum seekers to work.¹⁰³ The Commission exercised its *amicus curiae* function in this case, involving an applicant who was in the asylum system for more than eight years, during which time he was prohibited from seeking employment.¹⁰⁴ The Supreme Court examined the absolute prohibition on seeking work¹⁰⁵ against the background that there is no limitation on the length of time the asylum process can take and found the prohibition in principle to be contrary to the constitutional right to seek employment.¹⁰⁶

103 *N.H.V. v Minister for Justice and Equality and Ors* [2017] IESC 35 (available at <http://www.supremecourt.ie/Judgments.nsf/1b0757edc371032e802572ea0061450e/bba87f6e90ea3c5d80258130004199fe>). Ireland has opted out of the *Recast Directive 2013/33/EU* which requires States to grant asylum seeker the right to work where first instance decisions have not been made within nine months.

104 The Commission's core submission was that non-citizens, including those seeking asylum or subsidiary protection, are entitled to invoke the right to work or earn a livelihood guaranteed under article 40.3.1 of the Constitution. See IHREC (2017) 'Right to Work of People in Direct Provision – Commission welcomes Supreme Court decision' [press release] (available at <https://www.ihrec.ie/right-work-people-direct-provision-commission-welcomes-supreme-court-decision/>).

105 The prohibition on seeking work is currently found in s 16(3)(b) of the 2015 Act, and was represented in s 9(4) of the *Refugee Act 1996* when these proceedings commenced.

106 Para 21 *N.H.V. v Minister for Justice and Equality and Ors* [2017] IESC 35. The matter is currently adjourned for six months to allow parties to make further submissions.

POLICING IN IRELAND: ACCOUNTABILITY AND OVERSIGHT; INTERROGATION AND CUSTODY; DUTY TO INVESTIGATE (ARTICLES 6, 7, 11 & 12 UNCAT)

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This section sets out the priority matters of (1) accountability and oversight of policing in Ireland; (2) interrogation and other matters surrounding police custody within the State; and (3) the positive duty to protect and to investigate.

Police accountability and oversight

The principal bodies with an oversight role on policing in Ireland are: the Garda Síochána Inspectorate (the GSI),¹⁰⁷ the Garda Síochána Ombudsman Commission (GSOC)¹⁰⁸ and the Policing Authority (the PA)¹⁰⁹. Accountability in policing in Ireland was a significant theme in the work of the Commission's predecessor body, the Irish Human Rights Commission, and continues to be a priority for the Commission.¹¹⁰

An Garda Síochána is responsible for both law enforcement and national security in Ireland which may lead to restrictions on certain investigative functions of GSOC.¹¹¹ The Commission reiterates the recommendation that more proportionate measures could be put in place to protect national security, including for example, the designation of

certain documents by a senior member of An Garda Síochána which could be sealed and assessed by a judge, to obviate restrictions on oversight.¹¹²

In 2014, the Government initiated a package of legislative reforms to, *inter alia*: (i) extend the remit of GSOC¹¹³ (ii) improve protections for whistle-blowers¹¹⁴ and (iii) establish the Policing Authority.¹¹⁵ While the Commission welcomes these changes and the work carried out by the oversight bodies, reforms did not go far enough and continuing gaps in police accountability impact public confidence in law enforcement.¹¹⁶ In May 2017, the Government published the terms of reference for a Commission to examine the future of policing in Ireland.¹¹⁷

At the time of publication of the *Garda Síochána (Amendment No.3) Bill 2014* the Commission welcomed proposed reforms to strengthen GSOC.¹¹⁸ The Bill, which became the *Garda Síochána (Amendment) Act 2015* upon enactment, did not address a number of the Commission's ongoing concerns in relation to the powers and functions of GSOC. These concerns include (1) the limited scope of mandatory formal investigations by GSOC to those situations involving 'death or serious harm' resulting from Garda operations; (2) the limitation on GSOC's power to investigate the Garda Commissioner which is 'subject to the consent of the Minister'; (3) the continued involvement of An Garda Síochána in investigating disciplinary matters (including

107 Established under the *Garda Síochána Act 2005*, and operational since 2006, the GSI carries out inspections or enquiries on the operation and/or administration of the Garda Síochána seeking to ensure that 'that the resources available to the Garda Síochána are used to maintain and achieve the highest levels of effectiveness and efficiency in its operation and administration as measured against best international practice'. It reports directly to the Minister for Justice and Equality and has produced 12 reports to date. See http://www.gsinsp.ie/en/GSINSP/Pages/published_reports.

108 Established under the *Garda Síochána Act 2005* and operational in 2007, GSOC's primary responsibility is to address complaints from the public concerning the conduct of members of the Garda Síochána. It is also empowered to conduct inquiries and to examine practice and procedures. See <https://www.gardaombudsman.ie/about/about.html>.

109 Established under the *Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015*, the PA has a role in the appointment of senior police personnel, recommending the removal of the Garda Commissioner, setting priorities and performance targets for An Garda Síochána and establishing a Garda Code of Ethics amongst other functions. See p 5 Policing Authority (2017) *Annual Report 2016* (available at: <http://www.policingauthority.ie/website/PA/PolicingAuthorityWeb.nsf/page/Publications-en>).

110 See IHREC (2014) *Observations on the Garda Síochána (Amendment No.3) Bill 2014*; IHREC (designate)(2014) *Submission of IHREC (Designate) to the Cabinet Sub-Committee on Justice on the Establishment of an Independent Policing Authority*; IHREC (designate)(2014) *Review of the Garda Síochána Act, 2005*; IHRC (2009) *Policy Statement: Human Rights Compliance of An Garda Síochána* April 2009; IHRC (2004) *Observations on the Garda Síochána Bill 2004*; IHRC (2003) *Observations on the Scheme of the Garda Síochána Bill, 2003* and IHRC (2002) *A proposal for a New Garda Complaints System* (all publications available at <https://www.ihrec.ie/publications/>).

111 See IHREC (Designate)(2014) *Submission of IHREC (Designate) to the Cabinet Sub-Committee on Justice on the Establishment of an Independent Policing Authority*. See also IHREC (2016) *Review of the Law on Access to Communication Data on balancing the legitimate concerns of national security against the rights to privacy and data protection* (available at https://www.ihrec.ie/app/uploads/2016/11/Memorandum_Review-of-the-Law-of-Access-to-Communication-Data.pdf).

112 Unrestricted access by the CPT and a proposed NPM renders restrictions on GSOC anomalous, see p 11 IHREC (Designate)(2014) *ICCPR Submission*.

113 The *Garda Síochána (Amendment) (No. 3) Bill 2014* was enacted as the *Garda Síochána (Amendment) Act 2015*.

114 See *Protected Disclosures Act 2014*.

115 See *Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015*.

116 The Commission reiterates that: 'public confidence in the policing function is connected to the perception of adequate independent oversight of policing activities'. See p 10 IHREC (designate)(2014) *Review of the Garda Síochána Act, 2005*.

117 Department of Justice and Equality (2017) 'Tánaiste announces membership and final terms of reference of Commission on the Future of Policing in Ireland' 16 May 2017 [press release] (available at <http://www.justice.ie/en/JELR/Pages/PR17000162>).

118 See IHREC (2014) *Observations on the Garda Síochána (Amendment No.3) Bill 2014*. See also IHRC (2009) *Policy Statement: Human Rights Compliance of An Garda Síochána*.

serious disciplinary problems); and (4) the use of officers of An Garda Síochána by GSOC rather than its own independent pool of investigators.

Ongoing concerns surrounding the effective functioning of GSOC were reflected in a recent Parliamentary Report. GSOC submitted that the current legislative framework does not allow for the proportionate, effective and user friendly handling of complaints and oversight. GSOC representatives also called for a statutory basis allowing GSOC to provide An Garda Síochána with observations on systemic issues arising out of complaints.¹¹⁹

Recommendation:

The Commission welcomes the Government commitment to review powers of the Garda Síochána Ombudsman Commission (GSOC)¹²⁰ and reiterates its previous recommendations regarding, *inter alia*: the extension of GSOC's mandatory formal investigations, the power of GSOC to investigate the Garda Commissioner and the use of independent officers in the investigation of complaints.

The GSI has published 12 reports and has made many recommendations for changes in policing.¹²¹ In reviewing all aspects of the administration and operation of An Garda Síochána in November 2015, the GSI identified an ineffectual organisational structure; deficiencies in governance, accountability,

119 See p 14 Joint Committee on Justice and Equality (2016) *Report on Garda Oversight and Accountability* (available at <http://www.oireachtas.ie/parliament/mediazone/pressreleases/2016/name-40153-en.html>).

120 See Minister for Justice and Equality, Frances Fitzgerald TD 'Motion: Dáil Debate Committee Report on Garda Oversight and Accountability' *Parliamentary Debates: Dáil Éireann*, 2 February 2017 (available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017020200045>).

121 The Commission welcomes s 11 of the *Garda Síochána (Amendment) Act 2015* which enables the GSI to initiate an investigation or inquiry if it considers it appropriate to do so. Previously, its objective was to carry out inspections or inquiries 'at the request or with the consent of the Minister' under s 117 of the 2005 Act. Section 53 of the *Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015* empowered the PA to request an inquiry or investigation also.

leadership and intrusive supervision; inconsistent and inefficient allocation of resources and a culture which inhibits change, amongst other systematic issues.¹²² Separately, the GSI has reported on 'systematic operational deficiencies' in crime investigation.¹²³ The GSI is of the view that many of its previous recommendations could be implemented at a low or no cost.¹²⁴ The Commission welcomes the 2015 legislative amendment which gives the Policing Authority a role in monitoring and implementing recommendations of the GSI, either of its own volition or upon request by the Minister for Justice and Equality,¹²⁵ and recalls the view of the former IHRC that significant advances could follow from robust implementation of GSI recommendations.¹²⁶

Recommendation:

The Commission recommends that resources are allocated to the Policing Authority, enabling full capacity to oversee timely implementation of the reports of the Garda Síochána Inspectorate.

122 See Garda Síochána Inspectorate (2015) *Changing Policing in Ireland* (available at http://www.gsinsp.ie/en/GSINSP/Pages/published_reports).

123 'The GSI 'found a police service in critical need of modernisation of its crime investigation operational and support infrastructure. The absence of up to date technology and dated inefficient investigative processes and policies, combined with poor internal audit controls, inconsistent case management and poor supervisory practices have led to the systemic operational deficiencies identified in this and other recent government initiated reports. As a result, potentially hundreds of thousands of Garda staff hours and resources, which should be spent on front-line policing, are currently allocated to those inefficient processes'. See p I Garda Síochána Inspectorate (2014) *Crime Investigation* (available at http://www.gsinsp.ie/en/GSINSP/Pages/published_reports). The GSI made 212 recommendations, the majority of which were accepted by An Garda Síochána.

124 See Garda Síochána Inspectorate (2015) *Changing Policing in Ireland*. The report refers at p 2 of the Executive Summary, to the 'minimal and often ineffective internal changes made to the structure of the Garda Síochána in response to recommendations made in many previous reports and inquiries'.

125 Section 54 of the *Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015* inserts a new section 117A in the *Garda Síochána Act 2005*. According to the Chairperson of the PA, work has commenced on reporting on the implementation of the GSI *Changing Policing in Ireland* report, see Joint Committee on Justice and Equality Debate, *Policing Authority: Discussion*, 28 September 2016 (available at <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/committeetakes/JUU2016092800002>).

126 See p 38 IHRC (2009) *IHRC Policy Statement Human Rights Compliance of An Garda Síochána* (available at <https://www.ihrec.ie/documents/4ret-ihrc-policy-statement-human-rights-compliance-of-an-garda-siochana-april-09-doc/>).

The Commission welcomes the establishment of the PA,¹²⁷ but draws attention to deficits in the legislative framework which hinder the potential of the PA to effect transformative change. The Commission has previously called for the minimisation of political influence in the operational aspects of the work of An Garda Síochána, noting the value of an independent oversight authority.¹²⁸ While a draft version of the legislation¹²⁹ proposed more extensive reforms, the *Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015* did not go as far as what was originally proposed.¹³⁰ The powers retained by the Minister or Government, taken in their totality, reflect the scale of continued Executive control.¹³¹

In May 2014, the Commission called for the establishment of an independent oversight authority to ensure public confidence and trust in An Garda Síochána and to minimise political influence in the operational aspects of the work of An Garda Síochána, making detailed recommendations around its remit, including the function of supervising the Garda Commissioner's Office,¹³² establishing policies and procedures for An Garda Síochána, reviewing the adequacy of training of An Garda Síochána,¹³³ monitoring and addressing human rights and equality compliance at every level of An Garda Síochána and consulting with the community. The Commission also made recommendations regarding the appointment of PA members, the accountability of the PA to the Oireachtas, its relationship with GSOC, the proposed NPM and the Office of the

Confidential Recipient.¹³⁴ The Commission regrets that responsibility for the appointment and removal of the Garda Commissioner continues to lie with the Minister,¹³⁵ and the Garda Commissioner continues to be accountable to the Government with respect to national security.¹³⁶ Various additional functions retain an element of Government control¹³⁷ such that the PA did not displace either the Minister or the Department in terms of Garda Síochána governance.¹³⁸ The Commission notes that the *Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015* empowered the Government to designate a person to be appointed as the first chairperson of the PA. Subsequent appointments will require a resolution passed by each House of the Oireachtas.¹³⁹

Recommendation:

The Commission welcomes the Government commitment to review the powers of the Policing Authority¹⁴⁰ and reiterates its previous recommendations regarding the establishment of a truly independent oversight body with the functions and responsibilities previously outlined.

In relation to data retention by telecommunications service providers and disclosure of data to An Garda Síochána, the Commission has recently commented that:

134 See IHREC (2014) *Observations on the Garda Síochána (Amendment No.3) Bill 2014*.

135 The Commission recommended that a function of the PA should be to appoint, supervise and, where appropriate, discipline senior management within An Garda Síochána, including the Garda Commissioner.

136 This approach is stated to be justified on the basis of Article 28.2 of the Constitution regarding the Executive's role in national security.

137 For a full analysis see Vicky Conway (2015) *De-politicising Policing* (available at <http://www.macgillsummerschool.com/de-politicising-policing/>).

138 For further commentary, see Declan Walsh (2017) 'Dark side of the Garda will persist in the absence of radical reforms' *The Irish Times*, 17 February 2017 (available at <http://www.irishtimes.com/opinion/dark-side-of-the-garda-will-persist-in-the-absence-of-radical-reforms-1.2978050>).

139 Section 44 of the *Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015* inserted s 62C into the *Garda Síochána Act 2005*.

140 See Department of Justice and Equality (2017) 'Tánaiste publishes draft Terms of Reference for a Commission on the Future of Policing in Ireland' [press release] (available at <http://www.justice.ie/en/JELR/Pages/PR17000121>).

127 The *Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015* was fully commenced on 1 January 2017.

128 See IHREC (Designate)(2014) *Review of the Garda Síochána Act, 2005*.

129 See the General Scheme of the *Garda Síochána (Amendment) Bill* (available at <http://www.justice.ie/en/JELR/Pages/PolicingAuthorityAndOtherLegislativeReforms>).

130 According to Vicky Conway: 'Rather than achieving de-politicisation and a necessary separation of powers over policing, we instead get an added layer of bureaucracy, something which serves only to make the governance of policing more unwieldy and complicated'. See Vicky Conway (2015) *De-politicising Policing* (available at <http://www.macgillsummerschool.com/de-politicising-policing/>).

131 Reliance is placed on Article 28.2 of the Constitution to assert that power over policing must lie with the Executive.

132 In this context, the Commission recommended that the PA supervise national security policy and practice.

133 Training includes an emphasis on human rights and equality.

'the current legal framework is light touch, and not human rights compliant in that it lacks the necessary quality of law, well-resourced independent expert oversight at appropriate points in the process, and access to effective remedies where rights are infringed.'¹⁴¹ The Commission analysed the current legislative framework and practice in the acquisition and disclosure of bulk metadata.¹⁴²

Recommendation:

The Commission welcomes the commitment to review the law on interception of communications and recommends the incorporation of robust safeguards.

Police custody and interrogation¹⁴³

Ireland permits lengthy detention periods for questioning in relation to certain offences.¹⁴⁴ Irish law allows for adverse inferences to be drawn from silence to corroborate other evidence and such inferences have the potential to create an imbalance in power in police custody and interrogation.¹⁴⁵ In

141 See IHREC (2016) *Memorandum regarding the Review of the Law on Access to Communication Data* (available at <https://www.ihrec.ie/documents/memorandum-review-law-access-communication-data/>).

142 The Commission noted that: 'The powers appear to be in widespread use with almost 2 requests for access to data per hour (62,000 in 5 years), mainly by An Garda Síochána and fewer than 2% of these are declined. More rigorous statistics need to be maintained', IHREC (2016) *Memorandum regarding the Review of the Law on Access to Communication Data*.

143 The Commission participates in the Department of Justice and Equality Advisory Committee on the Interviewing of Suspects (the Smyth Committee) which is mandated to keep under review the adequacy of the law, practice and procedure relating to the interviewing of suspects detained in Garda custody, taking into account evolving best international practice and to advise the Minister and the Garda Commissioner on any changes that may be necessary.

144 A suspect can be held for a maximum of 7 days for interrogation under s 2 *Criminal Justice (Drug Trafficking) Act 1996*. See the website of An Garda Síochána for a summary: <http://www.garda.ie/Controller.aspx?Page=5147&Lang=1>.

145 In April 2012, the ECtHR granted liberty to the former Irish Human Rights Commission to make a written submission to the Court in the case of *Donohoe v Ireland*, Application No. 19165/08, Judgment of 12 December 2013. The applicant had been convicted in the Special Criminal Court of membership of an illegal organisation in 2004 and was sentenced to four years imprisonment. The conviction was upheld on appeal. The IHRC made submissions to the ECtHR regarding the evidence used by the Irish courts in convicting the accused: belief evidence, inferences drawn from the conduct of the accused and inferences that can be drawn from the silence of accused under questioning. In respect of access to a lawyer, the IHRC point out that in *Murray v UK* (1996) 22 EHRR 29, the Court stated that although the right to silence under Article 6 of the ECHR was not absolute and that inferences could admissibly be drawn from silence under questioning, a breach of the Article arose from the fact that the applicant did not have access to a lawyer during the first 48 hours of his detention, and the domestic court allowed adverse inferences to be drawn from his silence during that period. See paras 12-36, 46 IHRC (2012) *Amicus curiae Submission: Donohoe v Ireland* Application No. 19165/08.

this context, access to legal advice during questioning takes on a greater significance.

The Supreme Court has confirmed the right of access to a solicitor prior to questioning¹⁴⁶ and some judicial statements have suggested that the right to have a lawyer present during questioning may soon be recognised in Irish courts.¹⁴⁷ While current protocols dictate that An Garda Síochána cannot question a detained person prior to that person obtaining legal advice, the Council of Europe Committee for the Prevention of Torture (the CPT) observed some confusion amongst members of An Garda Síochána and lawyers with regard to the role of solicitors during interviews of persons detained during its visit to Ireland in 2014.¹⁴⁸ In April 2015, the *Code of Practice on Access to a Solicitor by Persons in Garda Custody* confirmed that upon request, a suspect ought to have a solicitor present during interview in custody in addition to the right to consult a solicitor prior to interrogation.¹⁴⁹ Legislation for the right of access to a lawyer during questioning may provide the clarity needed and align practice with the *EU Directive on Right of Access to a Lawyer in Criminal Proceedings*.¹⁵⁰

Police custodial settings are currently not subject to independent oversight or unannounced inspections at national level.¹⁵¹ The continuing gap in oversight of police custody requires immediate attention to assist in preventing ill-treatment in police custodial settings. According to a judicial statement conditions in police cells may undermine the resolve of an arrested person to wait for legal

146 *DPP v Gormley and DPP v White* [2014] IESC 17.

147 See statement of Justices McMeniman, O'Malley, O'Donnell in *DPP v Doyle* [2017] IESC 1.

148 Para 14 Council of Europe (2015) *CPT Report*.

149 An Garda Síochána (2015) *Code of Practice on Access to a Solicitor* (available at <http://www.garda.ie/Documents/User/Code%20of%20Practice%20on%20Access%20to%20a%20Solicitor%20by%20Persons%20in%20Garda%20Custody.pdf>).

150 Ireland has currently opted out of the *EU Directive on Right of Access to a Lawyer in Criminal Proceedings* and the Commission confirms that at the time of writing, s 9 *Criminal Justice Act 2011*, governing access to a lawyer, has not been commenced. The CPT was advised that: 'the practice of advising detained persons of their right to have legal representation present during an interview is meanwhile being actively implemented. This is positive, as is the announcement made in the above-mentioned letter that this right will be placed on a legislative footing by way of regulations adopted by the Minister of Justice and Equality', p 16 Council of Europe (2015) *CPT Report*.

151 Monitoring at international level is carried out by the CPT.

advice.¹⁵² National and international oversight bodies have brought attention to healthcare treatment for people in police custody.¹⁵³ In 2014, the GSI reported on deficits in supervision in the interviewing of suspects, incomplete custody records, instances of a failure to update PULSE¹⁵⁴ prisoner logs, lack of specific training, and an absence of an Independent Custody Visitor tasked with checking the welfare of persons detained. Inconsistencies in the use of CCTV in interview rooms and inadequacies of security in custody areas were also reported.¹⁵⁵

Recommendation:

The Commission recommends that the right of access to a solicitor during questioning be established on a statutory basis. The Commission further recommends that urgent attention be afforded to appointing an independent national body to carry out unannounced visits on Garda stations.

Duty to investigate

Recalling the obligation to investigate allegations of torture and ill-treatment, it is of concern that oversight bodies have reported on deficiencies in systems, processes, training, guidance and police awareness which together hinder the proper functioning of Garda investigations.¹⁵⁶ Particular issues arising in the investigation of rape, sexual assault and domestic violence have been highlighted.¹⁵⁷

In 2015, the Central Statistics Office found that 26% of domestic violence incidents were not recorded on the PULSE system.¹⁵⁸ There have been additional reports on the incorrect categorisation of domestic violence and sexual assault cases, together with delays in the investigation of complaints resulting in prosecutions not being progressed.¹⁵⁹ In the context of the exercise by An Garda Síochána of emergency child protection powers, a recent audit exposed further shortcomings in the recording of these cases.¹⁶⁰

Recommendation:

The Commission recommends full implementation of recommendations of GSOC and the GSI where they pertain to the investigation of crime to comply with the Convention obligations.

152 Separate Judgment of Hardiman J. in *DPP v Gormley and DPP v White* [2014] IESC 17.

153 See p 16 Council of Europe (2015) *CPT Report*. See also Minister for Justice and Equality, Frances Fitzgerald TD 'Motion: Dáil Debate Committee Report on Garda Oversight and Accountability' *Parliamentary Debates: Dáil Éireann*, 2 February 2017 (available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017020200045>). See Report of the Oireachtas Committee [press release] <http://www.oireachtas.ie/parliament/mediazone/pressreleases/2016/name-40153-en.html>.

154 PULSE (Police Using Leading Systems Effectively) is the computer system used by An Garda Síochána.

155 See Garda Síochána Inspectorate (2014) *Investigation of Crime*.

156 See Garda Síochána Inspectorate (2014) *Investigation of Crime* which contains detailed recommendations for improvements. See also the investigation by GSOC in 2014 into complaints of delays and inadequacies in the Garda investigation, 'a serious failure of the system' was found, stemming from shortcomings in internal Garda communication, external communication, policy, directives, training and guidance.

157 See Garda Síochána Inspectorate (2014) *Investigation of Crime*.

158 See the website of the CSO at <http://www.cso.ie/en/statistics/crimeandjustice/>.

159 See Garda Síochána Inspectorate (2014) *Investigation of Crime* which reports on examinations of the Garda Professional Standards Unit.

160 'It is clear that crucial demographic data in relation to individuals who engage with members of AGS is not routinely recorded on their PULSE file', see p xiii Dr Geoffrey Shannon (2017) *Audit of the exercise by An Garda Síochána of the provisions of Section 12 of the Child Care Act 1991* (available at <http://www.garda.ie/Controller.aspx?Page=20512>).

Human rights and equality information and training

The Commission welcomes publication by the PA of the *Code of Ethics for the Garda Síochána* in January 2017,¹⁶¹ but reiterates its view that the Code should explicitly name the relevant statutory provisions and international norms which underline the source and context of the duties set out in the Code.¹⁶² An explicit reference to the prohibition against torture would assist in the State's compliance with Article 10(2) of the Convention.

Recommendation:

The Commission recommends that the *Code of Ethics for the Garda Síochána* incorporate explicit reference to the prohibition on torture under the Convention.

In 2017, funding was announced for 800 Garda recruits, up to 500 civilian recruits and 300 Garda Reserves.¹⁶³ The recruitment of new police staff presents an opportunity to reinforce human rights and equality training from the beginning of a Garda member's tenure. The Commission recalls shortcomings in law enforcement training identified by the Commission,¹⁶⁴ the GSI¹⁶⁵ and most recently by the State's Special

Rapporteur on Child Protection.¹⁶⁶

The Commission welcomes the State's investment in the University-certified training programme for recruits, which incorporates human rights training.¹⁶⁷ The Commission highlights the importance of the obligations of An Garda Síochána under section 42 of the *Irish Human Rights and Equality Commission Act 2014* in this context.

Recommendation:

The Commission recommends that human rights and equality are central to the training of new police staff and to the continuous training of law enforcement personnel.

161 Policing Authority (2017) *Code of Ethics for the Garda Síochána* (available at <http://www.policingauthority.ie/website/PA/PolicingAuthorityWeb.nsf/page/Publications-en>).

162 The Commission wrote to the PA in September 2016 providing comments on the draft Code of Ethics.

163 By 2021, there is an objective to achieve an overall Garda workforce of 21,000 personnel (made up of 15,000 Garda Members, 2,000 Reserve members and 4,000 civilian staff). See Minister for Justice and Equality (2017) *Opening Remarks to the Joint Committee on Justice and Equality – Estimates 2017* (available at <http://www.justice.ie/en/JELR/Pages/SP17000122>).

164 Historical deficiencies were detailed by the former IHRC, for example in relation to the transparency of police training. See IHRC (2009) IHRC Policy Statement Human Rights Compliance of An Garda Síochána (available at <https://www.ihtec.ie/documents/4ret-ihrc-policy-statement-human-rights-compliance-of-an-garda-siochana-april-09-doc/>).

165 See Garda Síochána Inspectorate (2015) *Changing Policing in Ireland* which made various recommendations in relation to training requirements.

166 In the context of exercising emergency child protection powers, Geoffrey Shannon reported that there was little or no emphasis on formal training of new Garda recruits in relation to child protection. He reported more generally on a 'deep-seated culture' prioritising on-the-job training possibly to the detriment of formal core training in the Garda College (see pp xiv-xv). He further reported on a total absence of training or strategic policy direction in how [An Garda Síochána] should respond to Ireland's increasing ethno-cultural diversity (see p xvii), Dr Geoffrey Shannon (2017) *Audit of the exercise by An Garda Síochána of the provisions of Section 12 of the Child Care Act 1991*. On the last point, the Commission welcomes that a diversity and inclusion strategy is in development, see An Garda Síochána (2016) *Modernisation and Renewal Programme 2016-2021* (available at <http://www.garda.ie/Controller.aspx?Page=15955&Lang=1>).

167 See the website of An Garda Síochána at <http://www.garda.ie/Controller.aspx?Page=181&Lang=1>.

TREATMENT IN DETENTION (ARTICLES 11, 13 & 14 UNCAT)

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The Commission welcomes transformative improvements seen in relation to Ireland's physical prison infrastructure¹⁶⁸ and the ongoing attention afforded to penal reform by the State, including the implementation of the *Strategic Review of Penal Policy* in 2014 (the 'Strategic Review 2014'),¹⁶⁹ and the commitment to align the *Prison Rules 2007* with the United Nations Standard Minimum Rules for the protection of Prisoners (the 'Mandela Rules').¹⁷⁰

Significant obstacles remain to achieving compliance with minimum human rights standards for prisons and penal policy. Some recommendations made over thirty years ago (for example on accommodating prisoners in individual cells) are still in need of attention today.¹⁷¹ The Irish Prison Service (the 'IPS') has developed various strategies and the focus must now lie in reflecting those policies in prisons.¹⁷² In 2016, recruitment of prison officers re-commenced for the first time since 2008. Human rights and equality (including obligations under section 42 of the *Irish Human Rights and Equality Commission Act 2014*) must be at the core of training for new staff and integral to the ongoing training of existing staff.¹⁷³

168 In 2015, these were described as improvements 'beyond recognition'. See p 5 Inspector of Prisons (2015) *Culture and Organisation in the Irish Prison Service – A Roadmap for the Future* (available at <http://www.justice.ie/en/JELR/Pages/Culture-and-Organisation-in-the-Irish-Prison-Service-A-Road-Map-for-the-Future>). See also Irish Prison Service (2016) *Capital Strategy 2016-2021* (available <http://www.irishprisons.ie/index.php/information-centre/publications/strategy-statements/>).

169 The *Strategic Review 2014* made 43 recommendations for penal reform. Three implementation reports have been published in November 2015, June 2016 and March 2017. See Department of Justice and Equality (2014) *Strategic Review of Penal Policy* (available at http://www.justice.ie/en/JELR/Pages/Penal_Policy_Review).

170 See Goal 2.9 Irish Prison Service (2016) *Strategic Plan 2016-2018* (available at <http://www.irishprisons.ie/index.php/information-centre/publications/strategy-statements/>).

171 See the *Whitaker Report* (1985) (correlating with the *European Prison Rules*) recommended resorting to shared cells only where those cells were suitable, see IPRT (2007) *The Whitaker Committee Report 20 Years On: Lessons Learned or Lessons Forgotten?* (available at <http://www.iprt.ie/contents/304>).

172 The Inspector of Prisons noted the perceived disconnect between the culture in the IPS headquarters and that seen in Ireland's 13 prisons. See paras 3.13-3.14 Inspector of Prisons (2015) *Culture and Organisation in the Irish Prison Service – A Roadmap for the Future*.

173 It is estimated that 80 new prison officers will commence training during 2017, increasing to 200 in 2018. See Minister for Justice and Equality (2017) *Opening Remarks to the Joint Committee on Justice and Equality – Estimates 2017* (available at <http://www.justice.ie/en/JELR/Pages/SP17000122>).

Recommendation:

The Commission recommends that the State align prison standards with the Mandela Rules and further recommends that human rights and equality are central to the training of new and existing prison staff.

Central amongst the Commission's concerns is the over-reliance on prison as punishment which leads to continued overcrowding in prisons.¹⁷⁴ In-cell sanitation continues to be of concern.¹⁷⁵ Inter-prisoner violence and violence against prison officers are prevalent.¹⁷⁶ Open, low-security and step-down prison facilities are underused¹⁷⁷ and the separation of remand and convicted prisoners is not subject to a concrete timeline.¹⁷⁸

174 In 2015, 14,182 individuals were imprisoned, representing 17,206 committals. The Commission welcomes the reductions seen in 2016, when 12,579 individuals were imprisoned, representing 15,099 committals. The daily average number of prisoners in custody remained relatively static (decreasing from 3,722 in 2015 to 3,718 in 2016) and the daily number of female prisoners rose from 131 to 140. See Irish Prisons Service (2017) *Annual Report 2016* (available at <http://www.irishprisons.ie/index.php/information-centre/publications/annual-reports/>). Referring to 2015 figures, Fiona Ní Chinnéide (IPRT) stated: 'We have not seen this level since around 2011-2012 when we thought committals had reached their peak', speaking before the Joint Oireachtas Committee on Justice and Equality in 2017. Overcrowding was identified in 2013 as the greatest problem associated with the Dóchas Centre (Dublin's prison for women) and the greatest deterrent to the centre operating as it should, see Inspector of Prisons (2013) *Interim Report on the Dóchas Centre* (available at http://www.inspectorofprisons.gov.ie/en/iop/pages/inspection_of_prisons_reports). In April 2017, the UN Human Rights Committee requested further information from the State on measures to address overcrowding and the impact of those measures *Report on follow-up to concluding observations of the Human Rights Committee*, CCPR/C/119/2 (available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F119%2F2&Lang=en).

175 In April 2017, 56 prisoners had to 'slop out' and 41% of all prisoners had to use a toilet in the presence of another prisoner. See <http://www.irishprisons.ie/index.php/information-centre/statistics-information/census-reports/>. This represents a vast improvement on an issue which the State has long been called upon to eradicate, see CPT (1993) *Report to the Irish Government on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)* (available at <http://www.coe.int/en/web/cpt/ireland>).

176 The Prison Officers Association raised the issue of violence in prisons at their annual conference in April 2017 and appearing before the Oireachtas Joint Committee on Justice and Equality in March 2017, see Mr John Clinton 'Penal Reform: Prison Officers' Association' *Parliamentary Debates: Joint Committee on Justice and Equality*, 22 March 2017 (available at <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/committeetakes/JUJ2017032200002>). See also paras 26-28 Council of Europe (2015) *CPT Report* which called for detailed reporting of all incidents of inter-prisoner violence.

177 The Commission notes the commitment to develop a step-down facility for women offenders by 2018, see Department of Justice and Equality (2017) *National Women's Strategy* (available at www.genderequality.ie/en/GE/Pages/NationalWomensStrategy). The State's characterisation of women prisoners as being of low risk but with a high level of needs furthers the clear case for an open prison for women, p 4 Probation Service/Irish Prison Service Strategy (2014) *An Effective Response to Women Who Offend* (available at http://www.irishprisons.ie/images/pdf/women_strat_2014.pdf).

178 'Every effort' is made by the State to further this objective but it has not provided a concrete timeline to do so, see p 9 UN Human Rights Committee (2017) *Report on follow-up to concluding observations of the Human Rights Committee*.

The Commission welcomes the opening of Oberstown detention school¹⁷⁹ and the commitment to end sentencing of children to adult prisons. While there will be no new committals, 17-year-old children continue to be detained at Wheatfield prison.¹⁸⁰

Treatment in individual places of detention is addressed by state and non-state actors.¹⁸¹ Although systems and structures are not uniform across prison facilities, in this section, the Commission focusses on systemic issues identified in Irish prisons.¹⁸²

Transparency and consistency in organisational practices

The Commission welcomes publication by the IPS of daily, monthly and yearly statistics on prison occupancy. However transparency is lacking, for example, with regard to the length of time spent on remand¹⁸³ and the length of time that a detainee is 'restricted' under protection procedures.¹⁸⁴ Recent research draws attention to the absence of a database on the deaths of prisoners in custody in Ireland.¹⁸⁵

The *Strategic Review 2014* identified various

inconsistencies of practice and areas lacking in transparency within prison operations.¹⁸⁶ The former Inspector of Prisons (the 'IoP') reported on a lack of consistency arising when a prisoner breaks a rule and called for sanctions to be fair.¹⁸⁷

Recommendation:

The Commission recommends that the Irish Prison Service improve the transparency of statistics with regard to the length of time that prisoners spend on remand and on restricted regimes.

In 2015, the IoP criticised the culture of prison operations which prioritise the 'protection of the system' over the 'rights of the individual'¹⁸⁸ and made concrete and detailed recommendations for improvements, focussing on organisational practices.¹⁸⁹ Reports by the IoP regarding deaths of prisoners, while individualised to particular fatalities, reflect systemic problems in processes, decision-making and resource allocation.¹⁹⁰ The Commission welcomes the IPS commitment to effect culture change through organisational practices.¹⁹¹

179 The Ombudsman for Children has outlined the challenging circumstances arising since establishment of the centre, including industrial disputes, the struggle to recruit staff, escape attempts by detainees and concerns about staff safety. See p 33 Ombudsman for Children (2017) *Annual Report 2016*.

180 There were five 17 year-olds in custody in Wheatfield prison on 10 May 2017 (See http://www.irishprisons.ie/wp-content/uploads/documents_pdf/10-May-2017.pdf). The low number of 17-year-olds in Wheatfield may lead to isolation due to the lack of socialisation.

181 See for example reports of the Inspector of Prisons. See also reports by the IPRT, the Jesuit Centre for Faith and Justice and reports of Visiting Committees in relation to individual prisons.

182 Overarching issues have been identified through the Commission's desk-based research, its consultations, in the exercise of its *amicus curiae* role, in its legislative observations and its international reporting function to various UN and Council of Europe Committees.

183 '[T]here is no data on the average duration of pre-trial detention, the ratio of annual arrests to remand orders, the number of people granted station bail in comparison with court bail, or the number of people remanded in custody following breach of bail conditions.' See p 10 Irish Penal Reform Trust (2015) *Position Paper 11 on remand and bail* (available at <http://www.iprt.ie/contents/2805>).

184 In January 2017 there were 7 prisoners on 23-hour restricted regime and 65 prisoners on 22-hour restricted regime. IPS data shows the reasons for restriction, the age profile and the spread across prisons but it is unclear how long prisoners are restricted and whether they are repeatedly restricted. See IPS (2017) *Census of Restricted Regime Prisoners* (available at: http://www.irishprisons.ie/wp-content/uploads/documents_pdf/January-2017-Restriction.pdf).

185 See Shane Kilcommins (2016) *Deaths of Prisoners while in the Custody of the Irish Prison Service – Developing a Database* (available at <https://irishcriminologyresearchnetwork.files.wordpress.com/2016/10/final-report1.pdf>).

186 It reported on a lack of transparency in: the application of the Incentivised Regime Policy (the 'IRP') (Recommendation 20); access to open prison prior to release (Recommendation 27); the application of temporary release (Recommendations 28 and 29). The Commission welcomes the commitment by the IPS to develop a new protocol on the open and transparent application of the IRP. See p 14 *Strategic Review 2014 – 3rd Implementation Report*.

187 See p 18 Inspector of Prisons (2013) *Interim Report on the Dóchas Centre*.

188 The IoP pointed to contributing systematic factors including: 'the absence of a functioning line management structure in many of our prisons which in turn has led, in certain cases, to a failure to observe Standard Operating Procedures, to the falsifying of official records, to incomplete, inaccurate and at times misleading reports of incidents and inadequate or non-existent record keeping, which, combined with poor internal audit controls, inconsistent application of agreed procedures and poor supervisory practices has led to systemic operational deficiencies', see p 5 Inspector of Prisons (2015) *Culture and Organisation in the Irish Prison Service – A Roadmap for the Future*.

189 These recommendations were echoed in 2016 when the IoP called for all IPS staff to ensure that: 'the culture of the Irish Prison Service does not hinder the operation of a prisoner complaints structure' see Recommendation 14, Inspector of Prisons (2016) *Review, Evaluation and Analysis of the Operation of the IPS Prisoner Complaints Procedure* (available at http://www.inspectorofprisons.gov.ie/en/iop/pages/other_reports).

190 See in particular report into the death of Prisoner C (August 2014) which involved refusal of temporary release based on an 'unwritten rule' and 'long-standing policy' (available at http://www.inspectorofprisons.gov.ie/en/iop/pages/deaths_in_custody_reports).

191 See p 11 Irish Prison Service (2016) *Strategy Statement 2016-2019*.

Recommendation:

The Commission recommends that progress in reforming organisational practices in prisons is prioritised by the Irish Prison Service with ongoing oversight by the Inspector of Prisons.

Independence and resourcing of the Inspector of Prisons¹⁹²

The IoP has a statutory duty to carry out regular inspections of prisons¹⁹³ and investigates the death of any prisoner in custody.¹⁹⁴ The Commission recalls previous recommendations on giving the IoP the necessary statutory powers and adequately resourcing the IoP to fulfil its mandate.¹⁹⁵ The IoP is appointed for a five-year, renewable term by the Minister for Justice and Equality and is stated to be independent in carrying out its functions.¹⁹⁶ Recent research points to the possible need to enhance the IoP's independence and statutory powers in anticipation of a future rule in the National Preventive Mechanism, for example, by removing the power of appointment from the Minister for Justice and Equality and empowering the IoP to interview individuals in private.¹⁹⁷

192 The Commission notes the sad passing of Judge Michael Reilly in November 2016 who held this office since his appointment in 2008. The functions of the office are currently carried out by the late Judge Reilly's Deputy Inspector, Helen Casey, and the staff of the office, pending the appointment of a new Inspector of Prisons, see <http://inspectorofprisons.ie/en/iop/pages/home>.

193 Section 31 *Prisons Act 2007* mandates the IoP to carry out unannounced visits, obtain documentation and to bring issues of concern to the governor of the prison or to the Director-General of the IPS or to the Minister.

194 See website of the IoP (available at http://www.inspectorofprisons.gov.ie/en/iop/pages/deaths_in_custody_reports).

195 See para 93 IHREC (Designate)(2014) *ICCPR Submission*. The Commission notes the increased workload arising from the mandate to report on the deaths of prisoners and the limited number of prison inspection reports published in recent years, see http://inspectorofprisons.ie/en/iop/pages/inspection_of_prisons_reports. Stakeholders interviewed for the *OPCAT Report* described the IoP as being 'chronically under-resourced' and noted that he did not have the resources available to him to discharge the duty to carry out regular visits. See pp 38-39 Murray and Steinerte (2017) *OPCAT Report*.

196 Section 30 *Prisons Act 2007*. Stakeholders consulted in 2016 for the *OPCAT Report* considered the role of the IoP to be critical. The office is widely perceived to be exercised independently, with integrity, and is considered to be influential in effecting change. See Murray and Steinerte (2017) *OPCAT Report* which drew on semi-structured interviews.

197 See pp 38-39 Murray and Steinerte (2017) *OPCAT Report*.

Recommendation:

The Commission recommends enhancement of the independence of the role of Inspector of Prisons and increased resourcing to enable fulfilment of the Inspector's statutory mandate.

Prison complaints system

Prior to the State's first examination under the Convention, the former IHRC recommended the establishment of an independent statutory complaints mechanism for prisoners, such as a Prisoner Ombudsman.¹⁹⁸ In 2014, a new complaints mechanism was established.¹⁹⁹ Oversight by the IoP of this Prisoner Complaints Procedure does not extend to directing further enquiries; initiating a new investigation; taking further evidence or reversing the finding of a Prison Governor.²⁰⁰ In April 2016, the IoP reviewed and evaluated the operation of the procedure.²⁰¹ He described the system which was put in place in 2014 as 'grossly deficient', but one which could satisfy most of the requirements of a trustworthy prisoner complaints process (with the exception of the external oversight element) *if followed diligently*. The IoP reported on a 'litany of failures' and the 'absence of a functioning line management structure',²⁰² which rendered the operation of the system

198 See IHRC (2011) *Submission to the UN Committee against Torture on the Examination of Ireland's First National Report* (available at <https://www.ihrec.ie/documents/ihrc-report-to-un-committee-against-torture-april-2011/>). See also IHREC (Designate)(2014) *ICCPR Submission*. The IoP recommended that the independent Office of the Ombudsman was the appropriate body to perform this function following the exhaustion of internal procedures.

199 In 2010, the IoP outlined deficiencies in the complaints procedure in a Report titled: *Guidance on Best Practice relating to Prisoners' Complaints and Prison Discipline* and in 2012 recommended a *Suggested Prisoner Complaints Model*. The *Prison Rules 2007* were amended to insert new rules on complaints of criminal offence (rule 57A) and on the internal report of complaints (rule 57B) and this complaints process came into operation in 2014.

200 These powers were recommended by the IoP, see Inspector of Prisons (2012) *Suggested Prisoner Complaints Model*.

201 The IoP again voiced concerns regarding the necessary element of independence and the need for an appeal mechanism in relation to serious complaints. Inspector of Prisons (2016) *Review, Evaluation and Analysis of the Operation of the present Irish Prison Service Prisoner Complaints Procedure*.

202 See para 7.5 Inspector of Prisons (2016) *Review, Evaluation and Analysis of the Operation of the present Irish Prison Service Prisoner Complaints Procedure*.

'ineffectual'.²⁰³ The Commission welcomes a recent statement by the Minister for Justice and Equality on the steps being taken by her Department to address this IoP review of the complaints process.²⁰⁴

Recommendation:

The Commission reiterates its recommendation that an independent body, such as a Prisoner Ombudsman, investigate complaints by prisoners.

Health care in prisons

Prisoners have an 'absolute entitlement to healthcare'.²⁰⁵ Responsibility lies with the IPS,²⁰⁶ but the Commission notes the view of the IoP that this function more appropriately falls within the remit of the Health Service Executive.²⁰⁷ The *Prison Rules 2007* required the Minister for Justice and Equality to appoint a registered medical practitioner as the 'Director of Prison Healthcare Services' but this appointment has not been made.²⁰⁸ While the IPS seeks to secure: 'the same quality and range of healthcare services as that available [...] in the community',²⁰⁹ recent assessments reveal deficiencies.²¹⁰ In 2016, the IoP reported

on unmanageable workloads, the reduction of nursing staff to dangerous levels and the absence of overnight and weekend medical cover.²¹¹ Reports on deaths of prisoners are also illustrative of under-resourced health services in prisons.²¹²

Recommendation:

The Commission recommends the appointment of a Director of Prison Healthcare Services and that a comprehensive health needs assessment is carried out in all prisons.

Prisoners' health and social care needs are different and often more acute than those of the general population.²¹³ Drug treatment programmes vary across prisons,²¹⁴ which is inadequate considering the recognition that 'addiction is a major contributory factor in criminality and prison affords a unique environment in which to support offenders to address their addiction'.²¹⁵ Certain harm reduction measures operating in the community (such as needle exchange

203 While the CPT welcomed the introduction of a complaints mechanism, it recommended that prisoners' trust in the system could be enhanced, *inter alia*, by ensuring the timely investigation of complaints. It drew attention to inconsistencies in the quality of investigations and recommended regular training of investigators on comprehensive and effective investigations, Council of Europe (2015) *CPT Report*.

204 The Minister notes discussions with the Office of the Ombudsman to establish an effective complaints mechanism, amongst other measures. Minister for Justice and Equality, Frances Fitzgerald TD 'Priority Question: Prison Inspections' (questions 77 and 87) *Parliamentary Debates: Dáil Éireann* 30 March 2017 (available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017033000058>).

205 See paras 2.1-2.8 Inspector of Prisons (2016) *Healthcare in Irish Prisons* (available at http://www.inspectorofprisons.gov.ie/en/iop/pages/other_reports).

206 While each prison has a health team, Irish prisons do not have hospital facilities and prisoners are escorted for treatment. An exception to this is the provision of in-reach mental health psychiatric services by the Central Mental Hospital which is funded by the Health Service Executive.

207 See recommendation 5.1 Inspector of Prisons (2016) *Healthcare in Irish Prisons*.

208 See Rule 99(2) of the *Prison Rules 2007 (S.I. No. 252/2007)*.

209 See p 6 Irish Prison Service (2016) *Strategy Statement 2016-2019*.

210 Following its visit in 2014, the CPT described health care in some prisons as being in a 'state of crisis' and called on the State to pursue their efforts to identify an appropriate independent body to undertake a fundamental review of health-care services in Irish prisons, p 7 Council of Europe (2015) *CPT Report*. IHREC's CEDAW Consultations held in 2016 also raised concerns, see IHREC (2017) *CEDAW Submission*. In 2015, the Visiting Committee for Cloverhill prison reported on resource deficiencies in mental health and addiction treatments.

211 See Inspector of Prisons (2016) *Healthcare in Irish Prisons*. See also Inspector of Prisons (2011) *Guidance on Physical Healthcare in a Prison Context*.

212 For example, the treatment of an elderly and ill prisoner, prior to his death in custody, was deemed to be 'inhumane' by the IoP. See Report into the Death of Prisoner C (August 2014). The IoP found a failure in the duty of care towards a prisoner who was not transferred to hospital until he was found unresponsive in his cell. See Report into the Death of Prisoner F (June 2015). The IoP recommended that the provision of health care should not depend on operational considerations, such as the availability of prison staff to escort prisoners to hospital (All reports on deaths of prisoners are available at http://www.inspectorofprisons.gov.ie/en/iop/pages/deaths_in_custody_reports).

213 The Commission notes a higher prevalence of HIV, TB and Hepatitis C, the pervasiveness of drug and alcohol addiction and the high rate of mental health difficulties amongst prisoners. As summarised by the IPRT: 'Ireland's prison population is characterised by mental health issues, addictions, homelessness, poverty, unemployment, educational disadvantage, chaotic family backgrounds and social marginalisation.' See Ms Fiona Ní Chinnéide 'Prisons, Penal Policy and Sentencing: Irish Penal Reform Trust' *Parliamentary Debate: Joint Committee on Justice and Equality*, 8 February 2017 (available at <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/committeetakes/JUJ2017020800002>). See also Penal Reform: Simon Communities of Ireland *Parliamentary Debate: Joint Committee on Justice and Equality*, 29 March 2017 (available at <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/committeetakes/JUJ2017032900000>).

214 See Catherine MacNamara *et al* (2016) *Improving Prison Conditions by Strengthening the Monitoring of HIV, HCV, TB and Harm Reduction*, Report by the Irish Penal Reform Trust (available at <http://www.iprt.ie/contents/2892>). The IPS are seeking to replicate specialist drug treatments available in Mountjoy prison in other prisons with high demand for drug treatment services.

215 A 2015 study found that 60% of prisoners in Cork prison had a recorded history of substance abuse and addiction, see Clarke, A and Eustace, A (2016) *Review of Drug and Alcohol Treatment Services for Adult Offenders in Prison and in the Community* (available at http://www.justice.ie/en/JELR/Pages/Review_of_Drug_and_Alcohol_Treatment_Services_for_Adult_Offenders_in_Prison_and_in_the_Community).

programmes and overdose preventative drugs) are generally unavailable in prisons, despite evidence that prisoners inject drugs.²¹⁶ There are insufficient emphases on treating addiction to benzodiazepines, psychoactive substances and alcohol.²¹⁷ Community-based addiction services should be available for prisoners upon release to seek to ensure continuity of care.²¹⁸

Recommendation:

The Commission recommends increased resourcing for comprehensive and holistic addiction treatments across prisons.

Mental health illness is prevalent across the prison population.²¹⁹ Prison staff representatives recently reported on serious issues arising due to a lack of training and resources,²²⁰ and the limited number of places available to prisoners in the Central Mental Hospital.²²¹ There have been calls for consistent treatments across the prison

216 See p 26 Catherine MacNamara et al. (2016) *Improving Prison Conditions by Strengthening the Monitoring of HIV, HCV, TB and Harm Reduction*, Report by the Irish Penal Reform Trust. Harm reduction measures in prisons include addiction counselling and opioid substitution therapy (OST). 'Of all deaths in Mountjoy Prison between 2009 and 2014, 13 out of 15 had a history of heroin abuse and 6 out of 15 died following suspected illicit drug use' see p 7 Shane Kilcommins (2016) *Deaths of Prisoners while in the Custody of the Irish Prison Service – Developing a Database* (available at <https://irishcriminologyresearchnetwork.files.wordpress.com/2016/10/final-report1.pdf>).

217 See p 9 Clarke, A and Eustace, A. (2016) *Review of Drug and Alcohol Treatment Services for Adult Offenders in Prison and in the Community*. See also IHREC (2016) *CEDAW Consultation*.

218 See Clarke, A and Eustace, A. (2016) *Review of Drug and Alcohol Treatment Services for Adult Offenders in Prison and in the Community*.

219 'Mental health issues are a massive problem. People say that our prisons are our new asylums because we get so many people who have acute mental health problems. We have, at any one time, up to 30 people in prison who are psychotic or are waiting for a place in an acute mental facility. Mental health is a huge issue in prisons', Mr Michael Donnellan (Director of the IPS) 'Business of the Committee' *Parliamentary Debates: Public Accounts Committee*, 2 February 2017 (available at <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/committeetakes/ACC2017020200002>).

220 'Prisoners with mental health issues are more likely to assault staff, particularly if their psychiatric illness is combined with a drug problem. These prisoners require additional supervision resources compared with prisoners who do not present with psychiatric illness,' Mr John Clinton 'Penal Reform: Prison Officers' Association' *Parliamentary Debates: Joint Committee on Justice and Equality*, 22 March 2017 (available at <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/committeetakes/JUJ2017032200002>).

221 An average of 20 prisoners each week are waiting for a transfer, see Minister for Justice and Equality, Frances Fitzgerald TD, 'Priority Questions: Prison Medical Service' *Parliamentary Debates; Dáil Éireann*, 30 March 2017 (available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017033000058>).

system.²²² In 2015, the CPT reported on the detention of persons with psychiatric disorders too severe to be properly cared for in a prison setting and recommended a multi-pronged approach, noting a reliance on pharmacotherapy in some prisons.²²³ The Commission welcomes preliminary work undertaken towards diverting persons with mental health difficulties from the criminal justice system.²²⁴

Recommendation:

The Commission recommends investment in community-based treatments to divert individuals with mental health difficulties from the penal system and investment in a wider range of therapies within prisons.

Use of solitary confinement

A prisoner may be subjected to a 'restricted regime' (19 hours+ lock up) under the *Prison Rules 2007*.²²⁵ The Commission reiterates its view that solitary confinement is a last resort, exceptional measure, which must be

222 The College of Psychiatry (2012) highlighted the need to expand the model of the High Support Unit operating in Mountjoy to other prisons, particularly to meet the mental health treatment needs of female prisoners, *Submission to the Independent Monitoring Group on progress of A Vision for Change* (available at <http://www.irishpsychiatry.ie/wp-content/uploads/2016/12/CPsych1-report-to-IMG-re-vision-in-2011-Final-3-February-2012-1.pdf>). See also the assessment of T3 Associates Inc (2015) *New Connections - A review of the psychology service within the IPS* (available at http://www.irishprisons.ie/wp-content/uploads/documents_pdf/porporino_report.pdf).

223 See p 8 Council of Europe (2015) *CPT Report*.

224 See the Interdepartmental Group to examine issues relating to people with mental illness who come into contact with the criminal justice system, *First Interim Report September 2016* (available at <http://www.justice.ie/en/JELR/Pages/First-Interim-Report-of-the-Interdepartmental-Group-to-examine-issues-relating-to-people-with-mental-illness-who-come-in-contact-with-the-criminal-justice-system>).

225 Grounds for restriction/close supervision under *Prison Rules 2007* include: grounds of order (Rule 62); protection of vulnerable prisoners (Rule 63); medical grounds or based on the risk of harm (Rule 64) and disciplinary grounds (Rule 66).

imposed for as short a time as possible,²²⁶ a view reflected in recommendations of human rights monitoring bodies.²²⁷ The measure must be proportionate to the risk posed, due recognition should be given to the 'undoubted dangers of prolonged segregation on the mental health of a detainee',²²⁸ and there must be ongoing reviews and transparency of implementation.²²⁹ Prison authorities must be accountable to justify the use of solitary confinement and to explain why a less restrictive measures could not achieve the stated objective.²³⁰ In the disciplinary context, the loss of privileges which results in prisoners being held in conditions akin to solitary confinement is unacceptable.²³¹ The Commission welcomes the stated intent of the IPS to review the use of solitary confinement,²³² considering the continued prevalence of this measure.²³³

226 See *amicus curiae* submissions of the Commission in the case of *Daniel McDonnell v The Governor of Wheatfield Prison*, Court of Appeal, Appeal No. 2015/90 (available at <https://www.ihrec.ie/documents/mcdonnell-v-governor-of-wheatfield-prison/>). The High Court found that confinement over 11 months for the safety of the prisoner breached the constitutional right to bodily integrity. The Court of Appeal overturned this decision because *inter alia* the threat to the Applicant was grave, the purpose of the regime was protection, the conditions of detention although harsh were not intolerable, and the Prison Authorities were doing all they could to alleviate conditions (para 105). It would not be constitutionally permissible to keep a prisoner in solitary confinement indefinitely but a high level of threat could justify extremely restrictive regimes on a temporary basis. A substantial margin of appreciation is to be afforded to prison management (para 87). See also *Connolly v Governor of Wheatfield Prison* [2013] IEHC 334 where the Court found that protective segregation for over 23 hours per day over three months 'must be regarded as an exceptional measure'.

227 See pp 29-33 Council of Europe (2015) *CPT Report*.

228 See para 3 of *amicus curiae* submissions in *Daniel McDonnell v The Governor of Wheatfield Prison*. Prolonged solitary confinement is considered in the Mandela Rules to be segregation which exceeds 15 days.

229 The CPT commented on the lack of a clear legal basis for the segregation of some prisoners. It recommended that clear rules and procedures be adopted to govern the segregation of high-risk prisoners, which incorporate a right to be informed of the reasons for the measure, to contest the measure and to have the case reviewed on a regular basis. Council of Europe (2015) *CPT Report*.

230 The Government recently expressed a reluctance to restrict the rights and obligations of prison governors, see Minister of State at the Department of Arts, Heritage, Regional, Rural and Gaeltacht Affairs, Sean Kyne TD 'Prisons (Solitary Confinement) (Amendment) Bill 2016: Second Stage [Private Members]' *Parliamentary Debate: Dáil Éireann* (available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2016120100045>).

231 Council of Europe (2015) *CPT Report*.

232 The IPS commits to: 'reducing the use of solitary confinement to only extreme cases and where absolutely necessary for security, safety or good order reasons and for the shortest possible time' see p 6 IPS (2016) *Strategy Statement 2016-2018*.

233 See the website of the Irish Prison Service which publishes the *Census of Restricted Regimes* at <http://www.irishprisons.ie/index.php/information-centre/statistics-information/census-reports/>. There is a reported increase in prisoners requesting protection on committal to Cloverhill prison as a consequence of gang culture which pervades prisons, see for example p 5 Cloverhill Visiting Committee (2016) *Annual Report 2015* (available at http://www.justice.ie/en/JELR/Cloverhill_Prison_VC_Annual_report_2015.pdf/Files/Cloverhill_Prison_VC_Annual_report_2015.pdf).

Recommendation:

The Commission is concerned that solitary confinement is not currently imposed as an exceptional measure and recommends that any restrictions are subject to a proportionality test along with rigorous standards of review, to secure the imposition of the least restrictive measures.

Solitary confinement of children

Concerns have arisen before the Irish Courts with regard to the segregation of juvenile prisoners in Oberstown in circumstances where juvenile detainees claimed to have been confined to their cell, without respite for a period of weeks, in conditions that they alleged amount to solitary confinement.²³⁴ In its *amicus curiae* function, the Commission outlined the Irish laws and minimum international human rights standards applicable to solitary confinement for minors in detention.²³⁵ A separation policy that amounts to *de facto* solitary confinement should never be imposed on children, and if it is imposed, certain minimum safeguards must apply.²³⁶

Recommendation:

The Commission reiterates that any separation policy that amounts to solitary confinement should never be imposed on children.

234 See IHREC (2017) *Legal Submissions in Applicant v The Director of Oberstown Detention Centre and Another* (available at <https://www.ihrec.ie/documents/applicant-v-director-oberstown-detention-centre-another-jan-2017/>). See also HIQA (2015) which reported that 'single separation was used extensively and frequently for long periods of time', see p 10 *Follow up inspection Report* (available at www.hiqa.ie/system/files?file=inspectionreports/728_15%20June%202015.pdf).

235 See IHREC (2017) *Legal Submissions in Applicant v The Director of Oberstown Detention Centre and Another*.

236 The Commission recalls that 'the imposition of solitary confinement, of any duration, on children constitutes cruel, inhuman or degrading treatment or punishment or even torture'. UN Human Rights Council (2015) *Report of the Special Rapporteur of the UN Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, A/HRC/28/68.

Access to structured and purposeful activities

The *Prison Rules 2007* afford discretion to prison management to secure at least five hours of authorised structured activity for five days each week 'in so far as practicable'.²³⁷ Research focussing on young offenders highlights the repercussions of limited access to structured activities for the goal of rehabilitation.²³⁸ In the context of its CEDAW consultations, the Commission heard that the cancellation of classes and staff shortages were obstacles to the completion of educational courses.²³⁹ Committals for short sentences in women's prisons make it difficult to participate in rehabilitative activities.²⁴⁰ The Commission is concerned that the budget allocation for work training and education supports in the IPS has fallen consistently in the period 2013-2017,²⁴¹ and regrets the temporary closure of the Training Unit Place of Detention.²⁴²

Recommendation:

The Commission recommends that resource allocation should reflect the importance of access to structured activities to counteract the harmful impacts of incarceration.

237 Subject to restrictions, prisoners should 'be allowed to spend as much time each day out of his or her cell or room as is practicable and, at the discretion of the Governor, to associate with other prisoners in the prison.' Prisoners may engage in authorised structured activity (to the extent authorised by the Governor) to minimise reoffending and encourage re-integration in the community (Rule 27 of the Prison Rules 2007).

238 See p 68 Jesuit Centre for Faith and Justice (2016) *Developing Inside – Transforming Prison for Young Adults* (available at <http://www.jesuit.ie/news/featured-news/end-severe-confinement-young-adults-prison/>). Young adults should have 14.5 hours out of cell time to engage in education, training, work, recreation, or group/individual development/therapeutic sessions, and to seek to achieve the 'normalisation' objective, see Mr Eoin Carroll 'Penal Reform: Jesuit Centre for Faith and Justice' *Parliamentary Debates: Joint Committee on Justice and Equality* 22 March 2017 (available at <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/committeetakes/JUJ2017032200002>).

239 See IHREC (2016) *CEDAW Consultation*. See para 3.13 Inspector of Prisons (2013) *Interim Report on Dóchas Centre*.

240 The Inspector of Prisons noted that: 'the time span for any worthwhile intervention is too short' p 11 Inspector of Prisons (2013) *Interim Report on Dóchas Centre*.

241 See Minister for Justice and Equality, Frances Fitzgerald TD 'Written Answers: Prison Education Service' *Parliamentary Debates* 30 March 2017 (<http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017033000058>).

242 While the Commission welcomes a unit which is dedicated for older prisoners this should not come at the loss of the Training Unit, a semi-open facility for male prisoners in Dublin. See website of the Department of Justice and Equality: <http://www.justice.ie/en/JELR/Pages/SP17000136>.

Data and policy deficits in relation to particular groups

The Commission is concerned that recent queries to the Minister for Justice and Equality on the prison population show a lack of comprehensive data on the number of prisoners with a disability,²⁴³ and the number of persons with serious mental health conditions,²⁴⁴ which may inhibit the development of informed policies on, for example, reasonable accommodation and mental health in prisons.

The Commission welcomes publication of the Joint Strategy by the IPS and the Probation Service: *An Effective Response to Women Who Offend* which recognises the potential impact of an effective gender-informed intervention in the complex and multi-faceted area of women's offending.²⁴⁵ However, in the absence of adequate data on gender-specific issues, the appropriate policy approach will remain under-developed.²⁴⁶ The Commission reiterates recent recommendations in relation to women in prisons.²⁴⁷ The Commission highlighted particular difficulties related to health, education, family and private life (including family visiting arrangements,²⁴⁸ the impact of prison on parental-child

243 The IPS addresses individual prisoners who present with a disability on a case-by-case basis, see Minister for Justice and Equality, Frances Fitzgerald TD, 'Written Answers: Prisoner Welfare' (question no. 91) *Parliamentary Debates: Dáil Éireann* 30 March 2017 (available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017033000060>).

244 The IPS does not record data on the aggregate number of persons in its custody who are identified as having serious mental health conditions, see Minister for Justice and Equality, Frances Fitzgerald TD, 'Written Answers: Prisoner Data' (question no. 81) *Parliamentary Debates: Dáil Éireann* 12 April 2017 (available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017033000060>).

245 See p 4 Irish Prison Service / Probation Service (2014) *An Effective Response to Women Who Offend* (available at http://www.irishprisons.ie/images/pdf/women_strat_2014.pdf).

246 Research is required to understand why higher numbers of female prisoners are committed on remand and to monitor, on an ongoing basis, the high levels of committals for non-payment of fines. The Commission welcomes research initiated on foot of recommendations in the *Strategic Review 2014* (p 68). See also p 12 Inspector of Prisons (2013) *Interim Report on Dóchas Centre*. According to the Simon Communities, a significant proportion of homeless prisoners are women, see Penal Reform: Simon Communities of Ireland *Parliamentary Debate: Joint Committee on Justice and Equality* 29 March 2017.

247 These recommendations were made on foot of consultations carried out in both facilities for the detention of women in Ireland. See IHREC (2016) *CEDAW Consultation*.

248 There is a need to maintain family relationships as young children of prisoners may be taken into care. There is a stigma attached to the children of parents in prison. Agencies need to work together to promote contact between offenders and children.

relationships²⁴⁹ and delays in the receipt of postal communications).²⁵⁰

The IPS does not have a dedicated policy for transgender prisoners.²⁵¹ The Commission reiterates its position that such a policy must be aligned with the Yogyakarta Principles.²⁵²

Young people in detention have been the focus of recent Commission recommendations.²⁵³ There are persuasive arguments for treating young adults from 18-24 years as a distinct group in prison.²⁵⁴ The Commission welcomes the recognition of the challenges arising from transition to adulthood and the need for appropriate interventions.²⁵⁵

The Commission draws attention to the overrepresentation of Travellers in Irish prisons and welcomes the commitment by the IPS in its *Strategic Plan 2016-2018* to deliver 'improved services for all Travellers within the system' and to 'examine particular issues faced by female Travellers in custody'. Following recent consultations in prisons for women, the Commission reiterates its recommendation that an action plan, designed in consultation with the Traveller community, be implemented to address the needs of Traveller women in prison.²⁵⁶

The Commission draws attention to recent research which calls for a comprehensive strategy for the management of older persons in prisons to consider their rights in relation to: 'physical and mental health needs, mobility and the physical environment, social care needs, bullying and victimisation, participation in prison programmes and release planning and resettlement'.²⁵⁷

Recommendation:

The Commission recommends that the Irish Prison Service address the significant data and research gaps in the Irish prison population which inhibit the development of informed policies.

249 Such impacts are also highlighted by the IPRT, see p 21 IPRT (2012) *Picking up the pieces: The Rights and Needs of Children and Families Affected by Imprisonment* (available at http://www.iprt.ie/files/IPRT_Children_of_Imprisoned_Parents2.pdf).

250 See generally pp 119-123 IHREC (2017) *CEDAW Submission*.

251 The IPS does commit to setting up: 'a working group to prepare a new policy for LGBT prisoners taking account of the recommendations in the IPRT Report (February 2016)' Irish Prison Service (2016) *Strategy Statement 2016-2019*.

252 The Commission received a submission from the Transgender Equality Network of Ireland (TENI) as part of its CEDAW consultation on trans women having to serve custodial sentences in a male prison. See IHREC (2016) *CEDAW Consultation*.

253 See IHREC (2015) *Submission to the UN Committee on the Rights of the Child* (available at <https://www.ihrec.ie/documents/ireland-and-the-united-nations-convention-on-the-rights-of-the-child-ihrec-submission-to-the-un-crc-december-2015/>).

254 This cohort exhibits a higher rate of recidivism and young adults are more likely to be subject to a restrictive regime and are less likely to avail of incentivised regimes, see Jesuit Centre for Faith and Justice (2016) *Developing Inside – Transforming Prison for Young Adults*.

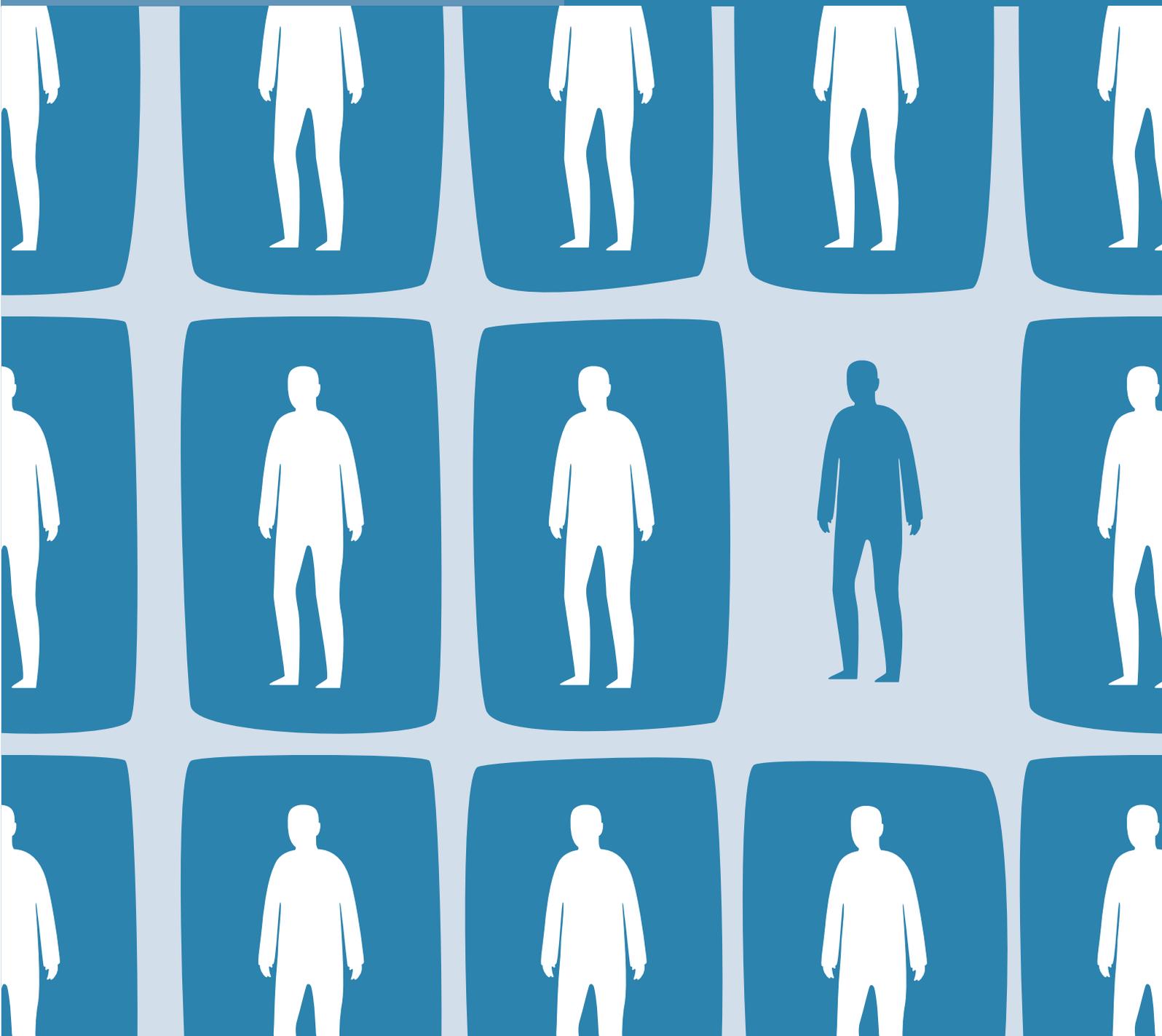
255 See Department of Justice and Equality (2014) *Youth Justice Action Plan 2014-2018* (available at <http://www.ijjs.ie/en/IYJS/Pages/Publications>). The *Strategic Review 2014* also called for immediate consultation on the most appropriate and effective means of targeting 18-21 year olds within the context of current and future resources. See also Part 3 of the General Scheme of the *Criminal Justice (Community Sanctions) Bill 2014* which provides for mandatory probation assessment reports for persons aged 18-21.

256 See IHREC (2017) *CEDAW Submission*.

257 See IPRT (2016) *The Rights and Need of Older People in Prison* (available at http://www.iprt.ie/files/IPRT-Older_People_in_Prison_Report_web.pdf).

ALTERNATIVES TO AND TRANSITIONING FROM CUSTODY (ARTICLE 11 UNCAT)

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High rates of recidivism²⁵⁸ point to failures in the rehabilitative function of penal policy,²⁵⁹ and reflect the 'one-size model' of the Irish prison estate which is dominated by closed prisons.²⁶⁰ The Commission welcomes improvements in integrated offender management programmes through, for example, increased co-operation of the Irish Prison Service and the Probation Service.²⁶¹ Many of the recommendations in the *Strategic Review 2014* were addressed to the latter body.

Legislative developments

The Commission welcomes recognition in the *Strategic Review 2014* that imprisonment should be regarded as a sanction of last resort²⁶² and the recommendation that this principle be incorporated in Statute.²⁶³ The Commission has previously welcomed this focus on 'decarceration'.²⁶⁴

Sentencing in Ireland is guided by the principle of proportionality.²⁶⁵ However, mandatory sentences may be seen to disproportionately impose minimum custodial punishments, in an approach involving a focus on the offence

rather than the offender.²⁶⁶ The Commission notes publication of the *Judicial Council Bill 2017* which proposes to establish a Sentencing Information Committee to collate and disseminate amongst judges information on sentences imposed by the courts.²⁶⁷

Recommendation:

The Commission recommends a review of the proportionality and utility of mandatory sentences.

The Commission welcomes publication of the *Criminal Justice Bill 2016*²⁶⁸ proposing to require the giving of reasons for the granting or refusal of bail together with reasons for the attachment of conditions to bail.²⁶⁹ The Bill seeks to increase the transparency of pre-trial detention²⁷⁰ but does not require reasons to be given in writing.²⁷¹ The Commission notes recommendations that bail conditions be individualised to the accused and further notes the utility of bail supports in assisting with offending-related difficulties.²⁷²

258 The rate of reoffending for prisoners released in 2010 was 45.1%, rising to 68.6% for burglary and related offences, CSO (2016) *Prison Recidivism* (available at <http://www.cso.ie/en/releasesandpublications/er/prir/prisonrecidivism2010cohort/>).

259 According to the *Strategic Review 2014*, penal policy was considered to be: 'without strategic objectives and long-term planning' and that this lack of coherence 'does not serve the public, the community, victims of crime or the offender'.

260 See Mr Eoin Carroll 'Penal Reform: Jesuit Centre for Faith and Justice' *Parliamentary Debates: Joint Committee on Justice and Equality* 22 March 2017.

261 The Community Return Programme (CRP) for example, is considered to be extremely successful according to the Probation Service. Under the CRP, offenders are assessed by the IPS and offered early temporary release in return for supervised community service, see Mr Brian Dack (Probation Service), 'Penal Reform: Discussion (Resumed)' *Parliamentary Debates: Joint Committee on Justice and Equality* 8 March 2017 (available at <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack/nsf/committeetakes/JUJ2017030800002>).

262 In the early 1980's, legislation for community service was grounded in the belief that imprisonment should be employed as a sanction of last resort, but prison numbers nevertheless soared in subsequent years. See *Strategic Review 2014*. See also IPRT (2015) *Position Paper on Bail and Remand*.

263 Progress in this regard appears to be limited to a correspondence exchange between the Minister for Justice and Equality and Chief Justice of the Supreme Court, see 3rd *Implementation Report on the Strategic Review 2014*. The Legislative Programme 2017 shows that consultations are underway in relation to the *Criminal Justice (Sentencing and Parole) Bill*.

264 See p 39 IHREC (Designate)(2014) *ICCP Submission*.

265 See the decision of the Court of Criminal Appeal in *People (DPP) v GK* [2008] IECCA 110.

266 See p 15 IHRC (2007) *Observations on the Criminal Justice Bill 2007* where the former IHRC noted that fixed mandatory sentences would 'unduly fetter the obligation of the judiciary to ensure that the sentence imposed is in line with the constitutional principle of proportionality, that a fair balance is struck between the particular circumstances of the commission of an offence and the relevant circumstances of the person sentenced'. The *Strategic Review 2014* recognised that: 'there are offenders for whom a community based response to their offending behaviour would be a more appropriate sanction and more likely to be effective in reducing the likelihood of reoffending'. The Law Reform Commission noted that 'the presumptive sentencing regimes under the Misuse of Drugs Act 1977 and the Firearms Acts may give rise to inconsistent and disproportionate sentencing' para 4.229 Law Reform Commission (2013) *Mandatory Sentences* (available at <http://www.lawreform.ie/publications/publications-by-year.547.html>).

267 Section 18 of the *Judicial Council Bill 2017*.

268 This Bill was previously titled the *Bail (Amendment) Bill 2016*.

269 Research by the IPRT shows that unconditional bail was not granted in any case in 2015 and recommended that onerous conditions should be reserved to cases involving a flight risk or a significant threat to society, see IPRT (2015) *Position Paper on Bail and Remand*.

270 Section 6 *Bail (Amendment) Bill 2016* proposes that: 'Where an application for bail is made or renewed by a person charged with an offence, a court shall give reasons for its decision to grant or refuse the application including reasons for a decision to impose or vary any conditions to be contained in the recognisance to be entered into by the person.'

271 The IPRT notes the potential for digital recording. See IPRT (2015) *Position Paper 11 on Bail and Remand*.

272 See IPRT (2015) *Position Paper 11 on Bail and Remand*. The IPRT provides comparative analysis of the value of bail supports aimed at preventing re-offending while on bail.

Recommendation:

The Commission recommends that the *Criminal Justice Bill 2016* is progressed to ensure that reasons are provided, in writing or through audio, for the granting or refusal of bail.

The Commission welcomes the recommendation by the *Strategic Review 2014* to make non-custodial sanctions the default position in relation to less-serious offenders, noting the continuing high number of committals for offences carrying sentences of less than one year.²⁷³ Irish law currently obliges judges in sentencing for an offence which carries a maximum one-year prison sentence to *consider* imposing a community service order (or 'CSO').²⁷⁴ Courts are at liberty to impose 12-months' imprisonment, with no requirement to support this decision in writing, resulting in a transparency gap.²⁷⁵ It is understood that the *Criminal Justice (Sentencing and Parole) Bill* will propose the requirement of written reasons for a sentence of imprisonment.²⁷⁶

Recommendation:

The Commission recommends that the State progress the *Criminal Justice (Sentencing and Parole) Bill* to ensure that reasons are provided for the imposition of prison sentences for minor offences.

273 Between 2007 and 2014, the number of persons serving sentences below three months increased four-fold, (from 2,293 to 9,361), see the website of the IPS: http://www.irishprisons.ie/wp-content/uploads/documents_pdf/committal_sentence_length_2007_2014.pdf.

274 See s 3 *Criminal Justice (Community Service)(Amendment) Act 2011*. For offences carrying a sanction of over 12 months, a judge may impose a CSO, but is under no obligation to consider this course of action. Section 4 of the Act sets out the conditions which must be present for judge to impose a CSO.

275 District Court judgments are not published. The Law Reform Commission has recommended requiring District Court judges to provide written reasons for imposing custodial sentences, see LRC (2003) *Report on Penalties for Minor Offences* (available at http://www.lawreform.ie/_fileupload/Reports/Report%20Minor%20Offences.pdf). The Commission notes proposals under the *Criminal Law (Victims of Crime) Bill 2016* and the requirement to provide information to victims of crime on decisions in criminal trials. See section 7 of the *Criminal Law (Victims of Crime) Bill 2016*.

276 This legislation is at an early stage of development and responds to a long-standing commitment to establish the Parole Board on a statutory basis. See the Legislative Programme 2017.

The impact of the *Fines Act 2010* and the *Fines (Payment and Recovery) Act 2014*²⁷⁷ on committals to prison is not yet palpable,²⁷⁸ and this legislation should be continually evaluated to ensure that the desired outcome of not sending people to prison for defaulting on fines is achieved. The *Civil Debt (Procedures) Act 2015* was enacted to provide that creditors may apply to the court for an order enabling either attachment of earnings or deductions from social welfare payments to enforce debts, but this legislation has not yet been commenced.²⁷⁹

Recommendation:

The Commission recommends early commencement of the *Civil Debt (Procedures) Act 2015*.

The potential to expunge minor convictions from offenders' records under the *Criminal Justice (Spent Conviction and Certain Disclosures) Act 2016* was, as enacted, of limited application²⁸⁰ and its operation should be closely monitored to understand the possible need for extension of the law's application.²⁸¹

The Probation Service is reported to be examining an integrated community service with a pilot having been introduced in July 2016²⁸² and the Commission welcomes calls by the Probation Service for a whole-

277 The *Fines (Payment and Recovery) Act 2014* was commenced on 11 January 2016.

278 In 2015, committals for non-payment of fines comprised 50% of total committals, see Ms Fiona Ni Chinnéide 'Prisons, Penal Policy and Sentencing: Irish Penal Reform Trust' *Parliamentary Debate: Joint Committee on Justice and Equality* 8 February 2017.

279 See FLAC (2017) *Govt claims that this legislation brought an end to imprisonment for civil debt, but commencement is required!* Commencement is necessary to ensure the debtor's presence in court upon the making of any instalment order. FLAC reports on the impact of this delay in a particular case, see <https://www.flac.ie/news/2017/03/30/flac-man-unlawfully-jailed-for-failure-to-pay-debt/>.

280 The application of the law is limited in terms of the offences to which it applies and the number of convictions which can be deemed 'spent'. See IPRT (2016) 'Passing of Spent Convictions legislation a historic step for Ireland, but could go much further' [press release] (available at <http://www.iprt.ie/contents/2856>).

281 The difficulties for young persons who seek to have sentences expunged has been highlighted recently, see Kieran Mulvey (2017) *Dublin North East Inner City - Creating a Brighter Future* (available at <http://www.merrionstreet.ie/ImageLibrary/20170218MulveyReport.pdf>).

282 See the 3rd Implementation Report on the *Strategic Review 2014*.

of-Government and whole-of-society approach.²⁸³ The Commission notes proposals under the general scheme of the *Criminal Justice (Community Sanctions) Bill* to modernise the law governing community sanctions and the role of the Probation Service and urges the State to progress this reform without further delay.²⁸⁴

Transparency and consistency of approach

While various schemes for alternative sanctions with rehabilitative objectives are in place,²⁸⁵ their application is sometimes seen to suffer from inconsistency of practice or from inflexibility due to the parameters²⁸⁶ or resourcing²⁸⁷ of the schemes. Restorative justice schemes²⁸⁸ currently operate on a non-statutory basis, which does not promote consistency of application.²⁸⁹ Greater transparency and uniformity in the application of open prison regimes was recommended by the *Strategic Review 2014*. Inconsistencies and a lack of transparency have been identified in the use of earned remission (whereby prisoners can gain early release through good conduct) and in the manner of gaining a right

to temporary release.²⁹⁰ The Commission notes that the Parole Board operates on a non-statutory basis and the Minister for Justice and Equality can currently veto decisions of the Board.²⁹¹

A dearth of information on the prevalence of crime and the profile of prisoners inhibits a comprehensive understanding of the reasons for individuals offending and re-offending. Improved data on the profiles of adults in prison is necessary to develop targeted diversion policies.²⁹²

The Probation Service presents data on individuals supervised in the community, post-custody.²⁹³ However, difficulties arise in analysing trends in post-custody supervision. There is no information 'on either patterns of sentencing involving supervision orders in the courts or the length of supervision orders' and 'very little empirical research on the conditions of supervision or on revocation causes, rates or consequences'.²⁹⁴

Recommendation:

The Commission recommends improvements in transparency and consistency of approach across various alternative sanction programmes and further recommends that policy is grounded in evidence and reliable data.

283 Mr. Vivian Geiran 'Penal Reform: Discussion (Resumed)' *Parliamentary Debates: Joint Committee on Justice and Equality* 8 March 2017.

284 The legislative programme 2017 shows that this legislation is being drafted.

285 The available of community sanctions in the main include: probation supervision, community service orders and suspended sentences with supervision conditions.

286 Persons serving mandatory sentences are statutorily banned from availing of temporary release. The Integrated Sentence Management Scheme (ISM) is open only to those serving a sentence of 12 months or more to the exclusion of those serving minor sentences.

287 For example, funding for a restorative justice programme in the midlands with the Traveller community was reportedly discontinued causing cases to come back before the courts.

288 Restorative Justice is increasingly in use, see Ms Maria McDonald 'Prisons, Penal Policy and Sentencing: Victims' Rights Alliance' *Parliamentary Debates: Joint Oireachtas Committee on Justice and Equality* 1 March 2017 (available at <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/committeetakes/JUJ2017030100002>).

289 Earlier draft proposals for legislation implementing the EU Victims' Directive incorporated provisions regarding restorative justice, however the published Bill did not address restorative justice measures. See IHREC (2017) *Legislative Observations on the Criminal Justice (Victims of Crime) Bill 2016*. In separate legislation, the General Scheme of the *Criminal Justice (Community Sanctions) Bill* proposed to make provision for restorative justice measures in District Court criminal proceedings for minor offences. During prelegislative scrutiny of the General Scheme, submissions raised concerns, *inter alia*, regarding a lack of awareness of restorative justice amongst legal practitioners. Recommendation 14 of the *Strategic Review 2014* recognised the positive impact which restorative justice can have and recommended its extension.

290 The *Strategic Review 2014* recommended: 'greater use of structured temporary release' and 'a consistent and transparent application of provisions, based on fair procedures, permitting offenders to earn remission of up to one third of the sentence imposed if such discretionary remission is to be retained' (Recommendation No. 28).

291 See the recent Parliamentary debate on a Private Members' *Parole Bill 2016* (available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2016061500036?>).

292 Historical analyses of prison population studies have found that most prisoners have a history of social exclusion, including high levels of family, educational and health disadvantage, together with poor prospects in the labour market. According to a 1997 demographic study of the prisoner population of Mountjoy Prisons: Almost 80% of those in the study had left school before the age of 16 with 56% of the sample coming and returning to six districts in Dublin characterised by clusters of high levels of economic deprivation and exclusion. See IPRT (2012) *The Vicious Circle of Social Exclusion and Crime: Ireland's Disproportionate Punishment of the Poor* (available at http://www.iprt.ie/files/Position_Paper_FINAL.pdf). See also Mr Eoin Carroll 'Penal Reform: Jesuit Centre for Faith and Justice' *Parliamentary Debates: Joint Committee on Justice and Equality* 22 March 2017.

293 See Probation Service (2017) *Annual Report 2016* (available at <http://www.probation.ie/EN/PB/sectionpage?readform>).

294 See p 114 Scott-Hayward and Williamson (2016) *Post-custody Supervision in Ireland: From Tickets-of-Leave to Parole* Irish Probation Journal Vol 13, October 2016.

Transitioning from prison to the community

Support upon leaving prison requires an inter-agency approach, with homelessness representing a significant hurdle for offenders transitioning to the community.²⁹⁵ A structured release approach must link prisoners with supports in the community prior to release, particularly in relation to vulnerable prisoners.²⁹⁶ The use of open and step-down facilities for persons transitioning, particularly from longer sentences and who may be vulnerable to institutionalisation, should be improved.²⁹⁷ Stable accommodation is a key element in recovery from addiction and for promoting mental health in the context of the continuum of care and supports.²⁹⁸

Recommendation:

The Commission recommends that the number of prisoners in open or step-down facilities is increased and that further efforts are made to improve structured release supports.

Alternatives to custody and diversion for particular groups

The Commission reiterates its call for the further development of gender-sensitive alternatives to custody,²⁹⁹ recalling that the

295 The Commission welcomes the prioritisation under the 2017 *Homeless Strategy* to improve discharge planning for prisoners. A significant proportion of women who leave the Dóchas Centre had no accommodation or at best temporary accommodation according to the Inspector of Prisons (2013) *Interim report on the Dóchas Centre*.

296 The *Strategic Review 2014* recommended retention of the current system of remission, but called for greater emphasis on a structured and monitored pre-release system of assessment. The Reports of the Inspector of Prisons into the deaths of prisoners on temporary release evidence the vulnerability of prisoners who are released from prison. Community prison link workers need to be integrated better in the system and care plans, shared electronically, should follow prisoners outside of prison, see p 10 Clarke and Eustace (2016) *Review of Drug and Alcohol Treatment Services for Adult Offenders in Prison and in the Community*.

297 See p 81 *Strategic Review 2014*.

298 See Ms Niamh Randall 'Penal Reform: Simon Communities of Ireland' *Parliamentary Debate: Joint Committee on Justice and Equality* 29 March 2017.

299 See IHREC (2017) *CEDAW Submission*. The Inspector of Prisons (2013) reported on limited options in the sentencing of women. The Inspector stated that the diversity of options available in sentencing should include Community Courts. See *Interim Report on Dóchas*. The IPRT submission to the CEDAW consultation drew attention to the fall in numbers of community service orders for women, see IHREC (2016) *CEDAW Consultation*. Alternative community programmes are reported to be underused in relation to women and do not respond to the complex needs of highly vulnerable women, see *Strategic Review 2014*.

majority of women in prison are convicted of non-violent crimes, and that this lower risk element is not reflected in the approach to sanctioning women. The Commission is concerned at reports that female offenders may opt for committal over other forms of community sanction as a form of respite from a 'chaotic lifestyle'.³⁰⁰ The Commission reiterates its recommendation for an open prison for women and welcomes recent commitments in this regard.³⁰¹

Recommendation:

Recalling that women's prisons are the most overcrowded in the State, the Commission calls for further development of women-specific alternatives to custody, progress on the development of an open prison for women and resourcing of community supports (including housing supports) such that committal to prison is not seen as the safest option.

Transferring from the youth criminal justice system to the adult system involves a transition based on the assumption that minors assume a level of understanding and responsibility upon turning 18 years of age which equips them to endure the adult regime. The case has been made for a distinct approach in relation to young adults (18 to 24 years) and the need for extended access to non-custodial options including the Garda Youth Diversion Programme.³⁰² Many young people may not be in a position to avail of the Integrated Sentence Management Scheme as it is only open to those servicing sentences of 12 months or more.³⁰³

300 See p 69 *Strategic Review 2014*. Recurring features of the lives of women prisoners include: physical and sexual abuse, addiction to drugs and alcoholism and the existence of mental health problems.

301 The National Women's Strategy (2017) provides for the opening of a step-down facility from prison for female offenders in 2018 (available at <http://www.genderequality.ie/en/GE/Pages/NationalWomensStrategy>).

302 Recommendation 4 of the *Strategic Review 2014* suggested an initial extension to the 18-21 age-group.

303 See the Jesuit Centre (2016) *Developing Inside – Transforming Prison for Young Adults*.

MENTAL HEALTH REFORM, DEPRIVATION OF LIBERTY AND TREATMENT OF VULNERABLE ADULTS AND CHILDREN (ARTICLES 11 & 16 UNCAT)

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In this section, the Commission reports on the slow progress seen in reforming mental health law together with the inadequate investment in the provision of mental health services. It notes that the *Assisted Decision-Making (Capacity) Act 2015* (the '2015 Act') has not yet been brought into operation.³⁰⁴ The Commission emphasises once again, the urgent need to align the treatment of persons with disabilities with the principles established under the UN Convention on the Rights of Persons with Disabilities (CRPD) which involves full consultation with persons with lived experience.

Recommendation:

The Commission recommends that the *Assisted Decision-Making (Capacity) Act 2015* is brought into operation and that the State ratify the UN Convention on the Rights of Persons with Disabilities without further delay.

In this section, the Commission also addresses the treatment of vulnerable adults and children and the deprivation of liberty in circumstances not within the ambit of mental health legislation, for example in the care of older persons and persons with intellectual disabilities.

Mental health law and policy

The *Mental Health Act 2001* (the 2001 Act) contains obstacles to achieving a mental health service that is human rights compliant. The Commission and former Irish Human Rights Commission have previously called for its reform.³⁰⁵

304 The *Assisted Decision-Making (Capacity) Act 2015* became law on 30 December 2015. Pending the establishment of Decision Support Services, most of the Act has not been commenced. When Section 7 of the Act is commenced, it will (subject to Part 6 of the Act) repeal the *Lunacy Act 1871* and the *Marriage of Lunatics Act 1811*.

305 See, for example: IHRC (2010) *Policy Paper Concerning the Definition of a 'Voluntary Patient' under s.2 of the Mental Health Act 2001* (available at https://www.ihrec.ie/app/uploads/download/pdf/policy_sec2_mentalhealthact_2001_201002.pdf) and IHRC (2011) *Note on the Mental Capacity Bill to Joint Committee on Justice, Defence and Equality* (available at <https://www.ihrec.ie/documents/ihrc-note-on-mental-capacity-bill-to-oireachtas-committee-aug-2011/>).

The 2001 Act came into operation in two stages (in 2002 and 2006). The second stage of commencement occurred in the same year as the publication of *A Vision for Change* ('AVFC'), the national mental health policy.³⁰⁶ Mental Health Reform, a coalition of 57 non-governmental mental health and human rights organisations, noted that AVFC is 'widely accepted to be a progressive and inspiring document that, if fully implemented would see Ireland have a modern approach to the mental health of the population and mental health services befitting the 21st century.'³⁰⁷

The objectives set out in AVFC in 2006 have not been realised, gaps in policy have been identified and the policy now needs to be updated.³⁰⁸ The Mental Health Commission in 2016 noted the combined effect of: 'poor manpower planning, lack of change in professional training schemes, the impact of public service expenditure reductions, delays in the process of recruitment and [...] a shortage of adequately trained staff'.³⁰⁹ While the resources for mental health services have increased, they have not reached the levels envisaged in the AVFC.³¹⁰ The Commission has previously called for the recruitment of staff for community mental health teams.³¹¹ The former IHRC recommended that consideration be given to placing core elements of AVFC on a statutory footing, to ensure that services are

306 Government of Ireland (2006) *A Vision for Change: Report of the Expert Group on Mental Health Policy*, Dublin: Stationery Office (available at <http://www.hse.ie/eng/services/Publications/Mentalhealth/VisionforChange.html>). This was a ten-year strategy which has now come to an end.

307 Mental Health Reform (2012) *Guiding A Vision for Change – Agenda for Action* (available at <https://www.mentalhealthreform.ie/docs/Guiding-A-Vision-for-Change-Agenda-for-Action.pdf>).

308 AVFC does not include a gender dimension and does not address maternal mental health. Further gaps arise in the area of dual diagnosis with an addiction or substance misuse. See Dr Shari McDaid 'UN Convention on the Rights of Persons with Disabilities: Discussion' *Parliamentary Debate: Joint Committee on Health* 17 May 2017 (available at <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/committeetakes/HEJ2017051700002>).

309 See p 7 Mental Health Commission (2016) *Annual Report 2015 Including Report of the Inspector of Mental Health Services* (available at http://www.mhcr.ie/Publications/Annual_Reports/). Hereafter cited as MHC (2016) *Annual Report 2015*.

310 '[T]he [Health Service Executive's] 2015 Mental Health Division Plan states that the services were operating with a staffing level of circa 75% of the Vision for Change recommended number' p 6 MHC (2016) *Annual Report 2015*.

311 See IHREC (2015) *Report to UN Committee on Economic, Social and Cultural Rights on Ireland's third periodic review* (available at <https://www.ihrec.ie/documents/ireland-and-the-ireland-and-the-international-covenant-on-economic-social-and-cultural-rights/>). Hereafter cited as IHREC (2015) *ICESCR Submission*.

being delivered in a manner that is 'available, accessible, acceptable and of a commensurate quality'.³¹² Recalling the deficiencies in implementing AVFC,³¹³ the Commission considers that implementation of national policy should be resourced, time-bound and that independent monitoring should resume in a robust manner.³¹⁴

In 2014, the *Expert Group on the Review of the Mental Health Act 2001* (the 'Expert Group Review') made comprehensive recommendations to amend the legislative framework,³¹⁵ but these recommendations have not yet been translated into legislative proposals.³¹⁶ According to the Expert Group Review, the 2001 Act 'does not reflect the significant changes in thinking about the delivery of mental health services that have taken place in the last ten years, such as the shift to 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 service'.³¹⁷ The Commission has previously called for implementation of the recommendations

of the Expert Group Review.³¹⁸ According to the Mental Health Commission, the required cultural shift 'from a linear medical model towards a more holistic bio-psychosocial one' is still needed and there is a 'serious deficiency in the development and provision of recovery-oriented mental health services'.³¹⁹

Recommendation:

The Commission recommends that reform of the *Mental Health Act 2001* be progressed. The Commission further recommends that implementation of a renewed national policy on mental health be resourced, time-bound and independently monitored. The Commission reiterates its recommendation that the State prioritise the recruitment of staff for community mental health teams.

The Commission recalls the recommendations in AVFC that advocacy should be available as of right to all service users all over Ireland.³²⁰ The Commission welcomes the recent commitment by the Health Service Executive to 'incorporate and take action on the views of service users, family members and carers, thereby, making them central to the design and delivery of mental health services',³²¹ in line with the recommendations set out in *Partnership for Change*.³²²

312 See p 12 IHRC (2011) *Submission to the Department of Health on the Proposed Review of the Mental Health Act, 2001* (available at <https://www.ihrec.ie/ihrc-calls-for-robust-human-rights-safeguards-in-revised-mental-health-legislation/>).

313 Independent Monitoring Group for A Vision for Change (2012) *A Vision for Change – the Report of the Expert Group on Mental Health Policy: Sixth Annual Report on Implementation 2011* (available at <http://health.gov.ie/blog/publications/sixth-annual-report-of-the-independent-monitoring-group-for-a-vision-for-change-the-report-of-the-expert-group-on-mental-health-policy-july-2012/>).

314 The Mental Health Commission has drawn attention to the 'absence of any independent monitoring of A Vision for Change policy' p 6 MHC (2016) *Annual Report 2015*. An Independent Monitoring Group produced six reports on the implementation of A Vision for Change. It last reported in 2012 and upon its lapse a successor body was not appointed.

315 The *Report of the Expert Group on the Review of the Mental Health Act 2001* made 165 recommendations for reform and the Commission welcomes the commitment in the State Report that this represents a 'Roadmap' for amendments to the *Mental Health Act 2001* (The *Report of the Expert Group* is available at <http://health.gov.ie/blog/publications/report-of-the-expert-group-review-of-the-mental-health-act-2001/>).

316 The *Department of Health Strategy 2016–2019* states that a General Scheme of a Bill to amend the 2001 Act is to be published in 2017 (at p 15 of the *Strategy*, available at: <http://health.gov.ie/blog/publications/statement-of-strategy-2016-2019/>). The Minister of State at the Department of Health reported to the Irish parliament on 2 May 2017 that the final text of the changes is expected to be 'significantly progressed' by the end of the year (Minister of State at the Department of Health, Helen McEntee TD, 'Mental Health (Amendment) (No. 2) Bill 2017: Second Stage [Private Members]', *Parliamentary Debates: Dáil Éireann* 2 May 2017 (available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebback.nsf/takes/dail2017050200057>).

317 See p 7 *Report of the Expert Group on the Review of the Mental Health Act 2001*.

318 IHREC (2015) *ICESCR Submission*.

319 See pp 6–7 MHC (2016) *Annual Report 2015*.

320 See recommendation 3.2 of *A Vision for Change*.

321 See p 8 Health Service Executive, *Mental Health Division Operational Plan 2017* (available at <http://www.hse.ie/eng/services/publications/serviceplans/Service-Plan-2017/Operational-Plans-2017/Mental-Health-Operational-Plans-2017.pdf>).

322 The HSE established the Mental Health Reference Group to make recommendations on the structures and mechanisms for service user, family member and carer engagement. HSE Mental Health Division (2016) *Partnership for Change: Report of the Mental Health Reference Group* (available at <http://www.hse.ie/eng/services/news/media/pressrel/partnerchange.html>).

Operation of the *Mental Health Act 2001*

Under the 2001 Act, 'best interests' is the 'principal consideration' in making decisions on the care or treatment of a person, with due regard to the right of the person to dignity, bodily integrity, privacy and autonomy.³²³ Without further definition of what is understood as 'best interests', the Irish Superior Courts have, in particular cases, adopted a paternalistic approach to assessing the treatment of persons under the 2001 Act,³²⁴ and determining whether a person is lawfully detained. For example, in 2009 the Supreme Court was guided by the 'overall scheme and paternalistic intent of the legislation' when it was called to interpret 'voluntary patient', and procedural defects in the admission of a patient.³²⁵ The former IHRC in exercising its *amicus curiae* function in a different case, emphasised the importance of rigorously enforcing safeguards and argued that 'paternalism cannot be given such a broad application as to defeat the significant recognition given to the patient's human rights' under the 2001 Act.³²⁶ The *Expert Group Review* concluded that the approach under the 2001 Act was at the opposite end of the scale from the autonomy principle and was not CRPD-compliant.

Following the approach advocated in relation to capacity legislation,³²⁷ the Commission calls for the 2001 Act to be amended to include guiding principles based on human rights, to

³²³ Section 4 of the *Mental Health Act 2001*.

³²⁴ See for example *E.H. v Clinical Director of St. Vincent's Hospital* [2009] IESC 46 [2009] 3 I.R. 774. The *Expert Group on the Review of the Mental Health Act* noted that the paternalistic interpretation served to continue the approach of the courts prior to the enactment of the 2001 Act, which is not consistent with the *Vision for Change Strategy* and the CPRD.

³²⁵ The case of *E.H. v Clinical Director of St. Vincent's Hospital* [2009] IESC 46 [2009] 3 I.R. 774 related to a person who was a voluntary patient for 12 days but who did not have capacity to consent. According to Keith Walsh, this decision has had a chilling effect on subsequent High Court judgments (Keith Walsh (2017) 'Best Interests – Some Perspectives', paper presented at: Mental Health Law, Capacity Law and Deprivation of Liberty Conference, 8 April 2017, School of Law, University College Cork, available at <http://www.ucc.ie/law/docs/mentalhealth/conferences/2017/mhconf2017.shtml>).

³²⁶ IHRC (2012) *P.L. and The Clinical Director of St Patrick's University Hospital and Dr Séamus O'Ceallaigh: Outline Submissions of the Human Rights Commission*, (available at <https://www.ihrc.ie/documents/ihrc-submission-p-1-v-clinical-director-spi-2/>).

³²⁷ IHRC (2014) *IHRC Observations on the Assisted Decision-Making (Capacity) Bill 2013*.

bring the law into line with CRPD principles, and to ensure that persons are not deprived of liberty on the basis of a paternalistic test.

Recommendation:

The Commission recommends that in reviewing the *Mental Health Act 2001* 'best interests' as the principal consideration should be replaced with a list of guiding principles to promote personal autonomy and the 'will and preferences' model, in order to adequately reflect the presumption of capacity.

The definition of a 'voluntary patient' under the 2001 Act

The ambiguities surrounding the definition of a 'voluntary patient' and the process involved in re-designating a voluntary patient as having an 'involuntary' status have not been resolved by the State since Ireland's first examination under the Convention.³²⁸

The former IHRC expressed concern in 2010 that the definition of a 'voluntary patient' under the 2001 Act does not incorporate any requirement to assess consent or capacity.³²⁹ A 'voluntary patient' under the 2001 Act is a person who 'is not the subject of an admission order or a renewal order'.³³⁰ This definition of a 'voluntary patient' does not capture a person who has not consented to an admission either because they do not have capacity to do so, or they have not been supported in making that decision. Therefore, patients who may be assessed as 'compliant incapacitated patients'³³¹ may be captured within the definition of a 'voluntary patient' and consequently do not have access to the

³²⁸ Para 28 *Concluding observations of the Committee against Torture: Ireland*, CAT/C/IRL/CO/1 (2011) available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fIRL%2fCO%2f1&Lang=en.

³²⁹ IHRC (2010) *Policy Paper concerning the Definition of a 'voluntary patient' under s. 2 of the Mental Health Act 2001*.

³³⁰ Section 2(1) of the 2001 Act.

³³¹ *H.L. v United Kingdom* (App. No. 45508/99) 5 October 2004 (<http://hudoc.echr.coe.int/eng?i=001-66757>).

periodic independent review by the Mental Health Tribunals, which apply to involuntary admissions to psychiatric units.³³² In this way, important safeguards are not afforded to these patients, who fail to object to admission, and whose right to liberty may be violated. The Commission reiterates its concern at the absence of any procedural protections afforded to incapacitated compliant patients, and to persons who may be assigned a 'decision-making representative' under the 2015 Act.

For the voluntary status of a patient to be truly genuine, consent must be informed. The Commission endorses the recommendation of the *Expert Group Review* that voluntary patients should be fully informed of their rights regarding consent or refusal of treatment and that it is explicitly set out in law that a voluntary patient has a right to leave an approved centre at any time.

Recommendations:

The Commission recommends that the State amend the definition of 'voluntary patient' under the *Mental Health Act 2001* to capture only those persons who have capacity to make a decision on admission to an approved centre and who have genuinely consented to their admission and continue to consent to same. Consent of patients should be fully informed consent.

The Commission underlines the importance of fully commencing the *Assisted Decision-Making (Capacity) Act 2015* to empower individuals to exercise the full extent of their decision-making capacity.

The Commission recommends that where persons are considered not to have capacity to make medical decisions and are considered to be in need of psychiatric treatment, they should be admitted as involuntary patients and should avail of all adjacent protections.

³³² The former IHRC also noted that wards of court may be deprived of protections afforded to involuntary patients. The wards of court system will be abolished under the 2015 Act once it is made fully operational. Persons who are wards of court will have their case reviewed and will have access to the Decision Support Service and may be assigned a decision-making representative. Pending commencement of the 2015 Act, wards of court are still subject to the *Lunacy Regulation (Ireland) Act 1871*.

Re-grading from voluntary to involuntary status

The process for reclassifying a patient from voluntary to involuntary status has not changed in practice since the State's first examination. It continues to involve an initial 24-hour period of detention followed by an admission order.³³³

The Commission is concerned at reports to the *Expert Group Review* that the re-classifying procedure might be used to coerce patients to remain as voluntary – that is, that an expression of desire to leave an approved centre may be countered with a threat to invoke the re-classification procedure.³³⁴ Such reports emphasise the importance of safeguarding, informing and providing assurances to voluntary patients that they are at liberty to leave an approved centre.

The *Expert Group Review* recommended incorporating additional safeguards in the reclassification process including a requirement to notify the Mental Health Commission during the initial 24-hour detention period. It further recommended that during the initial 24-hour detention period, an Authorised Officer should consult with the patient and determine whether or not there should be an application for involuntary admission. The power to reclassify patients should be used exceptionally and the same protections and considerations should apply to an involuntary admission decision made in the community as that made in an approved centre under the reclassifying process.³³⁵

333 Section 23 of the 2001 Act provides that where a voluntary patient expresses a desire to leave an approved centre, and a consultant psychiatrist, registered medical practitioner or nurse of the approved centre forms the opinion that they are suffering from a mental disorder, that person may be detained for up to 24 hours. Within 24 hours, if an additional consultant psychiatrist determines that the person is suffering from a mental disorder, an admission order can be made under Section 24 of the 2001 Act.

334 See pp 53–56 *Report of the Expert Group on the Review of the Mental Health Act 2001*.

335 See pp 55–56 *Report of the Expert Group on the Review of the Mental Health Act 2001*.

Recommendation:

The Commission recommends that the State consider the process of reclassifying a patient from voluntary to involuntary status, incorporating safeguards to ensure that the power to reclassify patients is invoked in exceptional circumstances.

Involuntary admissions

Applications for recommendations regarding involuntary admissions can be made by a family member, a member of An Garda Síochána, an Authorised Officer or any other person (subject to certain qualifications).³³⁶ It was envisaged that Authorised Officers under the 2001 Act would be available to provide a seven-day service, but resourcing has been inadequate in this regard.³³⁷ A high number of applications for involuntary admissions involve situations where the family and Gardaí are the primary applicants.³³⁸ This points to a need to review of the operation of the Authorised Officer Scheme.³³⁹

Recommendation:

The Commission recommends that a review of the system of Authorised Officers be undertaken to ensure that all community-based interventions are considered prior to invoking the process of involuntary admission.

A registered medical practitioner makes a recommendation for involuntary admission where, following an examination he or she is satisfied that the person is suffering

336 Section 9 of the 2001 Act.

337 See p 34 *Report of the Expert Group on the Review of the Mental Health Act 2001*.

338 In 2015, 70% of involuntary admissions were on foot of an application by a family member or a member of An Garda Síochána, see p 47 MHC (2016) *Annual Report 2015*, Table 12.

339 See pp 36–37 *Report of the Expert Group on the Review of the Mental Health Act 2001* and p 7 MHC (2016) *Annual Report 2015*.

from a mental disorder.³⁴⁰ The Commission is concerned at reports of a case where an examination comprising an informal conversation with a patient constituted a valid examination.³⁴¹ The Commission notes the decision of the High Court that a 'complete failure' to examine the patient will render a subsequent admission order invalid.³⁴² However, this case marks a high threshold³⁴³ and points to the need for greater transparency including clear certification in relation to the examination.³⁴⁴

Recommendation:

The Commission recommends that the State review protections surrounding the examination prior to involuntary admission in order to ensure that inadequate examinations cannot ground a deprivation of liberty.

Involuntary admissions are reviewable by the Mental Health Tribunal and an applicant can appeal a renewal order affirmed by the Mental Health Tribunal to the Circuit Court. A recent case examined the process for challenging detention under the 2001 Act against the protections afforded under the European Convention on Human Rights to have the lawfulness of detention reviewed at *reasonable intervals*.³⁴⁵ Despite safeguards afforded under the 2001 Act, the High Court held that 'in permitting the detention of a person suffering from a mental disorder for a period of 12 months, without the opportunity

to test the lawfulness of that detention (other than through an appeal to the Circuit Court at the very beginning of the period) is not [...] compatible with Article 5(4) of the [European Convention on Human Rights]'.³⁴⁶

Recommendation:

The Commission recommends that the 2001 Act be amended to secure the right to review detention at reasonable intervals in line with the jurisprudence of the European Court of Human Rights on Article 5(4) of the European Convention of Human Rights.

The decisions of the Mental Health Tribunals are not published. The *Expert Group Review* recommended that revised legislation should include a mechanism to allow information in relation to decisions to be published in anonymised form that ensures patient confidentiality and allows such decisions to be available to the Mental Health Commission and the public.³⁴⁷

Recommendation:

The Commission recommends that decisions of the Mental Health Tribunals be made available on an anonymised basis to further consistency and clarity in the development of the jurisprudence.

³⁴⁰ Section 10 of the 2001 Act.

³⁴¹ *MZ v Khattak* [2008] IEHC 262, [2009] 1 I.R. 417. See also: Niall Nolan (2017) 'A Magnificent Grey – Some Notes on Mental Health Law in Ireland', paper presented at: Mental Health Law, Capacity Law and Deprivation of Liberty Conference, 8 April 2017, School of Law, University College Cork, available at <http://www.ucc.ie/law/docs/mentalhealth/conferences/2017/mhconf2017.shtml>.

³⁴² *S.O. v Clinical Director of the Adelaide and Meath Hospital of Tallaght* [2013] IEHC 132 (available at <http://courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/ffb24b69bc83e42480257b4b005314f9>).

³⁴³ In the particular case, while the GP had knowledge of the patient's prior history and deterioration in behaviour, the GP conducted no examination prior to making the recommendation for detention.

³⁴⁴ The Expert Group Review recommended that the medical practitioner must clearly certify how he or she came to the view that the person is suffering from a mental illness and how the criteria for detention were being met, see p 38 Report of the Expert Group on the Review of the Mental Health Act 2001.

³⁴⁵ See *M.H. v United Kingdom* (Application No. 11577/06).

³⁴⁶ See para 145 of *A.B. v The Clinical Director of St Loman's Hospital and Ors* (High Court, Unreported, 3 May 2017).

³⁴⁷ See pp 36–37 Report of the Expert Group on the Review of the Mental Health Act 2001 and p 94 MHC (2016) Annual Report 2015.

Involuntary treatment, restraint and seclusion

The Commission welcomes the deletion of the 'unwilling' criteria from the categories of patients who may be subject involuntarily to electro-convulsive therapy (ECT) and from the criteria under which medication may be administered involuntarily,³⁴⁸ but notes that treatments can still be administered in cases where persons are 'unable' to give consent under the 2001 Act.³⁴⁹

The Commission notes that a combination of legislation, regulations, rules, standards, guidance, codes and policy apply to the use of restraint in various types of institutions and contexts, overseen by a number of regulatory bodies, and with differing legal statuses.³⁵⁰ The Commission is concerned that although these provisions contain much that reflects human rights standards on restraint, notably the CPT *Revised standards on the means of restraint in psychiatric establishments for adults*,³⁵¹ those standards are not reflected consistently in all of the provisions relating to restraint. The Commission is concerned that the principles of legality, necessity, proportionality and accountability should be incorporated into all relevant standards and must be applied in practice.

The Commission is concerned that the number of provisions, their differing legal status, and differences in the integration of human rights standards impede clarity and inhibit consistent understanding by all relevant persons,

including professionals; residents and patients; and patients' advocates, representatives, parents or guardians.

The Commission notes that regulatory bodies have identified significant shortcomings in the application by institutions of the relevant rules or standards. The Mental Health Commission reported that in 2015 only 58% of approved centres were compliant with the *Code of Practice on the Use of Physical Restraint* and only 74% were compliant with the statutory rules governing the use of mechanical constraint.³⁵²

HIQA carries out inspections in various settings (including nursing homes and residential centres for persons with disabilities) and has established that chemical restraint is practiced.³⁵³ The Chief Executive Officer of HIQA in a media interview cited the overuse of chemical restraint as a concern in relation to people with disabilities in residential care.³⁵⁴

Upon inspecting secure units, designed for persons with highly specialised care needs, HIQA has found 'evidence to suggest extensive use of environmental restraints such as locked doors and high fences surrounding centres'. HIQA has found that there are 'significant challenges in applying the current regulations to these kinds of environments', considering the complex, high-level support needs of residents who often have dual diagnosis which may include psychiatric care needs.³⁵⁵

348 Section 2 of the *Mental Health (Amendment) Act 2015*.

349 See ss 59–60 of the 2001 Act.

350 Primary legislation includes sections 44 and 62 of the *Assisted Decision-Making Act 2015*; regulations include the *Health Act 2007 (Care and Support of Residents in Designated Centres for Persons (Children and Adults) with Disabilities Regulations 2013*, SI no. 367 of 2013 and the *Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2013* SI no. 415 of 2013; rules include *Rules Governing the Use of Seclusion and Mechanical Means of Bodily Restraint*, issued by the Mental Health Commission in 2009, standards include *National Standards for Residential Care Settings for Older People in Ireland 2016* and *National Standards for Residential Services for Children and Adults with Disabilities 2013* issued by the Health Information and Quality Authority; guidance includes *Guidance for Designated Centres: Restraint Procedures* issued by HIQA in 2013; a key policy referred to in SI 415 of 2013 and the HIQA *Guidance* is Department of Health (2011) *Towards a Restraint Free Environment in Nursing Homes*.

351 CPT (2017) *Revised standards on the Means of restraint in psychiatric establishments for adults* CPT/Inf(2017)6 (available at <http://www.coe.int/az/web/cpt/-/cpt-publishes-standards-on-means-of-restraint-in-psychiatric-establishments-for-adults>).

352 See pp 25 and 27 Mental Health Commission (2016) *Annual Report 2015*, Figure 13 and Table 3 (available at http://www.mhcirl.ie/Publications/Annual_Reports/).

353 For example, see HIQA (2015) *Compliance Monitoring Inspection report: Bushy Park Nursing Home, Nenagh Road, Borrisokane, Tipperary* (18 February 2015): 'On the previous inspection it was identified that the practice of administering chemical restraint was not in line with National Policy. Despite an undertaking to have this rectified by 1st August 2014, the inspector found that the centre's practice in this regard had not changed [...] The inspector found that where chemical restraint had been administered, there was no record as to the rationale for same, there was no note in the daily progress chart that it had been administered.' (available at <https://www.hiqa.ie/areas-we-work/find-a-centre/bushy-park-nursing-home>).

354 Maeve Sheehan (2015) 'Health watchdog shines cold light on the dark side of disability care', *Sunday Independent*, 30 August 2015.

355 See pp 15–16 HIQA (2017) *Exploring the regulation of health and social care services – Disability Services* (available at <https://www.hiqa.ie/reports-and-publications/key-reports-and-investigations/exploring-regulation-health-and-social-1>).

Recommendation:

The Commission reiterates its concerns about the compliance of approved centres with provisions governing the use of restraint. The Commission calls on the State to incorporate the Revised CPT standards on restraint into existing provisions. The Commission recommends that the Mental Health Commission, the Health Information and Quality Authority, and the Department of Health review the suite of provisions on restraint to improve consistency and clarity.

Treatment of children

The Commission reiterates its continuing concern regarding the admission of children to adult psychiatric units, including the unmet demand for services to treat mental health difficulties in children. 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 in child friendly facilities. Approximately 60% of these young patients remained in an adult facility for more than three days, while 21% were there for more than 10 days.³⁵⁶ Although on a smaller scale, the practice continues.³⁵⁷

In 2016, the UN Committee on the Rights of the Child raised concerns regarding the lack of comprehensive legislation on children's consent to and refusal of medical treatment, in particular mental health-care services, the admission of children to adult psychiatric wards owing to inadequate availability of mental health-care facilities for children, long waiting lists for access to mental health support and

insufficient out-of-hours services for children and adolescents with mental health needs, in particular eating disorders.³⁵⁸ The UN Committee also highlighted the lack of a child-focused advocacy and information service for children with mental health difficulties.³⁵⁹

A Vision for Change recommended 99 multi-disciplinary teams for children and adolescents (based on data from Census 2006). Current provision is 66 multi-disciplinary teams.³⁶⁰ Census 2016 shows an increase of 15% in the population aged 17 years or younger since 2006. Based on the recommended need identified in *A Vision for Change* and the change in population that has occurred since it was published, the number of multi-disciplinary teams for children and adolescents is at a level that is about 41% below what it ought to be. Concern was expressed in the Irish Parliament in April 2017 that no emergency child and adolescent mental health services were available in Cork, the second largest city in Ireland, because of a lack of staff.³⁶¹ In May 2017, a children's mental health facility in Dublin announced the closure of 11 of its 22 beds due to staff shortages.³⁶²

358 25% of child and adolescent admission for girls related to eating disorders. *Irish Psychiatric Units and Hospitals Census 2016*, at table 6.3 (available at <http://www.hrb.ie/publications/hrb-publication/publications//724/>).

359 The UN Committee on the Rights of the Child made recommendations that the State:

- Enact legislation that explicitly and comprehensively provides for children's consent to and refusal of medical treatment, and ensure that the legislation is in line with the objectives of the Convention and encompasses clear recognition of the evolving capacities of children;
- Undertake measures to improve the capacity and quality of its mental health-care services for children and adolescents; in doing so, the State party should prioritize strengthening the capacity of its mental health-care services for inpatient treatment, out-of-hours facilities and facilities for treating eating disorders;
- Consider establishing a mental health advocacy and information service that is specifically for children and accordingly accessible and child-friendly.

See para 54 UN Committee on the Rights of the Child (2016) *Concluding observations on the combined third and fourth periodic reports of Ireland*, CRC/C/IRL/CO/3-4 (available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fIRL%2fCO%2f3-4&Lang=en).

360 Minister for Justice and Equality, Frances Fitzgerald TD 'Leader's Questions', *Parliamentary Debates: Dáil Éireann* 13 April 2017 (available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017041300015>).

361 Pat Buckley TD, 'Mental Health Serviced', *Parliamentary Debates: Dáil Éireann* 12 April 2017 (available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017041200033>).

362 Micheál Martin TD, 'Leaders' Questions', *Parliamentary Debates: Dáil Éireann* 23 May 2017 (available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017052300003>).

356 See p 1 Inspectorate of Mental Health Services (2013) *Child and Mental Health Services 2013: Admission of Children to Adult Units 2013* (available at http://www.mhcirl.ie/File/IRs/tr2013_camhschildtoadults.pdf).

357 For example, see p 62 Inspector of Mental Health Services (2015) *Approved Centre Inspection Report: Sliabh Mis Mental Health Admission Unit, Kerry General Hospital, Tralee* (available at http://www.mhcirl.ie/Inspectorate_of_Mental_Health_Services/AC_IRs).

Recommendations:

Recalling its previous recommendations, the Commission reiterates that all children who are admitted to psychiatric wards should be placed in child-friendly facilities which are age-appropriate.

The Commission recommends that revision and assessment of child-relevant aspects of *A Vision for Change* should be underpinned by principles set out in the Convention on the Rights of the Child. The Commission further endorses the recommendations of the UN Committee on the Rights of the Child in this regard and urges the State to implement its recommendations.

Treatment of persons with intellectual disabilities

Irish law defines 'mental disorder' as: mental illness, severe dementia or significant intellectual disability.³⁶³ Detention of persons with an intellectual disability in psychiatric institutions is inappropriate.³⁶⁴ The Commission calls on the State to delete the reference to 'significant intellectual disability' and 'severe dementia' as per the recommendation of the Expert Group on the Review of the Mental Health Act.³⁶⁵

The proportion of in-patients with a primary diagnosis of intellectual disability in Irish psychiatric units has fallen. However, the Irish Psychiatric Units and Hospital Census 2016 reported that of the 2,480 patients resident in Irish psychiatric units and hospitals on 31 March 2016, 5% had an intellectual disability (as a primary diagnosis) and 93% of those with a diagnosis of intellectual disability (122) had been

³⁶³ See s 3 of the 2001 Act.

³⁶⁴ Council of Europe (2015) *CPT Report*.

³⁶⁵ See p 7 *Report of the Expert Group on the Review of the Mental Health Act 2001*.

hospitalised for one year or more on census night.³⁶⁶

A recent case highlighted the insufficient resourcing of disability services, which resulted in a person being detained in an acute psychiatric unit involuntarily for extended periods.³⁶⁷ It was argued by the applicant that the psychiatric condition which grounded the initial admittance was resolved and continued involuntary treatment in an acute psychiatric unit resulted from the unavailability of disability services, and supported care in the community.

Recommendation:

The Commission recommends that a primary diagnosis of an intellectual disability should not be equated with mental health difficulties in law and persons with intellectual disability should not be treated in psychiatric care settings.

Regulation of deprivation of liberty in care settings

The Commission recalls CPT recommendations in 2002 regarding the *de facto* detention of so-called voluntary patients with an intellectual disability and recommended an urgent review of the legal situation, incorporating an adequate range of safeguards.³⁶⁸ In 2010, the CPT regretted that no such legal framework had been developed.³⁶⁹

³⁶⁶ See Health Research Board (2016) *Irish Psychiatric Units and Hospitals Census 2016*.

³⁶⁷ *A.B. v The Clinical Director of St Loman's Hospital and Ors* (High Court, Unreported, 3 May 2017).

³⁶⁸ Para 94 *Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 28 May 2002*, CPT/Inf (2003) 36 (available at <http://hudoc.cpt.coe.int/eng?i=p-irl-20020520-en-31>).

³⁶⁹ See para 152 *Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 25 January to 5 February 2010*, CPT/Inf (2011) 3 (available at <http://hudoc.cpt.coe.int/eng?i=p-irl-20100125-en-39>).

In 2016, the Commission made a submission to Government³⁷⁰ regarding the absence of legislation on the deprivation of liberty in settings outside of mental health treatments: in nursing homes, in care and residential accommodation, in the community, and in individuals' own homes³⁷¹ where the level of supervision and control is such that the person cannot exercise their own free will.

At the time of writing the proposed draft legislation to address this gap has been published.³⁷² However, provisions to address deprivation of liberty were not included in the Bill as published and it is intended to introduce an amendment containing those provisions at a later stage of the legislative process.

The Commission urges the State to consider the human rights standards applicable to the deprivation of liberty in developing safeguards for persons deprived of their liberty, in particular to comply with Article 14 CRPD. However, the Commission notes that the Government has indicated that it intends to make a declaration regarding Article 14 CRPD when it ratifies the CRPD.³⁷³ In order for consultation to take place, the Commission recommends publication of the relevant provisions on deprivation of liberty at the earliest stage possible followed by full consultation on the detail of the safeguards proposed, including consultation with persons who have lived experience.

Recommendation:

The Commission recommends that in order to ensure full compliance with Article 14 CRPD the absolute prohibition on the detention of persons on the basis of disability should underpin the proposed change in law.

The Commission recommends that the proposed change in law guarantees the right of persons with disabilities who are arbitrarily or unlawfully deprived of their liberty to have their detention reviewed, including the right of an appeal and to redress and reparation.

The Commission emphasises that community-based care is the preferred policy option which should be underpinned by clear legislative entitlement and dedicated funding to ensure that this legislative entitlement is delivered. The Commission reiterates its recommendation that the State move away from institutional living and ensure that persons with disabilities are adequately supported to live in the community.

370 IHREC (2016) *Observations on the General Scheme of the Equality / Disability (Miscellaneous Provisions) Bill* (available at <https://www.ihrec.ie/documents/observations-general-scheme-equality-disability-miscellaneous-provisions-bill/>). See also: IHREC (2017) *Supplementary Observations on the Disability (Miscellaneous Provisions) Bill 2016* (available at <https://www.ihrec.ie/documents/18229/>).

371 The Commission notes that the Government has stated that it intends to introduce legislation on the regulation and financing of homecare services: Minister of State at the Department of Health, Helen McEntee TD 'Written Answers: Care of the Elderly' (question no. 194), *Parliamentary Debates: Dáil Éireann* 9 February 2017 (available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017020900075>).

372 The *Disability (Miscellaneous Provisions) Bill 2016* was published in December 2016.

373 See p 7 Department of Justice and Equality (2015) *Roadmap to Ratification of the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD)*, (available at <http://www.justice.ie/en/JELR/Pages/PB15000549>).

Abuse of vulnerable adults

The Commission notes the need for legislation to protect vulnerable adults, and welcomes the statement by HIQA that 'the area of safeguarding needs to be further strengthened by introducing legislation which would enshrine adult safeguarding in law and acknowledge the State's responsibility to protect those who may be at risk'.³⁷⁴

The Commission welcomes the establishment of the National Safeguarding Committee.³⁷⁵

The Commission also notes the Government's acknowledgement that there is no statutory framework underpinning the existing policies and that a legislative basis must be provided for this safeguarding.³⁷⁶

The Commission continues to be concerned regarding abuse and mistreatment in residential settings, including centres for persons with intellectual disabilities and centres for older persons.³⁷⁷ The Commission is concerned at the findings of a recent opinion poll commissioned by the National Safeguarding Committee which found that 48% of adults had close experience of abuse, either of themselves or of a person close to them.³⁷⁸

The Commission recently noted that the official data on the prevalence of elder abuse shows a lower rate than in other developed countries and called for research to establish

whether this difference relates to a lower level of abuse, a lower level of awareness, or lower reporting, so that adequate policies and programmes can be developed.³⁷⁹ Subsequently, in June 2017, the National Safeguarding Committee reported that almost 8,000 cases of adult abuse concerns were raised with the Health Service Executive in 2016. These are the first annual figures available for reported abuse of adults and relate primarily to physical, psychological, financial abuse and neglect. The Commission echoes the concerns of the National Safeguarding Committee that these figures reflect a worrying prevalence of adult abuse and a need for greater public awareness.³⁸⁰

374 See p 7 Health Information and Quality Authority (2017) *Overview of 2016 regulation of social care and healthcare services* (available at: <https://www.hiqa.ie/reports-and-publications/key-reports-and-investigations/overview-2016-hiqa-regulation-social-care>).

375 The National Safeguarding Committee is a multi-agency and inter-sectoral body 'established by the Health Services Executive in December 2014 in recognition of the fact that safeguarding vulnerable people from abuse is a matter that cannot be addressed by any one agency working in isolation, but rather by a number of agencies and individuals working collaboratively with a common goal'. See website of the National Safeguarding Committee: <http://safeguardingcommittee.ie/>.

376 Minister for Health, Simon Harris TD, 'Adult Safeguarding Bill: Second Stage', *Parliamentary Debates: Seanad Éireann 5 April 2017* (available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/seanad2017040500002>).

377 IHREC (2017) 'Commission Calls for "Grace" Investigation to Respect Human Rights and Equality Obligations for People with Intellectual Disabilities' [press statement] (available at <https://www.ihrec.ie/commission-calls-grace-investigation-respect-human-rights-equality-obligations-people-intellectual-disabilities/>).

378 See p 13 RedC (2016) *Vulnerable Adults in Irish Society: Nationwide Public Opinion Survey* (available <http://www.hse.ie/eng/services/news/media/pressrel/Red-C-poll-April-2017.pdf>).

379 See p 28 IHREC (2016) *Comments on Ireland's 14th National Report on the Implementation of the European Social Charter* (available at <https://www.coe.int/en/web/turin-european-social-charter/national-reports>).

380 See National Safeguarding Committee (2017) 'Almost 8,000 cases of adult abuse concerns reported to the HSE' [press release] (available at <http://safeguardingcommittee.ie/index.php/2017/06/12/almost-8000-cases-of-adult-abuse-concerns-reported-to-hse/>).

EFFECTIVE REMEDIES, ACCESS TO REDRESS AND REHABILITATION (ARTICLES 12, 13 14 & 16 UNCAT)

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The Commission and a number of international human rights oversight bodies have identified shortcomings in the State's response to human rights abuses that occurred in the past but which have not been adequately addressed as victims and survivors have come forward.³⁸¹ These abuses have included the treatment of women in so-called Magdalene laundries, of children in residential institutions, of residents in mother and baby homes, of survivors of symphysiotomy and of children who suffered sexual abuse in schools. Although the State has taken a range of steps in response to abuses in the contexts listed above, there are a number of systemic failings in the State's responses to historical human rights abuses. This section presents concerns regarding these systemic shortcomings, and draws on specific cases to demonstrate the pertinence of the concerns raised.

Investigations into human rights abuses

The State's approach to inquiring into historical abuse is marked with inconsistencies.³⁸² The *Commissions of Investigation Act 2004* empowers the State to establish statutory independent investigations. A number of concerns arise with the application of this legislation.

First, it is possible for the terms of reference of an individual commission of investigation to meet human rights standards, but it is not required by the Act.³⁸³ The Council of Europe Commissioner for Human Rights recently noted that 'a common feature of most of these inquiries is that they have not taken a human rights based approach'.³⁸⁴

Second, when the Government accepts that

381 See IHREC (2017) *CEDAW Submission*; Nils Muižnieks (2017) *Report by Commissioner for Human Rights*; Committee on the Elimination of Discrimination against Women (2017) *Concluding observations on the combined sixth and seventh periodic reports of Ireland* CEDAW/C/IRL/CO/6-7; Committee on Economic, Social and Cultural Rights (2015) *Concluding observations on the third periodic report of Ireland*, E/C.12/IRL/CO/3; Human Rights Committee (2014) *Concluding observations on the fourth periodic report of Ireland*, CCPR/C/IRL/CO/4.

382 See p 41 IHREC (2017) *CEDAW Submission*.

383 For example, the European Court of Human Rights accepted that a Commission of Investigation could meet the necessary human rights standards in the context of a case brought before it: *Nic Gibb v Ireland* (App 17707/10) [decision] <http://hudoc.echr.coe.int/eng?i=001-142613>.

384 See para 170 Nils Muižnieks (2017) *Report by Commissioner for Human Rights*.

an investigation is justified, it is not required to establish a statutory independent investigation under the Act. Notably, this occurred in the establishment of the Inter-Departmental Committee on Magdalene laundries.³⁸⁵ There are concerns that the Inter-Departmental Committee had the discretion to establish its own terms of reference and its own working methods and procedures, and that it did not have a mandate or the powers to independently investigate allegations of abuse. When a non-statutory scheme of inquiry is the chosen approach, the State should account to Parliament justifying that approach.³⁸⁶ The UN Human Rights Committee continues to assess the State's approach as 'not satisfactory' in this regard and in April 2017 recommended that the perpetrators be prosecuted and punished with penalties commensurate with the gravity of the offences.³⁸⁷

A further key point is that the initial responses to historical abuses have sometimes been framed too narrowly. For example, in 2016 the Mother and Baby Homes Commission of Investigation reported that the exclusion of most of the mother and baby homes from a previous scheme (the Residential Institutions Redress Scheme) warrants further investigation.³⁸⁸

Recommendation:

The Commission reiterates its recommendation that the State amend the *Commissions of Investigation Act 2004* to embed human rights and equality considerations in the statutory framework for investigating abuses. The State should ensure that investigations into abuses are sufficiently comprehensive to encompass all persons potentially affected.

385 Department of Justice and Equality (2013) *Report of the Inter-Departmental Committee to establish the facts of State involvement with the Magdalen Laundries* (available at <http://www.justice.ie/en/JELR/Pages/MagdalenRpt2013>).

386 See pp 41-42 IHREC (2017) *CEDAW Submission*.

387 See p 4 Human Rights Committee (2017) *Report on follow-up to concluding observations of the Human Rights Committee*.

388 See paras 4.1-4.3 Mother and Baby Homes Commission (2016) *Second Interim Report* (available at https://www.dcy.gov.ie/docs/Mother_and_Baby_Homes_Commission_of_Investigation_Second_Int/4177.htm).

In relation to the Magdalene laundries, the State asserts that: 'No factual evidence to support allegations of systematic torture or ill treatment of a criminal nature in these institutions was found'.³⁸⁹ However, the Commission notes the testimonies of women regarding the deprivation of liberty, forced labour and the physical and psychological punishment suffered in the Magdalene laundries.³⁹⁰

Recommendation:

Recalling the State's obligations under the Convention to investigate cases of suspected torture and other cruel, inhuman or degrading treatment or punishment, the Commission recommends that the State fully investigate the treatment of women in the Magdalene laundries, seeking to ensure that the perpetrators of crimes in Magdalene laundries be prosecuted and punished.

In 2014, the Commission (Designate) welcomed³⁹¹ the establishment of a statutory investigation into mother and baby homes³⁹² under the *Commissions of Investigation Act 2004* but raised a number of concerns, including in particular the investigation's remit in respect of both the institutions and the relevant issues.³⁹³ In its second interim report,³⁹⁴ the Commission of Investigation

389 See para 241 *Consideration of reports submitted by States parties under article 19 of the Convention pursuant to the optional reporting procedure: Second periodic reports of States parties due in 2015, Ireland, CAT/C/IRL/2*, (available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fIRL%2f2&Lang=en).

390 See pp 11–32 Smith *et al* (2013) *State involvement in the Magdalene Laundries* (available at http://www.magdalenelaundries.com/State_Involvement_in_the_Magdalene_Laundries_public.pdf).

391 IHREC (Designate)(2014) 'IHREC designate: statutory inquiry into Mother and Baby Homes timely and appropriate' [press release] (available at <https://www.ihrec.ie/documents/ihrec-press-release-on-mother-and-baby-homes/>).

392 *Commission of Investigation (Mother and Baby Homes and certain related Matters) Order 2015*, SI no. 57 of 2015 (available at <http://www.irishstatutebook.ie/eli/2015/si/57/made/en/print>).

393 IHREC Designate (2014) *Submission to proposed commission of investigation to inquire into mother and baby homes* (available at: https://www.ihrec.ie/download/pdf/ihrec_designate_submission_on_mother_baby_commission_investigation_june_2014.pdf)

394 Mother and Baby Homes Commission of Investigation (2016) *Second Interim Report*.

was satisfied that the institutions it was investigating were unquestionably the main such homes that existed during the 20th century but noted that there are about 70 institutions which have not been investigated in the past or are not being investigated by the Mother and Baby Homes Commission of Investigation.³⁹⁵ The Mother and Baby Homes Commission of Investigation also received representations for investigations to be undertaken for all adoptions, regardless of whether the mother concerned were resident in the mother and baby homes.³⁹⁶

Recommendation:

The Commission reiterates its recommendations that the scope of the Commission of Investigation into Mother and Baby Homes be widened to include the operation of similar institutions that do not currently fall within its terms of reference. The Commission of Investigation should take all statements submitted to it into consideration in its deliberations, irrespective of whether or not they relate to the 18 named institutions.

Securing redress and effective remedies

Survivors of torture, ill-treatment and other human rights abuses are reported to have experienced various hurdles in relation to securing redress, rehabilitation and effective remedies to compensate for the trauma and suffering endured.³⁹⁷

In relation to survivors of symphysiotomy, the

395 See para 5.5 Mother and Baby Homes Commission of Investigation (2016) *Second Interim Report*.

396 See para 3.3 Mother and Baby Homes Commission of Investigation (2016) *Second Interim Report*.

397 For example, in June 2017, the High Court found that the administration of the *ex gratia* scheme established in December 2013 for women who worked in the Magdalene laundries was flawed in respect of two applicants who were denied the opportunity to make submissions in relation to a claim for eligibility under the scheme, *M.K.L. v Minister for Justice and Equality and D.C. v Minister for Justice and Equality*, Judgment of Mr Justice White delivered on 1 June 2017.

Walsh Report³⁹⁸ was published to establish the facts about the use of symphysiotomy and on the basis of those findings, the Murphy Report³⁹⁹ proposed an *ex gratia* scheme to provide redress to the victims. A report to the Minister for Health by the judicial assessor of the *ex-gratia* scheme for survivors of symphysiotomy has been subject to criticism for the tone of comments made with regard to certain applicants under the scheme, and to the actions of human rights defenders campaigning on the issue of symphysiotomy.⁴⁰⁰ The Council of Europe Commissioner for Human Rights noted that 'the scheme admits no wrongdoing or liability on the part of the state and public authorities, any private hospitals or nursing homes, or any medical staff.'⁴⁰¹ The response of the State does not address the need for a prompt, independent and thorough investigation into these cases, and does not establish a process whereby perpetrators (including medical personnel) can be prosecuted and punished where violations of human rights occurred. The Commission restates its position that the State's actions to date with regard to symphysiotomy have not met the standard for an 'effective

remedy',⁴⁰² and does not agree with the State's assertion that the establishment of the *ex gratia* payment scheme and access to medical services amounts to 'a comprehensive response to this issue'.⁴⁰³ The low level of compensation received in comparison to the suffering endured, the narrow timeline for applying for compensation and the evidential barriers faced by plaintiffs in the national courts are further causes for concern.⁴⁰⁴

Recommendation:

The Commission reiterates its recommendation that the State establish a statutory, independent and thorough investigation into cases of symphysiotomy, which can guarantee access to an effective remedy and adequate compensation.⁴⁰⁵

The Commission has made repeated comments on the State's narrow interpretation of the judgment in *O'Keefe v Ireland*⁴⁰⁶ and the consequences for access to an effective remedy. In *O'Keefe v Ireland* the European Court of Human Rights held there had been a violation of Article 3 ECHR as regards the State's failure to protect the applicant from sexual abuse by a teacher in her primary school in 1973. The Court also held that there had been a violation of Article 13 ECHR on account of the lack of an effective remedy as regards the State's failure to fulfil its obligation to protect the applicant. The State Claims Agency has now adopted a policy that it will offer out-of-court settlements only to survivors of child sexual abuse who can demonstrate

398 Professor O. Walsh (2014) *Report on Symphysiotomy in Ireland 1944–1984*, Dublin: Department of Health (available at <http://health.gov.ie/blog/publications/report-on-symphysiotomy-in-ireland-1944-1984-professor-oonagh-walsh/>).

399 Judge Y. Murphy (2014) *Independent Review of Issues relating to Symphysiotomy*, Dublin: Department of Health (available at <http://health.gov.ie/blog/publications/independent-review-of-issues-relating-to-symphysiotomy-by-judge-yvonne-murphy/>).

400 See for example, Máiréad Enright (2016) 'Notes on Judge Harding-Clark's Report on the Symphysiotomy Payment Scheme', *Human Rights in Ireland*, 24 November 2016 (available at <http://humanrights.ie/law-culture-and-religion/notes-on-judge-harding-clarks-report-on-the-symphysiotomy-payment-scheme/>). Enright says: 'the language the judge uses to describe unsuccessful applicants is entirely inappropriate in a report of this kind. At worst they are chastised for buying into "conspiracy theories", for "unreasonable" reactions, for their anger and disappointment. At best, they are patronised as "suggestive personalities" "amenable to ... emotional contagion" and subject to "acquired group memory" developed through involvement in campaigning organisations; or elderly women sent into "turmoil", not by their experience of symphysiotomy or by the government's attitude to it, but by irresponsible "media reports".' Enright also comments that 'The judge gives an impression of suspicion of campaigning organisations and their lawyers... [undermining] human rights campaigners, group organising, and social justice lawyering in one fell swoop, perhaps forgetting that without the work of these organisations the redress scheme – however flawed – would not have been set up at all, and many women would not have been able to access it'. A similar tone is evident in the media coverage surrounding the report's publication. See also: Paul Cullen, 'Symphysiotomy: the whitewash that never was', *Irish Times*, 23 November 2016 (available at <http://www.irishtimes.com/opinion/symphysiotomy-the-whitewash-that-never-was-1.2878271>).

401 See para 185 Nils Muižnieks (2017) *Report by Commissioner for Human Rights*.

402 The Commission notes the State's obligations under Article 2.3 ICCPR. See para 8 Committee on Civil and Political Rights, *General Comment No. 31*, CCPR/C/21/Rev.1/Add.13 (available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.13&Lang=en).

403 See para 62 *Combined sixth and seventh periodic reports of the State parties due in 2016: Ireland*, CEDAW/C/IRL/6-7.

404 See paras 185–187 Nils Muižnieks (2017) *Report by Commissioner for Human Rights*.

405 See IHREC (2015) *ICESCR Submission*.

406 *O'Keefe v Ireland* (App 35810/09), Decision of 28 January 2014 (<http://hudoc.echr.coe.int/eng?i=001-140235>).

that their circumstances involved abuse by a primary or post-primary school employee in respect of whom there was a prior complaint of sexual abuse to a school authority. In October 2016, the Commission criticised the State's interpretation of the judgment and submitted a request to the Council of Europe that the case of *O'Keeffe v Ireland* be referred back to the European Court of Human Rights, as the State has adopted an unduly narrow approach to the category of 'victim'.⁴⁰⁷

Recommendation:

The Commission reiterates its recommendation that the State review its narrow interpretation of the judgment in *O'Keeffe v Ireland* to ensure that all victims of sexual abuse have the right to an effective remedy irrespective of whether or not there was a prior complaint of abuse.

As noted above, the Second Interim Report of the Mother and Baby Homes Commission of Investigation identifies inconsistencies in the exclusion of unaccompanied children in mother and baby homes from the remit of the Residential Institutions Redress Scheme: 'Children who were resident in these institutions without their mothers would seem to have been in the same position as children resident in the industrial schools and orphanages which were covered by the redress scheme'.⁴⁰⁸ Re-opening applications for the Redress Scheme appears unlikely.⁴⁰⁹

407 Communication from a National Human Rights Institution (Irish Human Rights and Equality Commission) (19/10/2015) in the case of *O'Keeffe against Ireland* (Application No. 35810/09) (available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b193c>).

408 See para 4.4 Mother and Baby Homes Commission of Investigation (2016) *Second Interim Report*.

409 Fiach Kelly (2017) 'Mother-and-baby home redress scheme "is not possible"', *Irish Times*, 11 April 2017 (available at <http://www.irishtimes.com/news/ireland/irish-news/mother-and-baby-home-redress-scheme-is-not-possible-1.3045238>).

Recommendation:

The Commission is concerned that the exclusion of certain unaccompanied children from the Residential Institutions Redress Scheme represents an arbitrary barrier to accessing redress.

In relation to the Residential Institutions Statutory Scheme, the Commission notes the intention to review the eligibility for the services provided by Caranua, an independent State body set up to help people who, as children, experienced abuse in residential institutions in Ireland and have received an award.⁴¹⁰ Under the *Residential Institutions Statutory Fund Act 2012* those eligible to apply for support were the approximately 15,000 former residents who received awards from the Residential Institutions Redress Board or equivalent court awards or settlements.

Recommendation:

The Commission is concerned that the extent of a review of the eligibility for services provided by Caranua is subject to the resources available in the Residential Institutions Statutory Fund.⁴¹¹

In April 2017, compensation was awarded to a woman (known as 'Grace') with serious intellectual disabilities who had been mistreated in foster care to a degree that amounted to an abdication of responsibility by State agencies. The Court sought sworn undertakings from a State official that the terms of the settlement would be respected considering the past handling of this case,

410 Minister for Education and Skills, Richard Bruton TD, 'Priority Questions: Residential Institutions Statutory Fund' (question no. 33), *Parliamentary Debates: Dáil Éireann* 5 April 2017 (available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017040500026>).

411 The Fund is limited to €110 million, following the expenditure of which, Caranua will be dissolved. Department of Education and Skills (2017) *Caranua: Review of Eligibility – Draft Terms of Reference* (available at <http://www.education.ie/en/Learners/Information/Former-Residents-of-Industrial-Schools/Caranua-Review-of-Eligibility-Draft-Terms-of-Reference.pdf>).

illustrating that even following findings of serious wrong-doing, trust in the State's capacity to provide redress in this context is weak.⁴¹² The Commission is concerned that 'significant risks' were identified by HIQA in 2016 in foster services in respect of 'ineffective safeguarding practices to promote children's safety; allegations against staff not being investigated in line with relevant policies; and poor management of allegations made against foster carers'.⁴¹³ More recently HIQA has emphasised that 'there is no regulation of foster care' and that HIQA's role does not extend beyond monitoring.⁴¹⁴

The Commission recalls that access to redress encompasses guarantees of non-repetition.⁴¹⁵ The case of 'Grace' clearly raises questions about the treatment of some individuals in foster care settings and more broadly puts into question the possible systemic nature of such treatment.⁴¹⁶ The Commission has welcomed the establishment of a Commission of Investigation into certain issues relating to a former foster home in the south east of Ireland.⁴¹⁷

412 Mary Carolan (2017) 'Judge awards "Grace" €6.3m over "scandal" of her treatment', *Irish Times*, 27 April 2017 (<http://www.irishtimes.com/news/crime-and-law/courts/high-court/judge-awards-grace-6-3m-over-scandal-of-her-treatment-1.3063492>)

413 See p 49 HIQA (2017) *Overview of 2016 regulation of social care and healthcare services* (available at <https://www.hiqa.ie/reports-and-publications/key-reports-and-investigations/overview-2016-hiqa-regulation-social-care>).

414 Ms Mary Dunnion (HIQA) 'Findings of HIQA Statutory Foster Care Service Inspection Reports: Discussion' *Parliamentary Debates: Joint Committee on Children and Youth Affairs* 17 May 2017 (available at <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack/nsf/committeetakes/CYJ2017051700002>).

415 Para 18 UN Committee against Torture, General Comment No. 3 CAT/C/GC/3 (available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=1&DocTypeID=11).

416 See IHREC (2017) 'Commission Calls for 'Grace' Investigation to Respect Human Rights and Equality Obligations for People with Intellectual Disabilities' [media release] 7 March 2017, (<https://www.ihrec.ie/commission-calls-grace-investigation-respect-human-rights-equality-obligations-people-intellectual-disabilities/>)

417 See *Commission of Investigation (Certain Matters Relative to a Disability Service in the South East and Related Matters) Order 2017*, S.I. No. 96 of 2017 (available at <http://www.irishstatutebook.ie/eli/2017/si/96/made/en/print>).

Recommendation:

The Commission recommends that the South East Commission of Investigation is independent and transparent in how it carries out its work, includes the participation of victims and, in its findings, ensures pathways for access to redress.

The *Children First Act 2015* is welcome in bolstering the State's child protection framework but the Commission regrets that a large part of this Act not yet been commenced.⁴¹⁸ The Commission welcomes substantial commencement in 2016 of the *National Vetting Bureau (Children and Vulnerable Persons) Act 2012*.⁴¹⁹ The Commission notes with concern recent findings of systemic deficiencies in the exercise of emergency powers to remove children from their parents, and the reported lack of availability of out-of-hours social workers, amongst other concerns highlighted.⁴²⁰

Recommendation:

The Commission recommends full commencement of the *Children First Act 2015* together with adequate resourcing of Tusla (the Child and Family Agency) in order to guard against future abuses.⁴²¹

418 At the time of writing, 14 of the 28 sections have not been commenced.

419 *National Vetting Bureau (Children and Vulnerable Persons) Act 2012 (Commencement) Order 2016*, S.I. No. 214 of 2016 (available at <http://www.irishstatutebook.ie/eli/2016/si/214/made/en/print>).

420 Dr Shannon (2017) *Audit of the exercise by An Garda Síochána of the provisions of Section 12 of the Child Care Act 1991*.

421 This echoes the concerns of the Committee on the Rights of the Child in 2016. See para 10 Committee on the Rights of the Child (2016) *Concluding observations on the combined third and fourth periodic reports of Ireland*, CRC/C/IRL/CO/3-4 (available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CR%2fC%2fIRL%2fCO%2f3-4&Lang=en).

Repeat victimisation

Recent developments in legislating for the rights of victims of crime are welcome, in light of the obligations on the State under the EU Victims' Rights Directive⁴²² to protect victims of crime from secondary victimisation.⁴²³

The Commission is concerned that the treatment of survivors of abuse by public institutions can inflict further trauma upon survivors. Secondary victimisation can occur through the failure to acknowledge past abuses or the State's role therein, treatment which causes victims to believe that their voices are not being heard, the provision of insufficient health care, or the use of language lacking in empathy in addressing survivors of abuse.

Caranua's Chairman reported to the parliamentary Public Accounts Committee in April 2017 that upon taking up his position in 2014 he found an organisation that was understaffed and without the proper processes in place.⁴²⁴ The manner in which applications have been processed by Caranua has been the subject of complaints.⁴²⁵ In particular, guidelines regarding access to home improvements created expectations that could not be fulfilled under the 'very strict and specific conditions attaching to the approval of such applications'.⁴²⁶ Delays and excessive bureaucracy in processing appeals are further subjects of complaints. Delayed outcomes and responses are particularly unacceptable in relation to older claimants.

Owing to their treatment in institutions, many of the survivors of abuse have not had the

benefit of education, making bureaucratic schemes particularly difficult to navigate and increasing the stress and trauma involved in securing entitlements.

Recommendation:

The Commission recommends that as part of the Review for Eligibility for services provided by Caranua, safeguards are incorporated to ensure that victims of abuse are not subjected to repeat victimisation.

Non-commencement of certain provisions of the *Assisted Decision-Making (Capacity) Act 2015* continues to delay the processing of payments under the Magdalene Scheme for a number of persons currently deemed not to have capacity.⁴²⁷

Recommendation:

The Commission reiterates the recommendation that the State commence the relevant provisions of the *Assisted Decision-Making (Capacity) Act 2015* without further delay.

422 Directive 2012/29/EU (available at <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32012L0029>).

423 IHREC (2017) *Legislative Observations on the Criminal Justice (Victims of Crime) Bill 2016* (available at <https://www.ihrec.ie/documents/observations-criminal-justice-victims-crime-bill-2016/>).

424 David O'Callaghan, 'Caranua Financial Statements 2014 and 2015', *Parliamentary Debates: Committee of Public Accounts*, 13 April 2017 (available at <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/committeetakes/ACC2017041300002>).

425 Appeals Officer (2016) *Annual Report 2015 of the Appeals Officer Appointed under the Residential Institutions Statutory Fund* (available at http://www.caranua.ie/attachments/Annual_Report_2015_of_the_Appeals_Officer.pdf)

426 See p 15 Appeals Officer (2016) *Annual Report 2015 of the Appeals Officer Appointed under the Residential Institutions Statutory Fund*.

427 Tánaiste and Minister for Justice and Equality, Frances Fitzgerald TD, 'Written Answers: Magdalen Laundries' (question no. 52), *Parliamentary Debates: Dáil Éireann*, 30 March 2017 (available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017033000056>).



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