

**Irish Human Rights and
Equality Commission**

**Observations on the
General Scheme of the
Equality / Disability
(Miscellaneous Provisions)
Bill**

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

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1. Introduction

The Irish Human Rights and Equality Commission ('IHREC' or the '**Commission**') was established by the *Irish Human Rights and Equality Commission Act 2014* ('2014 Act').¹ The Commission has a statutory remit to protect and promote human rights and equality in the State, 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, to encourage good practice in intercultural relations and to work towards the elimination of human rights abuses and discrimination.² The Commission is tasked with reviewing the adequacy and effectiveness of law, policy and practice relating to the protection of human rights and equality, and with making recommendations to Government on measures to strengthen, protect and uphold human rights and equality accordingly.³

The Commission welcomes the publication of the General Scheme of the *Equality/Disability (Miscellaneous Provisions) Bill* ('**General Scheme of the Bill**').

The principal aim of the proposed legislation is to reform national law to enable Ireland to ratify the UN Convention on the Rights of Persons with Disabilities (the '**CRPD**'). In addition, the General Scheme of the Bill proposes a number of other changes to disability and equality law. The General Scheme of the Bill also includes a clarifying amendment to the *Irish Human Rights and Equality Commission Act 2014* which relates to the Commission's jurisdiction to appear as *amicus curiae* before the Court of Appeal.

As part of any pre-legislative scrutiny process that is being undertaken by the Oireachtas Joint Committee on Justice and Equality, the Commission strongly advocates broad consultation throughout the legislative process and thereafter in the implementation phase. The Commission recognises the skill and expertise of the many civil society organisations working in Ireland on issues relevant to the General Scheme of the Bill and urges the Oireachtas Joint Committee on Justice and Equality to hear from the wide range of interested stakeholders.

In these recommendations, the Commission provides substantive observations on the following Heads of the General Scheme of the Bill:

- Head 1: Reasonable accommodation
- Head 2: National mechanisms
- Head 3: Deprivation of liberty
- Head 10: Amendment of *Equal Status Act 2000-2015*
- Head 11: Amendment of *Employment Equality Acts 1998-2015*

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

² Section 10(1)(a)–(e) of the 2014 Act.

³ Section 10(2)(b) and section 10(2)(d) of the 2014 Act.

In these recommendations, the Commission also provides brief preliminary observations on the Heads of the General Scheme of the Bill listed below. The Commission may comment further on these Heads in more detail at a later stage:

- Head 4: Amendment of *Electoral Acts*
- Head 5: Amendment of *Juries Act 1976*
- Head 6: Amendment of section 4 of *Criminal Law (Insanity) Act 2006*
- Head 7: Miscellaneous statute law amendments
- Head 14: Amendment of the *Irish Human Rights and Equality Commission Act 2014*

2. Ratification of the UN Convention on the Rights of Persons with Disabilities

This year, 2016, marks a decade since the UN Convention on the Rights of Persons with Disabilities (the 'CRPD') was adopted by the United Nations General Assembly on 13 December 2006. Over nine years have passed since Ireland's signature of the CRPD in March 2007. In this context, the Commission strongly welcomes the unambiguous statements by the Irish Government that it will ratify the CRPD before the end of 2016.⁴ It further welcomes the commitment by Ireland to sign and ratify the Optional Protocol to the Convention on the Rights of Persons with Disabilities (OP-CRPD).⁵

While the CRPD does not create any new rights, it expresses its constituent rights in a way that allows us to understand how those rights may be given meaning when invoked by persons with disabilities.

The CRPD represents a paradigm shift from the medical model to a rights-based approach under the social model. This involves a move away from regarding people with disabilities as persons who require assistance due to their impairments, to regarding them as holders of rights who are entitled to social integration, under the social model.⁶

The CRPD is innovative in that it incorporates both international monitoring by the UN Committee on the Rights of Persons with Disabilities and national monitoring. Monitoring at the national level is facilitated through a framework which States Parties must establish under Article 33 CRPD, the 'national mechanisms', discussed in detail below in relation to Head 2 of the General Scheme of the Bill.

As the CRPD progresses towards universal ratification,⁷ Ireland can benefit from the body of jurisprudence developed by the UN Committee on the Rights of Persons with Disabilities,

⁴ See for example: Tánaiste and Minister for Justice and Equality, Frances Fitzgerald TD, 'Written Answers: Rights of People with Disabilities' (question no. 148) *Parliamentary Debates: Dáil Éireann*, 12 July 2016, vol. 917 No. 3 p. 68, available at:

<http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2016071200068>

⁵ The commitment to sign and ratify the OP-CRPD at the same time as the State ratifies the CRPD was signalled by Government in October 2015. See: Department of Justice and Equality (2015) *Roadmap to Ratification of the United Nations Convention on the Rights of Persons with Disabilities*, p.13, available at:

<http://www.justice.ie/en/JELR/Roadmap%20to%20Ratification%20of%20CRPD.pdf/Files/Roadmap%20to%20Ratification%20of%20CRPD.pdf>

⁶ Gauthier de Beco (2011) 'Article 33(2) of the UN Convention on the Rights of Persons with Disabilities: Another role for National Human Rights Institutions?', *Netherlands Quarterly of Human Rights*, Vol. 29/1, 84-106, p.84.

⁷ As of 3 November 2016, there were 168 States Parties to the CRPD, see the UN Treaty Series here: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en

including four General Comments⁸ and its commentary on the practice of states in their implementation of the CRPD.⁹

The Commission stresses the general obligation under Article 4.3 CRPD for close consultation and active involvement of persons with disabilities, including children with disabilities, through their representative organisations, in the development and implementation of legislation and policies to implement the Convention, and in other decision-making processes. The active involvement of civil society is a further obligation of the national mechanisms to be established under Article 33 of the CRPD. These provisions enshrine the principle of ‘nothing about us without us’, commonly invoked by the disability rights movement, not least during the negotiation of the CRPD. The Commission emphasises the obligation to guarantee the active involvement of persons with disabilities, leading up to and beyond ratification of the CRPD.

Recalling statements in the *Roadmap to Ratification* published by the Department of Justice and Equality in October 2015,¹⁰ the Commission has concerns with regard to the possibility that the State will lodge reservations and/or interpretative declarations upon ratification of the CRPD.¹¹

The Commission notes that any reservations which are incompatible with the object and purpose of the CRPD are not permitted.¹² The broadly framed purpose of the CRPD under Article 1 is to:

Promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

The Commission regrets that the State does not propose to incorporate the CRPD into national law to its fullest extent, as discussed further below in relation to the relevant provisions.

In this section, the Commission comments on the Government’s proposal to legislate for ratification of the CRPD in relation to Heads 1-7 of the General Scheme of the Bill:

⁸ As of 3 November 2016, the UN Committee on the Rights of Persons with Disabilities has issued four General Comments on: Article 12 (Equal recognition before the law), Article 9 (Accessibility), Article 6 (Women and girls with disabilities) and Article 24 (right to an inclusive education). All general comments are available at: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx>

⁹ All of the UN Committee’s Concluding Observations in relation to States Parties are available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5

¹⁰ Department of Justice and Equality (2015) *Roadmap to Ratification of the United Nations Convention on the Rights of Persons with Disabilities*, available at: <http://www.justice.ie/en/JELR/Roadmap%20to%20Ratification%20of%20CRPD.pdf/Files/Roadmap%20to%20Ratification%20of%20CRPD.pdf>

¹¹ The Department of Justice and Equality signalled the possibility of reservations and/or interpretative declarations in relation to: Article 5 (Equality and non-discrimination), Article 12 (Equal recognition before the law), Article 14 (Liberty and security of the person) and Article 27 (Work and employment).

¹² Article 46(1) CRPD and Article 19 of the Vienna Convention on the Law of Treaties.

- Head 1: Reasonable accommodation
- Head 2: National mechanisms
- Head 3: Deprivation of liberty
- Head 4: Amendment of Electoral Acts
- Head 5: Amendment of the Juries Act 1976
- Head 6: Amendment of section 4 of the Criminal Law (Insanity) Act 2006
- Head 7: Miscellaneous statute law amendments.

2.1 Reasonable Accommodation (Head 1)

Article 5(3) of the UN Convention on the Rights of Persons with Disabilities ('CRPD') requires States Parties to take all appropriate steps to ensure that reasonable accommodation is provided to persons with disabilities. The provision of reasonable accommodation seeks to promote equality and to eliminate discrimination and is defined in Article 2 CRPD as follows:

"Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.¹³

The CRPD also makes explicit reference to the reasonable accommodation requirement in relation to distinct protections concerning: the liberty and security of the person (Article 14), education (Article 24) and work and employment (Article 27).

Reasonable accommodation in all spheres of society, without exemption

Article 5 CRPD is a broad duty and encompasses, in addition to the employment sphere, the provision of goods and services, regardless of whether the provider is a public body or a private enterprise. In its concluding observations on Article 5 CRPD, the UN Committee on the Rights of Persons with Disabilities regularly raises concerns in relation to reasonable accommodation.¹⁴

The former Equality Authority previously recommended that Irish law on reasonable accommodation be 'levelled up across all of the grounds', in relation to both the Employment Equality and Equal Status legislation, stating:

Reasonable accommodation requires a focus on the tangible and less obvious barriers that effectively inhibit equal opportunities. It acknowledges that every person has abilities. It acknowledges difference and the need to take steps to accommodate this difference if equality of opportunity is to be realised. Arguably a fundamental task of a fair and efficient society is to organise in a manner that allows all to participate and to make their contribution.

Reasonable accommodation will help employers and service providers to overcome negative stereotypes and focus on the capabilities of the individual and to make positive space for people to participate.

The advantages of reasonable accommodation is that it is not dependent on a comparator and is not fault based. It focuses on the reality of the person's experience. It involves the employee/service user being in dialogue with the employer/service provider as to what the person needs and what is reasonable to provide.¹⁵

¹³ Article 2 CRPD.

¹⁴ The Concluding Observations of the Committee on the Rights of Persons with Disabilities are available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5

¹⁵ Equality Authority (2004) *Overview of the Employment Equality Act 1998 and the Equal Status Act 2000*

The Committee on the Rights of Persons with Disabilities regularly reminds States Parties to the CRPD that the application of the principle of reasonable accommodation extends to all areas of life.¹⁶ It recommends that states take steps to ensure that reasonable accommodation is provided in all spheres of society, without exemption.¹⁷ In its examination of the Czech Republic in May 2015, the Committee on the Rights of Persons with Disabilities noted that reasonable accommodation obligations in the Czech Republic were confined to employment and related labour relations. It recommended that the Czech Republic amend its legislation to extend reasonable accommodation to other areas in line with Article 5 CRPD.¹⁸

EU laws on the prohibition of discrimination on the grounds of disability and the duty to provide reasonable accommodation are currently focussed on the employment and occupation remit.¹⁹ This protection is proposed to be extended under the equal treatment directive (or the 'Horizontal Directive'),²⁰ which if adopted, will prohibit discrimination on the grounds of disability in all the areas of life covered by the Racial Equality Directive. The EU became a party to the CRPD in 2011 and in this context, the Committee on the Rights of Persons with Disabilities has stated that the EU has failed to:

Explicitly prohibit discrimination on the grounds of disability and to provide reasonable accommodation to persons with disabilities in the areas of social

in light of the Transposition of the European Union 'Race' Directive (RD), Framework Employment Directive (FED) and the Gender Equal Treatment Directive (GETD), p.66.

¹⁶ See for example, Concluding Observations in relation to Ukraine and Denmark: UN Committee on the Rights of Persons with Disabilities (2015) *Concluding observations on the Initial report of Ukraine*, CRPD/C/UKR/CO/1, para. 10, available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fUKR%2fCO%2f1&Lang=en

UN Committee on the Rights of Persons with Disabilities (2015) *Concluding observations on the Initial report of Denmark*, CRPD/C/DNK/CO/1, para. 15, available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fDNK%2fCO%2f1&Lang=en

¹⁷ See for example, Concluding Observations in relation to Sweden and Chile: UN Committee on the Rights of Persons with Disabilities (2014) *Concluding observations on the Initial report of Sweden*, CRPD/C/SWE/CO/1, para. 10, available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fSWE%2fCO%2f1&Lang=en

UN Committee on the Rights of Persons with Disabilities (2016) *Concluding observations on the Initial report of Chile*, Advance unedited version, CRPD/C/CHL/CO/1, para. 12, available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fCHL%2fCO%2f1&Lang=en

¹⁸ UN Committee on the Rights of Persons with Disabilities (2015) *Concluding observations on the Initial report of the Czech Republic*, CRPD/C/CZE/CO/1, paras 9-10.

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fCZE%2fCO%2f1&Lang=en.

¹⁹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>

²⁰ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation SEC(2008) 2180, available at: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008PC0426>.

protection, health care, (re)habilitation, education and the provision of goods and services, such as housing, transport and insurance.²¹

The Committee on the Rights of Persons with Disabilities recommended that the EU adopt its proposed horizontal directive on equal treatment, extending protection against discrimination to persons with disabilities, including by the provision of reasonable accommodation in all areas of competence.²²

It is clear from the *European Disability Strategy 2010-2020* that various action priorities (accessibility, participation, equality, employment, education and training) have strong implications for ‘reasonable accommodation’ in its broadest sense.²³

Reasonable accommodation and accessibility of goods and services

In 2014, the Committee on the Rights of Persons with Disabilities published General Comment No. 2 on Article 9 of the CRPD (Accessibility).²⁴ On the question of a public/private divide in relation to goods and services, the Committee on the Rights of Persons with Disabilities states that:

As long as goods, products and services are open or provided to the public, they must be accessible to all, regardless of whether they are owned and/or provided by a public authority or a private enterprise.²⁵

The Committee on the Rights of Persons with Disabilities highlighted the importance of continued monitoring and strict implementation in removing barriers to access, emphasising that denial of access should be viewed in the context of discrimination and recommended that states provide training and guidance for both the public and private sectors.²⁶

²¹ UN Committee on the Rights of Persons with Disabilities (2012) *Concluding observations on the Initial report of the European Union*, CRPD/C/EU/CO/1, para. 18, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fEU%2fCO%2f1&Lang=en CRPD/C/EU/CO/1.

²² UN Committee on the Rights of Persons with Disabilities (2012) *Concluding observations on the Initial report of the European Union*, CRPD/C/EU/CO/1, para 19, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fEU%2fCO%2f1&Lang=en

²³ In this strategy, accessibility is understood as meaning that people with disabilities have access, on an equal basis with others, to the physical environment, transportation, information and communications technologies and systems (ICT), and other facilities and services. See: European Commission *European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe* COM (2010) 636.

²⁴ While the focus of the General Comment is on Accessibility, the General Comment addresses the distinction between the accessibility obligation and requirements as to ‘reasonable accommodation’. Committee on the Rights of Persons with Disabilities (2014) *General comment No. 2, Article 9: Accessibility* CRPD/C/GC/2 available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/2&Lang=en

²⁵ Committee on the Rights of Persons with Disabilities (2014) *General comment No. 2, Article 9: Accessibility* CRPD/C/GC/2, p.4, available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/2&Lang=en

²⁶ UN Committee on the Rights of Persons with Disabilities (2016) *Concluding observations on the Initial report of Slovakia*, CRPD/C/SVK/CO/1, para. 14, available at:

General Comment No. 2 of the Committee on the Rights of Persons with Disabilities clarifies that while accessibility relates to groups, and states are required to take *ex ante*, proactive steps, reasonable accommodation relates to individuals. It further clarifies that while the duty of accessibility is unconditional, the duty of reasonable accommodation is qualified to the extent that it does not constitute an undue burden on the entity involved. The concepts are nonetheless interrelated:

Reasonable accommodation can be used as a means of ensuring accessibility for an individual with a disability in a particular situation. Reasonable accommodation seeks to achieve individual justice in the sense that non-discrimination or equality is assured, taking the dignity, autonomy and choices of the individual into account. Thus, a person with a rare impairment might ask for accommodation that falls outside the scope of any accessibility standard.²⁷

Generally, a higher level of accessibility will serve towards reasonably accommodating more people. The concept of Universal Design²⁸ is tied to making goods and services accessible to the largest amount of users possible. To illustrate the interrelated concepts:

Reasonable accommodation can be used as a solution when accessibility following universal design approaches is not ensured or does not (sufficiently) ensure the equal access of certain (groups of) disabled persons.²⁹

Reasonable accommodation under Irish law

Incorporating the reasonable accommodation requirement in Irish law has been interpreted by the Irish Supreme Court as raising difficulties in relation to the costs which can be imposed on private entities, considering the constitutional protection afforded to private property and the right to earn a livelihood and carry on a business³⁰. In the decision *In re Article 26 of the Constitution and in the matter of the Employment Equality Bill 1996*, the Supreme Court struck down employment equality draft legislation which was considered to have the potential to transfer the cost of positive discrimination on to private entities in the employment context, without distinction as to the size of the entity involved.³¹ In addition, the Supreme Court considered that the wide definition of ‘disability’ made an estimation of

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CRPD%2fC%2fSVK%2fCO%2f1&Lang=en

²⁷ Committee on the Rights of Persons with Disabilities (2014) *General comment No. 2, Article 9: Accessibility* CRPD/C/GC/2, p.4, available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CRPD/C/GC/2&Lang=en

²⁸ Article 2 CRPD defines Universal Design as: ‘the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. “Universal design” shall not exclude assistive devices for particular groups of persons with disabilities where this is needed’.

²⁹ Deloitte (2016) *Study on the socio-economic impact of new measures to improve accessibility of goods and services for people with disabilities Final Report*, pp. 7-8.

³⁰ Protected under Article 40.3 and Article 43 of the Irish Constitution.

³¹ See para. 367 of the decision: *In re Article 26 of the Constitution and in the matter of the Employment Equality Bill 1996* [1997] 2 Irish Reports 321, available at:

[http://www.supremecourt.ie/supremecourt/sclibrary3.nsf/\(WebFiles\)/EB802820AD644CFC802575F3003323B1/\\$FILE/Employment%20Equality_%5B1997%5D%202%20IR%20321.htm](http://www.supremecourt.ie/supremecourt/sclibrary3.nsf/(WebFiles)/EB802820AD644CFC802575F3003323B1/$FILE/Employment%20Equality_%5B1997%5D%202%20IR%20321.htm)

costs problematic for private entities, and that the ‘undue hardship’ exception under the draft law would require disclosure of private financial information.³²

Consequent upon the Supreme Court ruling, the *Employment Equality Act 1998* limited employers’ obligations in terms of expenditure to ‘nominal cost’ - the standard which was considered necessary at that time so as not to violate constitutionally protected property rights. The Framework Directive on Employment Equality, transposed in 2004, extended the threshold in the employment context from ‘nominal cost’ to the standard that employers should not incur a ‘disproportionate burden’.³³

This ‘disproportionate or undue burden’ standard is the standard which applies under the CPRD,³⁴ making Irish law compatible with the CRPD requirements for reasonable accommodation, but *only* in the context of employment equality law. The lower threshold of ‘nominal cost’ continues to apply more broadly in relation to the provision of goods and services.

A margin of appreciation is afforded to States Parties in terms of how ‘disproportionate or undue burden’ is interpreted. However, in light of the Concluding Observations discussed above, this is likely to raise a concern for the Committee on the Rights of Persons with Disabilities in relation to Ireland’s compliance with Article 5 CRPD.

Possible reservation or interpretative declaration

Considering that Article 5 CRPD imposes wide obligations which extend beyond the employment sphere to cover the private and public provision of goods and services, difficulties may arise in securing full compliance with Article 5 CRPD. The Explanatory Note accompanying the General Scheme of the Bill signals the intention to lodge a reservation or interpretative declaration under Article 5.

As noted, overriding EU law allows the State to impose the higher ‘disproportionate burden’ standard on employers. In addition, this higher obligation can be imposed in the provision of public services as well as certain commercial bodies ‘whose activities are regulated for quality of service, such as banks, insurance companies, public transport providers and telecommunications providers, and so on’.³⁵

This leaves a range of private sector service and goods providers to be considered. Pending the introduction of overarching EU anti-discrimination legislation, the Irish State proposes to limit the reasonable accommodation obligation for all other providers of goods and services

³² See para. 367 of the decision: *In re Article 26 of the Constitution and in the matter of the Employment Equality Bill 1996* [1997] 2 Irish Reports 321, available at: [http://www.supremecourt.ie/supremecourt/sclibrary3.nsf/\(WebFiles\)/EB802820AD644CFC802575F3003323B1/\\$FILE/Employment%20Equality_%5B1997%5D%202%20IR%20321.htm](http://www.supremecourt.ie/supremecourt/sclibrary3.nsf/(WebFiles)/EB802820AD644CFC802575F3003323B1/$FILE/Employment%20Equality_%5B1997%5D%202%20IR%20321.htm)

³³ The Framework Directive on Employment Equality 2000/78 prohibits discrimination on grounds of religion and belief, age, disability and sexual orientation and came into effect in 2003. It applies in the areas of employment and occupation, vocational training and membership of employer and employee organisations. See: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32000L0078>

³⁴ Article 2 CRPD refers to ‘disproportionate or undue burden’.

³⁵ Explanatory Note accompanying the General Scheme of the Bill.

to the lower ‘nominal cost’ standard and to lodge a reservation or interpretative declaration to Article 5 CRPD.

The Commission is concerned that the overarching exemption for ‘all other providers of goods and services’ will alleviate a wide range of undertakings from incurring anything other than a ‘nominal cost’ in relation to reasonable accommodation. This approach fails to ensure reasonable accommodation across all spheres of society and further fails to make any distinction in relation to the size of the undertaking involved.

Interpreting the standard of ‘nominal cost’

While Irish legislation does not define the term ‘nominal cost’, it appears from historical parliamentary debates that the legislature intended the term to refer to the costs incurred *after* receipt of any state grants and technical assistance.³⁶ Historical debates also suggest that the term ‘nominal cost’ is intended to be interpreted according to the size of the undertaking involved. The Minister of State at the Department of Justice and Equality, during a debate in 1998, stated that:

The word “nominal” has caused concern on the part of those involved with the issue of the employment of people with disabilities. It is worth noting that “nominal” may not be the same for every employer or enterprise and the term may be interpreted in a relative sense. What is a nominal cost for a large enterprise employing thousands of people will not be the same as that for a small business with two or three employees. The nominal cost is taken into consideration only after available grant aid or support is taken into account. After that, *the nominal cost will still be different for a big employer than it is for a small employer* (emphasis added).³⁷

In the absence of a legislative definition, this expansive interpretation of ‘nominal cost’ is difficult to apply in a consistent and transparent manner. The former Equality Authority previously recommended in the context of employment equality reforms that Irish legislation be amended to allow for a higher standard in relation to reasonable accommodation in the public sector and for larger employers.³⁸

Considering that the current wording of the General Scheme of the Bill does not contain a definition of ‘nominal cost’, a relative reading of the term ‘nominal cost’ might be implied but is not guaranteed.

³⁶ Mary Wallace TD ‘Employment Equality Bill, 1997 [Seanad]: Committee Stage (Resumed)’ Select Committee on Justice, Equality and Women’s Rights Debate, 28 May 1998, available at: <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/committeetakes/JUS1998052800003>

³⁷ Mary Wallace TD ‘Employment Equality Bill, 1997 [Seanad]: Committee Stage (Resumed)’ Select Committee on Justice, Equality and Women’s Rights Debate, 28 May 1998, available at: <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/committeetakes/JUS1998052800003>.

³⁸ Equality Authority (2004) ‘Overview of the Employment Equality Act 1998 and the Equal Status Act 2000 in light of the Transposition of the European Union ‘Race’ Directive (RD), Framework Employment Directive (FED) and the Gender Equal Treatment Directive (GETD)’.

Reconsidering the approach within the boundaries of the Constitution

The Commission is concerned that the requirement of reasonable accommodation under Article 5 CRPD is not proposed to be incorporated into Irish law to the fullest extent possible. Limiting accessibility to goods and services by imposing the lesser burden of ‘nominal cost’ on providers of goods and services has the potential for significant impact on the day-to-day lives of persons with disabilities.

The Commission recognises the constraints imposed by the Supreme Court decision of 1997,³⁹ which continues to represent the state of Irish law on this matter. It is important to note, however, that the exercise of property rights under the Irish Constitution is regulated by the principles of social justice.⁴⁰ The Commission recommends that the need and desirability of coherence in reasonable accommodation standards across all fields of equality legislation merit a re-assessment of the balance being struck between the right to private property and the principles of social justice, in light of evolving international and EU law developments.

The decision of the Supreme Court arguably left it open to the legislature to distinguish between categories of providers of goods and services, based for example on size or turnover. While the Supreme Court did raise privacy concerns in this regard (in relation to the disclosure of financial information), reliance on publicly available audited accounts or on employee thresholds may mitigate against this risk.⁴¹ It is open to the legislature to differentiate between groups of businesses for various purposes, for example in imposing varying degrees of obligations on smaller undertakings under company law.⁴² The Commission recommends that the proposed legislation incorporate a relatively increased burden for larger providers of goods and services, which might, for example, be based on a turnover threshold.

There is also scope for the legislature to consider the position of employers, who owe obligations to a specific group of individuals, in contrast to providers of goods and services whose obligations are arguably of a more general nature. It is worth considering that the transfer of the cost of positive discrimination arises in a different context to that which came before the Supreme Court in 1997.

³⁹ *In re Article 26 of the Constitution and in the matter of the Employment Equality Bill 1996* [1997] 2 Irish Reports 321.

⁴⁰ Article 43.2.1° of the Irish Constitution states that: ‘The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice’.

⁴¹ The Commission notes however the views of the Committee on the Rights of Persons with Disabilities in relation to Sweden and its exemption for small businesses in relation to reasonable accommodation: ‘The Committee is concerned that the new bill on discrimination, which classifies the denial of reasonable accommodation as discrimination, exempts organizations employing fewer than 10 employees.’ UN Committee on the Rights of Persons with Disabilities (2014) *Concluding observations on the Initial report of Sweden*, CRPD/C/SWE/CO/1, para. 10, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CRPD%2fC%2fSWE%2fCO%2f1&Lang=en

⁴² See section 350 of the *Companies Act 2014* which differentiates between companies based on turnover, balance sheet and number of employees.

Finally, upon ratification of the CRPD, Irish courts will be bound to interpret Irish law, in so far as is possible, in a manner which is consistent with its international obligations,⁴³ which may inform the Court in its interpretation of constitutional rights together with the concepts of social justice which qualify the scope of those rights. The Irish High Court has recognised that while the CRPD is not yet binding on the State, it may provide guiding principles in the interpretation and application of Irish law, in terms of identifying prevailing ideas and concepts.⁴⁴

The Commission recommends that the State consider how reasonable accommodation obligations might be extended to secure maximum impact, for example through the provision of grants to small business and training on reasonable accommodation in various service sectors, where barriers are identified.

The Commission recommends that the State consider how best the protection of property rights in this context are reconciled with the exigencies of the common good.

The Commission is concerned that the current wording of the General Scheme of the Bill does not propose to comply with Article 5 CRPD to the fullest extent possible.

The Commission is concerned that, in the absence of a clear definition of ‘nominal cost’, the proposed legislation fails to make any distinction with regard to the size of the undertaking involved.

The Commission is concerned that the overarching exemption for ‘all other providers of goods and services’ may alleviate a wide range of undertakings from incurring anything other than a ‘nominal cost’ in relation to reasonable accommodation.

The Commission recommends that the State consider how best the protection of property rights in this context are reconciled with the exigencies of the common good, by imposing obligations on undertakings in a proportionate manner. The need and desirability of coherence in reasonable accommodation standards across all fields of equality legislation merit a re-assessment of the balance being struck in light of evolving international and EU law developments.

The Commission recommends that the proposed legislation incorporate a relatively increased burden for larger providers of goods and services, which might, for example, be based on a turnover threshold.

⁴³ See *The State (D.P.P.) v Walsh* [1981] Irish Reports 151, 159; *D.P.P. v Gormley*; *D.P.P. v White* [2014] IESC 17.

⁴⁴ See *M.X. v Health Service Executive* [2012] 3 Irish Reports 254, at para. 282, where the High Court interpreted the CRPD to inform Irish law, even in the absence of ratification.

2.2 National Mechanisms (Head 2)

Introduction

Article 33 of the UN Convention on the Rights of Persons with Disabilities (the ‘CRPD’) requires Ireland to establish National Mechanisms to implement, coordinate and to monitor the State’s progress in achieving the aims of the CRPD. Article 33 CRPD also requires the direct participation of persons with disabilities. It has been described as possibly the most complete provision on national level implementation in international treaties.⁴⁵

Ireland’s delay in ratifying the CRPD is regrettable. However Ireland now has the opportunity to learn from the practice of other states, and the assessment of this practice by the UN Committee on the Rights of Persons with Disabilities, to inform its own implementation of Article 33 CRPD, and the development of National Mechanisms.

The Irish Human Rights and Equality Commission contracted the Centre for Disability Law and Policy in the School of Law & Institute for Lifecourse and Society at NUI Galway to conduct comparative research on the implementation of Article 33 of the CRPD. The resulting research was published in May 2016: *Establishing a Monitoring Framework in Ireland for the United Nations Convention on the Rights of Persons with Disabilities* (the ‘IHREC/NUI Galway Report’).⁴⁶ It analyses each key element of Article 33, and draws on the approach taken by six States Parties, identified by the Centre for Disability Law and Policy as the most useful comparators, to inform a best practice approach.

From the outset, the Commission echoes the recommendation made in the IHREC/NUI Galway Report that in designing and legislating for National Mechanisms under Article 33 CRPD, an extensive, State-led, participatory process to elicit views of people with disabilities is required.⁴⁷ This requirement arises not only from Article 33.3 CRPD, but more broadly from the principles of consultation and active involvement enshrined in Article 4.3 CRPD.⁴⁸ **The Commission recommends that every opportunity is afforded to a wide range of stakeholders, particularly people with disabilities, to meaningfully participate in any pre-legislative scrutiny undertaken. More broadly, the Commission recommends continued consultation with relevant stakeholders in the development of and implementation thereafter of the legislation.**

⁴⁵ Gauthier de Beco (no date) *Study on the Implementation of Article 33 of the UN Convention on the Rights of Persons with Disabilities in Europe*, Geneva: UN Office of the High Commission on Human Rights.

⁴⁶ Irish Human Rights and Equality Commission and NUI Galway Centre for Disability Law and Policy (2016) *Establishing a Monitoring Framework in Ireland for the United Nations Convention on the Rights of Persons with Disabilities* Dublin: NUI Galway and the Irish Human Rights and Equality Commission, available at: <http://www.ihrec.ie/publications/list/establishing-a-monitoring-framework-in-ireland-for-1/>

⁴⁷ Irish Human Rights and Equality Commission and NUI Galway Centre for Disability Law and Policy (2016) *Establishing a Monitoring Framework in Ireland for the United Nations Convention on the Rights of Persons with Disabilities* Dublin: NUI Galway and the Irish Human Rights and Equality Commission, p.3. Available at: <http://www.ihrec.ie/publications/list/establishing-a-monitoring-framework-in-ireland-for-1/>.

⁴⁸ Art 4.3 CRPD provides that: ‘In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.’

In the observations below, the Commission will draw heavily on the IHREC/NUI Galway Report together with recommendations by the UN Committee on Rights of Persons with Disabilities and other academic commentary. The UN Committee on Rights of Persons with Disabilities has published Concluding Observations on the implementation of the CRPD by 48 states that are parties to the CRPD.⁴⁹ These observations represent useful interpretative tools in understanding CRPD rights and obligations.

The constituent elements of Article 33 CRPD, discussed in turn below, are:

- A designated ‘**focal point**’ located within Government, Art 33(1)
- A ‘**coordination mechanism**’ located within Government, Art 33(1)
- A ‘**promotion, protection and monitoring framework**’ which includes an ‘**independent mechanism**’, Art 33(2) and
- A high level of **participation by civil society**, Art 33(3).

The distinct requirements under Articles 33(1) and 33(2) CRPD can be seen as two separate streams of compliance. Article 33(1) implementation obligations are located within Government and the Article 33(2) obligations regarding the promotion, protection and monitoring functions, expressly require a component which is independent of Government.

Of particular importance is the participation of ‘civil society, in particular persons with disabilities and their representative organizations’ outlined in Article 33(3) CRPD.⁵⁰

The Focal Point

The General Scheme of the *Equality/Disability (Miscellaneous Provisions) Bill* proposes to designate the Department of Justice and Equality as the focal point under Article 33(1) of the CRPD.

Article 33(1) of the CRPD does not prescribe the Government department or departments best suited to taking responsibility for this role. State practice includes both the appointment of a single Government Department and multiple focal points and each approach has been seen to have benefits.⁵¹ The CRPD Committee has nonetheless

⁴⁹ The concluding observations are available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?TreatyID=4&DocTypeID=5

⁵⁰ The Committee on the Rights of Persons with Disabilities has defined Disabled Persons’ Organisations (DPOs) as ‘those comprising a majority of persons with disabilities – at least half their membership – and governed, led and directed by persons with disabilities.’ Committee on the Rights of Persons with Disabilities, *Guidelines on the Participation of Disabled Persons Organizations (DPOs) and Civil Society Organizations in the work of the Committee*, CRPD/C/11/2 (April 2014) paragraph 3, Annex II in: Report of the Committee on the Rights of Persons with Disabilities on its eleventh session (31 March–11 April 2014) available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CRPD%2FC%2F11%2F2&Lang=en.

⁵¹ Irish Human Rights and Equality Commission and NUI Galway Centre for Disability Law and Policy (2016) *Establishing a Monitoring Framework in Ireland for the United Nations Convention on the Rights of Persons*

recommended that States Parties ‘establish strong and efficient focal points within each ministry and State institution responsible for implementing the Convention’.⁵²

Guidance by the UN Office of the High Commission for Human Rights (the ‘OHCHR’) recommends designation of the Justice Ministry as the focal point, to reflect a shift from the medical to the social model of disability.⁵³ The practice of EU Member States which are already a party to the CRPD shows that the majority have appointed ministries of social affairs or ministries with broader competences including social affairs as the focal point.⁵⁴

The focal point must be equipped with the necessary resources and must be accessible to persons with disabilities. Adequate resourcing extends beyond financial resourcing and requires that personnel within the focal point have sufficient knowledge of the CRPD.⁵⁵

The Commission welcomes the proposal in the General Scheme of the Bill to designate the Department of Justice and Equality as the focal point for the purpose of Art 33(1). It notes the current role of the Equality Division within the Department of Justice and Equality in chairing the Interdepartmental Committee on ratification of the CRPD and in acting as Secretariat to the National Disability Strategy Group.

To ensure that the Department of Justice and Equality is best equipped to fulfil its functions as an Article 33 Focal Point, the Commission recommends that:

- **the level of resourcing, both human and financial, for the focal point be continually reviewed and monitored; and**
- **the Department of Justice and Equality put in place the formal mechanisms to ensure that the Focal Point is fully visible and accessible to persons with disabilities, in keeping with Articles 4.3 and 33.3 CRPD.**

The Coordination Mechanism

The coordination mechanism is an optional element of fulfilling the requirements under Article 33(1) of the CRPD. A coordination mechanism is a means of ensuring smooth

with *Disabilities* Dublin: NUI Galway and the Irish Human Rights and Equality Commission, p.7, available at: <http://www.ihrec.ie/publications/list/establishing-a-monitoring-framework-in-ireland-for-1/>.

⁵² See Committee on the Rights of Persons with Disabilities (2016) *Concluding observations on the initial report of Lithuania*, CRPD/C/LTU/CO/1, paras 67-68, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fLTU%2fCO%2f1&Lang=en

⁵³ Human Rights Council (2009) *Thematic Study by the Office of the High Commission for Human Rights on the Structure and Role of National Mechanisms for the Implementation and Monitoring of the Convention on the Rights of Persons with Disabilities*, U.N.Doc. A/HRC/13/29 (22 December 2009).

⁵⁴ Gauthier de Beco (no date) *Study on the Implementation of Article 33 of the UN Convention on the Rights of Persons with Disabilities in Europe*, Geneva: UN Office of the High Commission on Human Rights, p.46.

⁵⁵ Gauthier de Beco (no date) *Study on the Implementation of Article 33 of the UN Convention on the Rights of Persons with Disabilities in Europe*, Geneva: UN Office of the High Commission on Human Rights.

communication between focal points and acts as a point of communication.⁵⁶ This point may be less relevant under the proposals set out in the General Scheme of the Bill, which recommends the designation of a single focal point in the Department of Justice and Equality. The Commission is cognisant of the view of the Committee on the Rights of Persons with Disabilities (noted above) that there should be a focal point located within each Government Department and considers that, at a minimum, a contact person in each Government Department with whom the focal point can liaise is advised.⁵⁷

A coordination mechanism further aims to facilitate decision-making and to mainstream disability across government, beyond the focal point. Coordination mechanisms may also liaise with international human rights bodies, including UN treaty bodies.⁵⁸

The role and functions of a Focal Point and a coordination mechanism are distinct. As highlighted in the IHREC/NUI Galway Report:

As the coordination mechanism and focal point are both located within government, and will work closely together, it is important to keep their functions separate.⁵⁹

Furthermore:

the coordination mechanism can act as a neutral platform, where various factions on issues of policy can meet. To properly serve his function, the coordination mechanism should not be situated in any particular ministry.⁶⁰

It is common practice in EU Member States to assign ‘broad advisory bodies’ the task of assisting the work of focal points and coordination mechanisms.⁶¹ A ‘broad advisory body’ is understood as consisting of representatives of both ministries and organizations of persons with disabilities’.⁶² This broadly reflects the status and role of the National Disability

⁵⁶ Irish Human Rights and Equality Commission and NUI Galway Centre for Disability Law and Policy (2016) *Establishing a Monitoring Framework in Ireland for the United Nations Convention on the Rights of Persons with Disabilities* Dublin: NUI Galway and the Irish Human Rights and Equality Commission, p.9. available at: <http://www.ihrec.ie/publications/list/establishing-a-monitoring-framework-in-ireland-for-1/>

⁵⁷ See Committee on the Rights of Persons with Disabilities (2016) *Concluding observations on the initial report of Lithuania*, CRPD/C/LTU/CO/1, paras 67-68, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CRPD%2fC%2fLTU%2fCO%2f1&Lang=en

⁵⁸ Gauthier de Beco (no date) *Study on the Implementation of Article 33 of the UN Convention on the Rights of Persons with Disabilities in Europe*, Geneva: UN Office of the High Commission on Human Rights.

⁵⁹ Irish Human Rights and Equality Commission and NUI Galway Centre for Disability Law and Policy (2016) *Establishing a Monitoring Framework in Ireland for the United Nations Convention on the Rights of Persons with Disabilities* Dublin: NUI Galway and the Irish Human Rights and Equality Commission, p.9. Available at: <http://www.ihrec.ie/publications/list/establishing-a-monitoring-framework-in-ireland-for-1/>

⁶⁰ Irish Human Rights and Equality Commission and NUI Galway Centre for Disability Law and Policy (2016) *Establishing a Monitoring Framework in Ireland for the United Nations Convention on the Rights of Persons with Disabilities* Dublin: NUI Galway and the Irish Human Rights and Equality Commission, p.9. Available at: <http://www.ihrec.ie/publications/list/establishing-a-monitoring-framework-in-ireland-for-1/>

⁶¹ Gauthier de Beco (no date) *Study on the Implementation of Article 33 of the UN Convention on the Rights of Persons with Disabilities in Europe*, p.43, Geneva: UN Office of the High Commission on Human Rights, p.5.

⁶² Gauthier de Beco, (no date) *Study on the Implementation of Article 33 of the UN Convention on the Rights of Persons with Disabilities in Europe*, Geneva: UN Office of the High Commission on Human Rights, p.5.

Authority ('NDA'), which would therefore be considered the appropriate body to provide assistance under Article 33(1).⁶³

Under the General Scheme of the Bill, the Department of Justice and Equality, as Focal Point, is proposed as the body having responsibility for co-ordinating implementation of the CRPD, with assistance from the National Disability Authority (the 'NDA').

The Commission notes the distinct role and functions of a focal point and coordination mechanism under Article 33.1, as outlined in the IHREC/NUI Galway Report.

The Commission recommends that should the Focal Point be given additional functions in keeping with those of an Article 33.1 coordination mechanism that measures are taken to appropriately delineate these respective functions.

The Commission welcomes the inclusion of a role for the National Disability Authority in assisting and advising the Focal Point and/or Coordination Mechanism in their functions.

The promotion, protection and monitoring framework

Article 33(2) CRPD requires States Parties to establish a promotion, protection and monitoring framework. The IHREC/NUI Galway Report's comparative research on Article 33(2) provides invaluable insights into the advantages and disadvantages of various state approaches and into how these have been received by the Committee on Rights of Persons with Disabilities.

Promotion involves awareness raising, material dissemination and event organisation to further an understanding and appreciation for CRPD values. The promotion role is a large domain which straddles the competencies of various actors, including governments and Disabled Persons' Organisations (DPOs), and this role may be undertaken by bodies other than the independent mechanism.⁶⁴

⁶³ Section 20 of the *National Disability Authority Act 1999* (as amended by the *Disability Act 2005*) sets out the procedure for appointing members to the Board of the NDA. It provides for the appointment of 12 ordinary members, one being a representative of the Department of Justice and Equality and makes provision for the appointment of a representative of another Government Department. It further provides that Ministerial board appointments must have regard to: 'the objective that a majority of the Authority would be persons with disabilities, their representatives, families or carers and, in the case of each member of the Authority, that he or she would have knowledge or experience, either directly or indirectly, of matters pertaining to disability or of any other subject which in the opinion of the Minister would be of assistance to the Authority in the performance of its functions', Section 20(3)(a) of the *National Disability Authority Act 1999*.

⁶⁴ Gauthier de Beco (2011) 'Article 33(2) of the UN Convention on the Rights of Persons with Disabilities: Another Role for National Human Rights Institutions?', *Netherlands Quarterly of Human Rights*, Vol. 29/1, 84-106, pp.95-96.

The **protection** function encompasses legal assistance for people seeking to defend their rights, for example, through mediation, taking cases on their behalf or making *amicus curiae* submissions to court.⁶⁵

Monitoring of the CRPD involves assessing and evaluating the compliance of both legislation and practice with human rights, through powers of inquiry and state reporting. De Beco writes that: 'it is necessary not only to detect breaches of CRPD but also to examine how social structures could be adapted to facilitate its implementation'.⁶⁶

The promotion, protection and monitoring framework may comprise a single, independent body.⁶⁷ It may, alternatively, comprise multiple-bodies, at least one of which must be independent. The requirement of independence is that which is understood under the *Principles relating to the status and functioning of national institutions for the protection and promotion of human rights* (the '**Paris Principles**'). The Commission was recognised as fully complying with the Paris Principles in November 2015, when it received 'A Status', the highest accreditation from the Global Alliance of National Human Rights Institutions.⁶⁸

Scholars have highlighted the need for adequate funding of NHRIs when designated as an independent mechanism, to ensure that they can independently discharge their new functions.⁶⁹ The adequate resourcing of the promotion, protection and monitoring framework has also repeatedly been raised by the Committee on the Rights of Persons with Disabilities.⁷⁰

⁶⁵ Gauthier de Beco (2011) 'Article 33(2) of the UN Convention on the Rights of Persons with Disabilities: Another Role for National Human Rights Institutions?', *Netherlands Quarterly of Human Rights*, Vol. 29/1, 84-106, p. 96.

⁶⁶ Gauthier de Beco (2011) 'Article 33(2) of the UN Convention on the Rights of Persons with Disabilities: Another Role for National Human Rights Institutions?', *Netherlands Quarterly of Human Rights*, Vol. 29/1, 84-106, p. 96.

⁶⁷ For example, the Committee on Rights of Persons with Disabilities considered the single body mechanism in Germany to be acceptable. However it made a recommendation that Germany ensure the availability of resources for more comprehensive and effective monitoring at regional and local levels. See UN Committee on the Rights of Persons with Disabilities (2015) *Concluding observations on the Initial report of Germany* CRPD/C/DEU/CO/1, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/096/31/PDF/G1509631.pdf?OpenElement>

⁶⁸ Irish Human Rights and Equality Commission (2015) 'The Irish Human and Equality Commission welcomes "A" status accreditation' [press release], 25 November 2015, available at:

<http://www.ihrec.ie/news/2015/11/25/the-irish-human-and-equality-commission-welcomes-a/>.

Article 33(2) CRPD applies these NHRI guidelines to actors other than NHRIs. The reference to the Paris Principles does not mean that the Article 33(2) CRPD body must be an NHRI, but rather than the body ultimately established or designated must adhere to the governing principles for NHRIs.

⁶⁹ See, for example, Gauthier de Beco (2011) 'Article 33(2) of the UN Convention on the Rights of Persons with Disabilities: Another Role for National Human Rights Institutions?', *Netherlands Quarterly of Human Rights*, Vol. 29/1, 84-106, p.94.

⁷⁰ See the Committee's concluding observations in relation to: Germany, Ukraine, Brazil, Czech Republic, Republic of Korea, Austria, Paraguay, Argentina, Croatia, Mongolia, Lithuania, Portugal, Uganda, Serbia, Italy and the EU, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5

The General Scheme of the Bill proposes to expand the current functions of the Commission to allow it to act as the independent mechanism.⁷¹ The Explanatory Note accompanying the General Scheme of the Bill considers the Commission to be best placed to carry out international periodic reporting to the UN.

A further amendment would mandate the Commission to appoint an advisory committee comprising members with lived experience of disability to support the Commission in its role as the independent mechanism.⁷²

This reflects the recommendation in the IHREC/NUI Galway Report for such a committee, drawing from the approach taken by Malta. The Commission recognises that the voices of persons with ‘lived experience’ of disability may not be easily communicated in the absence of an intermediary, which might be a family member, a primary carer or another advocate. This difficulty may be particularly acute in the case of persons with intellectual disabilities. The Maltese example is instructive in this regard, as it brings together within its advisory committee, ten people with lived experience of different kinds of disabilities as well as two people representing family members of people with disabilities. The umbrella body designated in Spain for the purposes of Article 33 CRPD (CERMI) represents people with disabilities and their families.

The IHREC/NUI Galway Report recommended that the advisory committee be selected through a transparent and participatory process. A new representative and diverse advisory committee, using a transparent process, would build confidence and trust and would ensure robust monitoring.⁷³ The Commission emphasises that wide participation is not limited to the selection of the advisory committee but permeates the entire process in developing the national mechanisms and thereafter in the operation of each facet of the national mechanism.

The Commission notes that the appointment and operationalisation of an advisory committee would require additional resources to ensure that it is managed and operates effectively to secure robust monitoring and ongoing consultation and cooperation with a wide variety of stakeholders.

The General Scheme of the Bill further proposes to amend section 8 of the *National Disability Authority Act 1999* to enable the NDA to assist and cooperate with the Commission by providing data analysis and policy advice. According to the Explanatory Note accompanying the General Scheme of the Bill, the NDA would input progress assessments and statistical information.

⁷¹ This would require an amendment of section 10 of the *Irish Human Rights and Equality Commission Act 2014* governing the Commission’s current functions.

⁷² This would require an amendment of section 18 of the *Irish Human Rights and Equality Commission Act 2014*.

⁷³ Irish Human Rights and Equality Commission and NUI Galway Centre for Disability Law and Policy (2016) *Establishing a Monitoring Framework in Ireland for the United Nations Convention on the Rights of Persons with Disabilities* Dublin: NUI Galway and the Irish Human Rights and Equality Commission, pp. 73-74. Available at: <http://www.ihrec.ie/publications/list/establishing-a-monitoring-framework-in-ireland-for-1/>

According to the Explanatory Note, the relationship between the Commission and the NDA for the purposes of Article 33(2) CRPD would be governed by way of a 'formal Memorandum of Understanding'.

While the Commission meets the standard of independence set by the Paris Principles, the Commission notes that the NDA likely would not meet the same standard.⁷⁴

While there is no impediment to the assignment of an Article 33.2 function to a non-Paris Principles compliant body, the Commission would note the concerns raised by scholars regarding the inclusion of broad advisory bodies such as the NDA in both Article 33(1) and Article 33(2) functions.⁷⁵

It is important, therefore, to safeguard against the possibility of any confusion arising between the NDA's proposed Article 33(1) functions and Article 33(2) functions.

The Commission welcomes the general approach to promotion, protection and monitoring signalled in the General Scheme of the Bill, noting that it broadly reflects the approach recommended under the IHREC/NUI Galway Report, combining designation of the Commission as the independent monitoring mechanism 'with an advisory committee, appointed in a transparent participatory way and consisting of a diverse group of people with lived experience of disability'.⁷⁶

The Commission recommends that adequate funding is designated to enable the effective operation of the advisory committee in its monitoring role and in its ongoing consultative functions.

The Commission further welcomes the proposal under the General Scheme to designate the independent mechanism in primary law.

⁷⁴ While section 7 of the *National Disability Authority Act 1999* deems the NDA to be independent in the performance of its functions, the procedure for appointment of ordinary members to the NDA is likely to bring the NDA outside of the independence requirement, as it is understood under the Paris Principles. Section 20 of the 1999 Act (as amended by the *Disability Act 2005*) sets out the procedure for appointing members to the NDA Board. It provides for the appointment of 12 ordinary members, one being a representative of the Department of Justice and Equality and makes provision for the appointment of a representative of another government department.

⁷⁵ As de Beco observes: '[broad advisory bodies] include representatives of ministries with voting rights, which is contrary to the Paris Principles [and] their existence has led to confusion between Article 33(1) and Article 33 (2) CRPD. The function of independent mechanisms is not just to advise government but to promote, protect and monitor the implementation of the Convention. Cooperation with organizations of persons with disabilities through broad advisory boards is therefore an issue which rather concerns Article 33(1) CRPD. It might be preferable to establish new ad hoc bodies in order to meet the requirements set out in Article 33(2) CRPD and to give broad advisory boards the task of assisting the focal points and coordination mechanism in the implementation of the Convention, as done by Austria.' Gauthier de Beco (no date) *Study on the Implementation of Article 33 of the UN Convention on the Rights of Persons with Disabilities in Europe*, Geneva: UN Office of the High Commission on Human Rights, p.7.

⁷⁶ Centre for Disability Law and Policy (2016) *Establishing a Monitoring Framework in Ireland for the United Nations Convention on the Rights of Persons with Disabilities* Dublin: NUI Galway and the Irish Human Rights and Equality Commission, p. vii. Available at: <http://www.ihrec.ie/publications/list/establishing-a-monitoring-framework-in-ireland-for-1/>

The Commission notes the role proposed for the NDA within this mechanism of assistance and cooperation through provision of data analysis and policy advice.

Recalling the potential for confusion to arise from the dual role proposed for the NDA within this General Scheme, the Commission recommends that consideration be given to elaborating the delineation of the NDA's role in primary legislation rather than solely through a memorandum of understanding, to avoid any conflict of interest and to secure maximum transparency. This should be done following appropriate consultation with both the Commission and the NDA.

Participation by civil society

Article 33(3) CRPD requires that civil society, in particular persons with disabilities and their representative organisations be involved and participate fully in the monitoring process. This requirement would not be discharged through consultation alone. Reading the CRPD as a whole, the IHREC/NUI Galway Report highlights the 'General Obligation' under Article 4(3) CRPD:

In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.

A holistic reading of the CRPD thus requires the involvement of persons with disabilities, not just in the monitoring context, but also in relation to the development and implementation of legislation and policies, CRPD implementation and in other decision-making processes.

The IHREC/NUI Galway Report explains that Article 33 requires that people with disabilities be allowed to participate separately from the participation of Disabled Persons' Organisations (DPOs), if they choose to do so. This has been identified as particularly relevant in Ireland given the dearth of organisations in Ireland meeting the DPO definition and noting that qualifying DPOs may lack the resources to participate in the Article 33 role.⁷⁷ On the latter point, States Parties have a role in building capacity within civil society to enable DPO participation, for example in accessing the focal point.⁷⁸ The IHREC/NUI Galway

⁷⁷ The Committee on the Rights of Persons with Disabilities has defined (DPOs) as 'those comprising a majority of persons with disabilities – at least half their membership – and governed, led and directed by persons with disabilities.' Committee on the Rights of Persons with Disabilities, *Guidelines on the Participation of Disabled Persons Organizations (DPOs) and Civil Society Organizations in the work of the Committee*, CRPD/C/11/2 (April 2014) paragraph 3, Annex II in: Report of the Committee on the Rights of Persons with Disabilities on its eleventh session (31 March–11 April 2014) available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CRPD%2FC%2F11%2F2&Lang=en.

⁷⁸ Irish Human Rights and Equality Commission and NUI Galway Centre for Disability Law and Policy (2016) *Establishing a Monitoring Framework in Ireland for the United Nations Convention on the Rights of Persons with Disabilities* Dublin: NUI Galway and the Irish Human Rights and Equality Commission, p. 13. Available at: <http://www.ihrec.ie/publications/list/establishing-a-monitoring-framework-in-ireland-for-1/>

Report further advises that the role of civil society under Article 33 CRPD is a permanent one.⁷⁹

The Explanatory note accompanying the General Scheme of the Bill recognises that it is appropriate to make explicit provision for the participation by persons with disabilities in the monitoring framework. This has been highlighted by the Committee on Rights of Persons with Disabilities.⁸⁰

As noted above, the General Scheme of the Bill proposes to require the Commission to appoint an advisory committee under section 18 of the 2014 Act, the members of which shall all have lived experience of disability. The Commission has noted above that the advisory committee may be extended to include persons who represent or advocate for people with intellectual disabilities, including for example, their primary carers. The role of a decision-making assistant or a co-decision maker appointed under the *Assisted Decision-Making (Capacity) Act 2015* might be considered in this regard.

The Commission welcomes the approach signalled under the General Scheme of the Bill and stresses the need for capacity building and the provision of resources to enable DPOs and individuals to participate to the fullest extent.

The Commission reiterates its recommendation that apart from the advisory committee proposed under Article 33.2 CRPD, appropriate formal mechanisms be put in place to ensure that all aspects of Ireland's Article 33 infrastructure, including the focal point and coordination mechanism, are fully visible and accessible to persons with disabilities, in keeping with Articles 4.3 and 33.3 CRPD.

⁷⁹ Irish Human Rights and Equality Commission and NUI Galway Centre for Disability Law and Policy (2016) *Establishing a Monitoring Framework in Ireland for the United Nations Convention on the Rights of Persons with Disabilities* Dublin: NUI Galway and the Irish Human Rights and Equality Commission, p. viii. Available at: <http://www.ihrec.ie/publications/list/establishing-a-monitoring-framework-in-ireland-for-1/>

⁸⁰ See for example Concluding Observations of the Committee on the Rights of Persons with Disabilities in relation to: Gabon, Kenya, Brazil, Republic of Korea, Ecuador, Hungary, Argentina, China, Peru, Mongolia, Cook Islands, Lithuania, Thailand, Uganda and Ethiopia. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5

2.3 Deprivation of Liberty (Head 3)

Introduction

Head 3 of the General Scheme of the Bill proposes to amend Irish law in relation to the deprivation of liberty of persons with disabilities in nursing homes and other care and residential accommodation. Currently a legislative gap arises with regard to who has statutory responsibility to decide whether or not a person may leave this type of accommodation.

The Explanatory Note accompanying Head 3 explains that the absence of legislation in relation to deprivation of liberty issues (in nursing homes and in other care and residential accommodation) means that Irish law is not in compliance with Article 14 CRPD.⁸¹

Legislative clarity is required to ensure that people with disabilities are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law.⁸²

The Commission is concerned that the deprivation of liberty may arise in a wide variety of settings, not limited to a nursing home or similar residential care facility. Gaps in protection arise in settings not limited to those mentioned in Head 3 of the General Scheme of the Bill. For example, a person may be deprived of their liberty in their own home or in community-based settings, where the level of supervision and control is such that the person cannot exercise their own free will.

This section of the legislative observations describes the international law standards in relation to deprivation of liberty, under Article 14 CRPD and Article 5 ECHR respectively (pending further information on the approach proposed to address deprivation of liberty under the Bill).

Requirements of Article 14 CRPD

Article 14 CRPD is a non-discrimination provision⁸³ which seeks to ensure the full and equal enjoyment of all human rights and fundamental freedoms and to promote the inherent dignity of persons with disabilities.⁸⁴

Article 14 CRPD requires States Parties to ensure that persons with disabilities, on an equal basis with others:

⁸¹ In this context, the Commission also notes the protection under Article 40.4.1° of the Irish Constitution that: 'No citizen shall be deprived of his personal liberty save in accordance with law.'

⁸² According to the Explanatory Note: 'The issue is that the absence of any statutory provision in relation to deprivation of liberty issues in nursing homes, and other care and residential accommodation means that Ireland cannot comply with the CRPD standard that any deprivation of liberty be in conformity with the law. The key point is that there is no statutory law.'

⁸³ In this way, Article 14 CRPD is closely connected to the Article 5 CRPD equality guarantee.

⁸⁴ UN Committee on the Rights of Persons with Disabilities (2015) Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities, The right to liberty and security of persons with disabilities, Adopted during the Committee's 14th session, held in September 2015. See also: OHCHR (2014) 'Statement on article 14 of the Convention on the Rights of Persons with Disabilities'.

- a) Enjoy the right to liberty and security of person;
- b) Are not deprived of their liberty unlawfully or arbitrarily, that any deprivation of liberty is in conformity with the law and that the existence of a disability shall in no case justify a deprivation of liberty.

Additionally, under Article 14(2) CRPD, States Parties must:

‘ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of [the CRPD] including by provision of reasonable accommodation’.

Article 14 CRPD **prohibits absolutely the detention of persons on the basis of disability**. It does not permit any exceptions to the prohibition of detention of a person on the basis of their actual or perceived disability.

In formulating Article 14 CRPD, it was the intention of the drafters to prohibit the deprivation of liberty on the basis of actual or perceived impairment *even* if additional factors or criteria are also used to justify the deprivation of liberty.⁸⁵ In other words, the fact of a disability (actual or perceived) should neither comprise a partial nor a full ground for involuntary detention.⁸⁶

A number of States Parties to the CRPD continue to allow for the detention of persons on the basis of actual or perceived impairment, provided that there are other reasons for their detention, including the fact that they are deemed a danger to themselves or others. The Committee on the Rights of Persons with Disabilities finds this practice to be incompatible with Article 14, in that it is discriminatory in nature, and amounts to arbitrary deprivation of liberty.⁸⁷

The Committee on the Rights of Persons with Disabilities has raised concerns at the use of restraint and seclusion as methods of treatment.⁸⁸ It further notes the tendency to consider persons with intellectual or psychosocial impairments to be dangerous to themselves and

⁸⁵ UN Committee on the Rights of Persons with Disabilities (2015) *Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities, The right to liberty and security of persons with disabilities*, Adopted during the Committee’s 14th session, held in September 2015, para. 7 (emphasis added).

⁸⁶ This approach is said to have heralded an ‘uncoupling of detention from disability’ such that ‘disability may not form any part of the justification for detention’, Peter Bartlett (2012) ‘A mental disorder of a kind or degree warranting confinement: examining justifications for psychiatric detention’ *The International Journal of Human Rights* Volume 16, 2012 - Issue 6.

⁸⁷ UN Committee on the Rights of Persons with Disabilities (2015) *Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities, The right to liberty and security of persons with disabilities*, Adopted during the Committee’s 14th session, held in September 2015, paras. 6-9. See also OHCHR (2014) ‘Statement on article 14 of the Convention on the Rights of Persons with Disabilities’ and para. 13 of the 2015 Guidance.

⁸⁸ UN Committee on the Rights of Persons with Disabilities (2016) *Concluding observations on the Initial report of Lithuania*, CRPD/C/LTU/CO/1, para. 29, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CRPD%2fC%2fLTU%2fCO%2f1&Lang=en

others, ‘when they do not consent to and/or resist medical or therapeutic treatment’.⁸⁹ Flynn (*forthcoming*) draws on scientific evidence to argue that where a person is engaging in or at risk of self-harm, care and support can be provided by non-coercive means, even in situations of acute crisis and distress.⁹⁰ Furthermore, persons with disabilities have the same duty ‘to do no harm’ to others and the criminal law procedures of a state should address any breaches of this duty.⁹¹

Involuntary commitment of persons with disabilities on health grounds also conflicts with the principle of free and informed consent of the person concerned for health care (Article 25 CRPD).⁹² In this regard, all health and medical personnel must obtain the free and informed consent of persons with disabilities, prior to any treatment. Forced treatment, seclusion and various methods of restraint should be eliminated, as these practices are not consistent with the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.⁹³

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

The right of persons not to be deprived of their liberty (Article 14 CRPD) is linked to the **presumption of legal capacity of persons with a disability and equal recognition before the law**, protected under Article 12 CRPD. This right implies that legal capacity is a universal attribute, which must be upheld for all persons with disabilities on an equal basis with others. This right is crucial for persons with disabilities when it comes to making fundamental decisions about their health.⁹⁴ States must:

Refrain from the practice of denying legal capacity of persons with disabilities and detaining them in institutions against their will, either without the free and informed consent of the persons concerned or with the consent of a substitute decision-

⁸⁹ UN Committee on the Rights of Persons with Disabilities (2015) *Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities, The right to liberty and security of persons with disabilities*, Adopted during the Committee’s 14th session, held in September 2015, para 14.

⁹⁰ Eilionóir Flynn (*forthcoming*) ‘Disability, Deprivation of Liberty and Human Rights Norms: Reconciling European and International Approaches’ *International Journal of Mental Health and Capacity Law*

⁹¹ UN Committee on the Rights of Persons with Disabilities (2015) *Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities, The right to liberty and security of persons with disabilities*, Adopted during the Committee’s 14th session, held in September 2015, para. 14.

⁹² UN Committee on the Rights of Persons with Disabilities (2015) *Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities, The right to liberty and security of persons with disabilities*, Adopted during the Committee’s 14th session, held in September 2015.

⁹³ UN Committee on the Rights of Persons with Disabilities (2015) *Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities, The right to liberty and security of persons with disabilities*, Adopted during the Committee’s 14th session, held in September 2015.

⁹⁴ UN Committee on the Rights of Persons with Disabilities (2014), *General Comment No. 1: Article 12: Equal recognition before the law*, 19 May 2014, CRPD/C/GC/1, at para. 8. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>

maker, as this practice constitutes arbitrary deprivation of liberty and violates articles 12 and 14 of the Convention.⁹⁵

Under Article 12 CRPD, persons with disabilities must be supported in exercising their legal capacity. The Commission has long called for a move away from archaic and discriminatory approaches to capacity towards an approach based on supporting a person's will and preference in decision making, as set out in international human rights law.⁹⁶ To comply with Article 12 CRPD, there should be a presumption that a person always has legal capacity and recognition that mental capacity may fluctuate depending on a person's disability.⁹⁷

The *Assisted Decision-Making (Capacity) Act 2015*⁹⁸ contains a move away from the 'status' approach to capacity towards a 'functional' approach. However, functional tests of mental capacity cannot be used as justifications for a denial of legal capacity. In this way, authorising detention on the grounds that the person does not have mental capacity to consent to a particular treatment is contrary to Article 12 CRPD.⁹⁹

While the Commission welcomes the move away from the 'status' approach to capacity, it has expressed concern at how a person can be assisted in decision-making. The Committee on the Rights of Persons with Disabilities states that persons with disabilities should not be denied the right to exercise their legal capacity on the basis of third-party analysis of their 'best interests'.¹⁰⁰ Where significant efforts have been made to determine a person's will and preferences, the standard of 'best interpretation of the will and preferences' should replace a 'best interests' analysis.¹⁰¹

The Commission recommends that, in accordance with the presumption of legal capacity, persons with disabilities are assisted in decision-making to enable a 'best interpretation of the will and preferences' to replace a 'best interests' analysis.

⁹⁵ UN Committee on the Rights of Persons with Disabilities (2014), *General Comment No. 1 on Article 12. Equal recognition before the law*, 19 May 2014, CRPD/C/GC/1

⁹⁶ Irish Human Rights Commission (2014) *Observations on the Assisted Decision-Making (Capacity) Bill 2013*, available at: <http://www.ihrec.ie/news/2014/03/24/ihrc-publishes-observations-on-the-assisted-decisi/>

⁹⁷ See also Irish Human Rights and Equality Commission (Designate) (2015) *Section 5 Criminal Law (Sexual Offences) Act 1993 Discussion Paper Submission on behalf of the Irish Human Rights and Equality Commission (Designate)* available at:

http://www.ihrec.ie/download/pdf/ihrec_submission_amendment_s5_sexual_offences_act_1993_9sept14.pdf

⁹⁸ The *Assisted Decision-Making (Capacity) Act 2015* was not commenced at the time of writing.

⁹⁹ Eilionóir Flynn (*forthcoming*) 'Disability, Deprivation of Liberty and Human Rights Norms: Reconciling European and International Approaches' *International Journal of Mental Health and Capacity Law*.

¹⁰⁰ UN Committee on the Rights of Persons with Disabilities (2014), *General Comment No. 1, Article 12: Equal recognition before the law*, 19 May 2014, CRPD/C/GC/1, at para. 21.

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en

¹⁰¹ UN Committee on the Rights of Persons with Disabilities (2014), *General Comment No. 1, Article 12: Equal recognition before the law*, 19 May 2014, CRPD/C/GC/1, at para. 23. Available at:

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>

Britain's Equality and Human Rights Commission has advocated an approach which gives effect to a person's wishes and preferences, where ascertainable, in so far as practicable, and noting that the move away from the 'best interests' standard raises complex and difficult questions, for example, where the person's wishes cannot be determined, appear irrational or contradictory or are inconsistent over time.

Persons with disabilities who are arbitrarily or unlawfully deprived of their liberty are entitled to have their detention reviewed and to obtain appropriate redress and reparation.

The UN Working Group on Arbitrary Detention reports that the right to challenge the lawfulness of detention is a self-standing right, the absence of which constitutes a human rights violation.¹⁰² The State is under an obligation to guarantee the effective exercise of this non-derogable right.

The UN Working Group on Arbitrary Detention presented the 'Basic Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court' (the '**Basic Principles and Guidelines**') to the UN Human Rights Council in May 2015.¹⁰³ These apply to a wide range of persons, including persons with dementia, older persons and persons with disabilities, including psychosocial and intellectual disabilities. They concern the deprivation of liberty without free consent and also cover *de facto* deprivation of liberty. **Principle 20** of the Basic Principles and Guidelines applies to persons with disabilities, in recognition that certain groups are more vulnerable when deprived of their liberty. In summary form, it requires the following:

- The deprivation of liberty of a person with disability, including physical, mental, intellectual or sensory impairments, must be in conformity with the law, including international law, offering the same substantive and procedural guarantees available to others and consistent with the right to humane treatment and the inherent dignity of the person.
- States must ensure the protection from violence, abuse and ill-treatment of any kind.
- Courts, in reviewing the deprivation of liberty of persons with disabilities, must comply with the absolute prohibition on the deprivation of liberty on the grounds of an actual or perceived impairment.
- The court's review must also comply with the obligation to design and implement deinstitutionalisation strategies based on the human rights model of disability
- The court's review must also include the possibility of an appeal.
- Persons with disabilities are entitled to request individualized and appropriate accommodations and support, if needed, to exercise the right to challenge the arbitrariness and lawfulness of their detention in accessible ways.

Principle 20 of the Basic Principles and Guidelines elaborates on the measures required to ensure accessibility and the provision of reasonable accommodation to persons with disabilities in places of deprivation of liberty. In brief, these include a guarantee to treatment with humanity and respect; the provision of health and support services; ensuring access, on an equal basis with others subject to detention, to the physical environment, information and communications; and other facilities provided by the detaining authority. Accessibility should take account of the gender and age of persons with disabilities. Legal and other supports should be provided so that individuals receiving

¹⁰² UN Working Group on Arbitrary Detention (2015) *United Nations Basic Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court*, 4 May 2015, WGAD/CRP.1/2015.

¹⁰³ UN Working Group on Arbitrary Detention (2015) *United Nations Basic Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court*, 4 May 2015, WGAD/CRP.1/2015.

services can be educated about their rights and support in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and should never amount to substituted decision-making.

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 obtain appropriate redress and reparation.

The Commission recommends that the State take measures to ensure accessibility and the provision of reasonable accommodation to persons with disabilities in places of deprivation of liberty.

Article 5 of the European Convention on Human Rights

Ireland currently has a positive duty under Article 5 of the European Convention on Human Rights ('ECHR', incorporated into Irish law by the *European Convention on Human Rights Act 2003*) to protect the right to liberty and security and to ensure that any deprivation of liberty be in accordance with law. The law must set out a clear procedure so that a person can foresee the circumstances in which they will be deprived of their liberty. The grounds on which it is considered necessary and proportionate to deprive someone of their liberty should be clearly identified.¹⁰⁴ In cases of unlawful detention, Article 5 ECHR guarantees the right to compensation, with associated access to legal aid, to ensure the adequate representation of the individual.

Article 5(1) provides an exhaustive list of circumstances under which a person can be detained 'in accordance with a procedure prescribed by law'.¹⁰⁵ Article 5(1)(e) expressly allows for the lawful detention of persons 'of unsound mind'.¹⁰⁶

In the case of *Stanev v Bulgaria*,¹⁰⁷ the applicant successfully complained of a violation of Article 5 ECHR by virtue of his placement in a social care home for people with mental disorders, together with his inability to obtain permission to leave the home (Article 5 ECHR). He further complained of the living conditions in the home¹⁰⁸ (Article 3 ECHR), the

¹⁰⁴ *Witold Litwa v Poland* (App. 26629/95) 4 April 2000, para.78. This point was also emphasised by the Equality and Human Rights Commission (2015) *Response of the Equality and Human Rights Commission to the Consultation on Mental Capacity and Deprivation of Liberty*, 11 November 2015.

¹⁰⁵ Flynn notes that Member States are afforded a wide margin of appreciation in this regard, Eilionóir Flynn (*forthcoming*) 'Disability, Deprivation of Liberty and Human Rights Norms: Reconciling European and International Approaches', *International Journal of Mental Health and Capacity Law*

¹⁰⁶ Article 5(1)(e) is permissive in *allowing* for the detention of persons 'of unsound mind' but never requiring such detention. It has historically been used by the ECtHR to allow the deprivation of liberty of persons based on the perception that they may represent a danger to public safety or that they should be detained in their own 'best interests' for the provision of medical treatment. See: Eilionóir Flynn (*forthcoming*) 'Disability, Deprivation of Liberty and Human Rights Norms: Reconciling European and International Approaches' *International Journal of Mental Health and Capacity Law*.

¹⁰⁷ *Stanev v Bulgaria* (App. No. 36760/60) 17 January 2012, citing the previous cases of *Winterwerp v. the Netherlands*, 24 October 1979, para. 39, Series A no. 33; *Shtukaturov* para. 114; and *Varbanov* para. 45

¹⁰⁸ The judgment refers to findings by the Committee for the Prevention of Torture that the social care home was in a deplorable state of repair and hygiene, that the home was inadequately heated, that food was

lack of an effective remedy in seeking release from partial guardianship (Article 13 ECHR), the inability to restore legal capacity (Article 6 ECHR) and the interference with his private and family life (Article 8 ECHR).

In discussing substituted-decision making in that case, the European Court of Human Rights recalled that 'it is sometimes difficult to ascertain the true wishes and preferences' of the person concerned, but 'the fact that a person lacks legal capacity does not necessarily mean that he is unable to comprehend his situation'.¹⁰⁹ The ECtHR has found that the 'compliance' of a person who does not resist admission does not necessarily constitute valid consent, in a case involving a person with severe autism.¹¹⁰

In *Stanev v Bulgaria*, the ECtHR summarised the three conditions which must be present in order for a person of 'unsound mind' to be deprived of their liberty, as follows:

- the person must reliably be shown to be of unsound mind
- the mental disorder must be of a kind or degree warranting compulsory confinement
- the validity of continued confinement depends upon the persistence of such a disorder.¹¹¹

Applying Article 5 ECHR to the facts of the case, the ECtHR found that an 'objective need for accommodation and social assistance must not automatically lead to the imposition of measures involving deprivation of liberty'.¹¹²

The ECtHR does not necessarily prescribe appropriate standards in the consideration of what is a mental disorder that warrants compulsory confinement under Article 5 ECHR. Its role is confined to seeing that appropriate standards are prescribed,¹¹³ such that the law is adequately precise and foreseeable.¹¹⁴ The Council of Europe Committee on the Prevention of Torture (the 'CPT') plays a role in ensuring compliance with these standards.

inadequate, the only form of treatment was the provision of medication without any therapeutic activities and that such conditions amounted to inhuman and degrading treatment, *Stanev v Bulgaria* (App. No. 36760/60) 17 January 2012, paragraphs 76-87 of the judgment.

¹⁰⁹ The ECtHR cited the case of *Shtukurov v Russia* (App. No. 44009/05) in this regard.

¹¹⁰ In the case of *H.L. v United Kingdom*, (App. no. 45508/99) Judgment of 5 October 2004, the ECtHR reiterated that: 'the right to liberty is too important in a democratic society for a person to lose the benefit of Convention protection for the single reason that he may have given himself up to be taken into detention [...] especially when it is not disputed that that person is legally incapable of consenting to, or disagreeing with, the proposed action', paragraph 90 of the judgment.

¹¹¹ *Stanev v Bulgaria* (App. 36760/60) 17 January 2012, para. 145

¹¹² *Stanev v Bulgaria* (App. No. 36760/60) Judgment of 17 January 2012, paragraph 153 of the judgment.

¹¹³ See Peter Bartlett (2012) 'A mental disorder of a kind or degree warranting confinement: Examining justifications for psychiatric detention' *The International Journal of Human Rights* Volume 16, 2012 - Issue 6

¹¹⁴ The ECtHR requires sufficient precision in law such that 'the citizen may, with legal advice if necessary, reasonably foresee the consequences of his or her actions', *Sunday Times v the United Kingdom* (App. No. 6538/74) 26 April 1979, (1979) 2 EHRR 245, para 49. This is discussed in Peter Bartlett (2012) 'A mental disorder of a kind or degree warranting confinement: examining justifications for psychiatric detention' *The International Journal of Human Rights* Volume 16, 2012 - Issue 6.

The case of *H.L. v United Kingdom*¹¹⁵ involved the informal admission of a person with autism to hospital, where the individual lacked capacity, but was compliant with his admission. The ECtHR found that the application of the common law doctrine of necessity did not meet the requirement of avoiding arbitrariness under Article 5 ECHR, i.e. the detention was not considered to be 'in accordance with a procedure prescribed by law'. The possibility of a later review of lawfulness did not remedy the harm in this case.¹¹⁶

Article 5(4) ECHR requires access to a remedy that is accessible and affords the possibility of reviewing compliance with the conditions to be satisfied if the detention of a person of 'unsound mind' is to be regarded as 'lawful'. Essentially, a person must have access to a court and the opportunity to be heard, either in person or, where necessary, through some form of representation.¹¹⁷ Article 5(4) ECHR may require the subsequent review of detention by a court, where the reasons initially warranting psychiatric confinement may cease to exist.¹¹⁸ The speediness of the review depends on the circumstances of the particular case.¹¹⁹

Reconciling Article 14 CRPD and Article 5 ECHR

Article 14 CRPD involves an absolute prohibition on detention on the basis of disability. On the other hand, Article 5(1)(e) ECHR permits the possibility of detention of persons 'of unsound mind' in certain limited circumstances, as outlined. The position of the UN Human Rights Committee is that:

The existence of a disability shall not *in itself* justify a deprivation of liberty but rather any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the individual in question from serious harm or preventing injury to others. It must be applied only as a measure of last resort and for the shortest appropriate period of time, and must be accompanied by adequate procedural and substantive safeguards established by law (emphasis added).¹²⁰

The inclusion of the words 'in itself' appears to align the position of the Human Rights Committee closer to the ECHR.¹²¹

¹¹⁵ In *H.L. v United Kingdom* (App. 45508/99) 5 October 2004.

¹¹⁶ *H.L. v United Kingdom* (App. no. 45508/99) 5 October 2004, para. 123 of the judgment.

¹¹⁷ *Stanev v Bulgaria* (App. No. 36760/60) 17 January 2012, para. 171 of the judgment.

¹¹⁸ *Kuttner v Austria* (App. No. 7997/08) 16 July 2015, para. 29.

¹¹⁹ *Kuttner v Austria* (App. No. 7997/08) 16 July 2015, paras 36-38. In the particular circumstances, the 16-month delay in relation to the applicant's further detention did not fulfil the speediness requirement.

¹²⁰ See also Human Rights Committee (2014) *General Comment 35 on Article 9 (Liberty and security of person) of the International Covenant on Civil and Political Rights (ICCPR)*, 16 December 2014, CPMR/C/GC/35, available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CCPR%2FC%2FGC%2F35&Lang=en.

¹²¹ Eilionóir Flynn (*forthcoming*) 'Disability, Deprivation of Liberty and Human Rights Norms: Reconciling European and International Approaches' *International Journal of Mental Health and Capacity Law*.

The UK Equality and Human Rights Commission recently considered this difference between Article 14 CRPD and Article 5 ECHR.¹²² It noted that medical evidence of a mental disorder as a precondition of lawful detention, the standard understood to apply under Article 5 ECHR, is difficult to reconcile with the requirements of Article 14 CRPD as derived from the Committee's guidance.¹²³ It accepted that the approach it ultimately advocated was not CRPD-compliant.¹²⁴ The Equality and Human Rights Commission recommended the maximum utilisation of reasonable accommodation (including, for example, extra support and assistive technology) to obviate any potential deprivation of liberty. It ultimately recommended that reasonable steps be taken to ensure the least restrictive care regime, in the absence of full compliance with the CRPD.¹²⁵

The Commission recommends that securing alternatives to detention and forced treatment is in line with the proportionate response required under both Article 14 CRPD and Article 5 ECHR, whereby care and support should be provided through the least intrusive measures possible.

¹²² Equality and Human Rights Commission (2015) *Response of the Equality and Human Rights Commission to the Consultation on Mental Capacity and Deprivation of Liberty*, 11 November 2015.

¹²³ Equality and Human Rights Commission (2015) *Response of the Equality and Human Rights Commission to the Consultation on Mental Capacity and Deprivation of Liberty*, 11 November 2015.

¹²⁴ The fact that the United Kingdom has not incorporated the CRPD in its national laws was a factor in taking this position. The United Kingdom has not lodged any reservations or declarations to Article 14 CRPD.

¹²⁵ In this context, the Commission notes that the United Kingdom has not incorporated the CRPD into its national law.

Proposed approach under the General Scheme of the Bill ¹²⁶

The Commission notes that the proposal under the General Scheme of the Bill relates to nursing homes and other care and residential accommodation. It is not clear the extent to which it will address other cases of *de facto* deprivation of liberty where persons are under continuous supervision and control and are not free to leave, and may also require regular reviews of their situations.

The Commission recalls that the *Roadmap to Ratification of the CRPD* published by the Department of Justice and Equality in October 2015¹²⁷ signalled the possibility of submitting a declaration with regard to Article 14 CRPD upon ratification of the CRPD. At that time, the Department of Justice and Equality signalled that the proposed declaration would be comparable to declarations submitted by Australia¹²⁸ and Norway,¹²⁹ which respectively interpret the CRPD as allowing for compulsory assistance or treatment of persons where such treatment is necessary as a last resort and subject to safeguards. It is useful to note the Concluding Observations of the Committee on the Rights of Persons with Disabilities urging **Australia** to:

Review its laws that allow for the deprivation of liberty on the basis of disability, including psychosocial or intellectual disabilities, and repeal provisions that authorize involuntary internment linked to an apparent or diagnosed disability.

The Committee on the Rights of Persons with Disabilities was concerned that:

Under Australian law a person can be subjected to medical intervention against his or her will, if the person is deemed to be incapable of making or communicating a decision about treatment.

The Committee on the Rights of Persons with Disabilities recommended that Australia:

Repeal all legislation that authorizes medical intervention without the free and informed consent of the persons with disabilities concerned, committal of individuals to detention in mental health facilities, or imposition of compulsory treatment, either in institutions or in the community, by means of Community Treatment Orders.¹³⁰

¹²⁶ Deprivation of liberty of persons with disabilities in the criminal justice context is not discussed in detail as it is not relevant to the proposals under Head 3 of the General Scheme of the Bill.

¹²⁷ Department of Justice and Equality (2015) *Roadmap to Ratification of the United Nations Convention on the Rights of Persons with Disabilities*, available at:

<http://www.justice.ie/en/JELR/Roadmap%20to%20Ratification%20of%20CRPD.pdf/Files/Roadmap%20to%20Ratification%20of%20CRPD.pdf>

¹²⁸ Upon ratification, **Australia** declared that it: understands that the Convention allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards.

¹²⁹ Upon ratification, **Norway** declared that it: understands that the Convention allows for compulsory care or treatment of persons, including measures to treat mental illnesses, when circumstances render treatment of this kind necessary as a last resort, and the treatment is subject to legal safeguards.

¹³⁰ UN Committee on the Rights of Persons with Disabilities (2013) *Concluding observations on the Initial report of Australia* CRPD/C/AUS/CO/1, para. 34.

Norway lodged its instrument of ratification to the CRPD on 3rd June 2013 and has not yet been examined by the Committee on the Rights of Persons with Disabilities.

It appears from the stated intention under the *Roadmap to Ratification* that Ireland will ratify the CRPD, subject to the understanding that it will allow for the compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards. The Commission may wish to comment in more detail upon the wording of the proposed legislation once it has been made available.

In July 2015, the UN Committee on Economic, Social and Cultural Rights raised concerns regarding the persistent institutionalisation of persons with disabilities, the poor living conditions of residential centres for persons with disabilities and at the lack of regular inspections of such centres. In its Concluding Observations, it recommended that Ireland:

Take all the steps necessary to make available alternatives to institutionalization, including community-based care programmes, and to improve living conditions in residential centres, including through regular inspections.¹³¹

Recommendations to accelerate deinstitutionalisation and to provide support for community services have recurred in the concluding observations of the Committee on the Rights of Persons with Disabilities.¹³²

The Commission emphasises that community-based care is the preferred policy option¹³³ which ‘should be underpinned by clear legislative entitlement and dedicated funding provided to ensure that this legislative entitlement is delivered’.¹³⁴ The Commission reiterates its recommendation that the State ‘move away from institutional living and ensure that people with disabilities are adequately supported to live in the community’.¹³⁵

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CRPD%2fC%2fAUS%2fCO%2f1&Lang=en

¹³¹ Committee on Economic, Social and Cultural Rights (2015) *Concluding observations on the third periodic report of Ireland* 8 July 2015, E/C.12/IRL/CO/3, available at:

http://www.ihrec.ie/download/pdf/un_committee_on_economic_social_and_cultural_rights_concluding_observations_on_the_third_periodic_report_of_ireland_8_july_2015.pdf

¹³² See for example the Concluding Observations of the Committee on the Rights of Persons with Disabilities in relation to Ecuador, Azerbaijan, Costa Rica, Argentina and Serbia. See also Human Rights Committee (2014) *General Comment 35 on Article 9 (Liberty and security of person) of the International Covenant on Civil and Political Rights (ICCPR)*, 16 December 2014, CPCR/C/GC/35, available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CCPR%2FC%2FGC%2F35&Lang=en.

¹³³ See: Ita Mangan (2002) *Older People in Long Stay Care*, research commissioned by the former Irish Human Rights Commission, available at:

http://www.ihrec.ie/download/pdf/research_elderly_in_institutions_200304.pdf

¹³⁴ Equality Authority (2002) *Implementing Equality for Older People*, available at:

http://www.ihrec.ie/download/pdf/implementing_equality_for_older_people.pdf.

¹³⁵ Irish Human Rights and Equality Commission (2015) *Report to UN Committee on Economic, Social and Cultural Rights on Ireland’s third periodic review*, May 2015, available at:

http://www.ihrec.ie/download/pdf/ihrec_report_ireland_and_the_international_covenant_on_economic_social_and_cultural_rights.pdf

The Commission nonetheless acknowledges that restrictive care and treatment can occur both in community-based or in home-care as well as in institutionalised settings, depending on the level of continuous supervision and control. Thus, the Commission is concerned that the development of policy in this area should not be confined in its application to nursing homes and similar residential care centres, recognising that restrictive regimes can occur more broadly in a wide variety of community-based and residential settings.

The Commission recommends that legislation on the deprivation of liberty should not be confined to particular care settings and should recognise that deprivation of liberty can also occur in various settings, including in community-based settings.

The Commission recommends that an approach which adequately resources community-based care would further Ireland's compliance with the CRPD on the whole, including, but not limited to, its compliance with: Article 19 (Living independently and being included in the community),¹³⁶ Article 23 (Respect for home and the family), Article 24 (Education) and Article 26 (Habilitation and Rehabilitation).

¹³⁶ The CRPD Committee states in its Guidelines on Article 14 CRPD that enjoyment of the right to liberty and security is central to the implementation of Article 19 on the right to live independently and to be included in the community. It has expressed concern in relation to the institutionalisation of persons with disabilities and the lack of support services in the community. It recommends implementing support services and effective deinstitutionalisation strategies in consultation with organisations of persons with disabilities, and calls for the allocation of financial resources to ensure sufficient community-based services; para. 9 of the 2015 Guidance.

2.4 Amendment of Electoral Acts (Head 4)

Head 4 of the General Scheme of the Bill indicates that it is intended to amend existing provisions in the *Electoral Act 1992* that prohibit a person ‘of unsound mind’ from being elected to or continuing to serve as a member of Dáil Éireann. This amendment seeks to ensure compliance with Article 29 CRPD which guarantees the right to equal participation in political and public life.

The Commission welcomes the stated intention to move away from the ‘status’ approach in relation to eligibility for election to Dáil Éireann, noting that Article 29 CRPD guarantees the right and opportunity for persons with disabilities to be elected. States must protect:

The right of persons with disabilities [...] to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate.

The Commission may wish to comment on the precise approach to be adopted following publication of the proposed wording.

Voting accessibility for people with disabilities

More generally, the Commission takes the opportunity to comment on Article 29 CRPD and the disenfranchisement of people with disabilities in Ireland, in terms of the right to vote. The right to vote by secret ballot in periodic elections is also protected under Article 25 of the International Covenant on Civil and Political Rights¹³⁷ and under Article 3 of the First Protocol to the European Convention on Human Rights.¹³⁸

The Concluding Observations made by the Committee on the Rights of Persons with Disabilities in the context of Article 29 CRPD regularly refer to voting accessibility for people with disabilities. Common themes arising under Article 29 analysis include recommendations that States Parties ensure that ‘all stages of an election are made fully accessible, including the political campaigns and their materials, the act of voting and the secrecy of voting’;¹³⁹ that ‘adequate and necessary assistance is provided in order to

¹³⁷ Article 25: Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
(c) To have access, on general terms of equality, to public service in his country.

¹³⁸ Article 3 of the First Protocol to the ECHR: ‘The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature’. See also the Council of Europe *Recommendation CM/Rec(2011)14 of the Committee of Ministers to member states on the participation of persons with disabilities in political and public life*, available at:

[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec\(2011\)14&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec(2011)14&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true)

¹³⁹ See for example Concluding Observations made to Gabon, Ukraine and Qatar, available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5

facilitate voting by all persons'¹⁴⁰ and that 'polling assistants are trained to accommodate voters'¹⁴¹.

The Committee on the Rights of Persons with Disabilities, in its General Comment No. 1 on Article 12 CRPD, comments on the connection between legal capacity and the right to political participation as follows:

48. Denial or restriction of legal capacity has been used to deny political participation, especially the right to vote, to certain persons with disabilities. In order to fully realize the equal recognition of legal capacity in all aspects of life, it is important to recognize the legal capacity of persons with disabilities in public and political life (art. 29). This means that *a person's decision-making ability cannot be a justification for any exclusion of persons with disabilities from exercising their political rights, including the right to vote, the right to stand for election and the right to serve as a member of a jury.*

49. States parties have an obligation to protect and promote the right of persons with disabilities to access the support of their choice in voting by secret ballot, and to participate in all elections and referendums without discrimination. The Committee further recommends that States parties guarantee the right of persons with disabilities to stand for election, to hold office effectively and to perform all public functions at all levels of government, with reasonable accommodation and support, where desired, in the exercise of their legal capacity (*emphasis added*).¹⁴²

It is a clear requirement under the CRPD that a person's ability to make decisions cannot justify exclusion from the right to vote. The Commission notes that accessible information leaflets and guidance for returning officers formed part of the relevant Sectoral Plan which was required under the *Disability Act 2005*.¹⁴³ However, people with disabilities in Ireland continue to face barriers to effective participation in the political process, including the assumption that people with intellectual disabilities cannot form or express political opinions and the risk of undue influence.¹⁴⁴ The *Assisted Decision Making (Capacity) Act 2015* did not address the right to vote.¹⁴⁵

¹⁴⁰ See Concluding Observations made to Denmark, available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5

¹⁴¹ See Concluding Observations made to Sweden, available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5

¹⁴² UN Committee on the Rights of Persons with Disabilities, *General Comment No. 1: Article 12:*

Equal recognition before the law, 19 May 2014, CRPD/C/GC/1, at paras. 48-49, available at:

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>

¹⁴³ See Department of Environment, Heritage and Local Government (no date) *Progress Report - Sectoral Plan under the Disability Act 2005*.

¹⁴⁴ See Caroline O'Doherty. (2016) 'If you were denied a vote, would you mind?' *Irish Examiner* 25 February 2016, available at: <http://www.irishexaminer.com/viewpoints/analysis/if-you-were-denied-a-vote-would-you-mind-383796.html>

¹⁴⁵ See Irish Human Rights Commission (2014) *IHRC Observations on the Assisted Decision-Making (Capacity) Bill 2013*, March 2014, p. 76, available at:

http://www.ihrec.ie/download/pdf/ihrc_observations_on_assisted_decision_making_capacity_bill_2013.pdf

The right to a secret vote is not currently guaranteed in Ireland for people who are blind or visually impaired as voting occurs through a companion. The option of a postal vote, if persons are eligible, may also require the assistance of a companion.¹⁴⁶ Alternatives proposed by the National Council for the Blind of Ireland include internet voting, telephone voting and a tactile ballot template.¹⁴⁷

Ballot templates involve a plastic/cardboard template that fits over the ballot paper and can be re-used.¹⁴⁸ Best practice internationally includes measures in the United Kingdom to equip every polling station with a special ‘tactile’ voting device. In Austria, voters are provided with a stencil for ballot papers that uses tactile paving to enable blind or visually impaired voters to exercise independent voting. Malta provides a perforated template to voters with visual impairments. Australia ensures accessible voting by using telephone voting.¹⁴⁹

The Commission is concerned that Article 29 CRPD is not adequately respected by the postal vote as the only means of ensuring that persons with disabilities can exercise their franchise.

The Commission notes that the current legislative programme includes the establishment of an independent Electoral Commission and recommends that the right of persons with disabilities to participate equally in political and public life be examined by the Electoral Commission, in consultation with the National Disability Authority.¹⁵⁰

The Commission recommends that access to voting for persons with disabilities and international best practice be examined by the independent Electoral Commission which is proposed to be established.

¹⁴⁶ Sinéad Breslin et al (2012) *Report on the Voting Rights for Blind and Visually Impaired People in Ireland*, Galway: Centre for Disability Law and Policy and NUI Galway FLAC.

¹⁴⁷ Sinéad Breslin et al (2012) *Report on the Voting Rights for Blind and Visually Impaired People in Ireland*, Galway: Centre for Disability Law and Policy and NUI Galway FLAC.

¹⁴⁸ Sinéad Breslin et al (2012) *Report on the Voting Rights for Blind and Visually Impaired People in Ireland*, Galway: Centre for Disability Law and Policy and NUI Galway FLAC, p.14. A Discussion Paper published by the National Disability Authority sets out the advantages and disadvantages of voting by template. See National Disability Authority (no date) *Discussion Paper – Accessible Voting*, available at: <http://nda.ie/nda-files/Accessible-Voting1.pdf>

¹⁴⁹ Sinéad Breslin et al (2012) *Report on the Voting Rights for Blind and Visually Impaired People in Ireland*, Galway: Centre for Disability Law and Policy and NUI Galway FLAC, p.12.

¹⁵⁰ The Programme for Government 2016, signals the establishment of an independent electoral commission whose functions would include increasing political participation, p. 152, available at; http://www.merrionstreet.ie/merrionstreet/en/imagelibrary/programme_for_partnership_government.pdf

2.5 Amendment of Juries Act 1976 (Head 5)

Head 5 of the General Scheme of the Bill proposes to amend the existing legislation in relation to who is defined as being incapable of serving on a jury. This amendment seeks to ensure compliance with Article 29 CRPD which guarantees the right to equal participation in political and public life.

In its observations on the *Assisted Decision-Making (Capacity) Bill*, the former Irish Human Rights Commission noted the absence of provision in relation to jury service:

323. Section 106 provides a list of exemptions from the legislation, including marriage and marital status, adoption, guardianship, sexual relations, voting and jury service. Section 106 notes that, unless otherwise expressly provided, nothing within the Bill shall be construed as altering or amending existing laws relating to capacity and consent in these areas.

324. The IHRC is concerned that this list of exceptions is contrary to the ethos of the CRPD, in particular Article 12(2) which calls upon the State Parties to recognise that legal capacity is to be enjoyed by people with disabilities ‘on an equal basis with others in all aspects of life.’ The areas listed in section 106 represent some fundamental areas of a person’s life. The functional approach to capacity appears to be removed for these areas, and rather, a sweeping ‘all or nothing’ approach is taken.¹⁵¹

The Commission therefore welcomes that the General Scheme of the Bill addresses this required reform in relation to jury service.

Head 5 of the General Scheme of the Bill proposes to deal with the exclusion from jury service of those who lack the capacity to understand and discharge the duties of a member of a jury. This ‘might be linked to the existence of a formal arrangement under the *Assisted Decision-Making (Capacity) Act 2015*’ in relation to a person who:

- (a) has entered into a decision-making assistance agreement
- (b) has entered into a co-decision-making agreement
- (c) has an enduring power of attorney registered in respect of themselves (whether under the *Assisted Decision-Making or the Powers of Attorney Act 1996*),¹⁵² or
- (d) is the subject of a declaration by a court that they lack capacity to make one or more decisions relating to their personal welfare or property and affairs.

The Commission welcomes the proposed move away from the ‘status’ approach of assessing eligibility for jury service. The Commission restates its position that the preferred approach would explicitly affirm the presumption of capacity, which is a guiding principle under

¹⁵¹ Irish Human Rights Commission (2014) *IHRC Observations on the Assisted Decision-Making (Capacity) Bill 2013*, March 2014, p. 76, available at:

http://www.ihrec.ie/download/pdf/ihrc_observations_on_assisted_decision_making_capacity_bill_2013.pdf

¹⁵² In this context, ‘registered’ means that the power has in effect been ‘triggered’.

section 8 of the *Assisted Decision-Making (Capacity) Act 2015*.¹⁵³ Linking capacity to any one of the arrangements under the *Assisted Decision-Making (Capacity) Act 2015*, in the absence of adequate safeguards, may serve to exclude persons with disabilities from participating in public life. The exclusion of categories of people should ensure that the principle of a fair trial is respected but should not go beyond what is necessary to achieve that imperative. Reasonable accommodation should be provided to ensure full participation as required, for example, in communicating decisions.

The Explanatory note accompanying the General Scheme of the Bill states that the proposed amendment caters for the 2010 judgment which secured the right for a deaf person to serve on a jury and to have a sign language interpreter present.¹⁵⁴

The Commission reaffirms that persons should be presumed to have capacity to serve on a jury. The existence of an arrangement under the *Assisted Decision-Making (Capacity) Act 2015* should not, of itself, exclude participation. Reasonable accommodation should be provided to secure maximum participation in jury service.

¹⁵³ Irish Human Rights Commission (2014) *IHRC Observations on the Assisted Decision-Making (Capacity) Bill 2013*, March 2014, available at:

http://www.ihrec.ie/download/pdf/ihrc_observations_on_assisted_decision_making_capacity_bill_2013.pdf

¹⁵⁴ See: Free Legal Advice Centre (2010) 'Judge rules deaf man can sit on jury' [press release] 29 November 2010, available at: <http://www.flac.ie/news/2010/11/29/judge-rules-deaf-man-can-sit-on-jury/>

2.6 Amendment of section 4 of Criminal Law (Insanity) Act 2006 (Head 6)

Head 6 of the General Scheme of the Bill proposes to amend the *Criminal Law (Insanity) Act 2006* to address a shortcoming that the High Court has found to be inconsistent with the equality guarantee in Article 40.1 of the Irish Constitution.¹⁵⁵ In brief, the inequality arose in relation the loss of opportunity for trial in the District Court in situations where the ‘fitness to be tried’ issue is decided in the Circuit Court and the case cannot be subsequently be returned to the lower court.

The Commission welcomes the intention to seek to eliminate the inequality which was identified by the High Court.¹⁵⁶

However, Head 6 of the General Scheme of the Bill raises questions around the wider issue of the insanity defence under Irish law and its compatibility with the CRPD. Broader concerns relate to the prevalence of persons who suffer from cases of mental ill-health ending up in the penal system.¹⁵⁷

Insanity defence

The *Criminal Law (Insanity Act) 2006* allows a defendant to raise the defence of insanity where the defendant was suffering from a mental disorder at the time of the offence, such that they should not be held responsible for the offence.¹⁵⁸ Where it is successfully pleaded, a verdict of ‘not guilty by reason of insanity’ is returned. A consequence of this verdict is detention for psychiatric treatment for a period usually longer than the penal sentence which would have been imposed had the defence not been raised.¹⁵⁹

According to the Committee on the Rights of Persons with Disabilities, declarations of unfitness to stand trial or incapacity to be found criminally responsible in criminal justice systems (and the detention of persons based on those declarations) are not Article 14 compliant. The Committee considers that such procedures deprive persons of the right to due process and the applicable safeguards.¹⁶⁰ Instead, disability-neutral doctrines on the subjective element of the crime should be applied, taking into consideration the individual defendant.¹⁶¹

¹⁵⁵ *BG v District Judge Catherine Murphy and Ors* [2011] IEHC 359.

¹⁵⁶ The former Irish Human Rights Commission appeared as *amicus curiae* in the relevant case, see: http://www.ihrec.ie/download/pdf/bg_v_dj_murphy_high_court_judgment__8_december_2011.pdf

¹⁵⁷ See, for example, Irish Penal Reform Trust (2012) *IPRT Submission to the Cross Sectoral Group on Mental Health and Criminal Justice*, available at: <http://www.iprt.ie/contents/2407>

¹⁵⁸ Section 5 of the *Criminal Law Insanity Act 2006* provides that the defendant should not be held criminally responsible due to the fact that they: (i) he or she did not know the nature and quality of the act, or (ii) did not know that what he or she was doing was wrong, or (iii) was unable to refrain from committing the act.

¹⁵⁹ Samantha Long (2016) *Deprivation of Liberty under the CRPD and its implications for the Insanity Defence* Irish Criminal Law Journal 2016, 26(3), 77-84, at p.80.

¹⁶⁰ UN Committee on the Rights of Persons with Disabilities (2015) *Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities, The right to liberty and security of persons with disabilities*, Adopted during the Committee’s 14th session, held in September 2015, para. 16.

¹⁶¹ Human Rights Council (2009) *Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with*

The indefinite detention or involuntary psychiatric treatment of persons who raise the defence requires serious consideration.¹⁶² Reform in this regard requires careful consideration so that unintended consequences of the introduction of a disability-neutral defence can be avoided.

The Commission may, as part of the wider discussion beyond the specific proposal under Head 6 of the General Scheme of the Bill, wish to address the moving away from the insanity defence towards treating all accused persons on an equal basis, and providing reasonable accommodation during the trial of the accused where appropriate.

Diversion from the criminal justice system

As described above, Article 14 CRPD protects the right to liberty and security of the person. The CRPD Committee has recommended the use of diversion programmes, stating that:

Deprivation of liberty in criminal proceedings should only apply as a matter of last resort and when other diversion programmes, including restorative justice, are insufficient to deter future crime. Diversion programmes must not involve a transfer to mental health commitment regimes or require an individual to participate in mental health services; such services should be provided on the basis of the individual's free and informed consent.¹⁶³

As argued by the Department of Health in considering detention in mental health facilities:

Ensuring adequately resourced community-based programmes of specialised care would go some considerable way in reducing the numbers of vulnerable people ending up in the criminal justice system.¹⁶⁴

The Commission welcomes the recent publication of the *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*.¹⁶⁵ The Report explores how diversion from the criminal justice system can be facilitated and recognises the conflict that arises in terms of the continuing invocation of the insanity defence and compliance with Article 14 CRPD. The

Disabilities A/HRC/10/48, 26 January 2009, available at:

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.48.pdf>

¹⁶² The former Irish Human Rights Commission previously raised concerns in relation to the resourcing of community outpatient treatments for persons who are conditionally discharged under the *Criminal Law Insanity Act 2006* (as amended). See IHRC (2010) *Observations on the Criminal Law (Insanity) Bill 2010*, April 2010, available at: <https://www.ihrec.ie/documents/observations-on-criminal-law-insanity-bill-2010/>

¹⁶³ UN Committee on the Rights of Persons with Disabilities (2015) *Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities, The right to liberty and security of persons with disabilities*, Adopted during the Committee's 14th session, held in September 2015, para. 21.

¹⁶⁴ Department of Health (2014) *The Detention of Voluntary and Involuntary Patients in Mental Health Facilities: The Ethical Considerations*, available at: <http://health.gov.ie/wp-content/uploads/2014/02/The-Detention-of-Voluntary-and-Involuntary-Patients-in-Mental-Healthcare-Facilities-The-Ethical-Considerations.pdf>

¹⁶⁵ See Department of Justice and Equality (2016) *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*, 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>

Commission recommends that the Report's recommendations be considered, with due regard for Ireland's obligations under Article 14 CRPD.

2.7 Miscellaneous statute law amendments (Head 7)

Head 7 proposes to introduce a replacement across the statute book of references to 'lunatics' or 'persons of unsound mind' being ineligible or ceasing to be ineligible for membership of certain bodies or to hold certain offices. The proposal in Head 7 is that such references should be replaced with a reference to 'a person who lacks the capacity to understand and discharge the duties concerned'. This is linked to the existence of a formal arrangement under the *Assisted Decision-making (Capacity) Act 2015* relating to a person who:

- (a) has entered into a decision-making assistance agreement as a relevant person under the Assisted Decision-making (Capacity) Act 2015,
- (b) has entered into a co-decision making agreement as a relevant person under the Assisted Decision-making (Capacity) Act 2015,
- (c) has an enduring power of attorney registered in respect of himself or herself under the Assisted Decision-making (Capacity) Act 2015,
- (d) has an enduring power of attorney registered in respect of himself or herself under the Powers of Attorney Act 1996, or
- (e) is the subject of a declaration under section 37(1) of the Assisted Decision-making (Capacity) Act 2015.'

The Commission welcomes the move away from the current archaic language in the Irish Statute Book. However, linking capacity to any one of the arrangements under the *Assisted Decision-Making (Capacity) Act 2015* may continue to exclude persons with disabilities from participating in public life.

A blanket replacement of the references to 'lunatic' or 'person of unsound mind' across a range of legislation applying to a wide range of bodies with a standard wording that is not drafted with the specific legislation and body in mind and which does not consider the actual reasons for restricting certain people from membership of the particular body may amount to replacing one status-based approach with another status-based approach and would not in fact apply a functional approach.

The Commission recommends that adequate consultation is conducted in relation to specific amendments such that a tailored approach is taken as required.

3. Amendments to Equality law

3.1 Amendment of Equal Status Acts 2000–2015 and Employment Equality Acts 1998–2015 (Heads 10 and 11)

Head 10 of the General Scheme of the Bill proposes to amend the *Equal Status Acts 2000–2015* and Head 11 of the General Scheme of the Bill proposes to amend the *Employment Equality Acts 1998–2015*, in broadly similar ways. The Commission welcomes the proposals to provide explicit protection from discrimination for trans people and intersex people in Irish equality legislation. The Commission recalls that in 2002 the former Equality Authority, recommended that ‘the definition of gender be explicitly extended to include gender expression, gender identity and transgender issues’.¹⁶⁶

The context of the law on discrimination based on gender is an assumed dichotomy between two clearly defined and unchangeable sexes, which form the basis of the respective male and female comparators.¹⁶⁷ However, many peoples’ identities do not fit neatly into categories under which discrimination may be determined by way of mechanical comparator formulae. The biological realities of peoples’ lived experiences may feature variations which relate to chromosomal, anatomical and hormonal characteristics and discrimination law must be flexible enough to cover these variations and combinations thereof, regardless of how individuals identify.

In an evolving area, the Commission welcomes the opportunity to comment on these draft proposals. It advocates an approach which is future-proofed to the greatest extent possible and which draws on international best practice in this area,¹⁶⁸ as was demonstrated in the approach taken in the *Gender Recognition Act 2015*. The *Equality/Disability (Miscellaneous Provisions) Bill* provides a welcome opportunity to put in place legislation which is sufficiently flexible to take account of an evolving sphere of discrimination law and which will guarantee protection to all persons who may require it.

Proposed definitions under the General Scheme of the Bill

Heads 10 and 11 of the General Scheme of the Bill propose to amend the existing ground of ‘gender’ to incorporate new categories of persons including: ‘transgender man’, ‘transgender woman’ and ‘intersex person’. The Commission is concerned that the draft legislation may, in practice, continue the binary approach to defining gender. In particular,

¹⁶⁶ This comment came in the context of a review conducted under Section 6(4) of the *Employment Equality Act* of the discriminatory grounds. See Equality Authority (2002) *Review of Discriminatory Grounds Covered by the Employment Equality Act, 1998: An Equality Authority Position*. Dublin: Equality Authority, at page 4.

¹⁶⁷ Silvan Agius and Christa Tobler (2011) *Trans and intersex people: Discrimination on the grounds of sex, gender identity and gender expression*, Luxembourg: European Commission, p. 40, available at: <http://www.teni.ie/attachments/35bf473d-1459-4baa-8f55-56f80cfe858a.PDF>

¹⁶⁸ Developments in the EU law sphere are likely in the future: The European Parliament has recommended that the European Commission include ‘gender identity’ among prohibited grounds of discrimination in any future equality legislation, including any recasts. Lunacek, U. (2014) *Report on the Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity* Brussels: European Parliament, p.8, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0009+0+DOC+XML+V0//EN>

this approach does not explicitly protect persons who do not conform to either a male or female gender identity.

Defining 'intersex person'

The proposed definition of 'intersex person' under the General Scheme of the Bill refers to a person born with 'gender features' which are indeterminate or ambiguous.¹⁶⁹ The proposed wording does not elaborate on the kinds of characteristics or 'features' at issue.

TENI defines intersex individuals by reference to 'sex characteristics (such as chromosomes, genitals, and/or hormonal structure)'.¹⁷⁰ The Maltese Gender Identity, Gender Expression and Sex Characteristics Act (2015) is instructive as another EU Member State approach. It defines 'sex characteristics' as referring to:

'the chromosomal, gonadal and anatomical features of a person, which include primary characteristics such as reproductive organs and genitalia and/or in chromosomal structures and hormones; and secondary characteristics such as muscle mass, hair distribution, breasts and/or structure.'¹⁷¹

The Commission notes that different intersex persons may have different characteristics that do not conform to the dominant binary model of gender:

- some intersex people may have genitals that show characteristics of both female and male or are indeterminate;
- other intersex people may have chromosomal characteristics;
- others may have hormonal characteristics;
- some intersex people will have characteristics that combine two or three of these.

Comparative best practice indicates that a reference to sex characteristics is preferable to 'gender features'. A non-exhaustive list of sex characteristics would add greater clarity to the definition of intersex without the risk of stagnating the law.

¹⁶⁹ The Council of Europe's Commissioner for Human Rights has noted the lack of international agreement on naming a new ground of discrimination based on intersex, where 'intersex status' and 'sex characteristics' are both used. It recommended that a specific non-discrimination provision for intersex (such as 'sex characteristics' or 'intersex status') has the advantage of playing an educational role for society at large and providing visibility to the marginalised group. It states that: 'In the absence of a specific term, an authoritative legal interpretation of the applicability of the category of sex/gender would appear necessary. See Council of Europe's Commissioner for Human Rights (2015) *Human Rights and Intersex People* Strasbourg: Council of Europe, p.44, available at:

<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2933521&SecMode=1&DocId=2367288&Usage=2>

¹⁷⁰ See the website of TENI at: <http://www.teni.ie/page.aspx?contentid=139>

¹⁷¹ The text of the legislation is available at on the website of Transgender Europe at: <http://tgeu.org/gender-identity-gender-expression-sex-characteristics-act-malta-2015/>

Defining 'gender identity' and 'gender expression'

The proposed definition of 'gender identity' under the General Scheme of the Bill does not explicitly encompass a person whose experience does not correspond with the gender binary and the wording would benefit from explicitly including a person who does not identify with a gender, or a person who identifies as non-binary. In addition, a person may present on hormonal, anatomical or chromosomal basis as non-binary but identify according to the traditional binary model.

The Commission would welcome the additional inclusion of 'gender expression' as a ground of discrimination as an encompassing term which, with a wide definition, would also offer protection to persons identifying as non-binary or where a gender is ascribed to a person by another person.¹⁷²

The inclusion of the term 'gender expression' would further protect people against discrimination which is based on the *perception* of a person's gender identity by others. Equality law in Ireland currently prohibits discrimination by imputation (where a person is treated less favourably because it is thought that they belong to a protected category). However, it is the Commission's view that the heightened potential for discrimination on the basis of perceived gender or gender identity warrants the explicit inclusion of the encompassing term 'gender expression'.

The Commission recommends that intersex is defined by reference to 'sex characteristics' and that clarity as to what is meant by 'sex characteristics' by way of a non-exhaustive list is preferable to the proposed reference to 'gender features'.

The Commission recommends that the proposed definition of 'gender identity' be amended to explicitly encompass a person who does not identify within the traditional gender binaries, including but not limited to, those who identify as not having a gender or as non-binary.

The Commission recommends that 'gender expression', is included as a discrimination ground to ensure that discrimination based on the perception of gender identity is explicitly prohibited.

Proposed comparators under the General Scheme of the Bill

Under Heads 10 and 11 of the General Scheme of the Bill, the proposed approach would discern discrimination as between persons of 'different genders' (as understood within the proposed expanded meaning of 'gender'). However, this approach may fail to protect certain types of discrimination.

An intersex person should be protected from being treated less favourably than another intersex person on the basis that the characteristics they have are different – for example,

¹⁷² For example, Maltese law defines 'gender expression' as referring to each person's manifestation of their gender identity, and/or the one that is perceived by others See: ACT No. XI of 2015, *AN ACT for the recognition and registration of the gender of a person and to regulate the effects of such a change, as well as the recognition and protection of the sex characteristics of a person*.

that the external genitalia are ambiguous of traditional binary sex in one person, but that another intersex person's external appearance conforms to the dominant binary model but their chromosomal characteristics do not. In other words, the protection should not simply be based on a distinction between, on the one hand, those inside the category encompassed by the term 'intersex' and, on the other hand, those outside that category.¹⁷³

Thus, discrimination may still arise between two persons, legally recognised to be of the same gender, one of whom identifies as non-binary. It may also arise between two intersex persons.

A broader list of comparators that would offer greater protection, would include discrimination between: persons of different gender identity, gender expression and/or sex characteristics.

The approach in equality law in Malta is instructive in the context of another EU Member State which has been identified as representing international best practice.¹⁷⁴ Maltese law defines discrimination as meaning:

discrimination based on sex or because of family responsibilities, sexual orientation, age, religion or belief, racial or ethnic origin, *or gender identity, gender expression or sex characteristics* and includes the treatment of a person in a less favourable manner than another person is, has been or would be treated on these grounds and "discriminate" shall be construed accordingly' (*emphasis added*).¹⁷⁵

The Commission recommends that equality legislation should provide protection against discrimination between persons of different gender identity, gender expression and/or sex characteristics.

The Commission notes that Head 11 proposes that no change be made to a number of provisions in the existing legislation that refer to 'gender' or 'sex'. It considers that each of these will need careful and detailed examination to ensure that their exclusion from amendment does not inadvertently put trans or intersex people at a disadvantage.

The Commission recommends that consultation is required to ensure the best practice approach to defining the relevant terms, to reforming the approach to comparators and to ensuring maximum protection throughout equality legislation, while at the same time seeking to secure future-proofed equality law.

¹⁷³ The logic of this principle has already been applied in the equality legislation in respect of the disability ground – for example section 6(2)(g) of the Employment Equality Act provides as one of the discriminatory bases 'that one is a person with a disability and the other either is not or is a person with a different disability'.

¹⁷⁴ See for example views of the LGBTI Intergroup of the European Parliament, 24 June 2015, at the European Parliament, available at: <http://tgeu.org/tgeu-tells-eu-to-take-trans-issues-to-heart/>

¹⁷⁵ Section 2(1) of the Equality for Men and Women Act 2003 (as amended).

4. Amendment to the Irish Human Rights and Equality Commission Act 2014

4.1 Amendment to the Irish Human Rights and Equality Commission Act 2014 (Head 14)

It is the Commission's position that its *amicus curiae* jurisdiction before the Court of Appeal can be derived from historical legislative amendments, as outlined below. The Commission nonetheless welcomes the proposed amendment which expressly confirms this jurisdiction. The amendment serves to guarantee that section 10 of the Commission's governing legislation, the *Irish Human Rights and Equality Commission Act 2014*, reflects the Commission's powers and functions comprehensively.

For clarity, the Commission outlines the legislative basis for its *amicus curiae* role before the Court of Appeal below:

The *Irish Human Rights and Equality Commission Act 2014* provided for the dissolution of the Human Rights Commission and the Equality Authority and for the transfer of their functions to the Commission.

Section 8(h) of the *Human Rights Commission Act 2000* (the '**2000 Act**') had conferred on the former Human Rights Commission the power "to apply to the High Court or the Supreme Court for liberty to appear before the High Court or the Supreme Court, as the case may be, as *amicus curiae* in proceedings before that court that involve or are concerned with the human rights of any person and to appear as such an *amicus curiae* on foot of such liberty being granted (which liberty each of the said courts is hereby empowered to grant in its absolute discretion)".

Section 60 of the *Court of Appeal Act 2014*, which came into operation on 28th October 2014,¹⁷⁶ amended section 8(h) of the 2000 Act by inserting "the Court of Appeal" after the High Court in each place where it occurs in that provision.

Section 10(2)(e) of the *Irish Human Rights and Equality Commission Act 2014* provided that the Commission, like the former Human Rights Commission, had among its functions the power "to apply to the High Court or the Supreme Court for liberty to appear before the High Court or the Supreme Court, as the case may be, as *amicus curiae* in proceedings before that court that involve or are concerned with the human rights or equality rights of any person and to appear as such an *amicus curiae* on foot of such liberty being granted (which liberty each of the said courts is hereby empowered to grant in its absolute discretion)".

¹⁷⁶ *Court of Appeal Act 2014 (Commencement) (No. 2) Order 2014*, SI No 479 of 2014.

The Commission was established on 1st November 2014 on which date the Human Rights Commission and the Equality Authority were dissolved.¹⁷⁷ It was also on this date that most provisions of the Act, including section 10, came into operation.¹⁷⁸


By virtue of section 60 of the *Court of Appeal Act 2014*, the Human Rights Commission had, prior to its dissolution, express authority to apply to the Court of Appeal for liberty to appear as *amicus curiae*.

Despite the failure of section 10(2)(e) of the *Irish Human Rights and Equality Commission Act 2014* to make express provision for applications to the Court of Appeal, this function had nonetheless been transferred to the Commission by virtue of section 44 of the 2014 Act which provides that “[a]ll functions that, immediately before the establishment day, were vested in a dissolved body are transferred to the Commission”.

The Commission welcomes the proposed legislative amendment expressly confirming the Commission’s jurisdiction to appear before the Court of Appeal as *amicus curiae*.


¹⁷⁷ Section 43, *Irish Human Rights and Equality Commission Act 2014*. S.I. No. 450/2014 - *Irish Human Rights and Equality Commission Act 2014 (Establishment Day) Order 2014*.

¹⁷⁸ *Court of Appeal Act 2014 (Commencement) (No. 2) Order 2014*, SI No 479 of 2014.



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