

**Submission to the UN Human
Rights Committee on the
Examination of Ireland's Third
Periodic Report on the ICCPR**

March 2008

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INTRODUCTION

1. The Irish Human Rights Commission (IHRC) is Ireland's National Human Rights Institution, set up by the Irish Government under the Human Rights Commission Acts 2000 and 2001.¹ The IHRC has a statutory remit under the Human Rights Commission Act 2000 to endeavour to ensure that the human rights of all persons in the State are fully realised and protected in the law and policy of the State. The IHRC seeks to ensure that Irish law and policy set the standards of best international practice. Its functions include keeping under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights, and making such recommendations to the Government as it deems appropriate in relation to the measures which the IHRC considers should be taken to strengthen, protect and uphold human rights in the State.

2. Since its establishment, the IHRC has prioritised interaction with the international treaty monitoring bodies as an important part of its work. The IHRC places great importance on the work of the Human Rights Committee and the IHRC is committed to being of assistance to the Committee in the forthcoming examination of Ireland's compliance with its obligations under the International Covenant on Civil and Political Rights (ICCPR), which will be the first examination since the establishment of the IHRC.

3. The purpose of the present submission is to provide the Human Rights Committee with a source of focused and critical information on the situation of civil and political rights in Ireland. In August 2007, the IHRC drew the Human Rights Committee's attention to a list of issues which it considered were of primary importance.² In its August 2007 Submission, the IHRC identified areas of domestic law and practice where, in the view of the IHRC, the Irish Government is not fully compliant with its international legal obligations under the ICCPR. These issues were selected by reference to a number of factors including: (i) issues addressed by the Human Rights Committee in its previous Concluding Observations on Ireland; (ii) the areas identified as strategic priorities for the IHRC in its Strategic Plan 2007-2011,³ and (iii) issues arising from the work of the IHRC, particularly through its casework functions, since its establishment. This present Submission is intended to provide a more detailed examination of the issues identified.

4. The Third Report by Ireland on the Measures Adopted to Give Effect to the Provisions of the Covenant ("Ireland's Third Periodic Report") outlines the legislative, judicial and administrative or other measures that have been adopted

¹ For detailed information on the work of the IHRC, see www.ihrc.ie.

² IHRC, *Submission of the Irish Human Rights Commission to the United Nations Human Rights Committee on the List of Issues, in Relation to the Examination of Ireland's Third Periodic Report under Article 40 of the International Covenant on Civil and Political Rights* (August 2007).

³ A copy of the Commission's Strategic Plan is available on our website and was previously sent to the Human Rights Committee in August 2007.

in Ireland to give effect to the provisions of the ICCPR. However, the IHRC notes that the Report contains little analysis or information on the impact of these measures and on the existing gaps in protection.

5. It is of particular concern that little or no action has been taken by the State to address a number of the concerns and recommendations highlighted by the Committee in its previous Concluding Observations. For example, despite the recommendations of the Committee no steps have been taken to incorporate or reflect all the provisions of the Covenant into domestic legislation;⁴ no steps have been taken to end the jurisdiction of the Special Criminal Court;⁵ and the Criminal Justice Act 2007 provides for seven day detention, despite the Committee's previous concern that the seven-day period of detention without charge, under the Drug Trafficking Act, raises issues of compatibility with article 9(1).⁶

6. It is of note that the Human Rights Committee, in its Concluding Observations on Ireland's Second Periodic Report in 2000, requested the Government give particular attention in its subsequent periodic report to the issues raised in the Committee's Concluding Observations.⁷

⁴ See Concluding Observations of the Human Rights Committee on Ireland's First Periodic Report, CCPR/C/79/Add.21 (1993), para. 18; Concluding Observations of the Human Rights Committee on Ireland's Second Periodic Report, A/55/40, (2000) para. 11.

⁵ See 1993 Concluding Observations, para. 11; 2000 Concluding Observations, para. 16.

⁶ See 2000 Concluding Observations, para. 17.

⁷ 2000 Concluding Observations, para. 30.

1. ICCPR and Domestic Law (Article 2)

a. Reliance on the ICCPR by the Irish Courts

7. The ICCPR is not incorporated into Irish law. With the exception of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the Irish Courts have for the most part chosen not to consider international human rights treaties either as sources of law or as interpretative authorities. The general practice before the Irish courts appears to indicate that the judiciary tends towards conservatism in this regard.⁸ Article 29.6 of the Irish Constitution provides that, “[n]o international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas [Parliament]”. The Irish Supreme Court decision in the case *Kavanagh v. Governor of Mountjoy Prison*, set out the judicial interpretation to Article 29.6 of the Constitution.⁹ The Supreme Court held that the Irish Constitution “establishes an unmistakable distinction between domestic and international law” and that where the Government wished the terms of an international agreement to have the force of domestic law it could “ask the Oireachtas to pass the necessary legislation”.¹⁰ Thus, the position at present is that international human rights treaties to which the State is a party have no force, as such, within the domestic legal order until the Oireachtas transposes them into domestic law, whether by way of legislation or constitutional amendment.

8. Notwithstanding the judicial interpretation of Article 29.6 of the Constitution outlined above, the Courts have on a number of occasions shown a willingness, in the absence of conflict between domestic and international provisions, to interpret Constitutional and statutory law in the light of international obligations. For example, in *State (Healy) v. Donoghue*, the Supreme Court had regard to the terms of Article 6 of the European Convention on Human Rights when considering the scope of the right to legal aid under Irish law.¹¹ The ECHR at that time had been ratified by Ireland but not incorporated into the domestic legal system. In addition, unincorporated international law provisions may have indirect effect through the operation of a presumption of compatibility of domestic law with international obligations. In *State (DPP) v. Walsh*, the court expressed the view that Irish domestic laws were generally presumed to be in conformity with the then unincorporated European Convention on Human Rights.¹²

⁸ See J. Kelly *The Irish Constitution*, 4th edition, ed. G. Hogan & G. White, (Butterworths, Dublin, 2003).

⁹ *Kavanagh v. Governor of Mountjoy Prison* [2002] 3 IR 97. The Committee will recall its decision in the case of *Kavanagh v. Ireland*, CCPR/C/71/D/819/1998, concerning the same facts, where the Committee found a violation of Article 26 of the Covenant and directed the State party to provide the author with an effective remedy.

¹⁰ *Kavanagh v. Governor of Mountjoy Prison* [2002] 3 IR 97.

¹¹ *State (Healy) v. Donoghue* [1976] IR 325.

¹² *State (DPP) v. Walsh* [1981] IR 412.

9. However, the IHRC is concerned at the reluctance of the legal establishment to consider the ICCPR as an interpretative tool or as an influential text. The IHRC considers, through its analysis of domestic Irish case-law, that there may be an inadequate level of awareness and understanding of the ICCPR within the legal system and profession. The Commission identified the need for significant progress to be made in this area in its Strategic Plan 2007-2011.

b. Incorporation of the ICCPR into Domestic Law

10. In its Concluding Observations of 1993 and 2000, the Human Rights Committee recommended that Ireland take effective steps to incorporate all the provisions of the ICCPR into law and ensure that they are accorded a status superior to that of domestic legislation.¹³ The IHRC notes that despite this recommendation, no steps have been taken to give effect to the ICCPR in domestic legislation or to provide an effective remedy to any person whose rights have been violated. In the view of the IHRC, it is regrettable that there has been no comprehensive analysis on the wider question of the status of international treaties in Irish law.

11. In Ireland's Third Periodic Report, the Irish Government does not provide an explanation as to the reasons for not incorporating all the provisions of the ICCPR into Irish law. In Ireland's Second Periodic Report under the ICCPR and in other reports to the various UN treaty-monitoring bodies, the Irish Government has outlined its argument concerning the legal reasons for not incorporating or giving legal effect to the UN human rights treaties.¹⁴ In essence, the Irish Government states that the dualist nature of the Irish legal system constitutes an obstacle to the incorporation of international human rights treaties, except in cases where domestic law already conforms to the relevant standards.

12. The position of the Irish Government on incorporation of human rights treaties has previously been criticised by treaty monitoring bodies. In the course of its examination of Ireland's Second Periodic Report under the ICESCR, the UN Committee on Economic, Social and Cultural Rights rejected the Government's position on incorporation of the Covenant, stating;

irrespective of the system through which international law is incorporated in the domestic legal order (monism or dualism), following ratification of an international instrument, the State party is under an obligation to comply with it and to give it full effect in the domestic legal order.¹⁵

¹³ Concluding Observations of the Human Rights Committee on Ireland's First Periodic Report, CCPR/C/79/Add.21 (1993), para. 18; Concluding Observations of the Human Rights Committee on Ireland's Second Periodic Report, A/55/40, (2000) para. 11.

¹⁴ See Ireland's Second Periodic Report under the ICCPR, CCPR/C/IRL/98/2, (1999) at para. 13-17; Ireland's Combined First and Second Periodic Reports under CERD, CERD/C/460/Add.1, (2004), para. 97-101.

¹⁵ Concluding Observations of the Committee on Economic, Social and Cultural Rights on Ireland's Second Periodic Report, E/C.12/1/Add.77, (2002), para. 23.

13. In the view of the IHRC, the Government's position, as previously articulated, does not stand up to legal analysis on a number of levels. Firstly, Ireland has already incorporated into domestic law a number of international treaties. The Diplomatic Relations and Immunity Act, 1967, gave force in Irish Law to the Vienna Convention on Diplomatic Relations; and the Protection of Children (Hague Convention) Act, 2000, gave force in Irish law to the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, 1996.

14. Secondly, Ireland has given indirect legal effect to the ECHR through the European Convention of Human Rights Act 2003 (ECHR Act 2003).

15. Thirdly, certain international treaty provisions have come into force at domestic level through the enactment of Irish legislation incorporating certain obligations under the treaty in question. Examples of where this has happened include: Section 4 of the Criminal Justice (United Nations Convention Against Torture Act), 2000, which gave effect in domestic law to Article 3 of the UN Convention Against Torture; and the Genocide Act 1973, which gave effect to certain provisions of the UN Convention on the Prevention and Punishment of the Crime of Genocide.

16. The IHRC has previously examined the question of the most appropriate means of giving legal effect to an international human rights treaty.¹⁶ The various forms of giving direct and indirect effect to the ICCPR, which the IHRC considers are available to the Irish Government, are detailed below.

(i) Constitutional Incorporation of the ICCPR

17. In Ireland's Second Periodic Report, the Government argued that where the Constitution already covers a particular area it would be inappropriate to insert a second parallel provision reflecting the language of the ICCPR, which might be superfluous or might lead to confusion or even conflict.¹⁷ The IHRC submits that this argument fails to address the possibility that an amended Constitutional text could reconcile existing Constitutional provisions with the provisions of an international treaty, such as the ICCPR. Indeed, in the case of many provisions of international treaties there will be no corresponding Constitutional text and therefore no issue of conflict.

¹⁶ See IHRC, *Submission on the European Convention on Human Rights Bill 2001 to the Joint Oireachtas Committee on Justice, Equality, Defence and Women's Rights*, (June 2002); IHRC, *Submission to the UN Committee on the Rights of the Child on Ireland's Second Periodic Report under the CRC* (May 2006).

¹⁷ Ireland's Second Periodic Report under the ICCPR, CCPR/C/IRL/98/2, (1999), at para. 16-17.

18. Ireland's Second Periodic Report also states that differences might arise between how the Irish Courts interpret treaty provisions and how they are interpreted by the relevant human rights treaty-monitoring body.¹⁸ However, in the view of the IHRC, if the Constitution were to reflect the text of international treaty obligations, such as those contained in the ICCPR, this would be a clear mandate for the Irish courts to apply the jurisprudence of the relevant international treaty-monitoring body. It should be emphasised that a key benefit of constitutional incorporation of the rights contained in the ICCPR would be that it would underpin and guarantee any legislative or policy provisions in relation to civil and political rights.

(ii) Direct Legislative Incorporation

19. A further possible means of giving legal effect to the ICCPR in domestic law, but one which is below the level of Constitutional incorporation, is direct legislative incorporation. Ireland's Second Periodic Report argues that, as a large number of the ICCPR rights are already recognised in the Constitution and by the Irish Courts, making provision for fundamental rights by way of legislation would lead to a two-tier system of rights.¹⁹ Ireland's Second Periodic Report also argues that where a provision in ordinary law differs from a constitutional norm, legislative incorporation would be ineffective and, where a provision is the same, legislative incorporation would be superfluous.²⁰

20. The IHRC considers that neither of these arguments justifies non incorporation of the ICCPR in domestic legislation. Firstly, as noted above, Ireland has given legal effect to a number of international treaties. Secondly, in the view of the IHRC, Article 29.6 of the Irish Constitution does not appear to be an obstacle to strengthening the protection of rights under Irish law.²¹ The IHRC considers this to be the case as, in most cases, the rights set out in international treaties to which Ireland is party are supplementary to domestic law and thus no conflict would arise. Thirdly, any incorporating legislation can easily repeal earlier legislation which may conflict with the treaty in question.

21. The IHRC considers that differences between Irish law and the provisions of a treaty which Ireland has ratified cannot justify a refusal by the Government to give domestic effect to that treaty. The view put forward by the Government denies international law the proper role it should have in promoting and informing law reform and acting as a positive engine for improving domestic protection of rights. It must also be recognised that many human rights obligations can be characterised as obligations of conduct; that is the nature of the obligation imposed on the State is programmatic, and it is not envisaged by the drafters of

¹⁸ *Ibid.*

¹⁹ *Ibid.*, para. 15.

²⁰ *Ibid.*, para. 15.

²¹ Article 29.6 of the Irish Constitution provides, "No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas".

the treaty in question that the obligation can be exhausted by a State in the short to medium term.

22. The IHRC recommends that the Irish Government clarify its position on giving direct effect to international human rights treaties through primary legislation. The IHRC considers that, either in addition to giving Constitutional expression to the ICCPR or at a minimum in the absence of Constitutional recognition, there are many areas of legislation which could usefully incorporate Articles of the ICCPR.

(iii) Potential Role of the ICCPR in Governing Administrative Action

23. The model chosen to give legal effect to the ECHR in Irish law, that is the European Convention on Human Rights Act 2003 (ECHR Act 2003), requires that public bodies carry out their activities in a manner compatible with the provisions of the Convention. Section 3(1) of the ECHR Act 2003 provides that, "every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions."

24. This form of legislative incorporation falls short of direct incorporation. It is indirect given that it does not directly transpose the ECHR into Irish law. The formulation adopted in Section 3 of the ECHR Act was criticised by the IHRC at the time of its adoption as being too limited as: (i) the definition of "organs of the State" was unduly restricted; and (ii) the remedies available where a public body acted in a non-compliant manner were too weak.²² Similar problems would most likely arise were this form of incorporation used for other international treaties. Accordingly, the IHRC emphasises that, while there may be benefits in this form of indirect incorporation it should not be seen as a substitute for, or as being mutually exclusive to, the more direct forms of incorporation identified in the preceding sections.

(iv) Interpretative Incorporation

25. While Ireland maintains a dualist position with respect to international law, ratification of international treaties can give rise to a presumption that Irish domestic legislation is compatible with those treaties.²³ A further form of giving legal effect to a treaty, which again amounts to indirect incorporation, would be to explicitly oblige the courts to interpret domestic law "insofar as is possible" in a manner compatible with a treaty such as the ICCPR. This model of incorporation

²² IHRC, *Submission on the European Convention on Human Rights Bill 2001*, (June 2002).

²³ See J. Kelly *The Irish Constitution*, 4th edition, ed. G. Hogan & G. White, (Butterworths, Dublin, 2003).

was also adopted in relation to the ECHR.²⁴ If adopted in relation to the ICCPR, interpretative incorporation would greatly increase the penetration of the ICCPR into the domestic legal system and could also allow courts to give full consideration to the Concluding Observations and General Comments of the Human Rights Committee. However, this form of incorporation has its limitations. It falls short of directly transposing the international treaty into Irish Law. Again, the IHRC emphasises that while there may be benefits in this form of indirect incorporation, it should not be seen as a substitute for, or mutually exclusive to, more direct forms of incorporation.

c. Human Rights Education

26. Ireland's Third Periodic Report provides information on human rights education in Ireland's schooling system. Human rights education features in many forms throughout the curriculum of primary and secondary schools. In addition, human rights courses are increasingly available at University level.

27. While these human rights education programmes are to be welcomed, there is a pressing need for awareness and education programmes at all levels in the Irish system. In particular, the IHRC remains concerned about the lack of human rights education for Government officials. In the view of the IHRC, human rights education among law enforcement officials and the civil service are of primary importance. The IHRC considers that the Government must take measures to ensure that law enforcement officers and the civil service are familiarised with international human rights norms and standards including, *inter alia*, the provisions of the ICCPR.

d. Establishment of the Irish Human Rights Commission

28. As previously noted, the Irish Human Rights Commission is Ireland's National Human Rights Institution, set up by the Irish Government under the Human Rights Commission Acts 2000 and 2001. The IHRC enjoys "A" accreditation status with the International Coordinating Committee of National Human Rights Institutions (ICC) and thus is generally considered to be in compliance with the Paris Principles governing the powers and functions of national human rights institutions.²⁵

²⁴ Section 2 of the European Convention on Human Rights Act 2003 requires courts "In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions". Section 4 of that Act also requires courts to have reference to the jurisprudence of the European Court of Human Rights in interpreting the ECHR. See also IHRC, *Submission on the European Convention on Human Rights Bill 2001*, (June 2002).

²⁵ Ireland's Third Periodic Report goes into some detail about the establishment, powers and functions of the Commission at paras 68-77.

29. The powers and functions of the IHRC are set out in Section 8 of the Human Rights Commission Act 2000 (IHRC Act). While its powers and functions are broad and robust, the IHRC can identify a number of factors which have inhibited its ability in carrying out its mandate effectively.

30. In particular, in line with the need for independence and impartiality, the IHRC has recommended that it should be administratively linked to the Oireachtas (Parliament) rather than to a Government Department, as it is at present.

31. In addition, it may be noted that Section 8(b) of the IHRC Act 2000 provides for the IHRC to examine legislative proposals for human rights implications at the request of a Minister. Prior to September 2006, the only Minister to refer legislative proposals to the IHRC was the Minister for Justice, Equality and Law Reform. The IHRC raised this concern with the Government. In 2006, legislative Bills were referred from the Department of Foreign Affairs and the Department of Defence. However, the number of referrals from Departments outside of the Department of Justice, Equality and Law Reform remains limited.

32. Furthermore, the IHRC has a limited functional capacity due to its size. In particular, it does not currently have the human capacity to review all relevant legislative Bills. It is essential that the IHRC be in a position to review all legislation with possible human rights implications, especially those raising cause for concern under Ireland's international obligations. Finally, there is no onus on the Government to reconsider the legislative proposals in light of IHRC concerns and observations.

e. Summary of Main Areas of Concern:

- The ICCPR is currently not incorporated into Irish law. In the view of the IHRC, the Government should take effective and immediate steps to incorporate the provisions of the ICCPR into domestic Law. This would safeguard the rights protected under the ICCPR in Irish law and would provide an avenue of domestic recourse for the IHRC to enforce the rights protected under the Covenant in the Irish courts.
- There is a pressing need to develop awareness and education programmes on the provisions of the ICCPR at all levels in the Irish system. In particular, the IHRC remains concerned about the lack of human rights education for Government officials. The Government should seek to promote human rights awareness and understanding of the rights enshrined in the ICCPR among law enforcement officials and the civil service.
- While the powers and functions of the IHRC are broad and robust, the Commission can identify a number of factors which have inhibited

its ability in carrying out its mandate effectively. In particular, in line with the need for independence and impartiality, the IHRC should be administratively linked to the Oireachtas (Parliament) rather than to a Government Department, as it is at present.

2. Jurisdiction of the Special Criminal Court (Articles 14 and 26)

33. Part V of the Offences Against the State Act 1939, provides for the establishment of a Special Criminal Court. Under Section 35(2) of the Act, the Government can issue a proclamation to bring Part V of the Act into effect when it is satisfied that "the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order."

34. The Special Criminal Court has been operational between 1939 and 1946, 1961 and 1962, and from May 1972 to date. While the Government did not expressly state its reasons for the establishment of the Special Criminal Court in 1972, it is believed to have been as a result of the overspill in violence from the civil conflict in Northern Ireland.²⁶

35. The Special Criminal Court differs from the ordinary criminal courts in that it sits with three judges and no jury. The Court has jurisdiction over scheduled offences²⁷ and non-scheduled offences.²⁸ It is within the discretion of the Director of Public Prosecutions²⁹ to direct whether a person charged with a scheduled offence or non-scheduled offence should be sent forward for trial to the Special Criminal Court.³⁰

36. The Human Rights Committee has been consistently critical of Ireland's retention of the Special Criminal Court. In the Concluding Observations following the examination of Ireland's First Periodic Report in 1993, the Human Rights Committee remarked that "[i]t does not consider that the continued existence of that Court is justified in the present circumstances."³¹ In 2000, the Human Rights Committee recommended that "[s]teps should be taken to end the jurisdiction of the Special Criminal Court."³² The Human Rights Committee expressed particular concern that the law establishing the Special Criminal Court does not specify

²⁶ Report of the Committee to review the Offences Against the State Acts 1939-1998, (2002).

²⁷ Scheduled offences include offences under the Explosive Substances Act 1883, the Firearms Acts 1925 to 1971, the Offences Against the State Act 1939 and Sections 6 to 9 and 12 of the Offences Against the State (Amendment) Act 1998.

²⁸ For a non-scheduled offence, the Director of Public Prosecutions can send a person charged forward for trial to the Special Criminal Court if in his opinion the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order. See Section 46 of the Offences Against the State Act, 1939.

²⁹ The Office of the Director of Public Prosecutions (DPP) was established by the Prosecution of Offences Act, 1974. The Act provided for the transfer to the DPP of all functions previously performed by the Attorney General in relation to criminal matters. The DPP is independent in the performance of his functions.

³⁰ See Sections 45, 46 and 47 of the Offences Against the State Act, 1939.

³¹ Concluding Observations of the Human Rights Committee on Ireland's First Periodic Report, CCPR/C/79/Add.21 (1993), para. 19.

³² Concluding Observations of the Human Rights Committee on Ireland's Second Periodic Report, A/55/40, (2000) para. 16.

clearly the cases which are to be assigned to that Court but leaves it to the broadly defined discretion of the Director of Public Prosecutions.³³

37. Furthermore, the Human Rights Committee will recall its decision in the case of *Kavanagh v. Ireland*.³⁴ In this instance, the Human Rights Committee considered that Ireland had failed to demonstrate that the decision to try the author before the Special Criminal Court was based upon reasonable and objective grounds. Accordingly, the Human Rights Committee concluded that the author's right under Article 26 to equality before the law and to the equal protection of the law had been violated.³⁵ The Human Rights Committee stated that Ireland "should ensure that persons are not tried before the Special Criminal Court unless reasonable and objective criteria for the decision are provided."³⁶

38. In 1999, the Committee to Review the Offences Against the State Acts 1939–1998 ("Hederman Committee") was established. The final report of the Hederman Committee, which considered the issue of the retention of the Special Criminal Court, was published in 2002. A majority of the Committee were of the view that the threat posed by paramilitaries in Ireland was sufficient to justify the retention of the Court.³⁷ In addition, the majority of the Committee were of the view that the threat posed by organised crime alone is also sufficient alone to justify the maintenance of the Special Criminal Court.³⁸

39. However, a minority of the Committee, including the Chair, Mr. Justice Hederman, held the view that the Special Criminal Court should be dispensed with.³⁹ The minority recognised the growth in organised crime in Ireland but did not find it plausible to suggest that Irish social conditions were so perilous as to warrant dispensing with jury trial.⁴⁰ Moreover, the minority stated;

Even if non-jury trials were considered appropriate in certain circumstances, the Special Criminal Court is unacceptable to us, on the basis that the decision whether an individual forfeits his or her right to jury trial is made by the Director of Public Prosecutions on his own discretion, and with no reasons given – a position which is in practice unreviewable in most cases.⁴¹

40. While the majority of the Hederman Committee favoured the retention of the Special Criminal Court, they were critical of a number of aspects of the Offences Against the State Act which relate to the Special Criminal Court and suggested a number of amendments. Section 35(4) and (5) of the Offences Against the State Act 1939 provide that, if at any time the Government or Dáil

³³ *Ibid.*, para. 15.

³⁴ *Kavanagh v. Ireland*, CCPR/C/71/D/819/1998.

³⁵ *Kavanagh v. Ireland*, CCPR/C/71/D/819/1998, para. 10.3.

³⁶ *Ibid.*, para 12.

³⁷ Report of the Committee to review the Offences Against the State Acts 1939-1998, (2002), p. 226.

³⁸ *Ibid.*

³⁹ *Ibid.*, p. 244.

⁴⁰ *Ibid.*, p. 243.

⁴¹ *Ibid.*, p. 244.

Éireann (House of Representatives) are satisfied that the ordinary courts are again adequate to secure the effective administration of justice and the preservation of public peace and order, a proclamation can be issued which will bring to an end the jurisdiction of the Special Criminal Court. The Hederman Committee recommended that Section 35 of the Offences Against the State Act 1939 should be amended to ensure that a resolution establishing the Special Criminal Court "should automatically lapse unless it is positively affirmed by resolutions passed by both Houses of the Oireachtas at three-yearly intervals."⁴² In addition, the Hederman Committee recommended that such resolutions should expressly set out the basis on which the Court is to be established.⁴³

41. The report of the Hederman Committee noted the Concluding Observations of the Human Rights Committee in 2002 and the decision reached by the Human Rights Committee in *Kavanagh v. Ireland*. The Hederman Committee was of the view that in neither instance did the Human Rights Committee have a difficulty with the concept of non-jury courts as such, but only with the mechanism for referring cases to it.⁴⁴ Accordingly, it recommended that the decision of the Director of Public Prosecutions to send a person charged forward for trial in the Special Criminal Court should be subject to a positive review mechanism.⁴⁵ The Hederman Committee gave consideration to four possible types of review mechanism; review by the High Court following *inter partes* hearing; application to the High Court *ex parte*, but in camera; administrative review by a retired judge; and review by a judge of the Supreme Court.⁴⁶

42. Despite the findings of the Human Rights Committee and the detailed recommendations of the Hederman Committee, the Government has taken no steps to address the situation or to implement the recommendations of the Hederman Committee. Moreover, it is of particular concern that the Government has failed to comply with its obligations under Article 3(a) of the ICCPR and to provide an effective remedy to the author of the complainant in the case of *Kavanagh v. Ireland*.⁴⁷

⁴² *Ibid.*, p. 227-228.

⁴³ *Ibid.*

⁴⁴ *Ibid.*, p. 234.

⁴⁵ *Ibid.*, p. 235.

⁴⁶ *Ibid.*, p. 235-238.

⁴⁷ In 2002, the complainant Kavanagh again took a case to the Human Rights Committee claiming a violation of Article 2(3) of the Covenant due to the States failure to provide an effective remedy. The Human Rights Committee deemed the communication inadmissible, finding that "the author has no claim under the Covenant that would go beyond what the Committee has already decided in the author's initial communication to it." 28 November 2002, 76th Session of the Human Rights Committee, CCPR/C/76/D/1114/2002/Rev.1, para. 4.2.

a. Summary of main areas of concern:

- The IHRC is concerned that the Special Criminal Court remains in existence. Moreover, in light of the views of the Human Rights Committee in the case of *Kavanagh v. Ireland* and the subsequent recommendations of the Hederman Committee, it is of particular concern that the mechanism for referring cases to the Special Criminal Court has not been addressed by the Government. It remains within the discretion of the Director of Public Prosecutions to decide whether a person charged should be sent forward for trial to the Special Criminal Court.

3. Rights of Detained Persons (Articles 7 and 10)

43. On the broad question of taking steps to prevent torture and inhuman or degrading treatment or punishment, the IHRC notes that Ireland has not ratified the Optional Protocol to the UN Convention Against Torture, which would compel the State to put in place a national preventative mechanism in relation to places of detention.

a. Police Detention

44. The Garda Síochána Ombudsman Commission (GSOC) was established under the Garda Síochána Act 2005. The GSOC became operational in May 2007. The primary function of the GSOC is to carry out investigations into complaints concerning the conduct of the Garda Síochána (police service) and to promote public confidence in the process of resolving those complaints. Thus, the GSOC is primarily an individual complaints mechanism rather than a preventative inspection mechanism. Consequently, the IHRC considers that there is a gap at the domestic level in relation to preventative visits to police stations, which has not been filled by the establishment of the GSOC.

45. Under Section 106 of the Garda Síochána Act 2005, the GSOC is required, at the request of the Minister for Justice, to examine a practice, policy or procedure of the Garda Síochána for the purpose of preventing complaints arising from such practice, policy or procedure. In addition, the Minister can sanction such an investigation following a request by the GSOC. Such investigations will result in a report including recommendations for reform. This type of an investigation may involve a system of inspections of persons detained in police stations or in other locations by the police.

46. While the IHRC welcomes the establishment of the Garda Síochána Ombudsman Commission, it remains concerned that the GSOC does not have a general power to inspect a Garda Station on a regular and unannounced basis.⁴⁸ Such powers should be assigned by the Minister to an appropriate body, in order that interviews may be carried out at random with detained persons, as well as inspections of their custody records and examinations as to whether the rules governing the detention and questioning of suspects are being complied with, thereby addressing an existing protection gap.

⁴⁸ The recommendation to extend the powers of the Garda Síochána Ombudsman in this regard was previously made to the Government, prior to the enactment of the Garda Síochána Act 2005, by the IHRC as well as the European Committee for the Prevention of Torture (CPT). See IHRC, *Observations on the Garda Bill 2004*, (February 2004); Council of Europe, *Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 2002* (2003).

47. The IHRC is also of the view that the GSOC should be given stronger powers to launch an investigation of its own volition into any practice, policy or procedure of the Garda Síochána, with the aim of preventing ill-treatment.

b. Detention in the Prison System

48. The Prisons Act 2007 established the Office of the Inspector of Prisons on a statutory basis. The Office had been originally established in 2002 on a non-statutory basis. While the IHRC welcomes this development, there are two issues of note. First, the Inspector of Prisons is only legally mandated to conduct visits to prisons. He is not mandated to visit and inspect other places of detention, such as Garda Stations or the Central Mental Hospital. Secondly, the Inspector is not authorised to investigate an individual complaint raised by a prisoner in relation to his or her treatment in prison.⁴⁹ The Inspector of Prisons has consistently advocated the establishment of a statutory Prisoner Ombudsman, as a matter of urgency, to deal with individual prisoner complaints.⁵⁰

49. It is of note that, after significant delays, the Prison Rules 2007 came into effect on 1 October 2007. The Prison Rules govern all aspects of prison life including accommodation, visiting rights, discipline, health and education and also set out the duties and responsibilities of Prison Officers and Governors. In addition, the new rules give effect to the compulsory drug testing of prisoners.

c. Respect for the Inherent Dignity of the Human Person

50. The Human Rights Committee, in its Concluding Observations following the examination of Ireland's Second Periodic Report, recommended that "further efforts be made to ensure that all prisons and detention centres are brought up to the minimum standards required to ensure respect for the human dignity of detainees and to avoid overcrowding".⁵¹ Since 2000, there have been efforts to improve prison and detention facilities. These have included; the building of new establishments for remand and women prisoners (Cloverhill Prison and the Dochas Centre), the opening of the Midlands Prison, the construction of new accommodation units in Limerick Prison and the refurbishment of some of the accommodation units in the older prisons. The IHRC considers these as welcome developments. However, the physical conditions in many of the State's prisons continue to be wholly inadequate and fail to comply with Ireland's obligations under Article 7 and Article 10 of the ICCPR.

⁴⁹ Prisons Act 2007, Section 5(6).

⁵⁰ Inspector of Prisons, *Fifth Annual Report of the Inspector of Prisons and Places of Detention 2006-2007*, (Government Publications: 2007), p. 37. Following its visit to Ireland in October 2006, the CPT also recommended that an independent body should be established to deal with individual prisoner complaints. See Council of Europe, *Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 2006* (October 2007).

⁵¹ Concluding Observations of the Human Rights Committee on Ireland's Second Periodic Report, A/55/40, (2000), para. 25.

51. The European Committee for the Prevention of Torture (CPT) has to date carried out four separate visits to places of detention in Ireland. The Committee in its most recent report stated that, “[t]he de facto overcrowding, combined with the conditions in certain of the old and dilapidated prisons, raises concerns as to the safe and humane treatment of prisoners kept in such establishments”.⁵² In-cell sanitation has still not been installed in the main accommodation blocks in Cork and Mountjoy Prisons and in the A and B wings of Limerick Prisons. Consequently, the “slopping out” procedure remains in existence in these accommodation units. In addition, the problem of overcrowding persists. Many of the cells continue to accommodate two prisoners in cells of 9.5m squared originally designed for single occupancy.⁵³

52. Ireland’s Third Periodic Report has acknowledged that there is much to be done to bring prisoner accommodation up to modern standards. The Government has stated that it hopes to address the problems by developing a large prison complex in Thornton Hall on the outskirts of Dublin. Once operational, prisoners will be gradually transferred to the new prison. The Government have recently confirmed that Thornton Prison will not be operational until 2011.⁵⁴

53. The IHRC acknowledges that the proposed prison building programme has the potential to address some of the concerns in relation to overcrowding and in-cell sanitation. However, the IHRC considers that urgent action is required to address the most egregious features of the present system. The IHRC is of the view that Government undertakings in relation to the provision of future facilities cannot relieve it of its responsibilities for ensuring minimum human rights standards in Irish prisons and places of detention in the intervening period.

54. The IHRC considers that adequate sanitary conditions must be provided without undue delay. Where a sanitary facility is not available in prisoner’s cell, the prisoner should be entitled to be released from his cell to use the available facilities at all hours of the day and night.⁵⁵ Furthermore, the IHRC is of the view that the direction of the Government’s current penal policy is of concern. The State’s focus on an increase in prison capacity may signal a lack of openness to consideration of the need to develop alternative, non-custodial sanctions in line with best international practice.

⁵² Council of Europe, *Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 2006* (October 2007).

⁵³ *Ibid.*, p.26.

⁵⁴ See *Thornton Hall, Prison Development News*, available at www.justice.ie.

⁵⁵ The CPT made a similar recommendation in its latest report. See Council of Europe, *Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 2006* (October 2007) p. 28.

d. Reformation and Social Rehabilitation

55. Article 10.3 of the ICCPR provides that “[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation”. The current level of treatment programmes available in Irish prisons is very poor. This is particularly evident from high rates of recidivism in Ireland. A study in December 2006 revealed that more than one in four prisoners in Ireland were back behind bars within twelve months and almost half within four years.⁵⁶

56. In recent years, there has been an increase in the number of psychologists attached to the prison service in Ireland. However, it is of particular concern that four prison institutions in Ireland still have no psychologist attached to the prison.⁵⁷ The CPT, following its most recent visit to Ireland, expressed a particular concern about the lack of adequate counselling for prisoners on methadone substitution programmes in some of the main prisons in Ireland.⁵⁸ Moreover, the delegation noted, particularly with regard to St. Patrick's institution, that prisoners who had committed acts of self harm and/or attempted suicide were usually not provided with any psychological support following such an incident.⁵⁹

57. Furthermore, the availability of treatment programmes for sex offenders is inadequate. There is only one sex offender's treatment programme available in Ireland. This programme operates in Arbour Hill prison and is limited to eight places, despite the there being over two hundred sex offenders in the prison system in Ireland in 2006.⁶⁰ There are no incentives to undergo the course. In the Midlands prison, which holds a significant number of sex offenders, there is no treatment programme available and limited psychological support. The lack of treatment programmes for sex offenders has been described as a matter of “grave concern” by the Inspector of Prisons in Ireland.⁶¹

58. The CPT, in its report, repeatedly expressed concern about the inadequate effort to provide prisoners with and to encourage them to partake in “purposeful activities”.⁶² The delegation welcomed the regime in Wheatfield prison which was, in their view, the only prison they visited where the vast majority

⁵⁶ Inspector of Prisons, *Fifth Annual Report of the Inspector of Prisons and Places of Detention 2006-2007*, (Government Publications: 2007), p. 14.

⁵⁷ These are Portlaoise, Castlereagh, Loughan House or Shelton Abbey Prison.

⁵⁸ The CPT listed in particular Mountjoy, Limerick, Cloverhill Prison and St. Patrick's institution. Council of Europe, *Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 2006*, (October 2007), p. 36.

⁵⁹ *Ibid.*, p. 37.

⁶⁰ The average daily number of sex offenders in prison in December 2006 was 244. Irish Prison Service, *Annual Report 2006*, (Government Publications: 2007).

⁶¹ Inspector of Prisons, *Fifth Annual Report of the Inspector of Prisons and Places of Detention 2006-2007*, (Government Publications: 2007), p. 71.

⁶² Council of Europe, *Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 2006* (October 2007).

of the prison population was involved in meaningful work, training and educational courses. The CPT encouraged such an approach to be replicated throughout the prison system in Ireland.⁶³ The most recent figures provided in the Irish Prison Service Annual Report, illustrate that only 25% of the total prison population were intensively involved (that is, for more than ten hours per week) in educational courses within the prison system, while 49% of the prison population were involved in some educational activities.⁶⁴ It is of particular concern that in St. Patricks Institution, which houses juvenile offenders, only 22% of inmates were intensively involved in educational activities.⁶⁵

e. Segregation of Juveniles

59. Ireland's Third Periodic Report states that four-fifths of all boys under 18 years of age are segregated from older prisoners using newly renovated accommodation at St. Patricks Institution. In its recommendations, following the last visit to Ireland, the CPT acknowledged the long term intention of the Government to place juvenile offenders in detention schools and not prisons. The CPT recommended, however, that in the meantime appropriate measures should be taken to ensure adequate separation between children and young adults in St. Patrick's Institution.⁶⁶

60. The requirement in Rule 69(1) of the Prison Rules 2007, to accommodate a prisoner who has not attained the age of 18 years in areas separate from those in which older prisoners are accommodated in or have access to, is qualified by the statement that this shall only be "as far as practicable and subject to the maintenance of good order and safe and secure custody." The IHRC is gravely concerned that the Prison Rules 2007 do not unreservedly require juveniles to be separated from adults in all cases, except where it is in the child's best interests, in light of the clear international standards on this issue.

f. Summary of Main Areas of Concern

- Ireland has not ratified the Optional Protocol to the UN Convention Against Torture. The IHRC considers that Government should take the necessary steps to ratify the Optional Protocol.
- The Garda Síochána Ombudsman Commission is primarily an individual complaints mechanism, rather than a preventative inspection mechanism. Consequently, the IHRC considers that there is a gap at the domestic level in relation to preventative visits of police stations. The Government should give further consideration to

⁶³ *Ibid.*, p. 30.

⁶⁴ Irish Prison Service, *Annual Report 2006*, (Government Publications: 2007).

⁶⁵ Irish Prison Service, *Annual Report 2006*, (Government Publications: 2007).

⁶⁶ Council of Europe, *Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 2006*, (October 2007), p. 18.

measures which may be taken to close this gap, including mandating the appropriate body with the power to inspect a Garda station on a regular and unannounced basis.

- The IHRC recommends that the Garda Síochána Ombudsman Commission should be given stronger powers to launch an investigation of its own volition into any practice, policy or procedure of the Garda Síochána (police service), with the aim of preventing ill-treatment.
- The Inspector of Prisons is not authorised to investigate an individual complaint raised by a prisoner in relation to his or her treatment in prison. As a result, an independent Prisoner Ombudsman should be established to investigate individual complaints made by prisoners in relation to their treatment while in prison.
- It is of concern that there are inadequate mental health services available within the prison system in Ireland.
- A sex offender's treatment programme should be available in all prisons where sex offenders are detained. In addition, further consideration should be given to providing incentives for sex offenders to partake in a treatment programme.
- The regime developed in Wheatfield prison, where the vast majority of the prison population are involved in meaningful work, training and educational courses, should be replicated in all prisons in Ireland as a matter of urgency.
- Provisions should be put in place, within a reasonable timeframe, to ensure that juvenile offenders are segregated from adult offenders in all cases except where it is in the best interests of the child.

4. Due Process Rights and Police Powers (Articles 9 and 14)

61. In recent years, a range of legislative measures have been introduced in Ireland impacting significantly on the rights of suspects. In particular, the Criminal Justice Act 2006 and the Criminal Justice Act 2007 have introduced increased police powers in investigating crime and greater intrusions on the liberties and freedoms of persons who may be questioned or charged with offences. The IHRC has repeatedly questioned both the limited time-frame within which this legislation has been discussed in the Oireachtas (Parliament) and the need for the introduction of measures that could have a serious impact on the fundamental rights of persons.⁶⁷ The IHRC does not propose, in this chapter, to analyse all of the measures introduced but instead to highlight the issues which raise important questions of human rights protection under the ICCPR.

a. Period of Detention

62. The Human Rights Committee in its Concluding Observations, following the examination of Ireland's Second Periodic Report, expressed concern that the seven-day period of detention without charge under the Criminal Justice (Drug Trafficking) Act 1996 raised issues of compatibility with Article 9(1) of the ICCPR.⁶⁸ Despite these Observations by the Committee, the Criminal Justice Act 2007 introduced further powers to detain suspects for a seven day period. According to the Government, the context for the Criminal Justice Act 2007 was the threat of so-called 'gangland' crime and increased use of firearms. At the time of signing the order bringing the Criminal Justice Act into operation, the Minister for Justice stated "[t]hese new powers are necessary to deal with the new challenges presented by gangland activity. As a result of these measures, the Gardaí [police], the prosecution services and the courts will be in a better and stronger position to respond to the new challenges."⁶⁹

63. Section 50 of the Criminal Justice Act 2007 provides for detention of an accused person for 168 hours or seven days in respect of; (a) murder involving the use of a firearm or an explosive, (b) murder to which Section 3 of the Criminal Justice Act 1990 applies, that is; murder of a Garda, prison officer or of a head of State; (c) possession of a firearm with an intent to endanger life;⁷⁰ and (d) false

⁶⁷ The IHRC has made detailed submissions to the Minister for Justice, Equality and Law Reform in relation to these legislative provisions. IHRC, *Observations on the Criminal Justice Bill 2007* (March 2007); IHRC, *Observations on the Criminal Justice Bill 2004*, (November 2004).

⁶⁸ Concluding Observations of the Human Rights Committee on Ireland's Second Periodic Report, A/55/40, (2000), para. 17.

⁶⁹ Press Release of the Department of Justice, Equality and Law Reform, "*Criminal Justice Act 2007 Brought into Operation*", (21 May 2007), available at www.justice.ie.

⁷⁰ An offence under Section 15 of the *Firearms Act 1925*.

imprisonment involving the use of a firearm.⁷¹ It is of note that in practice, it can be said that under Section 50 a person may be detained for longer than seven days taking into account the rest period between midnight and 8 a.m.

64. The IHRC is concerned that these provisions are a substantial expansion of police detention powers. Prior to the enactment of the Criminal Justice Act 2007, the Oireachtas Joint Committee on Justice Equality Defence and Women's Rights heard that empirical evidence does not seem to support the contention that prolonged detention benefits investigation or increases the possibility of a successful conviction.⁷²

65. The Human Rights Committee in its General Comment 8, pointed out that Article 9 of the ICCPR is applicable to all deprivations of liberty and that the delay in arresting a person and bringing them before a judge "must not exceed a few days".⁷³ It further stated that "pre-trial detention should be an exception and as short as possible".⁷⁴

66. The powers of detention under Section 47 of the Criminal Justice Act 2007 are somewhat ameliorated by the necessity for the Gardaí to bring the person before a judge if they wish to detain him for more than 48 hours. A person arrested under Section 50 of the Act may be detained for up to six hours initially. Detention may be extended by a member of An Garda Síochána (police service) not below the rank of chief superintendent for a further period of up to 18 hours, and again for a further 24 hours. Both extensions may be granted only if the authorising Garda has reasonable grounds for believing that it is necessary for the proper investigation of the offence. Judicial authorisation is required to extend detention past 48 hours, and is again necessary after 120 hours. The judge must be satisfied that further detention is necessary for the proper investigation of the offence and that the investigation is being conducted diligently and expeditiously. However, in practice privilege is often claimed and the judge is precluded from exploring the grounds upon which the request is made.⁷⁵

67. The IHRC is concerned that an increase in the period of detention of up to 168 hours or seven days for the offences listed above raises the possibility that Ireland may be in violation of its obligations under Article 9 of the ICCPR. The IHRC considers that a seven day detention period is a serious curtailment of the right to personal liberty.

68. Furthermore, the IHRC considers the limited time-frame within which the Criminal Justice Act 2007 was brought forward to be unfortunate. The Bill was

⁷¹ An offence under Section 15 of the *Non-Fatal Offences against the Person Act 1997*, involving the use of a firearm.

⁷² Joint Committee on Justice Equality, Defence and Women's Rights, *per* former Minister of State at the Department of Justice Equality and Law Reform, Mr. Frank Fahey TD., (December 13, 2006).

⁷³ General Comment 8, HRI/GEN/1/Rev.7, (1982), para. 2.

⁷⁴ *Ibid.* para. 3.

⁷⁵ IHRC, *Observations on the Criminal Justice Bill 2007*, (March 2007), p. 12.

published before an Expert Review Group, who had been charged by the Government to conduct a review of a wide range of areas within the criminal justice system, had made their final recommendations.⁷⁶ The IHRC considers that desire to change the law must be balanced by the need to discuss, analyse and reflect on provisions which involve a significant restriction of long established rights.⁷⁷ Equally, the IHRC considers that adequate time must be given to it for proper consideration of legislative proposals, in order that it may exercise its statutory function under Section 8(b) of the Human Rights Commission Act 2000.⁷⁸

b. Access to Counsel

69. The need to address the shortcomings in the availability of post-arrest legal advice in the Irish system is extremely pressing.⁷⁹ Although access to a lawyer is a constitutionally recognised right,⁸⁰ the Irish courts have stated that a person arrested and detained in this jurisdiction can be questioned prior to the arrival of the requested solicitor.⁸¹ The accused is only entitled to “reasonable access” to a legal advisor.⁸² In addition, a person arrested and detained is not entitled to have his solicitor remain with him during police interrogation.⁸³

70. The IHRC considers that the presence of a legal advisor is necessary throughout interrogation to ensure an accused person understands and appreciates at all times the nature of the allegations made against him and the

⁷⁶ The Expert Group was established in November 2006. The group was entitled “Balance in the Criminal Law Review Group”. Its final report was published on 23 March 2007, after publication of the Criminal Justice Bill 2007.

⁷⁷ The existence of the different stages involved in the enactment of legislation is an essential facet of the democratic process. Moreover, the legitimacy of the legislative process requires adequate time be given to such stages. The IHRC notes that the Irish Constitution does not set strict procedural requirements in relation to legislative procedures.

⁷⁸ Section 8(b) of the Human Rights Commission Act 2000 provides for the IHRC to examine legislative proposals for its human rights implications at the request of a Minister. The Criminal Justice Bill 2007 was scheduled for Report Stage in the Dáil (lower house of Parliament) only three weeks after the Bill was referred to the IHRC and prior to the submission of the IHRC observations on the Bill. The Bill was enacted on 9 May 2007.

⁷⁹ It is of note that police stations do not possess lists of solicitors who are available to attend at the Garda station and provide legal advice for detained suspects.

⁸⁰ In *The State (Healy) v. O’Donoghue* [1990] 2 IR 73 at 81, Finlay CJ stated that the effect of “such important and fundamental standard of fairness in the administration of justice as the right of access to a lawyer must be deemed to be constitutional in its origin, and [...] to classify it as merely legal would be to undermine its importance and the completeness of the protection of it which the courts are obliged to give”.

⁸¹ *People (DPP) v. Cullen* 30 March 1993 (CCA); See also *DPP v. O’Brien* 17 June 2002 (CCA) [2005] IESC 29; [2005] 2 IR 206 (SC); and Regulation 12(6) of the *Criminal Justice Act 1984* (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987 provide that an arrested person who requests consultation with a solicitor not be asked to make a written statement in regard to the offence until a reasonable time for the arrival of the solicitor has elapsed.

⁸² *The State (Healy) v. O’Donoghue* [1990] 2 IR 7. See also *Lavery v. Member-in-Charge, Carrickmacross Garda Station* [1999] 2 IR 390.

⁸³ *People (DPP) v. Cullen* 30 March 1993 (CCA).

consequences of his or her conduct during this time. The prevention of miscarriages of justice requires this standard of protection.

71. Indeed the European Committee for the Prevention of Torture (CPT), following its most recent visit to Ireland, noted that a lawyer was not permitted to be present during any interrogation conducted by the Gardaí. The CPT considered that a detained person should, in principle, be entitled to have a lawyer present during any interrogation.⁸⁴ In response to the report of the CPT, the Government provided assurances that they would keep the matter under review given the importance that the Committee attached to the issue.⁸⁵

72. The IHRC considers that the presence of a legal advisor prior to and during interrogation is all the more pressing in light of the changes to the rules of evidence introduced by the Criminal Justice Act 2007. The Criminal Justice Act 2007 introduced changes to the rules of evidence whereby refusal to answer certain questions could be used in evidence against a suspect. Section 28 of the Act allows inferences to be drawn from the failure or refusal of the suspect, upon arrest, to account for marks, objects or substances on his or her person or in the person's presence in a place, when asked to do so by the arresting Garda who reasonably believes that this may be attributable to participation in the offence for which he or she was arrested. Section 29 of the Act clarifies that this applies to the questioning of the accused at any time before he or she is charged with an offence or informed by a Garda that he or she may be prosecuted for it, and that the Garda in question need not be the arresting Garda. Section 30 of the Act allows inferences to be drawn from the failure of the accused to mention particular facts on which he or she later seeks to rely on in proceedings relating to all arrestable offences.

73. The IHRC is concerned with the potential consequences Sections 28, 29 and 30 of the Criminal Justice Act 2007 may have on the rights of an accused person. The consequences are of particular concern when the application of these provisions is coupled with a seven day detention period. The right to silence and the opportunity to subject a person to questioning are closely related to a suspect's right of reasonable access to counsel.⁸⁶ The Act provides that these Sections will only apply where the accused has had "a reasonable opportunity" to consult a solicitor before the failure to answer questions. Where the Gardaí (police) have made *bona fide* attempts to provide a solicitor, an incriminating statement made by the person concerned before the arrival of a solicitor may be admitted by the trial judge as a matter of discretion.⁸⁷ Given the

⁸⁴ Council of Europe, *Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 2006*, (October 2007), p. 16.

⁸⁵ Response of the Government of Ireland to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment on its visit to Ireland (October 2007) p. 15.

⁸⁶ This was affirmed in the Irish Courts in the case of *The State (Healy) v. O' Donoghue* [1990] 2 IR 73.

⁸⁷ For a discussion of what is meant by 'reasonable access' to legal advice see *People (DPP) v. Buck* [1990] 2 IR 73.

complexity of the provisions involved and the serious inroads made into the right to silence, the IHRC considers that inferences should be drawn only if the accused has actually consulted his or her solicitor and the solicitor has been present during the questioning of the accused.⁸⁸ The IHRC considers it absolutely necessary that the accused obtains legal advice before making a decision of whether or not to remain silent. The European Court of Human Rights has also expressed a similar viewpoint.⁸⁹

c. Summary of Main Areas of Concern

- The IHRC is concerned that an increase in the period of detention of up to seven days, under the Criminal Justice Act 2007, raises the possibility that Ireland is in violation of its obligations under Article 9 of the ICCPR.
- The IHRC considers that where legislation provides for extended detention periods it is desirable that a mechanism be established so that, when further detention is being sought, the grounds upon which the request is based are properly explored before an adjudication is made by the judge.
- The IHRC is concerned that there are still problems regarding access to legal advice post-arrest and during questioning and urges that the Government should give further consideration to allowing for the presence of a legal advisor during interrogations by the Gardaí (police).
- The IHRC is concerned about the potential consequences that Sections 28, 29 and 30 of the Criminal Justice Act 2007 may have on the trial of an accused. In light of these concerns, the IHRC considers that, at minimum, the drawing of inferences from failure to answer questions should be conditional upon the accused having actually consulted with his or her solicitor and the solicitor having been present during the questioning that gave rise to the supposed failure to answer questions.

⁸⁸ The IHRC made these views known to the Government prior to the enactment of the Criminal Justice Act, 2007. See IHRC, *Observations on the Criminal Justice Bill 2007* (March 2007).

⁸⁹ In the decisions in *Murray v. United Kingdom* (1996) 22 EHRR 13 and *Averill v. United Kingdom* (2001) 31 EHRR 36 the European Court of Human Rights state that given the complexity of the provisions governing the drawing of inferences and the dilemma faced by persons being questioned by the police under these provisions, it is essential that they have access to legal advice prior to any questioning where it is indicated that inferences may be drawn from their silence.

5. Legal Aid and Access to Justice for Vulnerable Persons (Articles 14 and 26)

74. The IHRC believes that there is a need for a comprehensive and well-resourced scheme of criminal and civil legal aid covering all areas of the law. In this regard, a sharp distinction needs to be drawn between the current provision for criminal and civil legal aid, respectively, in this jurisdiction.

a. Criminal Legal Aid

75. Ireland's Criminal Legal Aid Scheme is administered by the Department of Justice, Equality and Law Reform. The statutory framework for the Scheme is provided by the Criminal Justice (Legal Aid) Act 1962. Section 2 of the Act provides for a solicitor paid by the State to be appointed by the courts where a person is charged with a criminal offence. It is the role of the District Court to determine that the means of the person concerned are insufficient to enable him/her to pay for legal representation and that by reason of the gravity of the charge or other exceptional circumstances it is necessary in the interests of justice that he or she should have legal aid. An entitlement to the appointment of a solicitor and one or more barristers arises where the person is charged with a more serious offence and sent forward for a trial on indictment before the Circuit Court or the Central Criminal Court.⁹⁰ It also arises where there is an appeal, other than an appeal from the District Court to the Circuit Court in relation to a minor offence.⁹¹

76. The Criminal Legal Aid Scheme has worked reasonably well in relation to the matters that come within its scope. In particular, the mechanism whereby the courts determine a person's entitlement to legal aid has been effective in practice. Nevertheless, the IHRC considers that there are certain deficiencies in the current scheme. A range of important matters related to criminal charges are excluded from the scheme's scope. These include certain types of judicial review, bail, *habeas corpus* and extradition applications. Legal assistance to indigent persons in relation to such applications is provided for under the Attorney General's Scheme. This is a non-statutory scheme whereby fees at a level determined by the Attorney General, who is frequently the Respondent in such cases, may be paid by the State following a recommendation by the courts. The defects of the Attorney General's Scheme in practice, and in particular the difficulty for lawyers in obtaining adequate payment under the scheme, have led to problems for indigent persons in securing appropriate representation in such cases. The IHRC recommends that legal aid in such cases should be placed on a statutory footing, and should be available as of right.⁹²

⁹⁰ Section 3 of the Criminal Justice (Legal Aid) Act 1962.

⁹¹ Section 4 of the Criminal Justice (Legal Aid) Act 1962.

⁹² *Cf.* the decision of the Human Rights Committee in *Currie v. Jamaica* (377/89), where a violation of Article 14 was found in the failure to provide legal aid for a prisoner's constitutional motion to challenge the fairness of his trial.

77. Furthermore, the Criminal Legal Aid Scheme lacks provision for the court to appoint a barrister, as well as a solicitor, to represent an indigent person in criminal proceedings before the District Court or on appeal from the District Court to the Circuit Court. The IHRC is of the view that in certain circumstances such proceedings can be sufficiently serious and complex to warrant the appointment of a barrister as well as a solicitor, especially where the prosecution will be represented by a solicitor and a barrister. This situation may give rise to an inequality in representation between the parties. In this regard, the IHRC recalls that the Human Rights Committee's General Comment 32 interprets Article 14 as protecting a right to equality of arms in defending criminal cases.⁹³

78. In January 2005, a challenge concerning the failure to provide under the Legal Aid scheme for the appointment of a barrister as well as a solicitor in criminal cases before the District Court, as a breach of the Irish Constitution and the European Convention on Human Rights, was rejected by the High Court.⁹⁴ This decision was appealed to the Supreme Court, and the IHRC was represented as *amicus curiae* at the Supreme Court hearing in January 2008. The Supreme Court's decision is awaited.

b. Civil Legal Aid

79. Civil legal aid in Ireland is governed by the Civil Legal Aid Act 1995. The IHRC is of the view that the current provision for civil legal aid in Ireland falls short of providing universal access to legal aid for persons of insufficient means in civil cases. It is noted in this regard that the Human Rights Committee's General Comment 32 encourages the State to provide legal aid in cases other than criminal trials and states that in certain cases it is obliged to do so.⁹⁵

80. Section 28 of the Civil Legal Aid Act 1995 provides that the Legal Aid Board, rather than the courts, is responsible for determining whether a certificate for legal aid should be provided in civil cases. The Board provides representation through a network of Law Centres staffed by full-time solicitors and sometimes retains private solicitors.⁹⁶ It also provides representation for asylum-seekers through a specialised Refugee Legal Service. In practice, however, the scope of civil legal aid provided is very limited as the Board concentrates heavily on family law cases. According to an independent report by the Irish Free Legal Advice Centres, civil legal aid was granted in only 81 cases not involving family law in 2003.⁹⁷ The Legal Aid Board is also generally prohibited by statute from providing representation in legal matters outside the courts, such as before employment or social welfare tribunals or in cases involving a right or interest over land. The IHRC considers that there must be a comprehensive and well-resourced scheme

⁹³ U.N. Doc. CCPR/C/GC/32 (2007).

⁹⁴ *Carmody v. Minister for Justice and Others* [2005] 2 I.L.R.M. 1.

⁹⁵ U.N. Doc. CCPR/C/GC/32 (2007).

⁹⁶ This contracting out aspect of the Legal Aid Board is called the Private Practitioners Service

⁹⁷ Report by the Free Legal Advice Centres, *Access to Justice: A Right Or A Privilege?* (July 2005).

of civil legal aid covering all civil legal areas including; social welfare, housing, debt, immigration, consumer and employment law.

81. Persons applying for civil legal aid are subject to a means test.⁹⁸ Currently, a family whose disposable income exceeds approximately €346 per week is not eligible for civil legal aid. The means test was last revised in 2006 having not been previously reviewed since 2002 and there is currently no provision for inflation-proofing of the means test. Applicants are also required to pay certain minimum contributions in respect of engaging legal assistance, which in some cases can be quite substantial. The IHRC recommends that the financial criteria in relation to the provision of civil legal aid must provide a realistic reflection of an individual's capacity to pay for his or her own legal representation.

82. The IHRC considers that the provision of civil legal aid in this jurisdiction has been inadequate. In this regard, it is noted that in July 2005 only 89 solicitors were employed by the Legal Aid Board to administer the entire Civil Legal Aid Scheme.⁹⁹ The IHRC welcomes the Government's decision to increase the Board's financial allocation by 16% to €21.362m in 2005, and notes that this has led to a substantial reduction in waiting times, which had extended up to two years in some locations. However, this increase has not been sufficient to enable the Legal Aid Board to provide a comprehensive service to indigent clients and the statutory bar on representation before tribunals and in certain types of case remains.

c. Summary of Main Areas of Concern:

- The IHRC believes that there is a need for a comprehensive and well-resourced scheme of criminal and civil legal aid covering all areas of the law.
- The Criminal Legal Aid scheme excludes a range of important matters related to criminal charges from the scope of the scheme. These include certain types of judicial review, bail, *habeas corpus* and extradition applications. Legal assistance to indigent persons in relation to such applications is provided for under the non-statutory Attorney General's Scheme. The IHRC recommends that consideration should be given to placing legal aid in such cases on a statutory footing and for its availability as of right.
- The scope of Civil Legal Aid Scheme is very limited. The Legal Aid Board which is responsible for administering the scheme concentrates heavily on family law cases. In addition the Legal Aid Board is prohibited by statute from providing representation in legal

⁹⁸ See the Civil Legal Aid Regulations 2006, SI 460/2006.

⁹⁹ Report by the Free Legal Advice Centre, *Access to Justice: A Right Or A Privilege?* (July 2005). This figure excludes asylum cases under the Refugee Legal Service.

matters outside the courts, such as, before employment or social welfare tribunals or in cases involving a right or interest over land. The IHRC considers that there must be a comprehensive and well-resourced scheme of civil legal aid covering all civil legal areas including; social welfare, housing, debt, immigration, consumer and employment law.

6. Extraordinary Rendition (Article 7)

83. In December 2005, amid growing concerns both within the State and abroad about so-called “extraordinary rendition”¹⁰⁰ flights landing in Ireland, the IHRC exercised its statutory functions to review law and practice in the State pertaining to human rights and to make recommendations to Government thereon. The IHRC was concerned that the State may be in breach of its human rights obligations by failing to investigate claims that Shannon airport was being used by United States CIA aircraft involved in the practice of “extraordinary rendition”. In December 2005 allegations were made by international human rights organisations, Parliamentary questions put in the Oireachtas and two European probes into the issue (the investigations being announced at that time by Senator Dick Marty of the Parliamentary Assembly of the Council of Europe and the Inquiry being conducted by the Secretary General of the Council of Europe, pursuant to Article 52 of the European Convention on Human Rights).

84. The IHRC recommended to the Irish Government that it seek agreement from the US authorities to inspect suspect aircraft entering the State where there were suspicions those aircraft were involved in “extraordinary rendition” activities. The advice was based on the IHRC’s analysis of the State’s obligations under Constitutional and international human rights law regarding the right to be free from torture, or inhuman or degrading treatment or punishment.

85. The Government’s response stated that it had sought and received assurances from the US Administration that prisoners had not been and would not be transported illegally through Irish territory and that it felt it was appropriate to rely on such assurances. Accordingly, the Government’s view was and is that there is no necessity for a system of aircraft inspections to be put in place as the political assurances it has received are sufficient to meet its human rights obligations.

86. There followed a number of written exchanges between the IHRC and Government culminating in an oral dialogue in July 2007. Two very positive outcomes of these constructive engagements, which the IHRC would wish to recognise, is that the Department of Foreign Affairs firstly reconfirmed to the IHRC that the Government is totally opposed to the practice of “extraordinary rendition” and secondly, the Department provided the Commission with a copy of

¹⁰⁰ In the view of the IHRC, the term “extraordinary rendition” is a deliberately opaque phrase to describe the forcible kidnapping of an individual by the agents of a State and the transfer of that person to a secret prison in another State where he or she may be tortured or subjected to inhuman or degrading treatment or punishment, and be interrogated and detained indefinitely without recourse to the courts, to lawyers or to any of the mechanisms set up to protect the human rights of an individual. It may also lead to ‘enforced disappearances’.

the diplomatic assurances which it had sought and received from the U.S. Government in regard to the transportation of “prisoners” through the territory.

87. However, diametrically opposed views emerged in the course of the dialogue on the legal issues involved, as a result of which the IHRC decided to conduct a thorough review of the matter. It conducted this review having regard to the further evidence which had emerged by mid-2007 regarding the nature and extent of the “extraordinary rendition” programme, the possible use of Shannon airport, the case law of various human rights bodies, as well as the results of three pan-European investigations on the matter. The results of that review are contained in a detailed report published in December 2007 entitled *‘Extraordinary Rendition’: A Review of Ireland’s Human Rights Obligations*.

88. The review report concluded, in December 2007, that the Commission was essentially fortified in the view which it first expressed two years previously. The reliance being placed by the Government on the diplomatic assurances, which it has sought and obtained from the US Government, were not sufficient to comply with the State’s obligation to *prevent* torture or prohibited ill-treatment taking place in its territory or airspace and to ensure that its territory is not being used in any way to facilitate “extraordinary rendition” to another State where a person may be tortured or subjected to prohibited ill-treatment.

89. In reaching this conclusion, the IHRC took note of a number of international reports. These included the report compiled by five Special Rapporteurs for the UN Commission on Human Rights following an inspection of the detention centre in Guantanamo Bay (February 2006); the first and second Marty Reports of the Parliamentary Assembly of the Council of Europe (June 2006, June 2007); the Secretary General of the Council of Europe’s report drawn up as part of the Article 52 Inquiry (February 2006) and the Temporary Committee of the European Parliament’s report following its investigation (January 2007).¹⁰¹

90. The IHRC also considered the “Venice Commission Opinion”, which specifically addressed the obligations of Member States of the Council of Europe under the ECHR and other treaties in instances where the State’s involvement in

¹⁰¹ Respectively; 1) the Report of five UN Special Rapporteurs, *Situation of Detainees at Guantanamo Bay*, 15 February 2006, Commission on Human Rights; see para 87; 2) The Parliamentary Assembly of the Council of Europe, *Alleged secret detentions and unlawful inter-State transfers of detainees involving Council of Europe Member States*, dated 12 June 2006 (first Marty Report), Parliamentary Assembly Doc. 10957. The second Marty Report, commissioned by the Parliamentary Assembly of the Council of Europe: *Secret detentions and illegal transfers of detainees involving Council of Europe Member States; second report*, 7 June 2007; 3) Secretary General’s Report under Article 52 of the European Convention on Human Rights on the question of Secret Detention and Transport of Detainees suspected of Terrorist Acts, notably by or at the instigation of foreign agencies, SG/Inf 5 (2006); 4) European Parliament, *Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners*, FINAL A6-0020/2007.

“extraordinary rendition” activities includes the use of its airspace and/or airports in the context of the obligation to prevent a prisoner’s *exposure to risk of torture* or inhuman or degrading treatment.¹⁰²

91. In relation to these investigations the IHRC noted that the investigation commissioned by the Council of Europe’s Parliamentary Assembly, concluded that a number of countries, including Ireland, could be held responsible for what it described as “collusion” in the process of “extraordinary rendition” by virtue of being “stopovers” for flights involving the unlawful transfer of detainees. In a Resolution in June 2006, the Parliamentary Assembly called on Member States to “take effective measures to prevent renditions and rendition flights through the Member State’s territory and airspace”.¹⁰³

92. The IHRC noted that the Article 52 Inquiry Report¹⁰⁴ concluded, *inter alia*, that while stronger international controls were required to check whether transiting aircraft are being used for illegal purposes, even within the current legal framework, States should equip themselves with stronger control tools. The Article 52 Inquiry Report also concluded that mere assurances by foreign States that their agents abroad comply with international and national law are not enough, but that formal guarantees and enforcement mechanisms need to be set out in agreements and national law in order to protect ECHR rights.

93. The IHRC further noted that the European Parliament’s Temporary Committee Report and subsequent resolution regretted that ‘European countries have been relinquishing control over their airspace and airports by turning a blind eye or admitting flights operated by the CIA which, on some occasions, were being used for “extraordinary rendition”’.¹⁰⁵ The resolution contained a specific section relating to Ireland and expressed serious concern about the ‘147 stopovers made by CIA-operated aircraft at Irish airports that on many occasions came from or were bound for countries linked with “extraordinary rendition” circuits’.¹⁰⁶ It recommended that in the absence of random searches a “ban

¹⁰² European Commission for Democracy Through Law (Venice Commission) Opinion on the international obligations of Council of Europe Member States in respect of secret detention facilities and inter-State transfer of Prisoners, adopted by the Venice Commission at its 66th plenary session (Venice 17–18 March 2006). Emphasis added.

¹⁰³ Parliamentary Assembly’s Resolution of 27 June 2006, Resolution 1507, (2006).

¹⁰⁴ Report by the Secretary General of the Council of Europe on the use of his powers under Article 52 of the European Convention on Human Rights, in the light of reports suggesting that individuals, notably persons suspected of involvement in acts of terrorism, may have been arrested and detained, or transported while deprived of their liberty, by or at the instigation of foreign agencies, with the active or passive co-operation of States Parties to the Convention or by States Parties themselves at their own initiative, without such deprivation of liberty having been acknowledged.

¹⁰⁵ Motion for a European Parliament resolution on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners (2006/2200 (INI)), adopted 14 February 2007; 382 votes in favour, 256 against and 74 abstentions; at para 43.

¹⁰⁶ At para 123.

should be imposed on all CIA-operated aircraft landing in Ireland".¹⁰⁷ These findings and conclusions were subsequently criticised by the Minister for Foreign Affairs.¹⁰⁸

94. In addition to the European investigations, the IHRC took note of national inquiries such as the *Canadian Report from the Commission of Inquiry into the Action of Canadian Officials in Relation to Maher Arar*.¹⁰⁹

95. In considering international human rights law jurisprudence, the IHRC considered the jurisprudence under the UN Convention Against Torture and All Forms of Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), the ICCPR and the ECHR.

96. In this regard, it considered the communication of *Agiza v. Sweden*¹¹⁰ before the Committee Against Torture and the communication of *Alzery v. Sweden*¹¹¹ which was considered by the Human Rights Committee. It noted the principle of "due diligence" as considered by this Committee in *Ahani v. Canada*.¹¹² In relation to the ECHR, the IHRC considered the jurisprudence of the European Court in, *inter alia*, *Chahal v. The United Kingdom*.¹¹³

97. Applying these human rights principles to the situation pertaining in the State, the IHRC stated that, in its view, the State could not seek to rely on private individuals to bring forward evidence to An Garda Síochána (police service) of suspicious activities of aircraft and it regretted the fact that the Government appeared to have put the onus of producing evidence regarding suspect aircraft on to the private citizen. In the absence of a proper system of inspection, it pointed out that is impossible for an ordinary citizen to gain evidence regarding such activity or to ascertain with any level of confidence whether such illegal activity is taking place in the State, particularly, as was pointed out by the Government, the ordinary citizen has no authority to access the relevant parts of Shannon airport to gain evidence.

98. In the IHRC's view, a complaint-reactive mechanism as currently constituted - whereby complaints to An Garda Síochána have resulted in a number of Garda inquiries - was insufficient to discharge the State's human

¹⁰⁷ At para 125.

¹⁰⁸ *Statement by the Minister for Foreign Affairs Dermot Ahern TD in response to Irish Human Rights Commission Report on Extraordinary Rendition*, (11 December 2007).

¹⁰⁹ Available at www.ararcommission.ca

¹¹⁰ *Agiza v. Sweden* 20 May 2005, Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003(2005).

¹¹¹ *Alzery v. Sweden*, Human Rights Committee, Decision of 25 October 2006. Communication No. 1416/2005 communicated 29 July 2005.

¹¹² United Nations, Human Rights Committee, 80th Session, Comm. No. 1051/2002, UN Doc. CCPR/C/80/D/1051/2002.

¹¹³ *Chahal v. The United Kingdom*, Judgment of 15 November 1996.

rights obligations to prevent torture or prohibited ill-treatment. The IHRC considered that, a monitoring and inspection regime was required. In this, the IHRC took into consideration the fact that the entirely secretive nature of the process of “extraordinary rendition”, coupled with the inability of victims to access any legal system, meant it was unlikely a victim of “extraordinary rendition”, who had been transited through a state like Ireland in the course of a “rendition operation”, would ever be able to prove such facts in a court of law. Equally, the State had no objective mechanism to disprove any allegation that a person was “rendered” through the State. Finally, the IHRC questioned whether a Garda investigation reacting to a complaint made in the nearest town to Shannon airport could reasonably be equipped to track down suspected civilian aircraft in a time-sensitive manner. The IHRC stated that, to its knowledge, such aircraft have not been subject to any searches or inspections on Irish soil.

99. The IHRC considers that in its approach to ‘extraordinary rendition’, the State is not complying with its human rights obligations under Article 7 of the ICCPR to prevent torture or inhuman or degrading treatment or punishment. Its reliance on the assurances of the US Government is not enough. In order to ensure full compliance with its human rights obligations, the Irish State should put in place a reliable and independently verifiable system of inspection so that no prisoner is ever transported through this country except in accordance with proper legal formalities and the highest observance of human rights standards.

100. Subsequent to the publication of the report, the Department of Foreign Affairs, the Department of Justice, Equality and Law Reform and the Department of Transport and the IHRC were called before the Oireachtas Joint Committee on Foreign Affairs on 19 December 2007.

101. Following the IHRC report, the Government announced that it remained ‘determined to take all possible measures to counter the practice of “extraordinary rendition”’. It reiterated that at European Union level, it had already called for a review of the Chicago Convention governing civil aviation with a view to considering whether there are further steps which could be taken to counter any possibility of “extraordinary rendition”. It stated that An Garda Síochána “have been formally requested to ensure that all members are appropriately trained and familiar with the relevant legislation to ensure that the Programme for Government commitments on [“extraordinary rendition”] are complied with.” It also stated that “the Department of Transport intends to host a meeting of a regional subgroup of Member States of the International Civil Aviation Organisation at which it will raise the question of a review of the Chicago Convention”.¹¹⁴

102. At the Oireachtas hearing, both sides reiterated their views on the matter. The Government stressed the fact that seven investigations led by An Garda Síochána had not yielded any evidence of wrong-doing. The IHRC reiterated its

¹¹⁴ See footnote 108.

view that an effective monitoring and inspection regime was required to prevent torture or prohibited ill-treatment.

a. Summary of Main Areas of Concern

- The IHRC considers that in its approach to 'extraordinary rendition', the State is not complying with its human rights obligations under Article 7 of the ICCPR to prevent torture or inhuman or degrading treatment or punishment. Its reliance on the assurances of the US Government is not enough. In order to ensure full compliance with its human rights obligations, the Irish State should put in place a reliable and independently verifiable system of inspection so that no prisoner is ever transported through this country except in accordance with proper legal formalities and the highest observance of human rights standards.

7. Human Trafficking (Article 8)

103. Article 8 of the ICCPR provides that “[n]o one shall be held in slavery [...] no one shall be held in servitude”. The IHRC notes the comments of the Human Rights Committee in General Comment 28 where it requires States, in accordance with their obligations under Article 8, to inform the Committee of measures taken to eliminate trafficking of women and children, and forced prostitution, and of measures taken to protect women, including foreign women and children, from slavery disguised as domestic or other kinds of personal services.¹¹⁵ Ireland has signed but has not yet ratified the UN Convention on Transnational Organised Crime which includes the Optional Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. Ireland is also a signatory to the Council of Europe Convention on Action against Trafficking in Human Beings and the Optional Protocol to the UN Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, but has not as of yet ratified either.

104. It is broadly accepted in these international treaties that human trafficking involves the recruitment, transfer, harbouring or receipt of persons, by means of threats, deception or other forms of coercion, for the purposes of their exploitation.¹¹⁶ In this context, exploitation is understood to extend, at minimum, to sexual and labour exploitation, as well as slavery and other forms of servitude. The IHRC views the issue of trafficking as a complex and important human rights issue requiring a broad range of actions on the part of the State.

105. It is of note that the Concluding Observations of both the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination Against Women have criticised the absence of reliable data in relation to the scale of the trafficking problem in Ireland.¹¹⁷ While there remains some uncertainty as to the precise extent of the problem in Ireland, there is no doubt that trafficking as a form of exploitation is both serious and widespread.¹¹⁸ However, the IHRC notes the statement by the Minister for Justice, Equality and Law Reform that “[w]hile there is no evidence of a substantial human trafficking problem in Ireland, any level of this despicable crime is deplorable”.¹¹⁹

¹¹⁵ General Comment 28, CCPR/C/21/Rev. 1/Add. 10, (2000), para. 12.

¹¹⁶ See Article 3(a) of the Optional Protocol to the UN Convention on Transnational Organised Crime to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

¹¹⁷ Concluding Observations of the Committee on the Elimination of Discrimination Against Women on Ireland's 4th and 5th Periodic Reports, A/60/38, para. 388; Concluding Observations of the Committee on the Rights of the Child on Ireland's on Ireland's Second Periodic Report, CRC/C/IRL/CO/2, para. 77.

¹¹⁸ IHRC, *Observations on the Scheme of the Criminal Justice (Trafficking in Persons and Sexual Offences Bill) 2007*, (May 2007), p. 2.

¹¹⁹ Department of Justice, Equality and Law Reform, “Human Trafficking Bill Published”, (11 Oct. 2007).

a. Ireland's Legislative Framework

106. Under Section 3 of the Child Trafficking and Pornography Act 1998, it is an offence, punishable by up to life imprisonment, to traffic a person under 17 years of age through or out of Ireland for the purpose of that person's sexual exploitation. Section 2 of the Illegal Immigrants (Trafficking) Act 2000 creates an offence of organising or knowingly facilitating the entry into Ireland of another person who that person knows, or has reasonable cause to believe, is an illegal immigrant.

107. The Government has proposed to remedy the gaps in the current legislation through the enactment of the Criminal Law (Human Trafficking) Bill 2007. At the time of writing, this Bill has been passed by Dáil Éireann (House of Representatives) and is currently at Committee Stage in Seanad Éireann (Senate). This Bill proposes to create several trafficking offences in relation to adult victims, and also aims to refine and extend the child trafficking provisions of the Child Trafficking and Pornography Act 1998.

108. The General Scheme that preceded the Criminal Law (Human Trafficking) Bill 2007 Bill was referred to the IHRC by the Government under Section 8(b) of the IHRC Act 2000. The IHRC submitted its Observations on the Scheme to the Government.¹²⁰ As noted in those Observations, the substance of the prosecutorial model proposed under the 2007 Bill is to be welcomed. The Bill proposes the introduction of a series of new offences with a view to criminalising a variety of acts relating to trafficking of human persons including adults and children. The introduction of these offences will enhance the protection offered to many vulnerable persons, and particularly to children. Nevertheless, the IHRC is concerned that deficiencies remain in the Government's treatment of human trafficking, the most important of which relate to the lack of legislative recognition of the interests of victims.

109. The Criminal Law (Human Trafficking) Bill 2007 contains little reference to victims' rights or to the importance of their protection and rehabilitation. However, the more recent Immigration, Residence and Protection Bill 2008 ("2008 Immigration Bill") provides a limited form of protection for victims of trafficking. At the time of writing this Bill is at the Second Stage before Dáil Éireann and has yet to be debated in Seanad Éireann. In particular, the 2008 Immigration Bill grants suspected victims of trafficking a 45 day period of "recovery and reflection" in the State. Furthermore, the 2008 Immigration Bill provides that the Minister for Justice can grant the victim permission to remain in the State for six months so that he or she can assist the Garda Síochána in its investigation. However, this temporary residence permit can be revoked where, among other grounds, the victim no longer wishes to assist the Garda Síochána, or the Minister is satisfied that it is in the interests of public security, public policy or public order to do so.

¹²⁰ IHRC, *Observations on the Scheme of the Criminal Justice (Trafficking in Persons and Sexual Offences Bill) 2007*, (May 2007).

110. While the IHRC welcomes proposals which make specific provision for victims of trafficking in line with international standards, the IHRC is concerned that the inclusion of provisions on victims of trafficking in a Bill that deals with immigration issues fails to reflect the international definition of victims of trafficking who can originate both in member States of the EU, and within Ireland itself, as well as amongst non-EEA nationals. The IHRC has recommended that the 2008 Immigration Bill should specifically state that the provisions in relation to victims of trafficking relate to all victims of trafficking, and not just foreign nationals as is currently the case under the 2008 Immigration Bill. Moreover, the Section on victims of trafficking should be placed in a separate chapter of the 2008 Immigration Bill to clearly delineate that these provisions apply to a specific category of persons and not only to foreign nationals.

111. The IHRC has expressed concern that the 2008 Immigration Bill does not provide an adequate response for victims of trafficking that complies with internationally agreed minimum standards. In order to bring Ireland's law into compliance with these minimum standards the IHRC has recommended that the 2008 Immigration Bill should be amended to make provision for the following issues:

- Provision should be made for the health care needs of victims including sexual health care and psychological support;
- Provision should be made for the material assistance of victims of trafficking in the immediate term including access to housing and economic assistance;
- Provision should be made for ensuring the victims access to adequate information in relation to their legal situation, in particular, victims should be informed, through the medium of a translator where required, of their options for remaining in the State;
- Provision should be made for the provision of free legal advice to victims, particularly for the purpose of seeking compensation and legal redress in respect of their ordeal;
- Child-specific provision should be made dealing with particular issues for children including access to education, access to suitable accommodation etc.;
- Provision should be made for voluntary return schemes that seek to avoid re-victimisation. Return should be voluntary where possible and should never take place where there is a doubt as to the safety of the trafficked person or the risk of re-victimisation.

112. Furthermore, the IHRC has recommended that the issuance of a 6 month temporary permission to remain in the State should not be dependent on the victim's co-operation in the criminal prosecution of alleged traffickers. Permission to remain should be allowed for humanitarian reasons having regard to the personal situation of the victim in accordance with Article 14 of the Council of Europe Convention on Trafficking. Moreover, where it is established that a victim of trafficking is at a serious risk of being re-trafficked in light of his or her personal circumstances and the inadequacies of the legal system in his or her country of

origin, such a person should be permitted to remain in the State and should not be subject to repatriation.

113. The IHRC has urged the Government to ratify the Palermo Protocol, the Council of Europe Convention on Trafficking and the UN CRC Optional Protocol without delay and in the interim recommends that the necessary modifications to Irish law should be made building on this first important initiative in the 2008 Immigration Residence and Protection Bill.

b. National Action Plan on Trafficking

114. The Government is in the process of developing a National Action Plan to combat Trafficking in Human Beings. The Government has invited submissions from interested parties in relation to this initiative. The Government has indicated that the National Action Plan will be drafted under the following four headings: (1) prosecution of the trafficker; (2) protection of the victim; (3) prevention of trafficking and awareness raising; (4) response to child trafficking.¹²¹

115. The Government has set up a new Anti-Human Trafficking Unit, within the Department of Justice, Equality and Law Reform, exclusively dedicated to co-ordinating and facilitating the implementation of the new National Action Plan.¹²² The holistic approach to the problem of trafficking envisaged under the auspices of the National Action Plan is a welcome development.

116. The UN Committee on the Rights of the Child and the UN Committee on the Elimination of Discrimination Against Women previously recommended “the adoption and implementation of a comprehensive strategy to combat trafficking and the measures to be put in place for the physical and psychological recovery and social reintegration of victims.”¹²³ The IHRC considers that the Anti-Human Trafficking Unit and the National Action Plan should become the vehicle for the adoption and implementation of such a strategy.

c. Summary of Main Areas of Concern

- **There is an absence of reliable data in relation to the scale of the trafficking problem in Ireland. The IHRC considers that steps should be taken to analyse the scale of the problem and to compile**

¹²¹ Department of Justice, Equality and Law Reform Press Release, “Human Trafficking Bill Published”, (11th October 2007).

¹²² Department of Justice, Equality and Law Reform Press Release, “Lenihan announces new Anti-Human Trafficking Unit”, (20 November 2007).

¹²³ Concluding Observations of the Committee on the Elimination of Discrimination Against Women on Ireland’s 4th and 5th Periodic Reports, A/60/38, para. 388; Concluding Observations of the Committee on the Rights of the Child on Ireland’s on Ireland’s Second Periodic Report, CRC/C/IRL/CO/2, para. 77.

comprehensive information and data on the trafficking of women and girls into Ireland.

- The inclusion of provisions on victims of trafficking in the Immigration, Residence and Protection Bill 2008, which deals with immigration issues, fails to reflect the international definition of victims of trafficking who can originate both in Member States of the EU, and within Ireland itself, as well as from non-EEA countries. The 2008 Immigration Bill should be amended to state that the provisions in relation to victims of trafficking relate to all victims of trafficking, and not just foreign nationals as is the case under the 2008 Immigration Bill.
- The provisions contained in the Immigration, Residence and Protection Bill 2008 do not provide a comprehensive response to the short-term and long-term needs of victims of trafficking. In particular the 2008 Bill should be amended to address issues such as healthcare provision, economic assistance and housing, information and legal advice, child specific issues and voluntary return schemes that ensure a victim is not re-victimised.
- Permission to remain in the State should not be dependent on a victim's co-operation in the criminal prosecution of the alleged traffickers. Permission for the victim to remain should also be allowed for humanitarian reasons having regard to the personal situation of the victim.
- The Government is in the process of developing a National Action Plan on Human Trafficking and has set up a new Anti-Human Trafficking Unit. The IHRC considers that the Anti-Human Trafficking Unit and the National Action Plan should become the vehicle for the adoption and the implementation of a comprehensive strategy to combat trafficking. In addition, the IHRC hopes that that the National Action Plan will put measures in place for the protection of victims and ensure their physical and psychological recovery and social reintegration.

8. Privacy (Article 17)

117. The broad area of privacy rights has been identified by the IHRC as an issue of concern. While the Government published a Privacy Bill in 2006, this legislation has not been enacted. Consequently, to date Ireland has no comprehensive legislation in this area. In recent years initiatives in the criminal justice sphere have given rise to concerns regarding an individual's right to privacy. Of particular concern to the IHRC is the Criminal Justice (Forensic Sampling and Evidence) Bill 2007, which aims to establish a national DNA database. This Bill, the scheme of which was referred to the IHRC in 2007, is listed on the Government's legislative programme for 2008. It is expected to be published in mid-2008.

a. Privacy Legislation

118. In July 2006, the Government published proposals for a Privacy Bill. According to Ireland's Third Periodic Report the main purpose of the Bill will be to introduce a modern statutory framework to protect all citizens from the invasion of their privacy. However, the Government recently announced its intentions to "park" the Privacy Bill, thereby providing that the Bill will not be enacted in the foreseeable future.¹²⁴ The reason provided by the Government is to allow the newly created Press Council of Ireland and Press Ombudsman the opportunity to prove its effectiveness in defending the right to privacy from unwarranted intrusion by the media.¹²⁵ The Press Council of Ireland and the Press Ombudsman were established on a non-statutory basis in January 2008. While the IHRC welcomes the establishment of the Press Council of Ireland and Press Ombudsman, the IHRC acknowledges that other possible means of protecting the right to privacy exist. The IHRC considers that a comprehensive statutory provision is a necessary model of protection. The IHRC hopes that the Government will proceed with its plans to enact a Privacy Bill which is in line with best international practice and international human rights law.

b. DNA Database

119. The Criminal Justice (Forensic Sampling and Evidence) Bill 2007 will establish a DNA database in Ireland. The database will potentially identify a person not previously suspected of committing a crime as the possible perpetrator of an offence. It can also exclude a person from further investigation. The IHRC welcomes the potential a DNA database can offer as an effective crime control technique to An Garda Síochána (the police service). The Commission is, however, concerned about the potential human rights impact of the proposed legislation. The IHRC is of the view that there can be little, if anything, more

¹²⁴ Speech by the Minister for Justice, Equality and Law Reform at the Official Launch of the Press Council (9 January 2008), available at www.justice.ie

¹²⁵ *Ibid.*

private to an individual than information on his or her genetic make-up. The guarantee of a person's right to privacy is therefore fundamentally affected by the storage of their DNA sample on a database. What is objectively reasonable and proportionate must be taken into consideration in an examination of the parameters of the DNA database.

120. In relation to the gathering and holding of personal information the Human Rights Committee in General Comment 16 requires that;

The gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law. Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant.¹²⁶

121. The safeguards laid out in General Comment 16 illustrate the importance of effective protections being laid down in legislation to regulate the taking of samples, their use domestically and the exchange of DNA information to other public authorities or bodies internationally.

122. Clearly, legislative reform establishing a DNA database engages with the important question of an individual's right to privacy. In this regard, the IHRC has four primary concerns arising from the draft legislation. These are; the need to restrict the functions of the DNA database; the retention of DNA samples from suspects; the assignment of DNA samples to other labs, other than the lab designated by law; and the need to regulate international co-operation. These concerns are detailed below.

123. The IHRC previously submitted comprehensive observations to the Government on the far reaching consequences of this legislative proposal.¹²⁷ The IHRC hopes that the Government will make amendments to the Criminal Justice (Forensic Sampling and Evidence) Bill 2007 in light of the concerns of the IHRC.

c. Functions of the DNA Database

124. It must be acknowledged that the potential uses of DNA samples are likely to expand in the future. It is therefore essential that domestic law lays down, with sufficient precision, the circumstances in which authorities can store and make use of information relating to an individual's private life. The IHRC acknowledges the attempts made in the proposed Bill to limit the use of the DNA database to crime investigation and identification of missing persons. However, The IHRC is concerned that the terminology used to limit the potential use of the database for

¹²⁶ General Comment 16, HRI/GEN/1/Rev.7, (1988) para. 10.

¹²⁷ IHRC, *Observations on the Criminal Justice (Forensic Sampling and Evidence) Bill 2007* (July 2007).

the purposes of “criminal investigations generally or, as *appropriate*”¹²⁸ could be interpreted to allow the database to be used, *inter alia*, for research purposes which have only a minimal connection with crime detection and prevention.

125. Aware of such dangers and the phenomenon of “function creep”, legislative reform in other jurisdictions have used explicit yet precise terminology in the establishment of the functional basis of a DNA database.¹²⁹ The Commission considers it essential that the proposed legislation contains specificity as to the functions in explicit and exhaustive terms so as to limit the use of the database in the future to legitimate purposes.

d. Retention of DNA Samples from Suspects

126. The indefinite retention of a suspect's samples on the DNA databases is the exception rather than the norm both in Europe and internationally. Under the proposed Bill, the DNA profile of a person who has ultimately being found not guilty of the relevant offence or in respect of whom the charges have been withdrawn will be available on the DNA database for an indefinite period.¹³⁰ While the legitimate interest in the prevention and detection of crime may justify the retention of DNA profiles of those charged and proven guilty, it cannot serve as a justification for the indefinite retention of DNA samples of individuals who are by law presumed to be innocent. The IHRC considers the indefinite retention of samples taken from suspects, who have not been convicted of any offence, to be an unacceptable invasion of a person's right to privacy.

127. The IHRC does not consider it proportionate that the presumption now lies in favour of the indefinite retention of DNA samples from suspects.¹³¹ Section 4 of the Criminal Justice (Forensic Evidence) Act 1990 has been amended by the Criminal Justice Act 2007 by shifting the onus of responsibility on to the person, from whom a sample has been taken, to make an application to the Garda Commissioner requesting the destruction of his or her sample. As a result, it rests on the suspects to make a request and supply reasons for the destruction and removal of their sample from the DNA database.¹³²

¹²⁸ Head 2 (a) of the Bill (emphasis added by the IHRC).

¹²⁹ For example, Section 92 of the *New South Wales Crimes (Forensic Procedures) Act 2000* sets out a detailed list of permitted purposes of the DNA database.

¹³⁰ Head 8 of the Bill.

¹³¹ It can be said that up until the recent introduction of section 49 of the *Criminal Justice Act 2007*, the approach favoured the destruction as opposed to the indefinite retention of suspect's samples. Section 4 of the *Criminal Justice (Forensic Evidence) Act 1990* provided that every sample and record identifying the person from whom a sample has been taken must be destroyed where proceedings are not instituted against the person within 12 months, or where proceedings have been so instituted and the person is acquitted or discharged or the proceedings are discontinued.

¹³² Section 49 (8)(3) of the *Criminal Justice Act 2007* states: “Such a request shall be made in writing to the Garda Commissioner and shall- (a) contain sufficient particulars in relation to the request to enable the records to be identified, and (b) set out the reasons for the request.”

128. The IHRC has recommended that the removal and destruction of a suspect's sample and profile should occur as soon as practicable once the person has been discharged or acquitted following the conclusion or discontinuation of legal proceedings.¹³³ The IHRC acknowledges there may be limited circumstances where a sample should not be destroyed. In light of this, the IHRC recommends the inclusion of a saver provision to give the Director of Public Prosecutions (DPP) authority to make an application to the court allowing the retention of the sample or profile in certain circumstances. The onus of responsibility would rest on the DPP to provide a clear justification for the retention of the sample or profile.

e. Transfer of DNA Samples

129. The IHRC believes that the potential for reassignment and delegation of responsibility of work carried out by the designated laboratory, to another body inside or outside the State, raises a number of concerns for the privacy of personal information stored on a national DNA database. Under the proposed Bill, the Forensic Science Laboratory has the authority to seek the assistance of another laboratory in the analysis of samples within or outside the State.¹³⁴ In addition, where the services of the designated laboratory are temporarily unavailable work can be assigned to another laboratory.¹³⁵

130. General Comment 16 of the Human Rights Committee provides that, effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it. In addition it provides that every individual should be able to ascertain which public authorities or private individuals or bodies control or may control their files.¹³⁶ Accordingly, the IHRC recommends that accountability provisions should be intrinsic in any framework allowing the transfer of personal information such as DNA. Safeguards should be provided by legislation so that designation of responsibility of work to a third party only occurs in exceptional circumstances. In the view of the IHRC, a detailed explanation for proposing the reassignment of responsibility should be provided to the Minister for Justice.

f. International Co-operation

131. Ensuring effective compliance with safeguards is problematic when sensitive information is transferred between different states and between agencies with different access, use and privacy provisions. The IHRC considers the safeguards laid down in the proposed Bill to be inadequate. The IHRC believes an agreement between the Irish authorities and other states or agencies,

¹³³ IHRC, *Observations on the Criminal Justice (Forensic Sampling and Evidence) Bill 2007* (July 2007).

¹³⁴ Head 3(h) of the Bill.

¹³⁵ Head 3(j) of the Bill.

¹³⁶ General Comment 16, HRI/GEN/1/Rev.7 (1988) para. 10.

concerning the transfer of such personal information, is crucial as a necessary safeguard to ensure protection for the privacy and the fundamental rights and freedoms of data subjects. The IHRC is of the view that in the absence thereof, no exchange should be authorised.¹³⁷

132. In addition, the IHRC recommends legislation should make it explicit that non-public bodies are precluded from capacity as recipients of such information. Furthermore, the IHRC recommends that individual notification of the transfer of a person's DNA data internationally should be mandatory and individuals should be allowed to make a challenge to the use of his or her data.

g. Summary of Main Areas of Concern

- It is of concern that Ireland currently has no comprehensive legislation in the area of privacy rights. The IHRC recommends that the Government proceed with its plans to enact a Privacy Bill which is in line with best international practice and international human rights law.
- While appreciating the important contribution a DNA database can make to crime investigation, the IHRC considers it imperative that rigorous safeguards underpin the legal framework governing the taking of DNA samples and the operation of a DNA database. The IHRC previously submitted comprehensive observations to the Government on the far reaching consequences of the Criminal Justice (Forensic Sampling and Evidence) Bill 2007. The IHRC hopes that the Government will amend this legislative proposal in light of its concerns.
- The IHRC considers it essential that any proposed legislation specifies the functions of the DNA database in explicit and exhaustive terms so as to limit its use in the future to legitimate purposes.
- The IHRC recommends the removal and destruction of a suspect's sample and profile should occur as soon as practicable once the person has been discharged or acquitted, following the conclusion or discontinuation of legal proceedings. The IHRC acknowledges there may be limited circumstances where a sample should not be destroyed. In light of this, the IHRC recommends the inclusion of a saver provision to give the Director of Public Prosecutions (DPP) authority to make an application to the court allowing the retention of the sample or profile in certain circumstances.

¹³⁷ Head 19(b) of the Bill currently provides that the transfer of information can occur in the presence or absence of an agreement entered into by the State.

- The IHRC recommends that accountability provisions should be intrinsic in any framework allowing the transfer of personal information such as DNA. Safeguards should be provided by legislation so that designation of responsibility of work to a third party only occurs in exceptional circumstances.
- The IHRC believes an agreement between the Irish authorities and other states or agencies, concerning the transfer of DNA samples, are crucial as a necessary safeguard to ensure protection for the privacy and the fundamental rights and freedoms of data subjects. The IHRC is of the view that in the absence thereof, no exchange should be authorised. In addition, the IHRC recommends that legislation should make it explicit that non-public bodies are precluded from capacity as recipients of such information. Furthermore, the IHRC recommends that individual notification of the transfer of a person's DNA data internationally should be mandatory and individuals should be allowed to make a challenge to the use of his or her data.

9. Traveller's Rights (Articles 26 and 27)

133. Irish law and practice relating to the Travelling Community in Ireland is a major area of concern for the IHRC. The IHRC in its Strategic Plan 2007-2011 identified as a priority the need to address human rights issues affecting ethnic minorities, including Travellers. In spite of the progress that has been made in Irish equality law,¹³⁸ Travellers continue to suffer significant levels of discrimination in all areas of Irish society. Furthermore, it is of considerable concern to the IHRC that the Government refuses to recognise Travellers as an ethnic minority.

a. Ethnicity of Irish Travellers

134. Ireland's First Periodic Report under the ICCPR, submitted in 1992, referred to the "travelling community" and noted that some Travellers' bodies claimed that they constituted a distinct ethnic group. The Government queried the basis for this, stating that Travellers were not a distinct group in terms of religion, language or race. It did not mention the question of 'ethnic origin.' Despite this assertion the report stated that Travellers were entitled to all the rights protected under the Covenant. The Government stated;

Allegations are sometimes made of discrimination against the travelling community. This is a community whose members, like the gypsies in other countries, used to travel from place to place in pursuit of various traditional callings [...] Nowadays travellers tend to live in caravans close to the major cities. Some of the bodies representing travellers claim that members of the community constitute a distinct ethnic group. The basis of this claim is not clear. Travellers do not constitute a distinct group from the population as a whole in religion, language or race. They are not a Romany or gypsy people. However, members of the community are undoubtedly entitled to all the rights under the covenant and are not to be discriminated against as a group and it does not appear to be of particular significance whether their rights relate to their alleged status as an ethnic group or to their social group.¹³⁹

135. In Ireland's First and Second Combined Periodic Report under the Convention on the Elimination of all Forms of Racial Discrimination (CERD), submitted in 2004, the Government for the first time explicitly denied that Travellers constitute a distinct group in terms of "*ethnic origin*", as well as "race, colour, descent or national [...] origin". Among other things, this would appear to take Travellers outside the ambit of the definition of racial discrimination in the Convention. Somewhat inconsistently, the report goes on to say that the Government is committed to extending to Travellers all the protections afforded by CERD. The report states that, "[t]he Government's view is that Travellers do

¹³⁸ Discrimination against Travellers is expressly prohibited in the Employment Equality Act 1998 and the Equality Act 2000.

¹³⁹ Ireland's First Periodic Report under the ICCPR (1992).

not constitute a distinct group from the population as a whole in terms of race, colour, descent or national or ethnic origin".¹⁴⁰

136. In the section of the Government Report under CERD which records NGO concerns about the characterisation of Travellers, the Government states, "[t]o define Travellers as an ethnic minority would not entitle Travellers to any additional rights or protections".¹⁴¹ In the view of the IHRC, this is not entirely correct.¹⁴² First and foremost, the IHRC believes that the refusal to recognise Travellers as an ethnic minority suggests a lack of understanding by the Government of the importance Travellers place on the recognition of their culture and identity. In the view of the Commission, this also raises concerns that sufficient weight may not be given in policy making to the need to respect and promote that culture.

137. Moreover, the lack of recognition may place obstacles in the way of Travellers accessing all the protections of CERD, the ICCPR and other international human rights conventions. Refusing to recognise Travellers as an ethnic minority potentially takes Travellers outside the ambit of the provisions in the international human rights treaties, which provide protection for ethnic minorities. A recent report by Ireland's National Equality Authority raised the concern that international agreements and EU legislation do not name specific ethnic groups from particular States, within their provisions on ethnicity. Accordingly, Traveller ethnicity must be recognised by the State in order to ensure Travellers can enjoy the protections and benefits that flow from these agreements and legislation, alongside other ethnic groups.¹⁴³

138. Following the examination of Ireland's Combined First and Second Periodic Report under CERD, the Committee on the Elimination of all Forms of Racial Discrimination addressed the Government's decision to deny Traveller ethnicity in its Concluding Observations. It stated;

the Committee expresses concern at the State party's position with regard to the recognition of Travellers as an ethnic group. The Committee is of the view that the recognition of Travellers as an ethnic group has important implications under the Convention.¹⁴⁴

139. This stance was softened by the Committee welcoming the 'open position' of the Government and its acknowledgment that the State intends to work more concretely towards recognising the Traveller Community as an ethnic group.¹⁴⁵

¹⁴⁰ Ireland's First and Second Combined Periodic Report under CERD, CERD/C/460/Add.1, (2004), para. 28.

¹⁴¹ *Ibid.*, para. 405.

¹⁴² The IHRC communicated its position to Government on this issue following the publication of the Government's First Periodic Report under CERD, *c.f.* IHRC, '*Travellers as an ethnic minority under the Convention on the Elimination of Racial Discrimination- A Discussion Paper*', (2004).

¹⁴³ National Equality Authority, '*Traveller Ethnicity- An Equality Authority Report*', (2006).

¹⁴⁴ Concluding observations of the Committee on the Elimination of Racial Discrimination: Ireland, CERD/C/IRL/CO/2 (April 2005), para. 20.

¹⁴⁵ *Ibid.*

140. Ireland's Third Periodic Report fails to address the question of Traveller ethnicity. The Human Rights Committee has not yet analysed the issue and the IHRC would encourage the Committee to consider the matter. The Committee in its General Comment 23 provides, "the existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by the State party but requires to be established by objective criteria."¹⁴⁶

141. The IHRC is of the view that an examination of the objective social criteria establishes Travellers as an ethnic minority. Travellers clearly display common cultural values such as nomadism and a reliance on an expanded family unit. Travellers generally marry within their own group. There is clear separation between Travellers and settled society, with Travellers constituting a distinct social group, extending to the use of a distinct language within that group. Finally, as evidenced by the high level of discrimination against Travellers, there is no doubt that individual Travellers not only identify themselves as Travellers, but are also identified as such by settled society.

142. In an IHRC discussion paper on Traveller ethnicity, the Commission established that the United Kingdom (UK) courts have categorised Irish Travellers as an ethnic minority when construing the Race Relations Act, 1976.¹⁴⁷ In *Mandla v. Dowell*, a UK decision interpreting the Race Relations Act 1976, an understanding of ethnicity was laid down which has since been applied widely across common law jurisdictions.¹⁴⁸ According to the court, to constitute an ethnic minority a group must regard itself and be regarded by others as a distinct community by virtue of certain characteristics. The UK courts applied the *Mandla* test to the Irish Travelling Community in *O'Leary v. Allied Domecq* London County Court and found that they constituted an ethnic group.¹⁴⁹ Judge Goldstein held that Irish Travellers met the two essential conditions laid down in *Mandla*: (1) possessing a long shared history which distinguished them from other groups (the court held that a history that could be traced back to at least the middle of the 19th Century), and (2) having a distinct cultural tradition of their own

143. Indeed the definition set out in the Equal Status Act 2000 recognises that Travellers possess a shared history and a distinct cultural identity. Section 2 of the Equal Status Act 2000 provides;

'Traveller community' means the community of people who are commonly called Travellers and who are identified (both by themselves and others) as people with a shared history, culture and traditions including, historically, a nomadic way of life on the island of Ireland.

¹⁴⁶ General Comment 23, HRI/GEN/1/Rev.7 (1994) para. 5.2.

¹⁴⁷ IHRC, *Travellers as an ethnic minority under the Convention on the Elimination of Racial Discrimination- A Discussion Paper*, (2004).

¹⁴⁸ *Mandla v. Dowell* [1983] 2 A.C. 548, p. 562.

¹⁴⁹ *O'Leary and Others v. Allied Domecq & Others*, unreported 29th August 2000.

144. The view that the objective social criterion establishes Travellers as an ethnic minority is strengthened by the judgements of the courts in the UK. As a result, it is unfortunate that the Government has attempted to unilaterally declare competence over determining that Travellers are not an ethnic minority.

b. Protection and Promotion of Traveller's Rights

145. Respect for the right to pursue life as a Traveller and to adhere to Traveller's values is implicit in the Irish Constitution,¹⁵⁰ and the European Convention on Human Rights¹⁵¹ which has now been incorporated into Irish domestic law.¹⁵² This protection is more explicitly prescribed at Article 27 of the ICCPR. The right to respect for Traveller's way of life requires the Government to not only refrain from interfering with this right in a disproportionate manner, but further obliges the Government through commensurate positive obligations to protect and facilitate the pursuit of Traveller culture and values.¹⁵³

146. In view of the state's positive obligations with respect to Travellers, the IHRC is concerned by the approach the Government has taken in relation to the unique accommodation requirements of Traveller families and in response to issues arising as a result of a shortage of appropriate accommodation which would support the Traveller's nomadic lifestyle. Particularly troubling to the IHRC is the enactment of the Housing (Miscellaneous Provisions) Act, 2002 ("2002 Housing Act") which criminalizes trespass on public and private land. Section 24 of the 2002 Housing Act amends the Criminal Justice (Public Order) Act, 1994 by inserting a new section providing for offences relating to entering and occupying land.¹⁵⁴

147. The 2002 Housing Act, also referred to as the criminal trespass legislation, makes it a criminal offense to enter and occupy, without the consent of the owner, public or private land or bring onto it or place on it any object where it is likely to have one of five detrimental effects in relation to the land, its use or any amenity in respect of it.¹⁵⁵ The legislation gives members of the Garda Síochána (police service) wide ranging powers, including arrest and removal and storage of 'objects' which term includes caravans. The law was introduced at a time when there were more than 1,000 Traveller families camped on public land due to the lack of provision of Traveller accommodation and where there had

¹⁵⁰ Article 40.1 (equality); Article 40.3.1 (personal rights); Article 40.3.2 (state's duty to vindicate life, name, and property); Article 41 (protection of Family and Marriage).

¹⁵¹ Article 8.

¹⁵² ECHR Act (2003).

¹⁵³ *Connors v. United Kingdom* (2002) 35 EHRR 691; *Chapman v. United Kingdom* (2001) 33 EHRR 399.

¹⁵⁴ See Section 24 of the Housing (Miscellaneous Provisions) Act 2002 which amends the Criminal Justice (Public Order) Act, 1994 by inserting a new Part IIA, sections 19 A – H. The 2002 Housing Act is available at <http://www.irishstatutebook.ie/2002/en/act/pub/0009/index.html>.

¹⁵⁵ See Section 19C – (1) and (2).

been little progress by the Government in relation to the provision of transient accommodation for Travellers.

148. There is no question the legislation has had a disparate impact on vulnerable Traveller families who have no other place to go while awaiting accommodation.¹⁵⁶ The IHRC is aware of legal challenges to the validity of the 2002 Housing Act under both the Constitution and the ECHR Act 2003, and was granted liberty to appear before the High Court as *amicus curiae* in one of the early challenges in the case of *Lawrence & ors v. Ballina Town Council & ors*.¹⁵⁷ The observations made herein have been put to the High Court by way of legal submissions on behalf of the IHRC as *amicus curiae*. The judgment in *Lawrence* is pending.

149. The IHRC is concerned by the criminalisation of behaviour which previously may have given rise to a civil action for simple trespass and believes the criminal trespass legislation constitutes a disproportionate interference with the private and family life of Travellers. Where competing interests are at issue and where civil remedies will afford the parties with the same result, recourse to criminal law and sanctions may not meet the requirements of the principle of minimal restraint. Even in circumstances where no actual criminal charges have been lodged against a Traveller family who is camped on public land out of necessity, the fear of prosecution is sufficient to constitute an interference with the right to practice a nomadic lifestyle.

150. The IHRC is further concerned by the framing of the criminal offence as a 'strict liability' offence with no opportunity for the individual charged with the offence to mount a defence showing either necessity or reasonable excuse. Under the legislation, once the precipitating factors are demonstrated by the prosecution and in the absence of the accused proving consent by the owner of the land, the Court has no discretion to find the accused anything but guilty.¹⁵⁸ The offence of criminal trespass does not permit a consideration of circumstances in which the offence came to be committed, nor is there any means for balancing the hardship to the accused or the Traveller family if they are either made to move or are subject to having their home impounded as a consequence. Further there is no opportunity in the criminal proceedings to consider the availability of suitable alternatives or the family's health or educational needs.

151. The legislation further offends the guarantees of due process by shifting the burden of proof to the accused to prove the only defence open to him or her,

¹⁵⁶ See Dáil Éireann Debates, Vol. 551, 27 March, 2002 (remarks of Mr. Flood).

¹⁵⁷ High Court Record No. 2003/5813P; See also *McDonough & Ors v. Kilkenny County Council & Ors*. [2007] IEHC 350 wherein the Court held that the first-named Applicant, a member of the Travelling Community, having been charged with an offence under the Criminal Justice (Public Order) Act 1994, as amended, could not avail of judicial review proceedings to challenge the validity of the statute under which he is charged in advance of criminal proceedings.

¹⁵⁸ *Ibid.*, 19C – (1) and (2).

which is that the entry onto the lands in question was by consent. The legislation at Section 19G(2) provides that;

In any proceedings for an offence under this Part it shall be presumed until the contrary is shown that consent under this Part was not given.

152. It would therefore appear that it is necessary for an accused to show that he or she actually had consent to enter onto and occupy the lands in question and he or she may not rely upon a mistaken belief, however reasonable, that such consent had been granted. This seems to have the effect of displacing the presumption of innocence and further obviates the need for the prosecution to prove *mens rea* or 'guilty mind'. This leads to the worrying prospect that a person possessed of an 'innocent mind' upon entry onto and occupation of the land in question may not be protected from conviction.¹⁵⁹

153. The presumption of innocence has been recognized as an essential constituent of a trial in due course of law as guaranteed by Article 38.1 of the Irish Constitution. It is also a fundamental requirement of a fair trial which is specifically referred to in Article 6(2) of the ECHR. The purported purpose of the impugned legislation – to deal with the important issue of unauthorized temporary dwellings¹⁶⁰ – does not warrant the abridgement of the fundamental right to a fair trial as described herein.

c. Summary of Main Areas of Concern

- The IHRC is concerned that the Government refuses to recognise Travellers as an ethnic minority. The IHRC believes that the refusal to recognise Travellers as an ethnic minority suggests a lack of understanding, by the Government, of the importance Travellers place on the recognition of their culture and identity. In the view of the IHRC, this also raises concerns that sufficient weight may not be given in policy making to the need to respect and promote that culture. Moreover, the lack of recognition may place obstacles in the way of Travellers accessing all the protections of CERD, the ICCPR and other international human rights conventions.
- In the view of the IHRC, the Government should, as a matter of priority, reconsider its position in denying that Travellers are an ethnic minority. Recognition that Travellers are an ethnic minority would make clear from a legal standpoint that the rights and protections ethnic groups currently enjoy under international human rights law

¹⁵⁹ The Supreme Court has rejected attempts to hold someone criminally liable in circumstances where the accused was mentally innocent. See *CC v. Ireland* [2006] 2 ILRM 161; *In the Matter of Article 26 of the Constitution and In the Matter of the Employment Equality Bill, 1996* [1997] 2 IR 321.

¹⁶⁰ *Ibid.*, Dáil Debates (remarks of Minister of State at the Department of the Environment and Local Government).

(including under Article 27 of the ICCPR) would be comprehensively applied to Travellers.

- The IHRC is concerned that the unique accommodation requirements of Traveller families are not adequately being addressed by the State and that the appropriate accommodation which would facilitate Travellers' nomadic lifestyle should be provided. The IHRC recommends that the criminalisation of behaviour under the Housing (Miscellaneous Provisions) Act, 2002 constitutes a disproportionate interference with the private and family life of Travellers and as a consequence recommends that the relevant provisions of the legislation be amended or repealed.

10. Disability (Article 26)

154. The rights of persons with disabilities, including their civil and political rights, are a priority area of concern to the IHRC. The Human Rights Committee in its previous Concluding Observations recommended reform to ensure the full and equal enjoyment of Covenant rights by disabled persons without discrimination, in accordance with Article 26 of the ICCPR.¹⁶¹ While the Disability Act 2005 introduced some important new legal protections for persons with disability, the IHRC and others have been critical of the limitations of that legislation.

155. It is of note that Ireland signed the United Nations Convention on the Rights Persons with Disabilities in March 2007; however, the State has not yet ratified the Convention.

a. Effective Rights-Based Legislation

156. In recent years, the statutory framework in relation to disability in Ireland has grown increasingly complex. Statutes that are of specific relevance to the rights of disabled persons include the following: the Employment Equality Act 1998, the Equal Status Act 2000, the Equality Act 2004, the Education for Persons with Special Educational Needs Act 2004 and the Disability Act 2005. The IHRC has previously published Observations in relation to a number of these statutes prior to their enactment.¹⁶² As those Observations confirm, the IHRC welcomes the State's efforts to improve the position of disabled persons through legislation. Nevertheless, it must be stressed that not all of the provisions enacted are sufficient to comply with international human rights standards in this area. In particular, the Disability Act 2005 does not go far enough in creating a positive environment for the delivery of State resources to disabled persons.

157. The IHRC conducted a detailed review of the Disability Act 2005, with reference to Ireland's international human rights obligations. The IHRC welcomed the overall thrust of the Disability Act 2005, which is to establish mechanisms for the assessment of disabled persons' needs, and lay down structures for the allocation of Government resources in this sphere. However, the following issues continue to be of concern;

- The definition of disability used in the Disability Act 2005 is narrower than that contained in the Equal Status Act 2000 and the Equality Act 2004 and does not reflect international standards. The Equal Status Act and the Equality Act adopt a broad definition of the term "disability", which

¹⁶¹ Concluding Observations of the Human Rights Committee on Ireland's Second Periodic Report, A/55/40, (2000) para. 29(e).

¹⁶² See Irish Human Rights Commission, *Observations on the Equality Bill 2004*, (June 2004); *Observations on the Disability Bill 2004*, (November 2004); *Observations on the Education for Persons with Disabilities Bill 2003*, (September 2003).

encompasses temporary disabilities, as well as disabilities which affect only limited elements of a person's ability to function.¹⁶³ However, the IHRC notes that the Disability Act adopts a far more limited definition of the term "disability", covering only "enduring" impairments leading to a "substantial restriction" on a person's functioning.¹⁶⁴ A similarly narrow definition of disability is set forth in Section 2 of the Education for Persons with Special Educational Needs Act 2004.

- The Act fails to put in place a mechanism to ensure that the basic levels of services for persons with a disability will be provided. No reference is made to the concept of a "floor level" below which provision for disabled persons cannot fall. In this regard, the Disability Act fails to comply with the obligation to provide "at the very least, minimum essential levels" of protection for disabled persons as required under international human rights standards.¹⁶⁵
- Part 2 of the Disability Act 2005 makes provision for the Executive to undertake an assessment in respect of a person with a disability to determine the health and education needs occasioned by the disability and the health services or education services required to meet those needs. The assessment itself is made without reference to resource constraints, however, when determining a complaint in relation to an assessment the complaints officer will have regard to issues concerning resources or practicality.¹⁶⁶ This greatly undermines the force of the original assessment.
- In general, exclusion of court proceedings is a central aspect of the Disability Act and reduces justiciability of any of the determinations or decisions. No appeal to the courts, other than on a point of law, lies in respect of the assessment procedure. While there is an appeal to an independent appeals officer, the grounds on which such an appeal can be taken are limited; for example, it does not appear that the content of an assessment can be disputed in the context of the appeal.¹⁶⁷ Under international law proposals to exclude judicial remedies must be accompanied by evidence that proposed administrative mechanisms will provide effective alternative remedies. In the view of the IHRC, the administrative remedies provided for in the Act do not meet those standards of effectiveness.

b. Access to Education

158. The legislative framework that provides for the education of people with disabilities has improved in recent years with the enactment of the Education Act

¹⁶³ See Section 2 of the Employment Equality Act 1998; Section 2 of the Equal Status Act 2000.

¹⁶⁴ Section 2 of the Disability Act 2005 defines disability as, "a substantial restriction in the capacity of the person to carry on a profession, business or occupation in the State or to participate in social or cultural life in the State by reason of an enduring physical, sensory, mental health or intellectual impairment".

¹⁶⁵ See General Comment 3 of the UN Committee on Economic, Social and Cultural Rights.

¹⁶⁶ Section 14 and Section 15 of the Disability Act 2005.

¹⁶⁷ See Section 16-20 of the Disability Act 2005.

1998 and the more recent enactment of the Education for Persons with Special Educational Needs Act 2004. The Education for Persons with Special Educational Needs Act 2004 is a positive step forward in that it sets down a legislative framework to regulate the rights of persons with special educational needs in the education system. However, the IHRC has raised a number of deficiencies in this legislation and has made a number of recommendations for reform.¹⁶⁸

159. The commitment, under the Education for Persons with Special Educational Needs Act 2004, to educate children with disabilities in mainstream education is a very welcome development.¹⁶⁹ However, the extent to which primary, secondary and third level education establishments are accessible physically, educationally and socially to people with disabilities does not reflect the commitments made in policy documents and legislation. This lack of provision is confirmed in the statistics provided by the Ombudsman for Children which states that 20% of complaints received by the Ombudsman's office relate to access to services for children with special needs or disabilities and that 59% of these complaints related to education.¹⁷⁰

160. In the view of the IHRC there has been an inadequate implementation and resource allocation to ensure that mainstream education is fully accessible to people with disabilities.

c. Summary of Main Areas of Concern:

- Ireland has signed the United Nations Convention on the Rights of Persons with Disabilities in March 2007; however, the State has not yet ratified the Convention. Accordingly, the State should prioritise ratification of the Convention.
- While the IHRC welcomes the Government's efforts to improve the position of disabled persons through legislation, the IHRC considers that there is a need to build upon the existing legislative framework and to address the shortcomings in the Disability Act 2005.
- The commitment to educate children with disabilities in mainstream education has not been matched by an adequate allocation of resources to make mainstream education an adequate and effective form of education for people with disabilities.

¹⁶⁸ IHRC, *Submission on the Education for Persons with Disabilities Bill 2003*, (September 2003).

¹⁶⁹ See Section 2 of the Education for Persons with Special Needs Act 2004.

¹⁷⁰ Office of the Ombudsman for Children, Report of the Ombudsman for Children to the UN Committee on the Rights of the Child on the occasion of the examination of Ireland's Second Report to the Committee, (April 2006), p. 27. Issues raised with the Ombudsman for Children included: the allocation of special needs resources and access to appropriate professional special needs assessment; school transport for children with special needs; and the handling of bullying of children.

11. Immigration (Articles 2(3), 7, 9, 12 and 23)

161. The statutory framework providing for immigration and asylum in Ireland is currently the subject of a major reform and consolidation by means of the Immigration, Residence and Protection Bill 2008 ("2008 Immigration Bill").¹⁷¹ This Bill makes provision for general immigration matters, combined with the asylum and subsidiary protection matters pursuant to the State's obligations under international human rights law.¹⁷² At the time of writing this Bill is at the second stage before Dáil Éireann (House of Representatives) and has yet to be debated in Seanad Éireann (Senate). In pursuance of its statutory functions the IHRC has issued Observations on the provisions of the Bill advising the Minister for Justice, Equality and Law Reform on the impact the reform proposals will have for the rights of various categories of immigrants and asylum seekers.¹⁷³ Some of the reforms proposed in the 2008 Immigration Bill raise questions of compliance with a range of Articles in the ICCPR including: Article 7 (the prohibition against torture, inhuman and degrading treatment or punishment), Article 2(3) (the right to an effective remedy), Article 9 (the right to liberty and security of person), Article 12 (right of liberty of movement), and Article 23 (right to marry) of the ICCPR.

a. Deportation

162. The Bill provides that a foreign national who is unlawfully present in the State can be removed from the State and need not be given any notice of that removal where it appears to an immigration officer that a non-national is unlawfully present. Force not exceeding the minimum necessary may be used to secure the removal of a foreign national. While the prohibition against refoulement is contained in the 2008 Immigration Bill, the provisions that allow for removal are not explicitly stated to be subject to the prohibition against refoulement.¹⁷⁴

¹⁷¹ The current statutory framework includes: Aliens Act 1935; Refugee Act 1996; Immigration Act 1999; Illegal Immigrants (Trafficking) Act 2000; Immigration Act 2003 and Immigration Act 2004.

¹⁷² United Nations Convention relating to the Status of Refugees (Refugee Convention), the European Convention on the Protection of Human Rights and Fundamental Freedoms, the United Nations Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the United Nations International Covenant on Civil and Political Rights (ICCPR) and the United Nations Convention on the Rights of the Child (CRC)

¹⁷³ The IHRC also submitted extensive *Observations on the Scheme of the Immigration, Residence and Protection Bill 2007* (December 2007). However, in general the recommendations of the IHRC were not reflected in the 2008 Immigration Bill currently being debated in the houses of Parliament.

¹⁷⁴ Refoulement is defined in the Bill as the sending of a foreign national from the State to a territory where: (a) in the opinion of the Minister, the life or freedom of the foreign national will be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion; (b) the Minister has substantial grounds for believing that the foreign national will face a real risk of suffering serious harm; or (c) the Minister has substantial grounds for believing that the foreign national will be in danger of being subject to torture or inhuman or degrading treatment or punishment.

163. These provisions represent a significant change to current Irish law in relation to deportation. Under Section 3(3) of the Immigration Act 1999 the Minister is required to give the person to be deported 15 days notification of his or her proposed deportation and the Minister is required to consider any representations made to him in relation to the deportation. Furthermore, in making a deportation order the Minister is required to consider a range of factors including the duration of the person's residence in Ireland, their family circumstances, humanitarian considerations and other factors.

164. The removal of a person from the jurisdiction of the State can amount to a serious interference with a number of fundamental human rights under the Irish Constitution and the ICCPR including; the right to life, the right to bodily integrity, the right to be free from torture, inhuman and degrading treatment, and the right to family and private life. The possible harm that a person may be subjected to following a deportation order could have irreversible consequences for that person. The scope of the State's obligation to provide an applicant with an effective remedy is wide in these circumstances. It is difficult to envisage how a person's Constitutional and ICCPR rights can be considered in a deportation process which gives the person concerned no notification that he or she is about to be deported. A person who has no notification of their deportation will have extremely limited or no access in practical terms to an effective remedy as required under Article 2(3) of the ICCPR. The 2008 Immigration Bill contains no requirement that the person to be deported be informed of the possibility of judicial review of the deportation decision, or of the possibility of applying for protection status.

165. In its Observations on the 2008 Immigration Bill, the IHRC has recommended that in order to ensure compliance with the Constitution and Ireland's international human rights obligations, the position currently provided for in Irish law should be retained in respect of persons unlawfully in the State who are subject to deportation. Such persons should be given 15 days notification of their deportation. They should have the opportunity to make written submissions on their case which the Minister should be required to consider. Furthermore, the existing factors outlined for consideration in the deportation process should be retained. Finally, the power of deportation must be clearly stated to be subject to the prohibition against refoulement contained in Section 53(1) of the 2008 Immigration Bill and Section 4 of the Criminal Justice (United Nations Convention Against Torture) Act 2000.

b. Limitations on Judicial Review

166. Notwithstanding the comments of the Human Rights Committee in its previous Concluding Observations on Ireland's Second Periodic Report in relation to access to judicial review of detention decisions, Section 118 of the 2008 Immigration Bill proposes to further restrict the availability of judicial review

proceedings in relation to all immigration decisions.¹⁷⁵ The Bill retains the period of 14 calendar days within which to bring judicial review proceedings of decisions taken under the Bill, but limits the power of the High Court to extend that time to a narrower set of circumstances than is currently in Irish Law under the Immigration Act 1999. Moreover, the initiation of judicial review proceedings, or an application for an extension of the time limit, will not suspend the deportation of a person to their country of origin or a “safe third country”.

167. The IHRC has expressed the view that the 14 day time limit within which judicial review proceedings can be applied for, combined with the restriction of the grounds on which the High Court can extend that time, is likely to render the judicial review remedy in relation to immigration decisions ineffective in practice in violation of Article 13 of the ECHR and Article 2(3) of the ICCPR. Protection applicants and other immigrants commonly face significant difficulties in accessing the judicial review system due to language barriers and their lack of knowledge of the domestic context. This was acknowledged by the Supreme Court in the case of *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999*.¹⁷⁶ The return of an applicant to their country of origin or a safe third country, particularly a protection applicant, has the potential to lead to irreversible harm to that person. The obligation of the State to provide an effective remedy in practice in such circumstances is therefore a significant one. The IHRC recommends that to ensure compliance with Article 13 of the ECHR and Article 2(3) of the ICCPR, the time limit for judicial review proceedings should be extended, and the grounds on which the High Court can extend this time limit as currently set out in the Immigration Bill 1999, should be retained.

168. Furthermore, the IHRC has highlighted that the provisions in the Bill which allow for a situation where deportation or removal to a country of origin or safe third country is not suspended pending judicial review proceedings place Ireland in a position where it may be in violation of Articles 3 and 13 of the ECHR and Articles 7 and 2(3) of the ICCPR. The IHRC reiterates its recommendation that these provisions be reformulated and notes that failure to do so could lead to serious breaches of the prohibition against refoulement in contravention of international human rights law.

c. Detention of Protection Applicants

169. The 2008 Immigration Bill proposes to extend the circumstances under which an asylum seeker can be detained at the points of entry to the State where it is not practicable to issue the person with a protection entry permit. The applicant is required to be furnished with a protection entry permit as soon as practicable. However, there is no limit on the time period for which a person can be detained in these circumstances. Furthermore, a protection applicant can be

¹⁷⁵ Concluding Observations of the Human Rights Committee on Ireland's Second Periodic Report, A/55/40, para. 26.

¹⁷⁶ *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] IESC 19, [2000] 2 IR 360.

detained where he or she poses a threat to public security or public order in the State; or where he or she is the subject of removal and appears to have made an application for the purpose of delaying his or her removal. The IHRC has expressed concern in relation to the detention of asylum applicants at points of entry to the State for administrative convenience recommending that this should be stated to be a measure of last resort, and that a time period limiting such detention should be specified. Moreover, the IHRC has recommended that a person should only be detained on grounds of national security or public order where there is evidence to show that the asylum-seeker has criminal antecedents and/or affiliations which are likely to pose a risk to public security or public order

170. Asylum applicants detained under the Bill can be detained in a prescribed place being a prison or other place of lawful detention in charge of the Governor, immigration officer or member of the Garda Síochána. The IHRC has stated that it considers that the detention of asylum seekers is to be avoided and should always be a measure of last resort. However, where detention is unavoidable on the basis of limited grounds set down in legislation, such detention must be in a place which is suitable and in line with international standards. The IHRC has recommended that prisons and Garda Stations, which are currently used to detain asylum applicants, are not suitable places of detention for asylum applicants who have not been convicted of a criminal offence. The IHRC has pointed out that such detention is contrary to the CPT Committee Standards and UNHCR position on this issue.

171. On the question of the detention of unaccompanied minors the Bill provides that the detention provisions will not apply to minors unless a member of the Garda Síochána or an immigration official has reasonable grounds for believing that the person is not under 18 years. Where the immigration officer or Garda forms this view, the detention provisions that apply to adults shall apply to a person who is possibly a minor. There is no provision for an independent assessment of the person's age by a social worker for example. The IHRC has recommended that in line with international human rights standards on this issue, it should be assumed the person in such circumstances is a child, until the contrary is proven. Where age assessments are deemed necessary, they should be carried out in an age and gender-sensitive manner by a person with the relevant expertise.

d. Limitations on the right to marry for certain categories of immigrants and Irish citizens

172. The 2008 Immigration Bill proposes to put in place restrictions on the marriage of non-nationals whether they are marrying an Irish citizen or another non-national who are protection applicants or holders of non-renewable residence permits. Such persons will not be entitled to marry in the State unless the Minister for Justice, Equality and Law Reform grants an exemption. The Minister is entitled to refuse the granting of an exemption if granting would:

- Adversely affect the implementation of an earlier decision under the Bill relating to one or more of the parties to the proposed marriage;
- Create a factor bearing on a decision yet to be taken under this Bill relating to one or both of those parties;
- Not be in the interests of public security, public policy or public order;
- Adversely effect the implementation of a decision under the Irish Nationality and Citizenship Acts 1956 to 2004 or the European Communities (Free Movement of Persons)(No. 2) Regulations 2006.

173. The IHRC is concerned that a blanket restriction on the marriage of all persons who are protection applicants or non-renewable resident permit holders raises questions of compliance with Article 23 of the ICCPR and is not proportionate. The IHRC has sought clarification from the Minister for Justice as to what legitimate aim is sought to be achieved by these restrictions. Furthermore, the IHRC has stated that if, on the basis of objective, verifiable evidence the Minister can demonstrate that this restriction is in pursuance of a legitimate aim, such a restriction must be proportionate. The IHRC has recommended that if it is deemed necessary to retain this provision, the Minister should be required to recognise marriages by protection applicants and non-permanent resident holders who meet objective and transparent criteria which go to demonstrate the their union is genuine. An evaluation should take place on an individual basis with the parties being given an opportunity to make written submissions to the Minister, and the opportunity to appeal a negative decision.

e. Unaccompanied and Separated Children

174. The 2008 Immigration Bill makes some provision for unaccompanied children and separated children. Unaccompanied children are required to be referred to the Health Service Executive (HSE) and the provisions of the Child Care Acts shall apply. Where a child presents in the company of an adult who is not his or her parent the immigration officer is simply required to verify that the adult is taking responsibility for the child. The HSE are required to make a protection application where it is in the best interests of the child. Where a protection application is to be made the HSE is required to appoint a person to make an application for the child.

175. In general, the IHRC considers that the best interests of child should be a primary consideration in all immigration decisions that involve children and that this should be inserted as a basic principle in the 2008 Immigration Bill.

176. The IHRC is concerned that the provision for unaccompanied and separated children are not adequate. There are no specific provisions in the Child Care Act 1991 (as amended) to deal with the specific care needs of unaccompanied minors and separated children. The IHRC has previously recommended that the Child Care Act 1991 (as amended) should be amended to reflect the minimum standards set by the UNHCR and the Committee on the Rights of the Child on the question of unaccompanied and separated children.

Unaccompanied children are currently accommodated in centres which are separate from and regarded as being inferior to the accommodation of other children in the care of the State. The Ombudsman for Children has been critical of the treatment provided to unaccompanied children stating that the hostels where such children are accommodated do not meet the standards required of residence care centres where Irish children are placed. The Ombudsman stated;

In December 2005, I visited two of the hostel accommodation centres and the one registered residential care centre. The difference between the two types of centre was stark. The residence care centre, which accommodates 6 children, was staffed with 4 qualified staff at the time of my visit. The centre was a house and had homely feel. There were photos of the children in the kitchen and reception room and space to place in gardens outside. In contrast, I visited a hostel where 24 children were accommodated. Only 2 care staff were on duty of which only one was a trained child care professional. That is one trained member of staff for 24 children.¹⁷⁷

The Ombudsman for Children concluded that the “inferior care” provided to separated children seeking asylum is unacceptable and places the State in breach of its obligation to prevent discrimination under the UN Convention on the Rights of the Child and the ECHR.¹⁷⁸

177. The provisions in the 2008 Immigration Bill dealing with separated children who are in the company of an adult who is not their parent or legal guardian do not contain sufficient safeguards to identify and prevent trafficking in children. The IHRC considers that a more rigorous assessment should be carried out where a child presents in this situation. The immigration officer should be required to examine why the child is in the company of the adult and should be satisfied that the adult is acting in the best interests of the child.

f. Summary of Main Areas of Concern

- The proposals on deportation contained in the 2008 Immigration Bill represent a major reform of the current Irish law on deportation. A person who has no notification of their deportation will have extremely limited or no access in practical terms to an effective remedy as required under Article 2(3) of the ICCPR. The removal of a person from the State can amount to a serious interference with a number of fundamental human rights under the Irish Constitution and the ICCPR including; the right to life, the right to bodily integrity, the right to be free from torture, inhuman and degrading treatment, and the right to private and family life. The current Irish law on deportation should be retained to ensure compliance with Ireland's international human rights obligations and the Irish Constitution.

¹⁷⁷ Ombudsman for Children, Report to the UN Committee on the Rights of the Child on the occasion of Ireland's Second Report to the Committee, April 2006, p. 35.

¹⁷⁸ Ombudsman for Children, Report to the UN Committee on the Rights of the Child on the occasion of Ireland's Second Report to the Committee, April 2006, p. 35.

- To ensure compliance with Article 2(3) of the ICCPR the time limit for judicial review proceedings should be extended, and the grounds on which the High Court can extend this time limit as currently set out in the Illegal Immigrants (Trafficking) Act 2000 should be retained.
- The proposal that the initiation of judicial review proceedings under the 2008 Bill will not suspend deportation or removal to a safe third country pending the outcome of the judicial review raises serious questions of compliance with Articles 7 and 2(3) of the ICCPR.
- Detention of asylum seekers is to be avoided and should always be a measure of last resort. However, where detention is unavoidable on the basis of limited grounds set down in legislation, such detention must be in a place which is suitable and in line with international standards. The IHRC considers that prisons and Garda Stations, which are currently used to detain asylum applicants, are not suitable places of detention for persons who have not been charged with or convicted of a criminal offence.
- Unaccompanied minors should not be presumed to be adults where a member of the Garda Síochána has a reasonable suspicion that they are not under the age of 18 years. In compliance with international standards such persons should be assumed to be minors until the contrary is proven. Where an age assessment is deemed necessary it should be carried out in an age and gender-sensitive manner by a person with the relevant expertise.
- The IHRC is of the view that the restrictions on marriage of protection applicants and non-permanent residents may amount to a disproportionate interference with the right to marry. If it is deemed necessary to retain this provision the 2008 Immigration Bill should be amended to require the Minister for Justice to recognise marriages by protection applicants and non-permanent resident holders who meet objective and transparent criteria which go to demonstrate the their union is genuine. An evaluation should take place on an individual basis with the parties being given an opportunity to make written submissions to the Minister, and the opportunity to appeal a negative decision
- The Child Care Act 1991 (as amended) should be amended to make specific provision for the needs and standard of care to be provided to unaccompanied and separated children. The quality of care provided to unaccompanied minors should, at a minimum, meet the standard of care of Irish children in the care of the State. Moreover, any amendment to the Child Care Acts should address the distinct care needs and issues of this particularly vulnerable group.

- The provisions in the 2008 Immigration Bill dealing with separated children who are in the company of an adult who is not their parent or legal guardian do not contain sufficient safeguards to identify and prevent trafficking in children. A more rigorous assessment should be carried out where a child presents in this situation. The immigration officer should be required to examine why the child is in the company of the adult and should be satisfied that the adult is acting in the best interests of the child.

12. Women's Rights (Articles 3, 23 and 26)

178. Women in Ireland remain disadvantaged and unequal on the basis of their gender, notwithstanding that many of the formal legal barriers to women's equality have been removed. Some progress has been made in recent years. Most notably, the National Women's Strategy 2007-2016 was published in early 2007. The National Women's Strategy sets out the Government's priorities in relation to the advancement of women in Irish Society for a ten-year period. In general, however, the Government is not adequately fulfilling its positive obligation under Article 3 of the ICCPR to deliver substantive equality for women. The persistence of gender inequality is demonstrated by the emphasis on the stereotypical role of women as mothers and carers both within the Irish Constitution and within the broader economic, social and cultural life in Ireland, by the inadequate structural supports to enable women's long term participation in the labour force on an equal basis with men, and in women's gross under-representation in political life.

a. Gender Equality and the Irish Constitution

179. The IHRC considers that the Government's obligation under Article 3 of the ICCPR to ensure the equal rights of men and women to the enjoyment of all the rights protected in the Covenant requires a review of the Irish Constitution from a gender equality perspective.

i. Gender Stereotyping

180. An amendment of Article 41.2 of the Irish Constitution, which is based on a stereotyped view of the role of women in Irish society, is urgently required. Article 41 of the Constitution provides a State guarantee to protect the family as the necessary basis of social order and as indispensable to the welfare of the nation and the State. In this context, Article 41.2 of the Constitution provides;

1. In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.
2. The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

181. The Human Rights Committee, in their Concluding Observations on Ireland's Second Periodic Report, expressed concern that the reference to women made in Article 41.2 of the Constitution could perpetuate traditional

attitudes towards the role of women.¹⁷⁹ The Committee on the Elimination of Discrimination Against Women has also repeatedly expressed concern about the continuing existence of Article 41.2 in its current form.¹⁸⁰

182. In November 2004, the All-Party Oireachtas Committee on the Constitution announced that it was going to undertake an overall examination of the provisions of the Constitution that relate to the family including Articles 41, 42 and 40.3.¹⁸¹ In January 2006 the Committee launched its Tenth Progress Report on the family. The Committee in its conclusions recommended alternative wording which would render Article 41.2 gender-neutral. Ireland's Third Periodic Report comments that the recommendations of the All-Party Oireachtas Committee are under consideration.

183. The IHRC is concerned at the low priority being afforded to amending what has been consistently recognised as one of the most dated provisions of the Constitution. The Government persists in failing to provide a firm commitment and a specified timeframe for amending Article 41.2 of the Constitution.

ii. Equality before the Law

184. The Irish Constitution does not explicitly embody the principle of equality of men and women and does not contain an explicit prohibition against discrimination on the basis of sex. The equality provision in the Irish Constitution, Article 40.1 provides;

All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.

185. In its 1993 report, the Second Commission on the Status of Women recommended an amendment of the Constitution to prohibit all forms of discrimination, whether direct or indirect, based on sex.¹⁸² In its 1996 report, a majority of the Constitution Review Group¹⁸³ recommended that a provision should be added to Article 40.1 which should state that no person shall be

¹⁷⁹ Concluding Observations of the Human Rights Committee on Ireland's Second Periodic Report, A/55/40, para. 20.

¹⁸⁰ See Concluding Comments of the Committee on the Elimination of Discrimination Against Women on Ireland's Fourth and Fifth Periodic Reports, A/60/38, (2005), para 382; Concluding Comments of the Committee on the Elimination of Discrimination Against Women on Ireland's Second and Third Periodic Reports, A/54/38, para. 193.

¹⁸¹ The All-Party Oireachtas Committee on the Constitution was established to complete a full review of the Constitution. The function of the Committee is to provide a focus on the place and relevance of the Constitution and to establish those areas where constitutional change may be desirable or necessary with reference to the Report of the Constitutional Review Group.

¹⁸² Second Commission on the Status of Women, *Report of the Second Commission on the Status of Women*, (Government Publications 1993), p. 27.

¹⁸³ The Constitution Review Group was established by the Government in April 1995. Its mandate is to establish those areas where Constitutional change may be desirable or necessary, with a view to assisting the All-Party Oireachtas Committee on the Constitution.

unfairly discriminated against, directly or indirectly, on any ground including sex, race, language, religion, political or other opinion, national, social or ethnic origin, property, birth or other status.¹⁸⁴

186. The principle of equality has been given greater effectiveness in Irish law through the enactment of the Employment Equality Act 1998 and the Equal Status Act 2000. This legislation prohibits discrimination on the basis of nine distinct grounds, one of which is gender.¹⁸⁵ It is of note, however, that the prohibition against discrimination is limited to certain spheres of human activity.¹⁸⁶ While this legislation has an extremely important role to play in advancing the equality of women, the existence of this legislation does not diminish the importance of having an all-embracing effective equality guarantee in the Irish Constitution to bring the Constitution into line with international human rights law.

b. Women's Participation in the Labour Force on an Equal Basis with Men

187. Over the past twenty-five years, there has been a steep increase in the number of women, particularly young women, in paid employment in Ireland. The current employment rate amongst women is 60.3%, compared to a male rate of 77.2%.¹⁸⁷ While the rise in the level of women in employment is to be welcomed, the evidence would suggest that women at all levels face challenges in the work force. In general, women continue to earn lower salaries as compared to men. Women's income in 2005 was 66.3% of men's income.¹⁸⁸ When these figures are adjusted to take account of the average hours per week spent in paid employment, women's average hourly earnings were 86% of men's.¹⁸⁹

188. The lack of a comprehensive system of adequate and affordable childcare provision is a critical barrier to many women wishing to enter or re-enter the labour force. Statistics demonstrate that a woman's maternal status continues to be a primary determinant of her labour force participation. In 2007, the employment rates amongst women aged 20 to 44 years with no children was 88.1%. However, for women in that age bracket who had children, the youngest aged 4-5 years old, the employment rate was 57.5%, and for women with children, aged 3 years and under, their employment rate was 58.5%.¹⁹⁰ For women in low-income households and for lone parents the crisis in affordable,

¹⁸⁴ Constitution Review Group, *Report of the Constitution Review Group*, (Government Publications, May 1996) p. 230.

¹⁸⁵ The legislation also prohibits discrimination on the basis of membership of the Travelling Community, race, disability, age, marital status, family status, sexual orientation and religion.

¹⁸⁶ These include employment, vocational training, advertising, collective agreements, and the provision of goods and services to which the public generally have access.

¹⁸⁷ Central Statistics Office, *Women and Men in Ireland, 2007*, (Government Publications, December 2007) Table 1.1.

¹⁸⁸ *Ibid.*, Table 1.10. Refers to income liable for social insurance payments.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*, Table 1.7.

accessible childcare services is particularly acute and acts as a substantial barrier to them taking up employment or furthering their education.

c. Women in the Political Sphere

189. The Human Rights Committee, in their Concluding Observations on Ireland's Second Periodic Report, expressed concern at the under-representation of women in political life.¹⁹¹ Ireland continues to have a comparatively small number of female elected politicians in both central and local Government. Following the 2007 general election, only 13% of the representatives in Dáil Éireann (House of Representatives) were women. This rate is well below the average EU rate of 23.4%.¹⁹² Furthermore, it is evident from the latest figures that there is a much higher proportion of men than women in regional and local decision-making structures, with men accounting for around 80% of representatives in both local and regional authorities.¹⁹³ Within the civil service almost 80% of the staff in clerical grades were women, yet women represented just 10% of the staff at the more senior levels of Assistant and Deputy Secretary levels.¹⁹⁴

d. National Women's Strategy 2007-2016

190. In 2002, the Government submitted a report to the United Nations on the implementation of the Beijing Platform for Action. In the report the Government made a commitment to produce a National Women's Strategy by the end of 2004. After considerable delay the National Women's Strategy 2007-2016 was published in early 2007.¹⁹⁵ The National Women's Strategy sets out the Government's priorities in relation to the advancement of women in Irish Society for the next ten years. It is a comprehensive document containing twenty key objectives and over two hundred planned actions. These wide-ranging objectives and actions have been clustered together under three key themes, equalising socio-economic opportunity for women; ensuring the wellbeing of women; and engaging as equal and active citizens.

191. The IHRC has a number of key concerns regarding the implementation of the National Women's Strategy. A glaring omission in the document is that there are no measureable targets or timescales for implementation. This was a criticism highlighted by the National Women's Council of Ireland shortly after the launch of

¹⁹¹ Concluding Observations of the Human Rights Committee on Ireland's Second Periodic Report, A/55/40, (2000), para. 20.

¹⁹² Central Statistics Office, *Women and Men in Ireland*, 2007, (Government Publications, December 2007), Table 1.18.

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

¹⁹⁵ Department of Justice, Equality & Law Reform, *National Women's Strategy 2007-2016* (Government Publications, April 2007).

the Strategy.¹⁹⁶ The IHRC, in advance of the publication of the National Women's Strategy, recommended that the gender equality targets in the Strategy should be monitored on an annual basis.¹⁹⁷ In addition, the IHRC expressed the view that as part of this monitoring process the Strategy should contain guarantees that comprehensive gender equality data will be produced on an annual basis and will be disseminated widely in an accessible format.¹⁹⁸

192. While the Government sets out a range of actions in the document governing the implementation of the National Women's Strategy, almost no measurable targets or timescales underscore these actions.¹⁹⁹ This gives rise to the concern that the document is aspirational in nature.

e. Summary of Main Areas of Concern

- The IHRC is concerned that Article 41.2 of the Irish Constitution continues to perpetuate traditional attitudes towards the role of women in Irish society. The IHRC is particularly concerned at the low priority the Government has afforded to amending what has been consistently recognised as one of the most dated provisions of the Constitution. The Government, as a matter of priority, should establish a specified timeframe for replacing Article 41.2 of the Constitution with gender-inclusive language.
- The Irish Constitution does not explicitly embody the principle of equality of men and women and does not contain an explicit prohibition against discrimination on the basis of sex. In the view of the IHRC, the Government should consider holding a referendum to amend Article 40.1 of the Constitution to prohibit direct and indirect discrimination on the basis of gender, race, colour, age, disability, sexual orientation, religious belief, membership of the Travelling community, language, political opinion, property, birth or other status.
- The availability of adequate and affordable childcare is crucial in supporting working mothers and mothers who wish to re-enter the

¹⁹⁶ National Women's Council of Ireland, Press Release, *National Women's Strategy Breath of Women's Inequalities Acknowledged: Mechanisms to Remove them Absent*, (18 April 2007).

¹⁹⁷ IHRC, *Submission of the Irish Human Rights Commission to the UN Committee on the Elimination of Discrimination Against Women in respect of Ireland's Combined Fourth and Fifth Periodic Reports under the Convention on the Elimination of all Forms of Discrimination Against Women*, (2005),

p. 26.

¹⁹⁸ *Ibid.*

¹⁹⁹ There is one exception, that is, the commitment by the Government to undertake an interim review of the strategy every three years. The other range of actions with no timelines attached include, for example; a commitment to prepare reports on the progress of implementation; to establish a wide-ranging co-ordination Committee to review implementation; to publish periodic reports on implementation of the Strategy on the Department of Justice, Equality and Law Reform Website.

labour force or further their education. In order to ensure that a support framework is put in place that will lead to women's long-term participation in the labour force, on an equal basis as men, the Government must ensure that adequate and affordable childcare is available to all families and that there are a sufficient number of childcare places available.

- There are a considerably small number of female elected politicians in both central and local Government. This issue deserves further consideration.
- It is of concern that the National Women's Strategy 2007-2016 fails to incorporate measurable targets and timescales for implementation. In the view of the IHRC, gender equality targets in the Strategy should be monitored on an annual basis. In addition, as part of the monitoring process, the Strategy should contain guarantees that comprehensive gender equality data will be produced on an annual basis and will be disseminated widely in an accessible format.

13. Rights of Unmarried and Same Sex Couples and of Transgendered Persons (Articles 16, 17, 23 and 26)

193. It is of concern to the IHRC that Ireland continues to have no provision for legal recognition of same-sex partnerships or for other non-married relationships. Ireland is one of an ever-decreasing minority of EU States that do not permit some form of union conferring rights and obligations on *de facto* couples. Ireland is also one of a small number of European states which fails to provide an effective legal mechanism for transgendered persons to have their new gender identity legally recognised. The absence of such a mechanism has serious consequences for the rights of transgendered persons in Ireland, including on their right to marry.

a. Rights of Unmarried and Same Sex Couples

194. The 2006 Census marked an increase in the prevalence of non-traditional family arrangements in Ireland. According to the Census, cohabiting couples are by far the fastest growing type of family unit in Ireland, representing 11.6% of all family units in 2006.²⁰⁰ The IHRC considers that the State should provide some form of legal protection and recognition to same sex couples and to *de facto* couples in general. In May 2006 the IHRC published a research paper on "*The Rights of De Facto Couples*" which outlines the human rights standards which support the case for such legal provision.²⁰¹ In its research report, the IHRC advocated the view that reforms would best be introduced through an overarching statute providing for relationship recognition. Moreover, the IHRC suggested that reform of the Irish Constitution would be desirable from a pragmatic and normative point of view. A guarantee of respect for private and family life extending beyond marital relationships in the Constitution would anchor any attempts to legislate in the area of legal recognition.²⁰²

195. In 2006, a number of reports were published supporting the need for reform in this area. The Constitution Review Group had previously recommended certain changes to the definition of family life set out in the Constitution.²⁰³ While it advocated that the privileged position of married families ought to be retained, the Constitution Review Group considered that a guarantee extending to all individuals of respect for their family life "whether based on marriage or not" should be included in the Constitution.²⁰⁴ These recommendations were

²⁰⁰ Census 2006, Volume 3, Household Composition and Family Status (Dublin: Central Statistics Office, 2006).

²⁰¹ IHRC, *The Rights of De Facto Couples* (March 2006).

²⁰² The Irish Courts have established that the right of marital privacy is one of the personal rights guaranteed by Article 40.3.1 of the Irish Constitution. *McGee v. Attorney General* [1974] IR 284; [1975] 109 ILTR 29. Article 40.3.1 provides, "[t]he State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."

²⁰³ Constitution Review Group, *Report of the Constitution Review Group* (Dublin: Stationery Office, 1996).

²⁰⁴ *Ibid.*, p. 336.

subsequently referred to the All-Party Oireachtas (Parliament) Committee on the Constitution and its Tenth Report on the Family was published in 2006.²⁰⁵ The majority of the All-Party Committee did not favour an amendment of the constitutional definition of the family. However, the All-Party Committee as a whole did agree that a packet of distinct legislative reforms, designed to ameliorate the position of same-sex and opposite-sex partners, should be enacted.

196. Subsequently, the Department of Justice, Equality and Law Reform published an Options Paper on Domestic Partnership, in November 2006.²⁰⁶ The Options Paper considers the categories of partnerships and relationships outside of marriage to which legal recognition might be accorded, consistent with Constitutional provisions. In addition, the Law Reform Commission²⁰⁷ conducted a comprehensive examination of the law relevant to cohabitants and made extensive recommendations for change.²⁰⁸

197. The IHRC is concerned that despite the wide recognition that reform is required to provide for legal recognition of same sex relationships and other partnerships outside of marriage, no significant progress has been made in this area to date. However, it should be noted that in October 2007, the Government stated its intention to publish a Civil Partnership Bill in March of 2008.²⁰⁹ The IHRC hopes that the Government will proceed with this initiative and that the proposed Bill will reflect best international practice in the area.

b. Transgendered Persons

198. Irish law currently fails to provide an effective legal mechanism for transgendered persons to have their new gender identity recognised in law.²¹⁰ The recently published Passports Bill 2007, which has not yet been enacted, would allow transgendered persons to obtain passports in their new gender but would not change their legal status.²¹¹ While this preliminary step is to be welcomed and while it is possible for transgendered persons to obtain some other official documents in their acquired gender, it is not possible to obtain a new birth certificate or be legally recognised in that gender. This is of fundamental importance for a number of reasons, including that in the absence of legal recognition, transgendered persons are prohibited from marrying members of the now opposite sex.

²⁰⁵ All-Party Oireachtas Committee on the Constitution, *Tenth Progress Report: The Family*, (Dublin: Stationery Office, 2006).

²⁰⁶ Department of Justice Equality and Law Reform, *Options Paper on Domestic Partnership* (Government Publications: November 2006).

²⁰⁷ The Law Reform Commission is an independent body established under the Law Reform Commission Act, 1975. Its overall function is to keep the law under review and to make recommendations for reform.

²⁰⁸ Law Reform Commission, *Rights and Duties of Co-habitants*, (December 2006).

²⁰⁹ Irish Times, "Government to Legislate for Civil Partnerships" 31 October 2007.

²¹⁰ Transgendered or transsexual persons are people who suffer from Gender Identity Disorder or Dysphoria, a well recognised medical condition.

²¹¹ Section 11 of the Passports Bill 2007.

199. There is wide international acceptance of the rights of transgendered persons to legal recognition. The European Court of Human Rights has held that a law preventing transgendered persons from obtaining a birth certificate or marrying in their new gender is in breach of Article 8 (right to respect for private and family life) and Article 12 (right to marry) of the ECHR.²¹² On 14 February 2008, the Irish High Court in the case of *Lydia Annice Foy v. An t-Ard Chlaraitheoir, Ireland and the Attorney General* made a declaration that Irish law is incompatible with the ECHR, in that it fails to provide legal recognition for transgendered or transsexual people.²¹³

200. The European Convention on Human Rights Act 2003, gave effect to the ECHR in Irish law. Section 5(1) of the Act empowers the courts to grant a declaration of incompatibility of Irish law with the ECHR in certain circumstances. However, Section 5(2) of the ECHR Act provides that a declaration of incompatibility "shall not affect the validity, continuing operation or enforcement of the statutory provision or rule of law in respect of which it is made". The Act requires the Taoiseach (Prime Minister) to lay the order containing a declaration of incompatibility before each House of the Oireachtas (Parliament) within twenty-one days of the order being made, yet it does not oblige the Taoiseach to explain how the Government intends to rectify the incompatibility nor does it require the Government to propose legislation in order to bring Ireland into line with its international obligations under the ECHR.²¹⁴

201. It would thus appear that Ireland is now in breach of the European Convention on Human Rights on this issue and the IHRC believes that the Government should immediately begin the process of drafting legislation to provide for full legal recognition of transgendered persons. Such legislation should include the right to marry in the transgendered person's new gender and the have their new gender legally recognised. It should also protect the position of family members of the transgendered person. The IHRC would urge that the legislation should be drafted in consultation with all relevant parties, including representatives of transgendered persons.

c. Summary of Main Areas of Concern

- **The IHRC is concerned that Ireland continues to have no provision for legal recognition of same-sex partnerships or for other non-married relationships. In October 2007, the Government stated their intention to publish a Civil Partnership Bill in March of this year. The IHRC hopes that the Government will proceed with this initiative and that the proposed Bill will reflect best international practice in the area.**

²¹² *Goodwin v. The United Kingdom*, Judgment of 11 July 2002, (2002) 35 EHRR 18; *I. v. The United Kingdom*, Judgment of 11 July 2002, (2002) 2 FLR 518.

²¹³ Record No. 2006/33SP, unreported. Judgment was given in this case on 19 October 2007 and the Order of the Court was made on 14 February 2008.

²¹⁴ Section 5(3) of the European Convention on Human Rights Act, 2003.

- The IHRC is concerned that Ireland appears to be in breach of its obligations under the European Convention on Human Rights by reason of its failure to provide an effective mechanism for transgendered persons to have their new gender identity legally recognised. In the view of the IHRC, the Government should immediately prepare legislation, in consultation with relevant parties, to provide for full legal recognition of transgendered persons, including the right to marry in their new gender.