

**Submission on behalf of the Irish Human Rights and
Equality Commission (Designate) to Representatives
of the European Committee for the Prevention of
Torture and Inhuman or Degrading Treatment or
Punishment**

August 2014

Introduction

1. The Irish Human Rights Commission ("IHRC") is Ireland's National Human Rights Institution (NHRI), set up by the Irish Government under the Human Rights Commission Acts 2000 and 2001. The IHRC has a statutory remit 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 Irish Human Rights and Equality Commission Act 2014 merges the Equality Authority and the IHRC into a single enhanced body, the Irish Human Rights and Equality Commission (IHREC).

2. Ireland ratified the Council of Europe Convention for the Prevention of Torture and Inhuman or Degrading, Treatment or Punishment on 14 March 1988, which came into force in Ireland on 1 February 1989. The IHREC welcomes the opportunity to present this submission to Representatives of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") on its 6th visit to Ireland.

Ratification of Optional Protocol to the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)

3. Ireland ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("UNCAT") on 11 April 2002. Implementation of UNCAT was given effect in Ireland by the Criminal Justice (United Nations Convention against Torture) Act 2000. Subsequently, Ireland signed the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("OPCAT") on 2 October 2007, but has not yet ratified OPCAT. Legislation will be required prior to the ratification in order for the National Preventative Mechanism ("NPM") required by the OPCAT to be designated.

4. At the time of the examination of Ireland's first periodic report under UNCAT in May 2011, the State indicated that it had recently approved preparation of legislation to ratify OPCAT.¹ During Ireland's Universal Periodic Review in October 2011, the State indicated

¹ Head of Delegation, Mr Sean Aylward, said *"I am pleased to announce today that the Irish Government approved the preparation of legislation to ratify the Optional Protocol on Tuesday last (18 of May 2011). And while it is not possible, at this present time, to provide an indicative date for the enactment of the legislation every effort will be made to progress the*

likewise.² However, it is noted that the Inspection of Places of Detention Bill remains on the Government's Legislative Schedule as "Publication Expected – Not possible to indicate at this stage".³

5. Since 2007, the IHRC has recommended that the ratification of OPCAT, and the establishment of the NPM that meets OPCAT requirements, take place as a matter of urgency. In advance of this ratification, we have recommended that the Government should engage in consultations with relevant independent statutory bodies, civil society organisations and other stakeholders in its consideration of the designation of an effective NPM. The IHREC has also recommended that sufficient resources be ring-fenced in the body or bodies designated as NPM and that it be structurally independent of the Executive.⁴

Rights of Persons Detained in Police Stations and Prisons

Police Detention

6. The IHRC welcomed the establishment of the Garda Síochána Ombudsman Commission ("GSOC") in 2005 and since then has repeatedly called for its strengthening, in particular, to allow GSOC to investigate human rights abuses that may be perpetrated by An Garda Síochána.⁵ GSOC began operations in May 2007, with a primary function of carrying out investigations into complaints concerning the conduct of members of An Garda

passage of the legislation as quickly as possible". See Opening Statement for the consideration of Ireland's First Periodic Report under Article 19 of the Convention against Torture by Mr Seán Aylward, Head of Irish Delegation, 23 May 2011, available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCAT%2fSTA%2fIRL%2f46%2f11025&Lang=en, last accessed 20 June 2014.

² Then Minister for Justice, Defence and Equality, Mr Alan Shatter TD, said, "*Legislation is being prepared to enable ratification of the Optional Protocol to the Convention on Torture.*" See Minister for Justice, Defence and Equality, Mr Alan Shatter TD's statement to the UN Human Rights Council during Ireland's UPR examination, October 2011, <http://www.justice.ie/en/JELR/Pages/SP11000187>, last accessed 20 June 2014.

³ The Inspection of Places of Detention Bill, described as "*To give legislative effect to the OPCAT, strengthen Prisons Inspectorate, put Council of Europe inspection regime on a statutory footing and address matters relating to Prison Visiting Committees*" on the Legislative Programme. See http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/SECTION_C11.html, last accessed 20 June 2014.

⁴ See IHREC Designate, *Report on Ireland's 4th Periodic Report under the International Covenant on Civil and Political Rights*, June 2014, last accessed from <http://www.ihrc.ie/publications/list/ihrec-designate-report-on-iccpr-june-2014/> on 25 July 2014, at para. 100.

⁵ See IHREC Designate, *Report on Ireland's 4th Periodic Report under the International Covenant on Civil and Political Rights*, June 2014, last accessed from <http://www.ihrc.ie/publications/list/ihrec-designate-report-on-iccpr-june-2014/> on 25 July 2014, at paras 15-25. See also UN Human Rights Committee (HRC), *Concluding observations of the Human Rights Committee: Ireland*, 24 July 2014, CCPR_C_IRL_CO_4_17700_E, at para 13, 'Police complaint procedures'.

Sióchána and to promote public confidence in the process of resolving those complaints. The IHREC has previously suggested that this restriction on the functions of GSOC, and the breadth of the discretion conferred on the Minister for Justice, Defence and Equality and the Garda Commissioner, need to be addressed and that GSOC should process all Garda-related complaints.⁶ IHREC remains concerned that there is no existing inspection mechanism for police stations. GSOC is primarily an individual complaints mechanism rather than a preventative inspection mechanism and does not have powers to inspect Garda stations on a regular and unannounced basis. In the area of police detention, there is no independent inspection mechanism. It is also significant that investigators from international bodies, such as the CPT, have the power to enter any Garda station making it anomalous to restrict the powers of GSOC in this way.⁷

Length of Pre-trial Detention and Access to a Lawyer

7. The IHREC notes the significant disparity between the numbers of persons arrested under the Offences Against the State Act 1939 and the number of persons prosecuted under the same Act.⁸ No specific detail and/or breakdown is given by the State in relation to the figures concerning length of pre-trial detention and access to a lawyer, and there is no public source for the information given.⁹ The State should provide information to evidence

⁶ See IHREC Designate, *Review of An Garda Síochána Act 2005: Submission of the IHREC (Designate) to the Joint Oireachtas Committee on Justice, Defence and Equality*, 2014, at para. 30. Last accessed from http://www.ihrc.ie/download/pdf/ihrc_submission_to_review_of_an_garda_siochan_act_2005_by_oireachtas_committee_on_justice_april_2014.pdf on 25 July 2014. While GSOC has powers of compellability in relation to investigations under s.96 of the 2005 Act, the Minister, at the request of the person required to provide information to GSOC, may decide that certain information not be disclosed to GSOC if same would be prejudicial to the security of the State. Similar restrictions can exist in relation to GSOC's power to search a Garda Station where the officer has a reasonable suspicion that an offence has been committed.

⁷ See IHREC Designate, *Review of An Garda Síochána Act 2005: Submission of the IHREC (Designate) to the Joint Oireachtas Committee on Justice, Defence and Equality*, 2014, at paras 31-32. Last accessed from http://www.ihrc.ie/download/pdf/ihrc_submission_to_review_of_an_garda_siochan_act_2005_by_oireachtas_committee_on_justice_april_2014.pdf on 25 July 2014. See also UN Human Rights Committee (HRC), *Concluding observations of the Human Rights Committee: Ireland*, 24 July 2014, CCPR/C/IRL_CO_4_17700_E, at para 13, 'Police complaint procedures'.

⁸ In its Fourth Report to the Human Rights Committee, the State provided statistics in respect of arrests, convictions and cases pending under the Offences Against the State Acts. As can be seen from those figures, there is a huge disparity between the numbers arrested and the numbers prosecuted. For example in the year ending 31 May 2011, there were 764 persons arrested under section 30 of the Offences Against the State Act while only 38 were prosecuted (with 183 pending), see UN Human Rights Committee, *Ireland's Fourth Periodic Report under the ICCPR*, CCPR/C/IRL/4, 2012, at paras 574-575. Further detail is given in the State's Replies to the List of Issues where it is detailed that 442 persons were arrested in 2012 for terrorist motivated offences and nine people were convicted. It is not clear, however, how many prosecutions were undertaken in respect of terrorist acts. See UN Human Rights Committee, *Replies of Ireland to the list of issues*, CCPR/C/IRL/Q/4/Add.1, 2014, at para. 143.

⁹ See UN Human Rights Committee, *Ireland's Fourth Periodic Report under the ICCPR*, CCPR/C/IRL/4, 2012, at para. 578. In this Fourth report, the State noted that the average length of pre-trial detention is 12 months from the date of charge for persons in custody and 18 months from the date of charge for persons on bail. The Committee, in its 2008 *Concluding Observations on Ireland's Third Periodic Report*, also recommended that the State should carefully monitor the length of

its compliance with UNCAT and commit to regularly publishing such detailed statistics. IHREC has observed in the past that the right of “reasonable” access to a lawyer in Irish law has arguably fallen short of what is required under Article 6 of the ECHR, insofar as it does not place a sufficiently rigorous obligation on the State to ensure that a person has access to a lawyer during questioning from which adverse inferences may be drawn (subject to any necessary and proportionate limitation).¹⁰

8. Following the recent welcome Supreme Court ruling in *DPP v Gormley*¹¹ on non self-incrimination, the Department of Justice and Equality issued a circular to the Law Society, advising solicitors that they can now attend interviews with their clients.¹² The State should indicate how it intends to place this right on a statutory footing to ensure that it is properly protected.

9. Pursuant to Part 4 of the Criminal Justice (Amendment) Act 2009¹³ amendments have been made to various Acts¹⁴ which allow a judge, when hearing an application by a relevant member of An Garda Síochána to (A) extend a period of detention in respect of an accused and (B) to direct that “in the public interest” certain evidence relevant to the application be given in the absence of all persons including the accused person but excluding the member(s) of An Garda Síochána whose attendance is necessary to give the information (as well as such court clerks as the judge considers necessary).¹⁵ While IHREC

pre-trial detention and access to a lawyer in respect of persons arrested under suspicion of having committed a terrorist act, see para. 11.

¹⁰ IHREC Designate, Report on Ireland's 4th Periodic Report under the International Covenant on Civil and Political Rights, June 2014, at para. 154. Last accessed from <http://www.ihrc.ie/publications/list/ihrec-designate-report-on-iccpr-june-2014/> on 25 July 2014.

¹¹ *DPP v Gormley* [2014] IESC 17. The Supreme Court held, in this case, that “the entitlement not to self-incriminate incorporates an entitlement to legal advice in advance of mandatory questioning of a suspect in custody” and, further, that “the right to a trial in due course of law encompasses a right to have early access to a lawyer after arrest and the right not to be interrogated without having had an opportunity to obtain such advice. The conviction of a person wholly or significantly on the basis of evidence obtained contrary to those constitutional entitlements represents a conviction following an unfair trial process”; at para. 9.13.

¹² The Law Society also stated that the Director of Public Prosecutions recently issued a direction to the Garda Síochána about the attendance of solicitors during interviews in Garda stations. As a result of this direction, where a request is made by a suspect who is detained in a Garda station to have his or her solicitor present during an interview, a solicitor will be allowed to attend; see <http://blackhall.newsweaver.ie/gs3exor63n71bejcfacxqf?email=true&a=11&p=47219485>, last accessed 25 July 2014.

¹³ The Criminal Justice (Amendment) Act 2009, enacted on 23 July 2009, Number 32 of 2009.

¹⁴ The Acts (and the relevant sections thereof) which are amended by Part 4 of the Criminal Justice (Amendment) Act 2009 are the Offences Against the State Act 1939, ss.30, 30A; Criminal Justice (Drug Trafficking) Act 1996, ss.2, 3, 4, 5, 11; Criminal Justice Act 2007, ss.50, 51, 52; and Criminal Justice Act 1984, ss.4, 9, 10.

¹⁵ The judge may make such a direction either of his / her own volition or on the application of the member of An Garda Síochána. This direction can only be made where the particular evidence to be given by a member of An Garda Síochána: (i) relates to steps taken or to be taken in the investigation of the arrested person's or another person's involvement in the

accepts that the legislation allows the judge, having heard the evidence, to direct that it be re-given in open court if he or she is satisfied that this would not prejudice the investigation, we are concerned at the potential impact that these provisions could have on the rights of the accused. The IHREC urges the State to monitor the usage of these legislative provisions to ensure that they are used sparingly and only in cases of absolute necessity.

Overcrowding and "Slopping Out"

10. The CPT, in its visits to Ireland in 2006 and 2010, expressed concern stating that "the 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".¹⁶ IHREC notes that under the Irish Prison Service's current Strategic Plan, there is no provision made for the development of any strategy in respect of remand prisoners.¹⁷ The IHREC considers overcrowding in prisons to be an urgent human rights concern in Ireland, one which needs to be addressed, not only through short term measures to double up the capacity of cells, but through law reform and policy measures to reduce the number of people who are being sent to prison. IHREC has consistently expressed concern about overcrowding and the practice of "slopping out" in Irish Prisons.¹⁸ The problems of overcrowding and the physical conditions in the State's prisons are ongoing for in excess of 20 years.¹⁹ In the State's replies to the UN Human Rights Committee at the time of Ireland's Fourth Periodic examination under the International Covenant for Civil and

offence concerned or any other offence; and (ii) the nature of the evidence could prejudice in a material way the conduct of the investigation, see s.30(4BA)(b) of the 1939 Act, as inserted by s.21 of Part 4 of the 2009 Act.

¹⁶ See Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), October 2006, at para. 29. This exact statement is repeated in the Committee's Report of February 2011, at p. 15, para 21.

¹⁷ Irish Prison Service, *Three Year Strategic Plan 2012-2014*, 2012.

¹⁸ See, for example, IHRC, *Submission for the Twelfth Session of the Working Group on the Universal Periodic Review: Ireland*, 2011, at para. 17, last accessed from http://www.ihr.ie/download/pdf/ihr_report_to_un_universal_periodic_review_march_2011.pdf on 25 July 2014 and IHREC Designate, Report on Ireland's 4th Periodic Report under the International Covenant on Civil and Political Rights, June 2014, last accessed from <http://www.ihr.ie/publications/list/ihrrec-designate-report-on-iccpr-june-2014/> on 25 July 2014, at para. 90.

¹⁹ In a report on its visit in 1993, the European Committee for the Prevention of Torture expressed concern about the extent of overcrowding in Irish Prisons and the practice of slopping-out and recommended that both issues be dealt with as a "matter of priority". See Council of Europe, *Report to the Irish Government on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) October, 1993*, CPT/Inf (95) 14, 1995, at paras 98-101. Similarly, the UN Committee Against Torture recommended in its Concluding Observations in 2011, that the State put in place specific timeframes for the construction of the new prison facilities. See UN Committee Against Torture, *Concluding Observations on Ireland's Initial Report*, CAT/C/IRL/CO/1/2011, at para. 11(a).

Political Rights (“ICCPR”) List of Issues in 2014,²⁰ statistics show that of the 15 prisons identified, eight prisons had more prisoners in custody than there were beds to provide for these prisoners.²¹ While certain improvements have been made by the State, improvements in the system generally occur slowly.²²

Non-Custodial Sentences

11. Moves towards the development of non-custodial sanctions include the Criminal Justice (Community Service) (Amendment) Act 2011, introduced to promote the increased use of community sanctions as an alternative to imprisonment, are welcomed.²³ The State has initiated the development of a strategy *Unlocking Community Alternatives – A Cork Approach*, to address overcrowding and accommodation in Cork prison.²⁴ Also, IHREC welcomes the Report on Penal Reform carried out by the Joint Oireachtas Committee on Justice, Defence and Equality where a “de-carceration strategy”²⁵ was recommended, which would aim to reduce the prison population by one-third within 10 years. However, the State should indicate how the strategy is central to its penal policy and what practical steps it plans to that end. The continued delay by the State in dealing with the issues of overcrowding and “slopping-out” in prisons should be addressed. In this regard, the IHREC recommends that the State should provide a specific timeframe for the achievement of eliminating these problems.²⁶

²⁰ UN Human Rights Committee, *List of issues in relation to the Fourth Periodic Report of Ireland: Replies of Ireland to the List of Issues*, CCPR/C/IRL/Q/4/Add.1, 2014, Annex A, Table 3.

²¹ See Inspector of Prisons, *An Assessment of the Irish Prison System*, 20 May 2013, at Chapter 2; and Inspector of Prisons, *Report on an Inspection of Limerick Prison by the Inspector of Prisons, Judge Michael Reilly*, 25 November 2011, at Chapter 3.

²² See also UN Human Rights Committee (HRC), *Concluding observations of the Human Rights Committee: Ireland*, 24 July 2014, CCPR/C/IRL_CO_4_17700_E, at para 15, ‘Conditions of Detention’.

²³ The Criminal Justice (Community Service) (Amendment) Act 2011 requires the court to first consider the use of a Community Service Order (CSO) as a sanction for minor offences where the offender would otherwise receive a sentence of up to 12 months imprisonment.

²⁴ UN Human Rights Committee, *Ireland’s Fourth Periodic Report under the ICCPR*, CCPR/C/IRL/4, 2012, at para. 2, 361-364.

²⁵ Joint Oireachtas Committee on Justice, Defence and Equality, *Report on Penal Reform*, 31/JDAE/009, 2013, at p. 9. The Committee recommended that: (a) sentences for non-violent offences of less than six months be commuted to community service orders; (b) standardised remission of sentences be increased from one-quarter to one-third of a prisoner’s sentence with an incentivised remission scheme of up to half a prisoner’s sentence for certain categories of offenders; (c) legislation be introduced for structured release, temporary release, parole and community return; and (d) address prison conditions and overcrowding and increase the use of open prisons.

²⁶ See also UN Human Rights Committee (HRC), *Concluding observations of the Human Rights Committee: Ireland*, 24 July 2014, CCPR/C/IRL_CO_4_17700_E, at para 15, ‘Conditions of Detention’.

Deaths in Custody

12. In 2012, the then Minister for Justice, Defence and Equality announced that the death of any prisoner in the custody of the Irish Prison Service should be the subject of an independent investigation by the Inspector of Prisons. While welcoming this extension of the remit of the Inspector of Prisons, the IHREC would urge the State to ensure that the Inspector has the appropriate statutory powers to allow him or her to discharge this role effectively and in accordance with the State's obligations under international human rights law, including the procedural obligations on the State articulated by the European Court of Human Rights under Article 2 of the European Convention on Human Rights (ECHR). In discharging this role, the Inspector of Prisons should be afforded adequate resources and powers.²⁷ The report of a Commission of Investigation into the death in custody of Gary Douch in 2006 was published on 1 May 2014 and underlines IHREC's concern about the delays inherent in the State's investigative mechanisms.²⁸ IHREC had previously called for the publication of the report and the implementation of any recommendations and regrets the length of time the publication has taken.²⁹ The State should indicate how it has proceeded with the implementation of the Protocols recommended in the report.³⁰

²⁷ Reports on deaths in custody are available at <http://www.inspectorofprisons.gov.ie/en/IOP/Pages/WP14000001>, last accessed 25 July 2014.

²⁸ Department of Justice, Equality and Defence, *The Report of the Commission of Investigation into the Death of Gary Douch*, 1 May 2014, last accessed from <http://www.justice.ie/en/JELR/Pages/PB14000112> on 25 July 2014. Gary Douch was an inmate in Mountjoy Prison who suffered a fatal assault on 1 August 2006. The Commission found that "overcrowding in Mountjoy Prison completely undermined the ability of the prison to respond in a meaningful and safe way to Gary Douch's request for protection" and the conditions in the relevant part of the prison at that time were stated to be "appalling and unacceptable", at p. 25.

²⁹ See IHRC, *National Human Rights Institution Submission to the UN Committee Against Torture on the Examination of Ireland's First National Report*, 2011, at p. 6 and IHREC Designate, *Report on Ireland's 4th Periodic Report under the International Covenant on Civil and Political Rights*, June 2014, last accessed from <http://www.ihr.ie/publications/list/ihtec-designate-report-on-iccpr-june-2014/> on 25 July 2014, at para. 94.

³⁰ The Commission made the following recommendations relating to deaths in custody: (a) A protocol to be followed in the event of the sudden and unexpected death of a prisoner and incorporating best practice guidance should be drawn up within three months of the date of publication of this report. (b) The protocol should require that at a minimum two prison officers, (or delegated persons such as a member of the Gardaí and a Prison Chaplain if there is a perceived risk to prison officers attending the home of the next of kin) of whom one must be at senior management level, should travel to the home of the next of kin to inform them immediately of the death or risk of death and accompany that person or persons to the hospital or prison as the case may be. The protocol should require that a suitably qualified person, preferably a social worker be appointed to act in a supportive role to advise and assist the family to cope with the sudden death, and to act as a liaison between the bereaved family and the authorities. See *The Report of the Commission of Investigation into the Death of Gary Douch*, 1 May 2014, at p. 50.

Prison Complaints Mechanisms

13. IHREC is concerned that there are serious gaps in relation to current complaints and investigation mechanisms in places of detention in Ireland. While welcoming as an improvement the introduction of a prisoner complaints model and the oversight of the mechanism by the Inspector of Prisons, we note that it does not provide a fully independent system for dealing with serious prisoner complaints and, as such, would recommend that an independent Prisoner Ombudsman be established to investigate complaints by prisoners, rather than the Irish Prison Service, with limited oversight by an external authority.³¹

Detention of Minors

14. IHREC regards as regrettable the continuing detention of children alongside adult prisoners. IHREC notes that new facilities for the detention of minors are being constructed on the existing campus at Oberstown in Lusk, County Dublin. In addition, the State has outlined how 16 year old males are now being remanded/ committed to the Oberstown Campus.³² From July 2012, the Ombudsman for Children's remit has been extended to include 16 and 17 years old males detained in St. Patrick's Institution, until all detention there has been ceased.³³

15. The State has yet to identify the timeline for ending the use of St. Patrick's Institution for the detention of minors. Furthermore, IHREC is concerned about the detention of minors in "Wheatfield Place of Detention" as this facility also houses adult prisoners. It is noted that Rule 69(1) of the Prison Rules 2007 which provides for separate accommodation for children from adults is only "as far as practicable and subject to the maintenance of good order and safe and secure custody."³⁴ IHREC would urge for its amendment to unequivocally state that minors be separated from adults in all cases, except where it is in the best interests of the child.³⁵

³¹ See also UN Human Rights Committee (HRC), *Concluding observations of the Human Rights Committee: Ireland*, 24 July 2014, CCPR/C/IRL/CO_4_17700_E, at para 15, 'Conditions of Detention'.

³² It is noted that in *Ireland's Fourth Periodic Report under the ICCPR*, CCPR/C/IRL/4, 2012, it is stated that this is the case as of 1 May 2012, at para. 518. While in the Replies to the List of Issues, the State advises that as of July 2012, "no 16 year old boy has been detained in an adult prison", at para. 80. The Annual Report of the Irish Prison Service, 2013, states that from May 2012 all 16 year old boys have been detained in the Children Detention Facilities in Oberstown, at p.1.

³³ *Ireland's Fourth Periodic Report under the ICCPR*, CCPR/C/IRL/4, 2012, at para. 518.

³⁴ Irish Prison Rules, S.I. 252 of 2007.

³⁵ It is noted that in *Ireland's Fourth Periodic Report under the ICCPR*, CCPR/C/IRL/4, 2012, it is stated that this is the case as of 1 May 2012, at para. 518. While in the Replies to the List of Issues, the State advises that as of July 2012, "no 16 year old

Detention in Psychiatric Institutions

Definition of "Voluntary" Patients

16. The Department of Health has initiated a review of the Mental Health Act 2001 ("the 2001 Act") through the appointment of an Expert Group.³⁶ The definition of a voluntary patient under the 2001 Act is not sufficiently precise to protect the right to liberty of all persons, including individuals who are compliant but incapacitated and who might be admitted to an approved centre on a "voluntary" basis.³⁷ Such patients fall outside the procedural protections for involuntary patients set up under the 2001 Act, in the form of periodic reviews of their detention in an approved centre.³⁸ It is unclear whether the Assisted Decision-Making (Capacity) Bill 2013 will rectify the situation insofar as it appears incompatible with Article 16 ICCPR and Article 12 of the Convention on the Rights of Persons with Disabilities ("CRPD"). In this regard, the Bill may be construed as permitting the restriction and/or denial of legal capacity on the basis of a functional assessment of mental/decision-making capacity.

Persons with Intellectual Disabilities

17. In its 2002 report on Ireland, the CPT expressed concern at the *de-facto* detention of "so-called voluntary residents" with an intellectual disability and recommended "that the legal situation of persons placed in intellectual disability facilities be reviewed as a matter of urgency and that action be taken with a view to providing a comprehensive legal framework

boy has been detained in an adult prison", at para. 80. The Annual Report of the Irish Prison Service, 2013, states that from May 2012 all 16 year old boys have been detained in the Children Detention Facilities in Oberstown, at p.1.

³⁶ See *Ireland's Fourth Periodic Report under the ICCPR*, CCPR/C/IRL/4, 2012, at para. 344, where it is noted that a human rights based review of the Mental Health Act 2001, will be undertaken; and UN Human Rights Committee, *List of issues in relation to the Fourth Periodic Report of Ireland: Replies of Ireland to the List of Issues*, CCPR/C/IRL/Q/4/Add.1, 2014, at para. 108, where it is noted that the review of the legislation will conclude shortly. The report of the Expert Group, on which the IHREC sits, is not yet finalised.

³⁷ Under the 2001 Act, voluntary patients do not have their admission to an approved centre independently reviewed on the basis that they are not being detained against their will and have given consent to their treatment. In such circumstances, the voluntary patient does not need an independent review of detention to protect his/her right to liberty. See IHRC, *Policy Paper concerning the Definition of a "Voluntary Patient" under section 2 of the Mental Health Act, 2001*, 2010, at p. 3.

³⁸ In *EH v St. Vincent's Hospital and Others* [2009] IESC 46, *per Justice Kearns*, the Supreme Court considered the meaning of "voluntary patient" as defined in section 2 stating: "the terminology adopted in s. 2(1) of the Act of 2001 ascribes a very particular meaning to the term "voluntary patient". It does not describe such a person as one who freely and voluntarily gives consent to an admission order. Instead the express statutory language defines a "voluntary patient" as a person receiving care and treatment in an approved centre who is not the subject of an admission order or a renewal order. This definition cannot be given an interpretation which is *contra legem*."

for such institutions, offering an adequate range of safeguards to persons placed in them”.³⁹ In 2003, the Government formally responded to the CPT’s Report and referred to the commitment in its 2001 National Health Strategy to complete the overall transfer of persons with an intellectual disability from psychiatric hospitals not later than 2006. Following its 2010 visit, the CPT regretted that no such legal framework was yet in place for “voluntary” residents and recommended again, that the Irish authorities “take the necessary steps to ensure that all residents in institutions for persons with learning disabilities benefit from an adequate range of safeguards”.⁴⁰ According to 2013 statistics, persons with intellectual disabilities continue to reside in Irish psychiatric units and hospitals under the unsatisfactory “voluntary” and “involuntary” categories.⁴¹ In its 2010 Enquiry Report into intellectual disability centres, the IHRC recommended that the Government ratify the CRPD and enact capacity legislation without delay and that it also underpin these initiatives with clear rights-based protections for persons with intellectual disabilities which include enforceable codes of practice concerning assessment of capacity and adequate funding protocols to ensure the dignity of each individual based on the person’s needs.⁴²

Detention of Asylum Seekers

18. No express provision is made in the Immigration Act 1999 for affording persons seeking leave to land or detainees’ access to a solicitor pending their deportation, or for the provision of legal aid in respect of any such advice. The High Court has however held that, interpreted constitutionally, s.5(1) of the Immigration Act 1999 (which provides for detention pending deportation) is to be construed as allowing for access to legal advice.⁴³ It is well established that refugees and asylum seekers enjoy the right to liberty and security of person, and more particularly the right not to be subjected to arbitrary arrest or detention,

³⁹ CPT, *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*, from 20 to 28 May 2002, at para. 94.

⁴⁰ CPT, *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*, from 25 January to 5 February 2010, at paras 151-152.

⁴¹ The Irish Psychiatric Units and Hospitals Census 2013 states that, on the night of census, there were 161 patients diagnosed with intellectual disabilities residing in Irish psychiatric units and hospitals. Of that number, 158 were admitted voluntarily and 3 involuntarily: see HRB Statistics Series 22, *Irish Psychiatric Units and Hospitals Census 2013*, 2013, at p. 48.

⁴² IHRC, *Enquiry Report on the Human Rights Issues Arising from the Operation of a Residential and Day Care Centre for Persons with a Severe to Profound Intellectual Disability*, March 2010, at para. 12.118. See also, IHRC, *Observations on the Assisted Decision-Making (Capacity) Bill 2013*, 2014.

⁴³ *DP v Governor of the Training Unit & Ors* [2000] 1 IR 492.

as guaranteed by Article 9 ICCPR.⁴⁴ The State should ensure that asylum seekers and migrants not convicted of a criminal offence are not detained in prisons. IHREC reiterates its recommendation that detention of asylum seekers should always be a measure of last resort.⁴⁵

“Extraordinary Rendition”

19. In relation to the practice of “extraordinary rendition”, IHREC has expressed the view that a complaint-reactive mechanism, which is the current practice in Ireland, is insufficient to discharge the State’s human rights obligations and recommends the establishment of a monitoring and inspection regime and for the State to ratify OPCAT, so that no prisoner is ever transported through Ireland, except in accordance with proper legal formalities and the highest observance of human rights standards.

⁴⁴ UN Human Rights Committee, *General Comment No.8 on Article 9 (Right to Liberty and Security of Persons)*, HRI/GEN/1/Rev.7, 1982.

⁴⁵ IHRC, *Further submission on the Examination of Ireland’s Third Periodic Report in relation to the List of Issues*, 2008, at para. 29.