

**Submission to the UN Committee on Economic, Social
and Cultural Rights on Ireland's Third Periodic Report
on the International Covenant on Economic, Social
and Cultural Rights – List of Issues Stage**

October 2014

Introduction

1. The Irish Human Rights and Equality Commission (IHREC) is Ireland's National Human Rights Institution (NHRI), as established by the Irish Human Rights and Equality Commission Act 2014.¹ The IHREC has a statutory remit to endeavour to ensure that the human rights and equality of all persons in the State are fully realised and protected in the law and policy of the State. The IHREC seeks to ensure that Irish law and policy reflect 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 equality; and making such recommendations to the Government as it deems appropriate in relation to the measures which the Commission considers should be taken to strengthen, protect and uphold human rights and equality in the State. The IHREC enjoys 'A' Status Accreditation with the International Coordinating Committee of NHRIs.²

2. The IHREC welcomes the invitation of the Committee for Economic, Social and Cultural Rights ("the Committee") to provide preliminary remarks ahead of the forthcoming examination of Ireland's compliance with its obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR), which will be the State's third examination since the ratification of the Covenant in 1989. The IHREC notes the Committee's General Comment No.10 'The role of national human rights institutions in the protection of economic, social and cultural rights' and that 'national institutions have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights'.³

3. The IHREC is now pleased to provide the Committee with this short submission in advance of the discussion of the List of Issues at the Committee's Pre-Sessional Working Group in December 2014. The present submission is non-exhaustive and reflects primarily structural issues around accountability and remedies within the State as well as access to justice. The IHREC provides this submission with the aim of being of assistance to the Committee in preparing the List of Issues and

¹ The Irish Human Rights Commission was established by the Irish Government under the Human Rights Commission Acts 2000 and 2001. The Equality Authority was established under the Employment Equality Act, 1998. The statutory functions of the Equality Authority were set out in Part V of the Employment Equality Act, 1998. It was subsequently given additional functions under the Equal Status Act 2000. The Irish Human Rights and Equality Commission Act 2014 merged the Equality Authority and the IHRC into a single body which will commence operation on 1 November 2014.

² United Nations, *Principles relation to the Status of National Institutions (The Paris Principles)*, Adopted by General Assembly resolution 48/134 of 20 December 1993.

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

hopes to provide a longer Shadow Report in advance of the Committee's hearing on Ireland in 2015.

Ireland's Human Rights and Equality Infrastructure

4. Since the State's last examination by the Committee in 2002, Ireland's national human rights and equality framework has been targeted for significant cuts.⁴ While these cuts were partially reversed by the Government in 2013, both bodies were adversely affected during the reporting period. Not alone has this resulted in a decrease in the capacity of both bodies which has not yet been resolved, these cuts have also had consequences in silencing statutory voices on human rights and equality at the outset of Ireland's recent economic crisis, when the introduction of austerity budgets and retrogressive cuts were set to result in widespread effects to the most vulnerable and those most at risk of discrimination.

5. The Committee's General Comment No.10 on the role of national human rights institutions in the protection of economic, social and cultural rights addresses not only NHRIs, in that they should give full attention to economic, social and cultural rights in their work, but also addresses States, in that they should ensure that the mandates of such institutions also cover these rights.⁵ The 1998 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights state that '[p]romotional and monitoring bodies such as national ombudsman institutions and human rights commissions, should address violations of economic, social and cultural rights as vigorously as they address violations of civil and political rights.'⁶ The IHREC has highlighted that in order to discharge

⁴ In 2009 the budget of the Irish Human Rights Commission was cut by 32 per cent from €2.3 million to €1.6 million: see Irish Human Rights Commission (2009) *Submission to the UN Human Rights Committee on Ireland's 1 Year Follow-up Report to its Third Periodic Report under the ICCPR*, last accessed from http://www.ihrc.ie/download/pdf/ihrc_submission_on_iccpr_one_year_follow_up_sept_2009.pdf on 18 September 2014. The budget of the Equality Authority was cut by 43 per cent from €5.9 million to €3.3 million: see Department of Finance, *2009 Estimates for Public Services & Summary Public Capital Programme*, at p.19; last accessed from <http://www.budget.gov.ie/Budgets/2009/Documents/CombinedBudgetEstimates2009&SPCP.pdf> on 3 September 2014.

⁵ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 10: The role of national human rights institutions in the protection of economic, social and cultural rights*, 10 December 1998, E/C.12/1998/25.

⁶ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, (1998) 20 (3) *Human Rights Quarterly* 691-701, at para.25. See also the Office of the United Nations High Commissioner for Human Rights OHCHR Professional Training Series No. 12, *Economic, Social and Cultural Rights Handbook for National Institutions* (2005).

its functions effectively and ensure its independence, the body should be ensured a stable and sufficient budget over which it has autonomous control.⁷

6. The IHREC welcomes the passage of the Irish Human Rights and Equality Act 2014 into law. In its Observations on the previous Bill, however, it raised a number of areas where the legislation could be further strengthened to be in full compliance with the UN Paris Principles. Included in these recommendations is that there be one unified definition of human rights in the Act, so that international convention rights, including ICESCR, not yet incorporated into domestic law, would fall within the remit of the merged body, across its range of functions.⁸ This issue again raises the status of ICESCR in domestic law and the question of the State's commitment to incorporate ICESCR rights into domestic law (see below).

7. In the Committee's 2002 Concluding Observations, the Government was urged to ensure that the Combat Poverty Agency was 'well-resourced and able to fulfil, in an effective manner, its statutory advisory functions'.⁹ In July 2009 the Combat Poverty Agency was abolished and some of its functions subsumed into the Social Inclusion Unit of the Department of Social Protection. The National Action Plan against Racism ended in 2008 and the National Consultative Committee on Racism and Interculturalism (NCCRI), a national anti-racism body, was abolished in December 2008.

Incorporation of ICESCR into Domestic Law

8. The IHREC regrets that, despite a recommendation to incorporate the ICESCR into domestic law being made by the Committee in each of its Concluding Observations in 1999 and 2002, no specific steps have been taken since the previous reporting period to do so. The IHREC welcomes

⁷ The Paris Principles provide 'The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.' See <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>, last accessed 18 September 2014. See also Irish Human Rights and Equality Commission (Designate), *Observations on the Irish Human Rights and Equality Commission Bill 2014*, paras 6-12, last accessed from http://www.ihrc.ie/download/pdf/ihrec_designate_observations_on_ihrec_bill_2014.pdf on 18 September 2014.

⁸ Irish Human Rights and Equality Commission (Designate) *Observations on the Irish Human Rights and Equality Commission Bill 2014*, para 29, last accessed from http://www.ihrc.ie/download/pdf/ihrec_designate_observations_on_ihrec_bill_2014.pdf on 18 September 2014.

⁹ UN Committee on Economic, Social and Cultural Rights (2002) *Concluding Observations of the Committee on Economic, Social and Cultural Rights*, E/C.12/1/Add.77, at para.31.

the State's signature of the Optional Protocol to ICESCR (OP-CESCR) in 2012 but regrets that the protocol has not yet been ratified, without any indication of when this may take place.

9. At its 2011 Universal Periodic Review hearing, the State noted that 'Ireland had a dualist system under which international agreements to which Ireland becomes a party do not become a part of domestic law unless so determined by Parliament through legislation' and that it did not intend to 'alter current practice'.¹⁰ The IHREC has repeatedly expressed the view that the arguments for non-incorporation by the State do not stand up to legal scrutiny.¹¹ With respect to the argument that Ireland is a dualist system and that this is an obstacle to the incorporation of human rights treaties, it is noted that Ireland has previously incorporated international treaties into domestic law through both legislative and constitutional means.¹² The Government has stated that 'the State's obligations to implement the Covenant in Ireland are met through policies aimed at improving the enjoyment of economic, social and cultural rights, including by fighting persistent poverty and social exclusion' and that 'this differentiated approach affords the best means of implementing Ireland's obligations under the Covenant'.¹³

10. Since 2008, austerity-led cuts to budgets have severely impacted on economic and social rights due to the fact that in Ireland the enjoyment of those rights often relies on discretionary decision-making not amenable to judicial review. The manner in which the State ensures economic

¹⁰ UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Ireland*, A/HRC/19/9, 2011, at paras 27-28. Also of note is the fact that the incorporation of ratified treaty rights into domestic law was not formally referred to the Constitutional Convention for its consideration, despite an IHRC recommendation to the Taoiseach that this should occur. This represented a missed opportunity by the State to discuss the need for the incorporation of international conventions into domestic law as part of the Constitutional Convention, including how such incorporation could occur.

¹¹ See, for example, IHRC, *Submission to the UN Human Rights Committee on the Examination of Ireland's Third Periodic Report on the ICCPR*, 2008, at paras 17-25, last accessed from

http://www.ihrc.ie/download/pdf/ihrc_report_on_iccpr_march_2008.pdf on 18 September 2014. The IHRC suggested that the State might incorporate the Covenant through amending the constitutional text, through direct legislative incorporation or by expressly giving the Covenant a role in governing administrative action.

¹² Examples of legislative incorporation are the Diplomatic Relations and Immunity Act 1967, which gave force in Irish law to the Vienna Convention on Diplomatic Relations and the Protection of Children (Hague Convention) Act 2000 which 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. In addition, the Criminal Justice (United Nations Convention against Torture) Act 2000 gave force in Irish law to certain articles of the Convention against Torture and the Genocide Act 1973 gave force in Irish law to certain articles of the UN Convention on the Prevention and Punishment of the Crime of Genocide. The European Convention on Human Rights has been incorporated into domestic law indirectly and at a sub-constitutional level through the European Convention of Human Rights Act 2003. An example of constitutional incorporation was the Twenty-First Amendment of the Constitution which introduced a ban on the death penalty and removed textual references to capital punishment; approved by referendum on 7 June 2001 and signed into law on 27 March 2002.

¹³ UN Committee on Economic, Social and Cultural Rights (2013) *Third periodic reports of States parties due in 2007: Ireland*. E/C.12/IR/3, at paras 491 and 492 respectively.

and social rights is primarily through executive discretionary decision-making which the Supreme Court has ruled lies in the province of the Executive and is not amenable to judicial review absent a clear violation of a Constitutional right (such as property rights under Article 43 of the Constitution) or where an organ or agency of the State disregards its constitutional obligations in an 'exemplary fashion', namely following 'a conscious and deliberate decision by the organ of state to act in breach of its constitutional obligation to other parties, accompanied by bad faith or recklessness'.¹⁴ This high threshold for justiciability of economic and social rights mean that the courts, in upholding Constitutional rights, are nevertheless reluctant to require Executive action through the remedy of mandamus (for example that the State provide supports to a person to secure economic, social or cultural rights) or to condemn Executive inaction through the remedy of certiorari (for example censuring Executive omissions such as a failure to fund a programme which secures rights). The courts are more willing to strike down legislation through the remedy of a Declaration of Incompatibility with the Constitution, but this is usually in the field of civil and political rights which benefits from stronger constitutional protections.

11. One form of discretionary decision-making is in relation to State funding of non-State bodies which provide many of the health, education and social services in the State. Such services may include residential or day services for persons with intellectual disabilities, children with care needs, some older persons in nursing homes, asylum seekers in for-profit Direct Provision centres, schools to provide primary or post-primary education (schooling in Ireland occurs under patronage of mainly religious bodies)¹⁵, hospital trusts to provide health and social services. Decisions on budgets for funding such bodies is subject to variance and have been subject to cuts since 2008 (see below).

12. The fact that the State has chosen not to incorporate ICESCR into domestic law means that claims that economic, social or cultural rights have been violated are difficult to pursue under domestic law. IHREC would argue that there has been no comprehensive analysis on the wider

¹⁴ Murray J in *TD v Minister for Education* [2001] 4 IR 259 at 336 - 337.

¹⁵ IHRC, *Religion and Education: A Human Rights Perspective*, 2011. Last accessed from <http://www.ihrc.ie/download/pdf/religionandeducationpdf.pdf> on 18 September. See also Forum on Patronage and Pluralism in the Primary Sector, *Report of the Forum's Advisory Group*, 2012, last accessed from <http://www.education.ie/en/press-events/conferences/patronage-and-pluralism-in-the-primary-sector/the-forum-on-patronage-and-pluralism-in-the-primary-sector-report-of-the-forums-advisory-group.pdf> on 18 September 2014; IHRC, *Submission to the UN CERD Committee on the Examination of Ireland's Combined Third and Fourth Periodic Reports*, 2010, last accessed from <http://www.ihrc.ie/download/pdf/20101210101458.pdf> on 18 September 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.ihrc.ie/publications/list/ihrec-designate-report-on-iccpr-june-2014/> on 18 September July 2014

question of the status of international treaties in Irish law. In relation to ICESCR, it is regrettable that it is now 12 years since Ireland's last periodic examination as this does not lend itself to proper supervisory oversight and has allowed the status quo to remain and arguably worsen, during that period in light of recent austerity measures. The IHREC has consistently called upon the State to incorporate international human rights treaties into domestic law as it considers that, in the absence of such incorporation, human rights protections contained in international treaties are not fully realised in Irish law. The IHREC is of the view that the adoption of austerity measures in recent years has impacted severely on the enjoyment of economic, social and cultural rights within the State, particularly in areas where discretionary budgets are allocated and in the absence of an examination of whether a proposed measure will result in impermissible retrogression in relation to the State's obligations to respect, protect and fulfil core non-derogable ICESCR rights. Proper implementation of the provisions of the Covenant since 2002 is accordingly highly questionable.

13. In 2012, the Convention on the Constitution was established by Government to consider and make recommendations to the Houses of the Oireachtas on key constitutional issues, including a number of limited rights.¹⁶ The Convention first met on 1 December 2012 and concluded its work on 31 March 2014. Recommendations were made on eight issues specified in the Oireachtas resolution which established the Convention.¹⁷ An additional issue of the inclusion of economic, social and cultural rights in the Irish Constitution was also considered. We note that an extremely high proportion of the members of the Convention, at 85 percent, supported amendment of the Constitution to strengthen the protection of economic, social and cultural rights. A majority also favouring the option to insert a 'provision that the State shall progressively realise ESC rights, subject to maximum available resources and that this duty is cognisable by the Courts'.¹⁸

¹⁶ The Convention comprised 100 citizens, 66 chosen as representative of Irish society from the electoral register, 33 political representatives, plus an independent Chairman. See www.constitution.ie

¹⁷ The eight issues were: reducing the Presidential term of office to five years; reducing the voting age to 17; review of the Dáil electoral system; giving citizens resident outside the State the right to vote in Presidential Elections; provision for same-sex marriage; amending the clause on the role of women in the home and encouraging greater participation of women in public life; increasing the participation of women in politics; removal of the offence of blasphemy from the Constitution. Dáil Reform, and Economic, Social & Cultural Rights were additional issues not specified in the original Resolution.

¹⁸ The Convention on the Constitution (2014) *Eighth Report of the Convention on the Constitution: Economic, Social and Cultural (ESC) Rights*, at 6. Last accessed from <https://www.constitution.ie/AttachmentDownload.ashx?mid=5333bbe7-a9b8-e311-a7ce-005056a32ee4> on 18 September 2014.

Reservations to the Covenant

14. The State retains two reservations to the Covenant, on Article 2, paragraph 2, in relation to giving favourable consideration to a knowledge of the Irish language for certain occupations; and Article 13, paragraph 2 (a) in relation to the right of parents to home school their children.¹⁹ IHREC notes that the State did not address the reservations in its Third Periodic Report.²⁰ In Ireland's recently updated Common Core Document on International Human Rights Instruments, it is stated: 'The Irish Government has a policy of keeping existing reservations to human rights treaties actively under review, consistent with the Vienna Declaration and Program of Action. At present all of the reservations under these articles are considered necessary.'²¹ Insofar as reservations diminish the effectiveness of treaties, and in order to ensure they do not defeat the purpose of the treaty, all reservations must be kept actively under review.²²

Accountability and Remedies:

Ombuds Bodies and Regulatory Bodies

15. In addition to the State's human rights and equality infrastructure, there are a number of bodies which support the protection of human rights. The Office of the Ombudsman was established by the Ombudsman Act 1980.²³ The Ombudsman examines complaints concerning the administrative actions of Government Departments, the Health Service Executive (HSE), public hospitals and local authorities.²⁴ The Ombudsman can examine complaints about how most State

¹⁹ While home schooling does occur, the IHRC in its amicus curiae intervention before the European Court of Human Rights in *O'Keefe v Ireland Application No. 35810/09* noted how In practice, a negligible number of children are home schooled in the State and how references to home schooling and private schooling are far outside the norm in relation to the education of children: see IHRC submission September 2011, at para 27, last accessed from <http://www.ihrc.ie/enquiriesandlegal/amicuscuriae/ihrcmakesamicus.html> on 12 September 2012.

²⁰ UN Committee on Economic, Social and Cultural Rights (2013) *Third periodic reports of States parties due in 2007: Ireland*. E/C.12/IR/3.

²¹ Common core document forming part of the reports of States parties: Ireland (2014) HRI/CORE/IRL/2014 at para.81.

²² See International Law Commission, *Guide to Practice on Reservations to Treaties*, (2011), 'Periodic review of the usefulness of reservations' which points out how 'States or international organizations which have formulated one or more reservations to a treaty should undertake a periodic review of such reservations and consider withdrawing those which no longer serve their purpose.' At 2.5.3(1).

²³ The Ombudsman (Amendment) Act 2012 brought over 180 additional public bodies under the remit of the Ombudsman with effect from 1 May 2013. SI No 332 of 1984 extended the remit of the Ombudsman to include the functions of the Health Service Executive (HSE). Matters concerning the exercise of clinical judgement in connection with the diagnosis or illness or the care or treatment of a patient, however, are excluded. The Ombudsman also cannot examine planning decisions or decisions and activities called 'reserved functions' such as the making or revoking of bye-laws, which may only be carried out by elected members of a local authority.

²⁴ In addition to a general Ombudsman for public service, there are several other more specialised Ombuds bodies, such as the Office of the Ombudsman for Children, the Ombudsman for the Defence Forces, the Garda

bodies (the police, prison service and other bodies are excluded from its remit) carry out executive and administrative functions, including decision-making, complaints about delays or failure to take action. Under the Ombudsman for Children Act 2002, the Ombudsman for Children can similarly examine complaints relating to children and young persons.²⁵ Under Part IV of the Garda Síochána Act 2005, the Garda Síochána Ombudsman Commission can examine certain complaints against police officers. In relation to non-discrimination, General Comment No. 20 sets out how the ground of nationality should not bar access to Covenant rights and the Covenant rights apply to everyone within a State, including refugees, asylum-seekers, regardless of legal status and documentation.²⁶ Ombuds bodies have limited scope to review administrative acts with regard to immigration and asylum within the State. It is disputed, for example, whether the right of asylum seekers, in for example Direct Provision Centres, or other migrants '... to receive education and access to adequate food and affordable health care' without discrimination comes within the remit of Ombuds bodies.²⁷

16. Complaints to Ombuds bodies must be made within a number of months and not be the subject of legal proceedings through the courts. Administrative remedies relating to the realisation of economic, social and cultural rights in the State are not always capable of being enforced, however. The State's Ombuds bodies may not be capable of ensuring the remedies of compensation, reparation, restitution, rehabilitation, guarantees of non-repetition and/or a public

Síochána Ombudsman Commission, the Private Residential Tenancies Board, the Broadcasting Complaints Commission, the Financial Services Ombudsman, the Pensions Ombudsman, Office of the Press Ombudsman, the National Consumer Agency, and other complaints procedures in relation to particular professions, such as the Bar Council, Medical Council, etc. In the field of mental health and quality health services, the Mental Health Commission and the Health Information and Quality Authority are empowered to conduct inspections and issue reports but not to consider complaints.

²⁵ As with the Ombudsman certain bodies are excluded from her/ his remit.

²⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 20: Non-discrimination in economic, social and cultural rights* (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20, at para. 30. Other substantive rights receive similar protection, for example the principle of non-discrimination in relation to the right to health under General Comment 14 of the UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4.

²⁷ In April 2013, in response to questions concerning the creation of an independent complaints mechanism for asylum seekers living in Direct Provision via the Offices of the Ombudsman and the Ombudsman for Children, the Minister for Justice and Equality stated that 'Section 5(1)(e) of the *Ombudsman Act, 1980* and Section 11(1) (e) of the *Ombudsman for Children's Act, 2002* provide that either Ombudsman shall not investigate any action taken by or on behalf of a person in the administration of the law relating to, inter alia, asylum. Whilst there are no plans to change those legislative provisions to give either Office the power to investigate asylum related matters, INIS, including RIA, has administrative arrangements in place with both Offices to assist and provide information on matters brought to its attention' See Parliamentary Question No. 919, Asylum Complaints System, 16 April 2013. Last accessed from <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2013041600087?opendocument#WRLL04450> on 29 September 2014.

apology following a finding of a violation. The focus upon mal-administration and the requirement to exhaust internal complaints mechanisms before bringing a complaint to the State's Ombuds bodies, as well as the fact that the findings and recommendations of those bodies do not have the force of law, raises questions as to the availability of effective remedies. This is particularly so where most decision-making impacting on rights provides for a large degree of discretion to be vested in the decision-maker and where judicial review remedies against such decisions are severely limited.²⁸

Privatisation of Public Functions

17. The IHREC is also concerned that accountability mechanisms are weakening under recent decisions to privatise other public functions. Potentially impacting on the right to access water and sanitation as set out in General Comment No.15, a new entity, Irish Water, has been established²⁹ to introduce the privatisation of water services which will effectively replace State subvention by private subvention, as required under the 2010 Agreement between the State and the European Commission, European Central Bank and International Monetary Fund (see below). The right to access water and sanitation will henceforth be accessed through Irish Water which will be regulated by the Energy regulator (the Commission for Energy Regulation), whose remit does not include a human rights focus.

Accountability in Health: Symphysiotomy Procedures

18. The IHREC is concerned that the Government's approach to the issue of symphysiotomy procedures has failed to provide effective remedies and accountability following Concluding Observation 11 of the Human Rights Committee in 2014.³⁰ The Concluding Observation found that

²⁸ Even under the more progressive interpretations of the ability of the courts to judicially review and overturn decisions on the basis the decision lacks proportionality (as opposed to traditional judicial review grounds being merely illegality, irrationality and procedural impropriety (see Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, which test was subsequently adopted by the Irish courts), it is invariably in the field of civil and political constitutional rights: see the decision will be vulnerable to attack on the grounds of a mistake of law or failure to respect the rules of natural justice: see *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 IR 701 which concerned asylum determination and where Fennelly J for the majority of the Supreme Court held that the reviewing court could not substitute its own view for that of the administrative body.

²⁹ By way of the Water Services Act 2013, and the Water Services Act (No. 2) 2013.

³⁰ Which states: 'The Human Rights Committee expresses concern that symphysiotomy, childbirth operations which sever one of the main pelvic joints and unhinges the pelvis, was introduced into clinical practice and performed on approximately 1,500 girls and women in public and private hospitals between 1944 and 1987 without their free and informed consent. While noting the publication of a report by Professor Walsh in 2012, the review of the findings of the report by Judge Murphy and the planned establishment of the an ex-gratia scheme for the survivors of symphysiotomy, the Committee expresses concern at the State party's failure to: (i) initiate a prompt, and comprehensive independent investigation into the practice of symphysiotomy; (ii) identify, prosecute and punish, where still possible, the perpetrators for performing symphysiotomy without

the State had not provided criminal law and civil law remedies to the victims of violations and that redress mechanisms were lacking.³¹ In line with international human rights law on effective redress mechanisms, the IHREC recommends that the State moves to ensure (1) a prompt, independent and thorough investigation into cases of symphysiotomy; (2) a process whereby perpetrators (including medical personnel) can be prosecuted and punished; and (3) an effective (individualised basis) remedy being provided to the survivors of symphysiotomy for the damage sustained, including fair and adequate compensation and rehabilitation which includes access to judicial remedies for victims opting for the ex-gratia scheme offered whereby they can challenge sums offered under the scheme.

Impact of Austerity on Human Rights and Equality

19. In December 2010, the Government entered into a European Union (EU) - International Monetary Fund (IMF) financial assistance programme under which it was granted an €85 billion bailout.³² The resulting National Recovery Plan (NRP) 2011-2014 comprised €10 billion in expenditure cuts and €5bn in tax increases. The agreement set out certain conditions which have led to harsh austerity measures, including a rise in the pension age, the introduction of multi-year expenditure ceilings, a cut to the minimum wage (which was later reversed) and the introduction of water charges.³³ In contrast to previous national strategies, which have been negotiated with social partners, the NRP was negotiated with the IMF and EU.³⁴

patient consent; and (iii) provide effective remedies to survivors of symphysiotomy for the damage sustained as a result of these operations (arts. 2 and 7).’ See 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. 11.

³¹See also Article 12 of the Covenant; UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 20: Non-discrimination in economic, social and cultural rights* (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20, at para. 40; and UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, at para.59.

³² See Statement by Minister for Finance, Brian Lenihan T.D. on the Motion on the EU/IMF Programme for Ireland Dáil Éireann, 15 December 2010. Last accessed from http://archive.merrionstreet.ie/wp-content/uploads/2010/12/Statement-by-Minister-for-Finance-on-Motion-on-EU-IMF-Prog_15Dec10-2.pdf on 18 September 2014.

³³ The social impact of the economic and financial crisis has resulted in increased unemployment, falling income and wealth, and rising levels of poverty and deprivation. Deprivation has more than doubled from 11.8% in 2007 to 24.5% in 2011 (CSO Statistics, 2012). See National Economic and Social Council (2013) *The Social Dimension of the Crisis: The Evidence and the Implications*, last accessed from <http://www.nesc.ie/en/publications/publications/nesc-reports/the-social-dimensions-of-the-crisis-the-evidence-and-its-implications/> on 18 September 2014.

³⁴ The UN Special Rapporteur on Human Rights and Extreme Poverty, in her mission to Ireland in 2011 noted a lack of civil society participation in both the design and implementation of crisis response measures. See Special Rapporteur on Human Rights and Extreme Poverty, Report on Mission to Ireland, 17 May 2011, A/HRC/17/34/Add.2, at para 37.

20. Austerity measures raise important concerns in relation to the protection of economic, social and cultural rights, when viewed against the principles of non-retrogression, progressive realisation, non-discrimination and minimum core obligations. Although the State exited the bailout on 15 December 2013, the Government has been clear that austerity measures will continue.³⁵ ICESCR places obligations upon States to give effect to the Covenant rights through progressive realisation and to guard against retrogression. In its 2012 Open Letter to all State Parties, the Committee made certain recommendations to States in times of economic crisis but it is unclear how the State has taken concrete steps to this end.³⁶

21. ICESCR's General Comments clearly provide that retrogression may only occur when all other avenues have been pursued but not in relation to non-derogable rights such as the right to non-discrimination. In relation to the right to health under Article 12, for example, General Comment 14 suggests that there is a strong presumption that retrogressive measures taken 'are not permissible', with the burden of proof resting with the State to show such measures are warranted.³⁷ As noted above, there is limited justiciability of the effects of austerity measures on economic and social rights under Irish law, which raises the question of effective remedies and access to justice. Concern has been expressed by both the Council of Europe³⁸ and the United

³⁵ The Thirtieth Amendment to the Constitution in prohibiting the formation of deficits has arguably permitted the prioritisation of fiscal policy over economic, social and cultural rights. See Thirtieth Amendment of the Constitution (Treaty on Stability, Coordination and Governance in the Economic and Monetary Union) Act 2012. See also Government of Ireland (2014) *Programme for Government: Annual Report 2014*. Last accessed from http://www.taoiseach.gov.ie/eng/Work_Of_The_Department/Programme_for_Government/Programme_for_Government_Annual_Report_20141.pdf on 9 September 2014.

³⁶ See Committee on Economic, Social and Cultural Rights, Letter to States Parties, 16 May 2012, CESCR/48th/SP/MAC/SW, last accessed from <http://www2.ohchr.org/english/bodies/cescr/docs/LetterCESCRtoSP16.05.12.pdf> on 16 September 2014.

³⁷ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, at para. 32. The Office of the High Commissioner for Human Rights says States should demonstrate: (1) the existence of a compelling State interest; (2) the necessity, reasonableness, temporariness and proportionality of the austerity measures; (3) the exhaustion of alternative and less restrictive measures; (4) the non-discriminatory nature of the proposed measures; (5) protection of a minimum core content of the rights; and (6) genuine participation of affected groups and individuals in decision-making processes. See United Nations Office of the High Commissioner for Human Rights (2013) *Report on Austerity Measures and Economic and Social Rights*, at p.12. Last accessed from http://www.ohchr.org/Documents/Issues/Development/RightsCrisis/E-2013-82_en.pdf on 9 September 2014.

³⁸ See European Social Rights Committee reports which re-states European human rights case law on austerity -- see paragraphs 64 to 79 (Paragraph 70 contains key information on its own case law, including concerning Ireland). It provides a summary of other sources on austerity and rights, some policy and some legal -- see paragraphs 26 to 43 (citing European Court of Human Rights, PACE, ILO, CoE Committee of Ministers and Greek Human Rights Commission). Last accessed from http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC79Merits_en.pdf on 18 September 2014.

Nations³⁹ that the protection of human rights in particular economic, social and cultural rights must be protected at all times. The UN Special Rapporteur on Human Rights and Extreme Poverty stated that 'the impact of the crises has been severe, particularly for the most vulnerable segments of Irish society. The independent expert reiterates that Ireland's human rights obligations apply even during times of economic hardship, and that recovery measures must not disproportionately impact the poorest segments of society.'⁴⁰ To this end, many concerns have been expressed about the effects of the financial crisis and austerity measures on vulnerable groups.⁴¹

Impact of Discretion in Decision-Making and Access to Justice

Social Welfare Appeals

22. Lack of access to justice can also be viewed in the difficulty in challenging opaque discretionary decision-making processes. Access to social assistance may be subject to inconsistency in decision-making and independent appeals mechanisms are subject to delay. Not an independent appeals mechanism, the Social Welfare Appeals Office is a division of the Department of Social Protection and Appeals Officers remain employees of the Department. Guidelines for decision makers are not publicly available, resulting in a lack of transparency. Appellants do not have equal access to information as previous decisions are not published. Representation for appellants is excluded from free civil legal aid. The number of live appeals in the social welfare appeals system

Council of Europe Commissioner for Human Rights 'Safeguarding Human Rights in times of Economic Crisis' [https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH/IssuePaper\(2013\)2&Language=all](https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH/IssuePaper(2013)2&Language=all)

³⁹ Independent Expert on the Question of Human Rights and Extreme Poverty (2011) *Report of the Independent Expert on the Question of Human Rights and Extreme Poverty following: Mission to Ireland*, last accessed from <http://www.ohchr.org/EN/Issues/Poverty/Pages/ImpactofausteritymeasuresontheenjoymentHR.aspx> on 18 September 2014.

⁴⁰ Independent Expert on the Question of Human Rights and Extreme Poverty, *Report of the Independent Expert on the Question of Human Rights and Extreme Poverty following: Mission to Ireland*, 2011, last accessed from <http://www.ohchr.org/EN/Issues/Poverty/Pages/ImpactofausteritymeasuresontheenjoymentHR.aspx> on 18 September 2014.

⁴¹ Frances McGinnity, Helen Russell, Dorothy Watson, Gillian Kingston and Elish Kelly (2014) *Winners and Losers? The Equality Impact of the Great Recession in Ireland*, Equality Authority and Economic and Social Research Institute at p.5. Last accessed from <http://www.esri.ie/UserFiles/publications/BKMNEXT265.pdf> on 18 September 2014. See also Brenda Gannon and Brian Nolan (2004) *Disability and Labour Market Participation* Dublin: The Equality Authority; Philip J O'Connell and Frances McGinnity (2008) *Immigrants at Work: Ethnicity and Nationality in the Irish Labour Market* Dublin: The Equality Authority and the ESRI; Dorothy Watson, Pete Lunn, Emma Quinn and Helen Russell (2012) *Multiple Disadvantage in Ireland: an Equality Analysis of Census 2006* Dublin: The Equality Authority and the ESRI; Dorothy Watson, Gillian Kingston and Frances McGinnity (2013) *Disability in the Irish Labour Market: Evidence from the QNHS Equality Module 2010* Dublin: The Equality Authority and the ESRI; ; Gillian Kingston, Philip J. O'Connell and Elish Kelly (2013) *Ethnicity and Nationality in the Irish Labour Market: Evidence from the QNHS Equality Module 2010* Dublin: The Equality Authority and the ESRI.

has trebled since 2007, rising from 19,568 in that year⁴² to almost 59,000 live appeals in 2013.⁴³ Processing times have also increased significantly over the same period. In 2013, appellants had to wait an average of 34 weeks for an oral hearing and 26 weeks for a decision on the written evidence only⁴⁴ although the waiting times for oral hearings did fall from the 2011 peak of 52.5 weeks.⁴⁵ A consistently high rate of success at appeal⁴⁶ may indicate that appellants will access a payment to which they were originally entitled, if fewer discretionary decision-making processes had been involved in the first instance. Discretion in decision-making is difficult to challenge, either via the courts or through the appeals mechanisms themselves, as noted.

Habitual Residence Condition

23. The IHREC has previously expressed concerns in relation to the impact of the Habitual Residence Condition (HRC) on social assistance payments.⁴⁷ This condition requires that a person be habitually resident in Ireland in order to qualify for such payments. The term 'habitual residence' is not defined in law.⁴⁸ The IHREC has previously noted that the HRC has indirect and adverse effects on vulnerable group. These include financial and administrative barriers arising for victims of

⁴² Social Welfare Appeals Office (2008) *Annual Report 2007*, p.4. Last accessed from <http://www.socialwelfareappeals.ie/pubs/annreps/annrep07.pdf> on 18 September 2014.

⁴³ Minister for Social Protection, Joan Burton TD, Written Answers, Dáil Éireann, unrevised, 29 May 2014. Last accessed from <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2013052900072> on 18 September 2014.

⁴⁴ Social Welfare Appeals Office (2014) *Annual Report 2013*, p.6. Last accessed from <http://www.socialwelfareappeals.ie/pubs/annreps/annrep13.pdf> on 18 September 2014. Waiting times peaked in 2011 when an oral hearing took 53 weeks on average and 25 weeks for a summary/written decision.

⁴⁵ Social Welfare Appeals Office (2012) *Annual Report 2011*, p.3. Last accessed from <http://www.socialwelfareappeals.ie/pubs/annreps/annrep11.pdf> on 18 September 2014.

⁴⁶ In 2013, 55 per cent of appeals were decided in favour of the appellant while 21 per cent of the total number of appeals did not go to an Appeals Officer but were instead revised by the original decision-maker once an appeal was lodged. Social Welfare Appeals Office (2014) *Annual Report 2013*, p8.

⁴⁷ See IHREC Designate, *Report on Ireland's 4th Periodic Report under the International Covenant on Civil and Political Rights*, June 2014, at paras 28, 49, 53 and 56. Last accessed from <http://www.ihrc.ie/publications/list/ihrec-designate-report-on-iccpr-june-2014/> on 18 September 2014; IHRC, *Submission for the Twelfth Session of the Working Group on the Universal Periodic Review: Ireland, 2011*, at para. 40. The State Report refers to the introduction of the Habitual Residence Condition with EU enlargement in May 2004, following concerns that the social assistance provisions were open to abuse. See UN Committee on Economic, Social and Cultural Rights (2013) *Third periodic reports of States parties due in 2007: Ireland*. E/C.12/IR/3, Annex, at para 191.

⁴⁸ Under this requirement, a person regardless of their nationality, who has not been resident in the state for two years, is not entitled to claim a range of social welfare entitlements, including, child benefit, disability allowance, unemployment benefit, one parent allowance and carer's allowance. There are five criteria contained in Social Welfare and Pensions Act 2007 to determine habitual residence: 1) The length and continuity of living in the State or another country; 2) The length and reasons for any absence from the State; 3) The nature and pattern of the person's employment; 4) The person's main centre of interest; and 5) The future intentions of the person applying for the social welfare scheme.

domestic violence who are migrants.⁴⁹ The HRC, in limiting the persons entitled to claim certain social assistance payments, fails to make provision for women who are victims of domestic violence. Thus a victim of domestic violence who cannot meet the HRC may be forced to choose between remaining in a violent situation or facing destitution and homelessness due to their inability to access essential support services.⁵⁰

24. Travellers have been disproportionately affected by the HRC mostly because of regular movement between Ireland, Northern Ireland and UK.⁵¹ The HRC affects ability to claim Child Benefit of the Roma Community and also of the Traveller Community, as well as affecting victims of domestic violence within these groups.⁵² In the State's Third Periodic Report under ICESCR, it notes during consultations with civil society that concerns were raised by stakeholders 'over the lack of adequate statutory guidelines in making Habitual Residence decisions and the degree of discretion left to Deciding Officers' which, according to stakeholders 'leads to varied decisions and an inconsistent appeals process.'⁵³

Reproductive and Sexual Health

25. Under other international conventions to which the State is a party, the State's discretion in formulating its laws on the issue of abortion as it considers appropriate is recognised, provided that

⁴⁹ This condition requires that a person be habitually resident in Ireland in order to qualify for a number of social assistance payments. The term "habitual residence" is not defined in law. Whether or not a person is "habitually resident" is largely a question of fact but the decision maker is obliged to have regard to the length and continuity of residence in the State or in any other particular country; the length and purpose of any absence from the State; the nature and pattern of the person's employment; the person's main centre of interest; and the future intentions of the person concerned as they appear from all the circumstances. In addition, the person must have a legal right to reside in Ireland in order to be considered habitually resident, provided for s.246 of the Social Welfare Consolidation Act 2005.

⁵⁰ See Irish Human Rights Commission Submission to the UN Human Rights Committee on the Examination of Ireland's Fourth Periodic Report under the International Covenant on Civil and Political Rights, June 2014, at paras 49-54. Last accessed from <http://www.ihrc.ie/download/pdf/20140616113130.pdf> on 30 September 2014.

⁵¹ See address of Dr Maurice Manning, former President Irish Human Rights Commission, Pavee Point Seminar, *The Impact of the Habitual Residence Condition on Travellers and Roma in Ireland*, 22 March 2012. Last accessed from http://www.ihrc.ie/download/pdf/dr_maurice_manning_speech_pavee_point_seminar_22_march_2012.pdf on 19 September 2014.

⁵² The Habitual Residence Condition, in limiting the persons entitled to claim certain social assistance payments, fails to make provision for women who are victims of domestic violence. Thus a victim of domestic violence who cannot meet the Habitual Residence condition may be forced to choose between remaining in a violent situation or facing destitution and homelessness due to her inability to access essential support services. See IHREC Designate, *Report on Ireland's 4th Periodic Report under the International Covenant on Civil and Political Rights*, June 2014, at para. 53. Last accessed from <http://www.ihrc.ie/publications/list/ihrec-designate-report-on-iccpr-june-2014/> on 18 September 2014.

⁵³ UN Committee on Economic, Social and Cultural Rights (2013) *Third periodic reports of States parties due in 2007: Ireland*. E/C.12/IR/3, Annex, at paras 51 and 52 respectively.

any restrictions relating to how a lawful abortion can be obtained (i.e. as permitted under domestic law) are capable of being justified and provided that such restrictions do not impair the woman's human rights (such as the right to life, the right to freedom from torture or cruel, inhuman or degrading treatment or punishment or right to health (which includes the removal of barriers that inhibit women's effective access to reproductive and health services including on a non-discriminatory basis)).⁵⁴ In its 2013 Observations on the Protection of Life During Pregnancy Bill 2013 (as it then was), the IHRC expressed concern at certain aspects of the Bill. The Human Rights Committee in its Concluding Observation 9 recommended that the State, inter alia, revise its legislation on abortion.⁵⁵

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⁵⁴ In the context of the ICESCR, General Comment No. 14 of the CESCR Committee on the right to health under Article 12 ICESCR provides that the right to health extends to "control one's health and body, including sexual and reproductive freedom and the right to be free from interference". The General Comment makes clear that any and all barriers to women's right to control of their own health should be removed, including barriers interfering with access to health services, education and information. General Comment No. 20, at para. 9, also sets out how 'States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination' in relation to the provisions of the Convention.

⁵⁵ The State party should: (a) Revise its legislation on abortion, including its Constitution, to provide for additional exceptions in cases of rape, incest, serious risks to the health of the mother, or fatal foetal abnormality; (b) Swiftly adopt the Guidance Document to clarify what constitutes a "real and substantive risk" to the life of the pregnant woman; and (c) Consider making more information on crisis pregnancy options available through a variety of channels, and ensure that healthcare providers who provide information on safe abortion services abroad are not subject to criminal sanctions';. 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. 9.