CERD SUBMISSION

Submission of the
Irish Human Rights Commission
to the UN Committee on the
Elimination of Racial
Discrimination

in respect of

Ireland's First National Report
under the Convention on the
Elimination of All Forms
of Racial Discrimination

IHRC
IRISH HUMAN RIGHTS COMMISSION
AN COIMISIÚN UM CHEARTA DUINE

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Introduction

The Irish Human Rights Commission (IHRC) is a statutory body set up by the Irish Government and Parliament in 2001 to advise on the protection of human rights in Ireland. It has its origin partly in the Good Friday peace agreement in relation to the conflict in Northern Ireland, which provided for the establishment of Human Rights Commissions in both Northern Ireland and the Republic of Ireland and mandated them to work closely together. From the beginning the IHRC decided that combating racism would be one of its key priorities and we have worked closely with the Equality Authority and the National Consultative Committee on Racism and Interculturalism (NCCRI) in this area. We have also established a sub-committee on Racism with the Northern Ireland Human Rights Commission to deal with the issue throughout the island of Ireland.

Until about 15 or 20 years ago the Republic of Ireland had a largely homogeneous population. It was marked by emigration rather than immigration and had only a small non-national population. That did not mean that there was no racism here, however. Irish Travellers, an indigenous community with their own culture and a nomadic tradition, had been harassed, isolated and discriminated against for many years. There were cases where the small number of black Irish people were subjected to racial abuse and the Jewish community also encountered prejudice and occasional acts of violence against them.

Since the early 1990s there has been a substantial influx of asylum-seekers and, more recently, migrant workers attracted by the booming Irish economy. Economists predict that we will need large numbers of migrant workers to support our labour force for the foreseeable future and we have irrevocably become a much more diverse and multi-ethnic society. With that has come new tensions and racial prejudice. So far we have escaped the more acute forms of racism such as large scale ghettoisation and race riots that have scarred other European countries, but if we want to avoid going down that road, we need to tackle racism seriously and with determination. We need to bring in effective legislation to outlaw incitement to racial hatred and discrimination. We need political parties to take stern action against any of their members who try to stir up racial tension for electoral gain. We need Government to take a strong lead in condemning racism, stressing the value of diversity and paying tribute to the benefits that immigrants bring to this country.

There is a need for urgent action and leadership in a number of areas including a major campaign of anti-racism training in schools and throughout the public service, especially for those whose interaction with members of ethnic minorities can be most sensitive and stressful, such as the Garda (police), immigration officers and social welfare officials. Action needs to be taken to remedy the well-documented inequalities already suffered by Travellers and which other ethnic minorities could slip into without strong support and assistance. And special attention needs to be given to how racism affects ethnic minority women in particular, and the need for special support mechanisms to counteract this.

Official Irish attitudes to asylum-seekers have up to now been grudging and ungenerous and Government policy of direct provision of accommodation and

maintenance and prohibiting asylum-seekers from working run the risk of isolating and ghettoising already vulnerable people. Official statements using pejorative language and stating that 90% of asylum-seekers are "bogus" or "failed" claimants fuel popular prejudice that they – and by extension most non-nationals – are a drain on scarce public resources.

Immigration policy has been haphazard and unplanned. It leaves migrant workers vulnerable to unscrupulous employers, makes no proper provision for such workers to be joined by their families and makes no serious effort to integrate them into Irish society. This runs the risk of creating marginalised communities of "guest workers", leading in the future to growing tensions between them and the indigenous population.

The 30-year delay between Ireland's signing of the CERD Convention and its ratification emphasises the failure to take the issue of racism seriously until very recently, as does the official failure to collect even basic statistics on the numbers of members of ethnic minorities in the state. And, regrettably, we feel that the Government's First Report under the Convention still appears to underestimate the scale of the challenge that we face as a result of the changes in Irish society and the growth of racism. We welcome, however belated, the Government's ratification of the Convention and the opportunity it provides to inform the CERD Committee of the problems we face in Ireland and what we feel is the inadequacy to date of the Government's response in some key areas. We look forward to the dialogue that will take place between the Government and the CERD Committee and to the publication of the Committee's Observations, which we hope will spur the Government on to take a stronger and more proactive role in the struggle against racism.

There have been good initiatives as well from Government and from several areas of the public service and we welcome and support these. We welcome as well the Government's fulfilling of its commitment made at the World Conference Against Racism in 2001 to draw up a National Plan of Action Against Racism (NPAR), which is to be published shortly. We took part in the consultation process for the NPAR and we welcome and support many of the proposals outlined in the drafts of the Plan and hope that they are carried forward into the final version. We would stress, however, that the NPAR can only work if the Government allocates significant resources to it and we would welcome support from the CERD Committee for the argument that such an undertaking requires the commitment of substantial additional funding.

Our submission to the Committee highlights some of the issues that we feel need to be addressed urgently and seriously if we are to build a truly equal and intercultural society in Ireland. Other public bodies like the Equality Authority and the NCCRI and interested NGOs will deal in more detail with these and other issues. We look forward to the Committee members discussing these issues with the Government's representatives and hope that our contribution and those of the other interested bodies will help to inform that discussion and make its outcome more fruitful for the members of ethnic minorities in Ireland and for the development of a vibrant intercultural society here.

Executive Summary

1. Legal status of CERD in Irish law

The Government report does not address directly the question of giving legal effect to CERD and many of the arguments offered against giving legal effect to international treaties in Irish law are not applicable in the present context. In the opinion of the IHRC, the Irish Government's general position on giving legal effect to international human rights treaties does not stand up to scrutiny, particularly given that Ireland has given legal effect to the ECHR and certain other treaties, and the fact that other 'dualist' legal systems have incorporated human rights treaties into domestic law.

There would appear to be little awareness among legal practitioners or in the Irish legal system generally, or among the general public, of the possibility of bringing individual applications before the CERD Committee under Article 14 of the Convention. The IHRC is not aware of any cases in which CERD has been raised before the Irish courts and there appears to be a distinct reluctance within the Irish legal system to reliance on international human rights treaties. The ruling of the Irish courts in the case of *Kavanagh v. Governor of Mountjoy Prison* appears to indicate that any decisions of the CERD Committee, including any decision in a case relating to Ireland, would not be considered by the Irish courts to be binding on them.

In the absence of constitutional or legislative incorporation of CERD, the onus is on the State to demonstrate that the measures it has taken are effective in giving effect to the provisions of the Convention. In this context there are clear gaps in Ireland's legislative scheme for combating racism. In any event, even if Irish legislation was comprehensive in giving effect to the Convention, incorporation would serve the complementary purpose of raising awareness of the Convention.

2. Scale of the problem of racism in Ireland

The IHRC believes that the Irish Government's report demonstrates the inadequate nature of the available data in relation to the problems of racism and intolerance in Irish society. The report is generally descriptive of measures being taken to combat racism, rather than presenting an accurate picture of the reality of racism in Ireland which would allow for an evaluation of the effectiveness and appropriateness of those measures.

The IHRC is also concerned that the Report does not seem to acknowledge the nature and scale of the problem of racism in Irish society. While it is true that ethnic diversity in Ireland has increased significantly in recent years, the IHRC believes it is important to emphasis that racism is not a new phenomenon in Ireland and that it has existed for many years against the Travelling community and there have also at times been attacks on Jews and on the small number of black Irish people. While racism has not yet become as violent and pervasive as in other countries, there are worrying signs that it is currently on the increase in the Republic of Ireland.

The IHRC believes that a national strategy on statistics needs to be developed which involves a clear reflection of all the relevant human rights perspectives with one public body responsible for the development of statistical expertise and capacity in

this area. There should also be appropriate consultation with data protection, equality and human rights agencies. Guidelines for the compilation of data on ethnicity should be put in place based on the following principles:

- Respect for individual dignity and the right to respect for the private life of the individual.
- Self-identification should be the preferred mode of response in studies and surveys
- In the gathering of data on ethnicity, the informed consent of all persons should be sought in a manner which is fair and in accordance with domestic law.

The IHRC welcomes the pilot survey on the inclusion of a question on ethnicity in the census and recommends that the CSO should take on board the recommendations of the National Consultative Committee on Racism and Interculturalism (NCCRI) and engage in further consultation with representatives of ethnic minority groups in the formulation of a final draft of the question. It is imperative that a question or questions on ethnicity be included in the next census in 2007 and the IHRC calls on the Government to make a commitment to ensure this takes place.

The issue of the effective recording of racist crime and crime aggravated by racist motivation is a crucial component in the fight against racism and intolerance. The continuing failure to address this matter is a cause of grave concern to the IHRC and the Commission recommends that the Government now make a firm commitment to ensure that an effective system of recording such crime is put in place by a definite date, to be no later than the completion of the next Garda Annual Report.

3. Awareness of racism and Article 7 of CERD

The IHRC believes that the Government report demonstrates that Ireland still has much to do to put in place an effective and comprehensive education and awareness programme in pursuit of its commitments under Article 7 of CERD. In the formal education sector, there is a pressing need for a comprehensive anti-racism and intercultural education programme to be put in place through the social personal and health education programme (SPHE) in the primary sector and supported by extensive pre-service and in-service teacher training. At the secondary level the existing civic, social and political education programme (CSPE) should be expanded to the senior cycle with significant teaching time guaranteed each week and supported by extensive pre-service and in-service teacher training.

There is also a pressing need for an awareness and education programme in relation to the Convention at all levels in the Irish system for the administration of justice, in the provision of health and other social services and in the immigration system. The area of law enforcement is one of particular importance. The IHRC believes that the Garda Commissioner should publish the recent independent audit of Garda practices and training, and put in place an integrated human rights education programme both for trainee members of the Garda Síochána and in terms of in-service training for existing members. The IHRC also believes that the speedy establishment of a fully

independent and effective Garda Ombudsman would help to boost confidence in the Garda amongst members of ethnic minority groups.

4. Ireland's reservation under Article 4 of CERD

A key issue for Ireland in implementing the provisions of the Convention is the retention of Ireland's reservation under Article 4 of the Convention. The reservation, entered at the time of ratification of the treaty, sets out the Irish position on the appropriate balance to be drawn between the rights to freedom of speech, expression and association on the one hand and the State's obligations to tackle racism and prevent and prosecute incitement to racial hatred on the other. In relation to the State's obligations under CERD the Commission believes that Ireland's reservation under Article 4 is unnecessary and springs from an approach which overestimates the difficulties of protecting freedom of expression while outlawing hate speech and preventing incitement to racial hatred or discrimination. It does not take sufficient account of how thinking on the relationship between the prevention of racism and the freedoms of speech, expression and association has evolved over the years as reflected in the General Comments and General Recommendations of the Human Rights Committee and the CERD Committee.

The IHRC is concerned that there does not appear to be any effective review process in place in relation to the retention of the reservation. The retention of the reservation undermines Ireland's commitment to remove all reservations to international human rights treaties. If no adequate justification for retaining the reservation can be offered, the IHRC recommends that the reservation under Article 4 be withdrawn with immediate effect as it is superfluous and undermines the CERD Committee's own interpretation of the nature of the State's obligations under Article 4.

5. Freedom of expression and racist speech in Ireland

As outlined in the previous section, the retention of the Irish reservation to Article 4 can be read as indicating a distinct policy approach on the part of the Irish Government to the relationship between freedom of expression and the regulation of racist speech and incitement to hatred, based on an interpretation of Article 40.6.1 (i) of the Irish Constitution.

In relation to the Constitution, in the view of the IHRC there is merit in the proposal of the Constitution Review Group to replace Article 40.6.1(i) with a new formulation based on Articles 10 and 17 of the ECHR and Article 4 of CERD, balancing rights of freedom of expression with the need to prohibit incitement to racial hatred or discrimination.

In relation to policy and practice on the ground, the IHRC has identified a number of specific problems with racist speech and incitement in an Irish context and where there are insufficient and inadequate measures in place to tackle these. These include the continuing ineffectiveness of the Prohibition of Incitement to Hatred Act 1989 and the delay in completing the review of this legislation. This review must be completed as a matter of urgency and a more effective legislative scheme put in place.

The IHRC supports the recommendation of the NCCRI that the review of the Prohibition of Incitement to Hatred Act 1989 should include amendments to cover incitement to hatred through the medium of the internet. The IHRC recommends that further steps be taken by Government to monitor problematic websites and to prevent the dissemination of racist material in this manner wherever possible.

Putting in place a system of press regulation that might prevent and deal with dangerous and inflammatory reporting concerning minority groups must also be a priority. The IHRC recommends that any press council should be charged with ensuring compliance with Ireland's obligations under international human rights law. In this regard, the IHRC is concerned that the Minister for Justice, Equality and Law Reform has indicated that the proposed Press Council will not have competence in the area of equality and non-discrimination.

The issues of regulating hate speech and incitement to racial hatred within political discourse are ones that the IHRC will continue to monitor. On the face of it there would appear to insufficient provisions at present to deter and punish any such instances. The IHRC recommends that measures to regulate such speech at the legislative and administrative levels should be reviewed. It is also incumbent on political parties to ensure that effective measures and mechanisms are in place internally to address any instances of hate speech or incitement by their members should they arise.

6. Migrant workers

The IHRC has prioritised within its work the promotion and protection of the human rights of migrant workers and their families. In April 2004 the IHRC jointly published with NCCRI *Safeguarding the Rights of Migrant Workers and their Families, A Review of EU and International Standards*: *Implications for Ireland*.[1] That document sets out in detail the EU and international human rights standards which should underpin Irish immigration policy and practice. The IHRC continues to work closely with NCCRI and migrant support organisations with a view to ensuring that Irish law and practice in the area of immigration adequately protects and respects the rights of migrants and their families.

In the view of the IHRC, the existing work permit system inherently compromises the enjoyment by migrant workers and their families of their human rights, civil and political as well as economic, social and cultural. The IHRC welcomes the stated intention of Government to overhaul the existing system and encourages them to do so as a matter of urgency. There is also a pressing need for special measures to be taken in relation to migrant workers in vulnerable sectors of the economy and migrant workers and their families with special needs, such as language support needs. In particular the IHRC is concerned about the exclusion from the protections of the Employment Equality Act of workers seeking employment in the domestic sector.

The IHRC looks forward to the publication of the Government discussion paper on immigration and to an inclusive consultation process around this paper. Immigration law and policy should be based on Ireland's international human rights obligations

[1] Available at the IHRC website www.ihrc.ie.

and should be in the form of a comprehensive legislative scheme, which is accessible to migrants and is accompanied with strong enforcement and protection mechanisms. The IHRC is concerned that appropriate measures are taken to ensure that a national debate on immigration policy is used as an opportunity to confront racism and misinformed opinions about migrants, and does not become an opportunity for racism based on misinformation and prejudice to prosper.

The IHRC has consistently called for Ireland to ratify the UN International Convention on the Rights of All Migrant Workers and Members of their Families and believes Ireland should press for other EU member states to do likewise. In addition Ireland should ratify the European Convention on the Legal Status of Migrant Workers, and the three ILO Conventions which explicitly deal with the rights of migrant workers. Pending ratification of these conventions, the Government should endeavour to ensure that all new legislation affecting the position of migrant workers should conform as closely as possible to the provisions of the various conventions so as to ensure the observance of best practice and facilitate their early ratification.

7. Travellers

Travellers have historically been subject to systematic discrimination within Irish society. According to the Economic and Social Research Institute Travellers are "a uniquely disadvantaged group: impoverished, under-educated, often despised and ostracised, they live on the margins of Irish society." There are many areas in which the civil and political rights of Travellers are being violated on a continual basis, particularly in relation to their right to freedom from discrimination under Article 26 of the ICCPR. The scale of violations of the economic, social and cultural rights of Travellers is even more striking and in this section we will look at some of the main areas of Irish life where Travellers experience violations of their human rights.

While welcoming the application by the Government of the provisions of CERD to Travellers the IHRC is concerned at the Government statement that it does not accept that Travellers constitute an ethnic minority. Apart from the right of Travellers to be considered as an ethnic minority, this is the first time in which the Government has formally denied that Travellers constitute an ethnic minority. The IHRC is concerned that the refusal to recognise Travellers as an ethnic minority may in the longer term have a detrimental effect on the Traveller community in excluding Travellers from legal and administrative protections, including the EU Race Directive of 2000 recently brought into Irish law by the Equality Act 2004.

There are many indications that Travellers experience significant discrimination within the health-care system and that both Traveller men and women experience lower levels of health than the settled community. Figures on infant mortality and life expectancy are particularly worrying. The acute health care position of Travellers must be viewed in the context of a society that is among the wealthiest in the developed world. The Traveller Health Strategy 2002-2005 contains a realistic proposed action plan to improve the health status of the Travelling community. It is essential that the proposed actions in this strategy are realised within the time period specified. A pressing problem remains the absence of data on Traveller health.

The continuing failure of Irish local authorities to deliver appropriate accommodation for Traveller families represents an acute violation of the right to housing. There is an absence of the will to fulfil commitments made in this area and of enforcement mechanisms to ensure delivery. With respect to the law on criminal trespass, the IHRC believes that through this law the State has compromised the right to security of tenure of Traveller families and has exposed Travellers to unjustified and disproportionate interference with their rights. This measure has been introduced in a context of a long-standing and shameful failure on the part of public authorities to provide adequate accommodation for Traveller families.

The rate of early school leaving amongst Travellers and the low rate of higher educational attainment disclose a profound failure to respect, protect and promote the rights of Travellers, especially Traveller children to education. Existing measures are ineffective in achieving equality of access and equality of outcomes for Travellers in the educational sphere and a comprehensive plan of action must be put in place. Also, the highly disproportionate rate of unemployment among the Traveller Community convinces the IHRC that existing measures in place to respect, protect and promote the right to work of members of the Traveller community without discrimination are clearly ineffective.

8. Asylum seekers and refugees

Historically, Ireland received only a limited number of refugees into the country. However, since the mid-1990s there has been a significant increase in the number of persons seeking asylum in Ireland. The IHRC has a number of concerns about existing Irish law and administrative policy in relation to both refugees and asylum seekers. In particular the IHRC shares the concerns of the NCCRI, which has consistently identified asylum seekers as a group that has been the target for a high proportion of racist assaults in Ireland in recent years. A distinctive feature of racism against these groups is that administrative and legislative schemes regulating the entry, residence and determination of status of refugees may contribute to or exacerbate the difficulties they face.

The issue of public misinformation in relation to asylum seekers and the asylum process is also a key factor leading to the discrimination and racism that asylum seekers are exposed to, and the Government needs to make greater efforts to address negative stereotypes of asylum seekers. There is also a pressing need for a comprehensive review of existing integration support services, which remain inadequate to meet the needs of refugees.

The system of support for asylum seekers through dispersal and direct provision raises serious questions about the State's commitment to respect and protect the economic and social rights of asylum seekers in a number of respects. The IHRC recalls paragraphs 29-39 of the Committee's General Recommendation XXX which calls on States to remove obstacles to the enjoyment of economic and social rights by non-citizens. The differential treatment of asylum seekers in relation to social welfare represents a divergence from the general principle of needs-based social protection. The IHRC is concerned that this differential treatment through the system of direct provision cannot be justified by any considerations which would be allowed under Article 26 of the ICCPR.

The system of dispersal of asylum seekers to communal centres of accommodation is a major factor in their segregation and isolation and may contribute to hostility against asylum seekers in areas where centres are located. It has also been shown in a number of studies to be linked to higher rates of health problems for those asylum seekers and their families. There are also concerns that many of the health needs, social needs and cultural needs of asylum seekers are not capable of being adequately met within the communal accommodation centres. The denial of the right to work to all asylum seekers, regardless of duration of their residence in Ireland, is a major factor in their social exclusion and the IHRC believes that they should be allowed to work after a certain period of residence in the state.

The issue of the residency rights of the parents of Irish-born citizen children has been a priority for the IHRC in recent years. The IHRC believes that those parents of Irish citizen children who applied for leave to remain before a Supreme Court decision in the case of *L. and O. v. Minister for Justice, Equality and Law Reform* in 2003 should be allowed to remain on the same basis as applied before that decision. Non-national parents of Irish citizen children born after the Supreme Court decision but before the Constitution was amended and the law on citizenship changed should have their applications for leave to remain processed speedily. The IHRC believes that there is also a need for a more transparent and accessible naturalisation process to allow refugees to fully integrate with Irish society as Irish citizens.

The policy of detaining unsuccessful asylum applicants in prison prior to deportation, and also the policy of detaining migrants in breach of immigration rules, raises questions of compliance with the ECHR and ICCPR. The IHRC is concerned at many aspects of the deportation process, given reports of violations of due process rights and concerns about the conditions of deportation.

9. Gender and racial discrimination

The IHRC acknowledges the complex nature of multiple discrimination and in 2003 the Commission jointly published with other equality and human rights bodies in Britain and Ireland a report entitled *Re-thinking Identity: The Challenge of Diversity*, which explored the challenges facing society in both jurisdictions in tackling discrimination. Women from racial and ethnic minorities and migrant women in Ireland often experience multiple barriers in accessing the full range of their human rights. The IHRC is concerned that law and practice in Ireland often seem to fail to acknowledge the challenge of multiple discrimination.

As the Committee will be aware, Ireland's 4th and 5th reports under the Convention on the Elimination of All Forms of Discrimination Against Women are due to be examined at the CEDAW Committee's 33rd Session from July 5th-22nd 2005. The IHRC will shortly make a submission to the CEDAW Committee in relation to the 4th and 5th reports where we identify groups of women within Irish society who experience or are vulnerable to multiple discrimination.

The IHRC believes that immigration policy has an important part to play in protecting women migrants. In this regard it is imperative that any new immigration legislative framework should make special provision for the protection of vulnerable sections of the migrant working community including migrant workers who are women.

Domestic workers are a particularly vulnerable sector of the migrant work force and the exclusion of domestic workers from protection in the area of discrimination, through the Equality Act 2004 is likely to have a disproportionately negative impact on female migrant workers who are over-represented within the domestic sector.

The position of Traveller women in Irish society is also one of significant vulnerability. Notwithstanding the inadequate nature of available data on the position of Traveller women, it is clear that across a broad range of indicators Traveller women suffer discrimination in their enjoyment of the right to health, the right to education and the right to work. The Government report fails to refer to any targeted measures to address these difficulties.

Steps being taken to respect the rights of women in the asylum process are to be welcomed; however, the absence of specific gender related guidelines that take into consideration the concerns and experiences of refugee women allows for too much discretion within the process. Gender specific guidelines should allow for a regular review of the quality of the refugee determination process from a gender perspective. The system of direct provision has a particularly detrimental effect on the rights of women and children. Recent changes to the social welfare code in this area have also disproportionately affected women asylum seekers. Existing integration services for migrant women and refugee women are inadequate and the absence of effective child support services is a major barrier to women refugees' access to employment and education.

The IHRC also believes that there is a pressing need for improved monitoring and data collection on the problem of trafficking of women and girls into Ireland, particularly given the scale of the problem in the European region. There is no adequate policy in place at present to address this problem from either the perspective of protection of the women involved or of prevention of such trafficking.

Section 1 Legal Status of the Convention in Irish Law

In its approach to the issue of the legal status of international human rights treaties under domestic law, the Irish Human Rights Commission (IHRC) takes as its primary point of reference the texts of the main human rights treaties and the statements of the UN treaty-monitoring bodies as to the nature of States parties' obligations under those treaties as reflected for example in General Comment 3 of the Human Rights Committee. Article 2 of CERD sets out the nature of States parties' obligations to give effect to the provisions of the Convention. As with the other main human rights treaties, under CERD states are charged with putting in place appropriate structures and institutions at the constitutional, legislative and administrative levels to give effect to their obligations under the Convention.

The view of the IHRC is that giving legal effect at the domestic level to the provisions of CERD is a key aspect of the State's obligations under the Convention, not only in order to ensure the effective vindication of rights within the State, but also to contribute to raising awareness of the provisions of the Convention. The IHRC notes the recent Concluding Observations of the CERD Committee in respect of the United Kingdom (a country with a legal system similar to Ireland in respect of the status of international treaties under domestic law):

> "It is concerned that the State party's courts will not give legal effect to the provisions of the Convention unless the Convention is expressly incorporated into its domestic law or the State party adopts necessary provisions in its legislation. The Committee recommends that the State party review its legislation in order to give full effect to the provisions of the Convention in its domestic legal order."[2]

1.1 The status of international human rights treaties in Irish law

The choice of the most appropriate legal device(s) for giving effect to a particular treaty is an open and complex question to which a wide range of legal viewpoints may be offered, particularly for a country such as Ireland which has a 'dualist' legal system in relation to the status of international treaties.[3] The IHRC has already examined the question of the most appropriate means of giving legal effect to a human rights treaty in its submission on the incorporation of the European Convention of Human Rights and Fundamental Freedoms (ECHR) into Irish law, and much of the analysis contained in that submission is also applicable to the question of

[2] Concluding Observations of the CERD Committee in respect of the 16th and 17th Reports of the United Kingdom, issued at 10th December 2003, UN Document CERD/C/63/CO/11, at para. 11.

[3] For states with a monist system of law, international treaties which those states ratify automatically penetrate the domestic legal order. For dualist States, however, international treaties only take domestic effect where there is a positive enactment of their provisions by the national parliament.

giving legal effect to CERD.[4] In this section, we use the term "giving legal effect to" in a broad sense, encompassing a variety of legal constructs including technical incorporation of treaty provisions, constitutional adoption of treaty provisions and legislative, sub-constitutional action.

Article 29.5 of the Constitution states that every international agreement to which the State becomes a party, other than purely technical agreements, "shall be laid before Dáil Eireann". There is no requirement that the Dáil must approve the terms of the treaty unless it involves a charge on the finances of the State. Article 29.6 goes on to state that, "No international agreement shall be part of the domestic law save as may be determined by the Oireachtas". Read with Article 15.2.1 of the Constitution, which states that the "sole and exclusive power of making laws for the State is hereby vested in the Oireachtas…", Article 29.6 establishes the dualist nature of the Irish legal order in respect of international treaties and excludes such treaties from having the force of law at the domestic level unless they have been explicitly incorporated or transposed into legislation by the Irish parliament.

In its reports to the various UN Treaty-monitoring bodies the Irish Government has repeatedly stated that the dualist nature of the Irish legal system constitutes an obstacle to incorporating any international human rights treaty except where domestic law already conforms to the relevant standards (in which case giving domestic effect to such a treaty would presumably be of little significance). In its second national report under the International Covenant on Civil and Political Rights (ICCPR), the Irish Government outlined this argument in detail in its legal reasons for not incorporating or giving legal effect to that treaty.[5] A similar description of the limitations imposed by dualism in relation to the two UN Covenants is also set out in the Core Document submitted by Ireland to the UN Human Rights Committee in July 1998[6] and in Ireland's second report under the International Covenant on Economic, Social and Cultural Rights[7], although interestingly no such statement is included in some of Ireland's earlier reports to UN treaty-monitoring bodies.[8]

In the view of the Commission, the Government's position as articulated in those documents does not stand up to legal analysis on a number of levels:

(i) As a first point, the Government's position is undermined by the fact that other dualist legal systems have incorporated international human rights

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[4] *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, available at www.ihrc.ie.

[5] Ireland's second report under the ICCPR, UN Document CCPR/C/IRL/98/2, at paragraphs 13-17.

[6] UN Document HRI/CORE/1/Add.15/Rev.1.

[7] See Ireland's second report under the Covenant, UN Document E/1990/6/Add.29, at Part 1 of the report references the relevant paragraphs of the ICCPR report above.

[8] No such statement is included in Ireland's first national report under the Convention on the Rights of the Child, 17th September 1996, UN Doc. CRC/C/11/Add.12; in Ireland's second and third reports (published jointly) or Ireland's fourth and fifth reports (published jointly) under the Convention on the Elimination of All forms of Discrimination Against Women;

treaties into their domestic law, either by legislation or by constitutional initiative.

(ii) Indeed Ireland itself has given direct legal effect to a number of international treaties, most notably in the case of the ECHR, which was given legal effect in Ireland by the European Convention of Human Rights Act 2003.[9]

(iii) Ireland has also brought into domestic law a number of other international treaties, including treaties addressing important human rights issues, these include: the Vienna Conventions on Diplomatic and Consular Immunities; the Hague Convention on the Civil Aspects of International Child Abduction; and the European Convention on the Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration.

(iv) In other cases, the provisions of international treaties have been given effect at the domestic level by enactments in the Irish legislative form which address the obligations of the treaty in question. Examples of where this has happened include: the Genocide Act 1973, (which gave effect to the UN Convention on Genocide); and the Chemical Weapons Act 1997 which gives effect to the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction.

1.2 Ireland's approach to giving legal effect to CERD

In the period since Ireland's ratification of the Convention there has been no initiative to give effect to the State's obligations under the Convention at the constitutional level, neither has there been any specific legislative initiative to give legal effect to Ireland's ratification of the Convention. In paragraphs 97-101 of the present report the Government again relies on the dualist nature of the Irish legal system and on the existing fundamental rights provisions of the Irish Constitution as the justification for Ireland's failure to incorporate the Convention. The report states:

> "Direct incorporation could, therefore, only be achieved by way of constitutional amendment. … It follows then from the "dualist" nature of Ireland's legal system that the provisions of the Covenant cannot be invoked before and directly enforced by the Courts, and that it is necessary to examine the extent to which Irish law itself correctly reflects the obligations of the Covenant."[10]

Strikingly, the relevant sections of the present report nowhere address the specific issue of giving legal effect to CERD. On the Government's own rationale, each treaty should be approached on its own merits and the IHRC believes that the report fails to address this central question of giving legal effect to the treaty in domestic law,

[9] See fn. 1 above.
[10] *Ibid.* paras. 100-101.

particularly in light of the CERD Committee's recent Concluding Observations on the issue in relation to the United Kingdom. In particular the inclusion of a statement on the Government's view of dualism in its report under CERD leaves open several questions:

(i) First, the Government is offering a justification for not incorporating a "covenant", namely the ICCPR, which it considers, quite reasonably, to be 'constitutional' in nature. Curiously, the Report does not anywhere address the issue of incorporation of more specific 'conventions' such as CERD.

(ii) The Report fails to address the fact that Ireland has already given legal effect through legislation to the ECHR, a treaty which reflects a wide range of foundational values and must be considered to be at least as 'constitutional' as CERD.

(iii) The Government's report fails to address the significance in an Irish context of the difference between giving legal effect to a treaty at the constitutional level and giving legal effect through legislation. In the first case, rights protected under the Constitution are to be vindicated before the superior courts, whereas rights set out in legislation may also be vindicated by the lower courts, as is the case under the European Convention of Human Rights Act 2003.

1.3 Overview of measures taken to give legal effect to provisions of CERD in Irish law

In the absence of a constitutional or statutory transposition of the provisions of the Convention, the onus is on the Government to demonstrate (a) why action has not been taken at the constitutional or statutory level; and (b) how, in the absence of such action, the State believes it has given proper legal effect to its obligations under the Convention through other measures such as through separate pieces of legislation.

In its report the Irish Government points to a number of discrete legislative initiatives introduced to bring particular areas of Irish law in line with the requirements of the Convention. Most notable among these are the enactment of equality legislation and the establishment of specialist equality bodies, the establishment of the Human Rights Commission and the establishment of the National Consultative Committee on Racism and Interculturalism. However, it should be emphasised at the outset that, even if it were accepted that Irish law is in compliance with the requirements of CERD through a range of different pieces of legislation, incorporation of the Convention would still have the advantage of raising awareness of the State's international obligations and of the problem of racism at the domestic level.

In the following sections of the IHRC submission we will examine the principal legislation which the Government puts forward in support of its contention that Ireland has given legal effect to the provisions of the Convention. At this point we wish to identify some of the general lacunae in the Irish legislative scheme described in the report.

- Absence of an effective framework to prosecute racist activity and incitement to racial hatred in line with the State's obligations under Article 4 of CERD.

- Failure to put in place a legislative or administrative framework to compile and provide adequate disaggregated data on ethnic minorities in Ireland in line with the State's obligations under Article 9 of CERD, as elaborated on by the CERD Committee in its General Comments IV and XXIV.

- The need for a coherent immigration policy and revised comprehensive immigration legislation in the State. The shortcomings of existing law and policy in this area greatly undermine the capacity of the State to fulfil its obligations under CERD in respect of foreign nationals.

1.4 CERD before the Irish courts

Separate to the question of the formal legal status of the Convention at Irish law is the issue of whether the Irish Courts have seen fit in practice to rely on the State's obligations under the Convention to vindicate individual rights. Domestic courts have a primary function in vindicating the protection of human rights and even in countries with a dualist system of law, courts have demonstrated that significant progress can be made in advancing the protection and awareness of human rights by relying on international treaty obligations. There are a number of ways in which international treaties that have been ratified but not incorporated into domestic law could have resonance in Irish law. For example they could be used by a court in interpreting the Constitution, in line with the principle that the Constitution should where possible be interpreted in such a way so as not to conflict with Ireland's international obligations. International treaties such as CERD could also be of assistance to a court when interpreting domestic law. The Commission wishes to emphasise here that dualism in itself is not a defence for non-implementation of the Convention by national courts. In relation to treaties which have not been given legal effect in Ireland, such as CERD, nothing in the Irish Constitution prohibits Irish courts from relying on international human rights law *per se*.

Historically, a rigid dualist approach has been taken by the Irish Courts, whereby they have been reluctant to entertain invocations of rights contained in international treaties. With the exception of the ECHR,[11] the Irish courts have generally chosen not to look to international human rights treaties either as sources of law or as interpretative authorities and the general practice before the Irish courts appears to indicate that the judiciary tends towards conservatism in this regard.[12] The IHRC is not aware of any cases in which CERD has been raised in pleadings before an Irish

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

[12] Benedetto Conforti makes the observation that the attitude of the national judiciary of a country, as being more or less progressive or liberal, is more important than the characterisation of that legal system as 'dualistic' or 'monistic', B. Conforti, *International Law and the Role of Domestic Legal Systems*, Dordrecht 1993, p.9, referred to by M. Scheinin, *Domestic implementation of international human rights treaties: Nordic and Baltic* experiences, in *The Future of UN Treaty Monitoring* (ed. P. Alston & J. Crawford), Cambridge, 2000, at p.231.

court. Similarly, we are not aware of any cases in which CEDAW or CAT have been argued. There have been a small number of cases in which arguments based on the ICCPR have been raised, although the courts in those cases have rejected those arguments. The IHRC is also aware of at least one recent case before the Supreme Court, where one member of the Court relied on the Convention on the Rights of the Child as part of a minority judgment.[13]

Given the general reluctance of the Irish courts to rely on the State's international human rights obligations it would seem clear that, absent domestic incorporation of CERD, it is far from certain that the Convention would be regarded as having status even as an interpretative tool in any case where it was argued. Several factors may be responsible for this position, including a particular view of dualism in an Irish context, a possible lack of awareness of the Convention on the part of the Irish judiciary, or perhaps a cultural ambivalence on the part of the judiciary to referencing human rights treaties at the domestic level. Whatever the reasons, it is clear that CERD is not being relied on by the Irish courts and the prospects for any party attempting to rely on the Convention before the domestic courts are uncertain.

1.5 Individual petition under Article 14 of CERD

On 29th December 2000 Ireland made a Declaration accepting the competence of the CERD Committee to hear individual petitions under Article 14 of the Convention. To date no such individual petitions have been entered in respect of Ireland and the Government's report does not address Article 14. However in the case of *Kavanagh v. Governor of Mountjoy Prison* the Supreme Court relied on Article 29.6 of the Constitution to reject the applicant's contention that Ireland's ratification of the ICCPR created a legitimate expectation that the State would respect the terms of the Covenant and would abide by the rulings of the Human Rights Committee and also rejected the applicant's contention that the provisions of that treaty had become part of customary international law.[14]

The IHRC also recalls that the CERD Committee at paragraph 1 (e) of its General Recommendation XXVIII calls on States parties, "To make increased efforts to inform the public of the existence of the complaints mechanism under article 14 of the Convention." While the IHRC has published a handbook on the Convention (see section 3 below), we are not aware of any measures taken at the Government level to promote awareness of the right to petition the CERD Committee contained in Article 14.

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[13] Decision of Fennelly J in the case of *L. & O. v. Minister for Justice, Equality and Law Reform.*

[14] Judgment of March 1st 2002. The Human Rights Committee had found that Mr. Kavanagh's right to equality before the law, guaranteed in article 26 of the Covenant, had been violated, in that the Director for Public Prosecutions (DPP) had directed the author to be tried before a Special Criminal Court without providing grounds justifying the selection of that particular trial procedure in his case.

1.6 Summary of main areas of concern

1.6.1 In the opinion of the IHRC the Irish Government's position on giving legal effect to international human rights treaties, as expressed in its reports to the UN treaty monitoring bodies, does not stand up to scrutiny, particularly given that Ireland has given legal effect to the ECHR and certain other treaties, and the fact that other 'dualist' legal systems have incorporated human rights treaties into domestic law.

1.6.2 The Government report does not address directly the question of giving legal effect to CERD and the arguments offered against giving it legal effect relate to incorporation of an international Covenant, as opposed to a Convention, and are not applicable in the present context.

1.6.3 In the absence of constitutional or legislative incorporation of CERD, the onus is on the State to demonstrate that the measures it has taken are effective in giving effect to the provisions of the Convention. In this context there are clear gaps in Ireland's legislative scheme for combating racism. In any event, even if Irish legislation was comprehensive in giving effect to the Convention, incorporation would serve the complementary purpose of raising awareness of the Convention.

1.6.4 The IHRC is not aware of any cases in which CERD has been raised before the Irish courts and there appears to be a distinct reluctance within the Irish legal system to rely on international human rights treaties.

1.6.1 There would appear to be little or no awareness among legal practitioners or in the Irish legal system generally, or among the general public, of the possibility of bringing individual applications before the CERD Committee under Article 14 of the Convention. The ruling of the Irish courts in the case of *Kavanagh* appears to indicate that any decisions of the CERD Committee, including any decision in a case relating to Ireland, would not be considered by the Irish courts to be binding on them.

Section 2 Scale of the Problem of Racism in Ireland

In its second report on Ireland the European Commission Against Racism and Intolerance (ECRI) pointed to the dearth of reliable statistics as being a significant barrier to progress in combating racism in Ireland, identifying two aspects to this problem: (i) a lack of data on the situation of minority groups, including the absence of any question on ethnic origin in the census (though there was a question on membership of the Traveller community); and (ii) a lack of reliable data on the level of racist incidents in Ireland, which it blamed partly on the lack of legislation defining crimes as racist.[15] The IHRC believes that the Irish Government's report demonstrates the inadequate nature of the available data in relation to the problems of racism and intolerance in Irish society. The report is generally descriptive of measures being taken to combat racism, rather than presenting an accurate picture of the reality of racism in Ireland which would allow for an evaluation of the effectiveness and appropriateness of those measures. A particular difficulty in the Irish context is that, while there are many partial sources of data collected by individual agencies, such as health and immigration authorities, there is no standardised collection of data at a general level. The availability of partial information, which may be open to misinterpretation, may in some cases exacerbate the problem.

The IHRC is also concerned that the Report does not seem to acknowledge the nature and scale of the problem of racism in Irish society. While it is true that ethnic diversity in Ireland has increased significantly in recent years, the IHRC's Strategic Plan 2003-2006 states:

> "Racism is not a new phenomenon; it has existed for many years against the Travelling community and there have also at times been attacks at times on Jews and on the small number of black Irish people. While racism has not yet become as violent and pervasive as in other countries, there are worrying signs that it is currently on the increase in the Republic of Ireland."

2.1 International human rights standards in relation to the retention of data on the situation of ethnic minorities

There is widespread international acknowledgement of the importance of data collection in the fight against racism. The IHRC notes here General Recommendations IV and XXIV of the CERD Committee and the CERD Committee's Guidelines on the reporting obligations of States parties. The IHRC is particularly conscious that in the Guidelines the Committee specifically addressed the issue of census recording of ethnicity. The Committee acknowledges that many states consider that they should not draw attention to race when compiling a census "lest this reinforce divisions they wish to overcome", and goes on to state, "If progress in eliminating discrimination based on race, colour, descent, national and ethnic origin is to be monitored, some indication is needed of the number of persons who could be treated less favourably on the basis of these characteristics".

[15] Adopted on 22 June 2001 and made public on 23 April 2002, at paragraphs 60-61.

From a human rights perspective, the issue of compiling personal data of this kind raises two key issues. On the one hand there is the imperative, set out by the Committee, to compile comprehensive high-quality data on the demographic make-up of the population in order to inform policy in the relevant areas. Such data also plays a crucial role in identifying areas of discrimination and can be used to enable comparison between two beneficiary groups of a single service or measure in order to ascertain equality or differences in relation to treatment or outcomes. For example, under the recent EU Race Directive, Ireland is under specific obligations to establish rules for statistical evidence to be used to establish areas of indirect discrimination. In relation to criminal justice, collection of comprehensive disaggregated data could be used to identify practices of ethnic or racial profiling by police, or to disclose discriminatory practices of the courts towards particular groups in relation to bail applications or sentencing

On the other hand, the compilation of personal data gives rise to important privacy and data protection concerns on the part of the subjects of such data based on the principles that information should be retained in a secure manner and used for narrow purposes and with respect for the principles of anonymity. Even in relation to data collection practices where individual data is 'sealed' and can only be viewed as a part of a group figure which does not disclose individual responses, caution is necessary to ensure that the data set is sufficiently wide to protect the identity of smaller ethnic groups on dissemination (the IHRC is aware that the Irish Central Statistics Office (CSO) has guidelines in place in this regard). Particular concerns arise in relation to a number of areas of Government policy. For example there already exist informal practices within the Irish asylum determination system that ensure that disaggregated data is not disclosed, where to do so may risk identification of an individual or group of individuals. In the area of health-care, the gathering of data on ethnicity may be claimed to have potential benefits in identifying the public health needs of particular groups, but again it may also have negative effects and may not be successful in encouraging voluntary recording of ethnicity, particularly where recording of ethnicity has not led to any increase in equity of service.

A number of human rights standards are of relevance in balancing the two objectives of protecting privacy and providing the data needed to combat discrimination. The IHRC points particularly to the right to respect for family and private life contained in the Irish Constitution and in Article 8 of the ECHR. It can be argued that the right to privacy extends to the right not to be associated with groups or categories which do not represent who one is. Practical difficulties may also arise in the collection of data and need to be considered in developing guidelines for gathering of statistics on ethnicity. These may include illiteracy or poor language skills among particular groups or refusal to provide data because of fears of persecution or discrimination or because of concerns about data security.

2.2 Irish Policy and Practice in relation to Statistics and Data regarding minorities

The Government Report states that the Office for Social Inclusion is charged with developing a data strategy "to obtain a truer picture of ethnicity in Ireland", while also referring to a separate initiative to establish a Steering Group on Social and Equality

Statistics, which is to co-ordinate the development of a system for the collection and dissemination of statistics for social policy.[16]

Despite the fact that a number of State agencies have competence in this area, there has been little progress in achieving a cohesive national strategy on statistics and the IHRC believes that the State will be inhibited in its efforts to meet many of its other obligations under the Convention until such a system of data collection is in place. As a first step there should be clarity as to which public body is primarily responsible for the development of statistical expertise and capacity in this area (most probably the Central Statistics Office or National Statistics Board). The Data Protection Commissioner is the chief enforcer of standards for protecting against the misuse of data and his office should also be centrally involved in the development of policy and practice in this area. The IHRC also notes with some concern that the present Report does not refer to the role of the Equality Authority in this regard, notwithstanding the fact that the national agreement *Programme for Prosperity and Fairness*, agreed in 1999, referred specifically to a co-ordinated strategy on statistics relating to Travellers involving Government Departments, the Equality Authority and the Central Statistics Office.

The IHRC believes that guidelines need to be put in place to guarantee respect for the privacy rights and other associated rights of members of ethnic minorities. The importance of protecting such rights is emphasised by the fears among many ethnic minorities of discriminatory or prejudicial treatment that may arise from the inappropriate use of gathered data. There should be a clear commitment to meet best international standards in this area over a definite timeframe. Guidelines for the compilation of data on ethnicity should be put in place. These should be based on the following principles:

(i) Respect for individual dignity and the right to respect for the private life of the individual should guide the processes and methods for collecting, storage and archiving/retention of data on race and ethnicity.

(ii) Self-determination of identity should be the preferred mode of response in studies and surveys

(iii) In the gathering of data on ethnicity, the informed consent of all persons should be sought in a manner which is fair and in accordance with domestic law.

2.2.1 Census

The only data pertaining to ethnicity or race in the Irish census, (last conducted in 2002) relates to membership of the Travelling community. The IHRC acknowledges that the compilation of data on ethnicity is a sensitive issue and believes that, although it is regrettable that no question on ethnicity has been included in the Irish census to date, it is appropriate that the Central Statistics Office (the body responsible for compiling the census) should proceed cautiously on this issue. Paragraph 9 of the Government's Report explains why an ethnicity question was not included in the 2002

[16] At para. 10.

census, stating that the question being proposed was formulated at a late stage and consequently had not been pilot tested.

A pilot survey on ethnicity was conducted in April 2004 with a view to the inclusion of a more comprehensive question on ethnicity in the next proposed census in 2007. The question included in the pilot survey read, "What is your ethnic group?" and offered choices of the following categories and sub-categories:

"A. White
1. Irish
2. Irish Traveller
3. Any other White background

B. Black or Black Irish
4. African
5. Any other Black background

C. Asian or Asian Irish
6. Chinese
7. Any other Asian background

D. Other including mixed background
8. Other including mixed background"

The pilot survey also included questions on place of birth and nationality. The National Consultative Committee on Racism and Interculturalism has voiced concern that the formulation included in the pilot survey links ethnicity too closely to race/colour. Other points raised by NCCRI included a recommendation that "British" be included as a category in view of the inclusion of Irish as a category in the UK census and the high number of British persons living in Ireland. NCCRI also suggest a number of additional categories such as "Indian" in the Asian category and "White and African" in the mixed category.

2.2.2 Irish policy in relation to the recording of racist incidents

As already mentioned, ECRI in its most recent report on Ireland focussed on the particular problem of how racist incidents are recorded in Ireland. In examining this issue, we wish to treat separately here (i) incidents of discrimination on the basis of race; and (ii) incidents involving crimes motivated by or aggravated by racial hatred. Comprehensive data on discrimination under existing equality legislation is available through the Equality Authority and the Equality Tribunal.[17] However the Government report acknowledges the existing deficit in regard to data in the second category of racist crimes. The report states that comprehensive Garda statistics will not be available "until the 2003 Garda Annual report at the earliest". The 2003 Garda Annual Report has since been published and while it marks progress in the

[17] The websites of the Equality Authority and the Equality Tribunal contain up to date information on case-law under the Equal Status Act and the Employment Equality Act at www.equality.ie and www.equalitytribunal.ie respectively.

presentation of crime statistics as a whole, it still does not address the issue of racist assaults or assaults where racist motivation is an aggravating factor and we have yet to see what system will be put in place by An Garda Síochána in this regard. The Government Report also refers to two sources of qualitative data on racist crimes: data collected by the NCCRI; and a recently commissioned review of all existing surveys of attitudes towards minorities. Both studies point towards increase in hostility towards minority groups and demonstrate the need for urgent action and, in particular a comprehensive awareness programme.

2.3 Summary of main areas of concern

2.3.1 The IHRC believes that a national strategy on statistics needs to be developed which involves a clear reflection of all the relevant human rights perspectives with one public body responsible for the development of statistical expertise and capacity in this area. There should also be appropriate consultation with data protection, equality and human rights agencies. Guidelines for the compilation of data on ethnicity should be put in place based on the following principles:

- **Respect for individual dignity and the right to respect for the private life of the individual.**

- **Self-identification should be the preferred mode of response in studies and surveys**

- **In the gathering of data on ethnicity, the informed consent of all persons should be sought in a manner which is fair and in accordance with domestic law.**

2.3.2 The IHRC welcomes the pilot survey on the inclusion of a question on ethnicity in the census and recommends that the CSO should take on board the recommendations of the NCCRI and engage in further consultation with representatives of ethnic minority groups in the formulation of a final draft the question. It is imperative that a question or questions on ethnicity be included in the next census in 2007 and the IHRC calls on the Government to make a commitment to ensure this takes place.

2.3.3 The issue of the effective recording of racist crime and crime aggravated by racist motivation is a crucial component in the fight against racism and intolerance. The continuing failure to address this matter is a cause of grave concern to the IHRC and the Commission recommends that the Government now make a firm commitment to ensure that an effective system of recording such crime is put in place by a definite date, to be no later than the completion of the next Garda Annual Report.

Section 3 – Awareness of Racism and Article 7 of the Convention

The IHRC recalls that the CERD Committee has elaborated on the reporting obligations on States parties in relation to Article 7 in its General Recommendation V, which notes that information provided by States parties under Article 7 up to that time (the Recommendation was adopted in 1977) had been of a "general and perfunctory" nature and called on States to provide more detailed information. The Committee's revised guidelines regarding the form and content of State reports issued in 2000 call on State to provide information relating to their Article 7 obligations under three headings: (i) education and training; (ii) culture; and (iii) information. The Irish Government report in its section addressing its obligations under Article 7 acknowledges at the outset that racist hostility is on the rise and recognises the importance of "maximising education and information initiatives to prevent prejudice becoming ingrained in Irish society." In this section we will look at the information provided by the Government under the three headings referred to above and will also examine the role of the specialist bodies working in the area including the IHRC itself.

3.1 Education[18]

The 2000 reporting guidelines of the CERD Committee refer specifically to the importance of including anti-racist and intercultural education in school curricula and of incorporating into the training of teachers "programmes and subjects to help promote human rights issues which would lead to better understanding, tolerance and friendship among nations and racial or ethnic groups." The IHRC recalls that Part 3 of the Durban Declaration also addresses the issue of human rights education and contains specific requirements in relation to the need for specialised teacher training and the inclusion of antidiscrimination and anti-racism components in the school curricula and was referred to by the CERD Committee in its General Recommendation XXVIII.[19]

The Government report refers to a number of measures being taken in the field of intercultural education at paragraphs 358-362 and also sets out a number of measures relating to access to education among ethnic minorities. In addition to the measures set out in the Government report, there are also a number of other measures of note at the legislative level. The long title to the Education Act 1998 states that that Act aims to ensure that the education system is "accountable to pupils, parents and the State and respects the diversity of values, belief, languages and traditions in Irish society". The Education Welfare Act 2000 also requires schools to have written codes of practice which must honour the existing equality legislation. At the level of implementation, however, there has been little by way of assessment as to how effective the existing measures are in addressing racism or the level at which teachers are engaging with issues of racism within the classroom. At a deeper level,

[18] In preparing this section of the IHRC's submission the Commission is indebted to a recent analysis of measures taken in this area compiled by Ann Donnellan and published as an article in the Irish Law Times, [2004] ILT 96.

[19] See para. 129 of the Durban Declaration, referred to at para. 1. I (f) of General Recommendation XXVIII.

commentators have questioned whether there is a wider acceptance by teachers that they have a primary role in combating racism.[20]

3.1.1 Primary education

The main medium for intercultural education in the primary school is the social personal and health education course (SPHE) which aims at facilitating children to "explore and examine how discrimination can occur in school, in the local community and in their own country".[21] Though not referred to in the section of the Government report addressing the State's Article 7 obligations, SPHE can be considered as a human rights education programme. However, the difficulty lies in the application of the programme. The Department of Education and Science Teacher Guidelines only specify a recommended period of 30 minutes per week for SPHE, in which time teachers also have to cover a wide range of other subjects as well as racism and intercultural education.

A further area of concern is the current structure and curriculum of Irish teacher training. The IHRC is not aware of any pre-service teacher training on intercultural education currently available in the Irish teacher training colleges. There are limited courses on development education and SPHE at the primary level, but the former is only available in some of the colleges, while the latter is acknowledged as being under-resourced. It should be borne in mind that the majority of longer qualified teachers have had no formal training in teaching SPHE. Given the rapidly changing nature of Irish society in recent years and the increase in diversity within the classroom, there is a pressing need for comprehensive in-service anti-racism and intercultural teacher training for primary teachers.

The IHRC is involved in a cross-border primary schools human rights initiative involving 30 schools from both Northern Ireland and the Republic who pilot human rights education resource material which is developed by the initiative. [22] Through this initiative teachers receive in-service training in the use of the materials which are designed for use in the SPHE programme of the Primary Curriculum. Under the auspices of this initiative, a conference on human rights education in the primary school sector is scheduled to take place in Dublin in May 2005.

3.1.2 Secondary level education

At the secondary level, the civil, social and political education course (CSPE) is modelled on the Universal Declaration of Human Rights and the Convention on the

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[20] See Donnellan *supra*.

[21] Department of Education and Science, Social Personal and Health Education, Teacher Guidelines Dublin Stationery Office, (1999) p.25.

[22] The concept of a Cross Border Primary School Human Rights Education Initiative was first mooted in 1998 by Amnesty International (Irish Section). Both the Northern Ireland Human Rights Commission and the Irish Human Rights Commission are represented on the Steering Committee which also includes teachers unions and the Departments of Education in both jurisdictions. Following an evaluation of the initial 3-year pilot, a further phase commenced in 2004.

Rights of the Child.[23] CSPE has been in place in the junior cycle of the curriculum since 1997, but is only scheduled for 40 minutes per week. However, it is not continued in the senior cycle of the secondary system. Further difficulties are that, despite Department of Education and Science recommendations, measures to ensure continuity in CSPE teaching and to ensure integration with the overall curriculum are generally not in place.[24] There has been criticism that pressure on the curriculum, and the resulting emphasis in teacher training on the content of an overloaded curriculum, has caused the marginalisation of contemporary social and educational issues or indeed excluding them altogether. The course is offered only as an elective subject in third-level teacher training institutions with no specific intercultural education featuring in the teacher training syllabus. There is also a high turnover of CSPE teachers with the subject often taught by temporary or part-time teachers.

The Joint Managerial Board for voluntary secondary schools and the Association of Community and Comprehensive Schools have developed guidelines for intercultural education, building on the work of a support group Learning for Young Minority Ethnic Students (LYNS). The main purpose of these guidelines is to provide support for schools in meeting the needs of minority ethnic students and they were distributed to all secondary schools in May 2003. However, without appropriate follow-up in-service training these guidelines may not make the desired cross-school impact with all teachers. A pilot project on whole school interculturalism was launched in January 2002 in three schools and was completed in January 2003.[25] At this point the IHRC is not aware if there are plans to extend this project to other schools.

It is widely acknowledged that extension into the senior cycle of CSPE or an equivalent human rights based subject is key to the elevation of human rights education to acceptance as a key part of the syllabus and as a component for entry into university. The National Council for Curriculum and Assessment is currently considering an overhaul of the senior cycle and the IHRC believes comprehensive human rights and intercultural education must be a central part of any revised curriculum. As with the primary sector, there is an acute need for comprehensive in-service anti-racism and intercultural teacher training.

3.2 Culture and information

The Government Report refers to three main initiatives in the area of "culture and information". These are (a) the Know Racism campaign (which will be examined by the NCCRI in its submission to the CERD Committee; (b) Anti-racist workplace week (which is run primarily by the Equality Authority); and (iii) the Convention itself. In relation to the Convention itself, paragraph 370 of the Government report states that the Convention is available at the Department of Foreign Affairs website and that the Government report and a link to the UN website are available on the Department of Justice, Equality and Law Reform website. In this section we examine in more detail the obligation on the State to promote public awareness of the Convention and provide information to the Committee on the specific work of the IHRC in this area.

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[23] Department of Education and Science, An Introduction to CSPE, ICDU (2003) p.1.
[24] Donnellan p.19.
[25] CDVEC Curriculum Development Unit, A Whole School Approach to Interculturalism and Inclusion, May 2003.

3.2.1 Activities of the Irish Human Rights Commission (IHRC)

Paragraph 1 (d) of the CERD Committee's General Recommendation XVII foresees a special role for national human rights institutions in promoting public awareness of the Convention. In line with the General Recommendation, the IHRC Strategic Plan 2003-2006 sets out the Commission's commitment to prioritising issues relating to combating racism in its work. The Commission has established a Racism Committee comprised of a number of its members and the Joint Committee of the IHRC and the Northern Ireland Human Rights Commission (NIHRC) has also established a Sub-Committee on Racism. Through this Sub-Committee the Joint Committee published in September 2003 a *User's Guide to the International Convention on the Elimination of Racial Discrimination*. This publication was targeted at NGOs in both parts of the island to assist them in their engagement with the CERD Committee

The IHRC currently has one full-time Senior Human Rights Awareness Officer whose work to date has focussed on the development of information and awareness, e.g. developing a website; a video on the work of the Commission; press releases; and the organisation of conferences, seminars, public consultations. The Senior Human Rights Awareness Officer has undertaken a number of initiatives in the area of racism in 2004. A number of those were seminars or public events which included the following:

- A joint Amnesty International (Irish Section) and IHRC conference on the theme of Combating racism and promoting equality through legislation was held in March 2004.
- In conjunction with the NCCRI, the IHRC held an information seminar on CERD and the process of state reporting under the Convention in November 2004.
- As part of the Commission's public consultation process on its Strategic Plan, the Commission held a public meeting in Cork in November 2004 on the issue of racism.

The Commission also, through its website, seeks to raise awareness of all the State's obligations under the various international human rights treaties by including information on each of the treaties, including CERD, as well as State Reports, Concluding Comments and Observations in respect of Ireland and our own submissions to treaty monitoring bodies, including this submission to the CERD Committee.

3.2.2 Awareness among the public sector and decision makers

The CERD Committee has recognised the importance of training and education for public officials and decision makers. The Durban Programme of Action also address the importance of targeted measures in this area where it,

> "133. Urges States to develop and strengthen anti-racist and gender-sensitive human rights training for public officials, including personnel in the administration of justice, particularly law enforcement, correctional and security services, as well as among health-care, schools and migration authorities,"

We recall that the CERD Committee has emphasised in particular the importance of anti-racism and intercultural training for law enforcement officials in its General Comment XIII. Relations between the Garda and ethnic minority communities are crucial to the integration of minorities and the development of an inter-cultural society in Ireland. Members of ethnic minorities often interact with the police in stressful situations such as immigration controls or law enforcement. They also look to the police to protect them against racist abuse or attacks. It is essential that they have confidence in the Garda and do not fear racist harassment by Gardai or indifference to their concerns, and that they believe that when they do have complaints about Garda members, these will be dealt with fairly and effectively. While the IHRC is aware of the valuable work being done by the Garda (police) Racial and Intercultural Unit, there appears to be a continuing deficit in relation to training and education within the Garda. There is limited human rights education within the Garda training college. Some anti-racist training is provided in conjunction with Pavee Point, a human rights organisation working with and representing Travellers. The IHRC is aware that a human rights audit of operations and training within An Garda Síochána has been commissioned and the Commission awaits the publication of this audit. The existing Garda Complaints Board is widely regarded as ineffective and has been criticised by the (UN) Human Rights Committee and the European Committee for the Prevention of Torture as lacking independence. The Government has promised reform and legislation has been introduced, but it does not seem to have been given a high priority. The establishment of an independent and effective Garda Ombudsman would do a lot to engender confidence among minority groups.

3.3 Summary of areas of concern

3.3.1 There is a pressing need for a comprehensive anti-racism/intercultural education programme to be put in place through the SPHE course and supported by extensive pre-service and in-service teacher training.

3.3.2 At the secondary level the existing CSPE programme should be expanded to the senior with significant teaching time guaranteed each week and supported by extensive pre-service and in-service teacher training.

3.3.3 There is a pressing need for an awareness and education programme in relation to the Convention at all levels in the Irish system for the administration of justice, in the provision of health and other social services and in the immigration system.

3.3.4 The IHRC believes that the Garda Commissioner should publish the audit of Garda practices and training, and put in place an integrated human rights education programme both for trainee members of the Garda Síochána and in terms of in-service training for existing members.

3.3.5 The IHRC also believes that the speedy establishment of a fully independent and effective Garda Ombudsman would help to boost confidence in the Garda amongst members of ethnic minority groups.

Section 4 - Ireland's Reservation under Article 4

A key issue for Ireland in implementing the provisions of the Convention is the retention of Ireland's reservation under Article 4 of the Convention. The reservation, entered at the time of ratification of the treaty, sets out the Irish position on the appropriate balance to be drawn between the rights to freedom of speech, expression and association on the one hand and the State's obligations to tackle racism and prevent and prosecute incitement to racial hatred on the other. The reservations reads:

> "Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that the measures specifically described in sub-paragraphs (a), (b) and (c) shall be undertaken with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of the Convention. Ireland therefore considers that through such measures, the right to freedom of opinion and expression and the right to peaceful assembly and association may not be jeopardised. These rights are laid down in Articles 19 and 20 of the Universal Declaration of Human Rights; they were reaffirmed by the General Assembly of the United Nations when it adopted Articles 19 and 21 of the International Covenant on Civil and Political Rights and are referred to in Article 5 (d)(viii) and (ix) of the present Convention."

The IHRC recognises that protecting freedom of speech while tackling racism presents challenges. However, in relation to the State's obligations under CERD the Commission believes that Ireland's reservation under Article 4 is unnecessary and springs from an approach which overestimates the difficulties of protecting freedom of expression while outlawing hate speech and preventing incitement to racial hatred or discrimination. It does not take sufficient account of how thinking on the relationship between the prevention of racism and the freedoms of speech, expression and association has evolved over the years as reflected in the General Comments and General Recommendations of the Human Rights Committee and the CERD Committee. In this section we will examine the main elements of Irish policy in this area against the standards and guidelines developed at the international level, focusing on particular areas of difficulty with regard to freedom of expression and racism.

4.1 Reservations to human rights treaties generally and CERD in particular

The first point that should be made in relation to Ireland's reservation is that reservations to international human rights treaties are undesirable in principle and are regarded as a significant problem within the treaty monitoring system. The Human Rights Committee in its General Comment 24 states that,

> "States should also ensure that the necessity for maintaining reservations is periodically reviewed, taking into account any observations and recommendations made by the Committee during examination of their reports. Reservations should be withdrawn at the earliest possible moment. Reports to

the Committee should contain information on what action has been taken to review, reconsider or withdraw reservations."[26]

Part IIA of the Vienna Declaration and Programme of Action (VDPA) adopted in 1993 at the World Conference on Human Rights at paragraph 5 also calls on States to consider limiting the extent of any reservation they may have lodged and to regularly review existing reservations.

The comments of the Human Rights Committee referred to above, though made with reference to the ICCPR, are of general relevance. The IHRC recalls here that in its General Recommendation XXVIII on the follow-up to the World Conference on Racism, the CERD Committee called on States to consider removing their reservations under CERD. The IHRC further recalls that the Committee in its General Recommendation I acknowledged the balance of between the provisions of Article 4 and the liberties and rights set out in the Universal Declaration of Human Rights and contained in Article 5 of the Convention, while emphasising the importance of taking appropriate measures to implement the requirements of Article 4.[27] The Committee revisited the issue in its General Recommendation XV,

> "4. In the opinion of the Committee, *the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression*. This right is embodied in article 19 of the Universal Declaration of Human Rights and is recalled in article 5 (d) (viii) of the International Convention on the Elimination of All Forms of Racial Discrimination. Its relevance to article 4 is noted in the article itself. The citizen's exercise of this right carries special duties and responsibilities, specified in article 29, paragraph 2, of the Universal Declaration, among which the obligation not to disseminate racist ideas is of particular importance. *The Committee wishes, furthermore, to draw to the attention of States parties article 20 of the International Covenant on Civil and Political Rights, according to which any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law*." (emphasis added)

The IHRC has found it instructive here to look to the CERD Committee's recent examination of the reports of other countries on this point. In the course of its recent examination of the United Kingdom's 16th and 17th reports the Committee reiterated its concern in relation to that state's reservation,

> "regarding the restrictive interpretation by the State party of the provisions of article 4 of the Convention and maintains that such an interpretation is in conflict with the State party's obligations under article 4 (b) of the

[26] At para. 20.

[27] The United Nations Seminar to assess the Implementation of CERD with Particular Reference to Articles 4 and 6, held at Geneva on 9-13 September 1996 also examined the relationship between the two competing principles. UN Document E/CN.4/1997/68/Add.1.

Convention. The Committee recalls its general recommendation XV (42), according to which all provisions of article 4 are of a mandatory character and that prohibition of dissemination of racist ideas is compatible with the right to freedom of expression. The Committee adds further that the provisions of article 4 are of a preventive nature and that States parties on whose territories no organizations promoting and inciting racial discrimination hypothetically exist are nevertheless bound by those provisions."[28]

4.2 The nature of Ireland's reservation under Article 4 of CERD

Although couched in the form of a reservation the Irish reservation may be seen as having the general characteristics of an interpretative declaration. While the Government report states that the reservation is necessitated by Article 40.6.1 (i) of the Irish Constitution, which guarantees the right to free speech, the text of the reservation itself purports to offer an interpretation of the Convention, which is not significantly different from that of the CERD Committee. It is particularly curious that the Irish reservation was adopted after General Recommendation XV was adopted by the CERD Committee which resolves the main concern expressed in the Reservation.

In fact the text of Article 40.6.1 (i) emphasises the duty of the State to protect public order and morality stating that "…organs of public opinion …shall not be used to undermine public order or morality." It is notable that this provision only covers "organs of public opinion" and does not cover speech by individuals or individual organisations. The reservation itself recalls that the rights to freedom of opinion and expression and the rights to peaceful assembly and association are already guaranteed elsewhere in international law, but this is acknowledged by the CERD Committee in its General Recommendation I.

A further point of note about the reference to Article 40.6.1. (i) is that restrictions in line with the principles of public order and morality under that Article are not limited by a standard of legality and proportionality, therefore it is at least arguable that the Irish Constitution would allow a more restrictive approach to freedom of expression than is provided for by either the ECHR or the ICCPR. The Government Report does not outline how, or if, the standards set out in the Irish Constitution differ from those contained in international human rights law. In section 5 below we will examine the specific provisions that exist at Irish law to restrict freedom of expression in relation to racist speech and speech that incites racial hatred. To a certain extent, such restrictions can be seen as falling within the category of protecting public order and morality; however, tackling incitement to racial discrimination and hatred is a more complex and important issue, invoking aspects of equality and human dignity.

There is a wider policy concern here as the retention of reservations by states such as Ireland undermines the international effort to encourage all countries to review and progressively remove their reservations. Furthermore, in line with the principle of reciprocity under the Vienna Convention on the Law on Treaties, Ireland's reservation also has the effect of undermining Ireland's capacity to intervene in relation to violations by other state of their obligation under Article 4. In this context the IHRC

[28] UN Document CERD/C/430/Add.3 at para. 7

recalls the statement made by the Presidency of the European Union on behalf of the EU member states to the UN 3rd Committee on November 7th 2001,

> "The European Union deplores the large number of reservations made to human rights treaties. It would remind all States of their obligation not to make any reservations that are incompatible with the aim and purpose of those instruments. EU Member States regularly review the acceptability of reservations made to treaties and, in certain instances, they have felt it necessary to raise objections to them. They also keep their own reservations under constant review with the aim of withdrawing them and they urge other States to follow suit."

Ireland's endorsement of this statement as a member state of the EU adds further weight to the argument for the removal of this reservation. The Report also fails to refer to any process of review of the need to retain the reservation.

4.3 Summary of main areas of concerns

4.3.1 The retention of the reservation undermines Ireland's commitment to remove all reservations to international human rights treaties. In this regard the IHRC is concerned that there does not appear to be any effective review process in place in relation to the retention of the reservation.

4.3.2 Insofar as the Government believes that the reservation is necessitated by the Irish Constitution, the IHRC believes the Government should present evidence from Irish case-law supporting the view that the Irish Constitution does indeed require this reservation, especially in light of the balance that has been struck by the CERD Committee and other international human rights bodies between prohibiting incitement and preserving freedom of speech.

4.3.3 If no adequate justification for retaining the reservation can be offered, the IHRC recommends that the reservation under Article 4 be withdrawn with immediate effect as it is superfluous and undermines the CERD Committee's own interpretation of the nature of the State's obligations under Article 4.

Section 5 - Freedom of Expression and Racist Speech in Ireland

As outlined in the previous section, the retention of the Irish reservation to Article 4 can be read as indicating a distinct policy approach on the part of the Irish Government to the relationship between freedom of expression and the regulation of racist speech and incitement to hatred. In this section we turn to examine how this policy perspective manifests itself in relation to particular forms of speech and look to some of the difficulties this presents in terms of Ireland's compliance with its obligations under Article 4 of the Convention.

5.1 International human rights standards regarding the relationship between freedom of expression and preventing racist speech

In examining Ireland's obligations under Article 4 of the Convention, the IHRC is cognisant of the statements of the CERD Committee on the nature of the relationship between the obligations of States under Article 4 of the Convention and their obligations to protect free speech in its General Recommendations I, VII and XV. We have also noted the findings contained in the Report of the United Nations seminar to assess the implementation of CERD with particular reference to Articles 4 and 6, held at Geneva on 9-13 September 1996.[29] In the course of the seminar Mr. Rodriguez, member of the CERD Committee, emphasised that Article 4 was aimed at prevention rather than cure but that Article 4 did not require states to take preventive measures of censorship but rather to take preventive action through prohibiting acts of incitement.[30] We also look to the Study by the Special Rapporteur of the UN Commission on Human Rights on the topic of Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, which reviews the problem of political platforms that promote or incite racial discrimination.[31]

Although there is no provision of the ECHR directly addressing the problem of incitement to racial hatred or hate speech, this issue and the related issue of racial discrimination have come before the European Court of Human Rights in a number of cases. Paragraph 2 of Article 10 of the Convention sets out the general restrictions to freedom of expression which are acceptable under the Convention:

> "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[29] UN Document E/CN.4/1997/68/Add.1.
[30] *Ibid* at para. 41.
[31] UN Document A/59/330, adopted at 4th October 2004.

These principles were expanded on by the Committee of Ministers of the Council of Europe in its Recommendation on Hate Speech, Recommendation (97) 20 of 1997. The Recommendation includes an appendix of seven Principles which are to inform the State's approach to tackling hate speech. These seven principles relate to,

(i) reference to the special responsibility of public officials in tackling racism
(ii) the need for an effective legal framework to combat racism;
(iii) within such a legal framework interferences with freedom of expression must be narrowly circumscribed (see section 4 of this submission);
(iv) national law must allow courts to bear in mind that hate speech may in certain cases be so severe as to be excluded from the protection of Article 10 of the ECHR;
(v) national law should allow prosecution authorities to give special attention to cases involving hate speech;
(vi) national law and practice should take due account of the role of the media, distinguishing between the responsibility of the author of hate speech and that of the media in disseminating information on matters of public interest.

Article 14 of the ECHR affords protection against discrimination in the enjoyment of the other Convention rights and although a State may be able to justify differential treatment where it is in pursuit of a legitimate aim and is deemed to be proportionate, the European Court of Human Rights has made clear that it is unlikely that there are any circumstances in which discrimination on the basis of race could be justified.

In the case of *Abdulaziz, Cabales and Balkandali v United Kingdom* the Court held that discrimination on the basis of race may amount to degrading treatment under Article 3 of the Convention.[32] Earlier in the *East African Asians v. United Kingdom* case the European Commission on Human Rights had found that to publicly single out a group of persons for differential treatment on the basis of race may constitute a special form of affront to human dignity and might therefore be capable of constituting degrading treatment contrary to Article 3.[33]

On the specific issue of regulating racist expression, the Court has had to address the difficult question of whether the strong free speech protections of Article 10 of the Convention extend to protecting speech that may be deemed to constitute incitement or hate speech. In doing so the Court has drawn on the restrictions on free speech justified under Article 10 (2); the jurisprudence of the Court under Article 14 and also on Article 17 of the Convention which provides that nothing in this Convention may be interpreted as implying a right "to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth therein or at their limitation to a greater extent than is provided for under the Convention."

It was in the case of *Lawless v Ireland (No.3)* that the Court first had to apply Article 17 and in that case, the Court stated that the purpose of Article 17 is to make it impossible for groups or individuals to derive from the Convention a right to engage

[32] [1985] 7 EHRR 471 at para. 91.
[33] 3 EHRR 76

or perform any act aimed at destroying in any activity any of the rights or freedoms set forth in the Convention.[34] In *Glimmereveen and Hagenbeek v* Netherlands, a case concerning a conviction in the Netherlands for distributing racist pamphlets by a banned extremist group, the former European Commission stated in more direct terms that the purpose of Article 17 was to present totalitarian groups from exploiting the protections of the Convention.[35] The Court has since made clear that while certain categories of racist speech, and particularly Holocaust denial, can never be protected under Article 10, nonetheless Article 17 and Article 10 (2) are designed to restrict only certain very specific types of speech and they do not take from the general presumption in favour of freedom of speech within the Council of Europe area based on the core values of pluralism, tolerance and broadmindedness.[36]

Ireland is also a party to the Council of Europe Framework Convention on National Minorities, Article 6.2 of which says that States must take measures to prevent threats and attacks against minority groups (see section 5.2.2 below). The Advisory Committee charged with monitoring States' compliance with the Framework Convention submitted its opinion on Ireland's first report in May 2003.[37]

In addition to the international human rights standards relating to the regulation of freedom of expression generally, the European Convention on Transfrontier Television requires broadcasters to ensure that broadcast services do not give undue prominence to violence or broadcast material that is likely to incite racial hatred. It also provides that broadcasters have a responsibility to ensure that all news presents facts and events fairly.[38]

In relation to the specific problem of racism in politics, the IHRC paragraph 115 of the Durban Programme of Action at which the signatory States underlined the key role that politicians and political parties can play in combating racism, racial discrimination, xenophobia and related intolerance. The Programme of Action called on political parties to take concrete steps to promote equality, solidarity and non-discrimination, "*inter alia* by developing voluntary codes of conduct which include internal disciplinary measures for violations thereof, so their members refrain from public statements and actions that encourage or incite racism, racial discrimination, xenophobia and related intolerance."

5.2 Overview of Irish law regarding racism and freedom of expression

The Government report claims that the basis of the State's reservation to Article 4, considered in section 4 above, is Article 40.6.1 (i) of the Irish Constitution, which

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[34] [1961] 1 EHRR 15 at para. 7.

[35] Applications no. 8348/78 and no. 8406/78 [1979] 18 DR 187. The principles set out in this case were also applied by the Commission in the case of *Kuhnen v Germany* Application no. 12194/86 [1988] 56 DR 205 and by the Court in cases such as *Schimanek v Austria*, judgment of February 1st 2000.

[36] The most comprehensive examination of these issues by the Court can be found in its judgment in the case of *Lehideux and Isorni v France* [1998] 5 BHRC 540.

[37] Council of Europe Document ACFC/INF/OP/I(2004)003, available at http://www.coe.int/T/E/human_rights/minorities/.

[38] Council of Europe treaty that came into force on March 1st 2002 at Article 7.

guarantees the right of the citizens to express freely their convictions and opinions. As we have already stated, the text of Article 40.6.1 (i) also emphasises the duty of the State to protect public order and morality stating that "…organs of public opinion …shall not be used to undermine public order or morality." As restrictions in line with these principles are not expressly limited by a standard of legality and proportionality, in theory the Irish Constitution affords a *wider* discretion to the State to restrict freedom of expression than is set out in either the ECHR or the ICCPR.

It is curious that the Government report does not instead refer to Article 40.6.1 which contains a more general statement that the freedoms set out in Article 40.6.1 (i)-(iii) are to be subject to "public order and morality". Article 40.6.1 has been argued before the Irish courts in only a very limited number of cases. In *State (Lynch) v. Cooney*,[39] the Supreme Court held that restrictions on the freedoms contained in Article 40.6.1 must be based on considerations of public morality and public order. In *Attorney General for England and Wales v. Brandon Books Ltd*.,[40] the Supreme Court held that arguments based on the potential impact on public morality or public order in another jurisdiction could not be held to justify a restriction on organs of public opinion, covered by Article 40.6.1 (i) in this country. By this we can see that the courts are concerned primarily with national conceptions of what constitutes public order and are unlikely to take an interest in any Irish broadcast or publication which might impact upon public order or national security elsewhere.

There is no explicit provision for the Irish courts to consider the potential impact of any material on incitement to hatred or racial discrimination and it is unclear whether these general qualifications allow the State to restrict racist speech and publication of material which incites racial hatred. The Constitution Review Group recommended that the Irish Constitutional test of restrictions on free speech, free assembly and free association on the basis of "public order or morality or the authority of the State" be replaced by a new provision modelled on Articles 10 and 17 of the ECHR.

5.2.1 Irish policy in relation to racist speech and racism in the media[41]

In his report on his mission to Ireland in 1999, the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Mr. Abid Hussain, examined the impact of negative representation in the Irish media on ethnic minorities. With respect to Travellers the Special Rapporteur found,

> "66. It was also reported to the Special Rapporteur that Travellers are often represented by the media only in specific minority-related roles, and rarely as integrated and active participants of society. In particular, sometimes local newspapers and radios reportedly feature anti-Traveller declarations, often by quoting local politicians or members of the Garda making a discriminatory comment on Travellers. The Commission on the Newspaper Industry noted in its June 1996 report that "concern does exist with particular reference to the

[39] [1982] IR 337.
[40] [1986] IR 597.
[41] For a comprehensive discussion of the regulation of the media in Ireland, see Marie McGonagle, *Media Law in Ireland*, (2nd ed.) (Thomson Roundhall, Dublin, 2003) at chapters 8 and 9.

> question of the treatment of minority groups such as Travellers". The Special Rapporteur was informed that the National Union of Journalists has agreed to some guidelines for all its members to follow when dealing with race relations subjects. With reference to Travellers, the criteria are to "only mention the word Gypsy or Traveller if strictly relevant or accurate" and to "strive to promote the realization that the Travellers' community is comprised of full citizens of Great Britain and Ireland whose civil rights are seldom adequately vindicated, and who often suffer much hurt and damage through misuse by the media."[42]

The Special Rapporteur also examined the impact of the media on the then increasing numbers of asylum seekers and refugees in Irish society,

> "68. The Special Rapporteur's attention was drawn to the fact that the Irish media sometimes, especially in the past few years, contributed to intensify the prejudices of the Irish population against refugees and asylum-seekers. In fact, the Special Rapporteur was told that, especially in 1997, the media coverage of the refugees often criminalized and demonized them, labelling them as frauds, who were "economic migrants" stealing jobs and houses from Irish people. However, according to information received by the Special Rapporteur, the media are now trying to have a more constructive approach to this issue. For instance, he was told, RTÉ is reportedly trying to cover refugees and asylum-seekers in a balanced way, by adopting a tolerant and welcoming approach. RTÉ is also legally bound to broadcast the opposite point of view, but it is careful to avoid hate speeches."

In its second report on Ireland the European Commission against Racism and Intolerance (ECRI) similarly pointed to reporting on these two communities as raising particular problem stating that while some media report widely and in a responsible fashion on issues of racism and intolerance, "others have tended to adopt a very negative attitude, particularly towards asylum seekers and refugees and towards members of the Traveller Community." ECRI noted a particular problem around radio phone-in programmes which have been used by members of the public as a platform for airing prejudices and racist views, which apparently are not sufficiently countered by the programme presenters. ECRI called on the media professions to apply codes of self-regulation.[43]

The Council of Europe's Advisory Committee under the Framework Convention on National Minorities also expressed concern about allegations of racism and intolerance in the media towards Travellers community, migrants, refugees and asylum seekers. The Advisory Committee identified problems of negative reporting and under-reporting of these groups in the media and highlighted the importance of awareness raising for journalists. [44]

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[42] UN document E/CN.4/2000/63/Add.2.
[43] ECRI report on Ireland, Council of Europe document CRI (2002) 3 at para. 63.
[44] ACFC/INF/OP/I(2004)003 at para. 67.

The Advisory Committee also addressed the absence of independent complaints mechanisms in relation to newspapers and the broadcast media[45] and the fact that structure, personnel and content of the broadcast media still predominantly reflects the majority public interest and that, notwithstanding recent positive examples, there are only a few programmes for and by persons belonging to the Traveller community and other groups.[46]

It is clear from the Reports of the Special Rapporteur, ECRI and the Council of Europe Advisory Committee, and from research within Ireland that media reporting on Travellers and refugees and asylum seekers gives rise to the greatest level of concern. Research indicates that terms such as 'asylum seeker' and 'refugee' can be used as coded words for racist propaganda or abuse.[47] A number of media organisations have covered issues around asylum and immigration in a sensational manner where there has been little or no effort to follow good journalistic practice. In relation to Travellers, the Know Racism project studied newspaper reportage on Traveller issues and the Traveller community over a number of years and identified that a high proportion of reports which referred to Travellers were negative in tone and in content.

The IHRC is not aware of any case in which the Incitement to Hatred Act 1989 has been used to successfully prosecute a media organisation or a journalist in relation to any such article.[48] As described in the State report the operation of that Act is currently the subject of a review process by the Department of Justice, Equality and Law Reform. The IHRC believes this review process should be concluded as a matter of urgency. However, there are other means of addressing racist speech and problematic journalism. Many articles directed at particular communities might be categorised as being abusive rather than inciting and one of the difficulties identified in bringing prosecutions under the 1989 Act relates to the need to prove intent to incite hatred.

There exist informal codes of practice within the media in relation to reporting of ethnic minorities. In line with Article 10 of its Code of Practice, the National Union of Journalists (NUJ) has elaborated its rules on the reporting of the Travelling community and RTE has a diversity policy document and its 2002 Programme Makers Guide also includes sections on respect for diversity and representation of minority groups. The Advertising Standards Authority is a self-regulatory body which also has competence in relation to racism through advertising.

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[45] *Ibid.* at para. 68.
[46] *Ibid.* at para. 69.
[47] Response of the NCCRI to OSCE Note Verbales on Tolerance and Non-Discrimination October 2004, available at www.nccri.com.
[48] In 1996 the Director of Public Prosecutions decided not to prosecute a journalist writing in a major national newspaper for an article severely critical of Travellers and of Traveller culture. The article was titled "Time to get tough on tinker terror 'culture'", and included phrases such as "It [the life of Travellers] is a life worse than the life of beasts, for beasts at least are guided by wholesome instinct," and "Traveller life is without the ennobling intellect of man or the steadying instinct of animals". For a report of this case see Irish Times 3rd September 1996.

A key contemporary issue in the regulation of the media in Ireland is the current debate around the establishment of a Press Council. The Minister for Justice, Equality and Law Reform has recently indicated that he intends to bring forward proposals for an independently selected statutory press council to oversee the print media. However, the Minister has also made clear his opposition to this body having any competence in the area of equality. It remains unclear whether the body will have competence in relation to the unbalanced or biased reporting which might constitute or result in discriminatory treatment of particular groups.

5.2.2 Irish policy in relation to racism and the internet

The Committee of Ministers of the Council of Europe has adopted an Additional Protocol to the European Convention on Cybercrime covering acts of a racist or xenophobic nature on the internet, which are defined under the Protocol as any

> "Any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors."[49]

The Additional Protocol requires States parties to take measures at the national legislative level to tackle the dissemination of racist and xenophobic material including insults and threats motivated by racism and denial or justification of acts of genocide or crimes against humanity. The Irish Government has indicated that the Council of Europe Additional Protocol is one of the factors that are under consideration in its review of the Prohibition of Incitement to Hatred Act 1989 and the NCCRI has advised the Government that the revised legislation should include a specific reference to the internet. At present, there are no specific bodies to monitor racism on the internet in Ireland, although a number of mechanisms exist to record hate crimes more generally. In the past three years a small number of websites with a specific Irish focus have been identified by the NCCRI which could be characterised as racist. A wider problem however is the dissemination of racist material or material likely to incite hatred through message boards on more general Irish or foreign-based sites.

5.2.3 Irish legislation and policy in relation to racism and political speech

Under the Irish Constitution, political speech or speech directed at the citizenry at large or speech attempting to influence public opinion is granted a higher level of protection than speech directed at individuals. This is consistent with the view of the European Court of Human Rights that because of the importance of democratic institutions, political speech must be afforded stronger protection.

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[49] Article 2 of the Additional Protocol, opened for signature on 28th January 2003. Ireland has signed the Protocol, but it has not yet ratified it and the treaty has not yet received the necessary number of signatures to enter into force.

The Government report refers to both the Prohibition of Incitement to Hatred Act 1989 and sections 18 (d) and 18 (e) in Part III of the Offences Against the State Act 1989 as empowering the Government to prohibit organisations which promote and incite racial discrimination. The relevant section of the Offences Against the State Act does not in fact refer to inciting racial hatred, but rather to general powers to prohibit organisations that promote, encourage or advocate the commission of *any* criminal offence or the pursuit of any particular objective by unlawful means. While a number of organisations have been declared unlawful under section 18 of the 1939 Act, they have all been paramilitary organisations involved in the use of violence in connection with the Northern Ireland conflict and the 1939 Act has never been used in connection with incitement to racial hatred.

The Offences Against the State Act also contains several provisions relating to the prohibition of certain publications; however, this relates specifically to "seditious" or subversive publications, not to racist material. Given that the power to ban organisations is drawn so widely, concern has been expressed by the Constitution Review Group as to the compatibility of this part of the Act with the European Convention on Human Rights and a Committee set up by the Government to Review the Offences Against the State Acts 1939-1998 recommended the repeal and amendment of several elements of Part III of the Act. For our present purposes what is significant is that the relevant provisions of the 1939 Act are not focussed on preventing or prohibiting incitement to racial hatred *per se* and have never been used for that purpose. Indeed the IHRC considers that the Act as presently drafted is wholly unsuitable for such purposes.

In addition to the 1989 Act and the Offences Against the State Acts, section 6 of the Criminal Justice (Public Order) Act 1994 provides that, it shall be an offence for any person in a public place to "use or engage in any threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace." Section 5 of the 1994 Act also provides that it shall be an offence for any person in a public place to engage in offensive conduct at certain prescribed hours, offensive conduct meaning unreasonable behaviour "which, having regard to all the circumstances, is likely to cause serious offence or serious annoyance to any person who is, or might reasonably be expected to be, aware of such behaviour." There have been a few prosecutions under section 6 of the 1994 Act in connection with assaults on members of ethnic minorities but this legislation contains no specific reference to racist behaviour and does not appear to cover racist utterances or publications which do not create an immediate danger of a breach of the peace.

As far as political speech is concerned, it is important to emphasise in this context that a doctrine of privilege exists in relation to parliamentary utterances. Article 15.10 of the Irish Constitution sets out the general principle that the standing orders of the Houses of the Oireachtas (Parliament) shall protect freedom of debate. Article 15.13 addresses specifically the protection of members in respect of their utterances in the Houses prohibiting only treason, felony or breach of the peace[50]

[50]The question as to whether this privilege extends to parliamentary committees was clarified by the enactment of the Committee of the House of the Oireachtas (Privilege and Procedure) Act 1976 which made clear that it does.

The Standing Orders of the Dáil (lower house) prohibit defamatory statements as breaches of order and also contain powers on the part of the Ceann Comhairle (chairman) to rule out of order statements likely to breach the order of the House. However, there is no explicit prohibition on statements that might constitute hate speech or be likely to incite racial hatred, although it is likely that they would be covered by the more general order provisions. In the view of the IHRC it would be a powerful signal of the resolve of all the main political parties to combat racism if they would agree to review the Standing Orders of both Houses of the Oireachtas to prohibit racist speeches or comments in the legislature.

In recent Irish history there have not been any examples of organised far-right political parties as have been prevalent in other European countries. However, recent years have witnessed the establishment of a number of groups who have engaged in publicity campaigns around elections which might be categorised as racist. The Commission is concerned that systems should be put in place to deal with racist parties should they arise. Currently the only significant restriction on freedom of association in relation to political parties is contained in the Offences Against the State Act which, as we have seen, refers to organisations which advocate violence as a means to constitutional change. There is no specific legislation restricting the right to form or join a political party that espouses a racist agenda or ideology.

The NCCRI have developed an Anti-Racism Election Protocol for Political Parties, which has been signed by all the major political parties. However, concerns have been expressed that some individual members of political parties have been at best irresponsible in their interventions in public debate around issues of migration and asylum policy. In particular, individual politicians have been criticised by their party leadership in relation to comments made, but there has been no significant censure or discipline imposed. On issues relating to the Traveller community, the difficulties seem more endemic if more subtle. The IHRC is aware that individual politicians have made incendiary comments in relation to particular controversies surrounding Traveller accommodation issues and Traveller encampments, both legal and illegal. Again, in relation to comments made by a politician, there have been no successful prosecutions under the Incitement to Hatred Act 1989.[51]

There also appears to be a deep-rooted culture within Irish government and local government, whereby normal process of consultation and consideration are not felt to be necessary in respect of decisions which affect the Traveller community. There is some evidence to suggest that relations between the Traveller community and the majority settled community have not improved in recent years and have, if anything, deteriorated. Some legislative actions in this area may also have had the effect of sending out a signal that discrimination against Travellers can be acceptable. In the view of the IHRC the exclusion of Travellers from recognition as an ethnic minority

[51] A county councillor was prosecuted under the Act in 1999 in relation to a statement referring to Travellers. In that case, the judge felt that the comments did not incite hatred and the councillor and his party did not apologise. In another case an elected member of parliament referred to asylum seekers as "spongers" and "freeloaders", but his comments were made outside of Parliament. This incident was the subject of a complaint to the Gardaí by members of Amnesty International. However, no prosecution resulted.

and recent anti-trespass legislation specifically targeting Travellers has contributed to tensions between Travellers and the majority population. These matters will be examined more closely in section 7 below.

5.3 Summary of main areas of concern

5.3.1 The provisions of the Irish Constitution protecting freedom of speech do not specifically acknowledge the importance of prohibiting hate speech and incitement to racial intolerance.

5.3.2 In the view of the IHRC there is merit in the proposal of the Constitutional Review Group to replace Article 40.6.1(i) with a new formulation based on Articles 10 and 17 of the ECHR and Article 4 of CERD, balancing rights of freedom of expression with the need to prohibit incitement to racial hatred or discrimination.

5.3.3 The IHRC has identified inadequacy of measures in place to tackle specific problems with racist speech and incitement in an Irish context. These include the continuing ineffectiveness of the Prohibition of Incitement to Hatred Act 1989 and the delay in the completing the review of this legislation. This review must be completed as a matter of urgency and a more effective legislative scheme put in place.

5.3.4 Putting in place a system of press regulation that might prevent and deal with dangerous and inflammatory reporting concerning minority groups must be a priority. The IHRC recommends that any press council should be charged with ensuring compliance with Ireland's obligations under international human rights law. In this regard, the IHRC is concerned that the Minister for Justice, Equality and Law Reform has indicated that the proposed Press Council will not have competence in the area of equality and non-discrimination.

5.3.5 The IHRC supports the recommendation of the NCCRI that the review of the Prohibition of Incitement to Hatred Act 1989 should include amendments to cover incitement to hatred through the medium of the internet. The IHRC recommends that further steps be taken by Government to monitor problematic websites and to prevent the dissemination of racist material in this manner wherever possible.

5.3.6 The issue of regulation of hate speech and incitement to racial hatred within political discourse is one which the IHRC will continue to monitor. On the face of it there would appear to be insufficient provisions at present to deter and punish any such instances. The IHRC recommends that measures to regulate such speech at the legislative and administrative levels should be reviewed. It is also incumbent on political parties to ensure that effective measures and mechanisms are in place internally to address any instances of hate speech or incitement by their members should they arise.

Section 6 Migrant Workers

The IHRC has prioritised within its work the promotion and protection of the human rights of migrant workers and their families. In this section we propose to summarise the main issues facing migrant workers and their families in Ireland and measure Irish law and practice in this area against the relevant existing international human rights standards. In April 2004 the IHRC jointly published with the NCCRI *Safeguarding the Rights of Migrant Workers and their Families, A Review of EU and International Standards*: *Implications for Ireland*.[52] That document sets out in detail the EU and international human rights standards which should underpin Irish immigration policy and practice. The IHRC continues to work closely with NCCRI and migrant support organisations with a view to ensuring that Irish law and practice in the area of immigration adequately protects and respects the rights of migrants and their families.

6.1 Summary of the relevant international human rights standards

The IHRC /NCCRI report summarised the main international human rights standards which should underpin Irish immigration policy and also draws on Ireland's obligations to facilitate and protect the free movement of workers as a member state of the European Union. The main relevant international human rights standards referred to in the report which Ireland is a party to include:

- The Revised European Social Charter
- The European Convention on Human Rights and Fundamental Freedoms (ECHR)
- The International Labour Organisation (ILO) Equality of Treatment (Social Security) Convention
- The International Covenant on Civil and Political Rights (ICCPR)
- The International Covenant on Economic, Social and Cultural Rights (ICESCR)
- The International Convention of the Elimination of all Forms of Racial Discrimination (CERD)
- The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)
- The Convention on the Rights of the Child (CRC)

In addition to the treaties to which Ireland is a party, the report also recommended that the Irish Government should accede to the International Convention on the Rights of All Migrant Workers and Members of their Families, which we regard as being the most comprehensive internationally recognised set of human rights standards seeking to protect documented and undocumented migrant workers and their families. Other relevant conventions not yet ratified include the European Convention on the Legal Status of Migrant Workers, and three ILO Conventions which explicitly deal with the rights of migrant workers, particularly in relation to employment. The joint report

[52] Available at the IHRC website www.ihrc.ie.

argues that it is imperative that Ireland ratifies these conventions as part of the process of formulating and developing a fair and holistic immigration policy.

6.2 Law and practice in relation to migrant workers and their families

Drawing on the international human rights standards summarised in 6.1 above the IHRC/NCCRI report identified seven key implications for Irish migration policy arising from its EU and international human rights obligations. These are:

(i) Enhance existing rights and protections for migrant workers
(ii) Address areas of existing policy which are deficient
(iii) Provide adequate resources and powers to enforcement bodies
(iv) Link labour migration policy to social inclusion, anti-racism and intercultural policy
(v) Introduce targeted strategies to ensure adequate protection of the most marginalised migrant workers
(vi) Ratify the UN Migrant Workers Convention
(vii) Ireland should play a leadership role in safeguarding the rights of migrant workers and their families at the EU level

The IHRC wishes to focus on a number of areas of policy that give rise to serious concerns as outlined below.

6.2.1 Work permit system

Among the most problematic aspects of existing migration policy is the work permit system. At present work permits are issued to employers for a restricted range of low or semi-skilled jobs where the employer cannot fill the vacancy with Irish or EU nationals. The work permit is temporary and is valid for up to 12 months. Permits can be renewed for a further 12 months on an application by the employer. It is only possible for a migrant worker with a work permit to change jobs if another employer applies for a permit in respect of him or her and if the permission to remain in the state is still valid.

There has been widespread and consistent criticism of the present system of work permits as putting migrant workers in a position of vulnerability with respect to an employer who holds their work permit and upon whom they depend for their legal residence in the State. There are many documented cases of employers and employment agencies exploiting the position of migrant workers under the existing scheme.[53] Workers in the system face particular difficulties in respect of a number of specific rights. Where workers become unemployed they face difficulties in accessing alternative employment as the transfer of a work permit is currently controlled at the discretion of the Department of Enterprise Trade and Employment. They are also curtailed in exercising their right to freedom of movement within the EU as they must acquire a visa every time a visit is made to another EU state. More significantly, the right to family reunification for persons working on work permits is discretionary and over restricted. Other rights such as the right to join a trade union

[53] See studies published by both the Immigrant Council of Ireland and the Migrant Rights Centre in 2004.

are often notional for migrant workers who are in exploitative employment situations or who do not have adequate information on their rights. Of further concern is the ability to access key services such as education and vocational training, where migrant workers are often excluded from eligibility for services or EU nationals are given preferential treatment.

6.2.2 Enforcement and protection mechanisms

In our report with NCCRI, the IHRC called for greater resources to be provided to the Labour Inspectorate and the Employment Rights Unit of the Department of Enterprise Trade and Employment. We also emphasised the importance of adequate resourcing for the Equality Authority and the Equality Tribunal and the need for adequate funding of the important work of NGOs who support migrants to access rights.

There is also a pressing need for adequately resourced integration support services, particularly in the areas of education and employment, for migrant workers and their families.

6.2.3 Protection of vulnerable groups

The Government report refers at length to existing anti-discrimination protections contained in the Employment Equality Act 1998. However, the recent Equality Act 2004, which implements a number of EU directives in the area of anti-discrimination law, excludes domestic workers from protection against discrimination when seeking employment (they are protected from discrimination *within* employment). In its observations on the Equality Bill 2004 the IHRC rejected the suggestion that this exclusion was necessitated by considerations of privacy or family life. In particular the Commission emphasised that domestic workers are a particularly vulnerable sector of the work force and that women are over-represented within this sector of employment and that "failure to adequately protect workers in the domestic employment sector is likely to have a disproportionate detrimental effect on women."[54] Other groups of migrant workers which are particularly vulnerable include migrant workers with limited English language skills and targeted strategies are required to ensure the protection of the rights of these groups.

6.2.4 Proposals for immigration legislation

The IHRC published its Preliminary Observations on the Immigration Bill 2004 (now the Immigration Act 2004) in February 2004 and identified a number of problematic provisions of that legislation which had the potential to lead to discriminatory practices or an increase in prejudice against foreign nationals.[55] The Government has signalled its intention to introduce a comprehensive immigration code, a second work permit bill and a bill in relation to the regulation of employment agencies. Recently the Minister for Justice, Equality and Law Reform has expressed his intention to produce a discussion paper on immigration legislation in preparation for a proposed Immigration and Residence Bill to be published in 2005.

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[54] IHRC *Observations on the Equality Bill 2004*, June 2004 at page 5, available at www.ihrc.ie.

[55] See the IHRC's observations at www.ihrc.ie.

6.2.5 Detention of illegal immigrants in prisons

As with unsuccessful asylum applicants, immigrants who find themselves in violation of immigration regulations are liable to be detained in prison. This practice presents difficulties in relation to the human rights of these detainees in respect of their rights under the ECHR and other international human rights law (see section 8 below).

6.3 Summary of main areas of concern

6.3.1 The existing work permit system inherently compromises the enjoyment by migrant workers and their families of their human rights, civil and political as well as economic, social and cultural. The IHRC welcomes the stated intention of Government to overhaul the existing system and encourages them to do so as a matter of urgency.

6.3.2 There is a pressing need for special measures to be taken in relation to migrant workers in vulnerable sectors of the economy and migrant workers and their families with special needs, such as language support needs. In particular the IHRC is concerned about the exclusion from the protections of the Employment Equality Act of workers seeking employment in the domestic sector.

6.3.3 The IHRC looks forward to the publication of the Government discussion paper on immigration and to an inclusive consultation process around this paper. Immigration law and policy should be based on Ireland's international human rights obligations and should be in the form of a comprehensive legislative scheme which is accessible to migrants and is accompanied with strong enforcement and protection mechanisms.

6.3.4 The IHRC is concerned that appropriate measures are taken to ensure that a national debate on immigration policy is used as an opportunity to confront racism and misinformed opinions about migrants, and does not become an opportunity for racism based on misinformation and prejudice to prosper.

6.3.5 Ireland should ratify the UN International Convention on the Rights of All Migrant Workers and Members of their Families as a matter of priority and should press for other EU member states to do likewise. In addition Ireland should ratify the European Convention on the Legal Status of Migrant Workers, and the three ILO Conventions which explicitly deal with the rights of migrant workers.

6.3.6 Pending ratification of these conventions, the Government should endeavour to ensure that all new legislation affecting the position of migrant workers should conform as closely as possible to the provisions of the various conventions so as to ensure the observance of best practice and facilitate their early ratification.

Section 7 Travellers

Travellers have historically been subject to systematic discrimination within Irish society. According to the Economic and Social Research Institute[56] Travellers are "a uniquely disadvantaged group: impoverished, under-educated, often despised and ostracised, they live on the margins of Irish society." There are many areas in which the civil and political rights of Travellers are being violated on a continual basis, particularly in relation to their right to freedom from discrimination under Article 26 of the ICCPR. The scale of violations of the economic, social and cultural rights of Travellers is even more striking and in this section we will look at some of the main area of Irish life where Travellers experience violations of their human rights.

7.1 Recognition of Travellers as an ethnic minority

At paragraphs 27-28 the Government report sets out a view on the status of the Traveller community as a distinct ethnic group.

> "27. In regard to Appendix 1, it should be noted that some of the bodies representing Travellers claim that members of the Traveller community constitute a distinct ethnic group. The exact basis for this claim is unclear. The Government's view is that Travellers do not constitute a distinct group from the population as a whole in terms of race, colour, descent or national or ethnic origin. However, the Government of Ireland accepts the right of Travellers to their cultural identity, regardless of whether the Traveller community may be properly described as an ethnic group. In line with this, the Government is committed to applying all the protections afforded to ethnic minorities by the CERD equally to Travellers. As outlined in Ireland's Report under the International Covenant on Civil and Political Rights, Travellers in Ireland have the same civil and political rights as other citizens under the Constitution and there is no restriction on any such group to enjoy their own culture, to profess and practice their own religion or to use their own language.
>
> 28. The Government is committed to challenging discrimination against Travellers and has defined membership of the Travelling community as a separate ground on which it is unlawful to discriminate under equality legislation."

Appendix 1 of the Government Report provides information on the history and culture of Travellers, but goes on to deny that there is any linkage between recent legislative initiatives in the area of criminal trespass and non-discrimination (dealt with below) and anti-Traveller discrimination. Before we turn to examine the particular difficulties facing the Traveller community the IHRC believes it is important first to address the issue of recognition of the identity of Travellers and analyse the Government's position articulated in the report. The IHRC has already

[56] ESRI, July 1986, Paper 131.

communicated its position to Government on this issue and that position paper is attached as an appendix to this submission.[57]

7.1.1 International human rights standards of relevance to the status of the Travelling community as an ethnic minority

The CERD Committee has already made several pronouncements of relevance to the position of Travellers in Irish society and we wish here to summarise some of the main statements of the Committee on this issue. General Recommendation VIII on identification with a particular racial or ethnic group states the opinion of the Committee that "such identification shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned."

General Recommendation XXIV also addresses the issue of classification of particular groups as ethnic minorities. At para. 3 of that Recommendation the Committee refers in a critical manner to the practice whereby some States decide at their own discretion which groups constitute ethnic groups or indigenous peoples that are to be recognized and treated as such. The Committee states that there is an international standard concerning the specific rights of people belonging to such groups and draws to the attention of States parties that "the application of different criteria in order to determine ethnic groups or indigenous peoples, leading to the recognition of some and refusal to recognize others, may give rise to differing treatment for various groups within a country's population."

We recall here also the Committee's General Comment XXVII on Discrimination against Roma, where the Committee called on states specifically to respect the wishes of Roma as to the designation they want to be given and the group to which they want to belong. Paragraphs 39-44 of the Durban Programme of Action address the obligations on States in relation to "Roma/Gypsy/Sinti/Travellers". It is clear therefore that at Durban there was an explicit recognition that Travellers constitute a group that is vulnerable to racial discrimination. The IHRC also views as significant the Concluding Observation of the CERD Committee in relation to the United Kingdom's 17th Report in 2003, where the Committee expressed concern at the position of "Roma/Gypsies/Travellers", clearly including Irish Travellers. The IHRC also wishes to refer here to contemporary academic conceptions of ethnicity,

> "An ethnic group is a group of people sharing a collective identity based on a sense of common history and ancestry. Ethnic groups possess their own culture, customs, norms, beliefs and traditions. Other relevant characteristics shared in common could be language, geographical origin, literature or religion … Ethnicity is a cultural phenomena and is distinct from the concept of 'race', which has a perceived biological basis."[58]

7.1.2 The status of Travellers as a distinct group within Irish law and practice

In the IHRC's discussion paper on the issue, we also refer to case-law in the United Kingdom which has held that Irish Travellers qualify as an ethnic minority for the

[57] Available at the IHRC website www.ihrc.ie.
[58] F. Farrell, P. Watt (2001) *Responding to Racism*, Veritas, Dublin.

purposes of the UK Race Relations Act[59] and to the Race Relations (Northern Ireland) Order 1997 which explicitly considers Irish Travellers as a "racial group" for the purposes of that Order. In this jurisdiction, however, the Employment Equality Act, 1998 avoided the issue of whether Travellers came within the CERD definition of racial discrimination. It prohibits discrimination on the basis of "race, colour, nationality, or ethnic or national origins" and then separately prohibits discrimination on the basis of membership of "the Traveller community" (Sections 6(2) (h) and (i) of the 1998 Act). The "Traveller community" was not defined. The Equal Status Act, 2000 repeated this solution but included a definition of the "Traveller community" which was virtually identical to the definition of the "Irish Traveller community" in the Race Relations (Northern Ireland) Order, 1997. That definition had recognised Travellers as a "racial group" for the purposes of the Order. The definition in the Equal Status Act (Section 2) is:

> "'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".

Ironically, this has resulted in the anomalous situation where Travellers, who are identically defined in both jurisdictions, are regarded as a "racial group" on one side of the Irish Border but not on the other. This becomes even more anomalous where Travellers on either side of the Border are related to each other or where the same family moves from one jurisdiction to the other. A further anomaly is that in previous reports to international bodies, the Irish Government has referred to Travellers as "an indigenous minority who have been part of Irish society for centuries" and even to "Travellers and other minority ethnic groups".[60]

The Government report may offer historical and scientific data disputing the distinct racial nature of the Travelling community, but it nowhere offers a *justification* of the State's refusal to acknowledge the self-identification of Travellers as required by General Recommendation VIII. The position of Travellers in Ireland as a nomadic group is closely analogous to the position of Roma in Europe as a whole and the IHRC recalls that the common issues facing Travellers and Roma were acknowledged in the Durban Programme of Action where the rights of both groups were considered together.

7.2 Travellers and the right to health

In general, there is a lack of up to date and comprehensive disaggregated data on the Travelling community in Ireland (see section 2 of this submission). For example, there is currently no systematic or regular gathering of data relating to the health status of Travellers and there has been no significant statistical analysis of Traveller

[59] Note in particular the cases of *Mandla v. Dowell Lee* [1983] 2 AC 548 and *O'Leary and Others v. Allied Domecq & Others*, unreported 29th August 2000, referred to at pages 3 and 6 of the IHRC Discussion Paper.

[60] Ireland's first report under the Council of Europe Framework Convention on National Minorities, referred to in the IHRC Discussion Paper at pages 12-13.

health since 1986.[61] The major barrier to achieving this is the absence of any specific identifier of Travellers within the existing health data-gathering systems in use in hospitals or the community.[62] In general, there is no specific data gathered on the extent to which Traveller women and men participate in a broad range of areas. This lack of data undermines the ability of the Government and other service providers to gain a comprehensive understanding of the situation of the Travelling community. It also prevents us from gaining a full understanding of the intersection of gender and ethnicity. In addition, having available comprehensive statistical data is an essential part of the development of effective policies and strategies to tackle the problems facing Traveller women.

A health survey carried out in 1987 revealed that Traveller women have a life expectancy which is on average 12 years less than women in the general population, and Traveller men have a life expectancy 10 years less than men in the general population. The infant mortality rate amongst the Travelling community is 18.1 per 1000 live births compared to a national figure of 7.4 and the stillbirth rate is 20 per 1000 live births compared to a national figure of 5.4. The 1987 study also demonstrates that 34% of Traveller women suffer from long term depression compared to approximately 9% of the general population. This high prevalence can be directly linked to the high level of disadvantage experienced by the Travelling community.

As no similar study has been carried out since 1987 it is difficult to determine if Traveller's life expectancy has improved. However, since Travellers remain disadvantaged in other areas of health status and access to health services generally, the Traveller Health Strategy states that it is reasonable to assume that there has been little, if any, improvement since that time.[63] The report submitted by the Government states that a key target in the National Anti-Poverty Strategy is the reduction of the gap in life expectancy between the Traveller community and the overall population by 10 years by 2007.[64] However, the Government report does not provide any information on the extent to which this key target is being progressively realised. In any case, this target will be extremely difficult to monitor given the lack of data on Traveller health.

7.3 Travellers and housing

The issue of Traveller accommodation was recently considered by the UN Committee on Economic, Social and Cultural Rights in the course of its examination of Ireland's second periodic report under the ICESCR. In its Concluding Observations the Committee made the following observations in respect of the situation as it pertained in 2002:

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[61] Barry and others, *The Travellers Health Status Survey*, commissioned by the Health Research Board, 1987, referred to in *Traveller Health: A National Strategy 2002-2005*, at para. 5.1.
[62] *Ibid*.
[63] *Ibid.*
[64] Ireland's 4th and 5th periodic reports, p. 17.

"20. The Committee is concerned that: (a) many new households cannot secure adequate and affordable housing; and (b) some 1,200 families of the traveller community are living in roadside encampments without access to water and adequate sanitary facilities, and are liable to be forcibly evicted.
….

32. The Committee also urges the State party to accelerate its social housing programmes in order to reduce the waiting time for social housing. Moreover, the State party should enhance its efforts: (a) to provide, as early as possible, alternative accommodation for the 1,200 traveller families who are living in roadside encampments without adequate facilities and to respect General Comments Nos. 4 and 7 of this Committee; and (b) to meet its target of providing all necessary traveller accommodation by 2004.

33. The Committee requests the State party to provide in its next periodic report up-to-date and accurate information, including statistical data, on measures taken to provide adequate accommodation to traveller families."

As described by the Committee on Economic, Social and Cultural Rights, two particular issues give rise to acute concerns about the enjoyment by Travellers of the right to housing, namely the provision of accommodation by local authorities and the issue of forced evictions.

7.3.1 Local authority accommodation

As outlined in Appendix 1 of the Government report, in 1995 the Report of the Task Force on the Travelling Community recommended that 3100 new accommodation units were required by 2000 to provide proper accommodation for the Travelling community consisting of 2200 halting site bays and transient bays, and the 900 units of standard and group housing. This led to the development of a National Strategy for Traveller Accommodation and the enactment of the Housing (Traveller Accommodation) Act 1998. The Act requires each of the local authorities to adopt a five year programme for the provision of accommodation for Travellers and to take "reasonable steps" to implement that programme. However, statistics from 2002 demonstrate that the local authorities have made very little progress in providing suitable Traveller accommodation. Only 251 extra families have been provided with halting site accommodation, 192 families with group housing and 665 with standard housing.[65]

There are no sanctions against local authorities who fail to provide suitable accommodation. As a result of the failure of local authorities to carry out their statutory duty, according to statistics from the Department of the Environment, 788 Traveller families continued to live on the roadside in 2003 without access to water,

[65] Irish Traveller Movement, Pavee Point and National Traveller Women's Forum, Submission to the Department of Environment, Heritage and Local Government on the Review of the Housing (Traveller Accommodation) Act 1998.

sanitation and electricity.[66] Many other Travellers live in official accommodation that is poorly serviced and maintained, and often situated in unhealthy and dangerous conditions.[67] In addition, 323 Traveller families are living in shared accommodation while many others have had to live in temporary accommodation for extended periods of time. The Government Report refers to refurbishment work being carried out on 493 additional Traveller specific accommodation sites, including 375 halting site bays and 118 group houses.

The Government Report also states at para. 31 that the Equality Authority has worked with the City/County Development Boards to support new approaches to incorporating a focus in equality in strategic planning and that the Traveller Accommodation Plan is identified as a priority for most counties. However, the overall situation remains acute as was summarised by the First Progress Report of the Committee to Monitor and Co-ordinate the Implementation of the Recommendations of the Task Force on the Travelling Community, as follows:

> "The Monitoring Committee is aware that in reality one in every four Traveller families are currently living without access to water, toilets and refuse collection. The accommodation provision has not kept pace with increasing demand over the past five years and the Committee would like to emphasise in the strongest terms the importance of having local Traveller Accommodation Programmes delivered in a way that clears the backlog in Traveller accommodation. Local authorities have a crucial role to play in making progress in this area."[68]

7.3.2 Forced evictions

In 2002 the Government enacted the Housing (Miscellaneous Provisions) Act which made trespass, which was previously a civil offence, a criminal offence. Camping on public or private land is now punishable by one month's imprisonment or a fine or by the confiscation of property including caravans. This legislation criminalises Traveller families who are obliged to trespass on land because of the failure by local housing authorities to provide suitable accommodation in accordance with their statutory obligation under the Housing (Traveller Accommodation) Act 1998.

In relation to international human rights law, the IHRC recalls General Comment 7 of the UN Committee on Economic, Social and Cultural Rights;

> "9. Article 2.1 of the Covenant requires States parties to use "all appropriate means", including the adoption of legislative measures, to promote all the rights protected under the Covenant. Although the Committee has indicated in its General Comment No. 3 (1990) that such measures may not be indispensable in relation to all rights, it is clear that legislation against forced evictions is an essential basis upon which to build a system of effective

[66] Department of the Environment, Traveller Families in Local Authority and Local Authority Assisted Accommodation and on unauthorised sites, Annual Count 2003.
[67] National Traveller Women's Forum and Pavee Point Traveller's Centre, A Submission to the National Action Plan for Women, February 2002, p. 34.
[68] Monitoring Report published in 2001 at para. 13.

> protection. Such legislation should include measures which (a) provide the greatest possible security of tenure to occupiers of houses and land, (b) conform to the Covenant and (c) are designed to control strictly the circumstances under which evictions may be carried out. The legislation must also apply to all agents acting under the authority of the State or who are accountable to it. Moreover, in view of the increasing trend in some States towards the Government greatly reducing its responsibilities in the housing sector, States parties must ensure that legislative and other measures are adequate to prevent and, if appropriate, punish forced evictions carried out, without appropriate safeguards, by private persons or bodies. States parties should therefore review relevant legislation and policies to ensure that they are compatible with the obligations arising from the right to adequate housing and repeal or amend any legislation or policies that are inconsistent with the requirements of the Covenant."

The General Comment goes on to refer to the particular vulnerability of women, children, older persons and minorities who suffer disproportionately from forced evictions.

7.4 Travellers and education

Paragraph 39 of the Durban Programme of Action calls on all states to ensure that,

> "Roma/Gypsy/Sinti/Traveller children and youth, especially girls, are given equal access to education and that educational curricula at all levels, including complementary programmes on intercultural levels, which might, *inter alia*, include opportunities for them to learn official languages in the pre-school period and to recruit Roma/Gypsy/Sinti/Traveller teachers and classroom assistants in order for such children and youth to learn their mother tongue, are sensitive and responsive to their needs."

According to the Census 2002 primary school education is the highest level of education reached by 54% of the Travelling community who are aged over 15 years, (this contrasts to 18% of the general population). A significant proportion of Traveller children under the age of 15 years leave school early, 63.2%, compared to a national average of 15.4%.

7.5 Travellers and employment

Appendix 1 of the Government report provides figures on Traveller employment rates that date from 1996[69]. The report lists a number of factors that the Government considers contribute to the high level of unemployment among the Traveller population, namely the decline of traditional areas of economic activity and the Traveller preference for self-employment. The report does not acknowledge that discriminatory practices may be partly responsible for this phenomenon, despite

[69] The IHRC notes that the submission of Pavee Point Travellers Centre to the Committee refers to figures from the 2002 Census which disclose unemployment rates of 73% and 63% respectively for Traveller men and Traveller women.

evidence from the Equality Authority and the Equality Tribunal indicating persistent levels of discrimination against Travellers. Traveller women have a significantly lower rate of participation in the labour force than Traveller men, and men and women in the general population.

7.6 Summary of main areas of concern

7.6.1 While welcoming the application by the Government of the provisions of CERD to Travellers the IHRC is concerned at the Government statement that it does not accept that Travellers constitute an ethnic minority. Apart from the right of Travellers to be considered as an ethnic minority, the IHRC is concerned that this is the first time in which the Government has formally denied that Travellers constitute an ethnic minority.

7.6.2 The IHRC is concerned that the refusal to recognise Travellers as an ethnic minority may in the longer term have a detrimental effect on the Traveller community in excluding Travellers from legal and administrative protections, including the EU Race Directive of 2000 recently brought into Irish law by the Equality Act 2004.

7.6.3 There are many indications that Travellers experience significant discrimination within the health-care system and that both Traveller men and women experience lower levels of health than the settled community. Figures on infant mortality and life expectancy are particularly worrying. The acute health care position of Travellers must be viewed in the context of a society that is among the wealthiest in the developed world.

7.6.4 The Traveller Health Strategy 2002-2005 contains a realistic proposed action plan to improve the health status of the Travelling community. It is essential that the proposed actions in this strategy are realised within the time period specified. A pressing problem remains the absence of data on Traveller health.

7.6.5 The continuing failure of Irish local authorities to deliver appropriate accommodation for Traveller families represents an acute violation of the right to housing. There is an absence of the will to fulfil commitments made in this area and of enforcement mechanisms to ensure delivery.

7.6.6 With respect to the law on criminal trespass, the IHRC believes that through this law the State has compromised the right to security of tenure of Traveller families and has exposed Travellers to unjustified and disproportionate interference with their rights in a situation where public authorities have shamefully failed to provide adequate accommodation.

7.6.7 The rate of early school leaving amongst Travellers and the low rate of higher educational attainment disclose a profound failure to respect, protect and promote the rights of Travellers, especially Traveller children to education. Existing measures are ineffective in achieving equality of

access and equality of outcomes for Travellers in the educational sphere and a comprehensive plan of action must be put in place.

7.6.8 Given the highly disproportionate rate of unemployment among the Traveller Community, the IHRC is convinced that existing measures in place to respect, protect and promote the right to work of members of the Traveller community are clearly ineffective.

Section 8 - Asylum Seekers and Refugees

Historically, Ireland received only a limited number of refugees into the country. However, since the mid-1990s there has been a significant increase in the number of persons seeking asylum in Ireland.[70] The IHRC has a number of concerns about existing Irish law and administrative policy in relation to both refugees and asylum seekers. In particular the IHRC shares the concerns of the NCCRI, which has consistently identified asylum seekers as a group that has been the target for a high proportion of racist assaults in Ireland in recent years. A distinctive feature of racism against these groups is that administrative and legislative schemes regulating the entry, residence and determination of status of refugees may contribute to or exacerbate the difficulties they face. In assessing law and practice in this area the IHRC believes that there are a number of serious questions about the protection of human rights of asylum seekers and refugees and the Irish Government's commitment to prevent racial discrimination against a vulnerable group in Irish society. In this section we will firstly restate Ireland's international obligations in relation to refugees and we will go on to look at the particular forms of discrimination and racism to which refugees and asylum seekers are vulnerable.

8.1 International human rights standards in relation to refugees and asylum seekers

The IHRC recalls that the CERD Committee has addressed the issue of protection of refugees in its General Recommendation XXII, emphasising the right of refugees to return safely to their country of origin but also the right of refugees to freedom from *refoulement*. The General Recommendation also reiterates the basic principle of human rights law that "all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour, descent or national or ethnic origin".

The application of the general principle of equality of treatment to non-citizens resident in a state has been expanded on by the Committee in its General Recommendation XXX which addresses issues such as access to citizenship and naturalisation, the expulsion and deportation of non-citizens, and the enjoyment of economic and social rights by non-citizens. All of these issues have relevance to the position of asylum seekers, refugees and their families in Ireland. Ireland's other relevant human rights obligations include its obligations under the Convention on the Rights of the Child and its obligations under the ICCPR and the ICESCR, particularly its obligations in relation to non-discrimination.

[70] Prior to the mid-1990s Ireland had received a number of Programme refugees including from Hungary in the 1950s, from Vietnam in the 1970s and from the former Yugoslavia in the early 1990sand again from Kosovo in 1999. Ireland had also received a smaller number of refugees under the 1951 Convention.

As already outlined, the NCCRI has identified asylum seekers as being the focus of a large proportion of racist attacks.[71] The IHRC believes that this is due largely to negative stereotypes of asylum seekers as being "fraudulent", "economic migrants", "welfare tourists" or "citizenship tourists", all terms that have figured prominently in public discourse in recent years (see section 5 above). The NCCRI's research suggests that there is a great deal of misinformation and public ignorance about the asylum process in general and about the rights and entitlements of asylum seekers in particular. The UNHCR, the NCCRI and refugee support NGOs have been engaged in a number of public awareness campaigns to improve understanding about the asylum process and the experiences and backgrounds of those persons who come to Ireland seeking protection. However, the IHRC believes that the Government has not itself been sufficiently proactive in this area and there have been occasions when politicians have contributed to the problem (see sections 3 and 5 above).

8.2 Irish law and practice in relation to asylum seekers

Persons entering Ireland to seek protection require support in relation to their basic needs. Asylum-seekers are not allowed to undertake paid employment regardless of how long they have been in the state. Though the processing of asylum claims has been speeded up, many asylum-seekers still spend several years in Ireland before their claims and any subsequent applications for leave to remain on humanitarian grounds are finally determined. Trades unions, employers groups and refugee support organisations – and this Commission – have all called, without success, for asylum-seekers to be allowed to work after a certain period of residence in the state.

The prohibition on paid employment has tended to increase the social isolation of the asylum-seekers and has made it more difficult for them to integrate into local communities. It has also fuelled prejudice by encouraging the perception that asylum-seekers constitute a major drain on public resources, and it has made them wholly dependent on social welfare provision. Meanwhile, over the last five years the Government has progressively restricted asylum-seekers' access to social welfare benefits so that it is no longer on the same basis as Irish citizens.

In 1999, the Government introduced a system of direct provision whereby asylum seekers were to be accommodated with full board and entitled to €19.10 per week for adults and €9.60 for each child. In addition, asylum seekers are entitled to the same rights to primary and secondary education and basic health care as Irish citizens. Asylum seekers may also benefit from the Supplementary Welfare Allowance Scheme and from some general social welfare protections. The Supplementary Welfare Allowance Scheme provides that up to €124.80 per week can be given to a person based on need but at the discretion of a community welfare officer.

The IHRC recalls the 2003 report published by the Free Legal Advice Centres (FLAC) which pointed to the system of direct provision as an unwarranted diversion

[71] See NCCRI's six-monthly reports on racist incidents in Ireland available at their website www.nccri.com, including their most recent report for the period May-October 2004 which again identified asylum seekers as a group particularly vulnerable to racist attacks.

from regular social welfare code.[72] FLAC concludes that through the system of direct provision the Department of Justice, Equality and Law Reform has unlawfully fettered the discretion of community welfare officers and removed asylum seekers from the general system of needs-based assessment. The FLAC report questions whether the differential treatment of asylum seekers in relation to social welfare is compliant with the equality guarantee contained in Article 40.1 of the Irish Constitution. The IHRC would also raise here whether this differential treatment can be justified under Ireland's international human rights obligations under Article 26 of the International Covenant on Civil and Political Rights (ICCPR). Refugee support organisations have consistently criticised this system and called for a reversion to the pre-1999 system where asylum seekers received regular social welfare support and could receive rent allowance support to access private accommodation.

There have also been other legislative initiatives affecting the social protection rights of asylum seekers. Under the Social Welfare (Miscellaneous Provisions) Act 2003, asylum seekers are no longer entitled to claim rent supplement and can therefore no longer gain access to private rented accommodation. Private rental accommodation was previously granted to persons where the direct provision accommodation was judged unsuitable for certain asylum seekers for family reasons or because of illness. However, since the introduction of this law hostels, hotels, and other communal provision which is often unsuitable for children, pregnant women and families, is now the only accommodation option for asylum seekers. As a result of the introduction of a Habitual Residence Rule, asylum seekers who entered the country since May 1st 2004 are no longer entitled to monthly child benefits or One Parent Family Payments. The inadequacy of the income for asylum seekers has been highlighted by a number of organisations including FLAC and this further restriction on welfare entitlements will have a particularly negative impact on families and female asylum seekers who are lone parents.

A second component of the system put in place in 1999 was the dispersal of asylum seekers to communal accommodation in centres located around the country. One of the main criticisms of this system is that it focuses on providing basic accommodation and food needs but neglects the other needs of asylum seekers.[73] There is emerging evidence that there are links between prolonged stay in these centres and health problems.[74] While persons seeking asylum in Ireland are entitled to free medical care through the general medical card system, they will often have special needs in relation to physical, mental or sexual abuse they may have suffered prior to arrival in Ireland and will also require culturally sensitive health workers. Under the system, unaccompanied children seeking asylum are accommodated in centres which are separate from and regarded as being inferior to accommodation for other children in

[72] Free Legal Advice Centre, *Direct Discrimination? An analysis of the scheme of Direct Provision in Ireland*, July 2003; Fanning B., Beyond the Pale – Asylum Seeking Children and Social Exclusion in Ireland, 2001, Dublin: Irish Refugee Council.

[73] See for example *Asylum seekers allege intimidation at asylum centres*, Irish Times, 9th December 2004 which recounts allegations of intimidation, assault and degrading treatment of asylum seekers by staffing in centres.

[74] Such links have been traced by the NGOs including the Irish Refugee Council and Clann Housing Association in reports published in 2001.

the care of the State. It is possible that the conditions and social exclusion associated with this policy raise serious concerns that Ireland may be in violation of the ECHR. Particular concerns have been expressed in relation to Ireland's obligations under Article 3, Article 8, Article 2 of the Fourth Protocol and Article 14 of the ECHR.[75]

Another aspect of the policy of dispersal is that asylum seekers are thus segregated into centres often located in smaller rural communities and removed from other communities from their countries of origins based in the cities. The policy of locating sometimes large groups of asylum seekers in communal centres, often in smaller communities, has also given rise to hostility against asylum seekers in some areas where there have been proposals to locate such centres.[76]

While the IHRC is aware that CERD does not apply directly to distinctions made between citizens and non-citizens of a State party, it is our view that the distinctive treatment accorded to asylum-seekers in relation to the right to work, social welfare provision, and accommodation have contributed to their isolation from the host community, fuelled prejudice against them and hampered their integration into Irish society as well as having an adverse effect on their health and welfare.

8.3 Unsuccessful asylum applicants

Unsuccessful asylum applicants are liable to be deported. The asylum determination process is restricted to determining whether applicants qualify under the Refugee Act 1996 as amended. The Immigration Act 1999 sets out the procedures by which deportation orders are issued and enforced. The only other avenue for unsuccessful applicants is to seek leave to remain from the Minister for Justice, Equality and Law Reform through a discretionary system where the Minister may consider one of a number of factors including humanitarian considerations. No reasons are provided by the Minister in relation to any decisions made. For persons granted leave to remain, their qualification for residency is not unlimited but remains renewable by ministerial discretion. The continuing uncertainty that results extends to restricted rights in the areas of employment, education and social protection.

There is one discrete category of persons, many of them unsuccessful asylum-seekers, who have sought leave to remain in the State and about whom particular concerns arise. They are parents of children who, because they were born in Ireland, were entitled to be Irish citizens. Prior to a decision by the Irish Supreme Court in 2003 (*L. & O. v. The Minister for Justice, Equality and Law Reform*) such parents were assumed to have a right to remain in the State and a special procedure was in place for dealing with such applications. A number of asylum-seekers abandoned their asylum claims in order to make applications on this basis instead. The Supreme Court held in

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[75] See Suzanne Egan *Refugee Law*, in *The ECHR and Irish Law* (ed. Dr. Ursula Kilkelly), (Jordan Publishing, Bristol, 2004).

[76] See for example *Campaign against asylum centre fails*, Irish Times 1st May 2004, which recounts a legal challenge taken by residents in a Dublin suburb against the use of a publicly owned property to house asylum seekers and *Minister's dispersal policy criticised*, Irish Times, 8th May 2000 which recounts cases of an arson attack on an asylum centre in County Tipperary and a legal challenge by a chamber of commerce to the establishment of a centre in County Kildare.

the *L. & O.* case that parents of Irish-born citizen children had no actual right to remain in the State and the Government has applied this decision to a substantial number of families where the parents had applied for leave to remain prior to the Supreme Court decision. These cases are currently being reviewed on a case by case basis and this has led to uncertainty and distress for the families concerned who feel that they are being treated differently from other parents of Irish-born citizen children because of their place of origin. The Irish Constitution was amended during 2004 to remove the automatic right to citizenship of a child born in Ireland meaning that parents who had applied for leave to remain on the basis that they had an Irish-born citizen child constitute a closed group and the IHRC believes that they should be given leave to remain on the basis of the legal position as it was understood when they applied.

One of the most controversial aspects of the deportation process is that potential deportees are generally detained in prison prior to deportation. Additional concerns have been expressed about the practices adopted for deportation of families and unaccompanied children.[77] The IHRC is aware of a number of cases where it has been alleged that persons have been deported unlawfully, seemingly as a result of over zealous action by immigration officials.[78]

8.4 Refugees

In general, Ireland affords the same rights to refugees as pertain to citizens. However there are a number of rights including the political rights associated with citizenship and rights of access to education that are contingent on citizenship. The differential treatment of non-citizens, including refugees, means that naturalisation can have importance for refugees, even though all refugees enjoy unlimited rights to reside in the State. Ireland does offer an accelerated procedure for the naturalisation of refugees. However this naturalisation process is based on the exercise of a discretionary power by the Minister for Justice, Equality and Law Reform.

In the view of the IHRC the integration services managed by the Reception and Integration Agency are inadequate in a number of respects. Particular difficulties surround the provision of language support to non-native English language speakers and access to employment and training facilities.

8.5 Conclusions

8.5.1 Asylum seekers

The system of support for asylum seekers through dispersal and direct provision raises serious questions about the State's commitment to respect and protect the economic and social rights of asylum seekers in a number of respects. In this context the IHRC recalls paras. 29-39 of the Committee's General Recommendation XXX which calls on States to remove obstacles to the enjoyment of economic and social rights by non-citizens and wishes to raise the following issues:

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[77] See *Refugee council calls for humane deportations*, Irish Times, 26th July 2004.
[78] See *Counsel claims deportation were unlawful*, *Irish Times* 8th April 2004.

i. **The differential treatment of asylum seekers in relation to social welfare represents a divergence from the general principle of needs-based social protection. The IHRC is concerned that this differential treatment through the system of direct provision cannot be justified by any considerations which would be allowed under Article 26 of the ICCPR.**

ii. **The system of dispersal of asylum seekers to communal centres of accommodation is a major factor in their segregation and isolation and may contribute to hostility against asylum seekers in areas where centres are located. It has also been shown in a number of studies to be linked to higher rates of health problems for those asylum seekers and their families.**

iii. **There are also concerns that many of the health needs, social needs and cultural needs of asylum seekers are not capable of being adequately met within the communal accommodation centres.**

iv. **The denial of the right to work to all asylum seekers, regardless of duration of their residence in Ireland, is a major factor in their social exclusion and the IHRC believes that they should be allowed to work after a certain period of residence in the state.**

v. **The issue of public misinformation in relation to asylum seekers and the asylum process is a key factor leading to the discrimination and racism that asylum seekers are exposed to and there is an urgent need for the Government to make greater efforts to address negative stereotypes of asylum seekers.**

8.5.2 Unsuccessful asylum applicants

i. **Parents of Irish-born citizen children who applied for leave to remain before the Supreme Court decision in the *L. and O.* case should be allowed to remain on the same basis as applied before that decision. Non-national parents of Irish citizen children born after the Supreme Court decision but before the Constitution was amended and the law on citizenship changed should have their applications for leave to remain processed speedily.**

ii. **The policy of detaining unsuccessful asylum applicants in prison prior to deportation may raise questions of compliance with the ECHR and ICCPR.**

iii. **The IHRC is concerned at many aspects of the deportation process, given reports of violations of due process rights and concerns about the conditions of deportations.**

8.5.3 Refugees

i. **There is a need for a more transparent and accessible naturalisation process to allow refugees to fully integrate with Irish society as Irish citizens.**

ii. **There is a pressing need for a comprehensive review of existing integration support services which remain inadequate to meet the needs of refugees.**

Section 9 - Gender and Racial Discrimination

The IHRC acknowledges the complex nature of multiple discrimination and in 2003 the Commission jointly published with other equality and human rights bodies in Britain and Ireland a report entitled *Re-thinking Identity: The Challenge of Diversity*, which explored the challenges facing society in both jurisdictions in tackling discrimination. Women from racial and ethnic minorities and migrant women in Ireland often experience multiple barriers in accessing the full range of their human rights. The IHRC is concerned that law and practice in Ireland often seem to fail to acknowledge the challenge of multiple discrimination.

As the Committee will be aware, Ireland's 4th and 5th reports under the Convention on the Elimination of All Forms of Discrimination Against Women is due to be examined at the CEDAW Committee's 33rd Session from July 5th-22nd 2005. The IHRC has recently made a submission to the CEDAW Committee in relation to the 4th and 5th reports where we identify groups of women within Irish society who experience or are vulnerable to multiple discrimination. In this section we will address the relationship between the State's duties and obligations under CERD and the particular position of women of ethnic and racial minorities in Irish society.

9.1 International human rights norms and standards

In its General Recommendation XXV the CERD Committee acknowledges that racial discrimination does not always affect women and men equally or in the same way and that there are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men, requiring "recognition or acknowledgement of the different life experiences of women and men, in areas of both public and private life."

In paragraph 3 of the General Recommendation, the Committee requires States parties to develop "a systematic and consistent approach to evaluating and monitoring racial discrimination against women". At paragraphs 4 and 5 of the General Recommendation the Committee states that when examining forms of racial discrimination, it will integrate gender perspectives, incorporate gender analysis, and encourage the use of gender-inclusive language in its work and will include in its sessional working methods an analysis of the relationship between gender and racial discrimination. There is a significant overlap here with the issue of providing disaggregated data examined in section 2 of this Submission. At paragraph 6 of the General Recommendation, the Committee calls on States parties to,

> "describe, as far as possible in quantitative and qualitative terms, factors affecting and difficulties experienced in ensuring the equal enjoyment by women, free from racial discrimination, of rights under the Convention. Data which have been categorized by race or ethnic origin, and which are then disaggregated by gender within those racial or ethnic groups, will allow the States parties and the Committee to identify, compare and take steps to remedy forms of racial discrimination against women that may otherwise go unnoticed and unaddressed."

The CERD Committee's guidelines on States' reporting obligations also require States parties to provide information on the position of women.[79]

The CEDAW Committee has addressed the specific human difficulties faced by ethnic minority women as part of its consideration of the special measures which should be taken by states parties under Article 4 (1) of that convention in its General Recommendation 25, which refers to specific forms of, racial discrimination directed towards women specifically because of their gender, such as sexual violence committed against women members of particular racial or ethnic; the coerced sterilization of indigenous women; abuse of women workers in the informal sector or domestic workers employed abroad by their employers. The Recommendation goes on to state that women may also be further hindered by a lack of access to remedies and complaint mechanisms for racial discrimination because of gender-related impediments, such as gender bias in the legal system and discrimination against women in private spheres of life.

As a party to the Beijing Platform for Action Ireland also made a commitment to intensify its efforts to ensure that women and girls who face multiple barriers to their empowerment and advancement because of such facts as their race, ethnicity or culture, have equal access to all their human rights and fundamental freedoms.[80]

9.2 The position of women in relation to racial discrimination in Irish law and policy

Paragraphs 17-19 of the State report refer to measures being taken to address gender-based racism, focussing on the establishment of the Gender Equality Unit by the Department of Justice, Equality and Law Reform. However, the report refers only to work being undertaken in relation to female refugees. No information is provided on the wider issue of the impact of racism on women, including women migrant workers, Irish women of ethnic minority backgrounds or Traveller women. The IHRC in its submission on the draft National Acton Plan Against Racism (NAPR) in July 2004 made the following points in relation to the relationship between racism and gender discrimination:

> "A new joined-up immigration policy and all policies to do with racism and interculturalism should acknowledge the particular problems and difficulties faced by women immigrants, migrant workers and asylum-seekers, in relation to their family circumstances, access to health, education and other services, and to protection against exploitation. There should be a strong commitment to developing policies and supports for ethnic minority women in partnership with the women themselves."

9.3 Issues affecting particular minority groups

The position of particular ethnic minority groups has already been dealt with in sections 6-8 of this submission, however we wish to highlight here some of the particular difficulties facing women within those minorities. We should emphasise

[79] CERD/C70/Rev.5
[80] Beijing Platform for Action, para. 46.

here that many of the experiences of racial discrimination faced by women are not confined to their legal status in Ireland or even to their ethnicity, but rather are the product of a more general xenophobia and racism. We note for example that NCCRI in its report on racist incidents recorded between October 2001 and April 2002 referred to cases of visibly pregnant black African women being abused by persons suggesting they had become pregnant for citizenship purposes. The Government report contains very little information on measures being taken to address the particular difficulties faced by women from minority backgrounds or communities.

9.3.1 Women migrant workers

There has been a significant increase in the numbers of migrant workers residing and working in Ireland on work permits or work visas since the mid 1990's. Large numbers of the migrant workers working in Ireland are women. In 2002 23,326 women were issued with work permits in comparison to 16,562 men. The number of women being issued with work permits has fallen significantly in 2004 and has been overtaken by men with 6409 women having been issued with work permits as of August 2004 in comparison to 14,684 men.[81] Large numbers of migrant workers are employed in specific sectors of the labour force including the services sector, the catering sector, the agricultural sector and the medical and nursing sector. The number of migrant workers employed in the domestic sector has also risen significantly from 88 persons in 1999 to 861 persons in 2003.[82]

The ownership of work permits by employers can lead to exploitation and racism, and a substantial number of cases of abuse of the work permit system have been documented.[83] Women migrant workers can be particularly vulnerable as larger numbers of women work in isolated sectors such as private households in the domestic sector. In the case of pregnancy, the Migrant Rights Centre of Ireland, an advocacy and support organisation for migrant workers in Ireland, states that women migrant workers have little rights in practice. In a number of instances reported to the organisation pregnant women were asked to leave employment, and consequently accommodation.[84] Female migrant workers in isolated sectors can also experience poor working and living conditions; salaries below the minimum wage; lack of clarity re contracts; and difficulty in practising religion or adhering to cultural traditions of choice.[85]

The Equality Act 2004, which amends the Employment Equality Act 1998, excludes from the definition of an employee any person attempting to access employment for the provision of personal services in another person's home where the services affect the private or family life of those persons.[86] Therefore, the prohibition against

[81] Figures supplied by the Department of Enterprise Trade and Employment.
[82] Figures available from the Department of Enterprise, Trade and Employment at www.entemp.ie .
[83] Immigrant Council of Ireland, *Labour Migration Into Ireland*, 2003.
[84] Kelly N., *Work Permits in Ireland, A Recommendation for Change*, Migrant Rights Centre of Ireland, March 2004.
[85] Ibid. p. 47.
[86] Section 2 of the Employment Equality Act 1998 as amended.

discrimination does not apply to domestic migrant workers when they are accessing employment.[87]

9.3.2 Traveller women

As we note in section 7, there is a general lack of up to date and comprehensive gender-disaggregated data on the Travelling community in Ireland. This lack of data undermines the ability of the Government and other service providers to gain a comprehensive understanding of the situation of the Travelling community. It also prevents us from gaining a full understanding of the intersection of gender and ethnicity. While section 7 addresses in detail the main issues currently facing the Travelling community, in this section the IHRC wishes to highlight some of particular difficulties faced by Traveller women.

The health survey carried out in 1987 revealed that Traveller women have a life expectancy which is on average 12 years less than women in the general population, and Traveller men have a life expectancy 10 years less than men in the general population. The infant mortality rate amongst the Travelling community is 18.1 per 1000 live births compared to a national figure of 7.4 and the stillbirth rate is 20 per 1000 live births compared to a national figure of 5.4. The study also demonstrates that 34% of Traveller women suffer from long term depression compared to approximately 9% of the general population. This high prevalence can be directly linked to the high level of disadvantage experienced by the Travelling community.

Traveller women predominantly carry out the domestic work within Travelling families caring for children and the elderly.[88] Statistics from the Census 2002 demonstrate that 43% of Traveller women classified themselves as looking after the family and home, while only 2.6% of Traveller men look after the family and the home. Therefore, the living environment of Traveller women has a particularly detrimental impact on their quality of life and health. The Traveller Health Strategy states that "there is little doubt that the living conditions of Travellers are probably the single greatest influence on health status…it is clear that an immediate improvement to the living environment of Travellers is a prerequisite to the general improvement in health status."[89]

Traveller women have a significantly lower rate of participation in the labour force than Traveller men, and men and women in the general population. Amongst Traveller men aged 15 years and over**,** 72% are in the labour force compared to 37% of Traveller women aged 15 years and over. This may be compared with the overall participation rate of men and women in the Irish labour force which is 71% and 49.7% respectively. A significant proportion of Traveller women who are not in the labour force, 43%, are looking after the family and home, while only 2.6% of Traveller men not in the labour force are classified as looking after the family and home. One of the primary barriers to Traveller women participating in education and

[87] See section 6 above. See further IHRC, *Observations on the Equality Bill*, June 2004, available at www.ihrc.ie .
[88] See further Murray C., Pavee *Children A study on Childcare issues for Travellers*, Pavee Point Publications, 1997.
[89] Traveller Health, A National Strategy 2002-2005, para. 4.14.

employment is their experience of individual and institutional racism within the education system and when attempting to gain access to employment.[90] The generally low level of educational attainment amongst Traveller women further limits their access to employment. The lack of affordable and culturally appropriate childcare for Traveller women limits their access to further education courses and also to employment.[91]

9.3.3 Women asylum seekers and refugees

The only group of minority women referred to in the Government report are female refugees (see paragraphs 18-19). The report acknowledges that refugee women may face many forms of discrimination, but refers only to the work of the Gender Equality Unit in relation to measures in place to address these problems. The report does not address the particular difficulties faced by women asylum seekers.

Direct provision and social welfare for asylum seekers

As of August 2004 48.5% of all asylum seekers aged 18 or over living in direct provision accommodation are women. The largest portion of female asylum seekers, 58.7%, are between the ages of 26 and 35, and 27% are between the ages of 18 and 25 years. A significant proportion of women on direct provision, 30.9%, have been living on direct provision for between 12 and 18 months, and 13.4% have been living on direct provision for between 18 and 24 months. A total of 8.9% of these women have been on direct provision for 24 months and over.[92] The inadequacy of income for asylum seekers already outlined in section 8 above has been highlighted by a number of organisations and recent further restrictions on welfare entitlements will have a particularly negative impact on families, and female asylum seekers who are lone parents.[93]

In addition, as indicated above, under the Social Welfare (Miscellaneous Provisions) Act 2003 asylum seekers are no longer entitled to claim rent supplement and can therefore no longer gain access to private rented accommodation. Since the introduction of this law hostels, hotels and other types of communal accommodation, which are unsuitable for children, pregnant women and families, are now the only accommodation option for asylum seekers.

Women in the asylum determination process

The Refugee Act 1996 specifically provides that the definition of "membership of a social group" includes gender. In Ireland therefore, claims of gender-based persecution may be assessed on this specific ground, in addition to the other grounds

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[90] National Traveller Women's Forum and Pavee Point Traveller's Centre, A Submission to the National Action Plan for Women, February 2002

[91] See further Murray C., Pavee *Children A study on Childcare issues for Travellers*, Pavee Point Publications, 1997.

[92] Information provided by the Reception and Integration Agency, Department of Justice, Equality and Law Reform.

[93] Free Legal Advice Centre, *Direct Discrimination? An analysis of the scheme of Direct Provision in Ireland*, July 2003; Fanning B., Beyond the Pale – Asylum Seeking Children and Social Exclusion in Ireland, 2001, Dublin: Irish Refugee Council.

contained in the refugee definition. An overall assessment of the extent to which the asylum determination process takes into consideration the specific needs of female asylum seekers who have suffered gender-based persecution has not been carried out in Ireland. There are no specific written guidelines in existence in Ireland similar to those in Canada, the United States or the United Kingdom that require certain procedures and considerations to be taken into account during the refugee determination process.[94]

The Office of the Refugee Applications Commissioner (ORAC) states that interviewers receive specific training on gender-based asylum claims that draws on the UNHCR "Guidelines for the Protection of Women", as well as specific guidelines developed in other jurisdictions. The ORAC further states that female applicants are generally interviewed by female caseworkers, subject to the availability of female caseworkers. Where a gender related issue has been highlighted the ORAC states that a female interviewer will always be assigned to the case and a female interpreter will also be assigned.[95]

Integration services for refugee women

The Office of the Refugee Applications Commissioner has declared 808 women to be refugees at first instance from 2001-2004 and the Office of the Refugee Appeals Tribunal has declared 1228 women to be refugees at the appeals stage since 2001.[96] In accordance with section 3 of the Refugee Act 1996 refugees are entitled to the following rights: to seek and enter employment, to carry on any business, trade or profession and to have access to education and training in the State on the same basis as Irish citizens; to receive the same medical care and the same social welfare benefits as Irish citizens on the same terms; to reside in the State and travel to and from the State; to freely practise his or her religion; to have access to the Courts on the same basis as Irish citizens and to join and form trade unions. There is very little research in existence on the extent to which refugees in Ireland and refugee women in particular are effectively exercising their rights to employment, education, social welfare and health care in Ireland.

The Reception and Integration Agency (RIA) of the Department of Justice, Equality and Law Reform fund a small number of integration projects through the European Refugee Fund. One project in particular focuses on the integration needs of refugee women and provides language training and computer skills training.[97] In general, the integration measures in place are inadequate and only one of the projects has a particular focus on the integration needs of refugee women. In addition, there is one integration project for refugee women funded under the Equality for Women

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[94] United Kingdom, Immigration Appellate Authority, *Asylum Gender Guidelines*, 2000; Canada, Immigration and Refugee Board, *Guidelines for Women Refugee Claimants Fearing Gender-Related Persecution*, 1996; United States, Immigration and Naturalization Service, Office of International Affairs, *Considerations for Asylum Officers Adjudicating Asylum Claims for Women*, 1995.

[95] Information provided by the Office of the Refugee Applications Commissioner.

[96] Information provided by the Office of the Refugee Applications Commissioner and the Office of the Refugee Appeals Tribunal.

[97] The Longford Irish Country Women's Association provides a support service to women refugees, women with Irish born children and women asylum seekers.

Measure. This project can only cater for 25 women at a time despite a high demand for its services, and it is unclear whether the funding for this project will be continued when the Equality for Women Measure is ended in 2006. In general, there is no long-term, coherent strategy in place to integrate refugees into Irish society

There are no specific statistics available on the number of women refugees in employment or participating in education in Ireland. However, organisations working with refugee women report that refugee women face substantial barriers in accessing education and employment.[98] Similar to many women in Irish society the lack of adequate and affordable childcare is a major barrier for refugee women who want to access education and employment. This is compounded by the fact that refugee women, in particular single mothers, do not have an extended family support structure to aid them with childcare. The lack of recognition of qualifications is a further barrier to employment, as well as low educational attainment for some refugee women.

Habitual residence condition for social welfare payments to refugees
The habitual residence condition which was brought into effect on May 1st 2004 will have a negative effect on persons who have been declared refugees as well as asylum seekers. The habitual residence condition limits the range of persons who can claim certain social welfare payments. Under this requirement any person regardless of nationality has to be habitually resident in the State for 2 years before she or he is entitled to claim One Parent Family Payment, Child Benefit, Unemployment Assistance, Supplementary Welfare Allowance, Carer's Allowance, Disability Allowance, and Old Age Non-Contributory Pension. This restriction on welfare payments could foreseeably have a detrimental impact on persons who have been declared refugees who have not been habitually resident in the State for 2 years.

9.4 Trafficking of women and girl children

Article 6 of CEDAW requires States to take all appropriate measures, including legislation, to suppress all forms of trafficking in women and the exploitation of women as prostitutes. During its examination of Ireland's 2nd and 3rd periodic reports the CEDAW Committee asked the Irish Government to provide information with respect to trafficking in women. The Government responded by stating that trafficking in women is not a major problem in Ireland.[99] In its 4th and 5th periodic reports the Government takes a different approach and states that it opposes and seeks to eliminate the practice of trafficking in women and that this is a priority.[100] The Government also states that legislation will be prepared to give effect to the Protocol to the U.N. Convention on Transnational Organised Crime.[101] However, there is a growing awareness of the problem of trafficking in women and transnational prostitution in Ireland. The groups which are considered to be most vulnerable are women form Africa and women from Eastern Europe.

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[98] Information provided by Access Ireland, Refugee Social Integration Project, Women's Project.
[99] 21st Session of CEDAW (7th-25th June 1999).
[100] Ireland's 4th and 5th Periodic Reports, p. 29.
[101] Ibid. p. 30.

There is very little publicly recorded information on the extent to which women are being trafficked into Ireland or on the extent to which Ireland is being used as a transit country. According to the International Organisation of Migration (IOM), at least 500,000 women are sold annually to local prostitution markets in Europe. There is information now available from voluntary organisations and also from the Garda Síochána that trafficking is a serious problem in Ireland.[102] The Ruhama Women's Project, a voluntary organisation that provides support for women involved in prostitution, have been highlighting the rise in the trafficking of women into Ireland for a number of years. They state that "…more and more women are being trafficked into the country, mostly from Eastern Europe, where many have their passports taken by brothel owners and find themselves being subjected to ruthless exploitation."[103]

The study carried out for the IOM states that no public data is reported in Ireland specifically on child smuggling or trafficking, although such data is gathered under the Child Trafficking and Pornography Act 1998. This study found that in the 17 month period from January 2002 to May 2003 23 cases of investigations or preparation of prosecutions for trafficking in children for labour or sexual exploitation were identified. This figure does not include cases being investigated for which no information is in the public domain or suspect cases which social workers are still exploring. Of the 23 cases identified in the study 11 involved girls and 5 involved boys, while in 7 cases the sex of the child was not known. Eleven of the cases identified involved children under 12 years and twelve involved children aged between 13 and 17 years of age.

The Child Trafficking and Pornography Act 1998 protects children from being trafficked for purposes of sexual exploitation from one country to another, and also makes it a serious offence to use Ireland as a transit point for this activity. However, there is no specific legislative measure dealing with trafficking in women for the purposes of sexual exploitation. Moreover, the primary emphasis has been on criminal prosecution, and there has been very little emphasis on the protection of the victims of trafficking. As a signatory to the Protocol to the UN Convention on Transnational Organised Crime Ireland is required to put in place measures to both suppress trafficking and *protect* the victims of trafficking.

9.5 Summary of main areas of concern

9.5.1 It is imperative that any new immigration legislative framework should make special provision for the protection of vulnerable sections of the migrant working community including migrant workers who are women. Domestic workers are a particularly vulnerable sector of the migrant work force and the introduction of a blanket exclusion of domestic workers from protection in the area of discrimination is likely to have a disproportionately negative impact on female migrant workers who are over-represented within the domestic sector.

[102] IOM, *Trafficking in unaccompanied minors in the EU – Ireland*, July 2003.
[103] Irish Times 10th May 2003.

9.5.2 The position of Traveller women is one of significant vulnerability. Notwithstanding the inadequate nature of available data on the position of Traveller women, it is clear that across a broad range of indicators Traveller women suffer discrimination in their enjoyment of the right to health, the right to education and the right to work. The Government report fails to refer to any targeted measures to address these difficulties.

9.5.3 The system of direct provision has a particularly detrimental effect on the rights of women and children and in addition recent changes to the social welfare code in this area have also disproportionately affected women asylum seekers.

9.5.4 The steps being taken to respect the right of women in the asylum process are to be welcomed. However, the absence of specific gender related guidelines that take into consideration the concerns and experiences of refugee women allows for too much discretion within the process. Gender specific guidelines should allow for a regular review of the quality of the refugee determination process from a gender perspective.

9.5.5 Existing integration services for migrant women and refugee women are inadequate and the absence of effective child support services is a major barrier to women refugees' access to employment and education.

9.5.6 There is a pressing need for improved monitoring and data collection on the problem of trafficking of women and girls into Ireland, particularly given the scale of the problem in the European region. There is no adequate policy in place at present to address this problem from either the perspective of protection of the women involved or of prevention of such trafficking.