

**Irish Human Rights Commission Submission to  
the UN Human Rights Committee on the Examination  
of Ireland's Fourth Periodic Report under the  
International Covenant on Civil and Political Rights**

June 2014



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## INTRODUCTION

1. The Irish Human Rights Commission (IHRC) is Ireland's National Human Rights Institution (NHRI), set up by the Irish Government under the Human Rights Commission Acts 2000 and 2001.<sup>1</sup> The IHRC has a statutory remit under the Human Rights Commission Act 2000 to endeavour to ensure that the human rights of all persons in the State are fully realised and protected in the law and policy of the State. The IHRC seeks to ensure that Irish law and policy set the standards of best international practice. Its functions include keeping under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights, and making such recommendations to the Government as it deems appropriate in relation to the measures which the IHRC considers should be taken to strengthen, protect and uphold human rights in the State. The IHRC enjoys 'A' Status Accreditation with the International Coordinating Committee of NHRIs.<sup>2</sup>

2. The Irish Human Rights and Equality Commission Bill 2014 envisages the merger of the Equality Authority and the IHRC into a single enhanced body whose functions will include reviewing law and practice and making recommendations to Government thereon.

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

4. In August 2013, the IHRC provided a short submission to the Committee in advance of the discussion of the List of Issues for Ireland's Fourth Periodic Report, with the aim of being of assistance to the Committee in preparing the List of Issues.<sup>3</sup> The IHRC is now pleased to provide this Shadow Report to the Committee.

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<sup>1</sup> For detailed information on the work of the IHRC, see [www.ihrcc.ie](http://www.ihrcc.ie).

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

<sup>3</sup> IHRC, Submission to the UN Human Rights Committee on Ireland's Fourth Periodic Report under the ICCPR – List of Issues Stage, August 2013. The IHRC also made a number of contributions in respect of Ireland's Third Periodic Report under the ICCPR. In March 2008, the IHRC made a submission to the Committee in order to provide it with information to inform its examination of Ireland's Third Periodic Report under the ICCPR (IHRC, Submission to the UN Human Rights Committee on the Examination of

## CHAPTER 1

### The ICCPR and Domestic Law (Article 2)

#### Incorporation of the ICCPR into Domestic Irish Law

5. The IHRC regrets that, despite a recommendation to incorporate the ICCPR into domestic law being made by the Committee in each of its previous set of Concluding Observations, that no action has been taken by the State to implement these recommendations and that no specific additional steps have been taken, since the previous reporting period, to provide an effective remedy to any person whose rights, as protected by the ICCPR, have been violated. At its 2011 Universal Periodic Review hearing, the State noted that “Ireland had a dualist system under which international agreements to which Ireland becomes a party do not become a part of domestic law unless so determined by Parliament through legislation” and that it did not intend to “alter current practice”.<sup>4</sup>

6. The IHRC has repeatedly expressed the view that the arguments for non-incorporation by the State do not stand up to legal scrutiny.<sup>5</sup> With respect to the argument that Ireland is a dualist system and that this is an obstacle to the incorporation

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Ireland’s Third Periodic Report on the ICCPR, March 2008). The IHRC made a further submission in July 2008 (IHRC, Further submission on the Examination of Ireland’s Third Periodic Report in relation to the List of Issues, July 2008) focussing on some of the concerns raised in the Committee’s List of Issues (UN Human Rights Committee, List of Issues to be taken up in connection with the consideration of the Third Periodic Report of Ireland, CCPR/C/IRE/Q/3, May 2008). The IHRC also attended a hearing before the Committee in Geneva in July 2008 (See IHRC, Press Release: Ireland’s Protection of Key Civil and Political Rights Inadequate, 14 July 2008). In its Concluding Observations on Ireland’s Third Periodic Report, the Committee called on the Irish Government to provide relevant information on its implementation of the Committee’s recommendations made in paras 11, 15 and 22 within one year (UN Human Rights Committee, Concluding Observations in respect of the Third Periodic Report submitted by Ireland under Article 40 of the International Covenant on Civil and Political Rights, CCPR/C/IRL/CO/3 of July 2008, para. 25). The IHRC provided a brief submission for this one-year follow-up highlighting both the issues relevant to the specific paragraphs requested by the Committee and highlighting some emerging issues. (IHRC, Submission to the UN Human Rights Committee on Ireland’s 1 Year Follow-up Report to its Third Periodic Report under the ICCPR, September 2009).

<sup>4</sup> UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Ireland, A/HRC/19/9, 2011, at paras 27-28. Also of note is the fact that the incorporation of ratified treaty rights into domestic law was not formally referred to the Constitutional Convention for its consideration, despite an IHRC recommendation to the Taoiseach that this should occur. This represented a missed opportunity by the State to discuss the need for the incorporation of the ICCPR and other international conventions into domestic law as part of the Constitutional Convention, including how such incorporation could occur.

<sup>5</sup> See IHRC, Submission to the UN Human Rights Committee on the Examination of Ireland’s Third Periodic Report on the ICCPR, 2008, at paras 17-25. The IHRC suggested that the State might incorporate the ICCPR constitutionally through amending the constitutional text so that it reflects the text of the ICCPR. A second possible method of incorporating the ICCPR is through direct legislative incorporation, while a third option is that the ICCPR could be given a role in governing administrative action.

of human rights treaties, it is noted that Ireland has previously incorporated international treaties into domestic law through both legislative and constitutional means.<sup>6</sup>

7. With respect to the State's argument that pursuant to Article 29.3 of the Constitution it accepts principles of international law, including principles of international human rights law insofar as it forms part of customary international law, this argument is not always consistent with the State's practice. The Committee in its General Comment 29 suggests that while the right contained in Article 10(2) of the ICCPR is not expressly mentioned in Article 4 paragraph 2 as non-derogable, it is a right which expresses a general norm of international law not subject to derogation.<sup>7</sup> Despite this, the State has entered a reservation to Article 10(2) of the ICCPR and has continued to maintain that reservation notwithstanding recommendations for its removal by the Committee in its previous Concluding Observations.<sup>8</sup>

### **Reservations Under the ICCPR**

8. The IHRC welcomes the decision of the State to withdraw its Reservation under Article 19(2) as detailed in the State Report<sup>9</sup> and to withdraw its Reservation to Article 14. However, the IHRC remains concerned at the failure to either address the Reservations under Articles 10(2) and 20(1) or take measures in relation to these Reservations as recommended by the Committee previously.

9. It is accepted by the IHRC that the State has made some positive steps towards the progressive achievement of the rights as set out in Article 10(2) through the building of new prisons, including the opening of the remand prison at Cloverhill.<sup>10</sup> The signing

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<sup>6</sup> Examples of legislative incorporation are the Diplomatic Relations and Immunity Act 1967, which gave force in Irish law to the Vienna Convention on Diplomatic Relations and the Protection of Children (Hague Convention) Act 2000 gave force in Irish law to the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, 1996. In addition, the Criminal Justice (United Nations Convention Against Torture) Act 2000, which gave force in Irish law to certain articles of the Convention Against Torture and the Genocide Act 1973 which gave force in Irish law to certain articles of the UN Convention on the Prevention and Punishment of the Crime of Genocide. The European Convention on Human Rights has been incorporated into domestic law indirectly and at a sub-constitutional level through the European Convention of Human Rights Act 2003. An example of constitutional incorporation was the Twenty-First Amendment of the Constitution which introduced a ban on the death penalty and removed textual references to capital punishment; approved by referendum on 7 June 2001 and signed into law on 27 March 2002.

<sup>7</sup> See UN Human Rights Committee, General Comment 29, States of Emergency, CCPR/C/21/Rev.1/Add.11, 2001, states, at para. 3(a).

<sup>8</sup> UN Human Rights Committee, Concluding Observations on Ireland's Third Periodic Report, CCPR/C/IRL/CO/3, 2008, at para. 5.

<sup>9</sup> UN Human Rights Committee, Ireland's Fourth Periodic Report under the ICCPR, CCPR/C/IRL/4, 2012, para. 657.

<sup>10</sup> IHRC, Submission to the UN Human Rights Committee on the Examination of Ireland's Third Periodic Report, 2008, at para. 50.

into law of the Prison Development (Confirmation of Resolutions) Act 2013 further provides for the building of a new prison in Cork.<sup>11</sup>

10. The IHRC's concerns about overcrowding within prisons and their physical conditions are set out below. It notes how under the Irish Prison Service's current Strategic Plan, there is no provision made for the development of any strategy in respect of remand prisoners.<sup>12</sup> It recommends that the State withdraws its reservation to Article 10(2) and that the requirement that all remand prisoners should be separated from convicted prisoners be set out in primary legislation to guarantee the right. The IHRC regards as regrettable the continuing detention of children alongside adult prisoners.

11. In relation to the State's reservation to Article 20(1) and its prohibition of "any propaganda for war", the IHRC fully acknowledging that freedom of expression is an important right, considers that the State should be in a position to withdraw this reservation, particularly given the peaceful aspirations of the State under Article 29.<sup>13</sup>

## **Human Rights and Equality Infrastructure**

12. The IHRC welcomes the Irish Human Rights and Equality Bill 2014 insofar as a large number of the concerns previously expressed by the IHRC have been addressed in the Bill. The IHRC has, however, in its Observations on the Bill, raised a number of areas where the legislation could be further strengthened to be in full compliance with the Paris Principles. Included in these recommendations is that there be one unified definition of human rights in the Bill, so that international convention rights, including the ICCPR, not yet incorporated into domestic law, would fall within the remit of the merged body, across its range of functions.<sup>14</sup> This issue again raises the question of the State's commitment to incorporate ICCPR rights into domestic law. Further, the IHRC has highlighted that in order to discharge its functions effectively and ensure its independence, the Irish Human Rights and Equality Commission (IHREC) should be ensured a stable and sufficient budget over which it has autonomous control.<sup>15</sup>

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<sup>11</sup> The Prison Development (Confirmation of Resolutions) Act 2013 was signed into law on 23 July 2013.

<sup>12</sup> Irish Prison Service, Three Year Strategic Plan 2012-2014, 2012.

<sup>13</sup> The State has entered a similar reservation to Article 4 of the International Convention on the Elimination of all forms of Racial Discrimination (CERD). In relation to the CERD reservation see Submission of the IHRC to the UN Committee on the Elimination of Racial Discrimination in respect of Ireland's First National Report under CERD, 1 March 2005, at para. 4.

<sup>14</sup> See Observations on the Irish Human Rights and Equality Commission Bill 2014, pp. 7-8. [www.ihrc.ie/download/pdf/ihrec\\_designate\\_observations\\_on\\_ihrec\\_bill\\_2014.pdf](http://www.ihrc.ie/download/pdf/ihrec_designate_observations_on_ihrec_bill_2014.pdf), last accessed 29 May 2014.

<sup>15</sup> The Paris Principles provide "The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence." See [www2.ohchr.org/english/law/parisprinciples.htm](http://www2.ohchr.org/english/law/parisprinciples.htm), last accessed 29 May 2014. See Observations on the

## **Proposed Merger of the Labour Court, Labour Relations Commission, Employee Appeals Tribunal, National Employment Rights Authority and Equality Tribunal**

13. In respect of the proposed merger of the Labour Court, Labour Relations Commission, Employee Appeals Tribunal, the National Employment Rights Authority and the Equality Tribunal, the IHRC would urge the Minister for Jobs, Enterprise and Innovation when bringing forward the said legislation to ensure that it complies with all the requirements of judicial independence. In particular, the first instance body and the appellate body must be independent in their functions, operate in a fully transparent manner and make their decisions available to the public. Further, the IHRC notes that as the Equality Tribunal operates on an inquisitorial rather than adversarial basis, once a prima facie case of discrimination has been made out by the complainant, the burden of proof shifts to the respondent to rebut the presumption that discrimination has occurred. The manner of the operation of its successor body is crucial to maintaining effective protection for those with a complaint under both the Equal Status Acts 2000-2012 and the Employment Equality Acts 1998-2011 and the IHRC recommends that this format be continued under the new structures, with the specialist knowledge and expertise of the Tribunal maintained. At present there is a significant delay, of approximately two years, before cases are heard before the Tribunal. The IHRC recommends that this delay be immediately dealt with and, in the context of the merger of the structures, that the Minister for Jobs, Enterprise and Innovation ensures that the successor body to the Tribunal be allocated the necessary resources and have the required functional capacity for the specialised and timely adjudication of claims.

### **Structures for Protection Against Racism**

14. The State has indicated that it has no intention to update and replace the National Action Plan Against Racism 2005 – 2008.<sup>16</sup> It was recommended in the Report of the Working Group of the Universal Periodic Review that Ireland consider replacing and strengthening its National Action Plan Against Racism.<sup>17</sup> The IHRC would urge the State to reconsider its stance in this regards.

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Irish Human Rights and Equality Commission Bill 2014, pp4-5.  
[www.ihrc.ie/download/pdf/ihrec\\_designate\\_observations\\_on\\_ihrec\\_bill\\_2014.pdf](http://www.ihrc.ie/download/pdf/ihrec_designate_observations_on_ihrec_bill_2014.pdf), last accessed 29 May 2014.

<sup>16</sup> UN Human Right Committee, List of issues in relation to the Fourth Periodic Report of Ireland: Replies of Ireland to the List of Issues, CCPR/C/IRL/Q/4/Add.1, 2014, at para. 18.

<sup>17</sup> UN Human Rights Council, Report of the Working Group on the Universal Periodic Review of Ireland, 2011, at paras 64 and 99.

## **Proposed Policing Authority and the Garda Síochána Ombudsman Commission (“GSOC”)**

### Proposed Policing Authority

15. The Government has committed to establish an independent Police Authority in the State. The IHRC has welcomed this commitment to review accountability in the policing function. The IHRC has, for some time, recommended the establishment of an independent and representative Policing Authority similar to the recommendation in the 1999 Patten Report.<sup>18</sup>

16. In conducting this review, the IHRC has recommended to an inquiry established by the Joint Oireachtas Committee on Justice, Defence and Equality and to the Cabinet Sub-Committee on Justice which is receiving submissions on the matter, that any such Police Authority be established with sufficient independence, resources and functional capacity to address deficits in accountability and oversight of An Garda Síochána.

17. The IHRC has recommended that the functions of any such Police Authority be calibrated in such a way as not to encroach or undermine the work of GSOC, but rather should complement and support it. In addition, the Garda Síochána Inspectorate, established under Part 5 of the Garda Síochána Act, 2005, would need to be realigned with any new Policing Authority, in order to ensure that reporting procedures are through such an Authority and not the executive as is the case at present.<sup>19</sup>

18. IHRC recommendations address the functions and responsibility of the Policing Authority; the appointment and membership of the Authority, its relationship with the Government and the Oireachtas; the implications for GSOC, the Garda Síochána Inspectorate, the Confidential Recipient and the mooted new National Preventive Mechanism mooted under OPCAT.<sup>20</sup>

19. Specifically from a human rights and equality perspective, the IHRC has recommended that the new Authority monitor and address human rights and equality compliance by An Garda Síochána at every level of its operations and align breaches of discipline or criminal offences identified by GSOC and which would also reveal a breach of human rights or a discriminatory act with disciplinary procedures within the force. It has also recommended that it review the adequacy of standards in relation to the training of An Garda Síochána and the structures, policies and procedures for assessment and

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<sup>18</sup> Christopher Patten, A New Beginning: Policing in Northern Ireland, the Report of the Independent Commission on Policing for Northern Ireland, 1999.

<sup>19</sup> See Submission of IHREC (Designate) to the Cabinet Sub-Committee on Justice on the Establishment of an Independent Policing Authority (forthcoming, June 2014).

<sup>20</sup> IHRC, Review of the Garda Síochána Act 2005, Submission of the IHRC (Designate) to the Joint Oireachtas Committee on Justice, Defence and Equality, 4 April 2014.

development of those standards, with a very specific emphasis on training in human rights and equality.

20. The IHRC has noted that in addition to the five aspects of accountability identified in the Patten Report, there is an additional aspect of accountability increasingly evident, namely the responsibility of the State Parties to the European Convention on Human Rights and other conventions to ensure that proper accountability structures exist within their police forces to ensure: effective investigations following suspicious deaths (Article 2 ECHR); proper planning and oversight of police operations to address foreseeable risks of human rights violations (Articles 2, 8, 13 ECHR) and proper complaints mechanisms following any human rights violations that can occur at the hands of police (Article 13 when read in conjunction with Articles 2, 3, 8 and 14 ECHR). These obligations can also be found under the ICCPR.

#### Complaints to GSOC and Backlog of Cases

21. The IHRC welcomed the establishment of GSOC in 2005 and since then has repeatedly called for the strengthening of GSOC to allow it to investigate human rights abuses that may be perpetrated by An Garda Síochána.<sup>21</sup>

22. The IHRC notes that the State has provided data on the number of complaints filed with GSOC, the types of complaints and their outcomes. The State has responded that there is currently no backlog of complaints before GSOC, however the bifurcated nature of complaint handling between GSOC and An Garda Síochána has resulted in delays in the investigation of complaints by An Garda Síochána.

#### Referral of Complaints to the Garda Commissioner

23. Arising from the above, the IHRC has now recommended that all complaints be considered by GSOC. In this regard, it is of the view that there are deficits in legislation underpinning GSOC and that the existence of the complaints mechanism by GSOC is not necessarily sufficient to provide a comprehensive structure to ensure accountability in policing.<sup>22</sup> There is no investigative body authorised which has the remit to carry out unannounced inspections as is the case with the Committee for the Prevention of Torture ("CPT"). Furthermore, the IHRC has previously queried whether the current remit of GSOC, which extends only to complaints of alleged misconduct by members of An Garda Síochána, could be expanded to include poor standards of service.<sup>23</sup>

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<sup>21</sup> UN Human Rights Committee, Concluding Observations on Ireland's Third Periodic Report, CCPR/C/IRL/CO/3, 2008, at para. 14.

<sup>22</sup> IHRC, Review of An Garda Síochána Act 2005: Submission of the IHREC (Designate) to the Joint Oireachtas Committee on Justice, Defence and Equality, 2014, para. 8.

<sup>23</sup> Ibid., at para. 21.

24. The IHRC has recommended that GSOC have the power to receive complaints from members of An Garda Síochána.<sup>24</sup> The Garda Síochána (Confidential Reporting of Corruption or Malpractice) Regulations 2007 provide that members of An Garda Síochána and others can report allegations of Garda malpractice and or corruption in confidence. The Protected Disclosures Bill 2013 is also currently before the Oireachtas to provide for the protection of whistle-blowers. The IHRC is of the view that protection for whistle-blowers improves and safeguards accountability and therefore welcomes this new legislation.

25. Sufficient resources should be afforded to GSOC whose functional independence from the Minister should also be enhanced.

### National Security

26. The IHRC recognises that in Ireland there is a combined policing and State security service in An Garda Síochána. Under the 2005 Act, national security is a ground that restricts certain investigative functions of GSOC. The IHRC has previously suggested that this restriction on the functions of GSOC and the breadth of the discretion conferred on the Minister for Justice and Equality and the Garda Commissioner are not sufficiently calibrated to ensure transparency and accountability.<sup>25</sup> The IHRC accepts that national security is a legitimate ground for limiting rights and freedoms, in certain circumstances however, it would point out that the investigating staff of GSOC are bound by the same duties as members of An Garda Síochána, including the Official Secrets Act, 1963. In addition, any warrant for a search is restricted to material relevant to the specific complaint. It is also significant that investigators from international bodies, such as the CPT Committee, have the power to enter any Garda station and as such it is anomalous to restrict the powers of GSOC in this way.

27. The IHRC is of the view that other measures could be put in place to ensure the protection of national security and has previously addressed these views to the State

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<sup>24</sup> IHRC, Review of An Garda Síochána Act 2005: Submission of the IHREC (Designate) to the Joint Oireachtas Committee on Justice, Defence and Equality, 2014, at para. 26.

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

and recommends that this might be considered in the establishment of an independent Policing Authority.<sup>26</sup>

### **Austerity and Civil and Political Rights**

28. The IHRC has previously stated that it is of the view that the budget cuts to human rights and equality structures within the State in recent budgets, has had a disproportionate effect on the human rights and equality sector.<sup>27</sup> The IHRC is also concerned that the accountability mechanisms are weakening under the privatisation of public functions.<sup>28</sup> Cuts to the voluntary sector have impacted on the effective protection of civil and political rights in the State, including persons with disabilities, members of ethnic minority groups and non-nationals, where discretionary budgets have been cut. The IHRC considers austerity measures can affect the civil and political rights of marginalised groups through direct cuts to social security, housing and other support services<sup>29</sup> and also indirectly through pre-requisite requirements to certain support services, such as the habitual residence condition. The Committee may wish to ask the State to provide information on how it is ensuring that budgetary cuts are not impacting on civil and political rights protections of minority groups.

### **The Provision of Effective Remedies**

29. The IHRC is concerned at the absence of effective remedies in the State pursuant to Article 2(3) of the ICCPR. The absence of direct incorporation of Covenant

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<sup>26</sup> IHRC, Review of An Garda Síochána Act 2005: Submission of the IHREC (Designate) to the Joint Oireachtas Committee on Justice, Defence and Equality, 2014, at para. 34. The IHRC suggested that categories of documents could be designated for the purpose of state security, that material which a senior member of An Garda Síochána claims to be related to matters of national security could be sealed and a procedure whereby the nature of such material would be assessed by a judge.

<sup>27</sup> IHRC, Submission to the UN Committee Against Torture on the Examination of Ireland's First National Report, 2011, at para. 7.

<sup>28</sup> See for instance the Water Services Act 2013, and the Water Services Act (No. 2) 2013. A new entity, Irish Water, a subsidiary of Ireland's Gas Company has been established to introduce the privatisation of water services which will effectively replace State subvention by private subvention, as required under the 2010 Agreement between the State and the European Commission, European Central Bank and International Monetary Fund. The regulator for Irish Water is the Commission for Energy Regulation whose remit is limited.

<sup>29</sup> The IHRC has previously noted that the Habitual Residence Condition limits the range of person who can claim social welfare payments. Under this requirement, a person regardless of their nationality, who has not been resident in the state for two years is not entitled to claim a range of social welfare entitlements, including, child benefit, disability allowance, unemployment benefit, one parent allowance and carers allowance. The IHRC has previously noted however this has indirect and adverse effects on vulnerable groups including, immigrants, refugees, asylum seekers, the Roma Community and also the Traveller Community.

rights has been raised in this submission. This has led to a number of systemic human rights issues concerning remedies.

30. First, the State has on three recent occasions been found in violation of Convention rights before the Grand Chamber of the European Court of Human Rights. In *McFarlane v Ireland* (2010),<sup>30</sup> *A, B and C v Ireland* (2010)<sup>31</sup> and *O’Keefe v Ireland* (2014) the Grand Chamber considered the issue of theoretical rather than actual constitutional remedies, as advanced by the State.<sup>32</sup> All three cases involved constitutional doctrines under which ECHR rights could not be vindicated before the Irish courts. Of the three cases, only the *A, B and C* Judgment has been addressed by the State by way of amending legislation introduced.<sup>33</sup>

31. Second, is the restricted manner in which the ECHR has been incorporated into domestic law by virtue of the European Convention on Human Rights Act 2003. Section 5 (1) of the 2003 Act provides that where a Superior Court finds that no other legal remedy is adequate or available, it can make a “a declaration of incompatibility” that a statutory provision or rule of law is incompatible with the State’s obligations under the ECHR.<sup>34</sup> The limited effect of this provision is demonstrated through the State’s inaction in the case of *Foy v An tArd Chláraitheoir & Ors*,<sup>35</sup> where in 2007 the High Court found a Declaration of Incompatibility in relation to gender recognition but no legislation has been enacted to address the lacuna to date.<sup>36</sup> Otherwise the Statute of Limitations Acts 1957-2000 may act as an insuperable barrier to the bringing of legal claims based on historical abuses, insofar as it has only been amended to allow for such claims in cases of historic child abuse.<sup>37</sup>

32. Third, the State is somewhat proscribed in its ability to ensure effective investigations in cases of public concern by the need to afford full procedural rights protection to all persons and organisations who may be impugned during a public inquiry. This is evident in the treatment of the Douch Inquiry and the Magdalen Laundry Inquiry, addressed below and raises questions as to the State’s investigative mechanisms.

33. Fourth, administrative remedies in the State are not always capable of being enforced. Hence the State’s Ombuds bodies may not be capable of ensuring the remedies of compensation, reparation, restitution, rehabilitation, guarantees of non-repetition and/or a public apology following a finding of a human rights violation. The

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<sup>30</sup> *McFarlane v Ireland*, Application no. 31333/05, Judgment of 10 September 2010.

<sup>31</sup> *A, B and C v Ireland*, Application no.25574/05, Judgment of 16 December 2010.

<sup>32</sup> *O’Keefe v Ireland*, Application no.35810/09, Judgment of 28 January 2010.

<sup>33</sup> By way of the Protection of Life during Pregnancy Act 2013.

<sup>34</sup> European Convention on Human Rights Act 2003, at Section 5(1).

<sup>35</sup> *Foy v An tArd Chláraitheoir and Ors*, [2007] IEHC 470.

<sup>36</sup> Discussed further below.

<sup>37</sup> Statute of Limitations Act 1957, No. 6, as amended by Statute of Limitations Act 2000. No. 13 of 2000.

requirement to exhaust internal complaints mechanisms before bringing a complaint to the State's Ombuds bodies and the fact that the findings and recommendations of those bodies do not have the force of law raises questions as to the availability of effective remedies under Article 2(3).<sup>38</sup> This is particularly so where most decision-making impacting on rights provides for a large degree of discretion to be vested in the decision-maker and where judicial review remedies against such decisions may be limited to questions of irrationality. The restrictions on the remit of Ombuds bodies should also be removed.

34. The Committee may wish to ask the State the precise mechanisms under which it ensures that persons whose rights are violated have an effective remedy under Article 2(3) ICCPR by reference to concrete examples.

### **Main Areas of Concern**

- **The IHRC is concerned that the ICCPR has still not been incorporated into Irish law and that the State should withdraw its reservation to Article 10.2 and its reservation to Article 20(1).**
- **The IHRC urges the State to ensure that the Irish Human Rights and Equality Commission Bill 2014 is fully compliant with the Paris Principles and that a broad definition of human rights is included in the legislation and that a stable and sufficient budget is provided of which the new body has autonomous control.**
- **The functionality and independence of the Equality Tribunal should be ensured following its proposed merger.**
- **The establishment of the new Policing Authority should be based on the six aspects of accountability identified herein. The new Authority should be fully human rights and equality compliant.**
- **GSOC should be provided with enhanced functions as recommended including the ability to receive and adjudicate on all complaints. Complaints which also relate to aspects of national security should also come within its remit, with sufficient safeguards attached. Sufficient resources should be afforded to GSOC whose functional independence from the Minister should be enhanced.**

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<sup>38</sup> See, s.6 of the Ombudsman Act 1980 as amended. Also see, Chapter 5, The Ombudsman for Children Act 2002.

- The IHRC is concerned at the impact austerity is having on the enjoyment of not just economic, social and cultural, but also civil and political rights, with particular concern as to how such measures are affecting minority groups.
- The IHRC is concerned at the absence of available remedies for human rights violations. The Committee may wish to ask the State the precise mechanisms under which it ensures that persons whose rights are violated have an effective remedy under Article 2(3) ICCPR by reference to concrete examples.
- The IHRC recommends that the restrictions on the remit of Ombuds bodies be removed and their powers enhanced.

## CHAPTER 2

### **NON-DISCRIMINATION, RIGHT TO AN EFFECTIVE REMEDY AND EQUAL RIGHTS OF MEN AND WOMEN, INCLUDING POLITICAL PARTICIPATION (ARTICLES 2.1, 3, 16 and 26)**

35. The Committee has sought information on the steps taken or envisaged to amend Article 41.2 of the Constitution in line with the recommendation made in the Committee's previous Concluding Observations<sup>39</sup>, including a timeframe to hold a referendum. The State has indicated that a task force has been established within the Department of Justice and Equality with a view to reporting back to the Government by 31 October 2014 and to preparing for a constitutional referendum at the earliest opportunity thereafter.<sup>40</sup> However, no concrete steps have been taken to formulate an amended text of Article 41.2 and the State has refrained from outlining a specific timeframe for a referendum as requested by the Committee.<sup>41</sup>

36. The IHRC reiterates that Article 41.2 of the Constitution is based on a stereotypical view of the social roles of women as homemakers and mothers, thus retaining a perception in the Constitution which ascribes women to a limited and dependent role. The IHRC regards it as regrettable that Article 41.2 has not yet been amended or removed from the Constitution, notwithstanding the recommendations of the Report of the Second Commission on the Status of Women (1993),<sup>42</sup> the Constitution Review Group (1996),<sup>43</sup> the All-Party Oireachtas Committee on the Constitution (2006),<sup>44</sup> the Human Rights Committee (1993<sup>45</sup> and 2008<sup>46</sup>), the

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<sup>39</sup> UN Human Rights Committee, Concluding Observations on Ireland's Third Periodic Report, CCPR/C/IRL/CO/3, 2008, at para.10.

<sup>40</sup> This is in response to the recommendations made by the Convention on the Constitution in its Second Report (May 2013). See also Second Report of the Convention on the Constitution (May 2013), at Section 1, p. 4.

<sup>41</sup> The need for a Departmental review is stated to be on the basis that the recommendation made by the Convention on the Constitution for the amended text of Article 41.2 to make reference to carers is a "new element" which requires consideration in consultation with relevant Government Departments. The IHRC notes, however, that the Constitution Review Group in its First Report (1996) suggested a revised form of Article 41.2 which would make reference to carers, in the following terms:

"The State recognises that home and family life gives to society a support without which the common good cannot be achieved. The State shall endeavour to support persons caring for others within the home.", at pp. 311-312.

<sup>42</sup> Report of the Second Commission on the Status of Women (Government Publications, 1993), at p. 27.

<sup>43</sup> Report of the Constitution Review Group (Dublin: Government Publications, 1996), at pp.333-334.

<sup>44</sup> The All-Party Oireachtas Committee on the Constitution, Tenth Progress Report: The Family (Government Publications, 2006), at p.127.

<sup>45</sup> UN Human Rights Committee, Consideration of Reports Submitted by State Parties under Article 40 of the Covenant, CCPR/C/79/Add.21, 1993, at para. 6.

<sup>46</sup> UN Human Rights Committee, Concluding Observations on Ireland's Third Periodic Report, CCPR/C/IRL/CO/3, 2008, at para. 10.

Committee on the Elimination of All Forms of Discrimination against Women,<sup>47</sup> and the NHRI.<sup>48</sup>

37. Over this period of 20 years, 19 referenda have been held, yet the State has taken no concrete steps to formulate an amended text of Article 41.2 and/ or to put such a proposed amendment to the electorate by way of referendum. This is symptomatic of the State's general response to implementing the Committee's recommendations and typifies the difficulty in securing effective remedies where there is no domestic incorporation of the ICCPR. The IHRC regards this failure on the part of the State as being incompatible with its obligations under Article 3 ICCPR.

### **Representation of Women in Decision-Making Positions**

38. The IHRC welcomes the Electoral (Amendment) Political Funding Act 2012, which provides that State funding received by a political party will be reduced by 50%, unless at least 30% of its candidates at the preceding general election were women, and at least 30% were men. Moreover, it provides that seven years from the general election where this provision first applies, the required proportion of female and male candidates will be 40%.

39. The IHRC welcomes the enactment of this provision and hopes that it will be complemented by similar steps to increase the representation of women on the boards of State bodies to 40% in line with the commitment made in the Programme for Government, although it is regrettable that, the latter measures, will not come into force for several years.<sup>49</sup> The Committee may wish to be informed on what other measures are proposed to advance gender equality through increased representation of women in decision-making.

### **Assisted Decision-Making (Capacity) Bill 2013**

40. The Committee has asked to be informed as to the progress made in adopting the Assisted Decision-Making (Capacity) Bill 2013 ('the 2013 Bill'). The 2013 Bill was initiated on 17 July 2013, and was referred to the Oireachtas Select Committee on Justice, Defence and Equality on 12 December 2013.

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<sup>47</sup> Committee on the Elimination of Discrimination against Women, Concluding Comments: Ireland, CEDAW/C/IRL/CO/4-5, 2005, at paras 24–25.

<sup>48</sup> See IHRC, Report to the UN Committee on the Elimination of Discrimination Against Women (CEDAW), 2005, at p. 2.

<sup>49</sup> See Department of Justice, Gender Balance on State Boards, at [www.justice.ie/en/JELR/Pages/gender\\_state\\_boards](http://www.justice.ie/en/JELR/Pages/gender_state_boards), last accessed 28 May 2014.

41. The IHRC has provided observations setting out its concerns as to the compatibility of certain provisions of the 2013 Bill (to Government). These concerns relate to the principles of equal recognition before the law (Article 16 ICCPR) and equal protection of the law (Article 26 ICCPR), and indeed Article 12 of the UN Convention on the Rights of Persons with Disabilities ('CRPD').<sup>50</sup>

42. The IHRC is concerned that in its current form the 2013 Bill does not make adequate provision in the form of positive measures designed to ensure equal protection before the law for persons with disabilities. For example, there is no provision in the 2013 Bill for the appointment of a legal practitioner to represent the interests of the person who is the subject of an application to his or her mental capacity.<sup>51</sup> Furthermore, there are a broad range of circumstances which place a limitation on the right of such a person to a fair hearing, to exercise legal capacity and afford the person equal access to the Courts.<sup>52</sup> Finally, circumstances may arise, under the Bill where there is a risk that a person with a cognitive or psychological disability may bear the cost of legal representation in respect of applications pertaining to their legal capacity and decision-making ability.<sup>53</sup>

### **Equality: Constitutional and Legislative Framework**

43. The IHRC has concerns that neither the constitutional guarantee of equality (Article 40. 1) nor the legislative prohibitions on discrimination are co-extensive with the State's obligations under Article 26 ICCPR.<sup>54</sup>

44. The IHRC notes that qualifying phrases in Article 40.1, "as human persons", "equal before the law", "due regard for differences", have frequently been relied upon by the courts to restrict the operation of the constitutional guarantee of equality, which is

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<sup>50</sup> See IHRC, Observations on the Assisted Decision-Making (Capacity) Bill 2013, 2014. See Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36(3) ECHR, Application No.47848/08 - The Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania, CommDH(2011)37, 14 October 2011, at paras 10-13. See also the report of the EU Agency for Fundamental Rights, Access to Justice in Europe: An overview of Challenges and Opportunities (Luxembourg, Publications Office of the EU, 2011).

<sup>51</sup> IHRC Observations on the Assisted Decision-Making (Capacity) Bill 2013, at para. 66.

<sup>52</sup> IHRC, Observations on the Assisted Decision-Making (Capacity) Bill 2013, at Parts II (A), (B) and (E).

<sup>53</sup> See IHRC, Observations on the Assisted Decision-Making (Capacity) Bill 2013, at pp. 27-32.

<sup>54</sup> In Ireland, a constitutional guarantee of equality before the law (Article 40.1) is supplemented by legislative prohibitions on discrimination on nine specified grounds in respect of employment, as per the Employment Equality Acts 1998-2011, and the provisions of goods and services, as per the Equal Status Acts 2000 as amended by the Equality Act 2004. See the IHRC, Follow-up Report on State Involvement with Magdalen Laundries, 2013, at paras 304-305.

further compounded by the restricted manner in which the ECHR has been incorporated into domestic law by virtue of the European Convention on Human Rights Act 2003.<sup>55</sup>

45. In relation to the legislative infrastructure, the IHRC considers that the scope of protection against discrimination is limited, for example under the Equal Status Acts the State may legislate to allow for conduct that would otherwise be prohibited under the equality legislation.<sup>56</sup> Furthermore, discrimination for the purposes of the Equal Status Acts and the Employment Equality Acts is only taken to occur where a person is treated less favourably on one or more of nine specified grounds, which is in contrast to the more comprehensive protection as provided by Article 26 ICCPR.<sup>57</sup>

### **Main Areas of Concern**

- **The IHRC is concerned that the State has taken no concrete steps to formulate an amended text of Article 41.2 and/or to put such a proposed amendment to the electorate by way of referendum. The IHRC urges the State to set out a timeframe for the holding of a referendum on Article 41.2 of the Constitution.**
- **The IHRC is of the view that the Assisted Decision-Making (Capacity) Bill 2013 in its present form be amended to affirm the right of persons with cognitive or psychological disabilities to legal capacity and to ensure equal protection before the law regardless of any such disability through the provision of a scheme of legal aid whereby persons with impaired mental capacity may be represented in any applications concerning them.**
- **The IHRC recommends that the discrimination exemption provided for under the Equal Status Acts is removed and the scope of the Equal Status Acts and the Employment Equality Acts should be extended to address discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.**
- **The IHRC recommends that the constitutional protection of equality is strengthened to clearly prohibit indirect discrimination in any field of law or practice.**

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<sup>55</sup> For an illustration of this approach, see the application of the "human personality doctrine" in *Macauley v Minister for Posts and Telegraphs* [1966] IR 345, *Quinn's Supermarket v Attorney General* [1972] IR 1, *Brennan v Attorney General* [1983] ILRM 449.

<sup>56</sup> Equal Status Acts 2000 to 2012, s.14(1)(a)(i)

<sup>57</sup> Gender, civil status, family status, sexual orientation, religion, age, disability, race, or membership of the Traveller community: Equal Status Acts 2000 to 2012, s.3(2), Employment Equality Acts 1998 – 2011, s.6(2).

## CHAPTER 3

### DOMESTIC, SEXUAL AND GENDER-BASED VIOLENCE AND INQUIRY INTO THE MAGDALEN LAUNDRIES (ARTICLES 3, 7, 17, 23, 24 and 26)

#### Overview

46. Domestic, sexual and gender-based violence remains a serious problem in Ireland as in other European states, as reflected in the List of Issues raised by the Committee. The IHRC is concerned that although the State has accepted in principle the terms of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, it has not yet signed or ratified the Convention.<sup>58</sup>

#### Systematic Data Collection Procedure and Disaggregated Statistics

47. In addition to the Committee,<sup>59</sup> the UN Committee on the Elimination of Discrimination Against Women has also criticised Ireland for providing insufficient information on the question of sexual harassment and recommended that the State closely monitor the incidence of all forms of violence against women.<sup>60</sup> In 2008, the IHRC requested the State to provide detailed statistical data regarding violence against women as well as information on what additional measures it has put in place to protect particularly vulnerable groups such as Traveller women, migrant women, asylum-seeking and refugee women and women with disabilities.<sup>61</sup>

48. The State acknowledges that data collection could be improved in the areas of domestic and sexual violence. Statistics concerning the number of court cases in relation to rape and sexual offences are not disaggregated by age or gender of the victim. Similarly, court sentences in relation to prosecution of domestic violence are not disaggregated by reference to Traveller women, Roma women, migrant women, asylum-seeking and refugee women, or women with disabilities. An Garda Síochána record

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<sup>58</sup> UN Human Rights Council, 19<sup>th</sup> Session, Report of the Working Group on the Universal Periodic Review, Ireland, Addendum, views on conclusion and/or recommendation, voluntary commitments and replies presented by the State under review, 6 March 2012 A/HRC/19/9/Add.1, 2012, at para. 48. The State indicated that the detailed provisions of the Convention and the administrative and legislative arrangements that would be required to allow signature of the Convention were currently being examined, at para. 48, fn. 11.

<sup>59</sup> UN Human Rights Committee, Concluding Observations of the Human Rights Committee on Ireland, CCPR/C/IRL/CO/3, 2008, at para. 9.

<sup>60</sup> UN Committee on the Elimination of Discrimination against Women, Concluding Comments: Ireland, CEDAW/C/IRL/CO/4-5, 2005, at paras 28 and 29.

<sup>61</sup> IHRC, Submission of the Irish Human Rights Commission to the Irish Government in Preparation of Ireland's Sixth Periodic Report to the UN CEDAW Committee, 2008, at pp. 8-9.

incidences of domestic violence by reference to the type of offence that occurred, such as common law assault, but do not note the circumstances of the offence, without which targeted State responses are difficult to formulate.<sup>62</sup> Insufficient attention appears to have been paid to this issue.

## **Domestic Violence and Equal Protection Against Perpetrators of Violence**

49. The Committee has sought information in respect of the measures taken to ensure that women in “dating relationships” and unmarried cohabitants have equal access with regard to barring orders against perpetrators of violence, and that non-citizens whose status is linked to that of their partner under the Habitual Residence Condition are able to flee from situations of domestic violence to access the necessary welfare support services and to obtain separate residence permits.

50. The IHRC welcomes the enhanced protection offered to women against perpetrators of violence by virtue of the recent amendments to the Domestic Violence Act 1996.<sup>63</sup> However, further legislative action is required to ensure equal access to legal protection for all women against perpetrators of violence as set out below.<sup>64</sup>

51. Under the Immigration Act 2004 (the “2004 Act”)<sup>65</sup>, a victim of domestic violence seeking a migration status, independent of that of the perpetrator of violence, may apply for same pursuant to section 4(7). The 2004 Act, however, neither sets out the criteria to be fulfilled by the applicant, nor the matters to be considered by the decision-maker. A broad level of administrative discretion is thus allowed.

52. The IHRC welcomes the publication by the Irish Naturalisation and Immigration Service’s Guidelines for Victims of Domestic Violence,<sup>66</sup> but is concerned about the

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<sup>62</sup> UN Human Right Committee, List of Issues in relation to the Fourth Periodic Report of Ireland, Addendum: Replies of Ireland to the List of Issues, CCPR/C/IRL/Q/4/Add.1, 2014, at p. 8.

<sup>63</sup> UN Human Right Committee, List of Issues in relation to the Fourth Periodic Report of Ireland, Addendum, Replies of Ireland to the List of Issues, CCPR/C/IRL/Q/4/Add.1, 2014, at paras 47-49. The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 extended the application of domestic violence orders to civil partners, as defined by the Act. The Civil Law (Miscellaneous Provisions) Act 2011 introduces important amendments to the Domestic Violence Acts 1996 and 2002 to extend the powers of the court to order protection of persons in cases of domestic violence.

<sup>64</sup> Unmarried cohabitants are entitled to apply for a barring order in restricted circumstances only. Under, s.3(1) of the Domestic Violence Act 1996 (“the 1996 Act”), the applicant must have “lived with the respondent in an intimate and committed relationship for a period of at least six months in aggregate during the period of nine months immediately prior to the application for the barring order”, and s.3(4) of the 1996 Act, further requires that the respondent must not have a legal or beneficial interest in the place of residence that is equal to or greater than the interest of the applicant.

<sup>65</sup> The Immigration Act 2004, No. 1 of 2004, 13 February 2004 (“the 2004 Act”).

<sup>66</sup> In 2012, the Irish Naturalisation and Immigration Service published Immigration Guidelines for Victims of Domestic Violence which sets out “how the Irish immigration system deals with cases of domestic violence where the victim is a foreign national and whose immigration status is currently derived from or

accessibility of the application procedure detailed therein. First, the document does not specify a timeframe within which a decision in respect of an application will be made. Given the undoubtedly precarious circumstances of applicants, the IHRC notes that a swift decision-making process is necessary. Second, in the event of an application being successful, a registration fee of approximately € 300 will be applied, raising the spectre of financial barriers to the making of an application.<sup>67</sup> Third, the document provides that the application, which can be made through a solicitor or directly by the person, requires detailed information and supporting documentation. The IHRC emphasises the importance of ensuring that foreign national women, many of whom may not speak English, are provided with all necessary supports to ensure that they are capable of making an application.

53. In addition the IHRC notes with concern the negative effect the Habitual Residence Condition has on victims of domestic violence who are from marginalised and vulnerable groups.<sup>68</sup> The Habitual Residence Condition, in limiting the persons entitled to claim certain social assistance payments, fails to make provision for women who are victims of domestic violence. Thus a victim of domestic violence who cannot meet the Habitual Residence condition may be forced to choose between remaining in a violent situation or facing destitution and homelessness due to her inability to access essential support services.

54. Specific measures should be put in place to protect vulnerable groups of women in respect of their access to barring orders and similar legal protection against perpetrators of violence; necessary welfare and support services should be provided to particularly vulnerable victims of domestic violence; and, where relevant, separate residence permits should be provided.

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dependant on that of the perpetrator of domestic violence" Irish Naturalisation and Immigration Service, Victims of Domestic Violence Immigration Guidelines, 2012. See [www.inis.gov.ie/en/INIS/Pages/WP07000112](http://www.inis.gov.ie/en/INIS/Pages/WP07000112), last accessed 27 May 2014.

<sup>67</sup> The Irish Naturalisation and Immigration Service website states that "[a] fee of € 300 is charged in respect of each immigration certificate of registration issued to a non-EEA national with effect from 19 November 2012". See [www.inis.gov.ie/en/INIS/Pages/WP07000031](http://www.inis.gov.ie/en/INIS/Pages/WP07000031), last accessed 27 May 2014.

<sup>68</sup> This condition requires that a person be habitually resident in Ireland in order to qualify for a number of social assistance payments. The term "habitual residence" is not defined in law. Whether or not a person is "habitually resident" is largely a question of fact but the decision maker is obliged to have regard to the length and continuity of residence in the State or in any other particular country; the length and purpose of any absence from the State; the nature and pattern of the person's employment; the person's main centre of interest; and the future intentions of the person concerned as they appear from all the circumstances. In addition, the person must have a legal right to reside in Ireland in order to be considered habitually resident, provided for s.246 of the Social Welfare Consolidation Act 2005.

## **Violence Against Women in Vulnerable or Marginalised Groups**

55. Women with disabilities may be particularly vulnerable to violence.<sup>69</sup> Barriers facing women with disabilities may include a lack of accessible information, the institutionalised setting in which many women with disabilities may live.

56. In addition, there is evidence to suggest that victims of domestic violence from minority and migrant groups particularly struggle in accessing services and supports.<sup>70</sup> Barriers to fulfilling minority ethnic women's needs as identified may include inadequate resources; absence of staff training; the Habitual Residence Condition; and language and the absence of interpretation services.<sup>71</sup>

57. The Committee may wish to ask the State as to how it is supporting sustained training and awareness-raising initiatives on the issue of domestic violence amongst public officials, An Garda Síochána, the judiciary, health professionals and members of the public, including for the vulnerable groups of women identified above.

## **Inquiry into the Magdalen Laundries**

58. The Committee has sought clarity in respect of when the State will establish a prompt, thorough and independent investigation into the abuse perpetrated in the Magdalen Laundries, as recommended by the IHRC in its 2010 report and 2013 follow-up report on State involvement in the Laundries.<sup>72</sup> In its Replies to the Committee's List of Issues, the State said that "[w]hile isolated incidents of criminal behaviour cannot be ruled out, in light of facts uncovered by the McAleese Committee and in the absence of any credible evidence of systematic torture or criminal abuse being committed in the Magdalen Laundries, the Irish Government does not propose to set up a specific Magdalen inquiry or investigation". Rather the State is satisfied that the existing mechanisms for the investigation and, where appropriate, prosecution of criminal

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<sup>69</sup> IHRC, Submissions to the UN CEDAW in respect of Ireland's 4<sup>th</sup> and 5<sup>th</sup> Periodic Reports under CEDAW, pp. 47-48.

<sup>70</sup> Women's Aid reported in 2012 that 30% of its first time one to one support visits were with women from migrant communities: see Women's Aid, Annual Report 2012, at p.6. Available at: [www.womensaid.ie/policy/publications/annual-report-2012/](http://www.womensaid.ie/policy/publications/annual-report-2012/), last accessed 27 May 2014. In 2009 the Women's Health Council reported that Travellers made up 15% of all domestic violence service users and non-indigenous minority ethnic women comprised an average of 13% of service users: see the Women's Health Council, *Translating Pain into Action: A Study of Gender-based Violence and Minority Ethnic Women in Ireland*, February 2009, at para.8.1.1. Available at: [www.dohc.ie/publications/pdf/MEW\\_Full\\_Report.pdf](http://www.dohc.ie/publications/pdf/MEW_Full_Report.pdf), last accessed 27 May 2014.

<sup>71</sup> *Ibid*, at para. 8.3.

<sup>72</sup> See IHRC, *Assessment of the Human Rights Issues Arising in relation to the "Magdalen Laundries"*, 2010 and IHRC, *Follow up Report on State Involvement with Magdalen Laundries*, June 2013.

offences can address individual complaints of criminal behaviour if any such complaints are made.<sup>73</sup>

59. In 2010, the IHRC considered the extent and nature of the State's involvement in the Magdalen Laundries and made a formal recommendation to the Government that a statutory mechanism be established to examine: the extent of the State's involvement in and responsibility for the girls and women entering the Laundries; their treatment in and the conditions of the Laundries; and death and end of life issues for those who remained in the Laundries.<sup>74</sup>

60. In the event of State involvement or responsibility being established, the IHRC advised that the statutory mechanism should advance to conduct a larger-scale review of what occurred, the reasons for the occurrence, the human rights implications and the redress which should be considered, in full consultation with ex-residents and supporters' groups.<sup>75</sup> The recommendations of the IHRC were further reinforced by the concerns raised by the UN Committee Against Torture, in June 2011.<sup>76</sup>

61. The IHRC considers that the main advantage of a statutory investigative mechanism lies in the fact that it can guarantee independence and public accountability and may be vested with powers of compellability, in terms of accessing relevant records or testimony.<sup>77</sup>

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<sup>73</sup> UN Human Rights Committee, List of issues in relation to the Fourth Periodic Report of Ireland: Replies of Ireland to the List of Issues, CCPR/C/IRL/Q/4/Add.1, 2014, at p. 11.

<sup>74</sup> Death and end of life issues referred to the controversy around the exhumation in 1993 of remains of 155 women's bodies buried in a communal plot at High Park, Dromcondra (Magdalen Laundry), Dublin.

<sup>75</sup> IHRC, Assessment of the Human Rights Issues Arising in relation to the "Magdalen Laundries", 2010, at p. 132.

<sup>76</sup> UN Committee Against Torture, Concluding Observations on Ireland's Initial Report, CAT/C/IRL/CO/1, 2011, at paras 21-22. The Committee expressed grave concerns "at the failure by the State party to protect girls and women who were involuntarily confined between 1922 and 1996 in the Magdalen Laundries, by failing to regulate their operations and inspect them, where it is alleged that physical, emotional abuses and other ill-treatment were committed amounting to breaches of the Convention". Concern was also expressed in respect of "the failure by the State party to institute prompt, independent and thorough investigation into the allegations of ill-treatment perpetrated on girls and women in the Magdalene Laundries". That Committee further recommended that the State "institute prompt, independent, and thorough investigations into all allegations of torture, and other cruel, inhuman or degrading treatment or punishment that were allegedly committed in the Magdalene Laundries, and, in appropriate cases, prosecute and punish the perpetrators with penalties commensurate with the gravity of the offences committed, and ensure that all victims obtain redress and have an enforceable right to compensation including the means for as full rehabilitation as possible".

<sup>77</sup> Inter-Departmental Committee, Report of the Inter-Departmental Committee to establish the facts of State involvement with the Magdalen Laundries, Chapter 2: Establishment, membership and mandate of the Committee, 2013, at p. 4; UN Committee Against Torture, List of issues prior to submission of the Second Periodic Report of Ireland, CAT/C/IRL/Q/2, 2013, where the Committee, noting that the IDC did not have power to compel evidence, but only to receive what was forwarded voluntarily, queried "why the State party considers that it has obtained all the relevant evidence and facts"; at para. 21(a). See also para. 21(c); UN Rapporteur for the Follow-Up on Concluding Observations of the United Nations Committee Against Torture Felice D Gaer, Letter to Mr Gerard Corr Permanent Representative of Ireland to the United Nations Office at Geneva, 22 May 2013, at p. 3.

62. However, it is noted that although the remit of the non-statutory Interdepartmental Committee (IDC), established by the Government, was limited to establishing the facts of State involvement with the Magdalen Laundries (the first part of the IHRC's 2010 recommendation), the mechanism had the advantage of a relatively swift inquiry with the prospect for speedy redress for this small and aging population. Under Article 40.3.2 of the Constitution, every person has the right to a "good name" which has been interpreted by the Supreme Court as requiring certain procedural safeguards for individuals and institutions who could be potentially impugned on foot of an inquiry, which the Supreme Court has acknowledged can add to the length of proceedings.<sup>78</sup> This may explain why the State prefers inquiries conducted pursuant to the Commission of Investigations Act 2004 which are held mostly in private and which are viewed as less costly and speedier.<sup>79</sup> Some statutory inquiries into alleged human rights violations have been struck down by the Courts.<sup>80</sup>

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<sup>78</sup> In the case of *In Re Haughey* [1971] IR 217, the Court highlighted the importance of allowing a person who is essentially "a party" to the proceedings, as opposed to a witness, to protect their good name and their rights under Article 40 through the following mechanisms: "(a) that he should be furnished with a copy of the evidence which reflected on his good name; (b) that he should be allowed to cross-examine, by counsel, his accuser or accusers; (c) that he should be allowed to give rebutting evidence; and (d) that he should be permitted to address, again by counsel, the Committee in his own defence." See pp. 260-265.

<sup>79</sup> For example, see the Tribunal of Inquiry into certain Payments to Politicians and Related Matters ('The Moriarty Tribunal'), established under the Tribunals of Inquiry (Evidence) Act 1921, as adapted by or under subsequent enactments and the Tribunals of Inquiry (Evidence) (Amendment) Act 1979, set up to investigate into payments to politicians, which lasted for a period of 14 years. See also the Tribunal Of Inquiry Into Certain Planning Matters and Payments ('The Mahon Tribunal' and formerly 'The Flood Tribunal'), established under the Tribunals of Inquiry (Evidence) Act 1921, as adapted by or under subsequent enactments and the Tribunals of Inquiry (Evidence) (Amendment) Act 1979, to investigate payments to politicians in the context of planning decisions, which lasted for a period of 15 years. The Tribunal of Inquiry into complaints concerning some Gardaí of the Donegal Division ('The Morris Tribunal') established under the Tribunal of Inquiry (Evidence) Acts 1921-2002 into Certain Gardaí in the Donegal Division lasted for a period of six years. Concerns have been expressed in many Oireachtas debates regarding the considerable length of these tribunals of inquiry, and consequential substantial costs to the State of these three inquiries has been estimated as ranging from € 336 to € 366 million: see Comptroller and Auditor General, Special Report 'Tribunals of Inquiry' (Government Publications, 2008) at p.11. See [www.audgen.gov.ie/documents/vfmreports/63\\_Tribunals\\_of\\_Inquiry.pdf](http://www.audgen.gov.ie/documents/vfmreports/63_Tribunals_of_Inquiry.pdf), last accessed 9 June 2014.

<sup>80</sup> An example of how the constitutional right to one party's good name may result in a statutory inquiry into alleged human rights abuses being struck down by the Courts can be seen in the collapse of the Vaccine Trials Inquiry by the Commission to Inquire into Child Abuse in 2004. On 13 November 2000 the Government requested the Commission to Inquire into Child Abuse to also inquiry into the issue of whether children in institutional care were subject to vaccine trials. The Commission To Inquire Into Child Abuse Act, 2000 (Additional Functions) Order, 2001 ("SI 280/2001") granted the following additional functions to the Commission: (a) to inquire, through the Investigation Committee, into the circumstances, legality, conduct, ethical propriety and effects on the subjects thereof of - (i) the 3 vaccine trials referred to in the report [of the Chief Medical Officer], and (ii) any systematic trials of a vaccine or the mode of delivery thereof to test its efficacy or to ascertain its side effects on a person found by the Investigation Committee to have taken place during the period commencing on 1 January 1940 and ending on 31 December 1987, and to have been conducted in an institution, following an allegation by a person that he or she as a child in the institution was a subject thereof, and (b) to prepare and publish to the general public in such manner and at such time as the Commission may determine a report in writing specifying the determinations made by the Investigation Committee in its report under Article 4 of this Order." However, SI 280/2001 was declared ultra vires by the High Court in *Hillary v The Minister for Education*,

63. The IHRC recommends that if the Committee wishes to pursue the second part of the IHRC 2010 recommendation regarding a comprehensive statutory mechanism to evaluate the implications of State involvement in the Magdalen Laundries (once established) in terms of the State's human rights obligations, to ensure an effective remedy for such persons, it should also address the means by which this can feasibly occur.

64. Addressing the State's Replies to the Committee, the IHRC would note that the IDC "had no remit to investigate or make determinations about allegations of torture or any other criminal offense" and did not make findings of fact.<sup>81</sup>

65. In terms of the State response to the Committee that "[n]o individuals claiming to be victims of criminal abuse in Magdalen laundries have made any complaints or requests to the Department of Justice and Equality seeking further inquiries or criminal investigations", the IHRC regrets that similar responses were previously provided by the State on allegations of rendition flights and suggests a misunderstanding of the positive obligations placed on the State to identify and address human rights violations where it cannot be always expected that victims are aware of mechanisms of complaint or have the physical or psychological ability to present to law enforcement officials.<sup>82</sup> The IHRC also notes that the 2011 Concluding Observations of the Committee Against Torture addressed the issue of impunity of perpetrators of human rights violations in recommending that the State should "in appropriate cases, prosecute and punish the perpetrators with penalties commensurate with the gravity of the offences committed."<sup>83</sup>

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Science and others, Judgment 11 June 2004. Prior to this Judgment and Order, the Supreme Court had granted an Order of certiorari to a person the subject of a Direction to attend before the Commission to Inquire into Child Abuse in the proceedings *Meenan v Commission to Inquire into Child Abuse*, Judgment 31 July 2003. Despite some 877 persons filling in questionnaires for the Commission and an undisclosed number of persons being interviewed by it, with legal representation granted to a number of bodies and discovery of documents resulted in additional information coming to light of other persons affected by the vaccine trials, the inquiry was halted and not recommenced.

<sup>81</sup> See also UN Committee Against Torture, List of issues prior to submission of the Second Periodic Report of Ireland, CAT/C/IRL/Q/2, 2013, at para. 21. See Inter-Departmental Committee, Report of the Inter-Departmental Committee to establish the facts of State involvement with the Magdalen Laundries, Chapter 2: Establishment, membership and mandate of the Committee, at p. xxvii, and see also p. 930 and the Committee's, General Comment No. 31 [80], The Nature of General Legal Obligations Imposed on State Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 2004, at para. 15.

<sup>82</sup> UN Committee Against Torture has queried whether measures have been established to "inform persons confined to the Magdalen Laundries of the possibility of lodging criminal complaints" and whether the State has considered establishing an ombudsperson or representative to assist the alleged victims in lodging complaints. UN Committee Against Torture, List of issues prior to Submission of the Second Periodic Report of Ireland, CAT/C/IRL/Q/2, 2013, at para. 21(d). Moreover, whilst the State may thus bear some level of positive obligation in this regard, it is notable that the eligibility of redress is dependent on the applicant waiving any further right of action against the State and its agencies out of their admission to and work within the Laundries. See *The Magdalen Commission Report of Mr Justice Quirke, On the Establishment of An Ex Gratia Scheme and Related Matters for the Benefit of those who were admitted to and worked in the Magdalen Laundries*, May 2013, p. 13, 8<sup>th</sup> Recommendation.

<sup>83</sup> *Ibid*, at para. 21. A similar recommendation was made in relation to the follow-up to the Ryan report, see para. 20.

## Independent Monitoring of Redress Scheme and Operation of Appeals Process

66. The Committee has sought clarity on how the redress scheme proposed will be monitored by an independent body, and how the appeals process will operate. In its Replies to the Committee's List of Issues, it is stated that the Government decision to provide, on an ex gratia basis, a scheme of payments and benefits for those women who were admitted to and worked in the Magdalen Laundries, and other institutions for women and girls, suffices. The Office of the Ombudsman will provide an independent appeals procedure.<sup>84</sup> The IHRC considers that the State, in order to provide appropriate remedies for women who resided in Magdalen Laundries, should ensure that such remedies refer to an amalgam of compensation, reparation, restitution, rehabilitation, guarantees of non-repetition and/or a public apology.<sup>85</sup>

67. The IHRC has a number of concerns in respect of the redress scheme. First, Mr Justice Quirke's work was "premised on the incomplete investigations carried out by the McAleese Committee".<sup>86</sup> Second, the IHRC has recommended that measures should be put in place to ensure to the greatest extent possible the restitution and rehabilitation of the women. By way of restitution, lost wages and any pension or social protection benefits arising from engaging in compulsory work on an unpaid and unacknowledged basis should be identified and provided to the women concerned. Rehabilitation may take different forms and be delivered through a variety of interventions, such as: housing; pensions; health and welfare; education; and assistance to deal with the psychological effects of time spent in the Laundries.<sup>87</sup> Mr Justice Quirke's report recommends the provision of certain social supports, including access to a medical card and the state pension, but falls short of delivering the range of rehabilitative interventions recommended by the IHRC.

68. Third, the IHRC had recommended that the redress scheme "should provide for individual financial compensation for the impact of the human rights violations concerned".<sup>88</sup> Mr. Justice Quirke's report does not however provide for an individualised

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<sup>84</sup> The State also included: St Mary's Training Centre, Stanhope Street, and House of Mercy Training School, Summerhill, Wexford, UN Human Right Committee, List of Issues in relation to the Fourth Periodic Report of Ireland, Addendum; Replies of Ireland to the List of Issues, CCPR/C/IRL/Q/4/Add.1, 2014, at p. 11.

<sup>85</sup> IHRC, IHRC Follow-Up Report on State Involvement with Magdalen Laundries, June 2013, at p. 110 at para. 286.

<sup>86</sup> Letter from UN Rapporteur to Ireland on Follow Up on Concluding Observation of the UN Committee Against Torture to Mr Gerard Corr, Permanent Representative of Ireland to the United Nations Office at Geneva, 22 May 2013, at p. 3. See [www2.ohchr.org/english/bodies/cat/docs/followup/IrelandFurtherInfo22May2013.pdf](http://www2.ohchr.org/english/bodies/cat/docs/followup/IrelandFurtherInfo22May2013.pdf), last accessed on 27 May 2014.

<sup>87</sup> IHRC, Follow-Up Report on State Involvement with Magdalen Laundries, June 2013, at p. 6.

<sup>88</sup> For instance in assessing potential breaches of the right to liberty the IHRC concluded that the lawfulness of detentions in the Laundries was questionable in a number of respects and "[u]ltimately the circumstance by which each individual woman came to enter and reside in a Magdalen Laundry would have to be assessed to decide whether they were subjected to an unlawful deprivation of their liberty, and

approach to compensation. The amount of compensation received in each case is determined largely by the amount of time spent in the Laundries. Fourth, the IHRC has noted that an important part of the State's response to the Magdalen Laundries issue under domestic and international human rights law is the implementation of legislative and other measures to ensure non-repetition and to ensure structural issues evident in the history of the Magdalen Laundries' treatment of girls and women do not recur. The IHRC made a number of recommendations in this regard, which address the systemic human rights failings illustrated by the history of the Laundries.<sup>89</sup> Thus a redress scheme, whilst necessary, is not in and of itself enough.

69. The fact that the State has not adopted a human rights framework in its approach to the investigation and redress required on the issue has arguably led to the current human rights deficits, which compound the earlier State involvement in the Laundries. This forms part of a wider issue in relation to the State's ability to conduct effective investigations into alleged historic human rights violations and to provide redress where violations are found to have occurred. The effectiveness of the State's response to allegations of violations continues to arise in relation to allegations of human rights abuses occurring at former Mother and Baby homes and the historic use of symphysiotomy in the State (see below).<sup>90</sup>

### **Replacement Mechanism to Ensure Full Implementation of the Ryan Implementation Plan**

70. The Committee has sought clarity in respect of the "Ryan Implementation Plan"<sup>91</sup> and information on the replacement mechanism to ensure the full implementation of the plan, as well as on the number of criminal prosecutions in child abuse cases.

71. The IHRC notes that the fourth and final monitoring report on the Ryan Implementation Plan was due to be published at the end of 2013.<sup>92</sup> It remains outstanding. The third report noted that of the 99 actions detailed in the Plan, implementation of 59 was complete, implementation of 13 was ongoing, and

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what compensation might be merited for same"; IHRC Follow-Up Report on State Involvement with Magdalen Laundries, June 2013, p. 70.

<sup>89</sup> IHRC, Follow-Up Report on State Involvement with Magdalen Laundries, 2013, at pp. 6-8.

<sup>90</sup> The State's response to the deaths of children and babies born to mothers in the Bon Secours 'Mother and Baby' home in Tuam, Co. Galway between 1925 and 1961 is being reviewed by an inter-departmental group. The collapse of the Vaccine Trials Inquiry into children in institutional care is highlighted above.

<sup>91</sup> The Ryan Report Implementation Plan: Third Progress Report, 2012, Prepared by the Ryan Report Monitoring Group.

<sup>92</sup> *Ibid.*, at p. 9.

implementation of 27 was not yet complete.<sup>93</sup> Clearly, a great deal of work remains to be done before “full implementation of all actions contained in the Plan” will be achieved.

72. It is unclear as to the replacement mechanism intended to ensure full implementation of the “Ryan Implementation Plan”. It is recommended that the new mechanism be established prior to the conclusion of the current mechanism and in as short a time as possible, in order to minimise disruption to the work in this area. The IHRC welcomes the State’s recognition of the need for a focus on child protection issues across Departments and Agencies.<sup>94</sup>

72. Although the 1999 “Children First: National Guidelines for the Protection and Welfare of Children” were revised in 2011, they have not been placed on a statutory footing and remain a voluntary code of practice.<sup>95</sup> The IHRC thus welcomes the decision of the State to draft legislation to put elements of “Children First: National Guidelines for the Protection and Welfare of Children” on a statutory footing,<sup>96</sup> noting that this is a key commitment under the Ryan Implementation Plan.

### **Symphysiectomy.**

74. In 2008, the IHRC recommended that the Government reconsider its decision not to establish an external review of the use of symphysiotomy in the State from the 1950s to the 1980s and that consideration be given to introducing Guidelines on the use of the procedure in the State. The IHRC was informed by the Department of Health that the Institute of Obstetricians and Gynaecologists was being asked by the Department to consider the preparation of relevant clinical guidelines and protocols.

75. A report on the use of symphysiotomy in the State was commissioned by Government in June 2011. While a draft report (‘the Walsh Report’) was submitted to the Department for Health in June 2012, a final report has not been published. In November 2013, Government announced the appointment of a Judge to oversee a further process of investigation and consultation on the issue after meeting survivor’s

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<sup>93</sup> Ibid., at p. 10.

<sup>94</sup> UN Human Right Committee, List of Issues in relation to the Fourth Periodic Report of Ireland, Addendum; Replies of Ireland to the List of Issues, CCPR/C/IRL/Q/4/Add.1, 2014, at p.12.

<sup>95</sup> Department of Health and Children, Children First: National Guidelines for the Protection and Welfare of Children, 1999, was superseded by the Department of Children and Youth Affairs, Children First: National Guidance for the Protection and Welfare of Children, 2011. Other child protection codes have been placed on a statutory footing, such as the Protections for Persons Reporting Child Abuse Act 1998, the National Vetting Bureau (Children and Vulnerable Persons) Act 2012 and the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012.

<sup>96</sup> The Children First Bill 2014 (No. 30 of 2014).

groups.<sup>97</sup> The IHRC is concerned that the Government's approach to the issue suffers from a lack of clarity and focus.

76. In line with its recommendations on effective redress mechanisms, it recommends that an effective statutory process be put in place to investigate alleged violations and to provide redress where warranted and that further consideration be given to the preparation of relevant clinical guidelines and protocols by the Institute of Obstetrics and Gynaecologists or similar body. Related to this, the Committee may wish to ask the State how it ensures effective accountability mechanisms in relation to allegations of human rights violations in the field of health.<sup>98</sup>

### **Number of Criminal Prosecutions in Child Abuse Cases**

77. The State, in its Replies to the Committee's List of Issues, provides information in respect of the investigations and prosecutions that have arisen in connection with the Ryan Report. However, the Committee's query is more general in nature, seeking information on the number of criminal prosecutions in child abuse cases and this matter should be addressed by the State.

### **Main Areas of Concern**

- **The IHRC is concerned at the State's failure to establish a systematic data collection procedure and to provide disaggregated statistics on complaints, prosecutions and sentences regarding violence against women.**
- **The IHRC calls on the State to take further legislative action in order to ensure that all women, with particular regard to vulnerable groups of women, have equal access to protection against perpetrators of violence.**
- **The IHRC urges the State to ratify the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence without delay.**

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<sup>97</sup> See Department of Health press release of 26 November 2013, [www.dohc.ie/press/releases/2013/20131126.html](http://www.dohc.ie/press/releases/2013/20131126.html), last accessed 6 June 2014.

<sup>98</sup> Current redress mechanisms in the State focus on the law of negligence and the regulation of medical professionals. Under the Statute of Limitations Acts 1957 - 2000 and the Civil Liability and Courts Act 2004, there is a 2 year limitation imposed on instituting medical negligence proceedings. In its statement on the Walsh Report in 2012, the Institute of Obstetrics and Gynaecologists noted that it acts as an advisory body for professional training and 'does not have power of investigation into obstetric practice and that any of its interventions in hospital practice are for training purposes, rather than for the purpose of regulation of practice': Walsh Report on Symphysiotomy in Ireland: Statement by the Institute of Obstetricians and Gynaecologists, published 13 June 2012, see [www.rcpi.ie/article.php?locID=1.11.30&itemID=87](http://www.rcpi.ie/article.php?locID=1.11.30&itemID=87), last accessed 6 June 2014. Regulation of medical professionals in Ireland is otherwise conducted by the Medical Council of Ireland.

- The IHRC is concerned that the level of public funding and resources provided to domestic violence services is insufficient.
- The IHRC recommends that the State support sustained training and awareness-raising initiatives on the issue of domestic violence amongst public officials, the judiciary, health professionals and members of the public.
- The IHRC is concerned that the recommendation for a prompt, thorough and independent investigation into the alleged abuse perpetrated in the Magdalen Laundries remains unaddressed and is partly caused by the absence of speedy and timely statutory investigative mechanisms.
- The IHRC urges the State to put in place a system of redress for those women who resided in the Magdalen Laundries that provides for individual financial compensation for the impact of the human rights violations concerned and that measures are put in place to ensure to the greatest extent possible the restitution and rehabilitation of the women, as recommended.
- The IHRC urges the implementation of legislative and other measures to ensure structural issues evident in the history of Magdalen Laundries treatment of girls and women do not recur.
- A replacement mechanism should be established as soon as possible to ensure full implementation of the “Ryan Implementation Plan”.
- The IHRC is concerned that the process of investigation into the issue of symphysiotomy has been subject to delay and has not yet been brought to a satisfactory conclusion. The IHRC recommends that an effective statutory process be put in place to investigate alleged violations and to provide redress where warranted and that further consideration be given to the preparation of relevant clinical guidelines and protocols by the Institute of Obstetrics and Gynaecologists or similar body.
- The IHRC calls on the State to provide the Committee with information on the number of criminal prosecutions in child abuse cases.

## CHAPTER 4

### DEROGATION (ARTICLE 4)

78. The Committee has sought further information on measures taken to ensure that the State's domestic legal provisions, including Article 28.3 of the Constitution<sup>99</sup>, are consistent with Article 4 of the ICCPR, as was recommended by the Committee in its 2008 Concluding Observations.<sup>100</sup> The IHRC notes that the State does not accept that any actions taken in the context of a national emergency, and which derive from Article 28 of the Constitution, have been disproportionate to the nature of the threat faced by the State at that time and/or incompatible with the ICCPR.<sup>101</sup>

79. The IHRC is concerned that there is disparity between Article 28.3 of the Constitution and the requirements of Article 4 (as detailed in General Comment 29) in respect of legislation passed in time of war or armed rebellion. In particular, the Committee has pointed out that before a State moves to invoke Article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency.<sup>102</sup> However, in the Supreme Court decision in *Re Article 26 and the Emergency Powers Bill 1976*,<sup>103</sup> it was held that the Oireachtas need not pass a resolution declaring a national emergency before enacting legislation for the purpose of securing public safety and the preservation of the State in the time of war or armed rebellion.<sup>104</sup>

80. The IHRC is also concerned that there are no limitations under Article 28.3 of the Constitution to ensure that any measures adopted are proportionate in terms of duration,

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<sup>99</sup> Article 28.3 of the Constitution grants the Oireachtas special powers in the event of a time of war, armed rebellion and armed conflict in which the State is not a participant.

<sup>100</sup> UN Human Rights Committee, Concluding Observations on Ireland's Third Periodic Report, CCPR/C/IRL/CO/3, 2008, at para. 12.

<sup>101</sup> UN Human Rights Committee, List of issues in relation to the fourth periodic report of Ireland: Replies of Ireland to the list of issues, CCPR/C/IRL/Q/4/Add.1, 2014, at para. 11.64.

<sup>102</sup> UN Human Rights Committee, General Comment 29, States of Emergency, Article 4, UN Doc.CCPR/C/21/Rev.1/Add.11, 2001, at para. 2.

<sup>103</sup> In the matter of Article 26 of the Constitution and in the matter of the Emergency Powers Bill 1976 [1977] 1 I.R., pp. 159-176.

<sup>104</sup> Where, however the legislation was enacted for the purpose of securing public safety and the preservation of the State in respect of an armed conflict in which the State was not a participant, such a resolution must be passed by the Houses of the Oireachtas.

geographical coverage and material scope, which is not in accordance with Article 4.<sup>105</sup> Furthermore, IHRC is concerned that, while the Twenty-First Amendment of the Constitution Act 2001 prevents the reintroduction of the death penalty, there are no other rights which are protected from the emergency powers of the Oireachtas under Article 28.3.

81. Finally, as noted, General Comment 29 suggests that while the rights contained in Article 10 paragraph 2 of the ICCPR are not separately mentioned in Article 4 paragraph 2, they are rights which express a general norm of international law not subject to derogation and should not be subjected to a reservation.<sup>106</sup>

### **Main Areas of Concern**

- **The IHRC is concerned that Article 28.3 of the Constitution in its current form could allow derogations from rights which are specified as non-derogable under the ICCPR.**
- **The IHRC is concerned that there are no limitations imposed on the lifespan of legislation enacted under Article 28.3 of the Constitution.**

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<sup>105</sup> UN Human Rights Committee, General Comment 29, States of Emergency, Article 4, UN Doc.CCPR/C/21/Rev.1/Add.11, 2001, at para. 4. 4. The 1996 Constitution Review Group recommended that there should be a limit on the period for which the legislation passed under this Article can continue without review by the Oireachtas. See Report of the Constitution Review Group (Pn 2632), May 1996, at p 84. At <http://archive.constitution.ie/publication/default.asp?UsLang=EN> , accessed on 27 May 2014.

<sup>106</sup> UN Human Rights Committee, List of issues in relation to the fourth periodic report of Ireland: Replies of Ireland to the list of issues, CCPR/C/IRL/Q/4/Add.1, 5 May 2014, at para 2.3.

## CHAPTER 5

### RIGHT TO LIFE AND FREEDOM FROM CRUEL, INHUMAN OR DEGRADING TREATMENT AND PRIVACY (ARTICLES 6, 7 AND 17)

#### The Protection of Life During Pregnancy Act 2013

82. The Committee has sought information on how the Protection of Life During Pregnancy Act 2013 is in compliance with Articles 6 and 7 of the ICCPR and the Committee's previous recommendations.

83. Under the ICCPR, and other international conventions to which the State is a party, the State's margin of discretion in formulating its laws as it considers appropriate on the issue of abortion is recognised. This is provided that any restrictions relating to how a lawful abortion (i.e. as permitted under domestic law) can be obtained are justifiable and do not totally impair the woman's human rights including the right to life and freedom from torture or cruel, inhuman or degrading treatment or punishment.<sup>107</sup>

84. In its 2008 Concluding Observations on Ireland, the Committee expressed concern at what it then regarded as "highly restrictive circumstances under which women can lawfully have an abortion in the State party" and recommended that the State "bring its abortion laws into line with the Covenant" including taking "measures to help women avoid unwanted pregnancies so that they do not have to resort to illegal or unsafe abortions that could put their lives at risk (article 6) or to abortions abroad (articles 26 and 6)".<sup>108</sup>

85. Since 2008, the European Court of Human Rights ("the ECtHR") has considered Ireland's abortion laws under the Convention, in the 2010 case of *A, B and C v Ireland*<sup>109</sup>, and the Committee Against Torture in 2011 urged Ireland "to clarify the scope of legal abortion through statutory law".<sup>110</sup> In *A, B and C*, the ECtHR afforded the State a wide "margin of appreciation" in the balance it sought to strike between providing constitutional protection for the "unborn" and in seeking to vindicate the personal rights of the mother. The ECtHR found no violation in respect of Applicants A and B, where they felt compelled to travel to the United Kingdom to obtain an abortion for reasons

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<sup>107</sup> See UN Human Rights Committee, Concluding Observations on Ireland's Third Periodic Report, CCPR/C/ILR/CO/3, 2008, at para.13; see UN Committee Against Torture, Concluding Observations on Ireland's Initial Report, CAT/C/IRL/CO/1, 2011, at para. 26. See also *LMR v Argentina*, Communication No.1608/2007, CCPR/C/101/D/1608/2007, 2011.

<sup>108</sup> UN Human Rights Committee, Concluding Observations on Ireland's Third Periodic Report, CCPR/C/IRL/CO/3, 2008, at para.13.

<sup>109</sup> Application No. 25579/05, Judgment of 16 December 2010.

<sup>110</sup> UN Committee Against Torture, Concluding Observations on Ireland's Initial Report, at para. 26.

described by the ECtHR as pertaining to their health and well-being.<sup>111</sup> The ECtHR, however, found a violation in respect of Applicant C, who was in remission from cancer and who had also travelled to the United Kingdom for an abortion. In relation to Applicant C, the ECtHR considered that in respect of Article 8 (right to respect for private and family life) the legal framework in place allowing for abortions under certain restricted circumstances was unclear and lacked certainty from the perspectives of both pregnant women and medical practitioners.<sup>112</sup>

86. In response to this Judgment, and following the report of an expert group and extensive Parliamentary hearings, the Government enacted the Protection of Life During Pregnancy Act 2013. The 2013 Act was introduced to address the ruling of the ECtHR, while remaining within the constitutional parameters of Article 40.3.3 (the right to life of the “unborn”). The IHRC published its Observations on the Protection of Life During Pregnancy Bill 2013 prior to its enactment in which it assessed the proposed legislation against the standards set out in the Constitution and international human rights standards including the ICCPR.<sup>113</sup> The IHRC does not propose, in this shadow report, to re-state in detail its Observations to the then Bill, but rather will focus on the main areas where there may continue to be deficits under the ICCPR. In doing so, it draws attention to the fact that if the State had introduced legislation which ran counter to the right to life of the “unborn” under Article 40.3.3, the legislation would not have survived scrutiny by the Irish courts. The State was thus constrained in its approach to the A, B and C Judgment and indeed the 2008 Committee’s Concluding Observations, absent constitutional amendment.

### **Right of Access to Understandable Information to Exercise Rights**

87. In its 2013 Observations, the IHRC noted that Sections 7 and 9 of the 2013 Act allow for the carrying out of a medical procedure in respect of a pregnant woman in the course of which, or as a result of which, an unborn human life is ended, in circumstances where the pregnant woman’s life is at “real and substantial risk” and the medical procedure is the only means of averting that risk. Section 7 concerns the risk of loss of life from physical illness and section 9 concerns the risk of loss of life from suicide.<sup>114</sup> This would appear to conform in general terms to the constitutional right to life afforded to both the pregnant woman and the unborn under Article 40.3.3 of the Constitution, as

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<sup>111</sup> The Court found there was no violation of Article 8 (right to respect for private life) finding that the State had struck a fair balance between A and B in terms of their respect for their private lives and the rights invoked on behalf of the unborn, *A, B and C v Ireland*, at paras. 241-242.

<sup>112</sup> *Ibid.*, at paras. 250-268.

<sup>113</sup> Irish Human Rights Commission, *Observations on the Protection of Life During Pregnancy Bill 2013*, July 2013. See [www.ihrc.ie/publications/list/ihrc-observations-protection-of-life-during-pregna/](http://www.ihrc.ie/publications/list/ihrc-observations-protection-of-life-during-pregna/), last accessed 28 May 2014.

<sup>114</sup> *Ibid.* Section 8 of the Act concerns the risk of loss of life from physical illness in an emergency but is not considered in detail in these submissions.

interpreted by the Supreme Court in the X case.<sup>115</sup> However, there is a risk of a lack of clarity for women seeking effective access to the medical procedures referred to in sections 7 and 9 insofar as both sections are silent as to how the certification of medical practitioners will come about or be triggered. It appears that this will be a matter of medical practice. In its 2013 Observations, the IHRC recommended the provision of clear, comprehensive and authoritative guidance as to what constitutes “real and substantial risk”. In particular, the ability of women or girls from ethnic or non-English speaking backgrounds and women with intellectual disabilities to access medical services needs to be clear, including a clear expression of the supports available to them. The Committee may wish to ask the State how the question of one’s entitlement to a “lawful abortion” can be identified under the procedures set out under sections 7 to 9 and under the review procedures set out in sections 10 to 14 of the 2013 Act.

### **Limits to a “lawful abortion”**

88. The Act does not provide for access to a lawful abortion in the following circumstances: the pregnancy poses a risk to the health, as opposed to the life, of the pregnant woman; the pregnancy is the result of a crime, such as rape or incest; cases of fatal foetal abnormalities; or where it has been established that the foetus will not survive outside the womb. In its 2013 Observations, the IHRC noted how Section 22 replaces sections 58 and 59 of the Offences Against the Person Act 1861 with a new unified offence of intentionally destroying unborn human life. A prosecution for an offence under this section may be brought only by or with the consent of the Director of Public Prosecutions. The IHRC accepts the State’s view that the Act is unable to include provision for an abortion in cases of fatal foetal abnormality on foot of the current constitutional position.<sup>116</sup> This is also so in relation to rape unless the woman or girl involved can come within the risk to life requirements of sections 7 to 9. The Committee may wish to ask the State whether and if so, how, it proposes to align the constitutional and ICCPR positions and whether it is expected that the DPP will promulgate guidelines as to the factors that will be taken into account in deciding when a prosecution should be initiated by her Office under the relevant provisions of the 2013 Act.<sup>117</sup>

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<sup>115</sup> The Attorney General v X [1992] 1 IR 1 (“the X case”). The Supreme Court in this case found that under Article 40.3.3 of the Constitution a termination of the life of an unborn is only permissible where there is a “real and substantial” risk to the life, as opposed to the health, of the pregnant woman that can only be avoided by the termination of her pregnancy. In the years following the X case, no legislation regulating this issue was enacted by the State.

<sup>116</sup> IHRC, Observations on the Protection of Life During Pregnancy Bill 2013, 2013, at para. 112.

<sup>117</sup> IHRC, Observations on the Protection of Life During Pregnancy Bill 2013, 2013, at paras 104 and 116.

## Main Areas of Concern

- The IHRC recommends that clear, comprehensive and authoritative guidance as to what constitutes “real and substantial risk” should be provided to allow women and girls, particularly those from ethnic or non-English speaking backgrounds and with intellectual disabilities, to access medical services through appropriate supports.
- The IHRC recommends dialogue between the State and the Committee in relation to possible discrepancies between the 2013 Act and the provisions of the ICCPR in respect of situations where a pregnancy poses a risk to the health as opposed to the life of the pregnant woman, the pregnancy is the result of a crime, such as rape or incest, there is established fatal foetal abnormalities, or where it is established that the foetus will not survive outside the womb.

## CHAPTER 6

### RIGHT TO LIBERTY AND SECURITY OF THE PERSON, PROHIBITION OF TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, AND TREATMENT OF PERSONS DEPRIVED OF THEIR LIBERTY, AND FAIR TRIAL (ARTICLES 7, 9, 10, 14 and 24)

89. The Committee has sought updated information on the number of prisoners accommodated in each of the prisons in the State vis-a-vis the maximum capacity for each prison outlined by the Inspector of Prisons May 2013 Report; those without in-cell sanitation; the mortality rate in prisons; the number of victims (dead and injured) harmed by inter-prisoner violence; and the timeline for ending the use of St. Patrick's Institutions for the detention of minors.<sup>118</sup>

#### Overcrowding and "slopping out"

90. The IHRC has consistently expressed concern about overcrowding and the practice of "slopping out" in Irish Prisons.<sup>119</sup> The problems of overcrowding and the physical conditions in the State's prisons' are ongoing for in excess of 20 years.<sup>120</sup> In its Replies to the List of Issues,<sup>121</sup> the State's statistics point to the fact that of the 15 prisons identified, 8 prisons had more prisoners in custody than there were beds to provide for these prisoners.<sup>122</sup> While certain improvements have been made by the State, improvements in the system generally occur slowly.

91. Moves towards the development of non-custodial sanctions include the Criminal Justice (Community Service) (Amendment) Act 2011, introduced to promote the increased use of community sanctions as an alternative to imprisonment, are

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<sup>118</sup> UN Human Right Committee, List of Issues in relation to the Fourth Periodic Report of Ireland, 22 2013, at para. 13. D.

<sup>119</sup> See most recently for example, IHRC, Submission for the Twelfth Session of the Working Group on the Universal Periodic Review: Ireland, 2011, para. 17.

<sup>120</sup> In a report on its visit in 1993, the European Committee for the Prevention of Torture expressed concern about the extent of overcrowding in Irish Prisons and the practice of slopping-out and recommended that both issues be dealt with as a "matter of priority". See Council of Europe, Report to the Irish Government on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) October, 1993, CPT/Inf (95) 14, 1995, at paras 98-101. Similarly, the UN Committee Against Torture recommended in its Concluding Observations in 2011, that the State put in place specific timeframes for the construction of the new prison facilities. See UN Committee Against Torture, Concluding Observations on Ireland's Initial Report, CAT/C/IRL/CO/1/2011, at para. 11(a).

<sup>121</sup> UN Human Rights Committee, List of issues in relation to the Fourth Periodic Report of Ireland: Replies of Ireland to the List of Issues, CCPR/C/IRL/Q/4/Add.1, 2014, Annex A, Table 3.

<sup>122</sup> See Inspector of Prisons, An Assessment of the Irish Prison System, 20 May 2013, at Chapter 2; and Inspector of Prisons, Report on an Inspection of Limerick Prison by the Inspector of Prisons, Judge Michael Reilly, 25 November 2011, at Chapter 3.

welcomed.<sup>123</sup> Furthermore, the State has initiated the development of a strategy: Unlocking Community Alternatives – A Cork Approach, to address overcrowding and accommodation in Cork prison.<sup>124</sup> Furthermore, the IHRC welcomes the Report on Penal Reform carried out by the Joint Oireachtas Committee on Justice, Defence and Equality wherein it was recommended that the Government adopt a “de-carceration strategy”<sup>125</sup> which would aim to reduce the prison population by one-third within 10 years. The Committee may wish to ask the State if it endorses the “decarceration strategy” identified by the Joint Oireachtas Committee as central to its penal policy and if so, what practical steps it plans to that end.

## **Mortality Rate and Inter-prisoner Violence**

92. The level of inter-prisoner violence remains of concern.<sup>126</sup> The detail provided by the State to the Committee in terms of deaths in custody and assaults appears to be lacking. In this regard, it is noted that the State detailed that since 2008, there have been 50 deaths in custody and that the cause of death has been established in 31 of those cases.<sup>127</sup> While statistics are provided in relation to the causes of death and on prisoner assaults committed between 2011 and 2013<sup>128</sup> (full figures are not provided for 2013), there is no categorisation of this data with respect to the institution in which the assaults occurred, the type of assaults, the perpetrator(s) of the assaults, whether the victims are of minority status and the investigation/ prosecution of the assaults. In a 2010 report into the investigation of deaths in custody, the Inspector of Prisons expressed the view that internal investigations did not meet the standards of international best practice and were neither robust, independent nor transparent.<sup>129</sup>

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<sup>123</sup>The Criminal Justice (Community Service) (Amendment) Act 2011 requires the court to first consider the use of a Community Service Order (CSO) as a sanction for minor offences where the offender would otherwise receive a sentence of up to 12 months imprisonment.

<sup>124</sup> UN Human Rights Committee, Ireland’s Fourth Periodic Report under the ICCPR, CCPR/C/IRL/4, 2012, at para. 2, 361-364.

<sup>125</sup> Joint Oireachtas Committee on Justice, Defence and Equality, Report on Penal Reform, 31/JDAE/009, 2013, at p. 9. The Committee recommended that: (a) sentences for non-violent offences of less than six months be commuted to community service orders, (b) standardised remission of sentences be increased from one-quarter to one-third of a prisoner’s sentence with an incentivised remission scheme of up to half a prisoner’s sentence for certain categories of offenders; (c) legislation be introduced for structured release, temporary release, parole and community return; and (d) address prison conditions and overcrowding and increase the use of open prisons.

<sup>126</sup> The IHRC has previously expressed concern regarding inter-prisoner violence. See for example, IHRC, National Human Rights Institution Submission to the UN Committee Against Torture on the Examination of Ireland’s First National Report, 2011, at paras 90-92.

<sup>127</sup> UN Human Rights Committee, List of Issues in Relation to the Fourth Periodic Report of Ireland; Replies of Ireland to the List of Issues, CCPR/C/IRL/Q/4/Add.1, 2014, Annex I, Table 5. It would appear from the State’s Replies that harm was not inflicted in each of the assaults detailed in the statistics however again, no breakdown or detail is given on the numbers provided.

<sup>128</sup> Ibid., at Annex I, Table 6.

<sup>129</sup> See Inspector of Prisons, Guidance on Best Practice Relating to the Investigation of Deaths in Prison Custody, 2010, at para. 4.4.

93. In 2012, the Minister for Justice and Equality announced that the death of any prisoner in the custody of the Irish Prison Service should be the subject of an independent investigation by the Inspector of Prisons. While welcoming the extension of the remit of the Inspector of Prisons, the IHRC would urge the State to ensure that the Inspector has the appropriate statutory powers to allow him or her to discharge this role effectively and in accordance with the State's obligations under the ICCPR, including the procedural obligations on the State most fully articulated by the European Court of Human Rights under its Article 2 jurisprudence. In addition, in discharging this role, the Inspector of Prisons should be afforded adequate resources and powers.<sup>130</sup>

94. The report of a Commission of Investigation into the death of Gary Douch (2006 death in custody) was published on 1 May 2014 and underlines the IHRC's concerns about the delays inherent in the State's investigative mechanisms.<sup>131</sup> The IHRC had previously called for the publication of the report and the implementation of any recommendations therein and regrets the length of time the publication has taken.<sup>132</sup> The Committee may wish to ask the State as to the implementation of the Protocol's recommendations in the report.<sup>133</sup>

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<sup>130</sup> Inspector of Prisons, *An Assessment of the Irish Prison System*, May 2013, para. 7.11. Since the Inspector of Prisons's remit was extended to include the power to investigate deaths in custody, the office has published reports on 16 deaths in custody. The reports are available at [www.inspectorofprisons.gov.ie/en/IOP/Pages/Death\\_in\\_Custody\\_Reports](http://www.inspectorofprisons.gov.ie/en/IOP/Pages/Death_in_Custody_Reports), last accessed 12 May 2014.

<sup>131</sup> Department of Justice, *The Report of the Commission of Investigation into the Death of Gary Douch*, 1 May 2014. Gary Douch was an inmate in Mountjoy Prison when he suffered a fatal assault on 1 August 2006. Another inmate was subsequently convicted of manslaughter by reason of diminished responsibility in respect of the death. The Commission found that "overcrowding in Mountjoy Prison completely undermined the ability of the prison to respond in a meaningful and safe way to Gary Douch's request for protection"; and the conditions in the relevant part of the prison at that time were stated to be "appalling and unacceptable", at p. 25.

<sup>132</sup> IHRC, *National Human Rights Institution Submission to the UN Committee Against Torture on the Examination of Ireland's First National Report, 2011*, at p. 6.

<sup>133</sup> The Commission made the following recommendations relating to deaths in custody: (a) A protocol to be followed in the event of the sudden and unexpected death of a prisoner and incorporating best practice guidance should be drawn up within three months of the date of publication of this report. (b) The protocol should require that at a minimum two prison officers, (or delegated persons such as a member of the Gardaí and a Prison Chaplain if there is a perceived risk to prison officers attending the home of the next of kin) of whom one must be at senior management level, should travel to the home of the next of kin to inform them immediately of the death or risk of death and accompany that person or persons to the hospital or prison as the case may be. The protocol should require that a suitably qualified person, preferably a social worker be appointed to act in a supportive role to advise and assist the family to cope with the sudden death, and to act as a liaison between the bereaved family and the authorities. See *The Report of the Commission of Investigation into the Death of Gary Douch*, 1 May 2014, at p. 50.

## St. Patrick's Institution for the Detention of Minors

95. The IHRC notes that new facilities for the detention of minors are being constructed on the existing campus at Oberstown in Lusk, Co. Dublin. In addition, the State has outlined how 16 year old males are now being remanded/ committed to the Oberstown Campus.<sup>134</sup> From July 2012, the Ombudsman for Children's remit has been extended to include 16 and 17 years old males detained in St. Patrick's Institution, until all detention there has been ceased.<sup>135</sup>

96. The Committee may wish to ask the State to identify specifically the timeline for ending the use of St. Patrick's Institution for the detention of minors. The IHRC is concerned about the detention of minors in "Wheatfield Place of Detention" as this facility also houses adult prisoners. It is noted that Rule 69(1) of the Prison Rules 2007 which provides for separate accommodation for children from adults is only "as far as practicable and subject to the maintenance of good order and safe and secure custody"<sup>136</sup> and the IHRC would urge for its amendment to unequivocally state that juveniles be separated from adults in all cases, except where it is in the best interests of the child.

## Complaints

97. The Committee has sought statistics on complaints, investigations and prosecutions of torture and ill-treatment filed against prisons officers and any convictions arising.<sup>137</sup> The Committee also sought clarification of the steps taken in the establishment of a mechanism to investigate complaints against prison staff.<sup>138</sup>

98. A new complaints model provides for four categories of complaints. Category A Complaints relate to the most serious level of complaints and the procedure for such complaints was introduced on 1 November 2012. Any such complaints may on a

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<sup>134</sup> It is noted that in Ireland's Fourth Periodic Report under the ICCPR, CCPR/C/IRL/4, 2012, it is stated that this is the case as of 1 May 2012, at para. 518. While in the Replies to the List of Issues, the State advises that as of July 2012, "no 16 year old boy has been detained in an adult prison", at para. 80. The Annual Report of the Irish Prison Service, 2013, states that from May 2012 all 16 year old boys have been detained in the Children Detention Facilities in Oberstown, at p.1.

<sup>135</sup> Ireland's Fourth Periodic Report under the ICCPR, CCPR/C/IRL/4, 2012, at para. 518.

<sup>136</sup> Irish Prison Rules, S.I. 252 of 2007.

<sup>137</sup> UN Human Rights Committee, List of issues in relation to the Fourth Periodic Report of Ireland, CCPR/C/IRL/Q/4/, 2014, at para. 14.

<sup>138</sup> UN Human Rights Committee, List of issues in relation to the Fourth Periodic Report of Ireland, CCPR/C/IRL/Q/4/, 2014, at para. 14. Also the UN Committee Against Torture in its Concluding Observations on Ireland's Initial Report on the Convention Against Torture, CAT/C/IRL/CO/1, 2011, also recommended that "an independent and effective complaint and investigation mechanism to facilitate the submission of complaints by victims of torture and ill-treatment by prison staff and ensure that in practice complainants are protected against any intimidation or reprisals as a consequence of the complaints", at para. 18.

discretionary basis be investigated by external investigators on behalf of the Irish Prison Service and 79 such complaints have been lodged since 1 November 2012.<sup>139</sup> The procedures for other categories of complaints as detailed in the State report have not yet been introduced and the State has not provided statistics relating to complaints made by prisoners, which fall outside the boundaries of Category A.<sup>140</sup>

99. While welcoming as an improvement the introduction of a prisoner complaints model and the oversight of the mechanism by the Inspector of Prisons, the IHRC notes it does not provide a fully independent system for dealing with serious prisoner complaints and as such the IHRC would recommend that an independent Prisoner Ombudsman be established to investigate complaints by prisoners, rather than the Irish Prison Service, with limited oversight by an external authority.<sup>141</sup>

100. On the broader question of the protection of the rights under Articles 7 and 10 of the ICCPR, the IHRC, as previously recommended, would urge the State to ratify the Optional Protocol to the UN Convention Against Torture (the OPCAT). This would require the State to establish a national preventative mechanism in relation to all places of detention. While the Government indicated at its Universal Periodic Review examination that it will bring forward an Inspection of Places of Detention Bill, this has not yet occurred. Sufficient resources would need to be ring-fenced in the body or bodies designated under OPCAT and it would need to be structurally independent of the Executive.

### **Separation of sentenced and remand prisoners, and of detained immigrants from criminal prisoners**

101. The IHRC has previously addressed the Committee on its concerns regarding the State's failure to separate remand and sentenced prisoners.<sup>142</sup> Rule 71 of the Prison Rules 2007 only requires the separation of these categories of prisoners "in so far as is practicable".<sup>143</sup> As noted, the State has refused to remove its reservation to Article 10(2). While the IHRC welcomes recent initiatives, it is concerned at the delay in fully achieving this goal and the consequent impact on the rights of remand prisoners.

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<sup>139</sup> UN Human Rights Committee, List of issues in relation to the Fourth Periodic Report of Ireland: Replies of Ireland to the List of Issues, CCPR/C/IRL/O/4/Add.1, 2014, Annex I, Table 7.

<sup>140</sup> The State has committed to having the complaints model fully established during the current Three Year Strategic Plan of the Irish Prison Service, due to end in April 2015.

<sup>141</sup> In this regard, the IHRC notes that the Commission of Investigation into the Death of Gary Douch has also recommended the establishment of a Prisoner Ombudsman Report of the Commission of Investigation into the Death of Gary Douch, Vol. 1, at p. 79.

<sup>142</sup> IHRC, Submission to the UN Human Rights Committee on Ireland's 1 Year Follow-Up to its Third Periodic Report under the ICCPR, 2009, at paras. 5, 10-12.

<sup>143</sup> Irish Prison Rules, S.I. 252 of 2007, Rule 71.

102. In relation to the detention of migrants, the IHRC reiterates its recommendation that detention of asylum seekers is to be avoided and should always be a measure of last resort.<sup>144</sup>

### **Access to Counsel before Interrogation**

103. The IHRC has previously addressed its concerns on this issue to the Committee in light of the rules of evidence introduced under the Criminal Justice Act 2007.<sup>145</sup> Following the recent welcome Supreme Court ruling in *DPP v Gormley*<sup>146</sup> on non self-incrimination, the Department of Justice issued a circular to the Law Society, advising solicitors that they can now attend interviews with their clients, during interview.<sup>147</sup> The Committee may wish to ask the State Party if it intends to place this right on a statutory footing to ensure that it is properly protected.

### **Corporal Punishment of Children**

104. The IHRC notes that the Children First Bill 2014 which will codify parts of the Children First: National Guidance for the Protection and Welfare of Children (2011) is in the process of being passed through the Houses of the Oireachtas. However, there remains no express statutory prohibition on the use of corporal punishment in all settings, public and private. The common law defence of reasonable and moderate chastisement remains part of Irish law.<sup>148</sup>

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<sup>144</sup> IHRC, Further submission on the Examination of Ireland's Third Periodic Report in relation to the List of Issues, 2008, at para. 29.

<sup>145</sup> IHRC, Submission to the UN Human Rights Committee on the Examination of Ireland's Third Periodic Report under the ICCPR, 2008, at paras. 69-73.

<sup>146</sup> *DPP v Gormley* [2014] IESC 17. The Supreme Court held, in this case, that "the entitlement not to self-incriminate incorporates an entitlement to legal advice in advance of mandatory questioning of a suspect in custody" and, further, that "the right to a trial in due course of law encompasses a right to have early access to a lawyer after arrest and the right not be interrogated without having had an opportunity to obtain such advice. The conviction of a person wholly or significantly on the basis of evidence obtained contrary to those constitutional entitlements represents a conviction following an unfair trial process"; at para. 9.13.

<sup>147</sup> The Law Society also stated that the Director of Public Prosecutions recently issued a direction to the Garda Síochána about the attendance of solicitors during interviews in Garda stations. As a result of this direction, where a request is made by a suspect who is detained in a Garda station to have his or her solicitor present during an interview, a solicitor will be allowed to attend; see <http://blackhall.newsweaver.ie/gs3exor63n71bejcfacxqf?email=true&a=11&p=47219485>, last accessed 10 June 2014.

<sup>148</sup> The European Social Committee of Social Rights has found that Ireland is in breach of Article 17 of the European Social Charter due to its failure to prohibit corporal punishment of children, *World Organisation Against Torture v Ireland* (Complaint No 18 of 2003). See

## Extraordinary Rendition

105. The Committee has sought further information on the specific and concrete steps taken, beyond official assurances, to ensure that aircrafts used for the purpose of extraordinary rendition, whether they carry prisoners or on board, or not, do not pass through the territory of the State and what measures are taken to investigate past allegations concerning the use of the State party's territory for the purpose of extraordinary rendition flights. This refers to the IHRC's 2007 review report into the matter.<sup>149</sup> The IHRC expressed the view that a complaint-reactive mechanism, which is the current practice in Ireland, is insufficient to discharge the State's human rights obligations and recommended the establishment of a monitoring and inspection regime and for the State to ratify OPCAT.<sup>150</sup>

## Detention of Voluntary Patients in Psychiatric Institutions

106. The Committee has sought detailed information of the number of so-called voluntary patients who have been detained under s. 23 and 24 of the Mental Health Act 2001 during the reporting period. It is further noted that the Department of Health has initiated a review of the Mental Health Act 2001 ("the 2001 Act") through the appointment of an Expert Group.<sup>151</sup>

107. The definition of a voluntary patient under the 2001 Act is not sufficiently precisely drawn to protect the right to liberty of all persons, including compliant but incapacitated and who might be admitted to an approved centre on a "voluntary" basis.<sup>152</sup> Such

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<http://hudoc.esc.coe.int/esc2008/document.asp?item=5>, last accessed 12 May 2014. See also *Association for the Protection of all Children v Ireland* (93/2013). See also UN Committee on the Rights of the Child, Concluding Observations on Ireland's Second Periodic Report under the CRC, CRC/C/IRL/CO/2, 2006, at paras 39 and 40. During the Universal Periodic Review, two recommendations were made that Ireland should explicitly prohibit corporal punishment in the family, and take action on the recommendations of the CRC. Report on the Working Group, Universal Periodic Review of Ireland, A/HRC/19/9, 2011, at paras 106.10, 107.41 and 107.42.

<sup>149</sup> IHRC, *Extraordinary Rendition: A Review of Ireland's Human Rights Obligations*, December 2007. See also IHRC, *Resolution in Relation to Claims of US Aircraft Carrying Detainees*, 2005.

<sup>150</sup> See also Committee Against Torture Concluding Observations of 2011.

<sup>151</sup> See Ireland's Fourth Periodic Report under the ICCPR, CCPR/C/IRL/4, 2012, at para. 344, where it is noted that a human rights based review of the Mental Health Act 2001, will be undertaken; and UN Human Rights Committee, List of issues in relation to the Fourth Periodic Report of Ireland: Replies of Ireland to the List of Issues, CCPR/C/IRL/Q/4/Add.1, 2014, at para. 108, where it is noted that the review of the legislations will conclude shortly. The report of the Expert Group, on which the IHRC sits, is not yet finalised.

<sup>152</sup> Under the 2001 Act, voluntary patients do not have their admission to an approved centre independently reviewed on the basis that they are not being detained against their will and have given consent to their treatment. The view was that in such circumstances, the voluntary patient does not need

patients fall outside the procedural protections for involuntary patients set up under the Act, in the form of periodic reviews of their detention in an approved centre.<sup>153</sup> It is unclear whether the Assisted Decision-Making (Capacity) Bill 2013, will rectify the situation insofar as it appears incompatible with Article 16 ICCPR and in addition to Article 12 CRPD. In this regard the legislation may be construed as permitting the restriction and/or denial of legal capacity on the basis of a functional assessment of mental/decision-making capacity.

## Persons with Intellectual Disabilities

108. In its 2002 report on Ireland, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") expressed concern at the de-facto detention of "so-called voluntary residents" with an intellectual disability and recommended "that the legal situation of persons placed in intellectual disability facilities be reviewed as a matter of urgency and that action be taken with a view to providing a comprehensive legal framework for such institutions, offering an adequate range of safeguards to persons placed in them".<sup>154</sup> In 2003, the Government formally responded to the CPT's Report and referred to the commitment in its 2001 National Health Strategy to complete the overall transfer of persons with an intellectual disability from psychiatric hospitals not later than 2006.

109. Following its 2010 visit, the CPT regretted that no such legal framework was yet in place for "voluntary" residents and recommended again, that the Irish authorities "take the necessary steps to ensure that all residents in institutions for persons with learning disabilities benefit from an adequate range of safeguards".<sup>155</sup> According to 2013 statistics, persons with intellectual disabilities continued to reside in Irish psychiatric units and hospitals under the unsatisfactory "voluntary" and "involuntary" categories.<sup>156</sup> In

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an independent review of detention to protect his/her right to liberty. See IHRC, Policy Paper concerning the Definition of a "Voluntary Patient" under section 2 of the Mental Health Act, 2001, 2010, at p. 3.

<sup>153</sup> In *EH v St. Vincent's Hospital and Others* [2009] IESC 46, per Justice Kearns, the Supreme Court considered the meaning of "voluntary patient" as defined in section 2 stating: "the terminology adopted in s. 2(1) of the Act of 2001 ascribes a very particular meaning to the term "voluntary patient". It does not describe such a person as one who freely and voluntarily gives consent to an admission order. Instead the express statutory language defines a "voluntary patient" as a person receiving care and treatment in an approved centre who is not the subject of an admission order or a renewal order. This definition cannot be given an interpretation which is contra legem."

<sup>154</sup> CPT, Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, from 20 to 28 May 2002, at para. 94.

<sup>155</sup> CPT, Report to the Government of Ireland on the Visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, from 25 January to 5 February 2010, at paras 151-152.

<sup>156</sup>The Irish Psychiatric Units and Hospitals Census 2013 states that, on the night of census, there were 161 patients diagnosed with intellectual disabilities residing in Irish psychiatric units and hospitals. Of that

its 2010 report into intellectual disability centres, the IHRC recommended that the Government ratify the CRPD and enact capacity legislation without delay but that it also underpin these initiatives with clear rights-based protections for persons with intellectual disabilities which include enforceable codes of practice concerning assessment of one's capacity and adequate funding protocols to ensure the dignity of each individual based on the person's needs.<sup>157</sup>

### **The Use of Physical Restraint and Seclusion in Mental Health Facilities/Institutions**

110. The Committee requested information on how the State intends to improve conditions in mental health facilities and compliance by mental health institutions with the Code of Practice on the Use of Physical Restraint in Approved Centres and the Rules Governing the Use of Seclusions.

111. In its Annual Report for 2012 (the 2012 Report), the Mental Health Commission stated that "[t]he extent of the continued usage of seclusion and physical restraint is unacceptable.<sup>158</sup> It is noted in 2012 Report that full compliance with the Rules Governing the Use of Seclusion was achieved by just 29% of approved centres.<sup>159</sup> In relation to the Rules Governing the Use of Mechanical Means of Bodily Restraint, the Commission noted that compliance fell from 75% of approved centres in 2011 to 57% in 2012.<sup>160</sup> Finally, with regard to the compliance with the Code of Practice on the Use of Physical Restraint in Approved Centres, this was reported at 48% in 2012.<sup>161</sup> The Commission also carried out a consultation on seclusion and physical restraint reduction strategy in 2012. The Commission reported that 97.7% of the respondents stated that "it would be useful to put a seclusion and physical restraint reduction strategy in place".<sup>162</sup>

112. The IHRC, has recommended that the provisions regarding seclusion and restraint (including chemical restraint<sup>163</sup>) be amended to comply with the minimum

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number, 158 were admitted voluntarily and 3 involuntarily: see HRB Statistics Series 22, Irish Psychiatric Units and Hospitals Census 2013, 2013, at p. 48.

<sup>157</sup> IHRC, Enquiry Report on the Human Rights Issues Arising from the Operation of a Residential and Day Care Centre for Persons with a Severe to Profound Intellectual Disability, March 2010, at para. 12.118. See also, IHRC, Observations on the Assisted Decision-Making (Capacity) Bill 2013, 2014.

<sup>158</sup> Mental Health Commission, Annual Report 2012, including the Report of the Inspector of Mental Health Services, at p. 7.

<sup>159</sup> Ibid., at p. 26. It should be noted that this is an increase on a compliance level of just 13% in 2011.

<sup>160</sup> Ibid.

<sup>161</sup> Ibid., at p. 27. This was a substantial improvement on the 2011 figure of 29%.

<sup>162</sup> Mental Health Commission, Seclusion and Physical Restraint Reduction Strategy: Consultation Report, 2013, at p. 2.

<sup>163</sup> The Committee on the Prevention of Torture recommended that "use of "chemical restraint" be governed by clear rules and subjected to the same oversight as regards other means of restraint". See Council of Europe, Report to the Government of Ireland on the visit to Ireland carried out by the European Committee on Prevention of Torture, and Inhuman or Degrading Treatment or Punishment 2010,

standards set down by the CPT,<sup>164</sup> so that patients subjected to mechanical restraints be placed<sup>165</sup> under direct supervision of nursing staff at all times; and that secluded patients should be given the possibility to take at least one hour of outdoor exercise on a daily basis, if their medical condition permits.<sup>166</sup> Where the Inspector of Mental Health Services has been put on notice of a period of seclusion, in accordance with the Mental Health Commission Rules, the Inspector should have the power to order the end of the seclusion, where warranted. More broadly, the Mental Health Commission should be afforded stronger compliance powers, where this is required.

### **Electro Convulsive Therapy (ECT)**

113. The IHRC welcomes the publication by the Mental Health Commission regarding the Rules Governing the Use of Electro-Conversion Therapy.<sup>167</sup> It notes that no commitment is given to amending the Mental Health Act, 2001 on the administration of ECT.<sup>168</sup> More generally, the legal framework applicable to mental health treatment, administration of medicine, psychosurgery and electro-convulsive therapy, is unsatisfactory from a human rights perspective in the absence of capacity legislation supporting the decision-making of the person, providing for advanced directives and

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February 2011, at para. 132. The IHRC notes that the Irish State Response to this recommendation expresses reservations that the term “chemical restraint” could stigmatise mental health patients, and that regulation 23 of the Mental Health Act 2001 (Approved Centres) Regulations 2006, S.I. 551/2006 adequately deals with medications. The IHRC remains of the view that oversight of sedation is nevertheless required.

<sup>164</sup> See Council of Europe, Report to the Government of Ireland on the visit to Ireland carried out by the European Committee on Prevention of Torture, and Inhuman or Degrading Treatment or Punishment 2010, February 2011, at para. 128.

<sup>165</sup> *Ibid.*, at paras 129-132. Further specific recommendations were made in relation to the use of seclusion which the Committee noted, was used quite frequently although for short periods. The Committee noted for example, that at St Brendan’s Hospital, between October and December 2009, 142 seclusion orders were made in respect of 17 persons; in 87 cases, the seclusion was ended before expiry of the eight-hour seclusion order, while the remaining 55 orders concerned nine lengthier periods of seclusion, the longest lasting 112 hours.

<sup>166</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 16<sup>th</sup> General Report on the CPT’s Activities Covering the Period 1 August 2005 to 31 July 2006, at para. 128.

<sup>167</sup> Version 2 of the Rules were introduced on 1 January 2010. The Mental Health Commission 2012 Report shows that in 2012, there was 79% compliance with these Rules, an increase of 4% on the previous year, at p. 26. In addition, the Report notes that there was a 65% compliance rate of approved centres with the Code of Practice on the Use of ECT for Voluntary Patients, down from 74% compliance in the previous year, at p. 27.

<sup>168</sup> Section 59, Mental Health Act 2001. The State points out in its Replies to the List of Issues, that the Mental Health Act, 2001, is under review that that this will most likely result in a recommendation to change the law in Ireland with regard to the administration of ECT so that where a patient is capable of giving consent but unwilling to do so, ECT cannot be used on that patient. Currently, under Irish law, where a patient is unwilling or unable to consent to electro-convulsive therapy, it may still be administered if both the treating consultant psychiatrist and a second consultant psychiatrist approve the treatment, UN Human Rights Committee, List of Issues in Relation to the Fourth Periodic of Ireland; Replies of Ireland to the List of Issues, CCPR/C/IRL/Q/4/Add.1, 2014, at para. 108.

regulation of the role of substitute decision-makers.<sup>169</sup> The precise interplay between the Assisted Decision-Making (Capacity) Bill, 2013 and the Mental Health Act, 2001 remains unclear, with responsibility assigned to two different government Departments.

### **Main Areas of Concern**

- **The continued delay by the State in dealing with the issues of overcrowding and “slopping-out” in prisons should be addressed. The IHRC recommends that the State provide a specific timeframe for the achievement of eliminating these problems.**
- **The IHRC welcomes the introduction of a complaints mechanism in the Irish Prison System but would urge the State to make the system more independent and bring the full mechanism into operation. Detailed statistics should be provided to the Committee on prisoner assaults and deaths in custody and these statistics should be published regularly.**
- **The IHRC is concerned at the State’s maintenance of its reservation to Article 10.2 and the failure to put in place a timeframe for the achievement of the total separation of both remand and sentenced prisoners, juvenile and adult prisoners and detained immigrants and sentenced prisoners, respectively.**
- **The IHRC welcomes recent decisions recognising the right of access to a lawyer and would urge the State to introduce legislation in a timely fashion to ensure the protection of this right.**
- **The IHRC is concerned that the common law defence of reasonable chastisement remains part of Irish law. An express prohibition on the use of corporal punishment as against children in all settings is necessary to ensure effective protection of the rights of the child.**
- **The IHRC is concerned at the reliance by the State on complaint-reactive mechanisms in discharging its procedural obligations to inspect and monitor all places of detention in the State. Early ratification and implementation of OPCAT is recommended.**

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<sup>169</sup> Council of Europe, Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 25 January to 5 February 2010, CPT/Inf(2011)3, 2011, at para. 124. The European Committee for the Prevention of Torture noted that the legislation as it stands implies that a patient could be forcibly administered ECT and recommended that the second consultant engaged under section 59 to approve the treatment be an independent consultant, at paras 125-126.

- The IHRC has concerns regarding the definition of a “voluntary patient” under section 2 of the Mental Health Act, 2001 and the fact that incapacitated compliant patients fall within that definition. It urges the State, in its review of the Mental Health Act, 2001, to amend the definition and to align the Act with an amended Assisted Decision-Making (Capacity) Bill, 2013.
- The IHRC is concerned about the compliance of approved centres with the Rules and Codes governing the use of seclusion, the use of physical and mechanical restraint and the use of electro-convulsive therapy and calls upon the State to implement the relevant recommendations of the Committee for the Prevention of Torture and strengthen the compliance functions of the Mental Health Commission where warranted.

## CHAPTER 7

### ELIMINATION OF SLAVERY AND SERVITUDE (ARTICLES 2, 8, and 24)

#### Overview

114. The IHRC recognises that a number of welcome steps have been taken by the State in the reporting period to strengthen the legislative and administrative structure relating to survivors of trafficking and forced labour, including the enactment of the Criminal Law (Human Trafficking) Act 2008 and the Criminal Law (Human Trafficking) Amendment Act 2013, the introduction of the National Action Plan to Prevent and Combat Trafficking of Human Beings in Ireland (2009 – 2012), and the setting up of coordinating structures across a number of State agencies.

115. The IHRC welcomes the ratification by the State of the Council of Europe Convention on Action against Trafficking in Human Beings (CATHB),<sup>170</sup> and the UN Convention on Transnational Organised Crime together with the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.<sup>171</sup> The IHRC encourages the State to take steps to ratify and implement the International Labour Organisation Domestic Workers Convention.<sup>172</sup>

116. The IHRC notes that the State's report contains little analysis or information on the impact of the measures adopted by the State and does not address existing gaps in protection. In this regard, the IHRC has repeatedly raised the issue of trafficking and forced labour within the State as requiring the adoption of a human-rights based approach which places trafficked persons at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims.<sup>173</sup> The Council of Europe Group of Experts on Action against Trafficking in Human Beings ("GRETA") states that the elements of a human-rights based approach to trafficking in Ireland should comprise a comprehensive preventive framework, protection of survivors and the effective investigation and prosecution of traffickers. For this to occur, all survivors of trafficking must be properly identified and empowered through enhancing their rights.<sup>174</sup> In this context, the IHRC encourages the State to introduce a new national anti-human

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<sup>170</sup> Council of Europe Convention on Action against Trafficking in Human Beings (CETS No.197), 2008.

<sup>171</sup> Adopted by General Assembly resolution 55/25, 15 November 2000.

<sup>172</sup> International Labour Organisation Domestic Workers Convention (No.189), which entered into force on 5 September 2013.

<sup>173</sup> See OHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking, (Presented to the Economic and Social Council as an addendum to the report of the United Nations High Commissioner for Human Rights) E/2002/68/Add.1, at p. 3. See the Council of Europe, Council of Europe Explanatory Report on the Convention on Action against Trafficking in Human Beings, at paras 40-51.

<sup>174</sup> Council of Europe Group of Experts on Action against Trafficking in Human Beings, Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland: First Evaluation Round, GRETA(2013)15, 2013, at para. 45.

trafficking plan, and to appoint an independent national rapporteur as required pursuant to the State's obligations under EU law<sup>175</sup> in a manner which also meets GRETA's recommendations.

117. The IHRC remains concerned that the delay in enacting the Immigration, Residence and Protection Bill 2010 has meant that the rights of survivors of trafficking to support and protection are not provided for by law, but are rather set out in the non-statutory Administrative Immigration Arrangements for the Protection of Victims of Trafficking ("the Administrative Arrangements").<sup>176</sup>

118. While the Criminal Law (Human Trafficking) (Amendment) Act 2013 has taken the welcome step of introducing a definition of "forced labour", the decision of the High Court in *Hussein v Labour Court & Younis*<sup>177</sup> has exposed a legislative lacuna. Pending the introduction of new legislation, an individual who has been subjected to forced labour may be deprived of the protections afforded by employment legislation in circumstances where the contract of employment at issue is rendered illegal by the absence of an employment permit pursuant to the Employment Permits Act 2003.<sup>178</sup> This lacuna will be partly addressed by section 4 of the Employment Permits (Amendment) Bill 2014, which provides that a foreign national who can satisfy a Court that he/ she took all reasonable steps to comply with the requirement of having an employment permit, or alternatively, the Minister, may institute civil proceedings for compensation for work done or services rendered. However, the Bill neither addresses the issue of a remedy with regard to social security payments nor seeks to impose criminal penalties on employers.

## Data Collection

119. The IHRC notes that the Anti-Human Trafficking Unit of the Department of Justice and Equality has acknowledged in its Annual Report for 2012 that difficulties arise in collating and interpreting the figures furnished by inter-governmental and non-

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<sup>175</sup> Directive 2011/36/EU, on preventing and combating trafficking in human beings and protecting its victims. Article 19 provides: "Member States shall take the necessary measures to establish national rapporteurs or equivalent mechanisms. The tasks of such mechanisms shall include the carrying out of assessments of trends in trafficking in human beings, the measuring of results of anti-trafficking actions, including the gathering of statistics in close cooperation with relevant civil society organisations active in this field, and reporting". Pursuant to Article 22, the State was required to bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 6 April 2013.

<sup>176</sup> The Administrative Immigration Arrangements for the Protection of Victims of Trafficking came into operation on 7 June 2008, the date of commencement of the Criminal Law (Human Trafficking) Act 2008, and have been amended from time to time, most recently in March 2011. The IHRC notes that the importance of enacting statutory rights to assistance and protection has been stressed by GRETA in its recent report; *op. cit.*, at paras 18-19.

<sup>177</sup> *Hussein v Labour Court & Younis* [2012] IEHC 10 (Unreported, High Court, 31 August 2012).

<sup>178</sup> *Ibid.* Unusually, the High Court Judge who heard the case (Hogan J.) transmitted a copy of his decision to the chairmen of the upper and lower houses of parliament and to the Minister for Jobs, Enterprise and Innovation for consideration. However, no apparent steps have been taken to remedy the difficulties exposed by this judgment.

governmental organisations and the Garda Síochána in relation to possible survivors of human trafficking.<sup>179</sup> While the Unit attributes this difficulty to restrictions on the processing of personal data under the Data Protection Acts 1988 and 2003 it is unclear to the IHRC why such personal data (and perhaps sensitive personal data) may not be processed in a manner that is consistent with the safeguards provided for under those Acts. The Committee may wish to seek further information from the State as to the impact of any data protection restrictions on the collection of data relating to victims of trafficking and forced labour. In this regard, the IHRC is somewhat concerned that data protection restrictions are being invoked to excuse inaction in relation to the taking of concrete measures to identify and protect vulnerable persons at risk of exploitation. A framework approach as suggested by GRETA would permit the collection and use of such data where provided for by law. More generally, the IHRC is concerned at the practice employed by the State to invoke data protection or privacy concerns for victims of violations as a rationale for not taking positive measures to ensure their rights: see also the State's approach to the Magdalen Laundries, to victims of domestic violence and to ensuring Traveller and Roma rights.

### **Asylum-seekers: Recovery and Reflection Period and Temporary Residence Permission**

120. A significant number of victims of trafficking reporting to An Garda Síochána are asylum-seekers<sup>180</sup> and thus the IHRC notes with concern that under the 2011 Administrative Arrangements the provision of a period of recovery and reflection or temporary residence permission is limited to those who would not otherwise have permission to be in the State.<sup>181</sup> The Committee may wish to seek appropriate assurances from the State as to the legislative and/or Administrative Arrangements which ensure that asylum seekers excluded from the scope of the Administrative Arrangements may be afforded the protection and supports set out in CATHB as under current arrangements a clear lacuna is apparent.<sup>182</sup>

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<sup>179</sup> Department of Justice and Equality Anti-Human Trafficking Unit, Annual Report of Trafficking of Human Beings in Ireland for 2012, at p. 8.

<sup>180</sup> Department of Justice and Equality Anti-Human Trafficking Unit, Annual Report of Trafficking of Human Beings in Ireland for 2012, 17% of alleged victims of human trafficking reported to the Garda Síochána were asylum seekers, at para. 2.5. The equivalent figure in the report for 2011 was 56.1%, for 2010, 46.2% and for 2009, 60.6%.

<sup>181</sup> Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking, 2011, at para.1 and at fn.1.

<sup>182</sup> The State has emphasised in its response to the Committee that a possible victim of trafficking who applies for asylum under the Refugee Act 1996 has the equivalent residence rights and access to the same support services as a person in a recovery and reflection period provided for under the Administrative Arrangements, UN Human Rights Committee, List of issues in relation to the Fourth Periodic Report of Ireland: Replies of Ireland to the List of Issues, CCPR/C/IRL/Q/4/Add.1, 2014, at para. 117.

## Access to Legal Services

121. The Committee has asked the State to outline the availability of access to legal services by victims of trafficking and forced labour.<sup>183</sup> The State, in its response to the issue raised, has outlined the range of legal services provided by the Legal Aid Board to potential victims of human trafficking. The Legal Aid Board may provide advice to a person who is an "alleged victim of a human trafficking offence", under certain conditions.<sup>184</sup>

122. The IHRC notes that in the Interim Review of the National Action Plan to Prevent and Combat Trafficking in Human Beings 2009 - 2012 concerns were raised during the consultation process in relation to inadequacies in the legal support provided to victims of trafficking. In particular it was claimed by some participants that quality, early legal representation was not available, that only once-off information was provided, that the legal advice provided was insufficient to navigate the immigration system, and that there was a lack of legal representation throughout the criminal investigation and prosecution process.<sup>185</sup>

123. By virtue of Article 15.2 of the CATHB and Article 6 of the ECHR, the right to free legal aid in civil matters may be crucial to ensuring the right of effective access to court.<sup>186</sup> It is therefore imperative to ensure that no restrictions be placed on either the availability or scope of such assistance for potential victims of trafficking, whether such restrictions be de jure or de facto. In particular, no burden should be placed on an individual to establish that they are a victim of a trafficking offence (whether to the satisfaction of a member of An Garda Síochána or otherwise) as a condition precedent to the availing of legal advice from the Legal Aid Board.

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<sup>183</sup> Article 15(2) of the Council of Europe Convention on Action against Trafficking in Human Beings, 2008, prescribes that each State Party must provide, in its internal law, for the right of legal assistance and to free legal aid for victims, under the conditions provided by its internal law.

<sup>184</sup> According to s. 26(3B) of the Civil Legal Aid Act 1995, as inserted by the Civil Law (Miscellaneous Provisions) Act 2011, s.3, advice may be provided in relation to the following matters: "(a) any matter connected with the commission of the human trafficking offence (whether or not a prosecution for that offence has been instituted); (b) any matter connected with the commission of any other offence of which the person is alleged to be a victim, being an offence (whether or not a human trafficking offence) that is alleged to have been committed in the course of, or otherwise in connection with, the commission of the human trafficking offence, or (c) without prejudice to the generality of paragraph (a) or (b), the prosecution of the human trafficking offence or of the other offence referred to in paragraph (b)."

<sup>185</sup> Interim Review of the National Action Plan to Prevent and Combat Trafficking in Human Beings 2009 - 2012, at p.7; the concerns raised are addressed at p.10.

<sup>186</sup> See Council of Europe, Council of Europe Explanatory Report on the Convention on Action against Trafficking in Human Beings, at para.196, as to the intersection of this guarantee with Article 6 ECHR as interpreted and applied in *Golder v United Kingdom* (Application No. 4451/70) and *Airey v Ireland* (Application No. 6289/73).

## **Applicability of Anti-Trafficking Legislation to EU Residents or Nationals**

124. The Committee has sought confirmation from the State as to the applicability of anti-trafficking legislation to EU residents or nationals. The State, in its response to the issue raised, has indicated that the Criminal Law (Human Trafficking) Act 2008 (as amended) ('the 2008 Act') applies to EU residents or nationals. However, the Administrative Immigration Arrangements for the Protection of Victims of Trafficking, which came into operation in 2008, are limited in their application to persons who do not have permission to remain in the State, and as such exclude not only asylum-seekers, but also EEA residents or nationals from their ambit.<sup>187</sup>

125. The IHRC notes that in its 2013 report on Ireland, GRETA expressed the view that the continued operation of the Administrative Arrangements pending the enactment of the Immigration, Residence and Protection Bill 2010 has resulted in an absence of a "clear statutory basis on which victims of trafficking can invoke protection", and has urged the State to ensure that all victims of trafficking, including EEA nationals, are offered a period of recovery and reflection.<sup>188</sup>

126. The IHRC is of the view that EEA nationality/ residency should not operate to deprive victims of trafficking of the protections envisaged by Article 12 of CATHB during the period of recovery and reflection provided for by Article 13 thereof, including such measures and assistance as may be necessary to assist victims in their physical, psychological and social recovery and to ensure that their safety and protections needs are met.

### **Main Areas of Concern**

- **The IHRC urges the State to ensure that assistance and protection be afforded to potential victims of trafficking regardless of their nationality or immigration status.**
- **The IHRC encourages the State to take steps to put the rights of victims of trafficking to assistance and protection on a statutory basis without delay.**
- **The IHRC urges the State to address the lacunae in domestic law in relation to persons subjected to forced labour as highlighted in the Hussein v Labour Court & Younis judgment.**

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<sup>187</sup> See para. 4 of The Administrative Immigration Arrangements.

<sup>188</sup> Council of Europe Group of Experts on Action against Trafficking in Human Beings, Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland: First Evaluation Round, GRETA(2013)15, 2013, at paras 17-19.

## CHAPTER 8

### IMPRISONMENT FOR FAILURE TO FULFIL A CONTRACTUAL OBLIGATION (ARTICLE 11)

127. The Committee has previously expressed concern in its Concluding Observations on Ireland's Periodic Reports in relation to the use of imprisonment for failure to pay a contractual debt.<sup>189</sup> In its Second Periodic Report, the State pointed out that imprisonment for failure to pay a debt would not arise in respect of ordinary civil debt but could arise in the context of the failure by an individual to comply with a court order to discharge a debt where the court was satisfied that the failure to repay a debt was due to wilful failure or culpable neglect.<sup>190</sup> It was further noted that at that time, legislation in respect of civil debt and inability to pay fines was being prepared by the Department of Justice and Equality.

128. Despite these assurances from the State that legislative reform in this regard was imminent, there were no developments in relation to this issue in the third reporting cycle. The Committee expressed its concern about the ongoing failure of the State to amend the laws which could result in imprisonment for failure to comply with a contractual debt in its Concluding Observations in 2008.<sup>191</sup>

128. In January 2009, the High Court granted leave to the IHRC to be joined as *amicus curiae* in proceedings entitled *McCann v The Judge of the Monaghan District Court & Others*.<sup>192</sup> This case challenged the constitutionality of imprisoning a person for not fulfilling a contractual obligation.<sup>193</sup> The Court found that the system for the enforcement of civil debt was unconstitutional as it did not secure fundamental rights under the Constitution.<sup>194</sup> In particular, the High Court took note of the 2008 exchange between the State and the Committee on Article 11 of the ICCPR and the subsequent

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<sup>189</sup> UN Human Rights Committee, Concluding Observations on Ireland's Third Periodic Report, CCPR/C/IRL/CO/3, 2008, at para. 18.

<sup>190</sup> UN Human Rights Committee, Ireland's Second Periodic Report under the ICCPR, CCPR/C/IRL/98/2, 1998, at para. 193.

<sup>191</sup> UN Human Rights Committee, Concluding Observations on Ireland's Third Periodic Report, CCPR/C/IRL/CO/3, 2008, at para. 18. The Committee recommended that Ireland should ensure that its laws are not used to imprison a person for the inability to fulfil a contractual obligation.

<sup>192</sup> *McCann v Judges of Monaghan District Court and Ors.*, [2009] IEHC 276.

<sup>193</sup> The case concerned a single parent with two children who was dependent on social welfare, who faced imprisonment for inability to pay a contractual debt, in circumstances where she did not appear to have been present or represented when the Court ordered her arrest and imprisonment. In its *amicus curiae* submission the IHRC particularly drew the High Court's attention to the concerns expressed by the Human Rights Committee, in relation to Irish legislation dealing with civil debt, when Ireland's State report under the ICCPR was considered in July 2008.

<sup>194</sup> Including the right to fair administration of justice (Article 34), the guarantee of fair procedures (Article 40.1.3), and the right to personal liberty (Article 40.4.1), per Laffoy J.

Concluding Observations of the Committee, to which the IHRC had drawn the Court's attention.

130. The Enforcement of Court Orders (Amendment) Act 2009 ('the 2009 Act') was passed by the Houses of the Oireachtas in response to the McCann judgment. This legislation amended the law to remedy the constitutional and human rights deficiencies identified by the High Court. As noted in the State's Fourth Report, the 2009 Act provides that where failure to pay arises from inability to pay, the court will not impose a prison sentence.<sup>195</sup> For a prison sentence to be imposed in respect of a failure to pay, the court must be satisfied that the debtor has the means to pay and that non-payment is due to wilful refusal or culpable neglect. The court must also be satisfied that all other steps possible have been taken to recover the debt. The 2009 Act also gives the court the discretion to postpone the execution of an imprisonment order until such time as it thinks just, and the power to vary the terms of the breached instalment order or to refer the parties for mediation. The court must also inform a debtor of the risk of imprisonment and of his/her entitlement to apply for legal aid.

131. While the IHRC welcomes the introduction of the 2009 Act, it is concerned at the numbers of persons still being imprisoned for failure to pay a debt, particularly where the debt is a fine imposed by a court.<sup>196</sup> This is particularly in light of the issue of overcrowding in Irish prisons.<sup>197</sup>

132. It is noted that the Fines Act 2010 gives the Court discretion to take into account a person's financial circumstances, when imposing a fine.<sup>198</sup> However, it is further noted that s.14(3) provides that the Court cannot impose a fine that is less than the minimum fine to which a person would be liable upon conviction of the offence concerned which limits the discretion of the court. In addition, the effectiveness of the 2010 Act has been hampered further by the failure of the Government to commence s.15 of the 2010 Act which allows the court to direct that the fine be paid in instalments by the fined person.

133. The Fines (Payment and Recovery) Act 2014 ('the 2014 Act') was signed into law on 16 April 2014, but has yet to be commenced. One of the aims of this Act is to

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<sup>195</sup> UN Human Rights Committee, State Report of Ireland for its Fourth Periodic Report, CCPR/C/IRL/4, 2012, at para. 537.

<sup>196</sup> The State, in its Replies to the List of Issues, gave details of the number of persons imprisoned for failure to pay both fines and debts in the years 2007 – 2013. The figures in respect of the persons imprisoned for failure to pay fines rose from 1,135 in 2007 to 8,196 in 2013 which is more than a 700% increase in just six years. See UN Human Rights Committee, List of issues in relation to the Fourth Periodic Report of Ireland: Replies of Ireland to the List of Issues, CCPR/C/IRL/Q/4/Add.1, 2014, Table 11, Annex 1.

<sup>197</sup> The matter of overcrowding is dealt with further in Chapter 6 under Overcrowding and "Slopping Out".

<sup>198</sup> Section 14(1), Fines Act, 2010. Note, this section and, indeed, all of Part III of the Fines Act 2010 will be repealed if and when section 4 of the Fines (Payment and Recovery) Act 2014 is commenced. Section 14 will be replaced by section 5 of the 2014 Act which is very similar in content.

provide for a community service order as an alternative to imprisonment for defaulting. While this legislation is a welcome addition the 2009 Act outlined above, the IHRC is concerned that the 2014 Act has not yet been commenced by the Minister for Justice and Equality. This concern is particularly acute given the fact that certain provisions of the Fines Act 2010 have never been commenced<sup>199</sup> and are now due to be repealed if and when the Fines (Payment and Recovery) Act 2014 is commenced. Section 6 of the 2014 will replace Section 15 of the 2010 Act. Section 6 provides that it is the fined person who elects to pay by instalments rather than the judge. However, it is noted that the option to pay the fine by instalments is only available where the fine imposed exceeds € 100.<sup>200</sup> In circumstances where a person defaults on a fine imposed by the court, the court can make a recovery order<sup>201</sup> or an attachment order<sup>202</sup> and, where neither of these orders are appropriate, the court can impose a community service order if appropriate. Thus, the last resort for the court is imprisonment of the defaulter.

134. The IHRC welcomes the attempts by the State to bring the law into line with its obligations under the ICCPR and looks forward to seeing the positive impact that the Fines (Payment and Recovery) Act 2014 will have on the number of persons imprisoned for defaulting on a fine. The IHRC would urge the State to commence the entire 2014 Act as soon as possible. It regrets, however, the imposition of the lower limit of € 100 on fines which can be paid by instalment and would request the State to monitor the impact of this limit on the effective operation of the Act.

### **Main Areas of Concern**

- **The IHRC is concerned at the number of persons being imprisoned for failure to pay fines despite the passing of the Enforcement of Court Orders (Amendment) Act 2009 and the Fines Act 2010.**

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<sup>199</sup> Section 15 of the Fines Act 2010 provides that where, upon the imposition of a fine by a court, the court is satisfied that to require the person to pay the fine in full would cause undue hardship, the court can order that the fine be paid by instalments.

<sup>200</sup> Section 6(5), Fines Act 2010. This lower limit can be increased where prescribed by the Minister for Justice and Equality pursuant to s.6(5)(a)(i).

<sup>201</sup> Part 3 of the Fines (Payment and Recovery) Act 2014.

<sup>202</sup> Part 4 of the Fines (Payment and Recovery) Act 2014.

## CHAPTER 9

### REFUGEES AND ASYLUM SEEKERS (ARTICLES 17 AND 24)

#### Impact of Long-term Stay in Direct Provision Centres

135. The IHRC is concerned that asylum seekers living in Direct Provision centres are particularly susceptible to isolation and exploitation and continues to raise its concerns about the system of Direct Provision in the State and its impact on the rights of the child and the right to family life. In the IHRC's view, Direct Provision is not in the best interests of children. It is not clear how the right enshrined in Article 24 of the ICCPR is ensured through the forced residency of the child with her or his family in a Direct Provision centre for many years where the psycho-social integrity of the child and her family is at issue.<sup>203</sup> Equally, it is unclear how the right to family life is safeguarded under Article 17, particularly given the long delays in asylum processing.

136. In her 2011 report on Ireland, the Independent Expert on the Question of Human Rights and Extreme Poverty noted the Direct Provision system in Ireland limits the autonomy of asylum seekers and impedes their family life, as most accommodation centres have not been designed for long-term reception of asylum-seekers and are not conducive to family life.<sup>204</sup>

137. During 2014, the IHRC is commissioning research into the effects of delays in asylum application adjudications on the system of Direct Provision. Currently, permission to reside in the State may be granted to a family after years in the Direct Provision setting leaving individuals and families in Direct Provision centres for long periods of time, in receipt of € 19.10 per week and unable to work or integrate into society.

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<sup>203</sup> Article 18(2) of the Convention on the Rights of the Child (CRC) is also relevant insofar as it sets out how States Parties should assist parents in the performance of their child-rearing responsibilities and should develop facilities and services for the care of children. Article 22(1) of the CRC states that appropriate measures should be in place to ensure that children seeking refugee status receive "appropriate protection and humanitarian assistance in the enjoyment of applicable rights" while Article 27(1) states that States should recognise the right of every child to a "standard of living adequate for the child's physical, mental, spiritual, moral and social development".

<sup>204</sup> Independent Expert on the Question of Human Rights and Extreme Poverty, Report of the Independent Expert on the Question of Human Rights and Extreme Poverty following: Mission to Ireland, 2011, at para. 90. The independent expert reminds Ireland that asylum-seekers and refugees must be guaranteed the enjoyment of all human rights, including the right to privacy and family life, an adequate standard of living, and adequate standards of physical and mental health rights that complement the provisions of the 1951 Convention relating to the Status of Refugees, at para. 91.

## Applications for Asylum and Other Protection

138. Existing legislative and administrative structures relating to persons who are seeking asylum or other forms of protection within the State are, in the view of the IHRC, compromised by systemic delays in the processing of claims which arguably derive from a fragmented legislative framework.<sup>205</sup> Under current legislation, applications for asylum and for subsidiary protection are dealt with consecutively.<sup>206</sup> A comprehensive reform of the statutory scheme for identifying and protecting asylum seekers at risk of refoulement is required, whereby all aspects of an individual's application for asylum and/ or subsidiary protection may be heard and determined together, to ensure that an applicant is not subject to undue delay in the hearing and determination of such a claim.<sup>207</sup>

139. The State has committed itself to introducing 'comprehensive reforms of the immigration, residency and asylum systems, which will include a statutory appeals system and set out rights and obligations in a transparent way'.<sup>208</sup> However, to date no concrete steps have been taken to revive the progress of the Immigration, Residence and Protection Bill 2010,<sup>209</sup> which was intended to provide for a single application procedure for the investigation of all grounds for protection by applicants seeking to remain in the State. It has been indicated by the Minister for Justice and Equality that several hundred amendments to the Bill, as introduced, are required and are under consideration, such that it is proposed to publish a new and enhanced text. No indication has been given as to when such a revised Bill will be published.<sup>210</sup> The IHRC has recently recommended that consideration be given to separating the protection and immigration-related aspects of the legislation.

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<sup>205</sup> Relevant legislation includes: the Immigration Act 1999, the Illegal Immigrants (Trafficking) Act 2000, the Immigration Act 2003, the Immigration Act 2004, the European Communities (Eligibility for Protection) Regulations 2006 (SI No.518 of 2006), the European Communities (Asylum Procedures) Regulations 2011 (SI No.51 of 2011), the Refugee Act 1996 (Asylum Procedures) Regulations 2011 (SI No.52 of 2011), and the European Union (Subsidiary Protection) Regulations 2013 (SI No.425 of 2013).

<sup>206</sup> Applications for asylum are governed by the Refugee Act 1996 (as amended), while applications for subsidiary protection are provided for by the European Communities (Eligibility for Protection) Regulations 2006 (SI No.518/2006). Regulation 4(2), of the 2006 Regulations, effectively provides that the Minister for Justice and Equality is only obliged to consider an application for subsidiary protection where the applicant has been made subject to a deportation order, under s.3 of the Immigration Act 1999, following a negative decision in respect of his or her refugee status. The IHRC notes that this bifurcation of applications for international protection has been considered by the Court of Justice of the European Union (CJEU) in *HN v Minister for Justice, Equality and Law Reform & Ors* Case C-604/12, decision delivered by the Court (Fourth Chamber) on 8 May 2014, in light of the right to good administration guaranteed by Article 41 of the Charter of Fundamental Rights of the European Union.

<sup>207</sup> The need for such reform has long been recognised. See UNHCR, Statement on Need for Introduction of Single Procedure, 14 February 2011; Report of the Ombudsman, 'Dealing with Asylum Seekers: Why have we gone wrong?' Studies Magazine, Vol.102, No.406, 31 July 2013.

<sup>208</sup> Government for National Recovery 2011 – 2016, at p. 51.

<sup>209</sup> Introduced on 29 June 2010, withdrawn at Committee stage on 16 November 2010, and restored on 23 March 2011.

<sup>210</sup> Dáil Éireann, Debate Vol.792, No.1, 6 March 2013.

## **Establishment of an Independent Appeals Body to Review all Immigration-related Decisions**

140. Amongst the reforms proposed by the Immigration, Residence and Protection Bill 2010, was the establishment of a new and independent Protection Review Tribunal.<sup>211</sup> Under the current administrative structure, decisions of the Office of the Refugee Applications Commissioner ('ORAC') are reviewed by the Refugee Appeals Tribunal ('RAT'). The IHRC recommends that the appeals body, as a quasi-judicial body, be independent in its functions, operate in a fully transparent manner, consider applications de novo as required under international refugee law and make its decisions available to the public. Further, as a specialised refugee appellate body, it should retain its specialism in determining claims as set out in UNHCR Guidelines.<sup>212</sup>

## **Ensuring that Asylum Seekers have Full Access to Early and Free Legal Representation**

141. As the State has outlined in its response to the List of Issues raised by the Committee, applicants for asylum and other forms of protection are afforded access to free legal advice by the Refugee Legal Service, which is a specialised office of the Legal Aid Board.

142. No express provision is made in the Immigration Act 1999 for affording persons seeking leave to land or detainees' access to a solicitor pending their deportation, or for the provision of legal aid in respect of any such advice. The High Court has however held that, interpreted constitutionally, s.5(1) of the Immigration Act 1999 (which provides for detention pending deportation) is to be construed as allowing for access to legal advice.<sup>213</sup>

## **Establishment of an Independent Complaints/ Monitoring Mechanism for Persons Living in Direct Provision Centres**

143. While operating under the Reception and Integration Agency of the Department of Justice and Equality, Direct Provision accommodation centres are run by private non-

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<sup>211</sup> Immigration, Residence and Protection Bill 2010, at Part 7, Chapter 4.

<sup>212</sup> UNHCR, Handbook on Procedures and Criteria For Determining Refugee Status Under the 1951 Convention and 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1, 1979, Reedited, Geneva, January 1992.

<sup>213</sup> DP v Governor of the Training Unit & Ors [2000] 1 IR 492.

State actors.<sup>214</sup> A complaints mechanism is provided for by Part 4 of the Reception and Integration Agency's House Rules and Procedures (November 2009). The IHRC notes, however, that complaints are limited in scope to complaints that the accommodation centre is not fulfilling its obligations as set out at Part 1 ('Services') of the House Rules and Procedures.<sup>215</sup> Further, where a complainant is unsatisfied with the response received from the manager of the accommodation centre, the only further recourse is to the Reception and Integration Agency itself, and the decision of the Reception and Integration Agency is binding on all parties.<sup>216</sup>

144. The Committee on the Rights of the Child recommended in 2006, that the State take the necessary measures to bring the policy, procedures and practice of Direct Provision into line with its international obligations, as well as principles outlined in other documents, including the Statement of Good Practices produced by the United Nations High Commissioner for Refugees and Save the Children. The Committee further recommended that the State ensure that the same standards of and access to support services applies whether the child is in the care of the authorities or their parents.<sup>217</sup>

145. The IHRC regards the complaints mechanism provided for as lacking the requisite character of independence to ensure that complaints are handled fairly and impartially, and as being too limited in its scope to deal with alleged breaches of human rights that may arise.<sup>218</sup> The IHRC notes that asylum seekers are largely excluded from the ambit of the Ombudsman<sup>219</sup> and the Ombudsman for Children.<sup>220</sup> This is compounded by the exclusion of acts taken by a 'public authority' in relation to a 'non-national' from the scope of the Equal Status Acts 2000 to 2012.<sup>221</sup> The IHRC is

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<sup>214</sup> For an outline and analysis of the arrangements in place, see European Migration Network/Economic and Social Research Institute, *The Organisation of Reception Facilities for Asylum Seekers in Ireland*, January 2014, at s.2.

<sup>215</sup> Reception and Integration Agency, *House Rules and Procedures*, November 2009, at para. 4.8.

<sup>216</sup> *Ibid.*, at paras 4.12-4.13.

<sup>217</sup> Committee on the Rights of the Child, *Consideration of Reports Submitted by State Parties under Article 44 of the Convention: Concluding observations of Ireland, 2006*, at para. 65.

<sup>218</sup> It may be noted that the Ombudsman's Guide to Internal Complaints Systems, 1999, s.4, provides: "Complaints which have not been resolved by the original decision maker should be examined objectively by persons not involved with the original decisions or actions. The examination should have regard not only to the rules governing the scheme but also to considerations of equity and good administrative practice."

<sup>219</sup> Ombudsman Act 1980, s.5(1)(e), "The Ombudsman shall not investigate any action taken by or on behalf of a person [...] if the action is one [...] taken in the administration of the law relating to aliens or naturalisation."

<sup>220</sup> Ombudsman for Children Act 2002, s.11(1)(e)(i), "The Ombudsman for Children shall not investigate any action taken by or on behalf of a public body [...] if the action is one [...] taken in the administration of the law relating to asylum, immigration, naturalisation or citizenship."

<sup>221</sup> Equal Status Acts 2000 and 2012, at s.14(1)(aa), provides that nothing in those Acts shall be construed as prohibiting "(i) any action taken by a public authority in relation to a non-national (I) who, when the action was taken, was either outside the State or, for the purpose of the Immigration Act 2004, unlawfully present in it, or (II) in accordance with any provision or condition made by or under any enactment and arising from his or her entry to or residence in the State, or (ii) any action taken by the Minister in relation to a non-national where the action arises from any such action referred to in

concerned that these exclusions, grounded on a person's citizenship, are incompatible with the principle of non-discrimination enshrined in the ICCPR.

146. At issue here is the delegation of a public function to private bodies and whether in this arrangement, the State is failing to provide effective remedies for human rights violations occurring within the State, the more where a particularly vulnerable group of people is concerned. This arrangement appears at odds with the State's obligation of "due diligence" with regard to non state actors.

147. The IHRC therefore regards the existence of an accessible and independent complaints mechanism for such persons as a vital safeguard against forms of ill-treatment.

### **Review of Detention Policy with Regard to Asylum-Seekers**

148. It is well established that refugees and asylum-seekers enjoy the right to liberty and security of the person, and more particularly the right not to be subjected to arbitrary arrest or detention, as guaranteed by Article 9 ICCPR.<sup>222</sup> The State should ensure that asylum seekers and migrants not convicted of a criminal offence are not detained in prisons.

### **Main Areas of Concern**

- **The IHRC is concerned that systemic delays continue to undermine the fundamental rights and freedoms of persons seeking asylum or other forms of protection in the State, particularly those asylum seekers in Direct Provision centres. The IHRC calls on the State to introduce legislative reform without delay, whereby all grounds for protection may be investigated in a single application procedure, with a right of appeal to an independent appeals body.**
- **The duration of stay in Direct Provision centres should be as short as possible. Delays in asylum adjudication should not be a reason for continued stay in such centres where alternatives to such accommodation exist.**

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subparagraph (i)." The terms "non-national" and "public authority" for the purposes of the Acts are defined at s.14(2).

<sup>222</sup> UN Human Rights Committee, General Comment No.8 on Article 9 (Right to Liberty and Security of Persons), HRI/GEN/1/Rev.7, 1982.

- The IHRC recommends that the protection and immigration aspects of the Immigration, Residence and Protection Bill 2010 be separated to allow for the protection-related legislation to be enacted without delay.
- The IHRC is concerned that the internal complaints mechanism currently in place in Direct Provision centres, under the auspices of the Reception and Integration Agency, lacks independence and is not appropriate for the purpose of ensuring that persons in such centres are protected from abuse and exploitation.
- The IHRC regards the effective exclusion of complaints regarding the asylum system and Direct Provision from the ambit of the Ombudsman, the Ombudsman for Children and the Equal Status Acts as being incompatible with the principle of non-discrimination and prejudicial to ensuring that such persons are protected from ill-treatment. The delegation of a public function to private bodies requires the provision of effective remedies to individuals.
- The IHRC urges the State to take steps to ensure that asylum or migration-related detainees are not detained in prisons.

## CHAPTER 10

### RIGHT TO FAIR TRIAL (ARTICLE 14)

#### “Terrorist Acts”

149. The Committee has sought information on what measures have been taken to define “terrorist acts” under domestic legislation. Under the Criminal Justice (Terrorist Offences) Act 2005 (‘the 2005 Act’), the State has provided that specific offences can be categorised as terrorist offences when committed, *inter alia*, with intent to seriously intimidate a population, unduly compel a Government or international organisation to perform or abstain from performing an act, or seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a State or an international organisation.<sup>223</sup> Such activities are defined as “terrorist activities” in section 4 of the Act.

150. While the IHRC accepts that terrorism (international or domestic) is a threat to every State and its citizens, any measures taken to protect against such a threat must be proportionate and go no further than necessary. The 2005 Act was purportedly enacted to incorporate the EC Framework Decision on Combating Terrorism<sup>224</sup> into Irish law. The IHRC has observed that the definition of “terrorist activity” is “impermissibly wide and runs the risk of categorising groups opposing dictatorial or oppressive regimes, anti-globalisation, anti-war or environmental protestors, or even militant trade unionists, as terrorists”.<sup>225</sup> As the IHRC has previously pointed out, Ireland has a comprehensive body of legislation to deal with terrorism<sup>226</sup> and the State, following the Good Friday Agreement, commissioned a report to review this body of legislation with a view to reform or dispensation where possible.<sup>227</sup>

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<sup>223</sup> UN Human Rights Committee, Ireland’s Fourth Periodic Report under the ICCPR, CCPR/C/IRL/4, 2012, at para. 225.

<sup>224</sup> Official Journal of the European Communities, Council Framework Decision of 13 June 2002 on Combating Terrorism, 2002/475/JHA, 2002.

<sup>225</sup> IHRC, Comments on the Criminal Justice (Terrorist Offences) Bill 2002, at p. 3.

<sup>226</sup> *Ibid*, at p. 2.

<sup>227</sup> Committee to Review the Offences against the State Acts 1930– 1998, Report of the Committee to Review the Offences Against the State Act 1939– 1998 and Related Matters, 2002. This Report is also known as “the Hederman Report”, the Committee having been established under the chairmanship of the Honourable Mr. Justice Anthony J. Hederman. The mandate of the Committee was to examine all aspects of the Offences Against the State Acts 1939 to 1998, taking into account: (1) the view of the participants to the multiparty negotiations on Northern Ireland that the development of a peaceful environment on the basis of the Agreement they reached on 10 April, 1998 (Good Friday Agreement) can and should mean a normalisation of security arrangements and practices; (2) the threat posed by international terrorism and organised crime; and (3) Ireland’s obligations under international law. See [www.justice.ie/en/JELR/Pages/Review\\_of\\_the\\_Offences\\_against\\_the\\_State\\_Acts](http://www.justice.ie/en/JELR/Pages/Review_of_the_Offences_against_the_State_Acts), last accessed 28 May 2014.

151. In its Comments on the Criminal Justice (Terrorist Offences) Bill 2002, the IHRC recommended that the definition of terrorist activities be amended to ensure that groups legitimately opposing dictatorial regimes and various types of protestors would not be categorised as terrorists.<sup>228</sup> These recommendations were not incorporated into the 2005 Act. The Minister for Justice and Equality subsequently published the General Scheme of the Criminal Justice (Terrorist Offences) Bill 2012 on 6 November 2012. This Bill, when enacted, seeks to transpose the Council Framework Decision on Combating Terrorism 2008<sup>229</sup> into Irish law. The IHRC is of the view that this represents an opportunity for the State to amend the law as it currently stands in relation to the expansive definition of “terrorist activities”. It is also an opportunity to amend the Act to address the recent Court of Justice of the EU (‘CJEU’) ruling in *Digital Rights Ireland Ltd v Minister for Communications*<sup>230</sup> in which the IHRC appeared before the CJEU as a third party intervener.<sup>231</sup>

### **Investigation and Prosecution of Terrorist Acts, Length of Pre-trial Detention and Access to a Lawyer**

152. The Committee has sought up-to-date information on the number of terrorist acts that have been investigated and prosecuted, including information on the length of pre-trial detention and access to a lawyer in practice. The IHRC notes the significant disparity between the numbers of persons arrested under the Offences Against the State Act 1939 and the number of persons prosecuted under the same Act.<sup>232</sup>

153. No specific detail and/ or breakdown is given by the State in relation to the figures concerning length of pre-trial detention and access to a lawyer, and there is no

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<sup>228</sup> IHRC Comments on the Criminal Justice (Terrorist Offences) Bill 2002, at pp. 4-5.

<sup>229</sup> Official Journal of the European Union, Council Framework Decision of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism, 2008/919/JHA.

<sup>230</sup> *Joined Cases C-293/12 and C-594/12*, [2014] WLR (D) 164.

<sup>231</sup> See IHRC concerns relating to data collection, retention and use under the 2005 Act.

<sup>232</sup> The Committee has previously expressed concern about the lack of information provided by the State in respect of the extent, if any, to which limitations have been made to Covenant rights, especially Articles 9 and 14, see UN Human Rights Committee, Concluding Observations on Ireland’s Third Periodic Report, CCPR/C/IRL/CO/3, 2008, at para. 11. In its Fourth Report to the Human Rights Committee, the State provided statistics in respect of arrests, convictions and cases pending under the Offences Against the State Acts. As can be seen from those figures, there is a huge disparity between the numbers arrested and the numbers prosecuted. For example in the year ending 31 May 2011, there were 764 persons arrested under section 30 of the Offences Against the State Act while only 38 were prosecuted (with 183 pending), see UN Human Rights Committee, Ireland’s Fourth Periodic Report under the ICCPR, CCPR/C/IRL/4, 2012, at paras 574-575. Further detail is given in the State’s Replies to the List of Issues where it is detailed that 442 persons were arrested in 2012 for terrorist motivated offences and nine people were convicted. It is not clear, however, how many prosecutions were undertaken in respect of terrorist acts. See UN Human Rights Committee, Replies of Ireland to the list of issues, CCPR/C/IRL/Q/4/Add.1, 2014, at para. 143.

source for the information given.<sup>233</sup> The IHRC would urge the State to provide the Committee with more probative information to evidence its compliance with the ICCPR and to commit to regularly publishing such detailed statistics.

154. The IHRC has observed in the past that the right of “reasonable” access to a lawyer in Irish law has arguably fallen short of what is required under Article 6 of the ECHR, insofar as it does not place a sufficiently rigorous obligation on the State to ensure that a person has access to a lawyer during questioning from which adverse inferences may be drawn (subject to any necessary and proportionate limitation)<sup>234</sup>. It may be noted, however, that the recent Supreme Court decision in *DPP v Gormley* held that “the entitlement not to self-incriminate incorporates an entitlement to legal advice in advance of mandatory questioning of a suspect in custody.”<sup>235</sup> The IHRC welcomes this decision and the attendant protections it will provide for persons facing questioning while in Garda detention.

### **Special Criminal Court**

155. The Committee has continuously expressed concern about the operation and the continued existence of the Special Criminal Court. In 1993, the Committee concluded that “the continued existence of [the] Court is not justified in the present circumstances.”<sup>236</sup> Concerns raised by the Committee (and indeed the IHRC) about the Special Criminal Court will be dealt with in turn.

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<sup>233</sup> UN Human Rights Committee, Ireland’s Fourth Periodic Report under the ICCPR, CCPR/C/IRL/4, 2012, at para. 578. In this Fourth report, the State noted that the average length of pre-trial detention is 12 months from the date of charge for persons in custody and 18 months from the date of charge for persons on bail. The Committee, in its 2008 Concluding Observations on Ireland’s Third Periodic Report, also recommended that the State should carefully monitor the length of pre-trial detention and access to a lawyer in respect of persons arrested under suspicion of having committed a terrorist act, see para. 11.

<sup>234</sup> In April 2012, the ECtHR granted liberty to the IHRC to make a written submission to the Court in the case of *Donohoe v Ireland*, Application No. 19165/08, Judgment of 12 December 2013. The applicant had been convicted in the Special Criminal Court of membership of an illegal organisation in 2004 and was sentenced to four years imprisonment. The conviction was upheld on appeal. The IHRC made submissions to the ECtHR regarding the evidence used by the Irish courts in convicting the accused: belief evidence, inferences drawn from the conduct of the accused and inferences that can be drawn from the silence of accused under questioning. In respect of access to a lawyer, the IHRC point out that in *Murray v UK* (1996) 22 EHRR 29, the Court stated that although the right to silence under Article 6 of the ECHR was not absolute and that inferences could admissibly be drawn from silence under questioning, a breach of the Article arose from the fact that the applicant did not have access to a lawyer during the first 48 hours of his detention, and the domestic court allowed adverse inferences to be drawn from his silence during that period. See IHRC, *Amicus Curiae Submission: Donohoe v Ireland* Application No. 19165/08, 2012, at paras 12-36, 46.

<sup>235</sup> *DPP v Gormley* [2014] IESC 17, at para .9.13.

<sup>236</sup> UN Human Rights Committee, Concluding Observations on Ireland’s Initial Report under the ICCPR, CCPR/C/IRL/79/Add21, 1993, at para. 11.

## Discretion of the Director of Public Prosecutions

156. Currently, the Director of Public Prosecutions ('DPP') exercises a broad discretion in assigning offences to the Special Criminal Court to be heard. The DPP does not have to give reasons for her or his decision. The IHRC is concerned with both the broad level of discretion given to the DPP in respect of assigning cases to be heard by the Special Criminal Court and the absence of a requirement to objectively justify the decision on reasonable grounds.<sup>237</sup> This lack of any requirement on the DPP to provide reasons when assigning offences to the Special Criminal Court by virtue of her independent office arguably represents a lack of executive oversight.<sup>238</sup>

157. The IHRC has previously addressed the Committee on its concerns regarding the failure of the Government to address the mechanism for referring cases to the Special Criminal Court and these concerns remain.<sup>239</sup> This is particularly so given the fact that the State has failed to take any steps to implement previous recommendations made by the Committee in its Concluding Observations, the Committee's decision in *Kavanagh v Ireland*<sup>240</sup> or the recommendations of the Hederman Committee.<sup>241</sup>

## Retention of the Special Criminal Court

158. While it is accepted by the IHRC that there is still some paramilitary activity in existence in Northern Ireland, and in this jurisdiction, the IHRC remains concerned about the continued existence of the Special Criminal Court and its use in certain circumstances.<sup>242</sup>

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<sup>237</sup> In *Eviston v Director of Public Prosecutions* [2002] 3 IR 260 Kearns J. opined that "[t]he prosecutorial discretion is regarded as almost completely immune from judicial scrutiny except in extremely limited circumstances", at p. 269. The matter of the discretion of the DPP in the context of the Special Criminal Court was considered by the Human Rights Committee in *Kavanagh v Ireland*, Communication No. 819/1998, CCPR/C/71/D/819/1998, 2001.

<sup>238</sup> For a general discussion of the DPP's prosecutorial discretion, see *Fleming v Ireland* [2013] IEHC 2, at paras 126-175.

<sup>239</sup> IHRC, Submission to the Human Rights Committee on the Examination of Ireland's Third Periodic Report on the ICCPR, 2008, at paras 33-42.

<sup>240</sup> Communication No. 819/1998, CCPR/C/71/D/819/1998, 2001.

<sup>241</sup> The Hederman Committee recommended that the decision of the DPP to send a person charged forward for trial in the Special Criminal Court should be subject to a positive review mechanism and suggested four such mechanisms, see Report of the Committee to Review the Offences Against the State Act 1939-1998 and Related Matters, at paras 9.60-9.77. In the *Kavanagh* case, the Committee noted that the "DPP's decision to charge the author before the Special Criminal Court resulted in the author facing an extra-ordinary trial procedure before an extra-ordinarily constituted court." The Committee concluded that "the State party has failed to demonstrate that the decision to try the author before the Special Criminal Court was based upon reasonable and objective grounds. Accordingly, the Committee concludes that the author's right under article 26 to equality before the law and to the equal protection of the law has been violated." See *Kavanagh v Ireland*, at paras 10.2-10.3.

<sup>242</sup> IHRC, Submission to the Human Rights Committee on the Examination of Ireland's Third Periodic Report on the ICCPR, at paras 33-42.

159. As outlined by the IHRC previously, a minority of the Hederman Committee was of the view that the Special Criminal Court should be dispensed with.<sup>243</sup> While the majority was of the view that the threat posed by paramilitaries in Ireland was sufficient to justify the retention of the Court, they recommended changes to the legislation. It was recommended that Section 35 of the Offences Against the State Act 1939 be amended to provide that a resolution establishing the Special Criminal Court “should automatically lapse unless it is positively affirmed by resolutions passed by both Houses of the Oireachtas at three-yearly intervals”<sup>244</sup> and that any such resolutions should expressly and clearly set out the basis for the establishment of the Court.<sup>245</sup> The IHRC is of the view that such a measure would go some way towards addressing the concerns expressed by the Committee in previous Concluding Observations and would ensure a greater level of oversight for a mechanism which has strong potential to infringe upon a number of rights protected under the ICCPR.

#### Extension of the Remit of the Special Criminal Court

160. Despite the recommendations of the Committee on previous occasions to consider discontinuing the operation of the Special Criminal Court, the State instead decided to increase its remit pursuant to section 9 of the Criminal Justice (Amendment) Act 2009 (‘the 2009 Act’). The IHRC has previously addressed the Committee in respect of the legislation when it was a Bill.<sup>246</sup> The IHRC would urge the State to continually monitor the need for the Special Criminal Court in general, but particularly in respect of the category of offences which it now has jurisdiction to try under the 2009 Act. There is a provision in the Act which requires that it will cease to operate 12 months after it has been passed into law unless the Houses of the Oireachtas pass a resolution continuing its operation. Resolutions have been passed every year since the Act came into force and the current 12 months is due to expire on the 29<sup>th</sup> June 2014.

#### Ex parte Hearings under Part 4, Criminal Justice (Amendment) Act, 2009

161. Pursuant to Part 4 of the 2009 Act, amendments have been made to various Acts<sup>247</sup> which allow a judge, when hearing an application by a relevant member of An

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<sup>243</sup> See Report of the Committee to Review the Offences Against the State Act 1939– 1998 and Related Matters pursuant to the Good Friday Agreement, at para. 9.96.

<sup>244</sup> *Ibid.*, at para. 9.44.

<sup>245</sup> *Ibid.*

<sup>246</sup> IHRC, Submission to the UN Human Rights Committee on Ireland’s 1 Year Follow-up Report to its Third Periodic Report under the ICCPR, 2009, at paras 37-39.

<sup>247</sup> The Acts (and the relevant sections thereof) which are amended by Part 4 of the Criminal Justice (Amendment) Act 2009 are the Offences Against the State Act 1939, ss.30, 30A; Criminal Justice (Drug

Garda Síochána to extend a period of detention in respect of an accused, to direct that “in the public interest” certain evidence relevant to the application be given in the absence of all persons including the accused person but excluding the member(s) of An Garda Síochána whose attendance is necessary to give the information (as well as such court clerks as the judge considers necessary).<sup>248</sup> In its Replies to the List of Issues, the State did not specifically deal with the query raised by the Committee but rather pointed to the remaining “substantial threat from terrorist activity, in particular from so-called ‘dissident’ paramilitary groups” and “the activities of organised criminal groups”, stating that it is “satisfied that the legislative measures in place which give rise to this question are compatible with the ICCPR, including Articles 9 and 14”.<sup>249</sup>

162. While the IHRC accepts that the legislation allows the judge, having heard the evidence, to direct that it be re-given in open court if he or she is satisfied that this would not, in fact, prejudice the investigation, it expresses its concern at the potential impact that the use of these provisions could have on the rights of the accused under Article 14 of the ICCPR. The IHRC would urge the State to monitor the usage of these legislative provisions to ensure that they are used sparingly and only in cases of absolute necessity.

### **Main Areas of Concern**

- **The IHRC is of the view that the definition of “terrorist activities” within Irish legislation is overly broad and could encompass categories of persons who are legitimately protesting. The disparity between those arrested and those prosecuted under the legislation remains unexplained.**
- **The IHRC urges the State to consider narrowing the scope of the definition of “terrorist activities”.**
- **The IHRC is concerned at the continuing existence of the Special Criminal Court, the routine nature of the annual parliamentary resolutions authorising the continuance of its operation and, in particular, the extension of the**

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Trafficking) Act 1996, ss.2, 3, 4, 5, 11; Criminal Justice Act 2007, ss.50, 51, 52; and Criminal Justice Act 1984, ss.4, 9, 10.

<sup>248</sup> The judge may make such a direction either of his / her own volition or on the application of the member of An Garda Síochána. This direction can only be made where the particular evidence to be given by a member of An Garda Síochána: (i) relates to steps taken or to be taken in the investigation of the arrested person’s or another person’s involvement in the offence concerned or any other offence; and (ii) the nature of the evidence could prejudice in a material way the conduct of the investigation, see s.30(4BA)(b) of the 1939 Act, as inserted by s.21 of Part 4 of the 2009 Act.

<sup>249</sup> UN Human Rights Committee, Replies of Ireland to the List of Issues, CCPR/C/IRL/Q/4/Add.1, 2014, at paras 145-146.

**Court's remit to include offences outside the scope of "terrorist activities". The continuing discretion of the Director of Public Prosecutions to refer cases to the Special Criminal Court without the necessity of evidencing reasonable and objective grounds for the referral has not been addressed by the State.**

## CHAPTER 11

### RIGHT TO BE RECOGNISED AS A PERSON BEFORE THE LAW AND RIGHT TO PRIVACY, FAMILY, HOME, CORRESPONDENCE, HONOUR AND REPUTATION (ARTICLES 16 AND 17)

#### Transgender Recognition

163. In its 2008 Concluding Observations, the Committee recommended that the State recognise the right of transgender persons to a change of gender by permitting the issuance of new birth certificates having regards to Article 16 ICCPR.<sup>250</sup> In its response to the List of Issues raised by the Committee, the State advises the Committee of the establishment of a Gender Recognition Advisory Group (GRAG) and the publication of the General Scheme of a Gender Recognition Bill in July 2013.<sup>251</sup>

164. Although this legislative initiative is welcomed, it is long overdue.<sup>252</sup> In 2007, the Irish High Court found Irish law to be incompatible with the European Convention on Human Rights Act 2003 (“the ECHR Act 2003”) insofar as it did not make provision for the legal recognition of the preferred gender of transgender persons in *Foy v. An tArd Chláraitheoir, Ireland and the Attorney General*<sup>253</sup>. The fact that a finding of a violation under the ECHR Act 2003 does not require amending legislation to be introduced, but rather refers the matter to the Executive for consideration is a matter of concern and reinforces the points made above in relation to the effectiveness of remedies in the State.

164. The IHRC has recommended that any such legislative process be carried out in consultation with transgender persons and representatives of transgender organisations. Whilst the State response to the List of Issues suggest that transgender organisations have had an opportunity to contribute their views, it is not yet clear to what extent these views will inform the legislative process.<sup>254</sup>

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<sup>250</sup> UN Human Rights Committee, Concluding Observations in respect of Ireland’s Third and Fourth Periodic Report, CCPR/C/IRL/CO/3,2008, at para. 8.

<sup>251</sup> UN Human Rights Committee, List of Issues in relation to the Fourth Periodic Report of Ireland: Replies of Ireland to the List of Issues, CCPR/C/IRL/Q4Add.1, 2014, at p. 27.

<sup>252</sup> See, for instance, IHRC, Submission to the UN Human Rights Committee on the Examination of Ireland’s Third Periodic Report on the ICCPR, 2008 and IHRC, Submission to the Gender Recognition Advisory Group, 2010.

<sup>253</sup> *Foy v An tArd Chláraitheoir, Ireland and the Attorney General* [2007] IEHC 470.

<sup>254</sup> UN Human Rights Committee, List of Issues in relation to the Fourth Periodic Report of Ireland: Replies of Ireland to the List of Issues, CCPR/IRL/Q/4/Add.1, 2014, at p. 26.

166. The General Scheme sets down pre-conditions that must be satisfied by an applicant before their application for a gender recognition certificate may be considered. The IHRC has recommended that the term “ordinarily resident in Ireland” be defined broadly to include refugees,<sup>255</sup> migrants who have lived in Ireland over 12 months or who have been legally recognised as a transgender person in another jurisdiction, and persons recently returned to the State who can provide evidence of a genuine intention of living in the State in the foreseeable future.<sup>256</sup> There is a requirement under the scheme that applicants have reached eighteen years of age. The IHRC notes that the State has a legitimate interest in ensuring that children or young adults are protected from making misinformed or unwise choices, nonetheless, a young person who identifies as a transgender person or, a person who is intersex<sup>257</sup> may also have a legitimate interest in having their preferred gender recognised by the State, in keeping with European and international human rights standards.<sup>258</sup>

167. Under the Scheme, if a person is already married or in a civil partnership, then they must seek a divorce or annulment or dissolution of their civil partnership in order to have their preferred gender formally recognised. The IHRC has concerns that by requiring a married couple to divorce, potentially against their wishes, may violate Article 23 of the ICCPR in respect of the family’s right to protection by society and the State, and the right of men and women of marriageable age to marry and to found a family.<sup>259</sup>

168. Under the Scheme, in order to be provided with a gender recognition certificate, a transgender person will be required to provide evidence of transition from a physician. This raises concerns of unnecessary interference into the person’s private life, and may also raise questions as to whether gender identity is a matter of self-identification, or whether the question of being transgender is one of medical diagnosis. The IHRC notes a requirement might be appropriate if there is a concern regarding a person’s decision-making capacity, or in the case of a minor, in which case procedural safeguards should apply, but is unclear as to why it is required in respect of an adult with full decision-

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<sup>255</sup> The term refugees should be taken to mean refugees as recognised under the Refugee Act 1996 (to include persons fleeing persecution on account of their transgender condition) or programme refugees.

<sup>256</sup> See IHRC, Submission to the Gender Recognition Advisory Group, 2010, at pp. 20-21.

<sup>257</sup> Intersex is used here to refer to individuals who have the biological features of both the male and female sex.

<sup>258</sup> IHRC, Observations on the General Scheme of Gender Recognition Bill 2013, November 2013, at paras 16-21. A further anomaly posed by a requirement to attain 18 years of age is the failure to align it with section 23 of the Non-Fatal Offences Against the Person Act 1997, which recognises that a person over 16 years is capable of consenting to medical treatment.

<sup>259</sup> Seeking and obtaining a decree of divorce in Ireland is a relatively difficult process. In order to be granted a divorce, evidence must be provided to establish that the two parties have “lived apart from one another for a period of... at least four years during the previous five years” and that there is no reasonable prospect of reconciliation. The imposition of a requirement that applicants be single could pose an almost insurmountable challenge to many married transgender people. IHRC, Observations on the General Scheme of Gender Recognition Bill 2013, November 2013, at paras 33-34. Also see Equality Authority, Submissions on General Scheme of Gender Recognition Bill, 2013, Preliminary Observations of the Equality Authority, 18 September 2013.

making capacity. The IHRC recommends that the requirement for a medical statement be removed other than for certain exceptional and prescribed circumstances pertaining to the applicant and that the emphasis be placed on self-identification by competent adults.<sup>260</sup>

169. The IHRC recommends that any statutory appeals of a refusal of a gender recognition certificate under the legislation would be explicitly encompassed within the Civil Legal Aid Act, 1995, and that the merits test would be disapplied to such proceedings. Insofar as an appeal lies to a Court, rather than an inquisitorial specialised Tribunal, it is inevitable that such appeals will be dealt with under an adversarial model that will put the applicant at a disadvantage if not legally represented.<sup>261</sup>

170. Finally, the IHRC note that the Scheme allows a sporting body to exclude a person from participating in a competitive sport in their new gender. This has the potential to undermine the rationale for the legislation to provide universal recognition of a person's new gender, if such recognition may then be ignored in the context of a sport. The IHRC recommends that this provision be reviewed to ensure it does not allow for any undue interference in a person's right to privacy, or any inappropriate exclusion of transgender or intersex persons from participation in a sport of their choice.<sup>262</sup>

## **Marriage Equality**

171. Ireland has enacted the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. The 2011 Finance Act provides that civil partnerships are treated the same as civil marriages in the tax codes. This and other legislation now means that same-sex couples who enter into civil partnerships have almost all the rights and responsibilities that are provided for in a civil marriage; with the major exception of parenting and guardianship rights and responsibilities in respect of dependent children of the civil partners. The Government published the Heads of a Children and Family Relationships Bill in January 2014 which was reviewed by the Joint Oireachtas Committee on Justice, Defence and Equality. The Committee's report addressed a number of recommendations made during public hearings which, if acted upon, would mean the legislation would provide children of same-sex couples the means of

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<sup>260</sup> See IHRC, Observations on the General Scheme of Gender Recognition Bill 2013, November 2013, at paras 35-36.

<sup>261</sup> See IHRC, Observations on the General Scheme of Gender Recognition Bill 2013, November 2013, at paras 37-38.

<sup>262</sup> See IHRC, Observations on the General Scheme of Gender Recognition Bill 2013, November 2013, at paras 39-42.

establishing a legal relationship with their day-to-day parents; recognise foreign adoptions by same-sex couples and provide for step-parent adoption.<sup>263</sup>

172. In July 2013, the Constitutional Convention recommended that a Constitutional referendum on same-sex marriage be considered. In November 2013, the Government committed to holding a referendum on same-sex marriage to amend the Constitution to allow for civil marriage for same-sex couples before the end of 2015.<sup>264</sup> The IHRC welcomes this decision and believes that it will provide an opportunity to bring Ireland into closer compliance with international human rights standards and in particular Article 23 of the ICCPR.

### **Surveillance and Data Protection**

173. As noted, the European Court of Justice, Judgment in *Digital Rights Ireland v The Minister for Communications, Marine and Natural Resources and others*<sup>265</sup> (in which the IHRC appeared as third party intervenor) struck down the EU Directive on Data Collection, Retention and Use.<sup>266</sup> The IHRC notes the case will now return to the High Court for further consideration. The Committee may wish to ask the State as to its views on the matter noting that Part 7 of the Criminal Justice (Terrorist Offences) Act 2005 remains on the Statute books. Also of note is the fact that currently there are limited oversight mechanisms for State surveillance including those relating to telephony communications. In addition, the IHRC, in its 2014 Observations on the Criminal Justice (Forensic Evidence and DNA Database System) Bill 2013, has expressed some concern at the procedural safeguards for data protection proposed in the collection, retention and use of DNA samples under a proposed new DNA Database System and at the

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<sup>263</sup> See [www.oireachtas.ie/parliament/oireachtasbusiness/committees\\_list/jde-committee/reports/](http://www.oireachtas.ie/parliament/oireachtasbusiness/committees_list/jde-committee/reports/), last accessed 10 June 2014. Arguably the Bill has the potential to provide for the same rights and responsibilities for same-sex couples and their children in civil partnerships as for opposite-sex couples in civil marriages.

<sup>264</sup> See [www.constitution.ie/AttachmentDownload.ashx?mid=c90ab08b-ece2-e211-a5a0-005056a32ee4](http://www.constitution.ie/AttachmentDownload.ashx?mid=c90ab08b-ece2-e211-a5a0-005056a32ee4), last accessed 10 June 2014.

<sup>265</sup> C-293/12, 8 July 2014.

<sup>266</sup> The CJEU considered Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, finding that these Directives interfere in a particularly serious manner with the fundamental rights to respect for private life and to the protection of personal data and concluding that, by adopting Directive 2006/24, the EU legislature had exceeded the limits imposed by compliance with the principle of proportionality in the light of Articles 7, 8 and 52(1) of the Charter. The CJEU determined that the European Directive that requires European telecommunications providers to store details of all electronic communications for between six months to two years is invalid having regard to the Charter of Fundamental Rights of the European Union.

procedures proposed for oversight of the system, including those relating to children and vulnerable persons.<sup>267</sup>

### **Main Areas of Concern**

- **The IHRC recommends that gender recognition legislation be enacted and addresses the age requirement, the requirement to be unmarried and the requirement for a medical statement other than for certain exception and prescribed circumstances.**
- **The IHRC recommends that statutory appeals under gender recognition legislation be explicitly encompassed within the Civil Legal Aid Act 1995 and that the merits test should be dis-applied to such proceedings.**
- **The IHRC recommends that the provision which allows a sporting body to exclude a person from participating in a competitive sport in their new gender be reviewed to ensure it does not allow for any undue interference in a person's right to privacy, or any inappropriate exclusion of transgender or intersex persons from participation in a sport of their choice.**
- **The IHRC recommends that the Committee asks the State to ensure that domestic law is in accordance with the right to privacy under Article 17 ICCPR following the CJEU Digital Rights Judgment.**

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<sup>267</sup> See IHRC, Observations on the Criminal Justice (Forensic Evidence and DNA Database System) Bill 2013, March 2014. See [www.ihr.ie/download/pdf/final\\_obs\\_on\\_the\\_dna\\_crim\\_justice\\_bill\\_2013\\_doc\\_ff.pdf](http://www.ihr.ie/download/pdf/final_obs_on_the_dna_crim_justice_bill_2013_doc_ff.pdf), last accessed on 9 June 2014.

## CHAPTER 12

### FREEDOM OF RELIGION (ARTICLE 18)

#### Judicial Declaration

174. In its 2008 Concluding Observations the Committee recommended that the State amend the constitutional provision, in Article 34.5.1°, requiring a religious declaration from judges to allow for a choice of non-religious declaration, having regard to Article 18 ICCPR.<sup>268</sup> In its response to the List of Issues raised by the Committee, the State notes that the issue of the judicial declaration has been considered by an All-Party Oireachtas Committee on the Constitution, and that the Government has given approval for the consideration of an amendment to the relevant provisions of the Constitution.<sup>269</sup>

175. The European Court of Human Rights, in examining this issue, has found that where there is an obligation to take a religious oath in advance of assuming public office, a violation of Article 9 of the ECHR (freedom of thought, conscience and religion) may occur if no alternative oath is available. In this regard, the Court has held that the obligation to take such an oath may interfere with an individual's freedom not to have to manifest their religious beliefs and is not necessary in a democratic society for the purpose of Article 9(2) of the Convention.<sup>270</sup> The Committee may wish to seek an update from the State as to its proposals on the matter.

#### Recognition of Rights of Children of Minority Religions or Non-Faith Backgrounds

176. The issue of the rights of children and parents to freedom of thought, conscience and religion in the State-funded education system has been the subject of focused

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<sup>268</sup>UN Human Rights Committee, Concluding Observations on Ireland's Third Periodic Report, CCPR/C/IRL/CO/3, 2008, at para. 21. See the Committee's General Comment No. 22.

<sup>269</sup> UN Human Rights Committee, List of issues in relation to the Fourth Periodic Report of Ireland: Replies of Ireland to the List of Issues, CCPR/C/IRL/Q/4/Add.1, at paras 153-514. See also Report of the Constitution Review Group, 1996. In addition to Article 34.5.1°, Article 12.8 and Article 31.4 refer to the oaths to be taken by the President and members of the Council of State upon entering office, respectively.

<sup>270</sup> In the case of *Buscarini and Others v San Marino* [GC], Application No. 24645/94, Judgment of 18 February 1999, the Applicants were elected representatives of the San Marino parliament who complained that they had been required to swear a religious oath in order to take their seats in parliament, claiming that that the exercise of a fundamental political right was subject to publicly professing a particular faith. In *Alexandridis v Greece*, Application No. 19516/06, Judgment of 21 February 2008, the Applicant complained that taking the oath obliged him to reveal that he was not an Orthodox Christian, as there was only one form of oath. Violations of Article 9 were found in both cases. See also case of *Dimitras and Others v Greece*, Application Nos. 42837/06, 3237/07, 3269/07, 35793/07 and 6099/08, Judgment of 3 June 2010, where the Court found a violation of Article 9 on account of the obligation imposed on the Applicants, as witnesses in a number of sets of judicial proceedings, to disclose their religious convictions in order to avoid having to take an oath on the Bible.

debate in Ireland during the reporting period. The IHRC conducted a wide-ranging review of the adequacy and effectiveness of law and practice in the State relating to the protection of human rights in the education system culminating in its May 2011 report, *Religion and Education: A Human Rights Perspective*.<sup>271</sup> Its overarching recommendation was that in order to achieve human rights compliance, the State should ensure that there is a diversity of provision of school type within educational catchment areas throughout the State which reflects the diversity of religious and non-religious convictions now represented in the State. Diversity of provision would ensure the needs of faith (including minority faith) or non-faith children in schools can be met.

177. Separately, the Minister for Education and Skills established a Forum on Patronage and Pluralism in the Primary Sector in March 2011, which held a number of meetings with stakeholders and the wider community, and received and considered written submissions from a large number of interested parties, including the IHRC. The Advisory Group published its report in April 2012. The publication of the proposed White Paper on Pluralism and Patronage in the Primary Sector is awaited. Thus while a number of welcome initiatives have been introduced by the State, the pace and scope of reform in those areas agreed with education partners, such as the divesting of patronage of some schools has been slow.

178. The IHRC's 2011 report made recommendations based on the assumption that the State will choose to retain the current patronage model. Given the majority of patrons being religious denominations, it noted that significant modifications would be required in order to meet human rights standards and made a number of recommendations, which were:

- The clear definition of terms, such as "denominational", "multi denominational", "inter denominational", "non denominational" or "other" school, in primary legislation, Ministerial regulations or be determined by reference to the recognition of such schools under the Education Act 1988;
- Specifically, that section 15 of the Education Act 1998 be amended to provide for modifications to the integrated curriculum to ensure that the rights of minority faith or non-faith children are also recognised therein. The IHRC recommended here the State take sufficient care that information and knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner with the aim of enabling pupils to develop a critical mind with regard to religion in a calm atmosphere which is free of any misplaced proselytism;
- That the Minister for Education and Skills codify and review the Rules for National Schools, to ensure that the human rights standards set out in its report are

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<sup>271</sup> See also UN Human Rights Committee, Concluding Observations on Ireland's Third Periodic Report, CCPR/C/IRL/CO/3, at para. 22; Concluding Observations of the Committee on the Elimination of Religious Discrimination, CERD/C/IRL/CO/2, at para. 18; Concluding Observations of the Committee on the Rights of the Child, CRC/C/IRL/CO/2, at para. 61.

upheld. This could be further reviewed in the future in the context of increased diversity in school provision;

- Where diverse provision of education does not exist in a school's catchment area that consideration be given to move formal religion classes to the start or end of the school day. While not ideal in terms of separating children, it was stated that this might provide greater accommodation to parents of minority faith or non-faith children seeking exemption. If sufficient numbers of students sought the exemption, provision could be made for a parallel class in ethics and philosophy, or other minority religions as demand dictates at the same time;
- That the State seek to ensure that all patrons, in schools funded by the State, are sensitive to the impact that the manifestation of religious beliefs in the school may have on children of other faith or non-faith backgrounds. In this regard the report recommended that those children should never experience exclusion or segregation in the school or in any way be undermined in their own faith or other philosophical convictions. Guidelines and examples of good practice, together with the allocation of necessary resources to implement such good practice should be developed in tandem with the enhanced complaints mechanism being recommended to Government. The IHRC recommended that for their part, those denominational schools who have other faith or non-faith children as pupils should take steps to guard against any inadvertent indoctrination or proselytism of those children by teachers;
- That the State should continue to seek to promote religious harmony and understanding between groups, including those of a secular viewpoint. Further, the report recommended that it should ensure that indoctrination and proselytism does not take place in State funded schools, possibly through reviewing the remit of Departmental Inspectors to take account of issues concerning religion and education;
- That there be an expanded Ombudsman body with a remit to consider complaints concerning exemption procedures or any unwanted exposure to indoctrination or proselytism. Further, the report recommended that the remit of Schools Inspectors should include inspection of how religion classes are conducted in schools, regard being had to the effectiveness of exemption procedure being put in place by schools further to the recommendations in this report;
- That in ensuring the rights of school children in accordance with maturity, the report recommended that the views of most second-level students and arguably some older primary school students in relation to the exemption procedures or any perceived encroachment on their personal religious or philosophical convictions, be taken into consideration, in addition to the views of their parents;
- That the education of teachers not include compulsory content that conflicts with the rights of such teachers. The report recommended that any improper encroachment on the right to freedom of thought, conscience and religion of teachers should thus be avoided;

- That there be an appropriate amendment to the Employment Equality Acts 1998-2012 to ensure respect for the private life of teachers where their private life does not improperly encroach on the rights and freedoms of others.<sup>272</sup>

## Other Developments

179. Pending the introduction of the White Paper referred to there have been some moves towards divestiture of patronage. The IHRC welcomes the increase in the numbers of multi-denominational primary schools, achieved in part through opening new schools under existing patrons, and in part through the creation of a new model of primary school patronage, the Community National School.<sup>273</sup> In relation to complaints mechanisms, the Department has begun work on the development of a Parents' Charter. However, no formal complaints procedures have been prescribed by the Minister for Education and Skills, pursuant to section 28 of the Education Act 1998, for the hearing and resolution of grievances relating to matters other than admissions, suspensions and expulsions. The IHRC, in its 2011 report, noted that the existing complaints procedures do not cover all primary or second-level schools in the State, such that the situation pertaining in schools not covered by agreements between management bodies and teachers' unions, is unclear.<sup>274</sup>

180. Concerning the issue of access to schools, as outlined by the State in its Replies to the List of Issues, draft legislation and regulations have been introduced with a view to ensuring that 'the way schools decide on applications is structured, fair and transparent', by virtue of which a school's enrolment policy will be required to include a statement 'setting out the position of the school in relation to its arrangements for upholding the constitutional right of students not to attend religious instruction'.<sup>275</sup> In relation to restrictions under equality legislation, there have been no proposals to amend sections 7(3)(c) of the Equal Status Acts 2000-2012 but the Government is proposing to modify section 37 of the Employment Equality Acts 1998-2011 to address the rights of access to employment and promotion for student teachers, teachers and those in the health sector.

181. The Equality Authority in its Submission to the Department of Education and Skills on the Department's Discussion Paper on a Regulatory Framework for School Enrolment, recommended that the definition of 'characteristic spirit' in the Education Act

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<sup>272</sup> IHRC, Religion and Education: A Human Rights Perspective, 2011.

<sup>273</sup> Community National Schools currently operate under the (temporary) patronage of the Minister for Education and Skills, while they are managed by Education and Training Boards, established under the Education and Training Boards Act 2013.

<sup>274</sup> IHRC, Religion and Education: A Human Rights Perspective, 2011, at para. 81.

<sup>275</sup> UN Human Rights Committee, List of issues in relation to the Fourth Periodic Report of Ireland: Replies of Ireland to the List of Issues, CCPR/C/IRL/Q/4/Add.1, at paras 157-158.

1998 should be amended to prevent a school from defining its characteristic spirit in a way that enables it to exclude any student on any of the nine discriminatory grounds provided for under the Equal Status Acts 2000-2012, and that any application of the exemption provided for under these Acts or any proposed amendments or regulations must be assessed to ensure that they cannot result in a breach of the 'Race Directive'<sup>276</sup> and/or contribute to ethnic or racial segregation in schools.<sup>277</sup>

182. In its recent Judgment in *O'Keeffe v Ireland*,<sup>278</sup> the Grand Chamber of the ECtHR was of the view that by failing to provide for an effective complaints mechanism as against teachers, the State had failed in its obligation to protect the applicant from acts of sexual abuse to which she was subjected in 1973, while a student in a State-funded primary, in violation of its obligations under Article 3 ECHR.<sup>279</sup>

183. The State has recently taken a number of positive steps to fulfil its obligation to protect students in primary and post-primary education from sexual abuse, including the provision of a comprehensive (albeit as yet non-statutory) complaints mechanism.<sup>280</sup> Complaints which do not relate to abuse complaints are, as noted, otherwise the subject of locally agreed procedures which direct complainants away from State authorities to Boards of Management.

## Main Areas of Concern

- **The IHRC recommends that the issue of compulsory constitutional judicial and other declarations be reconsidered by the State to reflect religious and other beliefs.**
- **The IHRC recommends that legislation be introduced to prohibit discrimination in access to schools on the grounds of religion, belief or other status and that in tandem, sufficient choice be afforded to parents and children in school catchment areas.**
- **The IHRC recommends that modifications be made to the integrated**

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<sup>276</sup> Council Directive 2000/43/EC, of 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

<sup>277</sup> Equality Authority, Submission to the Department of Education and Skills on the Department's Discussion Paper on a Regulatory Framework for School Enrolment, November 2011, at paras 41 and 49.

<sup>278</sup> *O'Keeffe v Ireland*, Application No. 35810/09. Judgment of 28 January 2014, the IHRC was authorised to intervene as third party (under Article 36 § 2 of the Convention) in the written procedure.

<sup>279</sup> *Ibid.*, at para. 168.

<sup>280</sup> Department of Education and Skills, *Child Protection Procedures for Primary and Post Primary Schools*, 2011; Department of Children and Youth Affairs, *Children First - National Guidance for the Protection and Welfare of Children*, 2011. The Heads of the Children First Bill were published in April 2014.

curriculum through legislation to ensure that the rights of minority faith or non-faith children are fully recognised therein and that the Education Act 1988 and the 1965 Rules for National Schools be amended to fully reflect the State's human rights and equality obligations.

- The IHRC is concerned that there are school catchment areas where there is no parental schooling choice other than a school with a religion or ethos at variance with that of the parents of a child and/ or the child. The IHRC recommends that consideration be given to requiring formal religion classes to be held at the start or end of the school day.
- The IHRC recommends that an independent, accessible and uniform complaints mechanism be introduced and the role of School Inspectors be enhanced.
- The IHRC recommends that section 37 of the Employment Equality Acts 1998-2012 be amended to protect the rights of access to employment and promotion in the fields of education and health.

## CHAPTER 13

### FREEDOM OF OPINION AND EXPRESSION (ARTICLE 19)

#### **Blasphemy, the Defamation Act 2009 and the Incitement to Hatred Act 2009**

184. Article 40.6.1°(i) of the Constitution, which guarantees the right of citizens to express their convictions freely, provides that 'the publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law'. The Committee has asked the State to provide information relating to the measures taken or envisaged to remove the offence of blasphemy from the Constitution as well as the corresponding offence as provided for by the Defamation Act 2009.

185. The State, in its response, has indicated that pending any amendment to Article 40.6.1°(i) by referendum, it is required to maintain a criminal offence of blasphemy, and notes that the recommendation made by the Convention on the Constitution in November 2013 as to the removal of the Constitutional offence of blasphemy is currently under consideration by the Government.

186. The content and scope of the constitutional offence of blasphemy has been scrutinised by the Superior Courts,<sup>281</sup> parliamentary committees<sup>282</sup> and domestic law reform bodies.<sup>283</sup> In *Corway v Independent Newspapers (Ireland) Limited*, the Supreme Court held that, in the absence of any legislative definition, it was impossible to state what the offence of blasphemy consisted of and that a criminal prosecution was therefore not possible in the instant case.<sup>284</sup>

187. The Defamation Act 2009, which repealed the common law offence of defamatory libel, makes provision for an offence of publication or utterance of blasphemous matter, and creates powers of search, entry and seizure in respect of copies of blasphemous statements.<sup>285</sup> It is uncertain whether the Constitutional offence of blasphemy and its statutory counterpart, as restrictions on the right of freedom of expression, are capable of amounting to a proportionate restriction of this right within the terms of the

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<sup>281</sup> *Corway v Independent Newspapers (Ireland) Limited* [1999] 4 IR 484.

<sup>282</sup> Joint Committee on the Constitution, First Report: Article 40.6.1°i – Freedom of Expression, 2008, at p. 2.

<sup>283</sup> Law Reform Commission, Report on the Crime of Libel (LRC 41-1991), at pp.10 – 12, Report of the Constitutional Review Group, 1996; Report of the Legal Advisory Group on Defamation, 2003, at para. 59.

<sup>284</sup> *Corway v Independent Newspapers (Ireland) Limited* [1999] 4 IR 484, at p. 502.

<sup>285</sup> See s.35-37 of the Defamation Act. Section 36 of the Defamation Act 2009 provides a legislative definition of the offence of blasphemy, which includes publishing or uttering matter "that is grossly abusive or insulting in relation to matters held sacred by any religion, thereby causing outrage among a substantial number of the adherents of that religion," at s.36(2)(a).

jurisprudence of the European Court of Human Rights, notwithstanding the application of the doctrine of the margin of appreciation.<sup>286</sup>

188. In this regard, the IHRC notes that while the State has taken steps to update and elaborate the offence of blasphemy in the Defamation Act 2009, the provisions of the Prohibition of Incitement to Hatred Act 1989 are largely unused. Thus while the Prohibition of Incitement to Hatred Act 1989 creates offences in relation to the publication, broadcasting, preparation and possession of materials which are likely to stir up hatred against a group of persons on account of, inter alia, their religion, the apparent lack of prosecutions calls into question the effectiveness and accessibility of these sanctions.<sup>287</sup>

189. While the IHRC offers no view as to whether it is appropriate to include a specific criminal offence in the Constitution as recommended by the Convention, it is notable however that religious hatred, race hate, and other forms of hate crime are often closely linked, such that it is open to question whether any amended constitutional provision which makes reference to hate crime should be restricted to religiously motivated hate crime. Insofar as the prohibition of incitement to religious hatred may be considered to protect freedom of religion in a pluralist society, it is, in the IHRC's view, unclear why other forms of philosophical convictions or conscientious beliefs would not be afforded equal protection<sup>288</sup>

190. The IHRC is of the view that any constitutional amendment will require critical examination of the purpose and efficacy of both section 36 of the Defamation Act, 2009 and the Prohibition of Incitement to Hatred Act, 1989.<sup>289</sup>

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<sup>286</sup> For the approach adopted by the European Court of Human Rights, see *Gündüz v Turkey* [2003] ECHR 652, where a conviction for expressing radical anti-secularist Islamic comments during a television debate was held to infringe Article 10, as the defence of sharia was unaccompanied by a call for violence to establish it. In *Giniewski v France* [2006] ECHR 82, a conviction for the publication of an article which was virulently critical of Christianity infringed Article 10. In *Klein v Slovakia* [2006] ECHR 909, a conviction for vulgar criticism of an Archbishop infringed Article 10. In *IA v Turkey* [2005] ECHR 590, a conviction for an insulting and abusive attack on the Prophet of Islam did not infringe Article 10.

<sup>287</sup> See European Commission against Racism and Intolerance, Third Report on Ireland (Fourth Monitoring Cycle), CRI (2007)24, at paras 21-25.

<sup>288</sup> See UN Human Rights Committee, General Comment No.34, 12 September 2011, at para. 48.

<sup>289</sup> See also the IHRC, Submission to the UN Committee on the Elimination of Racial Discrimination on the occasion of Ireland's First National Report under the Convention on the Elimination of All Forms of Racial Discrimination, 2004. It is the view of the IHRC that there is merit in the proposal 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 the right of freedom of expression with the need to prohibit incitement to racial hatred or discrimination, at p. 6.

## **Main Areas of Concern**

- **The IHRC recommends that any proposed constitutional amendment in relation to Article 40.6.1°(i) includes critical examination of the purpose and efficacy of both section 36 of the Defamation Act, 2009 and the Prohibition of Incitement to Hatred Act, 1989.**

## CHAPTER 14

### RIGHTS OF PERSONS BELONGING TO MINORITIES (ARTICLES 2, 23, 24, 26 and 27)

#### Travellers as an Ethnic Minority Based on the Principle of Self-identification

191. Since its establishment, the IHRC has expressed its concerns regarding the human rights of the Irish Traveller Community.<sup>290</sup> In April 2014, the Oireachtas Joint Committee on Justice, Defence and Equality published a report on the recognition of Traveller ethnicity which concluded that it was no longer tenable for Ireland to deny Traveller ethnicity.<sup>291</sup> Nonetheless, Ireland continues to refuse to recognise Travellers as an ethnic minority group despite General Comments 8 and 23 of the Committee on the Elimination of Racial Discrimination.<sup>292</sup>

192. The link between recognition of ethnicity and better outcomes for members of the Travelling community cannot be disregarded. Statistics demonstrate that Travellers continue to have very poor outcomes in certain areas, such as employment, health, education and living conditions,<sup>293</sup> which reflects the fact that members of the Travelling

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<sup>290</sup> The IHRC's position on Travellers as an ethnic minority was most fully set out in a discussion document published in 2004: See IHRC, *Travellers as an Ethnic Minority under the Convention on the Elimination of Racial Discrimination: A Discussion Paper*, 2004. See also IHRC, *Submission to the UN Human Rights Committee on the Examination of Ireland's Third Periodic Report on the ICCPR*, 2008, at para. 136; and IHRC *Submission on the Recognition of the Traveller Community as an Ethnic Minority in the State*, 2013.

<sup>291</sup> Houses of the Oireachtas, Joint Committee on Justice, Defence and Equality, *Report on the Recognition of Traveller Ethnicity*, 2014.

<sup>292</sup> Namely that the existence of an ethnic, religious, or linguistic minority in a given State party does not depend upon a decision by the State party but requires to be established by objective criteria. See CERD, *General Recommendation No. 8: Membership of Racial and Ethnic Groups based on Self-Identification*, A/45/18, 1991, at p. 79, and CERD, *General Recommendation No. 23: Rights of Indigenous People*, A/152/18, 1997, at annex V at p. 122.

<sup>293</sup> An October 2012 publication by the Central Statistics Office regarding Irish Travellers notes the following: Unemployment in the Irish Traveller community was 84.3 per cent in 2011, up from 74.9 per cent five years earlier. Out of a total labour force of 9,973, 86.6 per cent of the 5,829 males were unemployed while 81.2 per cent of the 4,144 women were without work. The labour force participation rate among Irish Travellers was 57.3 per cent compared with 61.9 per cent for the general population. In 2011 Irish Travellers on average ceased their full-time education 4.7 years earlier than those in the general population. More than one in four (27.3 per cent) of Irish Traveller households in permanent accommodation were without access to a car in 2011, compared with 15.9 per cent of all households in the State. Almost one in three Irish Traveller households living in mobile or temporary accommodation had no sewerage facilities in 2011. These dwellings housed 886 people. One in five Irish Traveller households living in mobile or temporary dwellings (containing 566 people) had no piped water source in 2011. In 2011, the self-assessed health of Irish Travellers was below that of the general population. While overall the number of Irish Travellers indicating good or very good health was 86.6 per cent, compared with 90.2 per cent for the general population, Irish Travellers health deteriorates more quickly with age. (Central Statistics Office, *Profile 7, Religion, Ethnicity and Irish Travellers*, 2012).

community still experience significant discrimination and disadvantage in many aspects of their lives on account of their identity.<sup>294</sup>

193. In response to the State's suggestion that the recognition of Travellers as an ethnic minority may prove to be an elusive consensus amongst the Traveller community and Traveller representative organisations, the IHRC wishes to emphasise that a universal form of self-identification is not a necessary pre-requisite for recognition of an ethnic minority by the State for the purpose of ensuring legal protection of that group. The principle of self-identification pre-supposes the existence of an ethnic minority, but affords protection to each individual within that group from being coerced in any way to so identify.<sup>295</sup>

194. The IHRC renews its call that the State issue a statement that it formally recognises Travellers as an ethnic minority, while also emphasising the right of each individual member of the Traveller community to exercise their right of self-identification.

### **Traveller Accommodation**

195. The IHRC notes that little progress has been made to amend legislation to meet the specific accommodation requirements of Traveller families and the criminalisation of trespassing on land in the Housing (Miscellaneous Provisions) Act 2002 ("2002 Act") continues to disproportionately affect Travellers.<sup>296</sup> The IHRC remains concerned that not enough good quality or culturally appropriate accommodation is being provided to Travellers by Local Authorities.<sup>297</sup>

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<sup>294</sup> IHRC, Submission on the Recognition of the Traveller Community as an Ethnic Minority in the State, 2013, at p. 9.

<sup>295</sup> Houses of the Oireachtas, Joint Committee on Justice, Defence and Equality, Report on the Recognition of Traveller Ethnicity, 2014, at p. 14. See also IHRC, Presentation by the IHRC to Oireachtas Joint Committee on Justice, Defence and Equality: Recognition of Traveller Ethnicity, Opening Statement by Sinead Lucey, Senior Enquiry and Legal Officer of the IHRC, 2013.

<sup>296</sup> See UN Human Rights Committee, Concluding Observations on Ireland's Third Periodic Report, CCPR/C/IRL/CO/3, 2008, at para. 23. See IHRC, Submission on behalf of the Human Rights Commission: Lawrence and Others v Ballina Town Council and Others, High Court 5813P/2003 at pp. 46-47.

<sup>297</sup> See IHRC, Submission to the Human Rights Committee on Ireland's Fourth Periodic Report under the ICCPR – List of Issues Stage, 2013, at para. 45; IHRC, Submission for the Twelfth Session of the Working Group on the Universal Periodic Review: Ireland, 2011, at para. 31. In 2013, according to the Department of Environment, Community and Local Government's annual count there were 361 Traveller families living in what are termed as "unauthorised sites" out of a total of 9,899 families accommodated by or with the assistance of the local authority and on unauthorised sites. See [www.environ.ie/en/Publications/StatisticsandRegularPublications/TravellerAccommodation/FileDownload,37537,en.pdf](http://www.environ.ie/en/Publications/StatisticsandRegularPublications/TravellerAccommodation/FileDownload,37537,en.pdf), last accessed 29 May 2014. The HSE has noted that living in "unauthorised sites" is characterised by the absence of electricity, running water, toilet facilities and refuse collection: HSE, National Intercultural Health Strategy, 2007-2012, at p. 49.

196. The IHRC has previously expressed concern that an “indigenous only” policy employed by a number of Local Authorities was incompatible with respect for Travellers’ culture, since it only permitted a Traveller to be provided with transient accommodation where he or she had resided on a permanent basis for at least three years in a particular area.<sup>298</sup> The Housing (Traveller Accommodation) Act 1998 provides for the delivery of appropriate accommodation to Travellers, but requires to be enforced at a national level rather than being left to the discretion of Local Authorities, as is currently the case. Steps are required to ensure proper recognition and evaluation of Traveller needs, in consultation with Travellers, resulting in proper planning for public and private housing and proper provision of adequate and appropriate accommodation.<sup>299</sup>

197. The combination of the State’s failure to provide sufficient Traveller-specific accommodation and the subjection of Travellers to criminalising laws that allow for their summary removal from unofficial sites has largely reduced Travellers’ ability to maintain a nomadic way of life. The IHRC recommends that the relevant provisions of the 2002 Housing Act should be amended and repealed.

### **Enjoyment of Covenant Rights by Roma Communities**

198. The IHRC considers the publication of Ireland’s National Traveller Roma Integration Strategy (“the Strategy”) in 2011 to have been a positive development.<sup>300</sup> However the IHRC is concerned that the Roma community remains disadvantaged in four “crucial areas” namely access to education, employment, healthcare and housing.<sup>301</sup>

199. The IHRC calls on the State to further develop Ireland’s Strategy and, critically, to implement the recent recommendations of the European Commission on the

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<sup>298</sup> IHRC, Submission to the UN CERD Committee on the Examination of Ireland’s Combined Third and Fourth Periodic Reports, 2010, at para. 66.

<sup>299</sup> IHRC, Submission for the Twelfth Session of the Working Group on the Universal Periodic Review: Ireland, 2011, at para. 31.

<sup>299</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, An EU Framework for National Roma Integration Strategies up to 2020, /\*COM/2011/0173 final \*/ , 5 April 2011.

<sup>300</sup> Department of Justice and Equality, Ireland’s National Traveller/Roma Integration Strategy, 2011. See [www.justice.ie/ga/JELR/Ireland’s%20National%20Traveller%20Roma%20Integration%20Strategy%202011.pdf/Files/Ireland’s%20National%20Traveller%20Roma%20Integration%20Strategy%202011.pdf](http://www.justice.ie/ga/JELR/Ireland’s%20National%20Traveller%20Roma%20Integration%20Strategy%202011.pdf/Files/Ireland’s%20National%20Traveller%20Roma%20Integration%20Strategy%202011.pdf), last accessed 29 May 2014.

<sup>301</sup> As part of the European Commission proposal for an EU Framework for national Roma integration strategies up to 2020, all Member States were asked to present to the Commission a national Roma integration strategy by the end of 2011. Efforts should also be intensified to ensure that the education system guarantees all children of immigrant origin equality of opportunity in access to education, including higher education. See Council of Europe, ECRI, ECRI Report on Ireland (fourth cycle), CRI(2013)1, 2013, at p. 8.

implementation of the EU Framework for National Roma Integration Strategies<sup>302</sup> and to consider the criticism raised by the Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities in its recent report on Ireland<sup>303</sup> and the comments raised by the European Commission Against Racism and Intolerance in its report on Ireland.<sup>304</sup> This should take place in consultation with all of the stakeholders concerned and, in particular, members of the Roma community.

200. In addition the IHRC notes that on the opening page of the Strategy it is accepted that “[t]here are no official statistics on the number of Roma in Ireland”.<sup>305</sup> The IHRC considers that this reflects a general problem of lack of data regarding the Roma Community in Ireland. Collection and analysis of such data is necessary in order to ensure informed and effective policy development in this area. The IHRC is further concerned at continuing negative attitudes towards the Roma community in Ireland.<sup>306</sup>

### **Prohibition on Hate Speech**

201. The IHRC notes the Council of the European Union and the European Commission have been examining the compliance of member states with Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia through the criminal law and welcomes the State’s indication that it would consider any proposals made. The IHRC has previously addressed its concerns regarding the Prohibition of Incitement to Hatred Act, 1989 and its shortcomings to the Committee on the Elimination of Racial Discrimination.<sup>307</sup> In its

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<sup>302</sup> European Commission, Report on the implementation of the EU framework for National Roma Integration Strategies, 2014. This report made a number of recommendations in respect of Ireland at pp. 31-32.

<sup>303</sup> Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities: Third Opinion on Ireland, ACFC/OP/III (2012)006, 2013, at paras 28, 134 and 136. The Advisory Committee also expressed regret that no Roma representatives participate in the work of any of Traveller Consultative Committees such as the National Traveller Monitoring and Advisory Committees, the National Traveller Accommodation Consultative Committee, the Local Traveller Accommodation Consultative Committees, the Traveller Education Strategy Advisory, and Consultative Forum and The Traveller Health Advisory Committee, at para. 28.

<sup>304</sup> Council of Europe, ECRI Report on Ireland (fourth cycle) CRI(2013)1, 2013, at p. 8.

<sup>305</sup> Department of Justice and Equality, Ireland’s National Traveller/Roma Integration Strategy, 2011, at p. 3.

<sup>306</sup> While an investigation into the reported removal from their families by members of An Garda Síochána of two Roma children in October 2013, where they were subsequently placed into State care on suspicion that they were not the parents’ biological children, is awaited from the Ombudsman for Children (the report was submitted to the Minister for Justice and Equality in April 2014 but is not yet published), public discourse on Roma at the time included their portrayal as a community associated with criminal activities, attitudes similar to those displayed in other European States.

<sup>307</sup> See IHRC, Submission 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, at pp. 6-7; and IHRC, Submission to the UN Committee on the Elimination of Racial Discrimination on the Examination of Ireland’s Combined Third and Fourth Report, November 2010, at para. 20.

2011 Concluding Observations, the Committee on the Elimination of Racial Discrimination expressed regret that a review of the Prohibition of Incitement to Hatred Act, 1989 had stalled and recommended that the State make “efforts aimed at strengthening the protection of all people from racial discrimination by improving the existing draft pieces of legislation and passing them into law”.<sup>308</sup>

202. The IHRC notes that the Report on Combating Racism and Xenophobia through the Criminal Law previously referenced by the State was one commissioned by the National Action Plan Against Racism which expired in 2008 and has not been replaced.<sup>309</sup> While the IHRC welcomes the report, it is unclear whether its recommendations have been implemented by the State.

203. The IHRC notes the State has previously noted that the Prohibition of Incitement of Hatred Act 1989 covers offending material on websites and social networking sites. The IHRC recommends, however that further steps be taken by State to monitor problematic websites and to prevent the dissemination of racist material. The IHRC is of the view that there are insufficient provisions at present to deter and punish any such instances. It therefore 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.<sup>310</sup>

### **Main Areas of Concern**

- **The IHRC is concerned at the State’s continued refusal to recognise Travellers as an ethnic minority and recommends action on this issue, without delay.**
- **The IHRC recommends that the criminalisation of behaviour under the Housing (Miscellaneous Provisions) Act 2002 be amended or repealed.**

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<sup>308</sup> CERD/C/IRL/CO/3-4, 2011, at para. 15. In addition, CERD welcomed the Report on Combating Racism and Xenophobia through the Criminal Law. The CERD recommended that: in line with Article 4(b) of the Convention, legislation be passed to declare illegal and prohibit racist organizations; racist motivation be consistently taken into account as an aggravating factor in sentencing practice for criminal offences; and programmes of professional training and development sensitize the judiciary to the racial dimensions of crime, at para. 19.

<sup>309</sup> Jennifer Schweppe and Dermot Walsh, Centre for Criminal Justice, University of Limerick, Combating Racism and Xenophobia through the Criminal Law: A Report Commissioned by the National Action Plan Against Racism, 2008. See [www.integration.ie/website/omi/omiwebv6.nsf/page/AXBN-7UPE6D1121207-en/\\$File/Combating%20Racism%20with%20the%20Criminal%20Law.pdf](http://www.integration.ie/website/omi/omiwebv6.nsf/page/AXBN-7UPE6D1121207-en/$File/Combating%20Racism%20with%20the%20Criminal%20Law.pdf), last accessed on 29 May 2014.

<sup>310</sup> These recommendations mirror the recommendations to be found in IHRC, Submission 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, at pp. 6-7.

- The IHRC recommends that the necessary development of Ireland's National Roma Integration Strategy should take place in consultation with all of the stakeholders concerned and in particular members of the Roma community.
- The IHRC is concerned about the lack of data regarding the Roma community in Ireland and the consequent lack of positive action required in order to ensure protection of the human rights of the Roma community and recommends that this matter be addressed without delay.
- The IHRC urges the State to fully review the Prohibition on the Incitement to Hatred Act, 1989 in light of the Report from the Commission to the European Parliament and Council on the implementation of Council Framework Decision 2008/913/JHA, and to make any necessary amendments.
- The IHRC is also concerned that the Prohibition on the Incitement to Hatred Act 1989 may be out dated in light of developments in online technology and urges the State to review and amend the legislation accordingly in this regard.