



**Submission to the European Commission against
Racism and Intolerance
(ECRI)**

June 2006

About the ICCL

The Irish Council for Civil Liberties (ICCL) is the leading independent, non-governmental membership organisation working to defend human rights and civil liberties in Ireland. It was founded in 1976 by, among others, Mary Robinson (former President of Ireland and UN High Commissioner for Human Rights) and Kader Asmal (Professor of Law and Minister in the first democratic South African Government. Its members and officers through the years have included many leading academics, politicians, lawyers and public figures.

Over the last thirty years, the ICCL has campaigned in the sphere of civil liberties and human rights reform.

The ICCL has been very active in a wide range of constitutional reform campaigns, and has championed the rights of minorities including gay and lesbian rights, Travellers' rights, women's rights, and the rights of migrants, refugees and asylum-seekers.

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1. Introduction

The Irish Council for Civil Liberties (ICCL) welcomes the opportunity to contribute to the European Commission against Racism and Intolerance (ECRI)'s third report on Ireland. Since ECRI's last report there have been several major developments in the field of race equality and human rights. For example, the European Convention on Human Rights¹ has been given further effect in Irish law, the Irish Human Rights Commission² has become operational and the National Action Plan Against Racism³ has been launched. Despite these positive developments, the ICCL believes that, during the same period, there has been deterioration in the extent to which the rights of non-citizens and members of the Traveller community are protected. We are also concerned about the Government's willingness to include new exemptions in Irish anti-discrimination legislation.

2. Ratification of International Treaties

In ECRI's second report on Ireland, it encouraged Ireland to sign and ratify the following treaties: the European Convention for the Participation of Foreigners in Public Life at Local Level; the European Convention on Nationality; the European Charter for Regional and Minority Languages; the European Convention on the Legal Status of Migrant Workers and the UNESCO Convention against Discrimination in Education.

To date, no real progress has been made in signing and ratifying these treaties. It is the view of the ICCL that these conventions include important norms on the basis of which the Government could shape domestic law and policy. At present, there is a legal and policy vacuum particularly relating to the reception and integration of migrants. Although the Government published a discussion document on proposals for an Immigration and Residence Bill⁴, this document did not include proposals for concrete measures in respect of reception and integration.

¹ By virtue of the European Convention on Human Rights Act, 2003, enacted on 31 December 2003.

² www.ihrc.ie

³ Department of Justice, Equality and Law Reform (2004) *Planning for Diversity: The National Action Plan Against Racism*, available from www.justice.ie

⁴ Department of Justice, Equality and Law Reform (2005) *Immigration and Residence in Ireland: Outline Policy Proposals for an Immigration and Residence Bill*, available from www.justice.ie

3. Constitutional Change

Recognising deficiencies in the Irish Constitution, ECRI in its last report asked the Government to consider a constitutional amendment ensuring equality and other human rights for all individuals under Irish jurisdiction.⁵ The ICCL fully agrees with this recommendation particularly given that jurisprudence under Article 40.1 of the Irish Constitution (equality before the law) is so underdeveloped.⁶ Although Article 40.1 could be interpreted to include a prohibition against direct and indirect discrimination, the Constitutional Review Group note that Irish courts do not always regard indirect discrimination as falling within its scope.⁷ The Constitutional Review Group has recommended that Article 40.1 should be amended to include a provision outlawing direct and indirect discrimination on any ground, including race.⁸

Reducing Constitutional Protection for Children Born to Non-Citizens

The only amendment to the Constitution since Ireland's last report has been to reduce protection for children born to non-citizens. For example, the Government hastily organised a referendum on 11 June 2004 to radically change the basis of citizenship from *jus solis* to *jus sanguinis* with the inclusion of a new Article 9. Under this Article, only those born in Ireland to at least one Irish national parent will acquire citizenship upon birth.

Approximately 80% of the electorate voted in support of the Government's proposals and the legal basis for acquiring Irish citizenship was changed through the Irish Nationality and Citizenship Act 2004. Children born to non-citizens can be recognised as an Irish citizen if their parents have been legally resident in the State for three years.⁹ This measure is primarily aimed at non-citizens from outside Europe as children born to nationals from the European Union (EU), the European Economic Area (EEA) and the Swiss Federation are eligible for Irish citizenship if born in Ireland. In addition, children of asylum seekers and international students are specifically excluded from being recognised as Irish citizens.

It is the view of the ICCL that this recent change runs counter to the principle of equality in the Irish Constitution by creating a category of children, who, by virtue of their parentage, will not be citizens of Ireland.

⁵ ECRI (2001) *Second Report on Ireland*, Council of Europe: Strasbourg, p. 8.

⁶ Hogan, G.W. and Whyte, G.F (2003) *JM Kelly and the Irish Constitution*, Lexis-Nexus/Butterworths: Dublin, p. 1324.

⁷ Constitutional Review Group (1996), refer to section on Article 40.1.

⁸ *Ibid.*

⁹ Section 4, Irish Nationality and Citizenship Act, 2004.

4. Legislative Provisions Outlawing Racism and Xenophobia

No new legislative provisions have been introduced to combat racism and xenophobia, even though it is widely acknowledged that the Incitement to Hatred Act, 1989 is largely ineffective. As part of the National Action Plan Against Racism, in 2005 the Government commissioned Professor Dermot Walsh¹⁰ to research racism and the criminal law in Ireland. The main purpose of the study is to inform the Minister for Justice, Equality and Law Reform and to equip the National Action's Plan's Strategic Monitoring group to assess the effectiveness of Irish law to combat racially motivated crime. While the ICCL welcomes this move, it may still take some time for new legislative proposals outlawing racism and xenophobia to emerge.

5. Limits within Ireland's Equality Regime

Ireland's equality regime essentially consists of formal equal treatment measures and is not designed to bring about substantive equality. The Employment Equality Acts (EEA) 1998-2004 prohibit discrimination in relation to employment on the basis of: gender, family status, marital status, age, disability, sexual orientation, religious belief, race and membership of the Traveller community. The Equal Status Acts (ESA) 2000-2004 outlaws discrimination on the same grounds with regard to goods, services and education. While the range of grounds covered by Ireland's existing equality law compares favourably with other EU countries, in virtually all other respects we lag behind our European counterparts.

A particular weakness is that the Acts essentially rely on an individualistic justice model, which means that they can generally only be triggered if an individual is discriminated against and willing to take a case against an employer or service provider. This places an unrealistic burden on people who are already vulnerable because of their minority group status, in fact many may not even be aware of their rights. Moreover, positive action is permissible under the Acts but in practice it rarely happens.

The Equal Status Act does not cover all government controlling functions and this has been acknowledged by the United Nations Committee on the Elimination of All Forms of Racial Discrimination (CERD) in March 2006. CERD recommended that this Act should be amended to include all government controlling duties and functions.¹¹ However, the State has made no efforts to expand the scope of the Equal Status Act despite its obligations under the Race Directive (see section 7 below).

¹⁰ School of Law, University of Limerick.

¹¹ Committee on the Elimination of Racial Discrimination (14.04.05) *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Ireland*, (CERD/C/IRL/CO/2).

Since ECRI's last report a new trend has emerged where the Government has amended our equality legislation three times to include new exclusionary exemptions.

- The Government amended the equality legislation on foot of political pressure from publicans to remove the jurisdiction of the Equality Tribunal to hear complaints from individuals alleging discrimination by publicans and hoteliers.¹² These cases are now heard in the District Court, which makes it much more difficult for vulnerable people to challenge discrimination.
- Section 19 of the Social Welfare (Miscellaneous Provisions) Act 2004 was introduced to amend the main social welfare act to restrict the definition of 'spouse' or 'couple' to a married couple and to opposite sex cohabiting couples for state welfare schemes. This amendment was included by the Department of Social and Family Affairs to reverse the outcome of a successful Equal Status case and has the effect of restoring discrimination against persons in same-sex couples.
- Section 49 of the Equality Act 2004 amended the Equal Status Act to allow the Minister for Education and Science to discriminate on the basis of nationality when providing further and higher education grants. This section is in direct response to a decision from the Equality Tribunal in 2003.¹³ The Tribunal decided that further and higher education grants are a service and that 'non-nationals' who are denied access to this service are being directly discriminated against. In its decision, the Tribunal advised the Minister for Education and Science, Noel Dempsey TD, that his current scheme was discriminatory and should be amended accordingly. Instead of taking on board the Tribunal's recommendation, the Government decided to amend the ESA instead.

If the Government is truly committed to addressing racial discrimination in Irish society, then we believe that it should act to remove these exemptions from the equality legislation.

¹² See for example, *Joint Response of Equality and Human Rights Organisations to the Report of the Commission on Liquor Licensing on Admission and Services in Licensed Premises*, (2002) http://iccl.ie/DB_Data/issues/EqualityCoalition1_10014_Publications.htm

¹³ *Two complainants –v- the Department of Education and Science* (DEC2003- 042/043).

6. Equality Authority (EA) and the Equality Tribunal

Established under the Employment Equality Act, 1998, the Equality Authority (EA)¹⁴ is an independent body charged with promoting equality and supporting the implementation of Ireland's anti-discrimination legislation. With a good track record, the EA supports anti-discrimination cases and provides information to members of the public under the EEA Acts, 1998-2004 and the ESA Acts, 2000-2004. Race discrimination in employment (32% of casework) continues to be the EA's main area of work together with casework on the Traveller ground (29.1%) in relation to the provision of goods and services.¹⁵

The Equality Tribunal¹⁶ was established under the Employment Equality Acts to investigate and mediate complaints of alleged discrimination under equality legislation. Due to delays in appointing additional Equality Officers to hear cases¹⁷, it now takes approximately three years for cases to be heard by an Equality Officer.¹⁸ Three years is an extremely long time for an individual to wait for a legal remedy, particularly if they are being subjected to ongoing discrimination in the workplace. These delays may deter many individuals from taking a case. The ICCL believes that as a matter of urgency more funding needs to be allocated to the Equality Tribunal.

Funding is also a major issue for the EA and the ICCL is concerned that the institution does not have enough funding to perform all its functions, including conducting equality impact assessments. For example, in 2006 it only received an extra 1.5% in funding.¹⁹

The EA also faces major issues in the future as the Government intends to relocate it to Roscrea (County Tipperary) as part of its decentralisation programme. No staff member of the EA has applied to be relocated and it appears that the expertise built up in the institution over the last five years may be lost. Moreover, the EA will be put at a severe disadvantage if it is relocated to Roscrea given that that Dublin is the centre of commerce, government and politics. Furthermore, public transportation links are very poor in Ireland and centred on Dublin meaning that disadvantaged groups will experience more difficulties in making contact with the EA.

¹⁴ www.equality.ie

¹⁵ Equality Authority (2006) *Equality Authority Annual Report 2005*, Equality Authority: Dublin, p.14.

¹⁶ www.equalitytribunal.ie

¹⁷ Funding allocated to the Equality Tribunal by the Government has not increased significantly from 2005. For example, the Tribunal's funding increased by just under 4% in 2006. In 2005, the Tribunal received €1,970,000 and in 2006 it received €2,046,000. Source: Department of Justice, Equality and Law Reform (June, 2006) *Update for the Follow-up Coordinator on the Recommendations in the Concluding Observations on the initial and second national report of Ireland*, available from the Department of Justice, Equality and Law Reform.

¹⁸ Lucey, S. (2005) 'Race Equality and Public Interest Litigation: The Traveller Experience', paper delivered to NGO Alliance conference, *Anti-Racism Strategies for Activists and Practitioners: Using ICERD and Other 'Race' Equality Measures*, Croke Park, Dublin 1.

¹⁹ The EA received €5,451,000 in grant aid for 2005 and €5,531,000 in 2006. Source: Department of Justice, Equality and Law Reform (June 2006), *ibid*.

7. Failure to fully transpose the Race Directive

Increasing protection against discrimination for racial and ethnic minorities, the Irish Government transposed the Race Directive (2000/43/EC)²⁰ through the Equality Act 2004. Domestic workers are now protected by the Employment Equality Acts 1998-2004 and there is a new ‘burden of proof’ definition permitting more effective prosecution of discrimination cases. However, the State failed to transpose all sections of the Race Directive and the European Commission has initiated legal action against the Irish Government.²¹

The following sections of the Race Directive have not been transposed:

- Article 2 describes the concept of direct and indirect discrimination. The Government failed to fully transpose the definition of indirect discrimination which takes account of the potential for disadvantage.²²
- Article 3 details the scope of the Directive and states that it shall apply to both the public and private actors in relation to conditions of employment (including recruitment and promotion); education; membership of and involvement in trade unions/professional organisations; social protection; social advantages; representation and access to goods and services. This scope is much broader than those covered by the Equal Status Act and would include most government activities (national policy strategies, departmental policies, decisions on allocating funding) in relation to health, education and housing.
- Section 3 of the Equality Act contains a new definition of employee to be protected from discrimination. However, this definition specifically excludes persons applying for work in a person’s home for the provision of personal services. This means that domestic workers many of whom are migrants and/or ethnic minorities are not protected from discrimination under the Employment Equality Acts, 1998-2004. We do not believe that this is permissible under Article 3(1)(a) of the Race Directive.
- Article 7(2) makes clear that Member States shall ensure that associations, organisations and other legal entities with a legitimate interest in ensuring the implementation of the Directive may engage either on behalf or in support of a complainant in judicial/administrative procedures to enforce obligations under this Directive. This Article was not transposed in the Equality Act.²³

²⁰ The Race Directive implements the principle of equal treatment between persons irrespective of racial or ethnic origin.

²¹ Murphy, Colin (04.05.06) ‘European Commission Suing Government’, *Village Magazine*, www.villagemagazine.ie.

²² Article 2.1(b) reads “indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage...”. Section 47 of the Equality Act does not transpose the full definition. The relevant section defines indirect discrimination in the following manner “where an apparently neutral provision puts a person referred to in any paragraph of section 3(2) at a particular disadvantage...”.

²³ This includes Article 7.2 which states that “Member States shall ensure that associations, organisations or legal entities... may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this

- Article 15 provides that sanctions must be “effective, proportionate and dissuasive”. However, the Equality Act failed to raise the ceiling on compensation for discriminated persons. A maximum of €6,349 can only be awarded to complainants by the Equality Tribunal against services providers. European Court of Justice (ECJ) jurisprudence requires much higher sums.

It is worthwhile mentioning that the scope of the Race Directive is to be considered in a case currently before the High Court - *Lawrence and others v Ballina Town Council and Others*.

Directive”. Article 15 on sanctions has clearly been ignored by the State. It provides that “sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive”. In Equal Status cases, the most that the Equality Tribunal (adjudicating body on discrimination cases) can award victims of discrimination is €6,349.

8. Travellers

Criminal-Trespass Legislation

In 2002, the Irish Government enacted legislation which indirectly discriminates against Travellers and particularly Traveller women. The Irish Traveller Movement estimates that there are approximately 1,200 families who are transient with no fixed site for their mobile home.²⁴ The Housing (Miscellaneous Provisions) Act 2002 (otherwise known as the ‘Criminal Trespass’ legislation) allows the Gardaí (Irish police service) to move on families with no notice and to seize/impound their caravans/mobile homes.²⁵ To date, over 1,000 families have been forced to move on because of this provision.²⁶ With nowhere else to go, and because the State has failed to provide additional halting sites for Travellers, families often get moved on a second or third time. This provision particularly adversely affects Traveller women and children living in poverty.

Lack of Traveller Representation

In March 2006, the Government published a report from the High Level Group on Traveller Issues. Consisting mainly of senior civil servants, the Group did not include any representatives from Traveller organisations. Subsequently, the Department of the Environment, Heritage and Local Government circulated a letter to all local authorities indicating that the High Level Group report “represents government policy on the role of state bodies in delivering services and supports to the Traveller community”.²⁷ In the view of the ICCL, this report is a retrograde step in policy development on Traveller issues given that the community has been excluded from the decision-making process.

²⁴ Refer to the ITM website www.itmtrav.com

²⁵ ITM (2004) *An Analysis of the Use of Housing (Miscellaneous Provisions) Act, 2002*, available on the ITM website.

²⁶ Lucey, S. (2004) ‘The Impact of Incorporating the ECHR on Travellers’ Rights’ in *Celebrating the European Convention on Human Rights Act 2003, Airey v. Ireland: 25 years on*, published by the Independent Law Centres Network, available the Free Legal Advice Centres www.flac.ie

²⁷ Letter sent to all County Managers outlining Local Government Policy (LG12-06), December 2006.