

# ICCL REPORT TO THE UN HUMAN RIGHTS COMMITTEE

**Alternative to the State Report  
for Ireland's 2022 review under  
the International Covenant on  
Civil and Political Rights.**

**May 2022**





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# INTRODUCTION

This alternative report for the UN Human Rights Committee is intended to assist with its review of Ireland in July 2022. It is written by the staff of the Irish Council for Civil Liberties (ICCL), an Irish based NGO with a broad mandate to promote and protect human rights in Ireland and a particular focus on criminal justice, civil society freedoms, equality and digital rights.<sup>1</sup>

This report should be read in conjunction with Ireland's fifth periodic report, submitted by Ireland in 2019<sup>2</sup> and Ireland's Replies to the List of Issues submitted in March 2022.<sup>3</sup>

This is not a comprehensive response to every issue raised by the State or the Committee in its List of Issues. Rather we focus on issues that ICCL or our civil society and academic partners, who have endorsed this report, are working on as part of our existing mandates.

This report is endorsed by a broad range of non-governmental organisations (NGOs) and one academic institution. All of the views expressed in the report do not necessarily reflect the policies and positions of each endorsing organisation. However, all organisations have endorsed the sections relevant to their specific mandates.

## This report has been endorsed by:

1. Abortion Rights Campaign	20. Irish Network Against Racism (INAR)
2. Action for Choice	21. Irish Penal Reform Trust
3. Age Action	22. Irish Traveller Movement (ITM)
4. Alliance for Choice	23. LGBT Ireland
5. Belong To	24. Movement of Asylum Seekers in Ireland (MASI)
6. Children's Rights Alliance	25. Migrant Rights Centre Ireland (MRCI)
7. Clann Project	26. Nasc, the Migrant and Refugee Rights Centre
8. Coalition Against Hate Crime Ireland (CAHC)	27. National LGBT Federation (NXF)
9. Committee on the Administration of Justice (CAJ)	28. National Traveller Women's Forum Ireland (NTWF)
10. Digital Action	29. National Women's Council (NWC)
11. Digital Rights Ireland	30. One Family
12. Doctors for Choice	31. Outhouse LGBT Centre
13. Doras	32. Pavee Point
14. European Centre for the Study of Hate	33. Together for Safety
15. Free Legal Advice Centre (FLAC)	34. Transgender Equality Network Ireland (TENI)
16. Independent Living Movement Ireland (ILMI)	35. Transparency International
17. Immigrant Council of Ireland	36. Treoir
18. Inclusion Ireland	37. Women's Collective Ireland
19. Intersex Ireland	

<sup>1</sup> Written by Doireann Ansbro BL, Seán Beatty BL, Olga Cronin, Ronan Kennedy, Luna Lara Liboni, Cheryl Mellett, Sarah O'Malley BL, and Johnny Ryan. See [iccl.ie](https://iccl.ie) for more detail on our work.

<sup>2</sup> Ireland's Fifth Periodic Report submitted to UN Human Rights Committee under article 40 of the Covenant, 23 September 2019 [CCPR/C/IRL/5](https://www.unhcr.org/refugees/cpr/C/IRL/5).

<sup>3</sup> Replies of Ireland to the List of Issues identified in relation to its Fifth Periodic Report, received 31 March 2022, [CCPR/C/IRL/RQ/5](https://www.unhcr.org/refugees/cpr/C/IRL/RQ/5).

# ARTICLE 2 OBLIGATION TO IMPLEMENT THE PROVISIONS OF THE COVENANT

## Constitutional and legal framework within which the Covenant is implemented

1. Regarding Ireland's standing reservations to article 10(2) and article 20(1), ICCL considers these should be removed. In particular, we consider that the proposed new provisions on incitement to hatred currently contained in the General Scheme of the Criminal Justice (Hate Crime) Bill 2021<sup>4</sup>, (but which may be moved to a separate Bill)<sup>5</sup>, offer the opportunity for Ireland to prohibit propaganda for war.

### RECOMMENDATION

#### The State should:

- Remove reservations to articles 10(2) and 20(1) of the Covenant.

## Public Sector Duty

2. S.42 of the Irish Human Rights and Equality Commission Act 2014 creates a duty for all public sector workers to combat discrimination, promote equality, and respect the human rights of staff and users of the service.<sup>6</sup> ICCL considers that further research, training and education is required across the public sector on how to implement the public sector duty to fully embed human rights compliance across the public sector.

### RECOMMENDATION

#### The State should:

- Ensure the S.42 Public Sector Duty is effectively and appropriately implemented across all public sector services, including through adequate training and education.

<sup>4</sup> General Scheme, Criminal Justice (Hate Crime) Bill 2021.

<sup>5</sup> See Joint Committee on Justice Report on Pre-Legislative Scrutiny of the General Scheme of the Criminal Justice (Hate Crime) Bill 2021, April 2022, Recommendation 3 "The Committee recommends that the incitement to hatred or hate speech element of the Bill, contained in Head 3, be removed from this Bill and included as an amendment to the Prohibition Of Incitement To Hatred Act, 1989 where it would be better placed".

<sup>6</sup> Irish Human Rights and Equality Commission Act 2014.

## Non-Discrimination and Effective Remedies

3. The right to an effective remedy contained in article 2(3) of the ICCPR has no direct domestic effect.<sup>7</sup> However, the Committee has recognised that this right can be assured in different ways, including by application of comparable constitutional or other provisions of law.<sup>8</sup> Therefore, to the extent that the protections afforded by the ICCPR overlap with those in the Irish Constitution, the European Convention on Human Rights (ECHR) and/or the Charter of Fundamental Rights of the European Union ('the CFREU'), it is arguable that a right to an effective remedy exists in domestic law.
4. However, the CFREU only applies where EU law is in issue,<sup>9</sup> and constitutional/ECHR rights may not cover precisely the same ground as those under the ICCPR. Accordingly, the full scope of the rights protected by the ICCPR may not be protected under Irish law.

### RECOMMENDATION

- Domestic legislation, in a manner similar to the European Convention on Human Rights Act 2003, which implements the European Convention on Human Rights, should be passed which permits litigants to exercise their right to an effective remedy under the ICCPR.

<sup>7</sup> Article 29.6 of the Constitution of Ireland; *AG v Damache* [2015] IEHC 339, para. 10.49. See also *Crotty v An Taoiseach* [1987] 1 IR 713 (HC), 755: Article 29.6 of the Constitution "clearly accepts the dualistic concept that some international agreements may be perfectly valid in international law but remain of no relevance to the national courts of a particular country simply because the relevant constitutional authority has not made them part of the domestic law".

<sup>8</sup> UN Human Rights Committee, General Comment No. 31, para. 15.

<sup>9</sup> CFREU, Article 51.

# ARTICLE 3 EQUAL RIGHT OF MEN AND WOMEN

## TO ENJOYMENT OF ALL CIVIL AND POLITICAL RIGHTS

### Gender equality, the Constitution and the role of women and women's representation in leadership and decision making

5. In June 2021 the Citizens' Assembly on Gender Equality recommended three amendments to the Irish Constitution: on article 40 to refer explicitly to gender equality and non-discrimination; on article 41 to protect private and family life, with the protection afforded to the family not limited to the marital family; and on article 41.2 to delete and replace existing provisions with language that is not gender specific and obliges the State to take reasonable measures to support carers within the home and wider community.
6. The Citizen's Assembly issued forty-two other recommendations to advance gender equality, including in the areas of social protection, leadership in politics, public life and the workplace and pay and workplace conditions.<sup>10</sup>
7. Women are under-represented in political and public life and decision-making roles within the private sector.<sup>11</sup> The gender pay gap persists<sup>12</sup> (recognising the introduction of the Gender Pay Gap Information Act in June of 2021<sup>13</sup>). The Government has committed to providing follow-up information on the National Strategy for Women and Girls 2017-2020<sup>14</sup> – extended to end of 2021 due to Covid-19 - and to a new strategy.<sup>15</sup> This should be published without delay.

### RECOMMENDATION

#### The State should:

- Outline a timeline for a referendum to amend articles 40.1, 41 and 41.2 of the Irish Constitution.
- Outline clear actions to address the gender gap in political and decision-making positions in government and the private sector, including the following:
  - Consider establishing a 50% quota for gender balance, with targets for diversity, on all non-state Irish company boards;
  - Legislate for a quota system to be extended to local elections with an initial quota of 30% women's representation in the Local Elections 2024 & additional targets to improve diversity;
  - Introduce an entitlement to maternity/adoptive leave for women councillors and women TDs.
- Ensure the Gender Pay Information Act is fully commenced and implemented.
- Ensure that in advancing gender equality all those affected by gender inequalities are actively consulted, ensuring an intersectional approach, including by actively encouraging women in minoritised groups to participate in decision-making processes.
- Promptly provide the outcomes of the 2017–2020 National Strategy for Women and Girls and launch a new national strategy, which should include a consultative, monitoring mechanism.

<sup>10</sup> [Report of the Citizens' Assembly on Gender Equality](#), June 2021.

<sup>11</sup> Only 22,5% of TDs elected in 2020 were women, with Ireland ranking currently 100th out of 187 countries for parliamentary representation and women holding only 27% of cabinet positions. There are only 27% of women on boards of the top 20 listed Irish companies and 38% of Irish listed companies with no women on their leadership team. [Report of the Citizens' Assembly on Gender Equality](#), June 2021, p. 69.

<sup>12</sup> Last data available is from 2018, [Statistics | Eurostat](#).

<sup>13</sup> [Gender Pay Gap Information Act 2021](#).

<sup>14</sup> Department of Children, Equality, Disability, Integration and Youth, Departmental Strategies, 1 February 2022, [Written Answers](#).

<sup>15</sup> [Programme for Government: Our Shared Future](#), October 2020.

## Violence Against Women, including domestic violence (Articles 2, 3, 6, 7, 24 & 20)

8. Violence against women, including domestic violence continues to be a dominant issue in Ireland. An Garda Síochána (AGS) responded to 48,400 incidents of domestic abuse in 2021, a 10% increase on the previous year.<sup>16</sup> Despite this, only 144 safe spaces are available to women fleeing domestic violence.<sup>17</sup> AGS are not providing the assistance necessary. In 2019 over 3,000 calls to the emergency 999 number, relating to domestic violence, were cancelled by the Gardaí.<sup>18</sup> The Association of Garda Sergeants and Inspectors (AGSI) have expressed their concern at the lack of adequate training for their members over the last 4 years.<sup>19</sup> It is of great concern that the Central Statistics Office continue to flag that data gathered from AGS is still considered unreliable.<sup>20</sup>
9. The Domestic Violence Act 2018 brought about welcome changes to the law, including the introduction of the offence of coercive control. However, there is a need for further awareness raising and training on the availability of this charge.
10. Women from marginalised and minoritised groups, such as the Traveller community and Roma communities face significant barriers to accessing services and protections.<sup>21</sup>
11. The Harassment, Harmful Communications and Related Offences Act 2020 provides for the offence of image based sexual abuse for the first time in Irish law, which is welcome. However, s.4 of this Act is of concern from a defence and freedom of expression perspective given its low threshold for causing harm.<sup>22</sup> ICCL has requested the Director of Public Prosecutions to issue guidelines on how this offence will be interpreted by prosecutors and what threshold will be used to distinguish between permitted 'offensive' communication and illegal 'grossly offensive' communication. We believe this will assist individuals in regulating their own behaviour or at least understanding its consequences, victims in understanding how the criminal law protects them, and prosecutors and gardaí in interpreting and applying the new law.<sup>23</sup>
12. The new third National Strategy for Domestic Sexual and Gender-based Violence (DSGBV) due imminently must ensure that the State is able to deliver on its obligations set forth in the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention).<sup>24</sup> As per the Istanbul Convention, it is the State's responsibility to take specific measures to reduce barriers to ensure women can fully realise their social, cultural, political and economic rights to live a life free from violence. Gender based violence is rooted in power imbalances and gender inequality. It has long been recognised that gender is the single biggest risk factor for becoming a victim of DSGBV. Other significant risk factors include age, disability, sexual orientation, and being part of an ethnic minority. A significant weakness of the First and Second National DSGBV Strategies has been the lack of sufficient and coordinated oversight, accountability and action. The Citizens' Assembly on Gender Equality Report recommended that 'All Government action to prevent and counter domestic, sexual and gender-based violence should be coordinated by a Cabinet Minister with direct responsibility for implementation of a national strategy.'<sup>25</sup>

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<sup>16</sup> Laura Fletcher, [Gardaí responded to 48,400 incidents of domestic abuse in 2021](#), RTE News, 24 January 2022.

<sup>17</sup> [Women's Aid report](#) that between 1996 and March 2022, 245 women have died violently in Ireland, 18 children have died alongside their mothers, 154 of these women were killed in their own homes. Women's Aid - Domestic violence service in Ireland. 2022. [Women's Aid Femicide Watch | Women's Aid - Domestic violence service in Ireland](#).

<sup>18</sup> Paul Reynolds, [Gardaí continuing to cancel and misclassify 999 calls - Policing Authority](#), RTE News, 15 October 2021.

<sup>19</sup> Vivienne Clarke & Steven Heaney, [AGSI calls for face-to-face training for gardaí responding to domestic violence reports](#) The Irish Examiner, 11 April 2022.

<sup>20</sup> On its [website](#), the Central Statistics Office notes that information shared by AGS is "unreliable" and there are "data quality" issues.

<sup>21</sup> [Pavee Point Submission to the Garda Inspectorate on the Inspection into the Effectiveness and Efficiency of An Garda Síochána's response to Domestic Abuse, January 2022](#); See also [Pavee Point Submission to Joint Oireachtas Committee on Domestic Violence, 2013](#).

<sup>22</sup> ICCL expressed concern about the low threshold required by the term "grossly offensive communication" given that the term offensive is subjective and may not reach the level of clarity and foreseeability needed for criminal law. See ICCL's communication to the Director of Public Prosecutions [here](#).

<sup>23</sup> Correspondence to the Director of Public Prosecutions from ICCL, 13 January 2021; <https://www.iccl.ie/wp-content/uploads/2021/01/ICCL-letter-to-DPP-re-Harmful-Comms-Act.pdf>

<sup>24</sup> See Department of Justice, Draft National Strategy on Domestic, Sexual and Gender-Based Violence 2022-2026, [Summary Report](#).

<sup>25</sup> [Report of the Citizens' Assembly on Gender Equality](#), June 2021, p.19.

## RECOMMENDATIONS

### The State should:

- Increase resourcing for safe spaces for women trying to escape from domestic violence situations.
- Take measures to ensure that the cancelling of calls to the dedicated emergency 999 line does not occur in future and that there is accountability for the 3,000 plus calls related to domestic violence which were cancelled since the beginning of 2019.
- Immediately ensure adequate training for AGS in relation to domestic violence.
- Monitor the effectiveness of the Domestic Violence Act, to include gathering of data on the cases that have reached a conclusion and the penalties issued by the judiciary.
- Ensure that adequate legal aid is available for victims of domestic violence.
- Address the disproportionate risk of violence and domestic violence for minority and marginalised groups.
- Amend s.4 of the Harassment, Harmful Communications and Related Offences Act 2020 to create a clearer threshold for the criminalisation of speech, or ensure that the DPP issues guidelines on how to prosecute the offense of distribution of 'grossly offensive' communication.
- Ensure that the new third National Strategy for Domestic Sexual and Gender-based Violence (DSGBV) has sufficient and coordinated oversight, accountability and implementation. In line with the Citizens' Assembly on Gender Equality Recommendation, all Government action to prevent and counter domestic, sexual and gender-based violence should be coordinated by a Cabinet Minister with direct responsibility for implementation of a national strategy.

## Sexual health and reproductive rights (Articles 2,3,6,7 & 24)

13. The Health (Regulation of Termination of Pregnancy) Act 2018 requires that a review by the Minister must take place no later than 3 years after the commencement of the Act.<sup>26</sup> This review is required to analyse the operation of the Act and has now commenced. However, the Act's operation rests on the policies that underpin it. The review should therefore look at all barriers affecting the Act's operation and, therefore, policies that may affect access to abortion services and should not be narrowly defined to the operation of the law.
14. Several provisions in the Act represent significant and ongoing obstacles to accessing safe and legal abortions in Ireland. The Act provides for unrestricted termination up to 12 weeks' gestation. Services beyond 12 weeks are only available in very limited circumstances where two medical practitioners must confirm that there is a risk to the life or a risk of serious harm to the health of the pregnant person,<sup>27</sup> or that pregnancy entails a fatal foetal anomaly, which is defined narrowly.<sup>28</sup>
15. The following responds to each of the State's replies to the List of Issues in turn. In response to the State's reply asserting that the 3-day mandatory waiting period poses no barrier,<sup>29</sup> it is unclear why or how the State equated the number of abortions which occurred under section 12 with a perceived lack of problems with the mandatory 3-day waiting period. The Annual reports are so sparse in detail they cannot be used to rebut genuine claims of access barriers.<sup>30</sup> The State fails to acknowledge how this arbitrary wait period discriminates against certain groups, including disabled persons, those in rural areas and those struggling financially. In practice, a 3-day wait can become a 5 or 6 day wait.<sup>31</sup> A recent report flowing from an in-depth study from ARC (Abortion Rights Campaign) on barriers to access found that "the majority of respondents reported negative effects of the mandatory three-day waiting period. Participants described the mandatory delay as "demeaning" and as inducing "undue stress and anxiety".<sup>32</sup>
16. In response to the State's reply regarding fatal foetal abnormalities,<sup>33</sup> the State fails to acknowledge the barrier caused by the 28-day limit.<sup>34</sup> Abortions in cases of fatal foetal abnormalities can only be carried out if two medical practitioners form a view that there is a condition likely to lead to the death of the foetus either before, or within 28 days of, birth. This limit is extremely restrictive and arbitrary and is at odds with the State's justification that there is no gestational limit. There is no gestational limit if and only if the 28 day limit is approved. The ARC report as well as peer-reviewed academic research<sup>35</sup> have found that many persons who had to travel abroad to access abortion had received a diagnosis of a foetal anomaly which was "not fatal enough".<sup>36</sup> The State's claim that the legislation is in line with the recommendations made by the Citizens' Assembly is misleading as the Citizens' Assembly in fact recommended abortion up to 22 weeks for diagnoses that did not reach the 28 day threshold.<sup>37</sup>
17. In response to the State's reply regarding the chilling effect caused by criminalisation and pro-life protests,<sup>38</sup> the State fails to provide any information or timescale for the further "rolling out" of services. The 10 hospitals providing abortion are not evenly geographically spread out across the country but concentrated in the six largest cities and 2 other counties.<sup>39</sup> Nor is there a "good geographic spread of General Practitioners providing

<sup>26</sup> Health (Regulation of Termination of Pregnancy) Act 2018, s.7. The Act was commenced on 1 January 2019.

<sup>27</sup> Ibid, s.9.

<sup>28</sup> Ibid, s.11.

<sup>29</sup> Human Rights Committee, Replies of Ireland to the list of issues in relation to its fifth periodic report, CCPR/C/IRL/RQ/5, 31 March 2022, Reply to paragraph 11(a), para. 67.

<sup>30</sup> There have been two annual reports. The State cites the first: Department of Health, Health (Regulation of Termination of Pregnancy) Act 2018 - Annual Report on Notifications 2019, 30 June 2020 (First Annual Report). See also Department of Health, Health (Regulation of Termination of Pregnancy) Act 2018 - Annual Report on Notifications 2020, 29 June 2021 (Second Annual Report).

<sup>31</sup> If the service users' first appointment occurs on a Wednesday and the GP surgery is not open over the weekend or 6 days if there is a Bank holiday.

<sup>32</sup> Abortion Rights Campaign and Lorraine Grimes PhD, "Too Many Barriers: Experiences of Abortion in Ireland after Repeal", September 2021, p. 11. See also p.41-42.

<sup>33</sup> Human Rights Committee, Replies of Ireland to the list of issues in relation to its fifth periodic report, CCPR/C/IRL/RQ/5, 31 March 2022, Reply to paragraph 11(b), para. 68.

<sup>34</sup> Section 11(1) of the Health (Regulation of Termination of Pregnancy) Act 2018.

<sup>35</sup> Power, S., Meaney, S., O'Donoghue, K Fetal medicine specialist experiences of providing a new service of termination of pregnancy for fatal fetal anomaly: a qualitative study, BJOG: An International Journal of Obstetrics & Gynaecology, 15 September 2020, p. 3.

<sup>36</sup> Abortion Rights Campaign and Lorraine Grimes PhD, "Too Many Barriers: Experiences of Abortion in Ireland after Repeal", September 2021, p. 10. See also pp. 65-67.

<sup>37</sup> 80% of the Citizen's Assembly agreed that termination of pregnancy should be lawful where "The unborn child has a significant foetal abnormality that is not likely to result in death before or shortly after birth". See the Citizen's Assembly, Recommendations on the Eighth Amendment of the Constitution, 27 June 2017.

<sup>38</sup> Human Rights Committee, Replies of Ireland to the list of issues in relation to its fifth periodic report, CCPR/C/IRL/RQ/5, 31 March 2022, Reply to paragraph 11(c), para. 69.

<sup>39</sup> The 10 hospitals are: Dublin (3): National Maternity Hospital, Rotunda Hospital, Coombe Women & Infants University Hospital, Louth (1): Our Lady of Lourdes Hospital Drogheda, Cork (1): Cork University Maternity Hospital, Limerick (1): University Maternity Hospital Limerick, Galway (1): University Hospital Galway, Westmeath (1): Midland Regional Hospital Mullingar, Waterford (1): University Hospital Waterford, Mayo (1): Mayo University Hospital, Castlebar.

service”.<sup>40</sup> The ARC report found that some women “experienced great difficulty making an appointment, ... particularly with a lack of local providers or having to travel far to access services.”<sup>41</sup> Further, “[r]espondents typically travelled up to one hour to access abortion services. 30% travelled between 4 to 6 hours, and 57% of respondents stated that they had to spend longer travelling than they usually would to access medical care.”<sup>42</sup>

18. The State asserts that “[t]here has been a very limited number of anti-abortion protests”<sup>43</sup> without providing any evidence. While the State has not, to our knowledge, recorded any data of the number of protests of this kind, a grassroots campaigning group “Together for Safety” have been collecting this information via their website.<sup>44</sup> In addition, the national media and Parliament have raised concerns about the many anti-abortion protests at facilities providing services.<sup>45</sup> A report by the National Women’s Council found that “GPs interviewed for this paper argued that the threat of protests is potentially the biggest impediment to a new provider in areas which do not yet have adequate provision as it is in those areas that protests have had a disproportionately significant impact.”<sup>46</sup> A Private Member’s Bill seeking Safe Access Zones was passed by the Seanad (Senate) after lengthy debate on April 7<sup>th</sup> 2022.<sup>47</sup> It is now for the Dáil (lower house of Parliament) to pass the Bill. Government has committed to introducing a Bill on Safe Access Zones but it must be prioritised.
19. The criminalisation of practitioners singles out abortion care as “inherently less conscientious than other professionals and that the usual regulatory mechanisms of (general) criminal and civil sanctions and professional/fitness to practise oversight are insufficient for these professionals.”<sup>48</sup> In addition the ARC report found that almost 1 in 5 pregnant persons seeking an abortion were refused care and refused a referral to another doctor given the conscientious objection clause.<sup>49</sup>
20. In response to the State’s reply vis-à-vis the unequal access of services for certain groups,<sup>50</sup> the State failed to engage the issues facing survivors of domestic violence, and women living in rural areas. With respect to migrant women and asylum seekers it is disingenuous to suggest they have equal access. The ARC report detailed the racist discrimination faced by migrants attempting to access care,<sup>51</sup> as well as undocumented migrants and asylum seekers who were unable to produce a social security number (PPSN) being forced to pay for their procedures.<sup>52</sup> Thus while the Act provides for free care for all, in practice this is not the case.<sup>53</sup>
21. Government has recently signed a lease for land to build a National Maternity Hospital. This has been subject to controversy given the freehold of the land will remain with an organisation with ties to a religious organisation, known for opposing abortion. Many organisations and individuals have expressed concern that the NMH will not be legally required to provide reproductive healthcare services into the future, despite government assurances to the contrary.<sup>54</sup>

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<sup>40</sup> Human Rights Committee, Replies of Ireland to the list of issues in relation to its fifth periodic report, CCPR/C/IRL/RQ/5, 31 March 2022, Reply to paragraph 11(c), para. 69.

<sup>41</sup> Abortion Rights Campaign and Lorraine Grimes PhD, “Too Many Barriers: Experiences of Abortion in Ireland after Repeal”, September 2021, p. 8.

<sup>42</sup> Ibid. See also p. 39, 42-43. Government recently announced that the number of maternity units providing abortions would increase to 14 of 19 by end of 2022. Ellen Coyne, NMH row: 14 of 19 maternity units in Ireland will offer abortions by the end of the year, Independent, 6 May 2022.

<sup>43</sup> Human Rights Committee, Replies of Ireland to the list of issues in relation to its fifth periodic report, CCPR/C/IRL/RQ/5, 31 March 2022, Reply to paragraph 11(c), para. 69.

<sup>44</sup> See Together for Safety, Report anti-choice protests or activities / Share your experiences, 2022.

<sup>45</sup> Elaine Loughlin, Anti-abortion protests have been taking place at hospitals and clinics in 10 counties, Irish Examiner, 23 August 2021. Ellen Coyne, “Anti-abortion protesters say ‘divine providence’ led them to gather to pray at hospital on day of terminations”, the Independent, 11 February 2022. This interview with the protesters states on the record that they are there every week: “Every Wednesday (when its not Lent, everyday during Lent) - and we’ve been told by nurses that this corresponds with the day that [Termination of Pregnancy clinics] run”.

<sup>46</sup> National Women’s Council, Accessing Abortion in Ireland: Meeting the Needs of Every Woman, 24 May 2021, p. 41.

<sup>47</sup> Seanad Éireann debate, Safe Access to Termination of Pregnancy Services Bill 2021: Report and Final Stages, 7 April 2022.

<sup>48</sup> Mary Donnelly and Claire Murray, Abortion care in Ireland: Developing legal and ethical frameworks for conscientious provision, Ethical and Legal Issues in Reproductive Health, 2 November 2019.

<sup>49</sup> Abortion Rights Campaign and Lorraine Grimes PhD, “Too Many Barriers: Experiences of Abortion in Ireland after Repeal”, September 2021, p.11.

<sup>50</sup> Human Rights Committee, Replies of Ireland to the list of issues in relation to its fifth periodic report, CCPR/C/IRL/RQ/5, 31 March 2022, Reply to paragraph 11(d), para. 70.

<sup>51</sup> Abortion Rights Campaign and Lorraine Grimes PhD, “Too Many Barriers: Experiences of Abortion in Ireland after Repeal”, September 2021, p. 11. See also p.57.

<sup>52</sup> Ibid, p. 80 and 43.

<sup>53</sup> See also National Women’s Council, Accessing Abortion in Ireland: Meeting the Needs of Every Woman, 24 May 2021, p. 18 which explains who women from Northern Ireland where abortion is still criminalised cannot access abortion for free in the Republic of Ireland.

<sup>54</sup> See eg ICCL, Government must guarantee all healthcare at National Maternity Hospital, 11 May 2022.

## RECOMMENDATIONS

### The State should:

- Ensure that the review of the Health (Regulation of Termination of Pregnancy) Act 2018 addresses its operation in practice, including policies and considers the serious barriers facing pregnant persons trying to access abortion services. In particular:
  - The 3-day mandatory waiting period should be repealed to recognise women and pregnant people as competent decision-makers;
  - The 28-day limit for fatal foetal abnormalities should be repealed and abortion up to 22 weeks should be allowed for less fatal diagnoses, as recommended by the Citizens' Assembly;
  - Government should provide a timescale for the further rolling out of services across the country to improve geographically even access, in particular ensuring every county in Ireland provides abortion services;
  - Abortion should be completely decriminalised;
  - Government should address the issue of only a minority of General Practitioners and only 10 of 19 maternity units providing abortion services;
  - Government should ensure Safe Access Zones legislation is passed as a priority. This legislation should properly balance the rights of pregnant people to access healthcare services with safety, privacy and dignity with the right the rights to freedom of expression and freedom of assembly;
  - The Government should acknowledge and address the additional barriers faced by people from marginalised and minoritised groups by removing any requirement to show proof of PPSN number to access services for free;
  - The provisions on conscientious refusal of care should provide for mandatory and swift referrals in situations where services are not provided and where there are failures to provide swift referrals, this should be identified and appropriately addressed;
  - Maintain and enhance the telemedicine option for early abortion care so that all women and pregnant people can avail of remote consultation and pill delivery if this is their preference and clinically appropriate;
  - Revisit the gestational 12-week limit given the evidence that women are still being forced to travel to the UK for abortions and no pregnant person should have to travel abroad for reproductive care.<sup>55</sup>
- Ensure legal guarantees for the provision of all reproductive care at the National Maternity Hospital, now and into the future.

<sup>55</sup> In 2020 20.6% of non-residents travelling to England and Wales were from the Republic of Ireland when they were not able to access care in Ireland, despite the risk to their health while travelling during a pandemic. See UK National Statistics, [Abortion statistics, England and Wales: 2020](#).

# ARTICLES 4 & 5 LIMITED RIGHTS OF DEROGATION

## Emergency Powers (Articles 4, 5, 9,12, 21 & 22)

22. In its response to the Covid-19 pandemic, the Irish government did not invoke any derogations to the ICCPR but did restrict rights significantly. ICCL considers that derogations were not necessary as the Covenant provides the framework for necessary and proportionate limitations on rights. However, ICCL is concerned that the government did not properly use the human rights framework envisioned by the Covenant and other human rights instruments when justifying the limits on rights to liberty, free movement, freedom of association and freedom of assembly in its response to the pandemic. In a comprehensive report published in 2021, ICCL identified a series of recommendations for government to better protect rights in future emergencies.<sup>56</sup>

## RECOMMENDATIONS

### The State should:

- Carry out a meaningful and transparent proportionality test when restricting rights, including by ensuring all limits on rights are the least restrictive possible to achieve the aim of protecting public health and that the Irish Human Rights and Equality Commission is consulted on all legislation and regulations restricting rights, before they come into force, or immediately afterwards if required by the exigencies of the situation.
- To ensure democratic oversight of emergency legislation, government should facilitate pre-legislative scrutiny over each set of regulations unless the particular exigency of the public health situation requires an urgent response, in which case immediate post-legislative scrutiny should be required by the Oireachtas (Parliament).
- A human rights impact assessment should take place on all restrictions on rights to enable a proper review of the proportionality of restrictions on rights.

<sup>56</sup> Ansbro, Carthy, Cronin, McLoughlin-Burke, [Human Rights in a Pandemic](#), ICCL, May 2021.

# ARTICLE 6 RIGHT TO LIFE

## Substance abuse and deaths in the homeless community

**23.** As per General Comment 36, States are responsible for deaths occurring from widespread substance abuse and homelessness.<sup>57</sup> Ireland is facing a homeless and drugs crisis with the numbers of homeless persons dying on the streets on the rise.<sup>58</sup> There are increasing numbers of homeless people due to an acute housing shortage.<sup>59</sup> As a recent report shows, homeless persons are more likely to die by overdose: “[d]rug and alcohol intoxication was the most common cause of death amongst the homeless population, accounting for 39.9% of deaths where cause of death is known. Homeless persons in the current study were more likely to die by overdose than the general population, with opioids accounting for the majority of drug related deaths.”<sup>60</sup> There were 786 deaths in Ireland due to drugs in 2017.<sup>61</sup> Almost two people a day die from drug-related deaths in Ireland, which is twice the European average.<sup>62</sup> It was recently decided to delay a Citizens’ Assembly on the issue of drug use in favour of another issue, a decision that suggests a clear lack of Government commitment to tackling the crisis.<sup>63</sup>

## RECOMMENDATIONS

### The State should:

- Take immediate and urgent steps to end the homeless crisis, as well as the shortage of available housing in Ireland, which is pushing people into homelessness.
- Immediately set up a Citizens’ Assembly on drugs and consider decriminalisation of possession of minor drugs.

<sup>57</sup> UN Human Rights Committee, [General Comment No. 36](#), 3 September 2019, para. 26.

<sup>58</sup> [BreakingNews.ie](#), [New figures reveal 115 homeless people died in Dublin in 2021](#), 19 April 2022.

<sup>59</sup> [Focus Ireland](#), [Single adult homelessness continues to rise despite pandemic decreases](#), 28 December 2021.

<sup>60</sup> Dr. Jo-Hanna Ivers & Professor Joe Barry, [MORTALITY AMONGST THE HOMELESS POPULATION IN DUBLIN](#), January 2018, p.4.

<sup>61</sup> The Health Research Board, [Drug-related deaths - HRB publishes latest figures](#), 12 December 2019.

<sup>62</sup> [Supports needed for Irish families mourning drug-related deaths](#), RTE, 11 May 2022.

<sup>63</sup> Cormac O’Keeffe, [Delay on drugs assembly ‘will be measured in death and devastation’](#), the Irish Examiner, 23 February 2022.

## Police fatal use of force

24. As per General Comment 36, States have a “particular duty to investigate allegations of violations of article 6 whenever State authorities have used or appear to have used firearms or other potentially lethal force outside the immediate context of an armed conflict”.<sup>64</sup> On 30 December 2020, a member of the Garda Armed Support Unit fatally shot a black man, George Nkencho, outside his home in a multicultural working-class community in Dublin.<sup>65</sup> He was suffering from mental health difficulties at the time.<sup>66</sup> A far right smear campaign erupted on Telegram after the killing which aimed to stir up racist hate.<sup>67</sup> The Garda Síochána Ombudsman Commission’s (GSOC) investigation is still ongoing despite promises that it would conclude by the end of 2021.<sup>68</sup> It is unclear whether broader concerns relating to perceived racial bias and profiling are being addressed. The investigation failed to interview family witnesses for 28 days<sup>69</sup> or the Gardaí involved in the incident for 9 weeks and did not recommend the Gardaí who fired the shots be taken off duty upon investigation.
25. The fatal killing has impacted community and garda relations, with a notable decrease in the reporting of hate crimes in 2021.<sup>70</sup> Proposed new legislation on police powers appears to provide for an expanded use of lethal force in effecting police powers.<sup>71</sup>

## RECOMMENDATIONS

### The State should:

- Ensure that GSOC is properly empowered and resourced to conclude the investigation into George Nkencho’s death as soon as possible, in line with the requirements of article 6.
- Subject to the outcome of the GSOC investigation and the inquest into George Nkencho’s death, ICCL believes it is likely that a further independent public inquiry may be required to ensure the effective investigation of the incident. Such an investigation should have an expansive remit to address the Garda’s response, including failure to adequately respond with a mental health crisis team, the actual shooting, and surrounding events, including treatment of the Nkencho family, racist commentary, potential bias within AGS and deteriorating Garda/community relations.
- Ensure effective community engagement during investigations and following incidents of use of lethal force.
- Provide for anti-racist training in all schools and public sector services.
- Amend the Garda Síochána (Powers) Bill to include a reference to the requirement of “absolute necessity in terms of lethal force” and a corresponding reference to relevant principles of the ICCPR and ECHR, including non-discrimination, with an explicit reference to the state’s legal obligation to protect life.<sup>72</sup> AGS’s ability to use lethal force should not be expanded.

<sup>64</sup> UN Human Rights Committee, [General Comment No. 36](#), 3 September 2019, para. 29.

<sup>65</sup> ICCL, “[ICCL asks why GSOC has not interviewed Nkencho family, calls for system-wide inquiry into killing](#)” 24 January 2021.

<sup>66</sup> The Journal.ie, “[He needed help, not bullets’: George Nkencho’s family call for public inquiry ahead of GSOC meeting](#)”, February 11 2021.

<sup>67</sup> Michael Lanigan, [Telegram Is the Far-Right’s Weapon of Choice in Ireland](#), Vice, 30 April 2021; Institute for Strategic Dialogue, [Far-right activity on Telegram spikes after the death of George Nkencho](#), 30 April 2021.

<sup>68</sup> Conor Gallagher, “[Family of George Nkencho concerned at ‘snail’s pace’ of Gsoc inquiry](#)”, the Irish Times, 8 April 2022.

<sup>69</sup> ICCL, “[ICCL asks why GSOC has not interviewed Nkencho family, calls for system-wide inquiry into killing](#)” 24 January 2021.

<sup>70</sup> Shamim Malekmian, “[Fewer Victims Are Reporting Racist Crimes to Gardaí, Report Suggests](#)”, 23 March 2022.

<sup>71</sup> Department of Justice, [General Scheme of the Garda Síochána \(Powers\) Bill](#), Head 65, 14 June 2021.

<sup>72</sup> Irish Council for Civil Liberties, ‘[Submission on the General Scheme of the Garda Síochána \(Powers\) Bill](#)’, August 2021, pp 26-27.

## Deaths in custody following garda contact

26. The State has a duty of care to those detained in police custody.<sup>73</sup> Currently, the State has no data collection for deaths that follow garda contact.

### RECOMMENDATIONS

#### The State should:

- Collect data on deaths of individuals following Garda contact and make this information publicly available so proper investigations can take place, trends can be identified and proper support provided for all those who engage with the Gardaí who may be in need of assistance.

## Coroners Services (Articles 6, 14,19 & 26)

27. ICCL considers that to properly fulfil Ireland's human rights obligations and provide a proper public service, the coroners system needs root and branch reform. Despite the enactment of the Coroners (Amendment) Act 2019, ICCL remains concerned at substantial deficiencies in the Coroner's Service, highlighted in our comprehensive report, including interviews with families, lawyers and other legal professionals and published in 2021.<sup>74</sup> Bereaved families highlighted long delays and the failure of the inquisitorial inquest process to establish the truth. Many bereaved families do not have legal representation or sufficient access to evidential documentation.<sup>75</sup> The jury selection process lacks transparency and is not subject to challenge. Bereaved families complain about inadequate information regarding the inquest process, potential outcomes and media reporting.<sup>76</sup> ICCL is also concerned about reported discrimination towards the Irish Traveller Community in the inquest process.

28. ICCL believes that the Coroner Service should be professionalised, standardised, made fully independent of the State and An Garda Síochána, operating under a code of practice and an inspectorate.<sup>77</sup> Families and loved ones must be put at the centre of the process, with adequate supports provided.

### RECOMMENDATIONS

#### The State should:

- Properly resource an independent, full-time professional Coroner Service with a code of conduct and overseen by an inspectorate.
- Ensure that coroners are provided with medico-legal training, employed in full-time posts and be qualified professionals of five years' experience.
- Ensure that all bereaved families should be entitled to legal aid.
- Introduce a formal system for jury selection in line with normal jury selection processes must be introduced whereby jurors are randomly selected from the electoral register.
- Ensure jury empanelment in high-profile contested cases can be subject to challenge by properly interested persons.
- Address families' lack of access to evidential documents presented at inquests.
- Provide bereaved families with detailed information regarding the inquest process, potential outcomes and media reporting.
- Promote media compliance with the Press Council of Ireland Code of Conduct when reporting on inquests.
- Undertake further research to ensure institutionalised discrimination is eliminated focusing particularly on the experiences of the Irish Traveller Community.

<sup>73</sup> UN Human Rights Committee, *General Comment No. 36*, 3 September 2019. An expert policing academic has begun to gather this data due to the lack of state data, see Aoife Moore, 'I find it very disturbing': No data kept on deaths in garda custody, *The Irish Examiner*, 15 May 2022.

<sup>74</sup> Phil Scraton and Gillian McNaul, *Death Investigation, Coroners' Inquests and the Rights of the Bereaved*, ICCL, 2021.

<sup>75</sup> *Ibid*, pp. 15 & 21.

<sup>76</sup> *Ibid*, pp. 9 & 10.

<sup>77</sup> *Ibid*, pp. 8 & 9.

# ARTICLE 7 FREEDOM FROM TORTURE AND AND ILL-TREATMENT

## Ratification of the Optional Protocol to the UN Convention against Torture

29. Ireland has not yet ratified the Optional Protocol to the UN Convention against Torture. This limits the framework and oversight available to the State for ensuring that article 7 of the Covenant is protected. The Council of Europe's Committee on the Prevention of Torture has expressed concerns about the care of people in detention in Ireland in their 2020 report following a visit to Ireland in 2019.<sup>78</sup> ICCL is particularly concerned about the lack of regular inspection of garda custody suites, places including border crossings where people are detained under immigration law and the lack of human rights-based inspections into care homes and direct provision centres, where international protection applicants are housed.<sup>79</sup>

### RECOMMENDATION

#### The State should:

- Ratify OPCAT as a matter of urgency, prioritise the Inspection of Places of Detention Bill, and ensure that Ireland's National Preventative Mechanism is sufficiently supported and resourced to carry out its role in carrying out independent human rights focused inspections of all places of state care and detention in Ireland.

## Use of Spit Hoods

30. The Irish police force introduced the use of spit hoods in 2020, in response to the Covid-19 pandemic. These are mesh hoods placed over a detainee's head to prevent them spitting at police officers and potentially spreading disease. However, the manufacturer of these hoods stated that they are not designed to and may not be effective in spreading transmission of Covid-19. The use of these hoods on detainees may constitute inhuman and degrading treatment or punishment, given the clear finding by many human rights bodies that hooding is a violation of the prohibition on torture, cruel or inhuman or degrading treatment or punishment.<sup>80</sup>

31. We are also concerned at the introduction of spit hoods into the Irish prison service in 2019. This is regrettable given the above concerns and we note the absence of proper record keeping on their use in prisons.<sup>81</sup> Government must address this.

### RECOMMENDATION

#### The State should:

- Prohibit the use of spit hoods by An Garda Síochána.
- Ensure that any incident where a spit hood has been used by a state agency, including the Irish Prison Service, is recorded in full, including the reasons the spit hood was used and the duration of its use. This information should be compiled and annual statistics published so as to ensure transparency around the use of such devices.

<sup>78</sup> CoE Committee on the Prevention of Torture, [Report on Visit to Ireland](#), 24 November 2020.

<sup>79</sup> See eg ICCL follow up to UNCAT on [Concluding Observations 2017](#), 24 November 2018.

<sup>80</sup> See ICCL commentary [here](#) and ICCL [Submission to AGS on Spithoods and human rights](#), 26 August 2020.

<sup>81</sup> Conor Gallagher, [Use of spit hoods on prisoners not centrally recorded](#), The Irish Times, 6 February 2021

## Forced Family Separation and Mother and Baby Homes

- 32.** The following responds to the State's replies to the List of Issues with specific focus on forced family separation and Mother and Baby Homes. The State has failed to properly investigate and provide adequate remedies for all of those affected by forced family separation in Ireland, in violation of article 2(3) and 9 (5) of the Covenant.<sup>82</sup> Steps taken by Government so far have not properly fostered the process of truth telling, reconciliation or learning from survivors and adopted people.<sup>83</sup> With reference to the Committee's previous recommendations,<sup>84</sup> the State has failed to conduct effective investigations into *all* allegations of abuse in Mother and Baby Homes, County Homes and institutions, agencies and individuals identified as having been complicit in separating unmarried mothers from their children.<sup>85</sup>
- 33.** No perpetrators have been identified thus leading to no prosecutions to date with the State claiming they are "too difficult".<sup>86</sup> The State has also failed to provide full and effective remedies to all victims with a redress scheme that excludes over 40% of survivors<sup>87</sup> currently being pushed through Parliament with no effective consultation with survivors following the drafting of the Bill.<sup>88</sup> The planned compensation is inadequate in terms of the proposed financial sums and does not adequately address the four other forms of reparation owed to victims. The State must go further to ensure that appropriate and adequate forms of restitution,<sup>89</sup> rehabilitation,<sup>90</sup> satisfaction<sup>91</sup> and guarantees of non- repetition<sup>92</sup> are in place.
- 34.** In response to the State's reply to para 4(a) of the List of Issues<sup>93</sup> ICCL has numerous concerns. It is highly unlikely that implementing the Government's Action Plan will fulfil the State's human rights obligations. It does not refer to key pillars of transitional justice such as reparation nor does it mention restitution, rehabilitation, guarantees of non-repetition or satisfaction.<sup>94</sup>

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<sup>82</sup> See eg McGettrick, O'Rourke, O'Nolan, Birth Information and Tracing Bill 2022, [A Briefing Note and Amendments](#), February 2022. See also UN Human Rights Committee, [General Comment No. 31](#), 26 May 2004, para. 16.

<sup>83</sup> For example, the report from the Mother and Baby Home Collaborative Forum has yet to be published. See Department of Children, Equality, Disability, Integration and Youth, [Mother and Baby Home Collaborative Forum](#), last updated on 21 December 2020.

<sup>84</sup> UN Human Rights Committee, [Concluding observations on the fourth periodic report of Ireland](#), CCPR/C/IRL/CO/4, 19 August 2014, para. 10.

<sup>85</sup> McGettrick, [List Of Institutions, Agencies And Personnel Involved In Separating Unmarried Mothers From Their Children](#), Clann Project, last updated January 2022.

<sup>86</sup> The Journal.ie, ['We can't just say it's too difficult': Could criminal investigations into Ireland's mother and baby homes happen?](#) 17 January 2021; The Journal.ie, [Drew Harris says Mother and Baby Home crimes 'difficult to prosecute' despite reports of rape and incest](#), 29 April 2021.

<sup>87</sup> Notably boarded out children who were resident less than 6 months before being boarded out. The Journal.ie, ['I'll protest until I die': Call for 'forgotten' boarded out children to be given redress](#), 20 January 2022, "[t]he Mother and Baby Home Commission of Inquiry failed to address what steps it took, if any, to gather the views of those who were boarded out. Many victims wanted their voices to be heard, but were not given the opportunity to do so." Elaine Loughlin, [Mother and baby home survivors want redress scheme scrapped after High Court victory](#), 18 December 2021.

<sup>88</sup> A call for submissions on the draft legislation for the scheme was published online and through the Government Department's social media channels on 12 April 2022, with an extended deadline for submissions being given as 6<sup>th</sup> May, giving survivors and interested groups 17 working days. No group advocating on behalf of survivors nor any survivors themselves were directly alerted to this call for submissions.

<sup>89</sup> As per the definition adopted by the UN General Assembly, [Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law](#), 16 December 2005, para. 19.

<sup>90</sup> *Ibid*, para. 21.

<sup>91</sup> *Ibid*, para. 22.

<sup>92</sup> *Ibid*, para. 23, in particular subsections b, c, e, f, g and h. These are particularly important in terms of education and codes of ethics for members of religious institutions.

<sup>93</sup> Human Rights Committee, [Replies of Ireland to the list of issues in relation to its fifth periodic report](#), CCPR/C/IRL/RQ/5, 31 March 2022, Reply to paragraph 4(a), paras 17-22.

<sup>94</sup> See Department of Children, Equality, Disability, Integration and Youth, [Action Plan for Survivors and Former Residents of Mother and Baby and County Home Institutions](#), 16 November 2021.

- 35.** Many survivors have disputed the Mother and Baby Homes Commission of Inquiry's final report, and have successfully legally challenged the fact that they were given no opportunity to correct or challenge the published record of their evidence.<sup>95</sup> The State settled and agreed with the High Court that the report was fatally flawed.<sup>96</sup> As testimony was misrepresented by the Commission, 64 paragraphs of the Report were deemed unreliable.<sup>97</sup> These paragraphs include survivor's evidence that the Commission classified to be 'the product of a creative writing class',<sup>98</sup> the Commission determining that there was 'no evidence that the women who gave birth in Mother and Baby Homes were denied pain relief',<sup>99</sup> that there was 'no evidence' that at the time of adoption women thought 'their consent was not full, free and informed'<sup>100</sup> and that the Commission concluded that mothers were 'not "incarcerated" in the strict meaning of the word'.<sup>101</sup>
- 36.** There is no mention of human rights in the Government's statement on the final report of the Mother and Baby Homes Commission.<sup>102</sup> As noted by the Special Rapporteur on child protection the evidence was "not explicitly and consistently measured against the international human rights law standards to which Ireland was committed from 1953 onwards."<sup>103</sup> The Special Rapporteur's report addresses this lacuna and finds that the Commission's Final Report is indicative of violations of provisions of the ECHR, including the right to life, the right to liberty, the right to privacy and the prohibition on torture and ill treatment; thereby indicating violations of articles 6, 7, 8, 9, 10, and 17 of the Covenant.<sup>104</sup>
- 37.** In response to the State's reply to para 4(b)<sup>105</sup> of the List of Issues,<sup>106</sup> the Commission of Inquiry has been criticised for its overly narrow remit and its failure to address systemic human rights abuses.<sup>107</sup> An alternative report published by academics highlighted the issues not covered such as forced labour, inhuman and degrading treatment, forced adoption, involuntary detention and forced family separation.<sup>108</sup> The seriousness of these issues is underlined by the fact that the situation has been referred to the International Criminal Court.<sup>109</sup>

<sup>95</sup> See *Philomena Lee and Mary Harney v. the Minister of Children, Equality, Disability, Integration and Youth*. 2021/303JR, the High Court acknowledged that the rights of eight victims who took a test case were breached by the failure to provide them with a draft report. In particular, the State acknowledged that '[a] number of survivors do not accept the accounts given in the Final Report of the Commission of Investigation as a true and full reflection of the oral and documentary evidence they gave to the Confidential Committee or the Commission of Investigation. In particular, the accuracy of the following paragraphs is not accepted by survivors who believe the paragraphs in question relate to them or the evidence they gave.' See Department of Children, Equality, Disability, Integration and Youth, [Settlement of applications for judicial review of Final Report of Commission of Investigation into Mother and Baby Homes](#), 17 December 2021. See also Ellen O'Riordan, [Rights of eight mother and baby home survivors breached over report, State says](#), 17 December 2021.

<sup>96</sup> The Journal.ie, ['We've been totally vindicated': State admits rights of Mother & Baby Home survivors were breached](#), 17 December 2021.

<sup>97</sup> See Department of Children, Equality, Disability, Integration and Youth, [Settlement of applications for judicial review of Final Report of Commission of Investigation into Mother and Baby Homes](#), 17 December 2021.

<sup>98</sup> Department of Children, Equality, Disability, Integration and Youth, [Mother and Baby Homes Commission of Investigation report](#), updated on 11 March 2021, Chapter 18, footnote 78.

<sup>99</sup> *Ibid*, Executive Summary, para. 245.

<sup>100</sup> *Ibid*, Executive Summary, para. 254.

<sup>101</sup> *Ibid*, Recommendations, para. 27.

<sup>102</sup> Department of Children, Equality, Disability, Integration and Youth, [Government Statement on the Final Report of the Commission of Investigation \(Mother and Baby Homes and certain related matters\)](#), 12 January 2021.

<sup>103</sup> Department of Children, Equality, Disability, Integration and Youth, [Government approves publication of the annual report of the Special Rapporteur on Child Protection, Professor Conor O'Mahony](#), updated on 9 February 2022. [Annual report of the Special Rapporteur on Child Protection 2021](#), p. 70.

<sup>104</sup> [Annual report of the Special Rapporteur on Child Protection 2021](#), p. 129.

<sup>105</sup> Human Rights Committee, [List of issues in relation to the fifth periodic report of Ireland](#), CCPR/C/IRL/Q/5, 14 January 2021.

<sup>106</sup> Human Rights Committee, [Replies of Ireland to the list of issues in relation to its fifth periodic report](#), CCPR/C/IRL/RQ/5, 31 March 2022, Reply to paragraph 4(b), paras 23-25.

<sup>107</sup> See eg [ICCL MBHC Briefing Note](#), 5 March 2021.

<sup>108</sup> 23 senior academics responded to the report by writing an alternative report using a human rights lens as the report itself limited its consideration of human rights to one chapter and did not ground its analysis in human rights law. See eds. Mairead Enright, Aoife O'Donoghue, ["Rights and the Mother and Baby Homes Report: Reaching Different Findings"](#), July 2021.

<sup>109</sup> [KRW Human Rights Lawyers, Mother And Baby Homes: Referral To The ICC For Crimes Against Humanity](#), 18 May 2021.

- 38.** Despite the issues with the report, the redress scheme is part of the measures being used in “responding to the report”.<sup>110</sup> The scheme has been met with widespread criticism<sup>111</sup> and has several shortcomings.<sup>112</sup> It requires that victims who accept compensation under the scheme must sign a waiver to not pursue legal action against the state (in violation of their human right to an effective remedy).<sup>113</sup> This can be contrasted to other schemes, for example, in the State’s Report it states<sup>114</sup> that the Symphysiotomy Payment Scheme “did not require or compel any woman to forgo her right to initiate’ legal proceedings.”<sup>115</sup>
- 39.** The redress scheme excludes entire groups of survivors and adopted people due to its reliance on the Commission’s report: “The impugned parts of the Commission’s Final Report include findings and recommendations upon which the Government is relying to limit its proposed redress scheme. For example, the Commission concluded that redress should not be granted for forced or illegal adoption, forced labour in Mother and Baby Homes generally, vaccine trials in Mother and Baby Homes, or the abuse of ‘boarded out’ or adopted people as children.”<sup>116</sup> Unlawful forced adoptions which took place in the Mother and Baby Homes breached article 17 and article 23.
- 40.** Significant concerns remain about the three proposed Bills addressing institutional burials, birth information and tracing and the redress scheme currently before the Oireachtas.<sup>117</sup> Eight UN Special Rapporteurs have criticised the three Bills stating that they raise “serious concerns in relation to the State’s compliance with its international legal obligations, and raise concerns in relation to appropriate responses to the human rights issues raised in relation to the terms of reference, and methodology of the Mother and Baby Homes Commission of Investigation (hereafter the Commission), and other related redress schemes and reports on institutional and historic abuses.”<sup>118</sup>
- 41.** In addition to concerns raised by UN Special Rapporteurs, serious concerns have been raised in a legal opinion by Child Identity Protection regarding the Adoption Information and Tracing Bill 2022.<sup>119</sup> The opinion raises concerns at the mandatory information session for adopted persons and the ability of mothers, children and wider family members to effectively vindicate their rights of access to records and personal data, including because of narrow definitions related to the definition of ‘genetic relative information’.<sup>120</sup> The State may be in breach of the EU General Data Protection Regulation by not allowing survivors access to all of their personal data.<sup>121</sup>

<sup>110</sup> Department of Children, Equality, Disability, Integration and Youth, [Government approves proposals for Mother and Baby Institutions Payment Scheme and publishes An Action Plan for Survivors and Former Residents of Mother and Baby and County Home Institutions](#), 16 November 2021.

<sup>111</sup> Clann Project, [Irish High Court Declares That Mother And Baby Homes Commission Of Investigation Treated Survivors Unlawfully](#), 7 December 2021.

<sup>112</sup> For example, the majority of ICCL’s recommendations were not followed, see “[ICCL submission to the Mother and Baby Homes Redress Scheme](#)”, 31 March 2021.

<sup>113</sup> General Scheme of a Mother and Baby Institutions Payment Scheme Bill, 2022, Head 22(5); The Journal.ie, “[No understanding of trauma’: Survivors hit out at 6-month rule & legal waiver in redress scheme](#)”, 16 November 2021.

<sup>114</sup> Human Rights Committee, [Fifth periodic report submitted by Ireland under Article 40 of the Covenant, due in 2019](#), UN Doc CCPR/C/IRL/5, 31 January 2020.

<sup>115</sup> *ibid*, para. 87.

<sup>116</sup> Clann Project, [Irish High Court Declares that Mother and Baby Homes Commission of Investigation Treated Survivors Unlawfully](#), 17 December 2021.

<sup>117</sup> Irish Council for Civil Liberties, [Submission to the Committee on Children, Disability, Equality, and Integration on the General Scheme of a Certain Institutional Burials \(Authorised Interventions\) Bill, 2021](#), 26 February 2021; Irish Council for Civil Liberties, [ICCL Submission on the Birth Information and Tracing Bill](#), June 2021; Irish Council for Civil Liberties, [ICCL Submission on a Restorative Recognition Scheme for the Former Residents of the Mother and Baby Homes and County Homes](#), 31 March 2021.

<sup>118</sup> Eight Special Rapporteurs [Joint Other Letter to Ireland concerning the General Scheme of the Birth Information and Tracing Bill, the General Scheme of a Certain Institutional Burials \(Authorised Interventions\) Bill and the proposed Restorative Recognition Scheme](#), 5 November 2021.

<sup>119</sup> Maud de Boer-Buquicchio, [Legal opinion on behalf of Child Identity Protection on the compatibility of the Irish Birth Information and Tracing Bill 2022 with international legal standards on the right to identity and right to access to information](#), April 2022.

<sup>120</sup> Eight Special Rapporteurs’ [Joint Other Letter to Ireland concerning the General Scheme of the Birth Information and Tracing Bill, the General Scheme of a Certain Institutional Burials \(Authorised Interventions\) Bill and the proposed Restorative Recognition Scheme](#), Ref: OL IRL 2/2021, 5 November 2021, p. 2. The Adoption and Tracing Bill 2022 has faced significant criticism. (See Dáil Éireann debate, [Birth Information and Tracing Bill 2022: Second Stage \(Resumed\)](#), 20 January 2022). It fails to recognise the mothers’ right to information about their forced and/or illegal separation from their child. It ignores the States’ duty to reunite siblings separated from each other. It denies people access to certain parts of their files that contain essential historical information. (See Sarah Burns, [Requirement for information sessions set out in Bill receives further criticism](#), Irish Times, 20 January 2022.) The Bill does not require religious orders to preserve or make available information. It only creates rights to access held by TUSLA, the AAI and the General Registry Office.

<sup>121</sup> McGettrick, O’Rourke, O’Nolan, [Birth Information and Tracing Bill 2022, A Briefing Note and Amendments](#), February 2022; The Journal.ie, [Department ‘in breach of EU law’ unless it gives health records to Mother and Baby Home survivors](#), 9 January 2021.

42. In response to the State's reply to para 4(c)<sup>122</sup> of the List of Issues,<sup>123</sup> the State has not provided any specific mechanism for accountability or justice. While AGS issued a call for victims to come forward to facilitate criminal investigations, many investigations appear to have been hampered by a variety of issues, including difficulties tracking down victims.<sup>124</sup> No additional efforts have been made to facilitate survivors becoming complainants in criminal cases for example by way of providing targeted victim support or guaranteeing legal aid.
43. ICCL welcomes the government's commitment to the Sean McDermott Street National Site of Research and Remembrance. However, we call for the issue of forced family separation (including adoption) to be explicitly brought within its remit.

## RECOMMENDATIONS

### The State should:

- Commit to a new, independent investigation of all human rights abuses that occurred as part of the system of forced family separation.
- Substantively broaden the redress scheme and ensure it provides for adequate and appropriate redress for all those who suffered human rights abuses, as part of the Mother and Baby Homes system, ranging from adequate compensation to trauma-informed specialist mental health care, enhanced medical cards and any other forms of appropriate redress, in line with international standards on the right to effective remedy.
- Ensure that all crimes reported by survivors of Mother and Baby Homes are properly investigated, and ensure that victims are provided with information, support, as well as legal aid.
- Ensure that all relevant legislation, including the Birth Information and Tracing Bill 2022, the Institutional Burials Bill 2022 and the proposed Restorative Recognition Scheme, seeking to respond to human rights abuses in the Mother and Baby Homes System, properly comply with requirements under the ICCPR.
- Confirm that any financial payment accepted by survivors as part of the redress scheme will not preclude victims from exercising their right to pursue further legal action.
- Conduct an independent review of the Commission of Investigation Act 2004 to ensure its compliance with Ireland's international human rights obligations, including under the ICCPR.
- Bring the issue of forced family separation (including adoption) within the remit of the Sean McDermott Street National Site of Research and Remembrance.

<sup>122</sup> Human Rights Committee, [List of issues in relation to the fifth periodic report of Ireland](#), CCPR/C/IRL/Q/5, 14 January 2021.

<sup>123</sup> Human Rights Committee, [Replies of Ireland to the list of issues in relation to its fifth periodic report](#), CCPR/C/IRL/RQ/5, 31 March 2022, Reply to paragraph 4(c).

<sup>124</sup> Conor Gallagher, [Most investigations into alleged crimes at mother and baby homes closed](#), Irish Times, April 2 2022.

## Conversion Practices

44. In 2018, Ireland committed to prohibiting the promotion or practice of conversion practices – also known as “conversion therapies” - by health professionals in its national strategy on LGBTI+ young people.<sup>125</sup> Despite the presentation of the Prohibition of Conversion Therapies Bill at the Oireachtas in 2018,<sup>126</sup> conversion practices are still legal, and no legislative action has been taken to ban the practice in Ireland.

### RECOMMENDATION

#### The State should:

- Urgently enact legislation to completely ban conversion practices on LGBTI+ people.

## Surgeries on Intersex Children

45. Intersex genital mutilations (IGM) are still performed in Ireland for what medical professionals refer to as “social emergencies” rather than medical necessity.<sup>127</sup> IGM practices include non-consensual, medically unnecessary, irreversible, cosmetic genital surgeries, and/or other harmful medical treatments.<sup>128</sup>

### RECOMMENDATION

#### The State should:

- Take necessary measures to end the performance of irreversible medical acts, especially surgical operations, on intersex children who are not yet capable of giving their free and informed consent, except in cases where such interventions are absolutely necessary for medical reasons.

<sup>125</sup> Department of Children and Youth Affairs, [LGBTI+ National Youth Strategy 2018-2020](#).

<sup>126</sup> [Prohibition of Conversion Therapies Bill 2018](#).

<sup>127</sup> See Intersex Ireland, [Current Medical protocols](#).

<sup>128</sup> The Committee has previously recommended ending such practices in its concluding observations on the sixth periodic report of Belgium, CCPR/C/BEL/CO/6. See also, Human Rights Committee concluding observations on the sixth periodic report of Australia, CCPR/C/AUS/CO/6.

# ARTICLE 9 RIGHT TO LIBERTY AND SECURITY OF THE PERSON

## Arrest and duration of detention

46. The proposed Garda Síochána (Powers) Bill in its current draft form proposes to expand the number of offences for which detention of 168 hours can apply.<sup>129</sup> The Bill proposes to introduce a new general power of arrest without warrant for non-serious offences.<sup>130</sup>

## RECOMMENDATIONS

### The State should:

- Amend the draft Garda Síochána (Powers) Bill to ensure that a 24 hour limit for detention should apply for all crimes, or if deemed essential for the investigation of serious crimes, provision could be made for limited extension but only with judicial authorisation.
- The State should maintain the current position that the power of arrest without warrant should only apply to serious offences.

<sup>129</sup> Department of Justice, [General Scheme of the Garda Síochána \(Powers\) Bill](#), Head 47, 14 June 2021.

<sup>130</sup> Department of Justice, [General Scheme of the Garda Síochána \(Powers\) Bill](#), Head 23.

## Detention for inability to pay a fine (Articles 9 & 11)

47. A person in Ireland can be imprisoned for up to one year for failure to pay a fine.<sup>131</sup> Since the commencement of the Fines (Payment and Recovery) Act 2014 in 2016 there has been almost a doubling of the number of imprisonments for the non-payment of court ordered fines, from 455 in 2018 to 861 in 2019.<sup>132</sup> 285 people were imprisoned for non-payment of fines in 2020,<sup>133</sup> despite the risks to their health during a global pandemic. Imprisonment merely on the ground of inability to fulfil a contractual obligation may place a disproportionate burden on offenders from minoritised communities such as Travellers, as well as on women.<sup>134</sup> In 2015, 80% (2,667) of female committals to prison were for failure to pay court-ordered fines.<sup>135</sup> Despite the commencement of the Fines (Payment and Recovery) Act 2014, the highest percentage of female committals continues to be for fines default.<sup>136</sup> The provision of gender-specific non-custodial alternatives on a national basis is particularly important for women, who often have primary caregiving responsibilities and may be at risk of losing their home if imprisoned. Despite the introduction of the Criminal Justice (Community Service) Amendment Act 2011, the number of Community Service Orders for women decreased every year between 2012 and 2015.
48. As noted in a recent report, foreign nationals are “disproportionately over-represented in committals associated with driving without vehicle insurance. This offence is punishable by a €5,000 fine and, at the discretion of the court, imprisonment. This finding suggests that, for some, imprisonment may have been caused by the inability to pay the fine, rather than the original offence itself.”<sup>137</sup>
49. The Criminal Justice (Public Order) Act 2011 introduced offences related to begging with fines of up to €500 or a month imprisonment.<sup>138</sup> There are indications that these offences disproportionately penalise those most at-risk in society.<sup>139</sup> The lowest court, the District Court, routinely sets fines but “if proper consideration was not given to an offender’s means a fine could in effect be a custodial sentence “by the back door””.<sup>140</sup> Ireland has been singled out as an outlier in Europe for this practice by Finance Watch, the EU financial regulation NGO.<sup>141</sup>

## RECOMMENDATION

### The State should:

- Immediately stop the practice of sending debtors who are unable to pay court fines, or who cannot meet repayment schedules, to prison to bring Ireland in line with article 9 and 11 ICCPR.
- Urgently review all legislation that disproportionately affects those who do not have the means to avoid a custodial sentence in particular the Criminal Justice (Public Order) Act 2011.
- Implement gender-specific non-custodial options for women, as an alternative to custodial sentences, which take into account the complexity of female offenders’ needs, including those of Traveller women.
- Ensure that legislation provides for non-custodial and non-monetary sentencing options such as community service and probation orders and that judges, particularly in lower courts, are both required to and trained to be cognisant of an offender’s means before imposing an unrealistic fine which will likely lead to incarceration if unpaid.

<sup>131</sup> See for example section 19 “Imprisonment in default of payment of fine” of the [Fines Act, 2010](#).

<sup>132</sup> Irish Prison Service, [Annual Report 2020](#), p.31.

<sup>133</sup> Ibid.

<sup>134</sup> Irish Penal Reform Trust, “[SOMETIMES I’M MISSING THE WORDS](#)” [The rights, needs and experiences of foreign national and minority ethnic groups in the Irish penal system](#), 27 April 2022, p. 14 citing Avril Brandon and Michael O’Connell, [Same crime: Different punishment? Investigating sentencing disparities between Irish and non-Irish nationals in the Irish criminal justice system](#), (2018) 58(5) [British Journal of Criminology](#) 1127-1146.

<sup>135</sup> Irish Prison Service (2016) [Irish Prison Service Annual Report 2015](#), p. 31.

<sup>136</sup> Irish Examiner, [Jailing for Fines down by 1000](#), 3 December 2016.

<sup>137</sup> Ibid.

<sup>138</sup> [The Criminal Justice \(Public Order\) Act, 2011](#).

<sup>139</sup> Irish Penal Reform Trust, “[SOMETIMES I’M MISSING THE WORDS](#)” [The rights, needs and experiences of foreign national and minority ethnic groups in the Irish penal system](#), 27 April 2022, p. 14 citing Irish Penal Reform Trust, [The Vicious Circle of Social Exclusion and Crime: Ireland’s Disproportionate Punishment of the Poor](#), 2012.

<sup>140</sup> Claire Hamilton, [Sentencing in the District Court: “Here be dragons”](#), (2005) 15(3) [Irish Criminal Law Journal](#) 9-15, p.10.

<sup>141</sup> Sarah Taaffe-Maguire, [Ireland criticised for sending people to prison for not paying fines](#), [the Business Post](#), 18 February 2022; Finance Watch, [From debtor prisons to being prisoners of debt](#), 20 January 2022.

## Police Complaints Procedure (Articles 6, 7, 9 & 10)

50. ICCL is concerned about ongoing investigative difficulties that face the Garda Síochána Ombudsman Commission (GSOC)<sup>142</sup> including long delays in investigations, issues with interviewing key witnesses and providing regular updates and information to complainants.<sup>143</sup> The General Scheme of the Policing, Security and Community Safety Bill<sup>144</sup> proposes a new Policing and Community Safety Authority (to replace the Policing Authority and Garda Inspectorate) and a new Garda Síochána Ombudsman (to replace GSOC). ICCL welcomes the focus on human rights standards, independence, inspections, equality and diversity by the new Authority but would emphasise the need to ensure that the new oversight bodies have enhanced powers, resources and clarity in terms of their respective roles, including in relation to the Garda Commissioner's internal oversight role. ICCL considers that all complaints not related to performance should be investigated by an independent body.<sup>145</sup>

### RECOMMENDATION

#### The State should:

- Ensure that the proposed new independent bodies responsible for handling police complaints, as foreseen in the General Scheme of the Policing, Security and Community Safety Bill, are properly and clearly empowered, as well as resourced to ensure fair, timely and effective investigations into complaints against Garda members.
- Consider amending the proposed legislation to provide that the new Ombudsman should be titled the Independent Office of the Police Ombudsman to ensure public confidence in its independence.<sup>146</sup>

## Mandatory Hotel Quarantine

51. As part of its response to the Covid-19 pandemic, the Irish government introduced mandatory hotel quarantine for certain travellers arriving into Ireland. ICCL expressed concern that this scheme was potentially discriminatory, and was not subject to proper inspections and appeals.<sup>147</sup>

### RECOMMENDATION

#### The State should:

- Commit to carrying out a human rights impact assessment of its mandatory hotel quarantine scheme put in place as part of the Covid-19 pandemic response.
- Undertake not to reintroduce mandatory hotel quarantine as part of emergency responses unless a requirement to quarantine is directly connected to scientific data that underpins the necessity and proportionality test required to detain people against their will.
- If mandatory hotel quarantine or any similar scheme is reintroduced at any stage in the future:
  - a. Ensure that all people entering mandatory hotel quarantine are given a physical and mental health medical review and all necessary medical treatments, supports or interventions are provided;
  - b. Implement a system of effective and transparent review before people must enter mandatory hotel quarantine;
  - c. Implement an effective and transparent appeal process for all people subject to mandatory quarantine, including the right to an oral hearing with legal representation;
  - d. Ensure all places of mandatory hotel quarantine are subject to regular inspections to ensure conditions meet the standards for detention;
  - e. Ensure the designation of States is based on non-discriminatory, objective, transparent and foreseeable criteria that is based on up-to-date medical necessity.

<sup>142</sup> Irish Council for Civil Liberties, [Submission on the General Scheme of the Garda Síochána \(Powers\) Bill](#), August 2021, para. 72.

<sup>143</sup> See Irish Council for Civil Liberties, [Follow Up Submission on the General Scheme of the Policing, Security and Community Safety Bill](#), October 15, 2021; see also for example: Cianan Brennan & Daniel Mcconnell, [GSOC probes delayed over unofficial industrial action by gardaí](#), the Irish Examiner, 17 December 2021.

<sup>144</sup> Department of Justice, [General Scheme of the Policing, Security and Community Safety Bill](#), 2021.

<sup>145</sup> Irish Council for Civil Liberties, [Policing, Security and Community Safety Bill Submission](#), August 2021, p.5. relating to Heads 104, 113.

<sup>146</sup> Commission on the Future of Policing in Ireland (n 3) p xi.

<sup>147</sup> ICCL, [Briefing Note- Legal Issues Arising from Mandatory Hotel Quarantine](#), April 2021.

# ARTICLE 12 RIGHT TO FREEDOM OF MOVEMENT

## Right to travel and freedom of movement in emergencies

52. The government response to the Covid-19 Pandemic included severe restrictions on freedom of movement within the country and, at times, on exiting and entering the country. ICCL is concerned that the government failed to apply a human rights-based approach to restrictions on movement and, at certain times, the restrictions on freedom of movement may have been disproportionate.

## RECOMMENDATIONS

### The State should:

- Ensure that all restrictions on human rights provided for in law, including during emergencies, especially where underpinned by criminal sanctions for failure to comply, are defined with sufficient clarity, communicated clearly to the public, (outlining the precise scope of these restrictions), and accompanied by a clear commitment to ensure any interference with the right to movement is the most minimal possible, demonstrably necessary and proportionate to the aim of protecting public health.
- Ensure that any penalties for breaches of restrictions on rights are proportionate to the aim of protecting public health and proportionate to the potential harm caused by the particular breach.
- Commit to ensuring that criminal sanctions are always used as a measure of last resort.

## Freedom of Movement after Brexit; Freedom of movement & Non-Discrimination (Articles 1, 2, 12 & 26)

53. There has long been a Common Travel Area (CTA) between the UK and Ireland. At present the main statutory basis for passport control into the Republic of Ireland disappplies duties to carry and produce passports on journeys in the CTA to Irish and British citizens and persons exercising EU treaty rights (in practice EU/EEA citizens and their family members).<sup>148</sup> This differential approach in legislation means other non EEA citizens are required to produce passports. Whilst in practice on air routes passports or equivalent ID confirming citizenship are almost always sought, selective passport checks occur on the land border by the Irish police's immigration service (Garda National Immigration Bureau- GNIB).
54. Victim testimony indicates that these checks are frequently conducted on the basis of often blatant racial profiling. UK law explicitly precludes passport checks being conducted within the CTA.<sup>149</sup> In 2019, the Committee on the Administration of Justice (CAJ) submitted a claim of a breach of the equality scheme complaint<sup>150</sup> against the Northern Ireland public transport authority, Translink in response to the company facilitating discriminatory passport checks on its cross-border transport services. Information received under FOI in 2020 established that Translink do not record the number of checks,<sup>151</sup> nor do they provide training for drivers on how to assist passengers who are subject to the unlawful demands to produce identification.
55. In January 2022<sup>152</sup>, the Irish Human Rights and Equality Commission (IHREC) wrote to the Policing Authority to ask them to investigate complaints about ongoing racial profiling in respect of cross-border travel. The matter was raised at the February 2022 Policing Authority meeting with the Garda Commissioner.<sup>153</sup> The Garda Commissioner's response confirmed that checks are carried out and that they target certain nationalities, including now at Dublin Airport for those arriving in Dublin and with the intent of travelling to Northern Ireland.

### RECOMMENDATIONS

#### The State should:

- Ensure that the Minister for Justice directs the Gardaí to ensure no discriminatory racial profiling is taking place at borders and particularly within the Common Travel Area, this can be achieved only by ending all passport checks on the land border between the Republic of Ireland and Northern Ireland.
- Ensure that section 11 of the Immigration Act (2004) is enforced in a manner that respects article 12 of ICCPR with regard to freedom of movement and articles 26 and 2.1 of the covenant with respect to non-discrimination.

<sup>148</sup> Section 11 of the Immigration Act 2004 (as amended).

<sup>149</sup> The statutory basis for powers of passport/immigration control in the UK is the [Immigration Act \(1971\)](#). This contains, inter alia, passport control powers, including powers of examination (questioning) and duties to produce passports/id cards on request. However, local journeys in the CTA, including on the land border are explicitly exempt from the use of such passport control; [House of Lords Debate \(25<sup>th</sup> April 2018\) European Union Withdrawal Bill \(2018\)](#).

<sup>150</sup> ICCL Press Release: [Equality complaint made against Translink for facilitating discriminatory passport checks on cross-border buses](#) September 17 2019.

<sup>151</sup> Luker Butterly [Passport checks on cross-border buses not recorded by Translink](#) the detail, 15th June 2020.

<sup>152</sup> Kitty Holland [Claim of racial profiling at Border by Garda continues to cause concern](#) Irish Times, 6<sup>th</sup> January 2022; Cormac O'Keefe [IHREC raises allegations of racial profiling at cross-border checks](#) Irish Examiner 5<sup>th</sup> January 2022.

<sup>153</sup> [February 2022 Policing Authority meeting with the Garda Commissioner- 2:16](#).

# ARTICLE 13 RIGHTS OF NON-CITIZENS

## International protection, standards for Direct Provision Centres and regularisation of the status of undocumented people

- 56.** The rights of refugees and asylum seekers trigger protection under article 2 (right to non-discrimination) and article 13 (rights of non-nationals). Ireland's reception system for asylum seekers - known as Direct Provision - was designed as a short-term measure in the year 2000. Twenty-two years later, the system is still in place. As mentioned in the State reply to the List of Issues, the Government has pledged to end the Direct Provision system and replace it with a new International Protection policy. However, the reply fails at providing a timeline for the new housing arrangements and serious issues remain. These include: the length of stay (an average of 24 months with some residents having spent up to 12 years in these conditions), profit based system which does not have a people first approach (centres are managed on a for-profit basis by private contractors), employment (with limited access to employment, though this has expanded in recent years), health (asylum seekers are 5 times more likely to experience mental health issues and psychiatric conditions).<sup>154</sup>
- 57.** Asylum seekers and refugees were disproportionately impacted by Covid-19 and State measures, with significant outbreaks of Covid-19 in congregated settings such as direct provision centres.<sup>155</sup> According to a survey conducted to understand people's experiences of Direct Provision during the Covid-19 pandemic, over half of the respondents stated that they "did not feel safe in Direct Provision during the pandemic".<sup>156</sup>
- 58.** The pandemic has also highlighted the failure of the Government to collect data on health issues and vulnerabilities of people applying for international protection. ICCL has long called for independent, rights-focused inspections of Direct Provision, the problematic absence of which was highlighted during the pandemic.<sup>157</sup>
- 59.** While welcoming the introduction of a long-awaited scheme for undocumented people<sup>158</sup> which also includes a separate strand for those in the International Protection system,<sup>159</sup> we note that as currently designed the scheme has potential financial barriers (550 euro per adult and 700 euro per family)<sup>160</sup> and technological barriers (applications can only be submitted online) in place.
- 60.** The current increase in arrivals of refugees from Ukraine and the impending crisis of accommodation has again highlighted the housing and accommodation crisis in Ireland for all refugees.<sup>161</sup> Nearly 2,000 refugees have been given the right to leave Direct Provision as their status has been regularised in Ireland but are still living in the centres because they can't find accommodation. Half of those have been in the situation for over two years.<sup>162</sup> This can be seen in the context of a severe housing crisis across the State that the Government must address as a priority.

## RECOMMENDATIONS

### The State should:

- Fully implement the commitments to replace Direct Provision and establish a not-for-profit system.
- Conduct independent, rights-focused inspections of Direct Provision. If the current system is replaced, the new one must also be subject to inspections.
- Conduct a thorough review and reform of asylum, immigration and citizenship related administration and policy to address significant deficiencies in each area. This must include a review of relevant legislation to determine if it is fit for purpose, in consultation with civil society, legal professionals, and migrant communities.
- Ensure that the regularisation scheme for undocumented people does not contain substantial barriers, including financial and technological.

<sup>154</sup> For an overview of the key issues of the Direct Provision system see Doras, [Direct Provision](#).

<sup>155</sup> ICCL, [Human Rights in the Pandemic](#), May 2021, p.74-75.

<sup>156</sup> Irish Refugee Council, [Submission to the Special Committee on Covid-19](#), 26 May 2020, p. 6

<sup>157</sup> ICCL Press Release, [People in Direct Provision not getting the care they deserve](#), 30 March 2021.

<sup>158</sup> Department of Justice, [Regularisation of Long-term undocumented migrants scheme](#).

<sup>159</sup> Department of Justice, [International Protection strand of the regularisation scheme for long-term undocumented migrants now open for applications](#), Press Release, 7 February 2022.

<sup>160</sup> For those with active international protection applications, the fee is waived.

<sup>161</sup> See for example the Seanad (Senate) [Debate on 23 March 2022](#). The relevant ministers says: "We have to be very clear about the scale of the accommodation challenge that we, as a country, face".

<sup>162</sup> Irish Times, G. Howlin, [Who is in charge of the Ukrainian refugee response?](#), 20 April 2022.

# ARTICLE 14 RIGHT TO FAIR TRIAL AND EQUAL TREATMENT BEFORE THE LAW

## Garda Station Legal Advice Revised Scheme

- 61.** The right to a fair trial begins at first contact with police and the police interview is often critical for any subsequent trials.<sup>163</sup> The normal criminal legal aid scheme does not apply for police interviews<sup>164</sup> and the Garda Station Legal Advice Revised Scheme is extremely narrow in its reach.<sup>165</sup> Only persons detained under certain legislation come within the Revised Scheme, and it excludes those who voluntarily attend for interview.<sup>166</sup> Further, only those either in receipt of social welfare or an annual salary less than €20,316 gross are eligible.<sup>167</sup> The average annual Irish salary gross is €44,202.<sup>168</sup> The gap between the income threshold and the average person's ability to pay the costs of a lawyer privately is stark.
- 62.** There is no formal process for the selection of lawyers.<sup>169</sup> There is no quality control and neither legal aid lawyers nor police are adequately trained to deal with suspects in vulnerable positions.<sup>170</sup> Solicitors do not have to be specialised in criminal law in order to provide legal aid.<sup>171</sup> If a detained person is not eligible for the scheme and a solicitor believes that they will not be able to pay the fees privately, the solicitor does not have to attend the station.<sup>172</sup> The scheme does not cover time spent reviewing video or documentary evidence, or video interviews. There is no institution responsible for monitoring the quality of legal aid.<sup>173</sup>
- 63.** The Information for Persons in Custody form (C72) does not explain the garda station scheme.<sup>174</sup> It does not set out the circumstances in which legal aid may be granted and there is no obligation to inform a person in custody orally of their potential entitlement to legal aid. This creates a chilling effect as fear about the cost of legal advice deters suspects from exercising their right. The barriers created by the lack of information were recently

<sup>163</sup> See for example Dr Vicky Conway, *Policed: The Beat – Disruptive Lawyers*, 25 January 2022.

<sup>164</sup> In 2001, the Garda Station Legal Advice scheme was established to enable the provision of free legal advice to qualifying persons detained in Garda stations. For details on the garda station system that does apply during custody see Legal Aid Board, *Garda Station Legal Advice Revised Scheme Guidance Document*, accessed 19 April 2022.

<sup>165</sup> This has been in operation since 2014.

<sup>166</sup> There is a growing number of interviews that are pre-arranged with AGS whereby suspects attend voluntarily without being detained. However the scheme only applies only to those detained under Section 30 of the Offences against the State Act 1939 (as amended), section 4 of the Criminal Justice Act 1984, (as amended), section 2 of the Criminal Justice (Drug Trafficking) Act 1996, (as amended), or section 50 of the Criminal Justice Act 2007, (as amended), or if a person who is detained under other legislation and has a legal entitlement to consult a solicitor (this right is not yet on a statutory footing). See see Legal Aid Board, *Garda Station Legal Advice Revised Scheme Guidance Document*, accessed 19 April 2022, s. 3.

<sup>167</sup> See Legal Aid Board, *Garda Station Legal Advice Revised Scheme Guidance Document*, accessed 19 April 2022, s. 4.

<sup>168</sup> Jobted.ie, *Average Salary and Wage in Ireland*, accessed 19 April 2022.

<sup>169</sup> In practice, if the detainee does not nominate a particular solicitor, the police have complete discretion as to which solicitor is called. It appears that some police stations tend to routinely use the same limited number of solicitors. See Yvonne Daly and Vicky Conway, 'Selecting a Lawyer: The Practical Arrangement of Police Station Legal Assistance' (2021) 48 *Journal of Law and Society* 622.

<sup>170</sup> Garda Inspectorate, *Delivering Custody Services – A Rights-Based Review of the Treatment, Safety and Wellbeing of Persons in Custody in Garda Síochána Stations*, 24 February 2022, pp. 88-89; Alan Cusack, Gautam Gulati, Colum P. Dunne and Shane Kilcommins, *Towards inclusionary policing: a critical inquiry into the pre-trial treatment of suspects with intellectual disabilities in Ireland*, *Policing: An International Journal*, 22 March 2022.

<sup>171</sup> Yvonne Daly and Vicky Conway, *Selecting a Lawyer: The Practical Arrangement of Police Station Legal Assistance*, 2021, 48 *Journal of Law and Society*, p. 627; Open Society Justice Initiative, *Factsheet – legal aid in Ireland*, accessed 19 April 2022.

<sup>172</sup> Law Society of Ireland, *Guidance for Solicitors Providing Legal Services in Garda Stations*, 2015, p. 3.

<sup>173</sup> The only recourse for a suspect if by making a complaint against a solicitor through the Law Society, and against a barrister through the Bar Council.

<sup>174</sup> It currently only states under "Legal Aid" that "This is dealt with on application to the court and may be granted in certain circumstances." However, this is about criminal legal aid for proceedings not for garda custody (Garda station legal advice revised Scheme) and it is unclear why this oversight persists on the form. The Notice of rights provided currently states "You have the right to legal advice and to talk to a solicitor confidentially. If you can't afford a solicitor the Garda will explain how a solicitor can be provided free of charge." However, this could be explained more clearly and in more detail.

highlighted in a Garda Inspectorate report.<sup>175</sup> A determination under the scheme not to apply legal aid is final and cannot be appealed.<sup>176</sup> The Department of Justice are examining a public defender scheme, but it is unclear if this will encompass advice while in custody.<sup>177</sup>

64. The low fees for legal aid lawyers impact the right to a fair trial as they generate an excessive workload that is not compatible with the effective defence of the interests of persons deprived of their liberty.<sup>178</sup> The scheme pay lawyers a flat fee per hour, regardless of the complexity of the situation, which, arguably, may affect the ability of lawyers to prepare their client's defence adequately.

## RECOMMENDATIONS

### The State should:

- Raise the threshold for the Garda Station Legal Advice Revised Scheme to provide assistance for suspects who qualify for legal aid under the criminal legal aid scheme.
- Introduce a formal system for choosing a solicitor that both gives the suspect the right to choose and ensures that where their first choice may not be available that a suitable list of alternative solicitors is provided.
- Raise lawyer's fees for legal aid to ensure effective representation.
- Expand the scheme to apply to interviews under voluntary caution to encourage cooperation in investigations.
- Create an easily accessible appeal mechanism.
- If a public defender system is introduced, ensure that it covers police interviews.
- Create training programs for legal aid lawyers to cover socio-psychological aspects that can arise when assisting persons in situations of vulnerability.
- Ensure the lack of information on legal aid is remedied by updating the C72 form as well as providing easy read versions of same, and posters that explain rights should be visible in garda stations.<sup>179</sup>

<sup>175</sup> Garda Inspectorate, "[Delivering Custody Services – A Rights-Based Review of the Treatment, Safety and Wellbeing of Persons in Custody in Garda Síochána Stations](#)", 24 February 2022, p. 46: "The paucity of information made available to those who may be eligible for the Garda Station Revised Legal Advice Scheme may create a barrier to their availing of their right to consult a solicitor. Including more details of the scheme on the C.72(S), displaying the information on posters in the custody area and having members in charge explain it when appropriate would help people better understand how they can avail of legal aid."

<sup>176</sup> The only option is to judicially review a refusal - a Court reviews the soundness of the decision-making process but not the decision itself. This is an expensive, cumbersome, ineffective, and impractical remedy.

<sup>177</sup> Conor Gallagher, [Minister to consider public defender system to replace legal aid scheme](#), the Irish Times, 13 April 2021.

<sup>178</sup> The hourly rates payable to solicitors for client consultations and attendance at the police station vary depending on the time and day of the attendance, but not depending on complexity. The rate is €97.22 plus VAT between 8am to 8pm Monday to Friday, and €132.19 per hour + VAT for after hours, weekends and Bank Holidays.

<sup>179</sup> The European Commission also recommends that "[i]nformation on how and where to apply for such aid, transparent criteria on when a person is eligible for legal aid, as well as information on the possibilities to complain in circumstances where access to legal aid is denied or a legal aid lawyer provides insufficient legal assistance" is provided. See European Commission, [Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings](#) (OJ C 378), pp. 11–14), Section 2 (5).

## Civil Legal Aid

65. Significant reforms to the civil legal aid scheme in Ireland are necessary to improve access to justice.<sup>180</sup>

Civil legal aid is not available for representative actions. Funding for such actions is expressly precluded by legislation.<sup>181</sup> The 2022 Budget allocated an increase of €3.3 million to support the work of the Legal Aid Board. This is welcome, particularly the inclusion of the provision of legal advice and legal aid services to victims of sexual offences. However, it is not enough for meaningful reform. Legal aid is currently generally unavailable in discrimination cases.<sup>182</sup> To ensure everyone can exercise their rights, legal aid and access to justice concerns should be central in the ongoing review of the Equality Acts<sup>183</sup> and a separate review on balancing the provision of legal resources without adding costs or increasing the complexity of proceedings before the Workplace Relations Commission (WRC).<sup>184</sup>

## RECOMMENDATIONS

### The State should:

- Review and urgently reform the Civil Legal Aid system so every person seeking justice can access the courts, in particular to ensure legal aid is available in discrimination cases and where legal advice and representation is required in quasi-judicial tribunals such as the Workplace Relations Commission.
- Promote and resource the capacity of civil society and trade unions to provide independent advocacy, legal assistance and support services to people experiencing discrimination, including the provision of targeted legal services.
- Undertake a separate review on how to best balance the provision of legal resources and supports in discrimination and equality claims without adding cost barriers for individuals or unduly increasing adversarial and complex processes before the WRC.

<sup>180</sup> As recognised by the former Chief Justice Clarke: “I remain very concerned that there are cases where persons or entities have suffered from wrongdoing but where those persons or entities are unable effectively to vindicate their rights because of the cost of going to court.” *SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Ltd*. [2018] IESC 44.

<sup>181</sup> Legal aid is not granted where “the application for legal aid is made by or on behalf of a person who is a member, and acting on behalf, of a group of persons having the same interest in the proceedings concerned” (Section 28(9)(a)(ix), [Civil Legal Aid Act 1995](#)).

<sup>182</sup> Free Legal Advice Centre (FLAC), [FLAC welcomes WRC decisions in favour of client who suffered discrimination after disclosing his HIV status](#), 13 December 2021.

<sup>183</sup> Department of Children, Equality, Disability, Integration and Youth, [Consultation on the Review of the Equality Acts](#), 6 July 2021.

<sup>184</sup> National Women’s Council, [Submission on Review of Equality Acts](#), November 2021.

## Independence of the Judiciary

66. A Bill to reform the appointments scheme for judges was published in 2022.<sup>185</sup> ICCL supports reforms designed to remove political influence over the appointment of judges, as far as possible in line with the Irish Constitution. However, we query the need to retain the Attorney General on the Judicial Appointments Commission. This could be perceived as an untoward interference by the government into the independence of the judiciary, despite the fact that the Attorney General does not have a vote. We note that the presence of the Attorney General means that the judiciary does not represent half the membership of the Judicial Appointments Board, in line with the European Charter on the Statute for Judges.<sup>186</sup>
67. The Judicial Council Act 2019 ('the 2019 Act') established the Judicial Council ('the Council').<sup>187</sup> Under s.7(1), the Council is intended, *inter alia*, to promote and maintain (e) respect for the independence of the judiciary and (f) public confidence in the judiciary and the administration of justice. However, save for ss. 52, 65 and 66, the entirety of ss.50–84 of the 2019 Act, have not been commenced.<sup>188</sup>
68. These sections all fall under Part 5 of the Act which concerns the Judicial Conduct Committee and a proposed new Judicial Complaints procedure. While the Judicial Conduct Committee has been constituted and have published A Code of Ethics, as well as a draft complaints procedure. It is unclear how these new initiatives are to be implemented in practice, or when the complaints procedure will be commenced.<sup>189</sup>
69. In 2020, Ireland was reported to have the lowest budget for judicial systems in Europe, and a ratio of only 3.3 judges per 100,000 people compared to the European average of 21.<sup>190</sup> While this budget was increased in 2020 to allow for the establishment of the Council, in 2021 the President of the High Court commented that "we do not have enough judges to meet demand. This is not access to justice... I don't understand how Government doesn't seem to appreciate how important timely access to justice is for the citizen and for Irish business."<sup>191</sup> In March 2022, she observed that the Court requires an additional 18-20 judges.<sup>192</sup> On 22 January 2022, the President of the District Court stated that "[w]e do not have enough judges to provide the sort of service we would like to provide and that the country deserves".<sup>193</sup>

## RECOMMENDATIONS

### The State should:

- Fully commence the Judicial Council Act 2019.
- Ensure the Judicial Council is provided with sufficient resources and powers to effectively fulfil its role.
- Provide additional resources to the judiciary, including by ensuring the appointment of new judges to bring Ireland in line with the European average.

<sup>185</sup> [Judicial Appointments Commission Bill, 2022](#).

<sup>186</sup> See article 1.3 of the Council of Europe, [European Charter on the Statute for Judges](#), 1998.

<sup>187</sup> [Judicial Council Act 2019](#).

<sup>188</sup> See progress of commencements on the online version of the Irish Statute Book, updated to 7 April 2022 (Act No. 4 of 2022 and S.I No. 176 of 2022), [Judicial Council Act 2019](#), No.33 of 2019.

<sup>189</sup> For latest updates on the work of the Judicial Council please see their website: [judicialcouncil.ie](http://judicialcouncil.ie).

<sup>190</sup> 'Ireland bottom of judicial spending table', [Law Society Gazette](#) (23 October 2020); Colm Keena, 'Republic has lowest budget for judicial system in Europe, report finds' [Irish Times](#) (23 October 2020).

<sup>191</sup> Cormac McQuinn, 'Minister defends number of new judicial posts following criticism' [Irish Times](#) (12 July 2021).

<sup>192</sup> Shane Phelan, 'High Court President reignites row over lack of judges' [Independent.ie](#) (11 March 2022).

<sup>193</sup> Mary Carolan and Simon Carswell, 'Inside Ireland's District Courts' [Irish Times](#) (22 January 2022).

## Special criminal courts and terrorism (Articles 4, 14 & 26)

70. The Committee's recommendations in 2014<sup>194</sup> have not been implemented by the State. There is still no definition of "terrorist acts" in domestic legislation and the Special Criminal Court (SCC) is still in existence, 50 years after it was set up<sup>195</sup> and 27 years after the state of emergency ended in Ireland.<sup>196</sup> Alarmingly, in 2009, the remit of the Special Criminal Court was expanded to include organised crime and a second Special Criminal Court was established in 2015.<sup>197</sup> Defendants sent forth to the Special Criminal Court still do not have an opportunity to challenge this decision.<sup>198</sup>
71. The continuous existence of the SCC in Ireland infringes numerous ICCPR rights. Trials before the SCC are likely in violation of article 14.1 due to the dual role of the Judges in overseeing legal challenges and determining guilt.<sup>199</sup> A decision by the DPP to send an accused for trial without a jury in the SCC can be given without reasons other than a vague reference to national security. This affects the presumption of innocence protected by article 14.2. The permitted use of unchallengeable opinion evidence<sup>200</sup> and the inability to challenge privileged materials<sup>201</sup> likely violates article 14.3(e) (right to examine witnesses).<sup>202</sup> The use of inferences<sup>203</sup> violates article 14.3(g) (the protection against self-incrimination)<sup>204</sup> and article 14.5 (the right to appeal)<sup>205</sup> is at risk given the challenges around appealing the decision of a court playing a dual role. Further, there is still no definition of "national security" in Irish law<sup>206</sup> thus it is unclear what the State means when they cite "national security" as the justification to refuse to give reasons why a defendant is being sent forth to the SCC.<sup>207</sup>
72. The SCC's continuous operation outside of a time of emergency may be a continuing violation of article 4. The SCC, in its current form, also violates the requirement to have been established by law. While the Irish Constitution requires a threshold for the creation of special courts of 'inadequacy of ordinary courts', neither the government nor the judiciary has examined what this means or attempted to define it. Therefore, the continued operation of the Court potentially rests on a legal lacuna.<sup>208</sup>

### RECOMMENDATIONS

#### The State should:

- Establish legislation providing for a domestic definition of 'terrorism' and 'national security', in line with international human rights standards.
- Abolish the Special Criminal Court, given that the state of emergency that gave rise to the establishment of the Court no longer persists.
- Until such time as the SCC is abolished, introduce the following urgent legislative changes to bring the SCC in line with article 14:
  - Introduce protected juries to the SCC and across the criminal justice system; the empanelling of which should be based on an application with reasons by the state subject to defence rebuttal;
  - In the absence of protected juries, introduce a new procedure whereby the State must apply to a Court with evidence as to why a jury trial cannot take place. The defence should be able to respond to this application;<sup>209</sup>
  - Repeal the provisions of the Offences Against the State Act which interfere with fair trial rights, including those providing for the use of inferences, belief evidence from a police officer and 'privileged' or 'secret' evidence.

<sup>194</sup> See UN Human Rights Committee, *Concluding observations on the fourth periodic report of Ireland*, CCPR/C/IRL/CO/4, 19 August 2014, para. 18. The Committee has been critical of the SCC since 1993, see UN Human Rights Committee, *Report on Ireland*, CCPR/C/79/Add.21, 3 August 1993, paras 11 and 19.

<sup>195</sup> The Special Criminal Court was set up in 1972 as a temporary, emergency measure to respond to the threat from paramilitary organisations, mainly operating in Northern Ireland.

<sup>196</sup> The Irish government made a declaration in 1995 that the relevant emergency period was over via the Good Friday Agreement, see Dáil Éireann debate, *Cessation of State of Emergency: Motion*, 7 February 1995.

<sup>197</sup> Department of Justice, "*Minister Fitzgerald confirms the setting up of a second Special Criminal Court*", 28 October 2015.

<sup>198</sup> Despite the Committee's recommendation for reasons to be given with a right to challenge these reasons, see UN Human Rights Committee, *Concluding observations on the third periodic report of Ireland*, CCPR/C/IRL/CO/3, 30 July 2008, para. 20.

<sup>199</sup> ICCL, *ICCL Submission to the Offences Against the State Acts Review Group*, July 2021, pp. 23-36.

<sup>200</sup> *Ibid*, pp. 51-57.

<sup>201</sup> *Ibid*, pp. 45-49.

<sup>202</sup> *Ibid*, pp. 53-55.

<sup>203</sup> *Ibid*, pp. 58-61

<sup>204</sup> *Ibid*.

<sup>205</sup> *Ibid*, p. 31.

<sup>206</sup> Eoin O'Connor and Michael Lynn, *National Security Law in Ireland*, Bloomsbury Professional 2019, para 1.01.

<sup>207</sup> ICCL, *ICCL Submission to the Offences Against the State Acts Review Group*, July 2021, pp. 40-41.

<sup>208</sup> The Irish Constitution, Article 38.3.1, provides for the establishment of non-jury special courts, one of the few exceptions to the right to a jury trial enshrined in Article 38.5.

<sup>209</sup> For a full list of ICCL's recommendations see ICCL, *ICCL Submission to the Offences Against the State Acts Review Group*, July 2021, pp. 63-64.

## Rights in police investigations and in police custody (Articles 6, 9, 14 & 17)

73. The Garda Síochána (Powers) Bill 2021 is currently being amended by the Department of Justice following pre-legislative scrutiny by the Oireachtas Committee on Justice.<sup>210</sup> ICCL has a number of concerns with this Bill, outlined in our submission to the Justice Committee.<sup>211</sup> These include a concerning expansion of the power of arrest and the time allowed for detention, affecting the right to liberty; the need for a clearer threshold for a lawful stop and search and better oversight of searches that included password protected devices, affecting the right to privacy; and a higher threshold for the permissible use of lethal force, affecting the right to life. Below is a summary of our key recommendations on this Bill which effect a range of ICCPR rights.

### RECOMMENDATIONS

#### The State should amend the Garda Síochána (Powers) Bill to ensure:

- The definition of reasonable suspicion includes that the grounds, when judged objectively, are fair and reasonable.
- The legal and policy framework is developed to address the issue of parents, guardians and “other” or “appropriate” adults in the context of this Bill to provide clarity on the exercise of police powers in relation to children generally.
- Specific safeguards are clarified that may be taken when exercising powers in respect of persons with impaired capacity.
- Gender, ethnicity and other protected characteristics are included in the record of stop and searches and the geographic location of where the search is taking place is included.
- A requirement of consent to be searched is included when there has been no arrest.
- Specific limitations are provided for on the scope of a search, including in relation to safeguards.
- The provision that a superintendent can issue a search warrant in exceptional circumstances is removed and that only a court is able to issue a search warrant.
- The power to compel a password as part of powers that can be exercised under the general search warrant provision is removed and add a requirement that AGS must seek a separate warrant to seek permission to investigate a person’s device or obtain data from a phone company to track a device.
- The power of arrest is not expanded without warrant to non-serious offences; instead maintain the current position that the power of arrest without warrant should only apply to serious offences.
- The custody officer role is specified so that it should only be carried out by someone of a minimum rank to reflect the importance of this role, held for a specific duration, and there should be specific training for the role.
- The provision allowing for police questioning of an accused person prior to legal advice is removed.
- The restrictions on access to a lawyer during police questioning is removed.
- The possibility for extending detention periods beyond 24 hours is removed.
- The custody record gathers information on ethnicity and other protected grounds to be able to analyse issues of discrimination as to who is arrested and how they are treated.
- Provisions to safeguard the use of an electronic custody record are included, such as giving full details as to when information has been inputted and by whom.
- Detail on how long photograph, fingerprint and palm print information is kept and stored for and when and how it is destroyed is provided.
- More detail on the use of lethal force is included, to ensure that use of lethal force is only legal in the most exceptional circumstances, in line with jurisprudence from the European Court of Human Rights.
- The provision introducing a general offence for obstruction is reconsidered and the penalty for this new offence should be reconsidered to ensure that it is appropriate and reasonable.

<sup>210</sup> Department of Justice, [General Scheme of the Garda Síochána \(Powers\) Bill](#), Heads 42 and 43, 14 June 2021.

<sup>211</sup> ICCL, [Submission to Justice Committee on General Scheme of the Garda Síochána \(Powers\) Bill](#), August 2021.

## EU Procedural Rights Directives (Articles 7 & 9)

74. ICCL is concerned that Ireland has not opted into all of the EU procedural rights directives that would strengthen the rights of people in custody, and strengthen the legal framework in Ireland for the protection of articles 9 and 7 of the Covenant.
75. Ireland is yet to opt into EU Directive 2016/800 which outlines procedural safeguards that should apply to child suspects in criminal proceedings and EU Directive 2016/1919 on legal aid for suspects and accused persons in criminal proceedings.<sup>212</sup> Ireland also opted out of 2013/48/EU (access to lawyer) and Directive (EU) 2016/343 on Strengthening the Presumption of Innocence and the Right to be Present at Trial. Thus, suspects in Ireland are denied the full protection of their rights, as provided for by EU law as well as under the ICCPR.
76. Serious issues persist even in areas where EU directives have been implemented such as on the right to interpretation, which is “clearly deeply neglected & ineffective in Ireland”.<sup>213</sup> Similarly in terms of the right to information, lawyers are routinely denied any information on arrival at a police station, risking their ability to provide proper advice.<sup>214</sup> Vulnerable suspects suffer most from procedural shortfalls such as those with literacy challenges, children, those with intellectual disabilities and those with addiction and mental health problems.<sup>215</sup> The Garda Inspectorate’s recent report and recommendations are telling in terms of the issues surrounding ICCPR fair trial rights in custody.<sup>216</sup> For example, the Garda Inspectorate raises concerns regarding the right to legal advice,<sup>217</sup> the use of force in custody and how persons in custody often are not informed that they have the right to make a complaint.<sup>218</sup>

## RECOMMENDATIONS

### The State should:

- Opt into the remaining EU procedural rights directives and bring Ireland in line with EU basic standards for rights in custody.
- Immediately improve the right to information and interpretation by introducing an accreditation system for interpreters and rolling out plain English and Easy Read versions of the Notice of Rights.
- Improve lawyer’s ability to represent clients in custody by introducing a statutory duty for police to provide lawyers with basic information on the case on arrival at a police station.
- Implement all of the 41 Garda Inspectorate’s recent recommendations in its report: *Delivering Custody Services – A Rights-Based Review of the Treatment, Safety and Wellbeing of Persons in Custody in Garda Síochána Stations*, in particular regarding use of force, complaint procedures and on the right to legal advice.

<sup>212</sup> See Ursula Kilkelly and Louise Forde, *Children’s Rights and Police Questioning: A Qualitative Study of Children’s Experiences of being interviewed by the Garda Síochána*, 21 December 2020, p. 6.

<sup>213</sup> Vicky Conway, Yvonne Daly, Gearóidín McEvoy, *Interpretation in Police Stations: Lawyers’ Perspectives on Rights and Realities*, *Journal of Human Rights Practice*, Volume 13, Issue 3, November 2021, pp. 606–628.

<sup>214</sup> Anna Pivaty, Miet Vanderhallen & Vicky Conway, *Contemporary criminal defence practice: importance of active involvement at the investigative stage and related training requirements*, (2020) 27(1) *International Journal of the Legal Profession* 25-44 at part 2.2.1. “The informational deficit at the investigative stage”.

<sup>215</sup> A recent study found that 48% of those in custody had consumed alcohol or had a dependency on alcohol, drugs or both, 25% had poor mental health or had engaged in self-harm and 14% had drug or alcohol issues and mental health problems. See Garda Inspectorate, *Delivering Custody Services – A Rights-Based Review of the Treatment, Safety and Wellbeing of Persons in Custody in Garda Síochána Stations*, 24 February 2022, p. 22.

<sup>216</sup> Garda Inspectorate, *Delivering Custody Services – A Rights-Based Review of the Treatment, Safety and Wellbeing of Persons in Custody in Garda Síochána Stations*, 24 February 2022,

<sup>217</sup> *Ibid*, pp. 42-46.

<sup>218</sup> *Ibid*, p. 116-125.

## Pre-trial detention

- 77.** Article 9.3 of the Covenant guarantees a right to “trial within a reasonable time or to release” and that pre-trial detention should not be the “general rule”. Pre-trial detention infringes upon the right to the presumption of innocence as protected under article 14.2. The right to liberty is also protected in the Irish Constitution.<sup>219</sup>
- 78.** The test for bail is currently laid out in the Bail Act 1997<sup>220</sup> which significantly expanded the permissible use of pre-trial detention beyond flight risk.<sup>221</sup> Bail can be refused if someone is charged with a serious crime and there is a perceived risk of a serious offence being committed.<sup>222</sup> “Serious offences” are set out in a lengthy schedule to the Act. Further, the law provides no right to compensation where a person is subject to lengthy pre-trial detention only to be later acquitted.
- 79.** Ireland continues to increase its use of pre-trial detention,<sup>223</sup> a problem exacerbated by the Covid-19 pandemic. While the pandemic saw a marginal decrease in numbers of persons held in custody generally from 2019 to 2020,<sup>224</sup> there was an increase of people held in pre-trial detention.<sup>225</sup> In 2015, 14.2% of the prison population was being held in pre-trial detention, by 2020 the percentage was 18.9%.<sup>226</sup> The number of persons held in pre-trial custody for less serious crime has also increased.<sup>227</sup> Further, women are more likely than men to be remanded in custody for less serious offences.<sup>228</sup> The pandemic saw jury trials being suspended adding further to an already existing backlog.<sup>229</sup> Ireland has the lowest number of judges per inhabitant in the EU,<sup>230</sup> which adds to delays.<sup>231</sup>
- 80.** The right to a trial within a reasonable time protected by article 9 and 14(2)(c) is in jeopardy with people waiting in custody over a year for criminal trials.<sup>232</sup> Article 10(2)(a) continues to be violated as those in pre-trial detention are being held with other prisoners.<sup>233</sup> The State has made no progress in realising this right which was implied when it entered the reservation on this right.<sup>234</sup> A recent report by the Irish Penal Reform Trust highlighted that more research was needed on the issue of bail being less likely to be granted to foreign nationals, raising article 26 non-discrimination concerns.<sup>235</sup>

<sup>219</sup> Irish Constitution, Article 40.4.1: “no citizen shall be deprived of his personal liberty save in accordance with law”.

<sup>220</sup> The Bail Act 1997 as amended by the Criminal Justice Act 2007 and the Criminal Justice Act 2017.

<sup>221</sup> Prior to this Act the leading case was *People (AG) v O’Callaghan [1966] IR 501* where the Supreme Court held that the presumption of innocence could only be interfered with if there was a risk that the accused would attempt to evade justice (Walsh J. at p. 513).

<sup>222</sup> Bail Act 1997, section 2.

<sup>223</sup> There has been a 21% increase in the daily average number of people held in pre-trial detention since 2017. See Irish Penal Reform Trust (IPRT), *Progress in the Penal System*, 2020, p.35. At the time of writing, 884 prisoners are being held on remand or at trial on 4 April 2022. See Irish Prison Service, *Prisoner Population on Monday 4th April 2022*. On 1st April 2021 the number was almost half that at 428. See Irish Prison Service, *Prisoner Population on Thursday 1st April 2021*. In February 2022 835 prisoners were being held in remand or at trial, up from 712 in February 2021. See Irish Prison Service, *Monthly Information Note – February 2022*, p. 2.

<sup>224</sup> There was a decrease of 3.7% in custody generally. See Irish Prison Service, *Annual Report 2020*, p.3.

<sup>225</sup> Ibid. In 2020, the average number of pre-detention prisoners was 738, a 4.4% increase on 2019.

<sup>226</sup> In 2015 the number was 14.2%, by 2020 the percentage jumped to 18.9%, see World Prison Brief & Institute for Crime and Justice Policy Research, *World Pre-Trial/Remand Imprisonment List*, fourth edition, February 2020, p.11.

<sup>227</sup> Since 2016, there has been a 56% increase in the number of people imprisoned while awaiting trial or sentencing for “public order offences and other social code offences”. See Conor Gallagher, “Growing number of people in pre-trial custody for minor offences”, *The Irish Times*, November 25, 2020.

<sup>228</sup> Irish Penal Reform Trust (IPRT), *Progress in the Penal System*, 2021, p.44.

<sup>229</sup> ICCL, *Human Rights in a Pandemic*, 3 June 2021, p.24-25.

<sup>230</sup> European Commission, Rule of Law report 2021, *Country Chapter for Ireland*, 20 July 2021, p. 6.

<sup>231</sup> Shane Phelan, “High Court president reignites row over lack of judges, saying up to 20 extra are needed to clear case backlog” *The Irish Independent*, 11 March 2022, “...many trials, including rape and murder cases, would have to be cancelled”.

<sup>232</sup> 2020 saw an increase in the average duration of remand. In December 2020, 11.5% of all remand prisoners had been on remand for a duration of one year or more, compared with 6% in December 2019. See Irish Prison Service, *Annual Report 2020*, p.3.

<sup>233</sup> Irish Penal Reform Trust (IPRT), *Progress in the Penal System*, 2020, p.35.

<sup>234</sup> See UN Human Rights Committee, *Concluding observations on the fourth periodic report of Ireland*, CCPR/C/IRL/CO/4, 19 August 2014, para. 5.

<sup>235</sup> Irish Penal Reform Trust, “SOMETIMES I’M MISSING THE WORDS” *The rights, needs and experiences of foreign national and minority ethnic groups in the Irish penal system*, 27 April 2022, p. 65.

## RECOMMENDATIONS

### The State should:

- Independently review the Bail Act 1997 to assess its compatibility with Ireland’s international human rights obligations under the ICCPR.
- Amend the Bail Act to allow for refusal of bail in a much narrower set of circumstances by *inter alia* reducing the number of “serious offences” listed in the Schedule.
- Undertake research and gather comprehensive data to inform legal and policy reforms, including the reasons why bail is refused, and bail conditions given, to discern patterns and biases in the granting of bail.
- Ensure that criminal trials are expedited as quickly as possible where pre-trial detention is used by increasing the number of criminal trial judges.
- Legislate for the right to compensation where a person is subject to lengthy pre-trial detention, only to be later acquitted or given a non-custodial penalty to bring Ireland’s law in line with article 9.5.

# ARTICLE 16 RIGHT TO BE RECOGNISED BEFORE THE LAW

## Assisted Decision Making

81. The Assisted Decision-Making (Capacity) Act<sup>236</sup> was enacted in 2015. However, many of its substantive provisions have not yet been commenced, including a legal framework for Advance Healthcare Directives.
82. The Assisted Decision-Making (Capacity) (Amendment) Bill 2021<sup>237</sup> should be prioritised by Government and enacted as soon as possible to allow for full commencement of the Assisted Decision-Making (Capacity) Act 2015.<sup>238</sup> This will, among others, end the system of wardship in Ireland and designate IHREC as the monitoring body for implementing the UN Convention on the Rights of Persons with Disabilities (CRPD).
83. Associated Codes of Practice for the Decision Support Service have been drafted and a government consultation has taken place.<sup>239</sup> These Codes must be finalised in advance of the opening of the Decision Support Service, ensuring all concerns raised in the public consultation process have been addressed. This should be a matter of priority to ensure those who need assistance in decision-making have appropriate access to support, as soon as possible.

## RECOMMENDATIONS

### The State should:

- Enact the Assisted Decision-Making (Capacity) (Amendment) Act 2021 and fully commence the Assisted Decision-Making (Capacity) Act 2015 and provide adequate resources for their implementation.
- Complete work on the Associated Codes of Practice, addressing all concerns raised in the public consultation completed in early 2022. These should be in place before the Decision Support Service is opened.
- Ensure the Decision Support Service is properly resourced and fully functioning as soon as possible.

<sup>236</sup> [Assisted Decision-Making \(Capacity\) Act 2015](#)

<sup>237</sup> Government Press Release, [Cabinet Approves General Scheme of the Assisted Decision Making \(Capacity\) \(Amendment\) Bill](#), November 2021

<sup>238</sup> [Assisted Decision-Making \(Capacity\) Act 2015](#)

<sup>239</sup> See eg Health Service Executive, web update on Assisted Decision-Making (Capacity) Act 2015 [here](#).

# ARTICLE 17 RIGHT TO PRIVACY

## Police Surveillance (Articles 14, 17 & 26)

- 84.** Government proposes to expand the surveillance powers of An Garda Síochána in the An Garda Síochána (Digital Recordings) Bill 2021. ICCL has expressed considerable concern at the proposed expansion of surveillance powers while there are ongoing inquiries by the Data Protection Commission (DPC) into the compliance of An Garda Síochána (AGS) with data protection law. We note deeply concerning findings by the DPC that suggest compliance with data protection law by AGS is exceptionally poor, meaning privacy and data protection rights are at serious risk by existing surveillance capabilities, and will be put further at risk by expanded powers.<sup>240</sup>
- 85.** ICCL considers that AGS must demonstrate a real commitment to upholding privacy and data protection law before the expansion of surveillance powers envisaged by this Bill can be considered. ICCL considers that the tests of necessity and proportionality required for the introduction and expansion of surveillance technologies in the Irish context have not been met. In particular, there is no consistent or conclusive evidence that body worn cameras are necessary or effective<sup>241</sup> and we oppose their introduction, as provided for by this Bill. Further research is necessary into this issue and into the effectiveness of CCTV in preventing and detecting crime before their use is expanded, as provided for by this Bill.
- 86.** We consider that the requirement for minimal interference with rights to achieve criminal justice aims will not be sufficiently met by this legislation for the following reasons: (a) The lawful purpose assigned to the use of recording devices is too broad; (b) The definition afforded to ‘recording device’ is too broad and may pave the way for the introduction of controversial facial recognition technology and problematic future technology; (c) The provision for use of recording devices for covert surveillance, in particular drones, is not accompanied by sufficient safeguards and (d) The requirement for visibility of recording devices for overt surveillance is not sufficiently addressed.

## RECOMMENDATIONS

### The State should:

- Postpone the passing of the An Garda Síochána (Digital Recordings) Bill 2021 until such time as the DPC ceases its inquiries into AGS and local authorities.
- Ensure AGS has carried out a robust CCTV review examining AGS’s policies, procedures and guidelines and that this is examined by the DPC before this Bill is passed, and ensure that review is published.
- Narrow the purposes to use and definition of recording device, in particular to ensure that it does not encompass facial recognition technology.
- Ensure that the use of a recording device for covert surveillance, in particular drones, is accompanied by increased safeguards to ensure that it is human rights compliant and compliant with data protection concerns.
- Clarify the visibility or signage procedures regarding the use of a recording device.
- Clarify who can use a recording device, whether a Garda has to be of a specific rank, have received any specific training, or be identifiable as a Garda.
- Specify that the review of the relevant code of practice should take place on an annual or bi-annual basis rather than within 5 years.
- Implement a pilot scheme to trial the use of recording devices and body worn cameras to test their effectiveness and conduct a human rights impact assessment and data protection impact assessment, as part of this pilot scheme.
- Conduct further research into the effectiveness of CCTV in preventing, investigating or detecting criminal offences, securing public order and public safety, or safeguarding against and the prevention of, threats to public safety.
- Ensure that access to third party CCTV through a live feed is strictly regulated and only used where it is necessary and for a limited duration.

<sup>240</sup> Data Protection Commission, *DPC Ireland 2018-2020 Regulatory Activity Under GDPR*, June 2020, page 63. See also Data Protection Commission, *Annual report for 2020*.

<sup>241</sup> See ICCL, *Submission to Department of Justice on Body worn Cameras for AGS*, October 2019.

## Gender Recognition (Articles 17 & 26)

87. The Gender Recognition Act 2015<sup>242</sup> came into effect in September 2015. As highlighted by Ireland in its State report, a review of the Act was conducted in 2018. Important recommendations were made, including on the introduction of a system of gender recognition for children and for non-binary people.<sup>243</sup> In relation to trans healthcare, a Steering Committee was formed in 2019 to address specific issues in relation to the development of Transgender Identity Services in Ireland.<sup>244</sup>

### RECOMMENDATIONS

#### The State should:

- Ensure that the recommendations of the Steering Committee final report on the Development of HSE Transgender Identity Services and the review of the Gender Recognition Act 2015 are implemented.

## Data Protection (Articles 17, 18, 19, 20 & 26)

88. Data protection is a key element of the right to privacy and has particular relevance in the digital sphere. Under EU law, the Irish Data Protection Commission (DPC) has the lead role across the EU for enforcing the EU General Data Protection Regulation (GDPR) on Google, Facebook, Apple, Microsoft, and other major digital firms that have their European headquarters in Ireland.

89. Investigation by ICCL has revealed internal disfunction<sup>245</sup> and a failure to progress major cases<sup>246</sup> by the DPC.<sup>247</sup> No other GDPR enforcer in the EU can intervene if the Irish DPC asserts its lead role in cases against big tech firms headquartered in Ireland. As a result, EU GDPR enforcement against Big Tech is paralysed by Ireland's failure to deliver draft decisions on cross-border cases. Ireland's failure to uphold the GDPR has allowed surveillance to remain the default business model of the digital world. This creates a certain inevitability about privacy infringements and puts article 17 protections at risk.

90. A cross-party report from the Irish Parliament & Senate has acknowledged severe problems at the DPC.<sup>248</sup> Despite this, no action has been taken by the Irish Government or the European Commission to remedy this.

91. The DPC's failure violates the right to an effective remedy provided for in article 2.<sup>249</sup>

92. Misuse of personal data has enabled Big Tech firms to consolidate so much power as to potentially impinge on regulators and government, risking a breach of article 26. Their market power is so great that all news publishers rely on them for income. This undermines the right to freedom of expression (article 19), may undermine the prohibition on propaganda for war (article 20), and may indirectly undermine freedom of thought (article 18).

93. While some forms of algorithmic recommender systems may safely be permitted to operate by default, those that process data about people's political and philosophical views should not. Despite this, the Irish Government accepted the view that the forthcoming EU Digital Services Act should allow these recommender systems to operate by default, without people switching them on. Government should reconsider this position.

<sup>242</sup> Gender Recognition Act 2015.

<sup>243</sup> Department of Social Protection, [Review of the Gender Recognition Act 2015](#), 17 July 2018.

<sup>244</sup> HSE, [Final Report of the Steering Committee on the Development of HSE Transgender Identity Services](#), February 2020

<sup>245</sup> "Internal problems exposed at Irish Data Protection Commission", Irish Council for Civil Liberties, 9 February 2021.

<sup>246</sup> "Europe's enforcement paralysis", Irish Council for Civil Liberties, September 2021.

<sup>247</sup> The DPC accepted 969 GDPR cross-border complaints as lead authority since May 2018, and has produced 9 final or draft decisions as lead authority in that same period. The DPC also reports that 634 of these cross-border complaints were "concluded" but it is unclear what "concluded" means.

<sup>248</sup> "Report on meeting on 27th April 2021 on the topic of GDPR", Oireachtas Justice Committee, July 2021.

<sup>249</sup> ICCL is suing the DPC on this point. "ICCL sues DPC over failure to act on massive Google data breach", Irish Council for Civil Liberties, 15 March 2022.

## RECOMMENDATIONS

### **The State should:**

- Reform Ireland’s data protection enforcement through the following measures:
  - The Irish Government should launch an independent review of how to strengthen and reform the Data Protection Commission.
  - The Minister for Justice should appoint two additional Data Protection Commissioners, as provided for in the Irish Data Protection Act 2018.
  - The Data Protection Commission should publish detailed statistics on the number of times it has used its powers to investigate “Big Tech” firms.
- To constrain Big Tech power, through the Competition and Consumer Protection Commission use “purpose limitation” (in the meaning of article 5(1)b of the GDPR) to analyse and enforce against technology firms.
- To protect people and society against the harm of algorithmic content personalisation, take the position at the European Council that the Digital Services Act should prohibit recommender systems that involve the processing of “special categories of data” (in the meaning of article 9 of the GDPR) unless a person decides to activate the recommender system.

# ARTICLE 18 RIGHT TO FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

## Relationships and Sexual Education (Articles 18 & 26)

94. Many schools in Ireland continue to be run by religious orders, in particular those belonging to the Catholic Church. Religious ethos continues to impact the teaching of sex education and LGBTI+ inclusion, to the detriment of objective and inclusive teaching in line with principles of equality and non-discrimination.
95. Section 11 of the Education (Admission to Schools) Act 2018 amended the Equal Status Acts 2000-2015 (ESA) to the extent that primary schools that are 'recognised' (publicly funded schools) cannot discriminate on the basis of religion by affording preferential treatment to students of a particular religion. However, this does not apply to privately funded primary schools and secondary schools. Section 7(3) states that a school does not discriminate where the objective of the school is to provide education in an environment which promotes certain religious values. This includes the right to refuse to admit a student in the basis of religion where it is proved that the refusal is essential to maintain the ethos of the school. This has significant impacts on the rights of young people to inclusive, gender equality and broader equality focused education.
96. In 2019, the Joint Committee on Education and Skills produced a report with recommendations to update the curriculum and delivery of RSE in schools focusing on the importance of LGBTI+ inclusion.<sup>250</sup> Among other recommendations, the Committee called for the consideration of the inclusion within curriculums of LGBTQI+ specific sexual health issues and the presentation of LGBT relationships without distinction as to their heterosexual counterparts, as well as the introduction of a monitoring mechanism for data collection of homophobic and transphobic bullying episodes.
97. The Committee also recommended that a specific curriculum for people with an intellectual disability that is accessible and appropriate, and deals with sexuality and contraception, should be developed at the earliest possible date and that funding for specific education programmes for school leavers and older adults who, over the past 25 or 30 years, may have missed out on sexual education or who may need reinforced education should be made available. Any such programme should contain the same range and depth of information as programmes for those who are not disabled but produced in formats which will make it accessible to people with an intellectual disability to ensure equity of access.

## RECOMMENDATION

### The State should:

- Ensure that the recommendations from the 2019 Oireachtas Joint Committee on Education and Skills report on Relationships and Sexual Education are implemented in full, in a timely manner.

<sup>250</sup> Houses of the Oireachtas, [Joint Committee on Education and Skills Report on Relationships and Sexuality Education](#), January 2019.

# ARTICLE 19 RIGHT TO FREEDOM OF EXPRESSION

## New law to regulate online speech

98. There is no specific law regulating the right to freedom of expression online in Ireland. However, the State is currently passing legislation to regulate expression online via the Online Safety and Media Regulation Bill.<sup>251</sup> This bill will: (i) transpose the Audio-visual Media Services Directive (AVMD) [Directive (EU) 2018/1808]<sup>252</sup> into Irish law, a transposition which is overdue;<sup>253</sup> and (ii) dissolve the Broadcasting Authority of Ireland and establish a Media Commission, which will designate a specific online service.<sup>254</sup>
99. ICCL and digital rights groups have serious concerns about the Bill and how it may censor protected speech online.<sup>255</sup> Chief among the concerns are: (i) the definition of ‘harmful online content’ is hazardously vague; (ii) the threshold of cyberbullying in the definition “online content by which a person...humiliates another person” is extremely low;<sup>256</sup> and (iii) the vast pool of services from which a service may be designated as having to comply with these regulations means this law could extend to *all* human interaction online where user-generated content is found.
100. It is ICCL’s position that to ensure effective regulation and good governance, and robust protection of the right to freedom of expression, the appropriate response to a multi-national threat to online freedoms is a Europe-wide agreed response. The Irish Government should be focussing on ensuring that the new European legislation addresses the virality and amplification harms caused by opaque algorithms instead of focusing mainly on content moderation i.e., identifying and removing harmful content, which experts have warned will not work.<sup>257</sup>
101. Opaque algorithms and recommender systems select what people actually see in their social media feeds, and what groups and discussions will be promoted to them.<sup>258</sup> It is now known that they amplify unlawful material at enormous scale.<sup>259</sup> The vast majority of content on platforms is never seen by many people. Therefore, identifying and removing this material will not address the harms caused by the distribution and amplification of harmful content. It also potentially undermines freedom of expression.

<sup>251</sup> [Online Safety and Media Regulation Bill 2022](#).

<sup>252</sup> [Directive \(EU\) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audio-visual media services \(Audio-visual Media Services Directive\) in view of changing market realities](#).

<sup>253</sup> [Stepping up legal action: Commission urges 19 Member States to implement EU digital and media laws](#).

<sup>254</sup> The Bill will allow the Media Commission to create online safety codes; issue guidance materials and advisory notices in relation to harmful online content and age-inappropriate online content; audit user complaint mechanisms operated by designated online services; direct a designated online service to take specified actions, including to remove or restore individual pieces of content; conduct investigations and inquiries; issue compliance notices; issue warning notices if a service does not provide a satisfactory justification in relation to any alleged non-compliance; and, where the Commission deems necessary, apply to seek sanctions, up to and including seeking leave of the High Court to compel internet service providers to block access to the designated online service in the State.

<sup>255</sup> See Digital Rights Ireland, [Submission to Joint Committee on Media, Tourism, Arts, Culture, Sport and the Gaeltacht General Scheme of the Online Safety and Media Regulation Bill](#), March 2021: [Irish Council for Civil Liberties \(ICCL\) submission on the Online Safety and Media Regulation Bill](#), March 8, 2021.

<sup>256</sup> Other than offence-specific categories of online content, the other categories of online content, subject to a risk test, are: (a) online content by which a person bullies or humiliates another person; (b) online content by which a person promotes or encourages behaviour that characterises a feeding or eating disorder; (c) online content by which a person promotes or encourages self-harm or suicide. The risk test is met if the content gives rise to— (a) any risk to a person’s life, or (b) a risk of significant harm to a person’s physical or mental health, where the harm is reasonably foreseeable, [Online Safety and Media Regulation Bill 2022](#), page 76.

<sup>257</sup> Facebook whistle-blower Frances Haugen [told](#) the Joint Committee on Tourism, Culture, Arts, Sport and Media on February 23, 2022: “We cannot simply rely on the deletion or criminalisation of harmful content. This is not only because it risks infringing on free speech but because it does not work. Regulatory regimes that have focused solely on deleting content have failed. There is just too much out there.”

<sup>258</sup> Whittaker, J. & Looney, S. & Reed, A. & Votta, F. [Recommender systems and the amplification of extremist content](#). Internet Policy Review, 10(2), 2021.

<sup>259</sup> Miles, T, [U.N. investigators cite Facebook role in Myanmar crisis](#), Reuters, March 12, 2019; Lindsay, R, [I Designed Algorithms at Facebook, Here’s How to Regulate Them](#), New York Times, October 6, 2021; Stevenson, A., [Facebook Admits It Was Used To Incite Violence in Myanmar](#), New York Times, November 6, 2021.

**102.** Recommender systems should be off by default. Online platforms should only be allowed use a recommender system that uses profiling in the meaning of article 4 (4) of Regulation (EU) 2016/679 when the end user has provided their *informed consent* in line with the requirements under article 4(11), article 6(1)(a) and article 7 of Regulation (EU) 2016/679. In addition, online platforms must prominently make available a “recommender policy” that sets out in plain language the main parameters used in their systems, as well as any options for users to modify or influence those main parameters that they may have made available.

## RECOMMENDATIONS

### The State should:

- Transpose the Audio-visual Media Services Directive.
- Pause the passing of the Online Safety and Media Regulation Bill.
- Focus on ensuring that the EU Digital Services Act is robust and rights-respecting, including in conformity with ICCPR requirements, by tackling algorithmic amplification.

# ARTICLE 20 PROHIBITION OF INCITEMENT TO HATRED

## Incitement to Hatred and Hate Crimes (Articles 14, 19, 20 & 26)

- 103.** Despite some new initiatives by AGS, including new recording options on the Garda crime reporting system PULSE, there is an ongoing lack of reliable research and disaggregated data on causes and experiences of hate crime and hate speech in Ireland.<sup>260</sup> Data available on hate crime and hate incidents, provided annually by an NGO, the Irish Network Against Racism (INAR), focuses only on racist bias.<sup>261</sup> Based on the data collected by INAR, there were 154 reports about racist motivated criminal offences (excluding incitement to hatred) in 2021.<sup>262</sup> We note with concern that only 25% of crimes were reported to AGS in 2021, down from 43% in 2020. Those who reported expressed extremely low levels of satisfaction. The groups most targeted during this period were Chinese, South Asian, and Other Asian, continuing a pattern change from 2020 prompted by Covid-related abuse.<sup>263</sup>
- 104.** In April 2021 the Government published the General Scheme of the Criminal Justice (Hate Crime) Bill 2021.<sup>264</sup> While noting the 2019 public consultation on incitement to hatred<sup>265</sup> and the outcome report published in 2020,<sup>266</sup> a further specific consultation on hate crime has not been advanced, despite calls from ICCL and others and a public indication from the Department of Justice that such consultation would take place.<sup>267</sup> ICCL has raised several concerns in relation to the General Scheme of the Bill, as reflected in the recommendations below, including on the choice to address incitement to hatred and hate crime under the same legislation.<sup>268</sup>
- 105.** Together with the Coalition Against Hate Crime Ireland, we submitted the shared concerns of eighteen civil society organisations to Government.<sup>269</sup>

## RECOMMENDATIONS

### The State should:

- Progress the Criminal Justice (Hate Crime) Bill 2021, properly taking into account the concerns voiced by civil society and impacted communities.
- Ensure any restriction, including criminalisation on speech, is restricted only to the extent permitted by the ICCPR.
- Ensure the sentencing provided for in the Bill is proportionate, and the Bill makes provision for community-based sentencing with a focus on education and restorative justice.
- Commit to a national action plan to combat hate crime and hate speech beyond the criminal law.
- Establish awareness campaigns, education and training, in particular for public sector actors, including An Garda Síochána and the Office of the Director of Public Prosecutions.
- Ensure that disaggregated data collection mechanisms are in place, in addition to an effective reporting system for hate crime, incitement to hatred and hate incidents.

<sup>260</sup> See OSCE, ODIHR, Hate Crime Reporting, [Ireland Webpage](#).

<sup>261</sup> INAR, [iReport.ie](#).

<sup>262</sup> Of these, there were 40 assaults, 39 cases of harassment, 13 cases of serious threat, 44 public order offences, and 17 cases of criminal damage.

<sup>263</sup> INAR, [Reports of racism in Ireland, Data from iReport.ie, 2021](#).

<sup>264</sup> Criminal Justice (Hate Crime) Bill 2021.

<sup>265</sup> [Review of the Prohibition of Incitement to Hatred Act 1989, Public Consultation, October 2019](#).

<sup>266</sup> Department of Justice, [Legislating for Hate Speech and Hate Crime in Ireland, Report on the Public Consultation 2020](#).

<sup>267</sup> [Review of the Prohibition of Incitement to Hatred Act 1989, Public Consultation, October 2019](#): "The Department of Justice and Equality is conducting research on the effectiveness of approaches to hate-crime legislation in other countries. This research will conclude in November 2019 and the results will inform the development of new legislation to deal with hate crime in this jurisdiction. As part of the development of that legislation, a specific, separate consultation will be held, and experts and members of the public will be invited to submit their views."

<sup>268</sup> ICCL on behalf of the Coalition Against Hate Crime Ireland, [Calling for a wider involvement of civil society in the development of hate crime legislation in Ireland](#), letter to the Chair of the Joint Committee on Justice, 15 December 2021.

<sup>269</sup> Coalition Against Hate Crime Ireland, [Submission to the Oireachtas Joint Committee on Justice on the General Scheme of the Criminal Justice \(Hate Crime\) Bill 2021, August 2021](#).

# ARTICLE 21 RIGHT TO PEACEFUL ASSEMBLY

## The Right to Protest (Articles 2, 6, 7, 17, 18, 19, 20 & 21)

### Protest in Ordinary Times

- 106.** Research carried out by ICCL in 2019, which included consultations with a variety of protest groups indicated that there are significant discrepancies in the policing of protest across Ireland.<sup>270</sup> In general, protests are facilitated by AGS in large urban centres, where the protests follow planned routes that have been agreed in advance with AGS. Where the topic of a protest has general public support AGS are more likely to facilitate the protest. In contrast, when a number of factors are present AGS are less likely to facilitate protests and more likely to interfere with the exercise of the right. These include when a protest takes place spontaneously without prior consultation with AGS, in a rural area far from urban centres, or where the protest concerns a topic that does not necessarily have widespread public support.
- 107.** A disproportionate policing response against protesters has been identified against housing activists, in particular where protests against legally questionable evictions happen spontaneously.<sup>271</sup> Ongoing targeted harassment of protesters against the use of Shannon Airport, an airport in the West of Ireland, by US military planes continues to this day.<sup>272</sup> There has never been proper accountability for violent policing of protesters protesting against a Shell Petroleum plant in County Mayo, a county in the West of Ireland, as called for by the UN Special Rapporteur on Human Rights Defenders in 2012.<sup>273</sup>
- 108.** ICCL is also concerned at the criminalisation of protesters in Ireland. For example, two anti-war US veterans were recently convicted of interfering with the operation of an airport for their protest demanding inspections of US military planes in Shannon Airport.<sup>274</sup> Environmental protesters have also been jailed for criminal damage.<sup>275</sup>

### Protest in Times of Emergency

- 109.** During different phases of the Irish State's Covid-19 pandemic response, numbers who could gather together in public and in private were severely limited.<sup>276</sup> Although there was no direct reference to protest in the regulations that restricted gatherings, AGS interpreted the regulations as applying to protest. As a result, on numerous occasions, protests were disbursed even where efforts were clearly made to comply with health guidance, including mask wearing and social distancing. This had a chilling effect on protest in general and inconsistent approaches by AGS were noted by the oversight body, the Policing Authority.<sup>277</sup>
- 110.** ICCL is aware of a number of protest groups who cancelled protests as a result of the regulations. We are also aware that AGS has investigated organisers of protests for breaches of Covid-19 regulations and passed files to the DPP for potential prosecution.<sup>278</sup> The Dublin City Joint Policing Committee were informed in 2021 that the DPP had recommended some prosecutions of protest organisers and, as of March 2021 “*some proceedings have begun*”.<sup>279</sup> However, at time of writing, it is still unclear what protest organisers have been investigated and prosecuted and on what basis. We note that UN human rights experts have strongly advocated against the criminalisation of peaceful protesters.<sup>280</sup>

<sup>270</sup> See Ansbro, Pol, Power, *National Consultations on the Right to Protest in Ireland*, June 2019, ICCL.

<sup>271</sup> See for example, Adam Daly, *Men in balaclavas criticised during eviction of activists at occupied Dublin property*, 24 September 2018.

<sup>272</sup> See Ansbro, Pol, Power, *National Consultations on the Right to Protest in Ireland*, June 2019, ICCL.

<sup>273</sup> *Report of the Special Rapporteur on the situation of human rights defenders*, Margaret Sekaggya to the Human Rights Council on Mission to Ireland, A/HRC/22/47/Add.3 February 2013, para 72-78.

<sup>274</sup> See eg Isabel Hayes, Claire Henry, *US veterans fined €5,000 each over Shannon Airport interference*, *The Irish Times*, May 4 2022.

<sup>275</sup> See eg Kevin O'Sullivan, *Climate activist charged with trespassing at TCD to spend Christmas in jail*, *The Irish Times*, 23 December 2020.

<sup>276</sup> For full detail on the laws and regulations restricting protest (and other) rights during the Covid-19 pandemic up to April 2021 in Ireland see Ansbro; Carthy; Cronin; Mc Loughlin-Burke; *Human Rights in a Pandemic*, ICCL, April 2021.

<sup>277</sup> Conor Lally, *Covid-19: Garda response to protests may be seen as 'inconsistent'*- Policing Authority, *The Irish Times*, May 8, 2020.

<sup>278</sup> Conor Gallagher, *DPP to consider charges against protest organisers*, *The Irish Times*, 7 October 2020.

<sup>279</sup> Conor Gallagher, *Gardai investigate organisers of 38 Dublin protests so far this year*, *Irish Times*, 23 March 2021; Robin Schiller, *DPP directs prosecutions in relation to some of the 259 protests that have taken place in Dublin since start of pandemic*, *Irish Independent*, 26 January 2021.

<sup>280</sup> See e.g., *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association to the Human Rights Council*, July 2018, A/HRC/38/34, para. 39.

111. ICCL called repeatedly on Government to publish guidelines on safe protest during the pandemic but it failed to do so.<sup>281</sup>
112. The absence of a clear, publicly available AGS policy on policing protest during the pandemic was noteworthy and likely hindered a consistent approach. ICCL considers that the apparent blanket ban on protest during the pandemic was a disproportionate interference with the right to protest.

## RECOMMENDATIONS

### The State should:

- Establish an independent review of the operation of the Criminal Justice (Public Order) Act 1994 to assess its compatibility with Ireland's international human rights obligations under the ICCPR.
- Establish an independent inquiry into past violations of the right to protest by the AGS and ensure accountability where breaches of the right to protest are found.
- Ensure that all public order policing policies, strategies and planning are assessed for compliance with the ICCPR by AGS's internal human rights advisor and, where appropriate, the Policing Authority or other relevant oversight body.
- Request the DPP to clarify that protesters should not be prosecuted under the criminal law where they are engaging in peaceful protest in a public place, which should be considered a lawful excuse where the law so requires.

### During Emergency Periods, Including Public Health Emergencies:

- Include small, safe protests as a reasonable excuse where there are prohibitions on the organisation and participation of events.
- Issue guidelines to protest organisers and participants on how to organise and participate in a small, safe protest.

<sup>281</sup> See eg ICCL, [Public Letter to Minister for Justice on Right to Protest under Public Health Restrictions](#), 3 March 2021.

# ARTICLE 22 RIGHT TO FREEDOM OF ASSOCIATION

## Freedom of Association and Freedom of Thought, Conscience & Religion (Articles 18 & 22)

**113.** The 1997 Electoral Act (as amended in 2001)<sup>282</sup> inappropriately applies donation restrictions intended for political parties to CSOs and NGOs. The 2009 Charities Act<sup>283</sup> prevents organisations whose primary purpose is the promotion and advancement of human rights from being registered as charities. Furthermore, updated advice on political campaigning which was issued by the Charities Regulator in December 2021 may have a negative impact on charities' ability to advocate for their objectives.

### 1997 Electoral Act (as amended)

**114.** The wording of the 1997 Electoral Act defines 'political purposes' (which determines what groups, including community groups, are subject to strict spending rules) in such a broad and vague manner that it can be applied to almost every CSO and NGO. As a result, any group which calls on government to amend policy or legislation, could be found in breach of the Act.

**115.** Restrictions do not apply to private enterprises who seek to influence public policy as they do not rely on donations to fund their lobbying activities. A range of civil society organisations have been directly impacted.<sup>284</sup> These restrictions have disproportionately impacted secular education organisations.<sup>285</sup> This has implications for freedoms guaranteed under article 18(2). The human rights issues presented by the Electoral Act were highlighted by two UN Special Rapporteurs to the government in December 2020.<sup>286</sup>

**116.** The government has recently brought forward an Electoral Reform Bill<sup>287</sup> to address a number of issues, ICCL<sup>288</sup> and others<sup>289</sup> have argued that the development of the Bill presents a clear opportunity to address the existing definition of 'political purposes' as contained in the 1997 Electoral Act. The parliamentary committee concluded that civil society funding issues should be addressed in the redrafted bill.<sup>290</sup> The redrafted bill, which was published in March 2022 did not incorporate these recommendations.<sup>291</sup>

### 2009 Charities Act

#### Charitable Status for Human Rights Organisations and Advice on Political Campaigning

**117.** Charitable status for human rights promotion is not included in the Charities Act 2009, despite public and political opposition voiced against this exclusion<sup>292</sup> and the absence of any legal basis for same. Neighbouring common law jurisdictions have legislated for same,<sup>293</sup> and as a result, the current Act undermines the principle of equivalence in the Good Friday Agreement.<sup>294</sup> The UN Special Rapporteur on Human Rights Defenders has previously expressed concern about the legislation.<sup>295</sup> Draft legislation to address this anomaly was published

<sup>282</sup> [Electoral \(Amendment\) Act \(2001\)](#).

<sup>283</sup> [Charities Act \(2009\)](#).

<sup>284</sup> See Colm Keena, *Human rights campaigners defend donations from abroad* Irish Times, 16 December 2017. Aodhan O'Faolain *Group opposing Hellfire Club development resolves action against SIPO* Irish Times, October 22<sup>nd</sup> 2019. The Coalition for Civil Society *Freedom Statement on the Electoral Act* October 2018.

<sup>285</sup> See e.g. Carl O'Brien *Group against Baptism bar derailed after complaints*, Irish Times 15 October 2018. Jack Power *Humanist group reported to SIPO over €10,000 donation* Irish Times, 16 December 2017.

<sup>286</sup> Mandates of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on the situation of human rights defenders, [Letter to the Irish Government](#), 10 December 2020.

<sup>287</sup> [Electoral Reform Bill \(2022\)](#).

<sup>288</sup> ICCL, [Submission on the General Scheme of the Electoral Reform Bill \(2020\)](#) May 2021.

<sup>289</sup> Coalition for Civil Society Freedom & The Office of Senator Lynn Ruane; [Submission on the Definition of "Political Purposes" as contained in the 1997 Electoral Act](#), April 2021.

<sup>290</sup> Joint Committee on Housing, Local Government & Heritage; [Report on Pre-Legislative Scrutiny of the General Scheme of the Electoral Reform Bill 2020](#), July 2021.

<sup>291</sup> See parliamentary debates on the Bill in [April 2022](#).

<sup>292</sup> See e.g. Dr Oonagh Breen, [Establishing a Modern Statutory Framework for Charities: Report on the Public Consultation for the Department of Community, Rural and Gaeltacht Affairs](#) (Dublin, 2014).

<sup>293</sup> [The English Charities' Act \(2006\) s.2\(2\)\(h\)](#) and [Charities Act \(Northern Ireland\) 2008, s2](#).

<sup>294</sup> Chapter 6 on Rights, Safeguards and Equality of Opportunity, paragraph 9 of the [Good Friday Agreement 1998](#), which states that the human rights measures brought forward by the Irish government would "ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland".

<sup>295</sup> [Report of the Special Rapporteur on the situation of human rights defenders](#), Margaret Sekaggya, Mission to Ireland (19 – 23 November 2012), February 2013, A/HRC/22/47/Add.3.

in April 2022<sup>296</sup> but has not been enacted at the time of writing. A 2021<sup>297</sup> shift in eligibility for charitable status for organisations set up with an “exclusive” focus on campaigning to ones which “primarily” focus on campaign work has the potential to impede the work of charitable organisations. While we accept that an organisation set up for the “exclusive” promotion of a political cause cannot be considered a charity, the updated guidelines fail to acknowledge the critical role that campaigning plays in the advancement of charitable objectives for many organisations.

## RECOMMENDATIONS

### The State should:

- Update the Electoral Reform Bill 2022 to reflect the recommendations on civil society freedom and reform of the 1997 Electoral Act (as amended) as included in the pre-legislative report authored by the responsible parliamentary committee.
- That the 2009 Charities Act is amended to include the promotion of human rights as a valid charitable purpose as proposed in the draft Charities (Amendment) Bill 2022
- That the Charities Regulator revises the guidance issued in December 2021 which seeks to limit the ability of registered charities to engage in political activity to achieve their charitable objectives.

<sup>296</sup> [Daft Charities \(Amendment\) Bill \(2022\)](#)

<sup>297</sup> The Charities Regulator, which is responsible for the enforcement of regulations contained in the 2009 Charities Act published a document entitled “[Guidance on Charities and the Promotion of Political Causes](#)” in December 2021. The previous guidance document from 2018 sets out that an organisation set up *exclusively* to promote a political cause cannot be considered a charity. The new guidance from 2021 sets out that an organization set up *primarily* to promote a political cause cannot be considered a charity.

# ARTICLE 25 PARTICIPATION IN PUBLIC AFFAIRS

## Electoral Reform Bill and Electoral Commission

- 118.** The right to vote and participate in public affairs in Ireland is constitutionally guaranteed<sup>298</sup> and operationalised through a number of electoral acts.<sup>299</sup> The franchise is open to those qualifying based on residency/citizenship to everyone over 18 for local, European and national elections and referenda. The franchise for Senate elections remains restricted despite repeated calls for reform.<sup>300</sup>
- 119.** As per item 24 in the List of Issues, the government has published an Electoral Reform Bill to establish an electoral commission and address other electoral issues.<sup>301</sup> Ireland is highly unusual insofar as it is one of the few developed democracies without such a commission and the availability of voting options outside of attending a polling place on the day of the election are extremely limited.
- 120.** As part of the pre-legislative scrutiny process for the Bill, ICCL made a detailed submission with specific recommendations<sup>302</sup> to ensure that the legislation was human rights compliant to the relevant parliamentary committee. We remain opposed to any unconstitutional proposals which would require the sharing or possession of an Irish national insurance number (Personal Public Service Number: PPSN) in order to register to vote.<sup>303</sup> It is regrettable that these recommendations were not taken on board in the revised Bill which was published in March 2022 and we call on Government to reconsider.<sup>304</sup>
- 121.** Additional concerns remain with respect to the limited scope of the functions to be assigned to the electoral commission with respect to candidacy support and the countering of hate speech in the context of electoral events. It has been noted that the absence of these measures will have an unequal impact on women seeking election in particular.<sup>305</sup> This is compounded by the failure to amend the Electoral Act (1997),<sup>306</sup> to allocate state funding to qualified parties based on their first preference vote at the preceding general election and the preceding local election (e.g. 60-40 split). This would allow for a minimum 40% gender quota for parties contesting the 2024 local elections.

## RECOMMENDATIONS

### The State should:

- Expand the remit of the Electoral Commission beyond its current narrow focus to encompass a wider set of functions. These should include, *inter-alia*, countering mis/disinformation, candidacy support, the security of the electoral process and voter education. A clear timetable should be published to ensure that other functions are transferred without undue delay.
- Empower the Electoral Commission to develop standards in political discourse that are free from discriminatory rhetoric and hate speech.
- Use the opportunity of the development of the Electoral Reform Bill (2022) to amend Section 17(3) of the 1997 Electoral Act to apply a 40% gender quota to local elections in 2024.
- Review provisions related to the research functions of the Commission in order to ensure academic independence. The Commission should be free to set and direct its own research agenda without the need for prior approval of Parliament.
- Re-examine the proposed governance structure of the Commission in order to ensure that it aligns with international best practice for similar bodies.

<sup>298</sup> Constitution of Ireland; Article 16.

<sup>299</sup> Electoral Act (1963), Electoral Act (1992), Electoral Act (1997).

<sup>300</sup> Mary Carolan: Seanad voting rights case asked: 'Is there a constitution in the world without oddities?' Irish Times March 3rd, 2021.

<sup>301</sup> Electoral Reform Bill (2022) Explanatory Memorandum.

<sup>302</sup> ICCL; Submission on the General Scheme of the Electoral Reform Bill (2020) May 2021.

<sup>303</sup> The original draft bill contained provisions which could be read as mandating the possession/sharing of a PPSN in order to register to vote. The updated Bill has softened but not removed these provisions.

<sup>304</sup> Electoral Reform Bill (2022).

<sup>305</sup> National Women's Council: Submission to the Committee on Housing, Local Government and Heritage on the General scheme of the Electoral Reform Bill.

<sup>306</sup> Electoral Act (1997) Section 17 (3).

## RECOMMENDATIONS (CONTINUED)

- Examine the requirements for annual re-registration of voters with no fixed abode to ensure that the democratic rights of those seeking to register are not unduly undermined.
- Carry out more detailed considerations of the data security risks of the pooling of registration data.
- Ensure that the Electoral Commission should publish regular reports on the registration efforts of local authorities.
- Abandon any attempts to make the mandatory sharing of PPSN information in order to register to vote.
- Ensure that any individual who wishes to register either as a postal voter or as an anonymous elector can do so without being compelled to disclose sensitive personal or medical information.

### Anti-Corruption Measures (Articles 2 & 25)

**122.** The Criminal Justice (Corruption Offences) Act 2018 is the principal statutory source of anti-bribery and corruption legislation in Ireland.<sup>307</sup> The Ethics in Public Office Act 1995 & the Standards in Public Office Act 2001 regulate the conduct of public officials.<sup>308</sup> The Standards in Public Office Commission (SIPO) is responsible for the enforcement of these Acts. The Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2018 transposed the provisions of the fourth EU Anti-Money Laundering Directive into Irish law<sup>309</sup> and the Regulation of Lobbying Act 2015<sup>310</sup> regulates lobbying in Ireland.

### Public Ethics Reform

**123.** Following the 2020 General election, the draft Public Sector Standards Bill (2015) lapsed and was not re-tabled by the new government. On 25 November 2021 the Government announced that a review of Ireland's existing statutory framework for Ethics in Public Life would commence.<sup>311</sup> The Review of Ethics Legislation will seek to respond to outstanding recommendations of the Moriarty and Mahon tribunals and other recent developments. The Government has argued that since the Public Sector Standards Bill was last discussed in the parliament in 2017, instances of further potential gaps in the ethics framework have arisen as matters of public debate and concern.

### Lobbying

**124.** The Lobbying Register, which was established consequent to the Regulation of Lobbying Act (2015), does not allow for searches against Designated Public Officials, (DPOs) which impedes the practical ability to determine the lobbying focus on key officials. The system also does not capture the entire scope of internal effect of lobbying who may have been targeted. A number of key bodies and agencies are also excluded from the lobbying register.<sup>312</sup> The government have also voted to delay or have not progressed a number of opposition tabled bills on conflict of interest which have received parliamentary approval in the last 12 months.<sup>313</sup> These bills remain within the parliamentary process and have not become law. In February 2022 the government brought forward proposals to address some of these issues in the General Scheme of the Regulation of Lobbying (Amendment) Bill 2022.<sup>314</sup>

<sup>307</sup> [Criminal Justice \(Corruption Offences\) Act \(2018\)](#).

<sup>308</sup> [SIPO: Public Ethics Acts](#).

<sup>309</sup> [Criminal Justice \(Money Laundering and Terrorist Financing\) \(Amendment\) Act \(2018\)](#).

<sup>310</sup> [Regulation of Lobbying Act \(2015\)](#).

<sup>311</sup> [Ethics in Public Life - Reform and Consolidation of Ireland's Statutory Framework, 25 November 2021](#).

<sup>312</sup> e.g., An Bord Pleanála (the national independent planning authority) and The Environmental Protection Agency, (EPA).

<sup>313</sup> E.g. [Regulation of Lobbying \(Amendment\) Bill \(2020\)](#), [Regulation of Lobbying \(Post-Term Employment as Lobbyist\) Bill \(2020\)](#).

<sup>314</sup> [General Scheme of the Regulation of Lobbying \(Amendment\) Bill \(2022\)](#).

## Protected Disclosures

**125.** A draft bill, which would amend existing protected disclosure legislation to incorporate the provisions of EU directive 2019/1937, was published in May 2021<sup>315</sup> missing the deadline set out in the directive of December 2021. It is of concern that the government have chosen to derogate<sup>316</sup> from the Directive in a number of areas which would serve to strengthen protections for whistle-blowers in the revised Bill<sup>317</sup> which was published and tabled for parliamentary debate<sup>318</sup> in February 2022.

## Freedom of Information (Articles 25 & 19)

**126.** Following on from a political scandal in the summer of 2021<sup>319</sup> the government announced a review of the 2014 Freedom of Information Act.<sup>320</sup> The review, which is being led by the Department of Public Expenditure and Reform, has commenced gathering initial inputs from stakeholders. It is expected that the review will be completed in mid-2022.<sup>321</sup>

## RECOMMENDATIONS

### The State should:

- Urgently prioritise the passage of updated public ethics legislation.
- Ensure that the Regulation of Lobbying Act (2015) is updated to allow for searches against DPOs and that all state agencies are included in the context of the development of the Regulation of Lobbying (Amendment) Bill.
- Allow for easier access to machine readable data and allow easier download of data stored on the lobbying register.
- Progress the General Scheme of the Regulation of Lobbying (Amendment) Bill as a priority with meaningful inputs from civil society.
- Amend the Protected Disclosures (Amendment) Bill 2022 to ensure maximum protection for those making protected disclosures including, *inter-alia*, the requirement to follow up on anonymous disclosures and the requirement for all workplaces regardless of size to establish internal whistleblowing channels.
- Progress the review of the Freedom of Information system to ensure a regime that is transparent, user-friendly and accessible.
- Remove all fees charged for accessing corporate information and to publish open data sets on companies.

<sup>315</sup> [General Scheme of the Protected Disclosures \(Amendment\) Bill \(2021\)](#).

<sup>316</sup> Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach, [General Scheme of the Protected Disclosures \(Amendment\) Bill 2021: Discussion Wednesday, 29th Sep 2021](#).

<sup>317</sup> [Protected Disclosures \(Amendment\) Bill \(2022\)](#) These omissions include limiting the requirements to establish internal whistleblowing channels to companies with more than 49 employees. ICCL and others have called on the government to reverse this decision and further strengthen whistle-blower protections in a pre-legislative scrutiny session in September 2021.

<sup>318</sup> [Protected Disclosures \(Amendment\) Bill 2022: Second Stage Debate \(15 February 2022\)](#).

<sup>319</sup> Stephen McDermott [A crisis in FOI: How Zapponegate highlighted crucial flaws in Ireland's transparency legislation](#) *TheJournal.ie* September 7<sup>th</sup> 2021.

<sup>320</sup> [Freedom of Information Act \(2014\)](#).

<sup>321</sup> [Review of the Freedom of Information Act](#); Department of Public Expenditure and Reform, 22 October 2021.

# ARTICLE 26 RIGHT TO EQUALITY BEFORE THE LAW

## Non-discrimination (Articles 2, 3, 13, 20, 23, 26 & 27)

- 127.** In July 2021, the Department of Children, Equality, Disability, Integration and Youth launched the first comprehensive review of the Equality Acts (hereinafter referred to as “the Review”).<sup>322</sup> All public bodies need to be brought explicitly within the scope of the Equality Acts. The Review must respond to the lived experiences of discrimination of minoritised and marginalised group by introducing new grounds (including socio-economic status and sex characteristics and the prohibition of intersectional and multiple discrimination) and expanding existing grounds (including the recognition of all carers, gender identity and gender expression under gender and the strengthening of the obligations to provide reasonable accommodation to disabled people). The Equality Acts must be clear and effective, clarifying and strengthening key concepts and removing unnecessary exemptions, ensuring access to justice and effective remedies. Procedural barriers – including lack of consistency in the jurisdiction of discrimination claims<sup>323</sup>– should be addressed.
- 128.** A national programme of human rights and equality education for all public servants has not been adopted and human rights and equality proofing of legislation and policy is not carried out in a systematic manner. A connected overarching issue is the failure to gather disaggregated data in a range of areas where human rights are engaged in order to inform human rights compliant policies and programmes.
- 129.** There is evidence that Covid-19 and the State response disproportionately impacted certain groups and communities, including older people, disabled people, women, people residing on Direct Provision centres, LGBTI+ people and Travellers.<sup>324</sup> ICCL considers that a comprehensive human rights impact assessment must be carried out to assess the extent to which Covid-19 and the State’s response disproportionately affected minoritised groups and communities and to inform a better response to a public emergency in the future, which fully respects a human rights-based approach.
- 130.** Existing strategies and action plans such as the LGBTI+ Inclusion Strategy 2019-2021 and the National Traveller and Roma Inclusion Strategy 2017 – 2021 should be fully implemented and resourced.<sup>325</sup> Where relevant, new strategies should be developed to ensure the respect and promotion of the rights of all minoritised and marginalised groups and communities. All strategies and action plans must be drafted and implemented in strong collaboration with relevant communities and civil society organisations.
- 131.** An Anti-Racism Committee was appointed in June 2020 to draft the new Action Plan Against Racism (NAPAR) within one year. Ireland has now been without such a plan for 14 years.<sup>326</sup> The Anti-Racism Committee published its interim report at the end of 2020<sup>327</sup> followed by public consultation in April 2021. The status of the new Plan is currently unclear.

<sup>322</sup> Department of Children, Equality, Disability, Integration and Youth, [Consultation on the review of the Equality Acts](#), 6 July 2021.

<sup>323</sup> While most discrimination complaints are heard by the Workplace Relations Commission at the first instance, the Equality Acts provide that certain complaints may be heard by the Circuit Court and some must be made to the District Court.

<sup>324</sup> Covid-19 NGO Group, [Marginalised Groups and Promoting Equality, Inclusion and Human Rights in the Covid Crisis – A Joint Submission](#), 2020; ICCL, [Human Rights in the Pandemic](#), May 2021.

<sup>325</sup> These include Department of Children, Equality, Disability, Integration and Youth, [LGBTI+ Inclusion Strategy 2019-2021](#), November 2019; Department of Justice and Equality, [National Traveller and Roma Inclusion Strategy 2017 – 2021](#).

<sup>326</sup> The previous Action Plan Against Racism ended in 2008.

<sup>327</sup> Anti-Racism Committee, [Interim Report to the Minister for Children, Equality, Disability, Integration and Youth](#), November 2020.

## RECOMMENDATIONS

### The State should:

- Ensure that actions are taken to amend article 40.1 of the Irish Constitution to explicitly refer to non-discrimination.<sup>328</sup>
- Ensure that the review of the Equality Acts responds to lived experiences by ensuring the expansion of discrimination grounds, ensuring access to justice, effective remedies, removing unnecessary exemptions and procedural barriers.
- Collect and publish disaggregated data on those most affected by the Covid-19 pandemic and by the restrictions on rights, as well as a human rights impact assessment involving all stakeholders to help identify groups that have been disproportionately impacted by Covid-19 and the restrictions to ensure that more proportionate and targeted responses are used in the future.
- Introduce a national programme on human rights and equality education for civil and public servants and carry out human rights and equality proofing on legislation and policy in a systematic manner. Disaggregated data should be collected to inform the drafting of legislation and policies.
- Fully implement existing strategies. New strategies and action plans should be developed in close cooperation with civil society and people with direct lived experiences.
- Regularly review laws and policies to prevent discrimination against minoritised and marginalised groups and communities and to improve their access to employment, education, housing, and healthcare.
- Ensure that the new National Action Plan against Racism has concrete action plans with clear targets, indicators, outcomes, timeframes, and associated budget lines and includes measures to fund and provide for comprehensive support to victims of racism, including access to legal advice and counselling services.
- Examine the requirements for annual re-registration of voters with no fixed abode to ensure that the democratic rights of those seeking to register are not unduly undermined.
- Carry out more detailed considerations of the data security risks of the pooling of registration data.
- Ensure that the Electoral Commission should publish regular reports on the registration efforts of local authorities.
- Abandon any attempts to make the mandatory sharing of PPSN information in order to register to vote.
- Ensure that any individual who wishes to register either as a postal voter or as an anonymous elector can do so without being compelled to disclose sensitive personal or medical information.

<sup>328</sup> See Report of the Citizens' Assembly on Gender Equality, June 2021.

# ARTICLE 27 ETHNIC AND LINGUISTIC MINORITIES

## Roma and Travellers

- 132.** Anti-Traveller and anti-Roma discrimination continues to be prevalent, including in relation to accessing culturally appropriate accommodation, education, employment and health services.<sup>329</sup>
- 133.** A National Traveller and Roma Inclusion Strategy (2017-2021)<sup>330</sup> was developed but its implementation has been slow, piecemeal, and hampered by a lack of clear targets, government investment, budget lines or a robust implementation and monitoring plan.<sup>331</sup> A new Strategy must be prioritised and implemented.
- 134.** To date, the National Traveller Health Action Plan – to which the State has committed through its Inclusion Strategy – has not been published.<sup>332</sup>
- 135.** Recommendations from the Expert Review Group on Traveller Accommodation have not been fully implemented and require a time bound implementation plan, tangible targets, proper budget line and oversight.<sup>333</sup>
- 136.** Travellers were recognised as an ethnic group in Ireland in a 2017 statement by the Irish Taoiseach (Prime Minister).<sup>334</sup> As addressed in the State Report, this recognition was socially and symbolically important, however to date there has been no legislative action to enshrine this in law.

## RECOMMENDATIONS

### The State should:

- Take further action to combat all forms of discrimination against Travellers and Roma, including ethnic equality monitoring across all government services.
- Review, develop and fully implement the National Traveller and Roma Inclusion Strategy and develop and implement a new National Traveller and Roma Inclusion Strategy, including by developing concrete action plans with clear targets, indicators, outcomes, timeframes, and associated budget lines.
- Publish and implement the long-awaited National Traveller Health Action Plan.
- Implement all recommendations of the Report of the Expert Review Group on Traveller Accommodation with a time lined implementation plan, tangible targets, corresponding accountability measures and appropriate budget.
- Take legislative action to formalise the recognition of Travellers as a distinct ethnic group, clarify the rights accorded to them.

<sup>329</sup> NUIG for FRA, [Implications of Covid-19 pandemic on Roma and Travellers communities](#), 15 June 2020.

<sup>330</sup> Department of Justice and Equality, [National Traveller and Roma Inclusion Strategy 2017 – 2021](#).

<sup>331</sup> Pavee Point, [Civil society monitoring report on implementation of the National Traveller and Roma Inclusion Strategy](#), 2019, p.7.

<sup>332</sup> National Social Inclusion Office, [National Traveller Health Action Plan](#).

<sup>333</sup> See update of implementation of the Programme Board of the Expert Group at [Traveller Accommodation Expert Review Programme Board Update](#), Department of Housing, Local Government and Heritage, March 2022.

<sup>334</sup> Irish Times, O'Halloean, O'Regan, [Travellers formally recognised as an ethnic minority](#), 1 March 2017.

## ABOUT ICCL

**The Irish Council for Civil Liberties (ICCL)** is Ireland's oldest independent human rights body. We have been at the forefront of every major rights advance in Irish society for over 40 years. ICCL helped legalise homosexuality, divorce, and contraception. We drive police reform, defending suspects' rights during dark times. In recent years, we led successful campaigns for marriage equality and reproductive rights. ICCL has worked on data protection for decades.



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