



**Joint Shadow Report to the First Periodic Review of Ireland under the  
United Nations Convention against Torture and Other Cruel, Inhuman  
or Degrading Treatment or Punishment**

**April 2011**

## **Acknowledgements**

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## **Endorsement List**

This report is endorsed by a broad range of non-governmental organisations (NGOs) and civil society organisations. All of the views expressed in the report do not necessarily reflect the policies and positions of each endorsing organisation.

[Insert names of organisations]

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## About us

### **Irish Council for Civil Liberties (ICCL)**

The Irish Council for Civil Liberties (ICCL) is Ireland's leading independent human rights watchdog, which monitors, educates and campaigns in order to secure full enjoyment of human rights for everyone. Founded in 1976 by Mary Robinson and others, the ICCL has played a leading role in some of the most successful human rights campaigns in Ireland. These have included campaigns resulting in the establishment of an independent Garda Síochána Ombudsman Commission, the legalisation of the right to divorce, more effective protection of children's rights, the decriminalisation of homosexuality and introduction of enhanced equality legislation.

We believe in a society which protects and promotes human rights, justice and equality.

### **Irish Penal Reform Trust (IPRT)**

The Irish Penal Reform Trust (IPRT) is Ireland's leading non-governmental organisation campaigning for the rights of everyone in the penal system, with prison as a last resort. IPRT is committed to reducing imprisonment and the progressive reform of the penal system based on evidence-led policies. IPRT works to achieve its goals through research, raising awareness, building alliances and growing our organisation.

Through its work, IPRT seeks to stimulate public debate on issues relating to the use of imprisonment, including on sentencing law and practice in Ireland. Our work is based on the belief that the Irish Prison Service must meet or exceed international best practice and human rights standards, and that Ireland must reduce the overuse of incarceration by addressing the social inequality at the root of much criminal behaviour, and through the implementation of effective non-custodial sanctions and restorative justice programmes.

## Glossary of Terms

<b>CMH</b>	Central Mental Hospital
<b>CPT</b>	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
<b>Dáil Éireann</b>	Lower House of the Irish Parliament
<b>DPP</b>	Director of Public Prosecutions
<b>ECHR</b>	European Convention on Human Rights and Fundamental Freedoms
<b>EU</b>	European Union
<b>Garda Síochána</b>	Irish Police Service
<b>Gardaí</b>	Members of the Irish Police Service
<b>GSOC</b>	Garda Síochána (Police) Ombudsman Commission
<b>HIQA</b>	Health and Information Quality Authority
<b>HSE</b>	Health Service Executive
<b>HRC</b>	Human Rights Committee
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>IHRC</b>	Irish Human Rights Commission
<b>NGO</b>	Non-governmental organisation
<b>The Oireachtas</b>	Houses of Parliament
<b>Seanad Éireann</b>	Upper House of the Irish Parliament
<b>Taoiseach</b>	Irish Prime Minister
<b>TMB</b>	Treaty Monitoring Body



## Recommendations

### Section 2: Information of a General Nature (Institutional and Legal Framework)

- Claimants with a human rights or public interest element to their case should be entitled to apply for protective cost orders.
- The Special Criminal Court should be abolished forthwith.
- Reform the current State-funded human rights and equality bodies to produce a more coherent and effective institutional framework for the protection and promotion of human rights.
- The European Convention on Human Rights should be fully incorporated into Irish law.
- All UN treaties, including optional protocols, should be fully incorporated into Irish law.
- An institutional oversight mechanism for example, a Parliamentary Committee or Cabinet Sub-Committee, should be assigned responsibility to monitor the implementation of TMB recommendations.
- Amend the Criminal Justice (United Nations Convention against Torture) Act 2000 to incorporate Articles 8, 9, 10, 12, 13, 14, 15 into Irish law and repeal section 50 of the Criminal Justice Act 2006.
- The Government should immediately engage in a participative process to identify and/or create an effective mechanism or mechanisms with the capacity and resources to function as an NPM.
- Once it has been clearly established that Ireland has the capacity to meet its obligations under OPCAT, the Optional Protocol should be ratified by Ireland within a clearly-specified timeframe.

### Section 3: Extraordinary Rendition (Article 3)

- Appropriate legally-binding measures should be put in place to ensure that, in the event that a reasonable suspicion arises that a particular aircraft may be engaged in the practice of rendition, the relevant authorities are required to act expeditiously to discharge their positive obligations under the Convention Against Torture, having regard to other relevant regional standards, including the jurisprudence under the European Convention on Human Rights and Fundamental Freedoms and the standards elaborated by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

### Section 4: Non-refoulement and Deportation (Article 3)

- In order to ensure that Ireland remains in compliance with Article 3 CAT, the Irish authorities should take urgent steps to identify the underlying causes of the steep fall in positive determinations which has taken place since late 2009. In the event that deficiencies are identified in the decision-making process, these should be rectified and the necessary corrective action taken in relation to any cases found to be wrongly decided.
- Independent oversight of decisions to refuse leave to land at ports of entry should be introduced as a matter of urgency

- An independent appeals mechanism for immigration-related decisions, including deportation decisions, should be promptly established, as provided under Articles 12 and 13 CAT.

#### **Section 5: Prisons (Articles 11, 12, 13, 16)**

- The State should take all necessary measures to improve conditions of detention, including reducing overcrowding and setting safe custody limits.
- The State must eradicate the “slopping out” of human waste in Irish prisons as a priority issue and set targets to meet this obligation. In the interim, the Irish Prison Service should introduce measures to minimise the effects of slopping out by conducting toilet patrols throughout the night.
- The Irish Prison Service should introduce standard risk assessment procedures for all new prisoners upon admittance and they should be placed accordingly.
- The recommendations of the Inspector of Prisons for the use of safety observation cells and close supervision cells should be implemented in Irish Prison Service policy, so as to promote a common standard of use across the prison estate. These guidelines should set out clear limits on the length of time prisoners can be held and the provision of services that must be available.
- Adequate records must be kept detailing the usage of safety observation and close supervision cells.
- An independent prison complaints system must be established either through the prompt establishment of a Prisoner Ombudsman, or through amending or extending the remit of existing bodies.
- Prison staff accused of ill-treatment should be transferred to duties not requiring day to day contact with prisoners, pending the outcome of the investigation.
- The doctor to patient ratio in the prison system should be reduced to ensure a proper standard of care and the maintenance of adequate medical records. The time attendance of general practitioners at individual prisons should be increased.
- An annual report should be published on the state of medical services in the Irish Prison Service.
- Drug-free units should be established across the prison estate and the State should ensure that non-drug using prisoners are not accommodated with known drug-users.
- A structured approach to reducing and eventually stopping prisoners’ dependency on drugs must be developed.
- The placement of mentally-ill individuals in Irish prisons should cease.
- The Court Mental Health Liaison programme should be extended to operate nationally and a specific diversion system for children at the point of sentencing should be introduced.
- The Court Liaison programme, including a specific diversion system for children at the point of sentencing, should be established.
- Imprisonment of children in St Patrick’s Institution must end immediately. The planned development of the Oberstown facility should proceed, as a matter of priority, in a timely manner, notwithstanding current economic difficulties.

- The remit of the Ombudsman for Children must be extended to allow individual complaints from children held in prison and in detention on the same basis as children detained elsewhere.
- The State party should ensure that law enforcement, judicial, medical and other personnel who are involved in custody, interrogation or treatment or who otherwise come into contact with prisoners are provided with the necessary training with regard to the prohibition of torture.
- The State should establish a fully independent complaints mechanism for prisoners either as a new institution or under the auspices of the Ombudsman to receive, investigate and resolve complaints (Recommendation made under Section 7).

#### **Section 6: Policing, Detention and Procedural Rights (Articles 7, 10, 11, 12, 13, 16)**

- The State should implement the recommendations of the An Garda Síochána Training and Development Review Group Report, without delay.
- Garda National Immigration Bureau officers should receive specialist training, including training pertaining to people who may have been subjected to torture.
- Irish law should be amended to include appropriate safeguards where inferences are drawn from silence.
- People detained in Garda stations should be afforded access to a lawyer during Garda interviews.
- Sections 21 – 24 of the Criminal Justice (Amendment) Act 2009, concerning secret detention hearings, should be repealed immediately.
- Garda Síochána Ombudsman Commissioners should be appointed in an independent and transparent manner.
- Delays in the handling of complaints by the Garda Síochána Commission should be eradicated, if necessary, by the allocation of additional resources.

#### **Section 7: Deaths in State Custody or Care (Articles 12)**

- The State should establish a fully independent complaints mechanism for prisoners either as a new institution or under the auspices of the Ombudsman to receive, investigate and resolve complaints (see section 5 also).
- Human rights compliant amendments to inquest procedures should be introduced in the form of a new Coroner's Bill.
- With respect to children in care, the commitments on aftercare given in the Ryan Report *Implementation Plan* should be implemented in full.

#### **Section 8: Redress and Rehabilitation (Article 14)**

- Consideration be given to extending beyond 60 days the period of time during which a victim of trafficking may recover and reflect on the desirability of cooperating with the appropriate authorities
- The Government should establish a comprehensive framework for the rehabilitation to victims of torture.

### **Section 9: Female Genital Mutilation (FGM) (Article 16)**

- The State should enact legislation without delay prohibiting FGM and the removal of children and young girls from Ireland for the purposes of FGM abroad. The legislation should contain provisions in relation to rehabilitation including medical and psychological assistance.

### **Section 10: Domestic Violence (Article 16)**

- The Domestic Violence Act 1996 should be amended to include clear criteria to grant Safety and Barring Orders and extend eligibility to all parties who are or have been in an intimate relationship regardless of cohabitation, in line with internationally recognised best practice.
- Migrant women with dependant immigration status, who are experiencing domestic violence, should be afforded independent status under legislation and be facilitated to access the labour market and/or the social welfare system.

### **Section 11: Corporal Punishment (Article 16)**

- Legislation should be introduced without delay to remove the common law defence of 'reasonable chastisement' within the family and in care settings.
- Positive parenting support systems that lay down a clear standard for the way society aspires to treat its children should be strengthened.

### **Section 12: Mental Health Services (Article 16)**

- A test of legal capacity should be introduced in relation to informed consent to treatment.
- ECT should never be administered to a competent patient who is unwilling to be subjected to this procedure.

### **Section 13: Immigration-Related Detention (Article 16)**

- In line with the recommendations of the United Nations Human Rights Committee if, exceptionally, it is necessary to detain people for immigration-related reasons, the State should ensure that they are held in facilities specifically designed for that purpose.

## 1. Introduction

1. This Alternative Report to the United Nations (UN) Committee against Torture has been prepared by the Irish Council for Civil Liberties (ICCL) and Irish Penal Reform Trust (IPRT).
2. The ICCL and IPRT welcome the Government's First Report to the UN Committee against Torture. Ireland signed CAT in 1992, ratified it in 2002 and was due to submit its First Report to the UN Committee against Torture in 2005. On 13 December 2005, the Department of Justice, Equality and Law Reform, as it then was, sought submissions with respect to the State report from non-governmental organisations (NGOs) and other representatives of civil society. However, consultation with civil society was limited by the allocation of little more than three weeks<sup>1</sup> for organisations to submit responses to the Government's Report. The Government did not hold any consultation meetings or other interactions with civil society and it is not clear how the comments of civil society were incorporated into the State Report submitted to CAT. In October 2009, three years later and four years overdue, the Department of Justice, Equality and Law Reform, as it then was, published Ireland's first national report. Taken as whole, the State's report quite properly highlights areas of good practice, but does not provide a comprehensive picture of how the Government's obligations are fulfilled and the rights under CAT are protected in Ireland. Moreover, in some respects, for example, in relation to prisons, the State Report is largely silent.
3. This document was produced in collaboration with other NGOs including the Children's Rights Alliance,<sup>2</sup> Immigrant Council of Ireland,<sup>3</sup> Women's Aid<sup>4</sup> and Spirasi.<sup>5</sup> There are certain issues which are not considered in the report, most notably, the State's obligations to people with intellectual disabilities who live within institutions. We understand that the State-funded Irish Human Rights Commission (IHRC) intends to submit information to CAT on this issue.<sup>6</sup>

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<sup>1</sup> Advertisements were published in the national newspapers and on the website of the Department of Justice, Equality and Law Reform, now Department of Justice and Equality ([www.justice.ie](http://www.justice.ie)) on 13 December 2005, inviting submissions from interested parties less than one month later on 9 January 2006.

<sup>2</sup> <http://www.childrensrights.ie/>.

<sup>3</sup> <http://www.immigrantcouncil.ie/>.

<sup>4</sup> <http://www.womensaid.ie/>.

<sup>5</sup> <http://www.spirasi.ie/>. Spirasi is an organisation working with refugees, asylum seekers and other migrant groups with special concern for the survivors of torture.

<sup>6</sup> Irish Human Rights Commission (NHRI) submission to the Committee on the Convention Against Torture on the Examination of Ireland's First National Report, April 2011, available at <http://www.ihrc.ie>.

## 2. Information of a General Nature

### 2.1 The Irish Courts

#### (a) Taking a case before the Irish Courts

4. The State Report refers to the enforcement of rights in practice through the Irish court system.<sup>7</sup> However, in reality, human rights based challenges to the exercise of the State's authority remain rare. Delays on court lists and before administrative bodies continue. For example, in 2010, Ireland was found in breach of the European Convention on Human Rights (ECHR) for undue delay in criminal proceedings.<sup>8</sup> Furthermore, prohibitive costs and the possibility of the State's costs being awarded against claimants discourage litigation.<sup>9</sup> Costs orders protect public interest litigants from huge legal fees awarded against them and in favour of the State. However, the threshold for an award of a costs order in Irish courts is high and both applications which have made in Irish courts have been refused.<sup>10</sup> In addition, amendments to the system of judicial review, particularly around time limits, have created another burden for litigants. For example, section 5 of the Illegal Immigrants Trafficking Act 2000<sup>11</sup> imposes a 14-day time limit on foreign nationals issuing judicial review proceedings and concerns have been expressed about this by the Committee on the Elimination of Racial Discrimination.<sup>12</sup>

#### (b) The Special Criminal Court

5. The Special Criminal Court was established under the Offences against the State Act 1939.<sup>13</sup>

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<sup>7</sup> *United Nations International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: First National Report by Ireland, as required under Article 19 of the Convention on the measures taken to give effect to the undertakings under the Convention*, July 2009, pp. 9 -12.

<sup>8</sup> *McFarlane v Ireland* [2010] ECHR 1272, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=mcfarlane&sessionId=68060761&skin=hudoc-en> (last accessed 3 April 2011).

<sup>9</sup> Public Interest Law Alliance (PILA), *Public Interest Litigation: The Costs Barrier & Protective Costs Orders*, available at [http://www.pila.ie/download/pdf/flac\\_pila\\_report\\_final.pdf](http://www.pila.ie/download/pdf/flac_pila_report_final.pdf) (last accessed 3 April 2011). See the PILA website for further information on barriers to public interest litigation in Ireland, available at <http://www.pila.ie/resources/barrierstopil.html> (last accessed 3 April 2011).

<sup>10</sup> *Village Residents Association Ltd. v An Bord Pleanála and McDonalds* [2000] 4 IR 321 and *Friends of the Curragh Environment Limited v An Bord Pleanála & Ors* [2006] IEHC 243.

<sup>11</sup> Available at <http://www.irishstatutebook.ie/2000/en/act/pub/0029/index.html>.

<sup>12</sup> Committee on the Elimination of Racial Discrimination: Ireland, 14 April 2005, UN Doc CERD/C/IRL/CO/2 para 24.. Furthermore, recent case law puts certain Government actions beyond the reach of the Court. See *Bode (A Minor) -v- Minister for Justice, Equality & Law Reform & Ors*, [2007] IESC 62 (2007).

<sup>13</sup> Available at <http://www.irishstatutebook.ie/1939/en/act/pub/0013/index.html>. The establishment of "special courts" is permissible under Article 38.3.1 of the Constitution where "the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order".

The Court sits with three judges, without a jury and the judges reach a verdict through majority vote. The Court was established to deal with offences connected with terrorism and the other offences against the State listed as Scheduled Offences.<sup>14</sup>

Non-Scheduled Offences may also be forwarded to its jurisdiction if the Director of Public Prosecutions (DPP) certifies that the ordinary courts are inadequate.<sup>15</sup> The UN Human Rights Committee has consistently called on the Government to renounce the use of Special Criminal Court, which denies a defendant the safeguard of a trial by jury normally available to accused persons.<sup>16</sup> One of the main issues identified by the Human Rights Committee in relation to this non-jury court is the discretion afforded to the DPP, whose decisions are not made public, in assigning cases to the Court. This system lacks clarity, transparency, consistency and accountability. In the case of *Kavanagh v Ireland*,<sup>17</sup> the Human Rights Committee found that section 47 of the Offences against the State Act 1939 was in violation of article 26, paragraph 1 of the Covenant.<sup>18</sup> The Committee based its view on the fact that the DPP may refer a case for trial to the Special Criminal Court, thereby denying the defendant the safeguard normally available to accused persons of a trial by jury, without making public his reasons for so doing in line with reasonable and objective criteria.

6. The State Report<sup>19</sup> refers to the 2002 Hederman Report (*Report of Committee to Review the Offences Against the State Act 1939-1998 and Related Matters pursuant to the Good Friday Agreement*).<sup>20</sup> The Hederman Committee was established to carry out a review of the Offences Against the State Acts in May 1999. Ireland's compliance with international human rights standards, including the *Kavanagh* case<sup>21</sup> formed part of the remit of the Review. A majority of the Hederman Committee supported the retention of the Special Criminal Court, though a minority, including the Chair and a number of leading constitutional and criminal lawyers, dissented on this recommendation. Ultimately, the Hederman Committee recommended the retention of the Special Criminal Court on the grounds of security with regard to the continued threat from the operation of subversive organisations and/or that posed by organised criminal gangs.

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<sup>14</sup> Listed in multiple pieces of legislation.

<sup>15</sup> *Eviston v. Director of Public Prosecutions* [2002] 3 IR 260 at 269 where Mr Justice Kearns stated that "the prosecutorial discretion is regarded as almost completely immune from judicial scrutiny except in extremely limited circumstances".

<sup>16</sup> Concluding Observation of the UN Human Rights Committee: Ireland, 24 July 2000, UN Doc A/55/40, para 15 and Concluding Observations of the Human Rights Committee: Ireland, 30 July 2008, UN Doc CCPR/C/IRL/CO/3, para 20. See also, Communication No 819/1998: Ireland 26 April 2001, *Kavanagh v. Ireland*, UN Doc: CCPR/C/71/D/819/1998.

<sup>17</sup> Communication No 819/1998: Ireland 26 April 2001, *Kavanagh v Ireland*, UN Doc.: CCPR/C/71/D/819/1998.

<sup>18</sup> Communication No 819/1998: Ireland 26 April 2001, *Kavanagh v Ireland*, UN Doc.: CCPR/C/71/D/819/1998.

<sup>19</sup> *Op cit*, at p. 6.

<sup>20</sup> Report of the Committee to review the Offences against the State Acts 1939-1998 and related matters, available at <http://www.inis.gov.ie/en/JELR/hederman%20report.pdf/Files/hederman%20report.pdf> (last accessed 4 April 2011).

<sup>21</sup> *Op cit*, decided by the UN Human Rights Committee.

However, importantly, the Hederman Report recommended the review of cases before they are transferred to the Special Criminal Court against “reasonable and objective” criteria, as recommended by the UN Human Rights Committee.<sup>22</sup> Moreover, the Hederman Committee recommended that the retention of the Court be kept under regular review, that certain aspects of the Offences against the State Acts be removed and that judges’ traditional guarantees with regard to tenure, salary and independence be assured.<sup>23</sup>

7. In consideration of Ireland’s second periodic review under the International Covenant on Civil and Political Rights (ICCPR) (in 2000), the Human Rights Committee recommended that the jurisdiction of the Special Criminal Court should cease and that all criminal procedures should be aligned with article 9 and article 14 ICCPR.<sup>24</sup> However, in 2005, the law was amended to allow for the creation of further non-jury courts.<sup>25</sup> In consideration of Ireland’s third periodic review under ICCPR, the Human Rights Committee recommended that Ireland:

[C]arefully monitor, on an ongoing basis, whether the exigencies of the situation in Ireland continue to justify the continuation of a Special Criminal Court with a view to abolishing it. In particular, it should ensure that, for each case that is certified by the Director of Public Prosecutions for Ireland as requiring a nonjury trial, objective and reasonable grounds are provided and that there is a right to challenge these grounds.<sup>26</sup>

8. In 2009, another amendment to the law further expanded the remit of the Special Criminal Court. Section 8 of the Criminal Justice (Amendment) Act 2009, declared that the ordinary courts are “inadequate to secure the effective administration of justice”<sup>27</sup> and extended the range of offences eligible for trial at the Special Criminal Court to include the offences of directing a criminal organisation, participation or contribution to certain activities and the commission of an offence for a criminal organisation.<sup>28</sup> Discretion remains with the DPP in the 2009 Act (albeit that there is now to be a presumption in favour of the use of the Special Criminal Court) and no clear referral grounds are stipulated in the legislation. The protection of jury members and witnesses was mooted as the reason to extend the remit of the Special Criminal Court. However, the issue of witness intimidation will not be solved by the use of the Special Criminal Court as witnesses will still have to give evidence in court.

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<sup>22</sup> *Op cit*, paras 9.76 and 9.77.

<sup>23</sup> *Op cit*, para. 9.39.

<sup>24</sup> Concluding Observations of the Human Rights Committee: Ireland: 24/07/2000, UN Doc: A/55/40, paras. 422-451, para. 16.

<sup>25</sup> Section 53 of the Criminal Justice (Terrorist Offences) Act 2005 amends section 49 of the 1939 Act.

<sup>26</sup> Concluding Observations of the Human Rights Committee: Ireland: 30/07/2008, UN Doc: CCPR/C/IRL/CO/3, para. 20.

<sup>27</sup> Section 8(1).

<sup>28</sup> Section 8 (1).



Rather, the protection of witnesses should be tackled by putting in place measures designed to protect their identities; if necessary, in addition to Garda protection operations.<sup>29</sup>

#### **Recommendations:**

- **Claimants with a human rights or public interest element to their case should be entitled to apply for protective cost orders.**
- **The Special Criminal Court should be abolished.**

#### **2.1 National Human Rights Infrastructure**

9. The State-funded Irish Human Rights Commission<sup>30</sup> and Equality Authority<sup>31</sup> have powers that appear extensive on paper but are deficient in practice. In 2008, their modest budgets were disproportionately cut by 32% and 43% respectively, further constraining their independence and efficiency, contrary to recommendations of the Human Rights Committee.<sup>32</sup> The National Consultative Committee on Racism and Interculturalism,<sup>33</sup> which advised the Government on racism and interculturalism, was closed down in 2008 while a similar fate befell the Combat Poverty Agency.<sup>34</sup>

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<sup>29</sup> Moreover, speaking at the Annual Prosecutors' Conference 2009, the DPP raised an important point in relation to the participation of the ordinary citizen in the criminal justice system through service on juries. This, he said, "imports a degree of democratic legitimacy into the system". Hamilton, J., (23 May 2009), "Opening Address" at the 10<sup>th</sup> Annual National Prosecutors' Conference, Dublin Castle Conference Centre, at p. 2. For more information on witness protection, see Irish Council for Civil Liberties, *Combating Organised Crime and respecting the Rules of Law: Human Rights Based Alternatives to the Criminal Justice (Amendment) Bill 2009*, available at [www.iccl.ie](http://www.iccl.ie) (last accessed 29 March 2011).

<sup>30</sup> The Irish Human Rights Commission was established under the Human Rights Commission Acts 2000 and 2001 as a State-funded agency with a role to protect and promote the human rights of everyone in Ireland. See <http://www.ihrc.ie>.

<sup>31</sup> The Equality Authority was established under the Employment Equality Acts 1998 with a mandate to address discrimination under nine groups which are covered by the legislation. See <http://www.equality.ie>.

<sup>32</sup> The Chief Executive Officer of the Equality Authority and six board members resigned in protest amid allegations that the Department of Justice, Equality and Law Reform, as it then was, was punishing the Authority for its successful discrimination challenges against public bodies. Hickey, Shane (12 December 2008) "Equality Authority Chief quits after €2.5 million Budget Cut", *Irish Independent*, available at: <http://www.independent.ie/national-news/equality-authority-chief-quits-after-836425m-budget-cut-1572746.html>. Also refer to Coulter, Carol (12 December 2008) "Why was the CEO a beacon of equality forced to step down?", *Irish Times*, available at: <http://www.irishtimes.com/newspaper/opinion/2008/12/12/1228864714150.html>. The budget of the Irish Human Rights Commission was reduced by 32% in the same period. Source: Irish Human Rights Commission (November 2010) *Submission to the UN CERD Committee on the Examination of Ireland's Combined Third and Fourth Periodic Reports*, available at, <http://www.ihrc.ie/download/pdf/20101210101458.pdf>.

<sup>33</sup> The National Consultative Committee on Racism and Interculturalism (NCCRI), a private limited company, was set up by the Department of Justice, Equality and Law Reform, as it then was, as a partnership body on racism and interculturalism. It ceased operating in December 2008 when its funding was cut. The NCCRI was not replaced. See <http://www.nccri.ie>.

<sup>34</sup> The Combat Poverty Agency was a State agency that worked for the prevention and elimination of poverty and social exclusion. The Agency is now closed and its work has been partially subsumed into the Social Inclusion Division of the Department of Community, Equality and Gaeltacht Affairs. See <http://www.cpa.ie>.

Ostensibly their roles were subsumed into Government departments (mainly, the Department of Community, Equality and Gaeltacht Affairs); however, their functions have not been reallocated in their entirety.<sup>35</sup>

**Recommendation:**

- **Reform the current State-funded human rights and equality bodies to produce a more coherent and effective institutional framework for the protection and promotion of human rights.**

## **2.3 Implementation of international human rights law**

### **(a) European Convention on Human Rights Act 2003**

10. The European Convention on Human Rights (ECHR)<sup>36</sup> was given further effect in Irish law via the European Convention on Human Rights Act 2003 through a weak interpretative model.<sup>37</sup> Every organ of the State must perform its functions in a manner compatible with the State's obligations under the Convention;<sup>38</sup> however, there is a minimalist remedy in the form of a declaration by the Irish High Court that a law or act of a public body is incompatible with the Convention.<sup>39</sup>

### **(b) Treaty Monitoring Bodies**

11. Ireland often fails to submit reports to UN human rights bodies within specified timeframes.<sup>40</sup> Recommendations from the Treaty Monitoring Bodies (TMBs) are rarely implemented and there are no institutional mechanisms for follow-up.

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<sup>35</sup> Amongst its other functions, the National Consultative Committee on Racism and Interculturalism was the National Focal Point reporting on racism and related forms of intolerance to the European Union Fundamental Rights Agency (FRA). This function is now performed by the Irish Council for Civil Liberties.

<sup>36</sup> The European Convention on Human Rights was given further effect in Irish law on account of an obligation under the Good Friday (Belfast) Agreement, 1998. The Agreement is a multi-party document that commits all political parties on the island of Ireland to democratic and peaceful means of resolving differences. In Chapter 6, the Irish Government agreed to examine the incorporation of the ECHR, available at <http://www.dfa.ie/uploads/documents/Anglo-Irish/agreement.pdf> (last accessed 29 March 2011).

<sup>37</sup> The European Convention on Human Rights Act, 2003 is available at <http://www.irishstatutebook.ie/2003/en/act/pub/0020/print.html> (last accessed 29 March 2011). The Government favoured this model as it viewed direct incorporation as being "undesirable" and "unnecessary" according to the former Minister for Justice, Equality and Law Reform (2002-2007), Mr Michael McDowell, who brought forward the 2003 Act. Source: McDowell, (2008) "The European Convention on Human Rights Act, 2003 Embarks on its Fifth Year", presentation delivered to the ECHR Conference organised by the Bar Council on 9 April 2008.

<sup>38</sup> Section 3, European Convention on Human Rights Act 2003.

<sup>39</sup> Section 5, European Convention on Human Rights Act 2003.

<sup>40</sup> Ireland ratified CAT in 2002 but only submitted its first report to the CAT in 2009. Ireland's report to ICESCR was due in 2007 but has not yet been submitted. This creates severe work planning difficulties for NGOs and civil society groups that wish to engage with the TMB process.

Concluding Observations are not widely disseminated nor have they been regarded as binding by Government Ministers.<sup>41</sup>

**(c) Application of international human rights law: *McD v. L. & anor***

12. The Supreme Court has recently declared that the international human rights obligations undertaken by a Government arise under international law and not national law.<sup>42</sup> While the judgment referred specifically to the ECHR, the judgment has clear implications for the scope of application of international human rights standards within Irish law. In writing for the majority, Chief Justice Murray stated that the ECHR is not generally part of domestic law and is not directly applicable in Ireland.<sup>43</sup> As obligations reside at international level, in principle the State is not answerable before the national courts for a breach of an obligation under the ECHR unless express provision is made in national legislation for such liability (which the ECHR Act 2003 does not do).<sup>44</sup> Consequently, according to the Chief Justice, the Convention does not of itself provide a remedy at national level for victims whose rights have been breached under the ECHR. Furthermore, orders or declarations of the European Court of Human Rights are not enforceable at national level unless national law makes them so. According to the Court, this is the case even though a contracting State may be in breach of its obligations under Article 13 if it fails to ensure that everyone whose rights and freedoms as set out in the Convention has any effective remedy for their breach by the State.<sup>45</sup> This has serious implications for the effective performance of duties and protection of rights under CAT (and other UN treaties) in Irish law. For example, in relation to the United Nations Convention on the Rights of the Child, the Chief Justice stated that the Convention:

[D]oes not envisage its adoption as a part of the domestic law of ratifying states but rather that the states would ensure that their national law or administrative practices provide protection for the rights specified in the Convention. Its effective implementation is politically supervised by specialised agencies of the United Nations such as the United Nations Children’s Fund and by the fact that each state must submit periodic reports comprehensively explaining the manner and extent to which that convention has been implemented by national measures. Again, these are obligations owed in international level and direct applicability of the Convention in national law is not contemplated.<sup>46</sup>

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<sup>41</sup> On 28 June 2005, in response to a Parliamentary Question on the status of a CERD recommendation, the then Minister for Education and Science, Ms Mary Hanafin, downplayed its significance. She stated that: “On 10 March last, the United Nations Committee on the Elimination of Racial Discrimination did not issue a judgment imposing an obligation on the Irish State to promote the establishment of multidenominational schools. Rather the committee encouraged Ireland to promote the establishment of nondenominational or multidenominational schools”. This response is available at <http://www.kildarestreet.com/wrans/?id=2005-06-28.2631.0> (last accessed 4 April 2011).

<sup>42</sup> *McD v. L. & anor* [2010] 1 I.L.R.M. 461, available at <http://www.courts.ie/Judgments.nsf/bce24a8184816f1580256ef30048ca50/ce14854be09476c880257688003a0313?OpenDocument> (last accessed 29 March 2011).

<sup>43</sup> *Op cit*, p. 7.

<sup>44</sup> *Ibid*, p. 9.

<sup>45</sup> *Ibid*, p. 10.

<sup>46</sup> *Ibid*, p. 11.

#### Recommendations:

- **The European Convention on Human Rights should be fully incorporated into Irish law.**
- **All UN treaties, including optional protocols, should be fully incorporated into Irish law.**
- **An institutional oversight mechanism for example, a Parliamentary Committee or Cabinet Sub-Committee, should be assigned responsibility to monitor the implementation of TMB recommendations.**

#### 2.4 Criminal Justice (United Nations Convention against Torture) Act 2000

13. CAT is one of the few international human rights treaties which has been given further effect in Irish law.<sup>47</sup> Certain sections of CAT were incorporated into Irish law through the Criminal Justice (United Nations Convention Against Torture) Act 2000, including Articles 1, 2, 3, 4, 5, 6 and 7. However, not all aspects of CAT have been directly incorporated, in particular: Article 8 (including offences related to torture in extradition treaties and law); Article 9 (co-operation with states to bring torturers to justice); Article 10 (obligation to train law enforcement and medical personnel about the prohibition of torture and ill-treatment); Article 12 (prompt and impartial investigation where there is reasonable ground to believe that torture or ill-treatment has taken place); Article 13 (right to complain for individuals who make allegations of torture and ill-treatment); Article 14 (right to fair and adequate compensation and full rehabilitation for persons subjected to torture) and Article 15 (evidence extracted through torture is admissible in proceedings).<sup>48</sup>

14. The Criminal Justice Act 2006 amended the definition of torture under Section 1 of the Criminal Justice (United Nations Convention against Torture) Act 2000, limiting torture under the Act to refer only to those acts or omissions which are related to the actions of a public official.<sup>49</sup> However, in his 2008 Report to the Human Rights Council, the Special Rapporteur against Torture was clear that each State has an obligation to protect people within its jurisdiction from torture and ill-treatment committed by private individuals, if there was consent and acquiescence by a public official.<sup>50</sup> The amendment to the 2000 Act narrowing the definition of torture fails to conform to this standard.<sup>51</sup>

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<sup>47</sup> *Op cit*, p. 23.

<sup>48</sup> The State Report “rejects any such criticism” regarding the incorporation of CAT on pages 80 and 81 of the State Report. However, this Alternative Report demonstrates where gaps remain and that the State’s obligations under CAT remain unfulfilled in Irish law.

<sup>49</sup> Section 186 of the Criminal Justice Act 2006.

<sup>50</sup> *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak (A/HRC/7/3 of 15 January 2008)*, at para 31, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/101/61/PDF/G0810161.pdf?OpenElement> (last accessed 25 March 2011).

<sup>51</sup> See section 3 on Non-refoulement for more information on this.

**Recommendation:**

- **Amend the Criminal Justice (United Nations Convention against Torture) Act 2000 to incorporate Articles 8, 9, 10, 12, 13, 14, 15 into Irish law and repeal section 186 of the Criminal Justice Act 2006.**

**2.5 Optional Protocol to the UN Convention against Torture**

15. Ireland signed the Optional Protocol to the UN Convention Against Torture (OPCAT) on 2 October 2007 but it has not yet ratified the instrument. Ireland's non-ratification of OPCAT is at variance with its Belfast/Good Friday Agreement 1998<sup>52</sup> commitment to guarantee equivalency of human rights protection in both legal jurisdictions on the island of Ireland. The United Kingdom (UK) Government ratified OPCAT including in relation to Northern Ireland on 10 December 2003.

16. Some inspection mechanisms exist in Ireland;<sup>53</sup> however, none of these have the full set of functions and powers required to be National Preventative Mechanisms (NPMs) under OPCAT, nor do they cover all places of detention. In order to ensure that the State's obligations under OPCAT can be respected, Ireland should immediately engage in a participative process to identify and/or create an effective mechanism or mechanisms with the capacity and resources to function as an NPM. Once it is clear that Ireland has the capacity to meet its obligations under OPCAT, ratification of the Optional Protocol should follow within a clearly-specified timeframe.

**Recommendations:**

- **The Government should immediately engage in a participative process to identify and/or create an effective mechanism or mechanisms with the capacity and resources to function as an NPM.**
- **Once it has been clearly established that Ireland has the capacity to meet its obligations under OPCAT, the Optional Protocol should be ratified by Ireland within a clearly-specified timeframe.**

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<sup>52</sup> The Agreement is a multi-party document that commits all political parties on the island of Ireland to democratic and peaceful means of resolving differences.

<sup>53</sup> For example, the Garda Síochána Inspectorate, Garda Síochána Ombudsman Commission, Inspectorate of Mental Health Services, Inspectorate of Prisons and Places of Detention, , Office of the Chief Inspector for Social Services, Office of the Ombudsman for Children and Prison Visiting Committees.

### 3. Extraordinary Rendition

#### Article 3 CAT

No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he/she would be in danger of being subjected to torture.

17. The State Report notes that the "Government is completely opposed to the practice of so-called extraordinary renditions" and that the assurances received from the US authorities are "specific that prisoners have not been transferred through Irish territory, nor would they be, without our permission".<sup>54</sup>
18. Reports by both the European Parliament and the Council of Europe have expressed serious concern about the use of Irish airspace and Irish airports as part of a CIA "rendition circuit" of unlawful detentions and illegal prisoner transfers.<sup>55</sup> The Report by the European Parliament names a number of people who were transferred through Irish airports for this purpose. According to the Council of Europe Report (the "Marty Report"), Ireland could be held responsible for "active or passive collusion (in the sense of having tolerated or having been negligent in fulfilling the duty to supervise) - involving secret detention and unlawful inter-state transfers of a non-specified number of persons whose identity so far remains unknown".<sup>56</sup> Details of searches of flights, if any, by Irish authorities are not made public and no independent inquiry has been initiated to establish whether Irish airports assisted in the rendition process. Contrary to General Comment No. 2 to CAT,<sup>57</sup> the State continues to argue that it is entitled to rely on diplomatic assurances from the United States that Irish airports have not been used to facilitate rendition.<sup>58</sup>
19. In his report of April 2008, the Council of Europe's Commissioner for Human Rights, Thomas Hammarberg recommended that the Irish Government "review the current inspection and monitoring arrangements in Ireland with a view to ensuring that effective and independent investigations are carried out into any serious allegation of extraordinary rendition."<sup>59</sup>

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<sup>54</sup> *Op cit*, p. 79.

<sup>55</sup> European Parliament Report: RR\382246EN.doc of 30 January 2007, paras. 121-126. Council of Europe, Committee on Legal Affairs and Human Rights: Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states AS/Jur (2006) 16 Part II, 7 June 2006, para. 289.

<sup>56</sup> Council of Europe, Committee on Legal Affairs and Human Rights: Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states AS/Jur (2006) 16 Part II, 7 June 2006, para. 289.

<sup>57</sup> Committee against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 2: Implementation of article 2 by States parties, 24 January 2008, UN Do.: CAT/C/GC/2.

<sup>58</sup> Department of An Taoiseach, Speech by Noel Treacy, former Minister for Europe: Seanad Private Members' Motion: 31 January 2007.

<sup>59</sup> Recommendation 34, *Report by the Commissioner for Human Rights Mr Thomas Hammarberg on Ireland 26-30 November 2007*, COE: Strasbourg.

In response the Irish Government indicated that it was “confident that under international law, it is fully entitled to rely on the categorical and absolute assurances secured from the United States Government that they have not engaged in extraordinary rendition through Ireland.”<sup>60</sup> It also mentioned that it does not intend to commission any review of current inspection monitoring arrangements.

20. In December 2007, the Irish Human Rights Commission published a report charting the actions of the Irish Government with respect to complaints made that extraordinary rendition flights had been landing in the State. The report set out a detailed review of Irish aviation law and the State’s international human rights obligations with regards to the suspected illegal transfer of prisoners. The Commission made a number of recommendations to the Irish Government including that, an effective inspection regime should be introduced as a matter of urgency; the recommendations of the Marty Report and the European Parliament’s Temporary Committee on the issue of ‘extraordinary rendition’ be implemented; and, the Optional Protocol to the UNCAT should be ratified without delay and an effective national preventive mechanism introduced.<sup>61</sup> In response, the former Minister for Foreign Affairs stated, among other things, that the report had produced no new information or specific allegations and that under international law the State “is fully entitled to rely on the categorical and absolute assurances secured from the United States Government at the highest level that they have not engaged in extraordinary rendition through Ireland”.<sup>62</sup>
21. In 2008, the Human Rights Committee recommended that Ireland should exercise the “utmost care in relying on official assurances”. The Committee further recommended that the State “should establish a regime for the control of suspicious flights and ensure that all allegations of so-called renditions are publicly investigated”.<sup>63</sup> The State Report references the planned work of a Cabinet Committee on Aspects of International Human Rights but does not give any information on outputs or determinations of the Committee.<sup>64</sup> It is understood that this is because this Committee has produced no outputs and made no determinations; certainly, the Irish Government’s stated policy in relation to combating extraordinary rendition has not altered since the State Report was submitted.

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<sup>60</sup> *Ibid.* Irish Government’s response to the Commissioner’s Recommendation no. 34.

<sup>61</sup> Irish Human Rights Commission, (December 2007), *‘Extraordinary Rendition’: A Review of Ireland’s International Human Rights Obligations*, available at [http://www.ihrcc.ie/download/pdf/ihrcc\\_rendition\\_report\\_emb.pdf](http://www.ihrcc.ie/download/pdf/ihrcc_rendition_report_emb.pdf) (last accessed 3 April 2011).

<sup>62</sup> Statement by the former Minister for Foreign Affairs, Dermot Ahern, in response to Irish Human Rights Commission Report on Extraordinary Rendition, (11 December 2007), available at <http://www.irishembassy.jp/home/index.aspx?id=37641> (last accessed 3 April 2011).

<sup>63</sup> Concluding Observations of the Human Rights Committee: Ireland, 30 July 2008, UN Doc CCPR/C/IRL/CO/3, para 11.

<sup>64</sup> *Op cit*, p. 79.

**Recommendation:**

- **Appropriate legally-binding measures should be put in place to ensure that, in the event that a reasonable suspicion arises that a particular aircraft may be engaged in the practice of rendition, the relevant authorities are required to act expeditiously to discharge their positive obligations under the Convention Against Torture, having regard to other relevant regional standards, including the jurisprudence under the European Convention on Human Rights and Fundamental Freedoms and the standards elaborated by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).**



## 4. Non-refoulement and Deportation

### Article 3 CAT

No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he/she would be in danger of being subjected to torture.

22. The State Report lists the legislation and jurisprudence applicable under Irish with regards to non-refoulement and the return of a person to another State.<sup>65</sup> However, the report fails to adequately explain or demonstrate the concrete steps that it takes to ensure that people are not at risk of refoulement within the Irish asylum, protection and immigration system.

### 4.1 Persons seeking Protection

#### (a) Ports of Entry

23. As of 30 November 2010,<sup>66</sup> a total number of 2,811 people had been refused leave to land in 2010;<sup>67</sup> some 284 people were subsequently permitted to enter the State in order to apply for protection, meaning that 2,527 people were recorded as being returned to other destinations from ports of entry in Ireland during 2010.<sup>68</sup> However, there is no independent oversight of decisions to refuse leave to land at ports of entry. Consequently, as matters stand, it is not possible to verify whether or not the 2,527 people concerned may have included some other individuals with potentially valid protection claims. Current practice is that persons refused leave to land are removed from the State on the next available passenger flight by the carrier concerned to the known airport of origin of the passenger.<sup>69</sup> However, the Garda National Immigration Bureau (GNIB) may temporarily detain foreign nationals prior to their removal, if such persons are to be kept overnight or for a period of a few days (until the next available flight to their known airport of origin) they may be transferred to prison.

24. The State Report refers to the training delivered to immigration officers and the GNIB in relation to their obligations to assist asylum seekers.<sup>70</sup> A recent inquiry report by the Irish Human Rights Commission highlights the experience of a valid visa-holder who was refused entry to the State and eventually deported. The person was arrested and detained by the Gardaí and taken to Mountjoy Prison where he was imprisoned in a holding cell for three nights.

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<sup>65</sup> *Op cit*, pp. 28-32.

<sup>66</sup> Latest figures available. Parliamentary Question, 16 December 2010, Vol. 725 No. 3, Written Answers.

<sup>67</sup> Under the Immigration Act 2004.

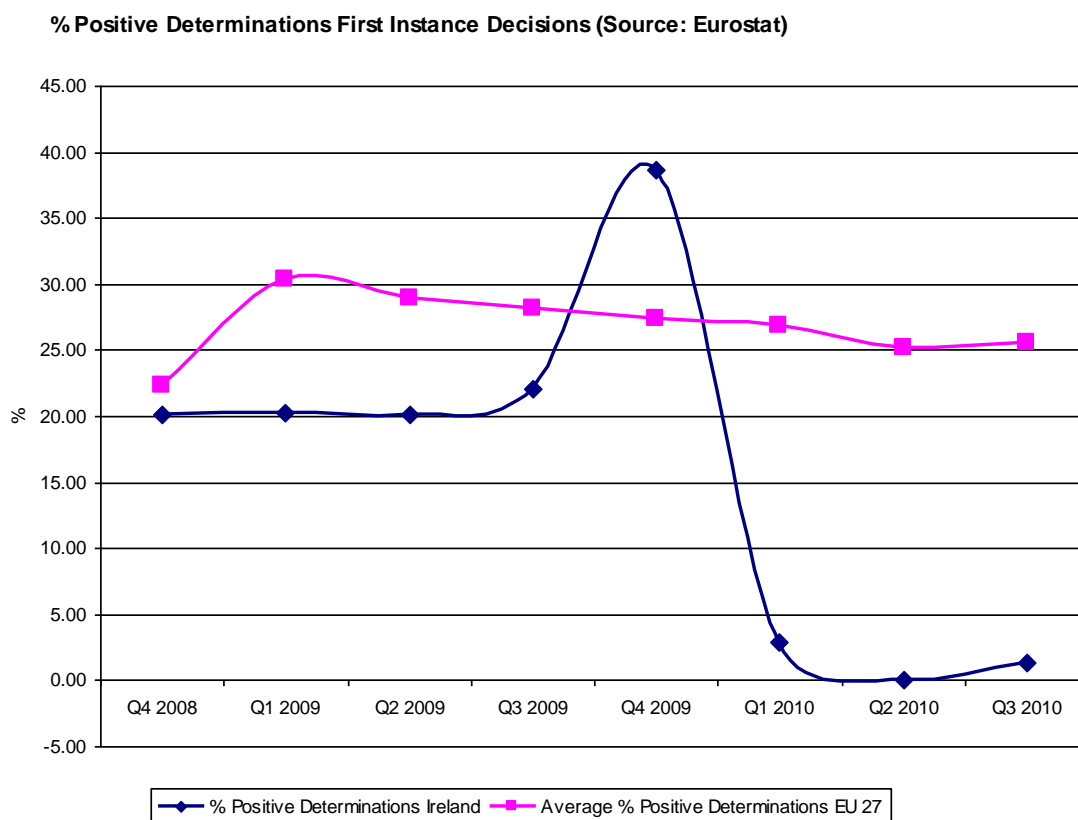
<sup>68</sup> Under the Refugee Act 1996, as amended.

<sup>69</sup> Irish Human Rights Commission, (January 2009), Report on an *Enquiry into the Treatment of a Visitor Refused Leave to Land in the State*, at para 6.16, available at <http://www.ihrcc.ie/download/pdf/2ndenquiryreportjan09.pdf> (last accessed 5 April 2011).

<sup>70</sup> *Op cit*, p. 77.

He was then forcibly removed to the UK (from where he was sent to Kuwait, eventually arriving back in Pakistan nearly two weeks after his arrival in Dublin airport). Noting the absence of any effective remedy to question such removal decisions made by immigration officials, the Commission indicates that “the lack of safeguards and any oversight apart from a theoretical judicial remedy must place in doubt whether the complainant and others in a similar situation had an effective remedy available to them under Article 13 and Article 2(3) of the ICCPR, particularly when safeguards against repetition cannot be ensured”.<sup>71</sup>

**(b) Protection Determination System**



**Graph 1**

25. Graph 1. shows the trend over the last eight quarters (since the end of 2008) for positive first instance decisions made for refugee status, subsidiary protection or humanitarian reasons in Ireland, compared with the average of European Union (EU) States.<sup>72</sup>

<sup>71</sup> *Ibid*, para. 9.9.

<sup>72</sup> [http://epp.eurostat.ec.europa.eu/portal/page/portal/population/publications/migration\\_asylum](http://epp.eurostat.ec.europa.eu/portal/page/portal/population/publications/migration_asylum) (last accessed 24 February 2011).

On average, Ireland made positive determinations in 24% of decisions in 2009, which was slightly below the EU average of 27% for the same period. However, in 2010, Ireland dropped far below the EU average of 25.8% with an average of only 1.4% positive determinations made. For example, in the months of December,<sup>73</sup> April<sup>74</sup> and May 2010<sup>75</sup> not a single positive determination was made by the Office of the Refugee Appeals Commissioner (ORAC). It is difficult to explain this decrease in positive determinations by a differential country of origin caseload as the country profile for asylum applications over the period concerned did not significantly change.<sup>76</sup> Moreover, contrary to reported assertions by a Department of Justice and Equality spokesperson that “the reason for this is that Ireland does not operate a single procedure and therefore our recognition rate does not include subsidiary protection decisions and decisions made for humanitarian reasons at first instance,”<sup>77</sup> the EUROSTAT statistics concerned *do* include subsidiary protection and humanitarian reason decisions reported to them by the national authorities.

26. As a matter of fact, Ireland currently has the lowest level of positive asylum determinations in the EU 27, having recently fallen behind Greece.<sup>78</sup> This trend is continuing: for example, in January 2011, five applications for refugee status out of a total of 133 applications received positive determinations;<sup>79</sup> while, eight applications were recommended for refugee status in February 2011 from a total number of 125.<sup>80</sup>

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<http://www.orac.ie/pdf/PDFStats/Monthly%20Statistics/2010/2010%2012%20December%20ORAC%20monthly%20Report.pdf> (last accessed 4 April 2011).

<sup>74</sup> [http://www.orac.ie/pdf/PDFStats/Monthly%20Statistics/2010/04\\_ORAC\\_Monthly.Report\\_Apr.2010.pdf](http://www.orac.ie/pdf/PDFStats/Monthly%20Statistics/2010/04_ORAC_Monthly.Report_Apr.2010.pdf) (last accessed 4 April 2011).

<sup>75</sup> [http://www.orac.ie/pdf/PDFStats/Monthly%20Statistics/2010/05\\_ORAC\\_Monthly.Report\\_May.2010.pdf](http://www.orac.ie/pdf/PDFStats/Monthly%20Statistics/2010/05_ORAC_Monthly.Report_May.2010.pdf) (last accessed 4 April 2011).

<sup>76</sup> See Office of the Refugee Applications Commissioner, <http://www.orac.ie/pages/Stats/2010.htm> (last accessed 24 February 11).

<sup>77</sup> Beesley, Arthur, (30 March 2011), “Nearly all asylum requests rejected”, *Irish Times*, available at <http://www.irishtimes.com/newspaper/ireland/2011/0330/1224293359321.html> (last accessed 4 April 2011) (last accessed 5 April 2011).

<sup>78</sup> Ireland rejected 1,575 applications out of 1,600 application made: Eurostat (statistical office of the European Union), available at [http://epp.eurostat.ec.europa.eu/portal/page/portal/population/publications/migration\\_asylum](http://epp.eurostat.ec.europa.eu/portal/page/portal/population/publications/migration_asylum) (last accessed 24 February 2011). The main groups of asylum applicants were from (in order), Nigeria, China, Pakistan and Afghanistan. See also Beesley, Arthur, (30 March 2011), “Nearly all asylum requests rejected”, *Irish Times*, available at <http://www.irishtimes.com/newspaper/ireland/2011/0330/1224293359321.html> (last accessed 5 April 2011).

<sup>79</sup> Statistics available from the Office of the Refugee Appeals Commissioner, available at <http://www.orac.ie/pdf/PDFStats/Monthly%20Statistics/2011/2011%2001%20January%20ORAC%20monthly%20Report.pdf> (last accessed 4 April 2011).

<sup>80</sup> <http://www.orac.ie/pdf/PDFStats/Monthly%20Statistics/2011/2011%2002%20February%20ORAC%20monthly%20Report.pdf> (last accessed 4 April 2011).

In any jurisdiction in which such an atypically low level of positive determinations is made over a sustained period of time, it is impossible to exclude the risk that some people who may have a well-founded fear of persecution may have been returned to places in which they run a risk of being tortured or otherwise ill-treated. Were it to have occurred, such a situation would be entirely contrary to the State's obligations under Article 3 CAT.

### **(c) Deportation**

27. Section 3 of the Immigration Act 1999 provides that when the Minister for Justice, Equality and Defence intends to make a deportation order against a person, he or she must notify the individual in question and give them 15 working days in order to make representations against their removal. Section 3(6) obliges the Minister to consider certain issues when making a deportation order, including "humanitarian considerations". Notwithstanding general prohibitions against torture and refoulement, the decision-making process with regard to the making of deportation orders is discretionary and not transparent. Furthermore, there is no independent appeals mechanism other than judicial review which can only challenge the decision-making process and not the decision itself.
  
28. In the case of *Lelimo v Minister for Justice, Equality and Law Reform*,<sup>81</sup> the applicant was granted leave to seek judicial review challenging a deportation order on the basis that the former Minister for Justice, Equality and Law Reform<sup>82</sup> had failed to consider whether the removal was compatible with its obligations under section 4 (freedom from torture, inhuman and degrading treatment) of the Criminal Justice (United Nations Convention Against Torture) Act 2000. The Government settled the case before legal argument could be heard and shortly after, the then Minister for Justice, Equality and Law Reform, introduced an amendment via the Criminal Justice Act 2006 to restrict the definition of torture to acts committed by a public official only and prevent any further challenges on this ground.<sup>83</sup>
  
29. Despite the gaps outlined above under the Section 3 procedure, it was the intention of the previous Government to scrap it altogether.

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<sup>81</sup> *Lelimo v Minister for Justice, Equality and Law Reform* [2003] IEHC 78.

<sup>82</sup> Now Minister for Justice, Equality and Defence.

<sup>83</sup> See above at paragraph 15 of section 1.

Section 59 of the Immigration, Residence and Protection Bill 2010<sup>84</sup> provides that where an immigration officer or member of the Garda Síochána is satisfied that a foreign national is unlawfully present in the State or at a frontier of the State, the officer or member may remove the foreign national from the State. Section 59(2) indicates that a foreign national who is removed from the State under this section shall be removed to a territory the officer or member considers appropriate in a range of circumstances.<sup>85</sup>

30. While Section 58 of the Bill provides that a foreign national being removed from the State under these provisions shall not be removed to a territory where there is a risk of refoulement, the Bill does not contain effective safeguards to combat that risk. Moreover, in contrast to the Section 3 procedure described above, there is no notice procedure or formal possibility to review a decision made by an immigration officer or another member of the Gardaí. If such a form of expedited removal were to become part of Irish law, it would inevitably increase the risk that people may, directly or indirectly, be returned to places in which they face a real risk of ill-treatment.

#### **Recommendations:**

- **Independent oversight of decisions to refuse leave to land at ports of entry should be introduced as a matter of urgency.**
- **In order to ensure that Ireland remains in compliance with Article 3 CAT, the Irish authorities should take urgent steps to identify the underlying causes of the steep fall in positive determinations which has taken place since late 2009. In the event that deficiencies are identified in the decision-making process, these should be rectified and the necessary corrective action taken in relation to any cases found to be wrongly decided.**
- **An independent appeals mechanism for immigration-related decisions, including deportation decisions, should be promptly established, as provided under Articles 12 and 13 CAT.**

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<sup>84</sup> This Bill was introduced by the previous administration but remains on the current Government's current Legislative Programme. See Government Legislative Programme for the Summer Session, (5th April, 2011), Section D, available at

[http://www.taoiseach.gov.ie/eng/Taoiseach\\_and\\_Government/Government\\_Legislation\\_Programme/](http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/) (last accessed 6 April 2011).

<sup>85</sup> These include:

- (a) the state where he or she last embarked for the State, if that state can be ascertained;
- (b) where he or she was refused permission to enter the State at a port for the purpose of passing through the port in order to travel to another state, and either—
  - (i) the carrier who would have taken him or her to that other state has refused to do so, or
  - (ii) the government of that other state has refused him or her entry into that state and, in consequence, he or she remains in the State or has been returned to the State, the state where he or she last embarked for the State for the purpose referred to in this paragraph;
- (c) the state or territory, the government or other authorities of which issued any travel document held by him or her;
- (d) the state or territory which appears to the officer or member to be the country of origin of that foreign national.

- **The new Government must ensure that the forthcoming Immigration, Residence and Protection Bill does not include summary removal provisions. All aspects of the Bill must be compliant with Ireland's obligations under international law, including CAT.**

## 5. Prisons

### 5.1 Prison Conditions

#### Article 16(1) CAT

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

31. The State Report to CAT does not provide any information on prison conditions even though in many circumstances they can lead to situations which constitute ill-treatment, contrary to the State's obligations under UNCAT. Particular issues of concern which have a cumulative impact include: (a) overcrowding; (b) lack of in-cell sanitation; (c) inter-prisoner violence and (d) solitary confinement and use of special cells.

#### (a) Overcrowding

32. On 25 January 2011, the prison population was 4,541, representing a doubling since 1997.<sup>86</sup> Despite the largest ever prison-building programme undertaken in Ireland in the last 30 years, overcrowding has increased, raising "real concerns as to the safe and humane treatment of prisoners."<sup>87</sup> Since 1997, more than 1,930 new spaces have been added and new prisons are planned at Thornton Hall in Dublin and Kilworth in Cork, although building has been delayed due to lack of funding.

33. In its 2010 report on Ireland, the CPT noted that "the *de facto* overcrowding, combined with the conditions in certain of the old and dilapidated prisons, raises real concerns as to the safe and humane treatment of prisoners."<sup>88</sup> The Inspector of Prisons, Judge Michael Reilly, assessed the safe custody limits for each of the State's prisons in 2010 and identified an overcrowding level of approximately 120%.<sup>89</sup>

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<sup>86</sup> In 1997 the prison population stood at 2,124. See *Written answers* Department of Justice, Equality and Law Reform: *Irish Prison Service*, 12 January 2011, <http://www.kildarestreet.com/wrans/?id=2011-01-12.2392.0&s=prison+section:wrans> (last accessed 4 April 2011).

<sup>87</sup> *Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 25 January to 5 February 2010*, paragraph 21, p. 15, available at [http://www.cpt.coe.int/documents/irl/2011-03-inf-eng.htm#\\_Toc284508913](http://www.cpt.coe.int/documents/irl/2011-03-inf-eng.htm#_Toc284508913) (last accessed 4 April 2011).

<sup>88</sup> *Ibid*, para 21.

<sup>89</sup> Inspector of Prisons Report on *The Irish Prison Population – an examination of duties and obligations owed to Prisoners 2010*. See *Report on an Inspection of Mountjoy Prison by the Inspector of Prisons Judge Michael Reilly*, 24<sup>th</sup> March 2011, paragraph 2.6, pp. 12-13 where the Inspector states that while the IPS stated bed capacity

Table 1 contrasts the ‘bed capacity’ for each prison as specified by the Irish Prison Service (IPS), the actual number in custody on 23 July 2010 and the recommended safe maximum number that should be imprisoned, according to the Inspector of Prisons.

**Table 1: Occupancy in Irish Jails 23 July 2010**

	Bed Capacity	No. in Custody	Recommended Maximum
Mountjoy (male)	630	728	540
Dóchas Centre	105	140	85
St Patricks	217	210	217 approx (with more activities)
Cork	272	316	194
Limerick (male)	290	322	185
Limerick (female)	20	23	10
Castlerea	351	414	300 (360 short-term)
Cloverhill	431	462	446 (with more activities)
Wheatfield	470	507	378 (465 short-term)
Portlaoise	359	273	359 approx (with more activities)
Arbour Hill	148	151	131 (146 short-term)
Training Unit	107	114	96 (115 short-term)
Midlands	566	568	497 (560 short-term)
Loughan House	160	142	160 (with more activities)
Shelton Abbey	110	108	110+ (with more activities)

34. The Inspector of Prisons has stated that in addition to inappropriate accommodation and threats to prisoner safety, an important factor leading to the conclusion that a prison is overcrowded is the lack of adequate services and regimes.<sup>90</sup> In his view, all prisoners wishing to avail of relevant structured activities are entitled to a minimum of 5 hours per day, five days a week, in addition to out of cell time and recreation time.<sup>91</sup> This is currently not the case in many Irish prisons, where libraries and workshops have been closed owing to low staffing levels.<sup>92</sup>

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Mountjoy Prison was 630, on 8 March 2011 710 prisoners were held there – 137% of capacity based on the Inspector’s safe custody criteria.

<sup>90</sup> Inspector of Prisons Report on *The Irish Prison Population – an examination of duties and obligations owed to Prisoners* 2010, p. 7.

<sup>91</sup> Inspector of Prisons, *The Irish Prison Population – an examination of duties and obligations owed to prisoners*, 2010, p. 19. See *Report on an Inspection of Mountjoy Prison by the Inspector of Prisons Judge Michael Reilly*, (24 March 2011), paragraphs 2.11 and 2.12, pp. 13-14. The Inspector is positive about the provision of enhanced regimes and services at Mountjoy prison and recommends that if new workshops were erected in the A yard, thus ensuring “worthwhile activity for practically all prisoners for five days of each week”, whereby the population at Mountjoy could then be capped at 600.

<sup>92</sup> See *Report on an Inspection of Mountjoy Prison by the Inspector of Prisons Judge Michael Reilly*, (24 March 2011), paragraph 2.12, p. 14 and paragraph 2.60, p. 22. See *Statement by Mr. Juan E Méndez Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 16th session of the Human Rights Council, 7 March 2010, p. 7, where the Special Rapporteur criticised the lack of “any meaningful opportunities for education, work and recreation” in the context of his visits to Jamaican prisons.



35. Given the excessive numbers in prison, the State should develop a strategy to reduce the use of imprisonment and to close the gap between actual prison capacity and prisoner numbers.<sup>93</sup> New prison spaces should not be built, without commensurate investment in services and activities (workshops, educational, recreational etc.) for prisoners. Safe custody limits, in conformity with the recommendations of the Inspector of Prisons' can act as a critical safety check and would clearly establish accountability for overcrowding.

**(b) Slopping Out and In-Cell Sanitation**

36. A quarter of Irish prisoners do not have in-cell sanitation.<sup>94</sup> Many prisoners are required to “slop out” every morning in overcrowded conditions and forced to eat in proximity to the chamber pots. This causes particular suffering to prisoners in shared cells or overcrowded conditions notably in Limerick, Cork and Mountjoy prisons. In “slopping out” prisoners queue at certain times to empty their buckets or pots into slop hoppers, and in some instances, into bins.

37. In 2008, the UN Human Rights Committee called on Ireland to address the “slopping out” of human waste in Irish prisons as a priority issue.<sup>95</sup>

38. In 2010, the CPT discovered prisoners were using plastic bags as toilets in Cork Prison<sup>96</sup> and has consistently called upon the Irish authorities to “eradicate” slopping out from the prison system. It has also demanded action to minimise its degrading effects including the provision of toilet patrols during the night.<sup>97</sup>

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<sup>93</sup> See *IPRT Briefing on Overcrowding in Irish Prisons* available at [http://www.iprt.ie/files/IPRT\\_Briefing\\_on\\_Overcrowding\\_June\\_2010.pdf](http://www.iprt.ie/files/IPRT_Briefing_on_Overcrowding_June_2010.pdf) (last accessed 6 January 2011). The document outlines short, medium and long-term measures for tackling the issue of overcrowding. See “Labour to bring in alternatives to jail for non-violent offenders”, *Irish Times*, 10 January 2011 where Pat Rabbitte TD (now Minister for Communications, Energy and Natural Resources) called for the implementation of the 2009 recommendation by the Inspector of Prisons that no more than 540 prisoners be accommodated at any one time in Mountjoy Prison.

<sup>94</sup> On December 17<sup>th</sup> 2010, 1,003 prisoners out of a total of 4,397 prisoners were required to slop out. See Department of Justice, Equality and Law Reform Parliamentary Question on Prisoner Statistics, 27 January 2011 available at <http://www.kildarestreet.com/wrans/?id=2011-01-27.524.0&s=prison+section%3Awrans> (last accessed 15 March 2011) and see also <http://www.iprt.ie/prison-facts-2> (last accessed 6 April 2011).

<sup>95</sup> Concluding Observations of the Human Rights Committee: Ireland: 24/07/2000, UN Doc: CCPR/C/IRL/CO/3, para 15.

<sup>96</sup> *Op cit*, paragraph 41, p. 26.

<sup>97</sup> *Op cit*, paragraph 48, p. 29.

While some limited refurbishment is occurring in the worst affected prisons,<sup>98</sup> the State does not appear to have any plan to introduce in-cell sanitation across the entire prison estate in a timely manner.

### **(c) Inter-Prisoner Violence**

39. The IPS 2009 Annual Report states that there were a total of 814 incidents of violence in prisons, approximately two incidents per day.<sup>99</sup> In 2006, the CPT deemed Mountjoy Prison, Limerick Prison and St. Patrick's Institution to be "unsafe, both for prisoners and for prison staff" because of inter-prisoner violence<sup>100</sup> and its 2010 report also observed that at Mountjoy Prison: "[s]tabbings, slashings and assaults with various objects are an almost daily occurrence."<sup>101</sup>

40. Overcrowding has a direct effect on increasing incidences of inter-prisoner violence; the proliferation of drugs further fuels the violence in addition to the existence of gangs, poor material conditions and the lack of purposeful activities.<sup>102</sup> Inter-prisoner violence also arises from a failure by State authorities to conduct individualised risk assessments on new prisoners upon admittance.<sup>103</sup> As acknowledged by the Inspector for Prisons, certain prisoners can pose a risk to themselves and to others which needs to be managed. This failure to carry out a risk assessment contributed to the murder of Gary Douch in Mountjoy Prison who was beaten to death in an overcrowded prison cell by a mentally ill prisoner. Refer to Box 1.

41. Regarding the situation of women in prison, high risk women prisoners are accommodated with women prisoners posing little risk.<sup>104</sup>

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<sup>98</sup> See *Report on an Inspection of Mountjoy Prison by the Inspector of Prisons Judge Michael Reilly*, 24<sup>th</sup> March 2011, paragraph 2.29 at p. 17 where the Inspector states: "I am pleased to report that the Irish Prison Service and local management at Mountjoy Prison are taking active steps to end ... [the] practice [of slopping out] in the prison. This is a major step and my strong recommendation is that it should be rolled out throughout the prison" See also paragraph 2.16 at p. 15. Work has begun on refurbishing the C Base and C Division at Mountjoy, where the cells will have their own toilet facilities. There will be 34 single cells in the C Base: 26 cells for committal purposes and 8 for segregation. See also *Statement by Mr Brian Purcell, Director General of the Irish Prison Service on the publication of the CPT's report of its visit to Ireland in 2010*, 10 February 2011, available at <http://www.irishprisons.ie/documents/StatementbyMrBrianPurcellonCPT2010Report.doc> (last accessed 6 April 2011).

<sup>99</sup> Irish Prison Service, *Annual Report 2009*, p. 28.

<sup>100</sup> *Op cit*, paragraph 38, p. 21.

<sup>101</sup> *Op cit*, paragraph 32, p. 21.

<sup>102</sup> *Op cit*, paragraph 38, p.22.

<sup>103</sup> Inspector of Prisons *Report on an Inspection of Mountjoy Prison by the Inspector of Prisons 2009*, para, 5.20, p.3.

<sup>104</sup> Inspector of Prisons, *Standards for the Inspection of Prisons in Ireland – Women Prisoners' Supplement*, 2011 p. 5.

This is compounded by overcrowding in certain women's prisons particularly the Dóchas Centre<sup>105</sup> in Dublin and Limerick Women's Prison.<sup>106</sup>

**Box 1: The Death of Gary Douch**

On 1 August 2006, Gary Douch was beaten to death by another prisoner in a holding cell of the B Basement in Mountjoy. There were five other prisoners present in the cell at the time of the murder but they were threatened not to call for help. The perpetrator, Stephen Egan, was sentenced to life imprisonment after being found not guilty of murder, but guilty of manslaughter by reason of diminished responsibility, after a two day trial in April 2009. Egan had been assessed by the Central Mental Hospital after spending time in Cloverhill Prison, but was placed in the basement holding cell in Mountjoy Prison which contained just three mattresses for seven prisoners - without the anti-psychotic medication prescribed to him at the Central Mental Hospital – because there was no other cell available for him. Mr. Douch had been placed in the holding cell after requesting protection from other prisoners calling into question the adequacy of protection available to prisoners. The killing of Mr. Douch was described by the CPT as “a tragic illustration of the unsafe nature of certain prisons in Ireland.”<sup>107</sup> Criminal proceedings into deaths in custody do not usually provide an opportunity for examination of systemic or contextual issues going beyond the establishment of individual criminal responsibility in cases where a specific assailant can be identified. An independent inquiry into the death of Mr. Douch, chaired by Gráinne McMorrough SC was launched on 23 April 2007 under the Commissions of Investigations Act 2004. The Report has yet to be published.<sup>108</sup>

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<sup>105</sup>Current prison building plans for the Dóchas Centre will see the capacity of women's prisons double from a design capacity of 85 to a bed capacity of 175 by the end of 2011 by creating new accommodation in a former administration block. See Parliamentary Questions, Department of Justice, Equality and Law Reform, Prison Overcrowding, 3 November 2010, available at <http://www.kildarestreet.com/sendebates/?id=2010-11-03.90.0&s=Limerick+Women%27s+Prison#g124.0>.

<sup>106</sup> Recently, the CPT observed that the “single occupancy cells” always occupied two women “and frequently held three, with the third inmate either sleeping on a mattress on the floor or sharing a bed with a cell-mate”, noting that some prisoners alleged that four women had been accommodated in one cell for a few nights in December 2009. *Op cit*, paragraph 42, p. 27.

<sup>107</sup> *Op cit*, p. 22.

<sup>108</sup> See RTÉ News, (16 November 2010), ‘Barrister conducting inquiry not being paid’ available at <http://www.rte.ie/news/2010/1116/douchg.html> (last accessed 19 January 2011). See also Inspector of Prisons, *Guidance on Best Practice relating to the Investigation of Deaths in Prison Custody*, 21 December 2010, paragraph 1.2, p. 5, where it is stated that there is “no consistent procedure for the investigation of prisoners’ deaths across the Irish Prison Service” and that “such investigations did not meet the requirements of international best practice.”

#### **(d) Solitary Confinement and Use of Special Cells**

42. The culture of violence in Irish prisons means that large numbers of prisoners seek to be placed 'on protection'. In December 2009, 972 prisoners - 20% of the prison population - were on protection for their own safety (up from 832 in 2008).<sup>109</sup> The IPS regards the large number of prisoners on protection "as an indicator of the steps taken in individual prisons to ensure the safety of prisoners".<sup>110</sup> It also suggests that most prisoners go on protection at committal stage, because of outside factors such as gang rivalry, drug debts or perceived cooperation with Gardaí.
43. Prisoners on protection are generally moved to a communal landing or wing made up of other vulnerable or protection prisoners.<sup>111</sup> Where individuals are "under such threat that they can have absolutely no contact with other prisoners", they are subjected to a restricted regime.<sup>112</sup> In some instances, this means being locked up for 23 hours a day with limited or no access to educational or recreational facilities. As of 26 January 2011, there were 250 prisoners on 23 hour protection, 26 prisoners on 22-23 hour protection, 164 prisoners on 20-22 hour protection and 60 prisoners on 18-20 hour lock-up in Ireland.<sup>113</sup>
44. Long periods of solitary confinement can cause mental suffering among prisoners particularly those with psychiatric disorders who need to be cared for in proper mental health facilities.<sup>114</sup> While the IPS claims that prisoners are rarely kept in isolation for prolonged periods, the CPT previously found that many people remain on protection for in excess of a year in solitary confinement.<sup>115</sup> Special cells may be necessary but their design should be adapted to their specific use, they should not be used arbitrarily and clear rules must govern their use. However, in 2010, the Inspector of Prisons found that of the overall instances where special cells were used, 25% of that usage was categorised as being for "management purposes".<sup>116</sup>

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<sup>109</sup> Irish Prison Service, *Annual Report 2009*, p. 28 and Irish Prison Service, *Annual Report 2008*, p. 27.

<sup>110</sup> Irish Prison Service, *Annual Report 2009*, p. 28.

<sup>111</sup> Mountjoy, Limerick, Cork, Cloverhill and St Patrick's Institution follow this practice.

<sup>112</sup> Irish Prison Service, *Annual Report*, 2009, p. 28.

<sup>113</sup> Parliamentary Questions, Department of Justice, Equality and Law Reform, Prison Accommodation, 27 January 2011 <http://www.kildarestreet.com/wrans/?id=2011-01-27.528.0&s=prison#g530.0.r> (last accessed 3 April 2011).

<sup>114</sup> The CPT has recently expressed concern that Irish prisons "continued to detain persons with psychiatric disorders too severe to be properly cared for in a prison setting; many of these prisoners are accommodated in special observation cells for considerable periods of time. *Op cit*, paragraph 87, p. 47.

<sup>115</sup> *Op cit*, paragraph 65, p.31. Prompted by the discovery that a prisoner in Wheatfield Prison had been placed on protection against his will and kept in isolation in 'a close observation cell' for almost 10 months, the CPT stressed the need to provide him with regular counselling and some kind of out-of-cell activities.

<sup>116</sup> These cells were used a total of 1592 times between January 2009 and March 2010, ranging from 510 times in Mountjoy, to 16 times in Arbour Hill. On average, they were used 72% for *medical* purposes (from 100% in certain prisons to 24.5% in Mountjoy), 18% for *accommodation* purposes (ranging from 0% in certain prisons to 51.75% in Mountjoy), and 25% for *management* purposes (ranging from nearly 0% in Cork prison to 47% in St. Patrick's Institution). A management purpose relates to an official decision to run the prison in a particular manner, for

45. Prisoners placed in safety observation cells for medical reasons need to be monitored by medical personnel. However, the Inspector of Prisons has noted that safety observation cells are generally monitored by prison officers with inadequate mental health training to deal with vulnerable prisoners.<sup>117</sup> During his investigations into the use of these cells, the Inspector of Prisons found a lack of clear policies for the use of observation cells as well as the failure to keep comprehensive records, in particular regarding medical information.<sup>118</sup> Stressing the need for transparency, accountability and consistency in the use of special cells, the Inspector recommended that appropriate records (comprehensive and standardised across the prison estate) must be kept in each prison relating to the detention of prisoners.<sup>119</sup> Similarly, where a prisoner must be separated from others for disciplinary or security purposes, effective safeguards must be put in place. For example, according to the CPT, a prisoner should be informed of the reasons for the measure taken against him, be given an opportunity to present his views on the matter, and be able to contest the measure before an appropriate authority.<sup>120</sup>

**Recommendations:**

- **The State should take all necessary measures to improve conditions of detention, including reducing overcrowding and setting safe custody limits.**
- **The State must eradicate the “slopping out” of human waste in Irish prisons as a priority issue and set targets to meet this obligation. In the interim, the Irish Prison Service should introduce measures to minimise the effects of slopping out by conducting toilet patrols throughout the night.**
- **The Irish Prison Service should introduce standard risk assessment procedures for all new prisoners upon admittance and they should be placed accordingly.**
- **The recommendations of the Inspector of Prisons for the use of safety observation cells and close supervision cells should be implemented in Irish Prison Service policy, so as to promote a common standard of use across the prison estate. These guidelines should set out clear limits on the length of time prisoners can be held and the provision of services that must be available.**
- **Adequate records must be kept detailing the usage of safety observation and close supervision cells.**

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example, in order to maintain good order and discipline within the prison. See Inspector of Prisons, *Report of an Investigation on the use of ‘Special Cells’ in Irish Prisons 2010*, paragraph 5.6, pp. 20-21.

<sup>117</sup> Inspector of Prisons, *Report of an Investigation on the use of ‘Special Cells’ in Irish Prisons 2010*, p. 13.

<sup>118</sup> *Ibid*, pp. 19 and 24.

<sup>119</sup> *Ibid*, p. 25.

<sup>120</sup> See *2nd General Report on the CPT’s activities covering the period 1 January to 31 December 1991*, available at <http://www.cpt.coe.int/en/annual/rep-02.htm> (last accessed 24 March 2011).

## 5.2 Accountability Procedures<sup>121</sup>

### Article 12 CAT

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

### Article 13 CAT

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

#### (a) Lack of Independent Complaints

46. There is currently no independent system to receive, investigate, and act upon complaints of ill-treatment made by prisoners in Ireland. The State Report notes that prisoners who complain of ill-treatment may complain to the Prison Governor, the Minister for Justice for Justice, Equality and Law Reform, the Director General of the Irish Prison Service or the Prison Visiting Committee.<sup>122</sup> However, neither the Prison Governor nor the Minister for Justice can claim to be impartial adjudicators of complaints and the Prison Visiting Committees have no power to resolve any complaints that they receive. Even where ill-treatment occurs, prisoners are often unwilling to complain due to their lack of faith in the internal complaint procedures.<sup>123</sup> In calling for an independent complaints system for prisoners, the Inspector of Prisons has stated that many prisoners informed him that they had no confidence in the appeals procedure and saw no point in appealing decisions of the Governor.<sup>124</sup>

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<sup>121</sup> Refer to paragraph 74, in Section 6 of the present report for deaths in prisons.

<sup>122</sup> *Op cit*, p. 68.

<sup>123</sup> *Op cit*, paragraph 37, p. 21.

<sup>124</sup> Inspector of Prisons, *Guidance on Best Practice relating to Prisoners' Complaints and Prison Discipline*, 2010, pp. 9 and 19. See also *Report on an Inspection of Mountjoy Prison by the Inspector of Prisons Judge Michael Reilly*, 24<sup>th</sup> March 2011, p. 3.26 at 33, where the Inspector states that he expects all prisoners' complaints to be dealt with transparently, "in accordance with best practice" by 1<sup>st</sup> July 2011 and that proper records will be maintained.

47. The Inspector of Prisons has also been critical of the inadequate records of prisoner complaints across the prison estate and the practice of permitting prison officers against whom allegations of ill-treatment<sup>125</sup> were made to remain in their positions while the complaint was being investigated.<sup>126</sup> He recently stated that “a culture of abuse of prisoners was emerging amongst a small group of prison officers at Mountjoy prison.”<sup>127</sup> According to the State Report, the complaining prisoner “and any relevant witness or witnesses are afforded whatever protection is deemed appropriate including, where necessary, transfer to another part of the prison or to another prison.”<sup>128</sup> The practice of moving a prisoner to another part of the prison or to a different prison is not an appropriate solution where alleged wrongdoing by a prison officer is at issue - wrongdoing which might well amount to torture or inhuman or degrading treatment or punishment under CAT. Instead, where a prisoner alleges ill-treatment at the hands of a prison officer, the prison officer should be suspended from prisoner-related duties pending the outcome of an investigation into the allegation. Prison officers across the entire prison service should also wear identifying marks or numbers to facilitate the efficient investigation of complaints.<sup>129</sup>
48. The CPT has reported that procedural changes in the complaints mechanism of the IPS have taken place.<sup>130</sup>

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<sup>125</sup> See “Prison officers not to face charges of inmate assault”, *The Irish Times* 14 February 2011, available at <http://www.irishtimes.com/newspaper/ireland/2011/0214/1224289736564.html>. Of the 46 prisoner complaints investigated by the Garda team, the Director of Public Prosecutions (DPP) received 23 files making claims of ill-treatment by staff. The DPP directed that no prosecutions would take place in all 23 cases. See *Report on an Inspection of Mountjoy Prison by the Inspector of Prisons Judge Michael Reilly*, 24<sup>th</sup> March 2011, paragraphs 3.12-3.13, p. 27. At paragraph 3.6, p. 25 the Inspector states that he was “satisfied that the Garda Investigation was robust and thorough” and that the correct decision was made by the DPP. At paragraph 3.8, p. 25 he states: “A suspicion of involvement is not sufficient reason for mounting a prosecution. In a number of cases the Gardaí were satisfied that something had happened but because of lack of evidence a prosecution could not proceed.” Problems with evidence-gathering are discussed by the Inspector in paragraph 3.9.1, p. 25. However, at paragraph 2.56 at p. 21 the Inspector referred to the greater use of CCTV cameras at Mountjoy, which could prove vital as an evidence-gathering tool. Also, at paragraph 2.61, p. 22, the Inspector repeated his call to have prison officers across the entire prison service wear “identifying marks or numbers”.

<sup>126</sup> The CPT recently expressed similar concern that a prison officer accused of fracturing an inmate’s nose at the Midlands prison “had not been transferred to other duties which did not bring him into regular contact with prisoners pending the outcome of the ongoing investigations. *Op cit*, paragraph 35, p. 23.

<sup>127</sup> See *Report on an Inspection of Mountjoy Prison by the Inspector of Prisons Judge Michael Reilly*, 24<sup>th</sup> March 2011, paragraph 3.22, p. 32.

<sup>128</sup> *Op cit*, p. 68.

<sup>129</sup> See *Report on an Inspection of Mountjoy Prison by the Inspector of Prisons Judge Michael Reilly*, 24<sup>th</sup> March 2011, paragraph 2.61, p. 22 and paragraph 3.9.1, p. 25.

<sup>130</sup> *Response of the Government of Ireland to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Ireland from 25 January to 5 February 2010*, p. 30. See *Report on an Inspection of Mountjoy Prison by the Inspector of Prisons Judge Michael Reilly*, 24<sup>th</sup> March 2011, paragraph 3.18, p. 29 where the Irish Prison Service Investigation into prisoner complaints revealed that the management response to the allegations of excessive force had been less than satisfactory and the “result

However, no improvement at the procedural level can address the need for an external and independent system and an external complaints system for prisoners should be established as a matter of urgency, ideally in the form of an independent Prisoner Ombudsman.<sup>131</sup> The Inspector of Prisons has suggested that the establishment of an external complaints review mechanism could be modelled on the Garda Síochána Ombudsman Commission or the Ombudsman for Children.<sup>132</sup> Another alternative would be to amend or extend the remit of existing bodies, such as the Office of the Ombudsman.<sup>133</sup>

#### Recommendations:

- **An independent prison complaints system must be established either through the prompt establishment of a Prisoner Ombudsman, or through amending or extending the remit of existing bodies.**
- **Prison staff accused of ill-treatment should be transferred to duties not requiring day-to-day contact with prisoners, pending the outcome of the investigation.**

### 5.3 Health Services

#### Article 16(1) CAT

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

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is the beginnings of a culture of impunity, advantage of which is being taken by a group of staff: a group which may well grow in number unless speedy action is taken to enforce the law.”

<sup>131</sup> Irish Penal Reform Trust, *IPRT Position Paper 7 – Complaints, Monitoring and Inspection in Prisons*, p. 4, available at [www.iprt.ie](http://www.iprt.ie), (last accessed 6 April 2011).

<sup>132</sup> Inspector of Prisons, *Guidance on Best Practice relating to Prisoners' Complaints and Prison Discipline* 2010, p. 18.

<sup>133</sup> Office of the Ombudsman, Ireland *Developing and Optimising the role of the Ombudsman*, 2011, available at <http://www.ombudsman.gov.ie/en/OtherPublications/StatementsandStrategyDocuments/February2011-DevelopingandOptimisingtheroleoftheOmbudsman/>. (last accessed 8 February 2011) The Ombudsman expressed her willingness to address prisoner complaints, as well as all issues relating to immigration, refugees, asylum seekers and naturalisation.



49. As noted by the CPT, the provision of health care services in prisons can help to prevent the “ill-treatment of detained persons, through the systematic recording of injuries and, when appropriate, the provision of general information to the relevant authorities.”<sup>134</sup> In Irish prisons health services are provided through the Healthcare Directorate of the IPS. However, the CPT recently found that doctors in some prisons were not fulfilling contracted hours, even where these hours were already grossly insufficient.<sup>135</sup> The CPT also expressed serious concern about the chaining of a prisoner to a staff member during medical treatment in the Midlands Prison<sup>136</sup> and the fact that a prisoner was forced to undergo withdrawal from heroin while subjected to slopping out in Cork Prison.<sup>137</sup> Overall, medical records were found to be incomplete or lacking in detail,<sup>138</sup> with prisoners not receiving medical examination on admission at Cork or Mountjoy prisons.<sup>139</sup> The mandatory examination and documentation of physical injuries could act as a preventative mechanism and facilitate the investigation of allegations of torture and ill-treatment in prisons.

50. As part of Integrated Sentence Management, more needs to be done to help drug-using prisoners to beat their addiction(s). More drug-free units are crucial in this regard. In its 2009 Annual Report, the Mountjoy Prison Visiting Committee stated that a dedicated structured approach to “reducing and eventually stopping dependency on drugs should be implemented as a priority issue.”<sup>140</sup> The Irish Prison Chaplains have remarked on the fact that some people first use drugs while in prison, sharply criticising the IPS for permitting a situation to occur where “non-drug users are incarcerated alongside drug users, sharing the same spaces. Because of overcrowding, non-drug-users sometimes have to share a cell with others who are using heroin. A considerable number of ex-prisoners report that they never touched drugs before they went into prison but came out heroin addicts.”<sup>141</sup>

#### **Recommendations:**

- **The doctor to patient ratio in the prison system should be reduced to ensure a proper standard of care and the maintenance of adequate medical records. The time attendance of general practitioners at individual prisons should be increased.**
- **An annual report should be published on the state of medical services in the Irish Prison Service.**
- **Drug-free units should be established across the prison estate and the State should ensure that non-drug using prisoners are not accommodated with known drug-users.**

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<sup>134</sup> *Op cit*, para 70, p. 40.

<sup>135</sup> *Op cit*, para 60, p. 35.

<sup>136</sup> *Op cit*, para 65, p.37.

<sup>137</sup> *Op cit*, para 75, p. 43.

<sup>138</sup> *Op cit*, para 67, p. 38.

<sup>139</sup> *Op cit*, paras 68 - 70, pp. 39-40.

<sup>140</sup> Mountjoy Prison Visiting Committee, *Annual Report 2009*.

<sup>141</sup> Irish Prison Chaplains, (November 2009), *Annual Report*, p. 14.

- **A structured approach to reducing and eventually stopping prisoners' dependency on drugs must be developed.**

#### 5.4 Mental Health Treatment

##### Article 16(1) CAT

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

51. In Ireland, there is a particular problem of over-representation of mentally ill prisoners in the remand prison population. Furthermore, studies have shown that 27% of sentenced men and 60% of sentenced women have at least one diagnosed mental illness.<sup>142</sup>

52. The CPT has recently expressed concern that Irish prisons “continued to detain persons with psychiatric disorders too severe to be properly cared for in a prison setting; many of these prisoners are accommodated in special observation cells for considerable periods of time.”<sup>143</sup>

Furthermore, a recent report by the Ombudsman for Children into St. Patrick’s Institution showed that children may be reluctant to speak up about mental health problems for fear of being placed in special observation cells.<sup>144</sup>

53. In his interim report in 2008, the Inspector of Prisons listed mental health issues as one of his main areas of “particular concern” in Irish prisons, stating that prisoners with mental health problems have an *absolute right* to treatment in an appropriate setting, a right which is not respected at present.<sup>145</sup> The placement of individuals with mental health difficulties in prisons places them at greater risk of self-harm and suicide. It also places other prisoners, as well as prison staff, at risk of behaviours that may be caused by mental illness such as heightened levels of violence, as was the case in the tragic incident which led to the death of Gary Douch, discussed above.

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<sup>142</sup> Kennedy, H.G., Monks, S., Curtin, K., Wright, B., Linehan, S., Duffy, D., Teljeur, C. and Kelly, A. (2004), *Mental Illness in Irish Prisoners: Psychiatric Morbidity in Sentenced, Remanded and Newly Committed Prisoners*. Dublin: National Forensic Mental Health Service.

<sup>143</sup> *Op cit*, para 87, p. 47.

<sup>144</sup> *Young people in St. Patrick’s Institution, A report by the Ombudsman for Children’s Office* (2011), available at <http://www.oco.ie/assets/files/St%20Pats%20Report.pdf> (last accessed 3 April 2011).

<sup>145</sup> *Interim Report presented to the Minister for Justice, Equality and Law Reform by Judge Michael Reilly, Inspector of Prisons*, (September 2008), p. 6.

The Dublin-based Court Liaison programme and Prison In-Reach programme have succeeded in diverting prisoners away from prison and the Central Mental Hospital to appropriate community care settings; however, these programmes are not available on a national level. Neither is there a specific diversion programme for children.

54. A 2005 study commissioned by the National Forensic Mental Health Service found that 5.4% of female prisoners in Ireland should be diverted to hospital psychiatric services, whilst as many as 32% of female committals presented with mental health issues requiring psychiatric care.<sup>146</sup> Of these, 16% suffered from a major depressive disorder. Furthermore, women in prison are also more likely to self-harm than male prisoners.<sup>147</sup> The Inspector of Prisons noted that women prisoners are especially vulnerable in the days following committal and states that prison staff must ensure that adequate attention is, therefore, given to newly committed prisoners.<sup>148</sup>

**Box 2: Young People in St Patrick's Institution**

'... you could talk to the Governor, but that means you'd be going on protection ... Just get locked up 23 hours a day.'

'... if you went down there and you said to one of the counsellors 'I'm suicidal, I'm thinking of killing myself' ... they stick you in the pad, do you know what I mean? That's why you don't ... You don't open your mouth about anything like that ... You don't open your mouth.' ..."

Source: A report by the Ombudsman for Children's Office (2011), p. 36

**Recommendations:**

- **The placement of mentally-ill individuals in Irish prisons should cease.**
- **The Court Liaison programme should be extended to operate nationally and a specific diversion system for children at the point of sentencing should be introduced.**

<sup>146</sup> HG Kennedy, S Monks, K Curtin, B Wright, S Linehan, D Duffy, C Teljeur, A Kelly. "Mental health in Irish prisoners: psychiatric morbidity in sentenced, remanded and newly committed prisoners" in (2005) *National Forensic Mental Health Service*, Dublin at [http://www.drugsandalcohol.ie/6393/1/4338\\_Kennedy\\_Mental\\_illness\\_in\\_Irish\\_prisoners.pdf](http://www.drugsandalcohol.ie/6393/1/4338_Kennedy_Mental_illness_in_Irish_prisoners.pdf) (last accessed 31 January11).

<sup>147</sup> Palmer, J., "Special health requirements for female prisoners", in *Health and prisons: a WHO guide to the essentials in prison health*, p. 157.

<sup>148</sup> Inspector of Prisons, *Standards for the Inspection of Prisons in Ireland – Women Prisoners' Supplement*, 2011 p. 9, Standard 233.

## 5.5 Children in Penal Detention

### Article 16(1) CAT

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

#### Box 3: St Patrick's Institution

"St. Patrick's Institution is a "warehouse" for young people, many of whom were broken by those childhood experiences. By entering into a harsh and punitive system, they are further broken down. It is a demoralizing, destructive and dehumanizing experience, with few redeeming features, characterized by idleness and boredom, for young people, who are full of energy, at a critical time in their development."<sup>149</sup>

Source: *Irish Prison Chaplain's Annual Report 2009*, p. 20

55. Children continue to be detailed in St. Patrick's Institution - a medium security prison housing male offenders between the ages of 16 and 21. In 2009, there were a total of 227 children aged 16 and 17 committed to St. Patrick's; this represents a slight decrease on the 2008 figure of 241 children. Although children under 16 years are detained in one of three Children Detention Schools which are run on a care model and have a clear focus on education, boys over 16 years continue to be detained in St. Patrick's which is run on a penal model, an environment considered wholly inappropriate for their needs.

#### (a) Conditions at St Patrick's Institution

56. The CPT recently repeated concerns about the suitability of St. Patrick's Institution for the detention of juveniles due to problems with material conditions, the regime and staffing, and criticized the lack of a clear timetable as to when 16 and 17 year olds would be transferred to a Children Detention School, as committed to by the Government.<sup>150</sup>

57. There is no requirement for staff at St. Patrick's to have qualifications in child care, while the prison regime means the children spend much of the day locked up in a carceral atmosphere that is wholly inappropriate for children. Unlike people in other prisons, young people at St Patrick's are not permitted to wear their own clothes. Moreover, all young people in St Patrick's must speak with visitors through a Perspex screen.<sup>151</sup>

<sup>149</sup> Irish Prison Chaplains, *Annual Report 2009*, p 20.

<sup>150</sup> *Op cit*, paragraph 26, p. 17.

<sup>151</sup> Ombudsman for Children's Office *Young people in St. Patrick's Institution 2011*, where recommendations are made as regards contact with family and the outside world, p. 70.

No other prison imposes such conditions on *all* its prisoners. As regards protection in the juvenile context, the Inspector of Prisons noted in 2009 that 25% of the children at St. Patrick's Institution request to be held "on protection", fearing for their own safety. Being "on protection" in St Patrick's means being locked up for 23 hours a day. The Ombudsman for Children reported on the reluctance of young people at St. Patrick's to admit to experiencing mental health difficulties for fear that they would be placed in "special observation cell".<sup>152</sup> In 2008, the previous Government committed to build a new National Children Detention Facility on the Oberstown campus in Lusk; however, little progress has been made over the past four years. It is imperative that the necessary budgetary means be made available to advance this project.

**(b) Lack of an Independent Complaints Mechanism**

58. Unlike children in the Children Detention Schools, those held in St. Patrick's Institution have no access to an independent complaints mechanism. Given the vulnerability of these children, their lack of access to such a mechanism is of very serious concern. As noted above in the general complaints section, Visiting Committees are appointed by and report to the Minister, not to the Oireachtas, and therefore are not independent. The Ombudsman for Children cannot accept individual complaints from children in prisons or certain places of detention and has repeatedly called for an extension of her remit to accept complaints from such children.

**Recommendations:**

- **Imprisonment of children in St Patrick's Institution must end immediately The planned development of the Oberstown facility should proceed, as a matter of priority, in a timely manner, notwithstanding current economic difficulties.**
- **The remit of the Ombudsman for Children must be extended to allow individual complaints from children held in prison and in detention on the same basis as children detained elsewhere.**

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<sup>152</sup> *Ibid*, p. 55.

## 5.6 Training of Prison Staff

### Article 10(1) CAT

Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

59. To date, the IPS has not organised training for prison staff on their specific obligations under CAT. The Ombudsman for Children's recently recommended that staff training and development at St. Patrick's Institution should cover issues such as child protection policy, procedures and practice<sup>153</sup> and children's rights (among others).<sup>154</sup>

60. In its 2006 Report on Ireland the CPT was highly critical of the fact that insufficient ongoing training was provided to prison officers in the previous ten years, purportedly due to lack of funds due to substantial overtime costs. The CPT recommended that the Irish authorities provide training courses to officers to "assist them in meeting the evolving challenges within the prison system".<sup>155</sup> In 2010, the CPT also recommended that prison officers undergo training on inter-personal communication skills, stating that such skills "permit prison officers to defuse situations which could otherwise become violent, and help to reduce tensions and improve the quality of life in the prison concerned, to the benefit of all."<sup>156</sup> It appears that this recommendation has not been implemented.

### Recommendations:

- **The State party should ensure that law enforcement, judicial, medical and other personnel who are involved in custody, interrogation or treatment or who otherwise come into contact with prisoners are provided with the necessary training with regard to the prohibition of torture.**

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<sup>153</sup> Furthermore, the report recommended the development of protocols between the Irish Prison Service and the HSE to ensure that all child protection standards and practices implemented in the prison comply with the *Children First: National Guidelines for the Protection and Welfare of Children*. Ombudsman for Children Office, *Young people in St. Patrick's Institution 2011*, p. 71

<sup>154</sup> Including building and maintaining relationships with young people, effective handling of peer bullying and intimidation etc., and standard behaviours associated with common psychological and medical conditions that manifest in children in conflict with the law. Ombudsman for Children Office, *Young people in St. Patrick's Institution 2011*, p. 69.

<sup>155</sup> *Report to the Irish Government on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 2 to 13 October 2006* (available at: <http://www.cpt.coe.int/documents/irl/2007-40-inf-eng.pdf>) (last accessed 3 April 2011), p. 21.

<sup>156</sup> *Ibid*, p. 20.

## **5.7 Detention of Migrants in Prisons**

61. Migrants are detained for immigration-related reasons in prison facilities. Refer to paragraph 107 in section 13 of the Report.

## 6. Policing, Detention and Procedural Rights

### Article 10(1) CAT

Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

#### 6.1 Human rights training

62. A number of reports in recent years including from the Garda Síochána Inspectorate and a judicial Tribunal of Inquiry have placed emphasis on the need to enhance Garda training in relation to high-risk policing situations.<sup>157</sup> In 2009, an extensive audit of all training and development within an Garda Síochána took place leading to the publication of *An Garda Síochána Training and Development Review Group Report*.<sup>158</sup>

63. Regarding the place of human rights training within an Garda Síochána, overall the Review Group concluded that the manner in which human rights were factored into training programmes was not systematic<sup>159</sup> and there was a lack of expertise within the force to deliver such training.<sup>160</sup> In particular, the Review Group found that few training manuals have been assessed as ECHR compliant.<sup>161</sup> The Review Group recommended that learning and training within an Garda Síochána should be underpinned by a “fundamental commitment to *human rights and the principles of the European Convention on Human Rights*”.<sup>162</sup>

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<sup>157</sup> Garda Síochána Inspectorate, (February 2007) *Review of Practices and Procedures for Barricade Incidents*; Garda Síochána Inspectorate (November 2007), *Policing in Ireland: Looking Forward*; Garda Síochána Inspectorate (March 2009), *Missing Persons Review*, available at <http://www.garda.ie> and <http://www.gsinsp.ie/> (last accessed 6 April 2011).

<sup>158</sup> Available at <http://www.garda.ie> (last accessed 6 April 2011). The Strategic Human Rights Advisory Committee report (SHRAC, 2008) identified training as a key enabler of human rights compliance. The report noted that the requirement for training goes beyond teaching ECHR legislation but also involves ensuring that training embeds compliance and promotion of human rights in all policing activities.

<sup>159</sup> For example, the interviews conducted by the training review team with the heads of the training schools at the Garda College identified that there were no consistent processes, and insufficient expertise available, to ensure Garda College training materials were ECHR compliant. *Ibid*, p.155.

<sup>160</sup> Many of the contributors to the review considered that training manuals should be evaluated by a human rights/education specialist and that the absence of such an evaluation limited “the organisational capacity to demonstrate appropriate levels of transparent accountability for human rights compliant training”. *Ibid*, p. 72.

<sup>161</sup> *Op cit*, p. 72.

<sup>162</sup> *An Garda Síochána Training and Development Review Group Report*, p. 24. Within the Reserve garda training programme, participants receive an overview of the law on human rights as part of six modules on a sixteen-hour course.



More specifically, it identified the need for an enhanced Training and Development Unit with “sufficient resources, expertise and designated responsibility”, including to “ensure compliance and promotion of human rights in all training.”<sup>163</sup> The Review Group recommended that the Training Development Unit should be reconfigured to comprise four sections including one devoted to human rights<sup>164</sup> and that appropriate expertise in human rights and education should be available within the TDU.<sup>165</sup> In addition, the Review Group recommended the establishment of an expert panel on training and development, which should include an internal human rights expert and have as one of the aims of which would be to ensure ECHR compliance and promotion.<sup>166</sup> In order to meet the recommendation that all training should be compliant to the ECHR (No. 24), the Review Group advised that a human rights specialist be appointed to the Training Development Unit.<sup>167</sup>

64. Very significant progress has been made towards implementing many of these recommendations; the National Training Development Unit has been re-structured and now includes a dedicated human right section. A major investment has been made in human rights proofing training in a range of training areas, including professional development and continuous learning, and a new university-accredited BA Applied Policing uses a best-practice problem based learning approach (PBL).

65. Nonetheless, doubts persist about the extent to which the lessons learned in training are being applied in practice, especially in public order situations. On 7 April 2011, the Garda Commissioner (Chief of the National Police Service) made a public apology for the conduct of police officers involved in policing a long-running public order dispute at the Corrib Natural Gas Project at Bellanaboy Bridge in County Mayo.<sup>168</sup> The transcript of a tape which captured a conversation between a number of officers suggested that they remain uncertain about the legitimate means that may be used when policing public order situations and about the extent to which they may be held accountable for their actions.

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<sup>163</sup> *Op cit*, p. 129.

<sup>164</sup> *Op cit*, p. 129.

<sup>165</sup> *Op cit*, p. 131. To ensure that:

- human rights principles are embedded at the design stage of all new training courses and in the maintenance process of existing courses
- training processes promote human rights principles: this would include training needs analyses, training audits and assessments
- training policies are compliant with the European Convention of Human Rights
- issues of likely contention are identified and managed
- all staff in the NTDU continue to increase their knowledge of human rights in education.

<sup>166</sup> *Op cit*, p. 145.

<sup>167</sup> *Op cit*, p. 155.

<sup>168</sup> “Commissioner Apologises for garda remarks”, (7 April 2011), *RTÉ Television, 6.1 News*, available at, <http://www.rte.ie/news/2011/0407/corrib.html> (last accessed 7 April 2011).

### Recommendations:

- The State should fully implement the recommendations of the An Garda Síochána Training and Development Review Group Report, without delay.
- The Minister for Justice should request the Garda Síochána Ombudsman Commission to examine the practices, policies and procedures of the Garda when policing public order situations, including the manner in which training is translated into practice in the management of incidents of crowd protest or civil disobedience by groups or persons.

### 6.2 Fair procedures and detention in Garda custody

#### Article 7(3) CAT

Any person regarding whom offences are brought in connection with any of the offences referred to in Article 4 shall be guaranteed fair treatment at all stages of the proceedings.

#### Article 11 CAT

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

66. People who are investigated, charged and detained for the purposes of a criminal investigation must be afforded fair procedure rights to prevent against torture or ill-treatment. The State Report notes that the “presumption of innocence and the right of an individual to legal representation is enshrined in Irish Law” and that the “Irish Constitution guarantees the rights of all accused to due process at all stages of the proceedings”.<sup>169</sup> However, there are well-documented gaps in procedural protection for those suspected of crime under the Irish legal system. In this section, the main areas of concern have been organised accordingly:

- (a) Right to silence when questioned in Garda stations
- (b) Access to a lawyer during questioning in a Garda station
- (c) Extension of length of detention, including *habeas corpus*

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<sup>169</sup> *Op cit*, under article 7.

### **(a) Right to silence when questioned in Garda stations**

67. The right to silence is protected under the Constitution and the ECHR. The European Court of Human rights has consistently recognised the right to silence as lying at the heart of the notion of fair procedures under Article 6<sup>170</sup> and has warned that “particular caution was required before a domestic court could invoke an accused’s silence against him”.<sup>171</sup> Nevertheless, since 2006, the right to silence when questioned in a Garda station has been eroded by a series of legislative developments. The Criminal Justice Act 2007 expanded the circumstances under which inferences from silence could be drawn (beyond cases allegedly involving offences against the State and those connected to drug trafficking), to all arrestable offences.<sup>172</sup>

Moreover, in summer 2009, the Criminal Justice (Amendment) Act 2009 further chipped away at the right to silence through the extension of inference-drawing provisions to cover certain organised crimes.<sup>173</sup> Inference drawing provisions have now been extended across a range of offences; however, no new form of Garda caution has been given on foot of these amendments (despite the fact that the Criminal Justice Act 2007 makes provision for Executive Regulations in this respect). As a result, people held in Garda custody are not being informed, in a consistent fashion, of the consequence of remaining silent when questioned. This failure by the Executive to put in place effective procedures to implement legislative changes has created difficult working conditions for the Gardaí, exacerbated the risk of confusion and uncertainty by detained persons, impedes their legal representatives from advising them effectively and ultimately, could lead to miscarriages of justice.

### **(b) Access to legal advice while being questioned**

68. Detained people still do not have the right to have a legal representative present while being questioned by the Gardaí, despite amendments to the law on the right to silence as set out above. The jurisprudence from the European Court of Human Rights is clear regarding access to legal advice, particularly where inferences may be drawn; yet the State has not put measures in place to ensure the fair treatment of those in police custody. In a seminal judgment from 2008, the European Court of Human Rights notes the particular vulnerability of defendants at the investigatory stages of proceedings around the “rules governing the gathering and use of evidence”.<sup>174</sup> The Court continued that “this particular vulnerability can only be properly compensated for by the

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<sup>170</sup> Article 6 of the ECHR protects the right to fair trial. *Heaney and McGuinness v. Ireland*, *op cit*; *Averill v. UK*, *op cit*; *Condon v. UK*, (2001) EHRR 31; *Quinn v. Ireland*, (2001) 33 EHRR 264; *Weh v. Austria*, (2005) 40 EHRR 37; *Shannon v. UK*, (2006) 42 EHRR 31.

<sup>171</sup> *Condon v. United Kingdom*, *op cit*, p. 15.

<sup>172</sup> Defined as an offence carrying the punishment of imprisonment of 5 years or more, where the person is without prior conviction.

<sup>173</sup> Section 9.

<sup>174</sup> [2008] ECHR 36391/02 [Grand Chamber] (27 November 2008), para 54. The *Salduz* case has been followed by a series of similar findings in cases before the European Court of Human Rights.

assistance of a lawyer, whose task it is, among other things, to help ensure respect of the right of an accused not to incriminate himself.”<sup>175</sup>

69. The Government has yet to implement the ECHR requirement to provide access to a lawyer from the first interrogation in order to ensure equality of arms and the prevention of police coercion or oppression.<sup>176</sup> In July 2010, following on from the Sixth Report of the Morris Tribunal of Inquiry,<sup>177</sup> the Government established a Standing Committee to advise on Garda Interviewing of suspects, comprising individuals from State agencies and the legal representative bodies.<sup>178</sup> At present, the Committee is considering the caution to be given to persons in custody and the removal of the need for taking contemporaneous hand-written notes of interviews, amongst other matters.<sup>179</sup> According to the Department of Justice and Equality, the Committee meets on a regular basis and will produce recommendations to the Minister for Justice, Equality and Defence as a result of its deliberations;<sup>180</sup> however, no clear timetable has been published with regards to the Committee’s work.

### **(c) Detention in Garda stations**

70. Detention in Garda stations is governed by the Criminal Justice Act 1984 and by the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987, which sets out the rights available to detained persons including access to medical assistance, rest periods and the treatment of juveniles. However, in recent years, amendments to the criminal law have increased the length of time for which people can be detained without charge in Garda stations. For example, the Criminal Justice Act 2007 broadened the categories of offences for which people can be held in Garda custody for up to seven days, despite the fact that a pre-existing seven-day detention power was rarely, if ever, used.<sup>181</sup> Very few, if any, Garda stations are equipped to hold persons for periods in excess of a couple of days.

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<sup>175</sup> *Ibid.*

<sup>176</sup> *Op cit*, para 55.

<sup>177</sup> The Morris Tribunal was established in 2002 to investigate complaints into the activities of some Gardaí in Donegal. The Tribunal has published five reports detailing its findings in relation to a number of Garda investigations, arrests and detentions. Mr Justice Frederick Morris has reported that he has been “staggered” by the amount of “indiscipline” and “insubordination” that he has found in the Garda force, see *Report on the detention of ‘suspects’ following the death of the late Richard Barron on the 14th of October 1996 and related detentions and issues, Volume 3*, at p. 264, available at <http://www.morristribunal.ie/Narrative.asp-ObjectID=310&Mode=0&RecordID=113.htm> (last accessed 4 April 2011).

<sup>178</sup> See

<http://www.inis.gov.ie/en/JELR/Pages/Minister%20Ahern%20establishes%20Advisory%20Committee%20on%20Garda%20Interviewing%20of%20suspects> (last accessed 4 April 2011)

<sup>179</sup> Written correspondence between Irish Council for Civil Liberties and the Department of Justice and Equality, 6 April 2011.

<sup>180</sup> Written correspondence between Irish Council for Civil Liberties and the Department of Justice and Equality, 6 April 2011.

<sup>181</sup> Section 50.

71. More recently, legislation has been passed to facilitate secret detention hearings. Part 4 of the Criminal Justice (Amendment) Act 2009<sup>182</sup> introduced procedures for District Court hearings to extend the detention of a person under the Offences against the State Act 1939 (as amended).<sup>183</sup> At the judge's discretion, such hearings can now take place completely in private, excluding not only the accused person, but also his or her legal representative. A former Minister for Justice (Dermot Ahern) justified this by claiming that members of organised criminal gangs had been attending detention hearings and deciphering the direction of the investigation from the evidence that was given in court. This provision fundamentally alters the nature of criminal justice in Ireland. It allows for the judge to hear evidence of a Garda of any rank, in private, and without legal representation, in order to justify the continuing detention of a person.
72. This includes answers to questions under cross-examination without either the defendant or his or her legal representative or the prosecutor present.<sup>184</sup> In essence what this means is that a person can be held without knowledge of the grounds on which the judge has agreed to extend their detention in Garda custody. Detention can be based on secret information provided by any member of the Garda Síochána, regardless of his or her seniority or length of service.

**Recommendations:**

- **Irish law should be amended to include appropriate safeguards where inferences are drawn from silence.**
- **People detained in Garda stations should be afforded access to a lawyer during Garda interviews.**
- **Sections 21 – 24 of the Criminal Justice (Amendment) Act 2009, concerning secret detention hearings, should be repealed immediately.**

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<sup>182</sup> Sections 21 – 24.

<sup>183</sup> Section 21.

<sup>184</sup> If the judge considers that there is nothing material in the evidence, the tendering of the evidence will be heard again in open court.

### 6.3 Policing: Right of complaint and for a prompt and impartial investigation

#### Article 12 CAT

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

#### Article 13 CAT

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

73. Despite the assertion in the State Report that the Garda Síochána Ombudsman Commission (GSOC)<sup>185</sup> is a “a model of independent oversight of policing in the state,”<sup>186</sup> a number of issues have emerged in relation to the operation of GSOC since it opened in May 2007 which potentially impact upon its effectiveness. These areas of concern are:

- (a) lack of independence and transparency of the process of appointing members of GSOC
- (b) a proposal that additional categories of cases could be “leased back” to Gardaí for investigation
- (c) extended delays in the handling of investigations, including an investigation “in the public interest”

#### (a) Independence and transparency in appointments

74. On 4 February 2009, the then Minister for Justice, Equality and Law Reform (and former Minister for Foreign Affairs) appointed Dermot Gallagher, recently-retired Secretary General of the Department of Foreign Affairs, as the new chairman of the Garda Síochána Ombudsman Commission following the untimely death of Mr Justice Kevin Haugh. Judge Haugh had, however, signalled his intention to step down from his GSOC role many months previously, and the Government did not prepare an open and transparent recruitment process to find his successor.<sup>187</sup>

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<sup>185</sup> <http://www.gardaombudsman.ie/> (last accessed 6 April).

<sup>186</sup> *Op cit*, p. 54. See also pp. 62 and 63.

<sup>187</sup> In Ireland, the Public Service Management (Recruitment and Appointments) Act 2004 established the Commission for Public Appointments and set out core principles of probity and fairness that should apply in the recruitment of public servants. However, section 7 of the Act specifically excludes positions where the appointment concerned is made by the President or by the Government.

Public appointment to a body charged with the independent scrutiny of the conduct of agents of the State should include prior scrutiny by a panel independent of the Government department filling the post.<sup>188</sup> Until principles of probity and fairness govern public appointments, doubts will persist about the propriety of the Government ministers directly nominating retired public servants who have served them as senior officials to posts of this nature. Furthermore, neither of the other two members of the Ombudsman Commission (Conor Brady, ex Editor of the Irish Times) and Carmel Foley (ex-Director of Consumer Affairs) were appointed through an open recruitment process.<sup>189</sup>

**(b) “Leaseback” to the police of investigations of Garda criminality**

75. In its “Two Year Report”, the Garda Ombudsman Commission proposes ten legislative changes to the Garda Síochána Act 2005.<sup>190</sup> One such proposal was to amend section 94 of the 2005 Act to allow for the “leaseback” of cases involving criminal investigations.<sup>191</sup> In its 3<sup>rd</sup> Annual Report, GSOC indicated that “It was a source of concern to the Commission that none of the legislative amendments drafted after discussions in 2007 were advanced during 2008”. According to GSOC, without “such fine-tuning of the legislation, the Commission is severely hampered in providing its services to the public and to gardaí alike”.<sup>192</sup> In the most recent Annual Report, GSOC maintains the view that arrangements such as those involving the ‘leaseback’ of cases achieve further efficiencies and enhance the “perception of the oversight system as being fair and effective among the public and gardaí alike”.<sup>193</sup>

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<sup>188</sup> In Northern Ireland, appointments to senior positions of public trust, such as the Police Ombudsman, must be made through open and transparent recruitment. See <http://www.publicappointmentscommissioner.org/independent-assessors/> (last accessed 6 April 2011). The Nolan Principles are derived directly from recommendations made by the Committee on Standards in Public Life chaired by Lord Nolan, in its First Report (May 1995).

<sup>189</sup> Moves towards more independent and public appointments have taken place since the new Government took office. For example, on 29 March 2009, the Minister for Transport, Tourism and Sport announced that all vacancies on State boards under his remit would be advertised. Deaglán de Bréadún, (29 March 2011), “Varadkar says vacancies on State boards to be advertised”, *Irish Times*, available at <http://www.irishtimes.com/newspaper/ireland/2011/0329/1224293299178.html> (last accessed 3 April 2011).

<sup>190</sup> Garda Síochána Ombudsman Commission, (May 2008), *Two Year Report*, available at <http://www.gardaombudsman.ie/GSOC/GSOC-2-year-Report-2008.pdf> (last accessed 3 April 2011).

<sup>191</sup> *Ibid*, p. 22.

<sup>192</sup> Garda Síochána Ombudsman Commission, (March 2009), *3<sup>rd</sup> Annual Report*, available at [http://www.gardaombudsman.ie/GSOC/2008\\_GSOC\\_%20Third\\_Annual\\_Report.pdf](http://www.gardaombudsman.ie/GSOC/2008_GSOC_%20Third_Annual_Report.pdf) (last accessed 3 April 2011). See the letter from the Commissioners to the Minister for Justice, Equality and Law Reform.

<sup>193</sup> Garda Síochána Ombudsman Commission, (2010), *4<sup>th</sup> Annual Report*, available at <http://www.gardaombudsman.ie/GSOC/GSOC-Annual-Report-2009.pdf> (last accessed 3 April 2011).

76. However, no allegation that a member of An Garda may have committed a criminal offence is a minor matter. Indeed, a sequence of complaints regarding very minor criminality by a particular Garda member may indicate a major problem. If there is a real danger that the Commission could become “snowed under” by the sheer volume of complaints regarding Garda criminality, the appropriate response would be for the Commission to be given the additional resources that it needs to discharge its statutory functions, a point that was echoed by the CPT in its 2010 report on Ireland.<sup>194</sup> Any suggestion that complaints regarding Garda criminality could be “leased back” to the Garda themselves for investigation will only serve to undermine the relatively high level of public confidence that the Ombudsman Commission currently enjoys.

**(c) Delays in the handling of investigations**

77. The State report acknowledges the backlog of complaints and investigations that have accumulated and cites a number of factors as having contributed to this, mainly staffing vacancies and lack of appropriate IT systems.

78. NGOs have commenced tracking the delay in investigations; however, one high profile case provides a good demonstration of the delays which are being incurred. Mr. Terence Wheelock was found hanging in his cell at Store Street Garda Station, Dublin on 2 June 2005. A cord from his clothing had been used as the ligature. On 27 July 2007, the GSOC decided that it was desirable, “in the public interest”, to investigate the circumstances surrounding his death. The GSOC report was finally published on 10 March 2010, i.e. almost three years after the Commission launched its investigation, and almost five years after Mr Wheelock died. The report concluded that there was insufficient evidence that Terence Wheelock was assaulted by Garda members during his arrest in 2005 and that there was “no credible evidence that Terence Wheelock was mistreated in any way during his detention at Store Street Garda Station.”<sup>195</sup> However, the investigation did find that “systemic failures and the lack of clear instruction led to the presence of a ligature suspension point” in Mr Wheelock’s cell; a “lack of clear instruction and process” allowed Terence Wheelock to bring a ligature with him into the cell during his detention; and, the recording of the details of the custody of Terence Wheelock fell below appropriate standards.<sup>196</sup>

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<sup>194</sup> *Op cit*, para 13.

<sup>195</sup> Garda Síochána Ombudsman Commission, (10 March 2010), Death of Terence Wheelock: Report by the Garda Síochána Ombudsman Commission, p. 3, available at [http://www.gardaombudsman.ie/GSOC/Section-102\(4\)-Mr-Terence-Wheelock.pdf](http://www.gardaombudsman.ie/GSOC/Section-102(4)-Mr-Terence-Wheelock.pdf) (last accessed 6 April 2011).

<sup>196</sup> *Op cit*, p. 4. See also, Irish Council for Civil Liberties, (10 March 2010), *Wheelock Report Prompts Call to Release Torture Probe Findings*, available at <http://www.iccl.ie/news/2010/03/10/-wheelock-report-prompts-calls-to-release-torture-probe-findings.html> (last accessed 6 April 2011).



The GSOC report was sent to the Director of Public Prosecutions in early December 2009; however, no charges have been forthcoming yet.<sup>197</sup>

79. Parliamentary questions about the efficiency of GSOC have reportedly been raised with the new Minister for Justice, Equality and Defence.<sup>198</sup>

**Recommendations:**

- **Garda Síochána Ombudsman Commissioners should be appointed in an independent and transparent manner.**
- **Delays in the handling of complaints by the Garda Síochána Commission should be eradicated, if necessary, by the allocation of additional resources.**

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<sup>197</sup> Foxe, Ken, (30 January 2011), "DPP sent report over Wheelock Custody Death", *Sunday Tribune*, available at <http://www.tribune.ie/article/2009/dec/06/dpp-sent-report-over-wheelock-custody-death/> (last accessed 3 April 2011).

<sup>198</sup> "Watchdog is "too slow" in garda probes" by John Mooney, *Sunday Times* (Irish edition), 3 April 2011, p. 8.

## 7. Deaths in State Custody or Care

### Article 12 CAT

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

#### 7.1 Deaths in Prisons and Garda Custody

80. The State has procedural obligations in cases involving deaths or serious injuries in prisons or Garda or prison custody, including the carrying out of an independent, prompt and effective investigation of the incident.<sup>199</sup>
81. Under the Coroners Act 1962, an inquest is held into deaths which occur in custody. However, the legislation and framework is out-dated and requires reform. The Coroner's Bill 2007<sup>200</sup> which lapsed with the previous Government, provided for the reform of the Coroner's Service. In its observations on Scheme of the Bill, the Irish Human Rights Commission recommended a number of amendments including the establishment of categories of deaths which would be regarded as reportable to the coroner and the disclosure of witness statements to victims' families and legal representatives.<sup>201</sup>
82. At present, legal aid or legal assistance for the next-of-kin of those who die in State custody is granted on an *ad hoc* basis, for one member of the next-of-kin only and at the discretion of the Minister for Justice, Equality and Law Reform. The 2007 Bill proposed that legal aid should be provided in proceedings where the coroner was of the opinion that the death of the deceased person may have occurred in Garda, military or prison custody, in an institution, including a hospital or other institution for the care and treatment of persons, was a child in care, or the death would give rise to major issues of public importance.<sup>202</sup>

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<sup>199</sup> *McCann and Ors v. United Kingdom* (1996) 21 EHRR 97; *Jordan and Ors v. United Kingdom* (2001) 37 EHRR 52. See Inspector of Prisons, *Guidance on Best Practice relating to the investigation of Deaths in Prison Custody*, 21<sup>st</sup> December 2010, paragraph 4.4 at p. 19 where the Inspector states that the internal investigation into deaths in prison custody "is neither robust, independent nor transparent."

<sup>200</sup> <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2007/3307/document1.htm> (last accessed 3 April 2011).

<sup>201</sup> Irish Human Rights Commission, (19 September 2006), *Observations of the IHRC on the General Scheme of the Coroner's Bill 2005*, at p. 20, available at <http://www.ihrc.ie/publications/list/submission-on-scheme-of-coroners-bill/> (last accessed 2 April 2011). The Commission also recommended at p. 16 of its submission that, in the case of deaths which occur in Garda custody or as a result of Garda operations, the Coroner should have the assistance of coroner's officers who are not members of An Garda Síochána in order to break the institutional connection between those investigating and those being investigated.

<sup>202</sup> *Op cit*, section 86.

83. If an individual dies in the custody of the Gardaí, their death is subject to an independent investigation by the Garda Síochána Ombudsman Commission.<sup>203</sup>
84. However, as is set out above in paragraphs 75 to 77, there are unacceptable delays in the handling of complaints by GSOC, including those complaints pertaining to the death of a person in custody. Nor is it clear if, and if so how, GSOC itself (which has investigative powers analogous to the Garda Síochána), complies with other aspects of the procedural obligations incumbent upon organs of the State.
85. There is no corresponding independent, investigative facility available in relation to people who die in prisons (although such deaths may of course be subject to police investigations and inquest procedures). In December 2010, the Inspector of Prisons presented the Minister for Justice, Equality and Law Reform with *Guidance on Best Practice relating to the Investigation of Deaths in State Custody*.<sup>204</sup> The Inspector concluded that the current internal investigatory procedures of the IPS (conducted the Prison Governor) did not satisfy the State's obligation under the ECHR and recommended that measures be brought forward to ensure compliance.<sup>205</sup>

## 7.2 Children in State Care

86. In 2010, the circumstances surrounding a number of deaths of children in the care of the State became public<sup>206</sup> and it emerged that the numbers of such deaths was far higher than previously known. Official figures from the Health Service Executive (HSE) of children who had died while in State care since 2000 rose from an initial estimate of 37 deaths (given in June 2010) to a confirmed figure of 199 (released in December 2010). The figure of 199 relates to children known to social work child protection services and certain young adults previously in care and known to care services.<sup>207</sup> In March 2010, a leaked report into the life and death of T.F.<sup>208</sup> was published and in May 2010, the body of murdered 17-year-old Daniel McAnaspie was discovered. Both these cases involved children who had been or were still in the care of the State. These cases highlighted the vulnerability of children in care, and the inadequate State response to their needs.

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<sup>203</sup> Section 102, Garda Síochána Act 2005.

<sup>204</sup> Inspector of Prisons, 21 December 2010, *Guidance on Best Practice relating to the Investigation of Deaths in State Custody*, available at <http://www.justice.ie/en/JELR/iop%20rpt%20deaths%20in%20cusody.pdf/Files/iop%20rpt%20deaths%20in%20cusody.pdf> (last accessed 2 April 2011).

<sup>205</sup> *Ibid*, para 4.7, p. 20 where he stated that a system similar to the Garda Síochána Ombudsman Commission could be considered in the context of deaths in prison custody.

<sup>206</sup> O'Brien, Carl (5 June 2010), "Child deaths while in care or contact with services now at 188", *The Irish Times*, available at <http://www.irishtimes.com/newspaper/frontpage/2010/0605/1224271912786.html> (last accessed 6 April 2010).

<sup>207</sup> Mitchell, Susan, (23 May 2010), "HSE believes 200 children died in care", *Sunday Business Post*, available at <http://www.sbpost.ie/news/hse-believes-200-children-died-in-care-49451.html> (last accessed 6 April 2010).

<sup>208</sup> TF A Case Review 1983 to 2002, <http://www.finegael.org/upload/TF.pdf> (last accessed 4 January 2010).

87. Subsequently, the HSE introduced a new system for recording the deaths of children in care. Under this system the HSE notifies the Health Information and Quality Authority (HIQA) of all deaths of children in care and children known to the child protection services. It also records the deaths of young adults between 18 and 21 years who were previously in State care or are in receipt of aftercare services. On 5 April 2011, the HSE reported that 27 children died while in State care in 2010. It was reported that seven of the deaths were due to suicide, four were drug overdoses and two were homicides. A further seven children died of natural causes such as diseases, while four died in road traffic incidents and three in other accidents.<sup>209</sup>

88. The link between youth homelessness and children leaving State care has been clearly established.<sup>210</sup> The latest housing-need statistics, gathered in 2008, show that the largest increase in demand for social housing was from young people leaving institutional care, an increase of 179% since 2005.<sup>211</sup> The Ryan Report *Implementation Plan*<sup>212</sup> makes six commitments relating to aftercare support:

- provision of aftercare services for children leaving care in all instances where recommended by a social worker;
- longitudinal study to follow young people who leave care for 10 years in order to map their transition to adulthood;
- review the approach to prioritising identified 'at risk' young people leaving care and requiring local authority housing;
- care plans should include aftercare planning for all young people of 16 years and older;
- aftercare planning identifies key workers in other health services to which a young person is referred, for example, disability and mental health services;
- consider how best to provide necessary once-off supports for care leavers to gain practical lifelong skills.<sup>213</sup>

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<sup>209</sup> Jamie Smyth, (5 April 2011), "HSE records deaths of 27 young people involved in State care", *Irish Times*, available at <http://www.irishtimes.com/newspaper/frontpage/2011/0405/1224293869892.html>.

<sup>210</sup> P. Mayock and E. O'Sullivan (2007) *Lives in Crisis: Homeless Young People in Dublin*, Dublin: The Liffey Press, and P. Kelleher, C. Kelleher and M. Corbett (2000) *Left Out on their Own: young people leaving care in Ireland*, Dublin: Oak Tress Press.

<sup>211</sup> Department of the Environment, Heritage and Local Government (2008) *Annual Housing Statistics Bulletin 2008*.

<sup>212</sup> Office of the Minister for Children and Youth Affairs (2009) *Report of the Commission to Inquire into Child Abuse, 2009: Implementation Plan*. An Implementation Plan was published in July 2009 to respond to the recommendations contained in the Report of the Commission to Inquire into Child Abuse, commonly known as the Ryan Report (*Commission to Inquire into Child Abuse (2009) Report of the Commission to Inquire into Child Abuse*). The Implementation Plan contains 99 commitments to reform and strengthen the child care and protection system, available at [http://www.omc.gov.ie/viewdoc.asp?fn=/documents/Publications/Implementation\\_Plan\\_from\\_Ryan\\_Commission\\_Report.pdf](http://www.omc.gov.ie/viewdoc.asp?fn=/documents/Publications/Implementation_Plan_from_Ryan_Commission_Report.pdf) (last accessed 3 April 2011).

<sup>213</sup> *Op cit*, recommendations 64-69, p. 49.

89. There have been recent positive developments in this area, including work by the Ombudsman for Children's Office on the feasibility of comprehensive child death review mechanisms<sup>214</sup>, the establishment of an independent Child Death Review Group to review the HSE's investigations into child deaths in State care since 2000,<sup>215</sup> and the establishment of a Child Death National Review Panel to undertake future investigations.<sup>216</sup> In addition, *Guidance for the Health Service Executive for the Review of Serious Incidents including Deaths of Children in Care* was published in 2010 by the Health Information and Quality Authority (HIQA), a commitment of the Ryan Report *Implementation Plan*. The appointment of a Minister for Children with full Cabinet rank offers a further opportunity for progress in this area to be consolidated.

**Recommendations:**

- **The State should establish a fully independent complaints mechanism for prisoners either as a new institution or under the auspices of the Ombudsman to receive, investigate and resolve complaints.**
- **Human rights compliant amendments to inquest procedures should be introduced in the form of a new Coroner's Bill.**
- **With respect to children in care, the commitments on aftercare given in the Ryan Report *Implementation Plan* should be implemented in full.**

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<sup>214</sup> Office of the Ombudsman for Children, (15 June 2010), *Advice of the Ombudsman for Children on the Health (Amendment) Bill 2010*; Office of the Ombudsman for Children, (February 2009), *Child Death Review Options Paper*.

<sup>215</sup> Geoffrey Shannon, Child Law expert, and Norah Gibbons, Director of Advocacy with Barnardos, were appointed onto this panel; an international expert, yet to be appointed (as of January 2011), will also join the panel.

<sup>216</sup> It is chaired by Dr. Helen Buckley of Trinity College, Dublin and comprises 15 members.

**Box 4: The Death of Brian Rossiter**

In September 2002, 14 year old Brian Rossiter was found unconscious in a cell in Clonmel Garda Station and died two days later. In April 2008, the Department of Justice released a summary of a report by Hugh Hartnett SC (senior counsel) into the circumstances surrounding his death. Mr Hartnett found multiple investigative shortcomings benchmarked against the procedural obligation requirements of the ECHR. In December 2008, the State settled a legal action (for €200,000) taken by the family of Brian Rossiter. The State said it accepted that Mr Rossiter's detention was unlawful and that the circumstances surrounding his death were not properly investigated.

**Box 5: The Death of Dwayne Foster**

In September 2010, more than four years after his death, the inquest into the death of 24-year old Dwayne Foster was finally completed. The jury at the inquest into the death of Foster has found that he died from methadone intoxication after he told a doctor an untruth that he was on a methadone maintenance programme when he was not. Dr Curtis said he was informed the arrest had been "forceful" who reported finding a large number of injuries on Mr Foster's body including two black eyes, and bruising to the nose and left ear. He concluded, however, that Mr Foster died from methadone intoxication. Rohypnol and cocaine were also detected in his urine.

The jury recommended that the methadone protocol be implemented as soon as possible at all Garda stations, that there should be continuity of medical information and that access to the central treatment list should be available out of hours. For fifteen months following the death of Mr Foster, the family knew little about the circumstances of his death and the inquest was adjourned on a number of occasions during its three year existence.

## 8. Redress and Rehabilitation

### Article 14 CAT

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.

#### 8.1 Human trafficking

90. The State Report refers to the Criminal Law (Human Trafficking) Act 2008 within the generic chapter setting out relevant domestic legislation, without any elaboration on how this legislation fulfils the State's obligations under CAT.
91. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, has stated that human trafficking may amount to gender-based torture under Article 2 CAT, "if States fail to act with due diligence".<sup>217</sup> In 2008, the Human Rights Committee recommended that the State continue to reinforce its measures to combat trafficking of human beings, in particular by reducing the demand for trafficking. The Committee also urged the State to ensure the protection and rehabilitation of victims of trafficking and that permission to remain in the State party is not dependent on the cooperation of victims in the prosecution of alleged traffickers. According to the Committee, Ireland should consider ratifying the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.<sup>218</sup> The Criminal Law (Human Trafficking) Act, 2008 came into effect on 7 June 2008, criminalising certain activities around trafficking. Furthermore, the Anti-Human Trafficking Unit within the Department of Justice, Equality and Defence has been established to ensure a coordinated State response to trafficking. However, key components of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children are absent within the Irish framework. Of particular relevance to CAT is the right to rehabilitation, discussed further below with respect to recovery and reflection and temporary permits.
92. A victim of trafficking has a recovery and reflection period of 60 days during which she or he must make an informed decision as to whether to assist the Garda Síochána or other relevant authorities.<sup>219</sup>

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<sup>217</sup> *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak (A/HRC/7/3 of 15 January 2008)* para 44, p. 13 available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/101/61/PDF/G0810161.pdf?OpenElement> (last accessed 25 March 2011).

<sup>218</sup> UN Human Rights Committee: Ireland, 30 July 2008, UN Doc CCPR/C/IRL/CO/3, para 16.

<sup>219</sup> *Op cit*, para 5.

Victims of trafficking will often be highly traumatised and may not recover sufficiently within 60 days to make an informed decision about whether to participate in an investigation and/or prosecution.

93. In accordance with the current administrative arrangements, a temporary residence permit may only be issued in circumstances where the Minister for Justice, Equality and Law Reform is satisfied that it is necessary for the purposes of the suspected victim's continuing assistance with the relevant authorities in relation to any investigation or prosecution.<sup>220</sup>

94. Since 2000, 503 separated children went missing from State care, 441 of whom remain missing.<sup>221</sup> It is possible that some of these children may have been trafficked. On a positive note the number of separated children missing from their HSE care placements dropped in 2010.

## 8.2 Rehabilitation

95. The State Report makes no reference to a framework or system to provide rehabilitative services to identified victims of torture. While victims of torture may be in a position to take a claim for compensation through the Criminal Injuries Compensation Tribunal, counselling and rehabilitative services are provided by NGOs. In order to fulfil its obligations under article 14 of CAT, the State should establish a specifically designed (and resourced) scheme for rehabilitation for torture survivors.

### Recommendations:

- **Consideration be given to extending beyond 60 days the period of time during which a victim of trafficking may recover and reflect on the desirability of cooperating with the appropriate authorities**
- **The Government should establish a comprehensive framework for the rehabilitation of torture survivors.**

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<sup>220</sup> *Op cit*, para 12 and 13.

<sup>221</sup> Speech by Denis Naughten TD, Fine Gael Spokesperson on Immigration & Integration at the Dignity & Demand Conference Royal College of Physicians, 5 November 2009



## 9. Female Genital Mutilation (FGM)

### Article 16 (1) CAT

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

96. According to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Female Genital Mutilation (FGM) may amount to gender-based torture under Article 2 of CAT “if States fail to act with due diligence”.<sup>222</sup> The State Report makes no reference to how the State is fulfilling its obligations to protect the victims and potential victims of FGM.
97. There is currently no specific legal prohibition against FGM in Ireland; and neither is there specific legislation to protect a child from being removed from the country to have the procedure carried out overseas. In 2008, a number of NGOs produced their own “*Plan of Action to Address FGM*”.<sup>223</sup> This document proposes a number of concrete measures to deal with FGM and suggests that high-quality and appropriate health care/ supports should be provided for women and girls who have undergone FGM in Ireland or elsewhere.
98. In January 2011, during the administration of the previous Government, the then Minister for Health and Children introduced the Criminal Justice (Female Genital Mutilation) Bill 2011. Despite the change in administration since the Bill was introduced, it has been retained within the legislative programme; however it remains in the Upper House and has yet to be debated in the Dáil (lower House of Parliament).<sup>224</sup> It is crucial that any new legislation incorporate provisions regarding medical and psychological assistance for women and girls who are experience FGM.

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<sup>222</sup> *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak (A/HRC/7/3 of 15 January 2008)* para 44, p. 13 available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/101/61/PDF/G0810161.pdf?OpenElement> (last accessed 25 March 2011).

<sup>223</sup> *Ireland’s National Plan of Action to Address Female Genital Mutilation*, (2008), available at <http://www.akidwa.ie/FGM%20Plan%20of%20Action%20Report.pdf> (last accessed 6 April 2011). Members of the National Steering Committee include AKiDwA, Amnesty International Ireland, Barnardos, Cairde, Children’s Rights Alliance, Christian Aid, Comhlámh, The Integration Centre, Integration of African Children in Ireland, Irish Family Planning Association, National Women’s Council of Ireland, Somali Community in Ireland, Somali Community Youth Group and UNICEF Ireland.

<sup>224</sup> Government Legislative Programme for the Summer Session, (5th April, 2011), Section D, available at [http://www.taoiseach.gov.ie/eng/Taoiseach\\_and\\_Government/Government\\_Legislation\\_Programme/](http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/).

**Recommendation:**

- **The State should enact legislation without delay prohibiting FGM and the removal of children and young girls from Ireland for the purposes of FGM abroad. The legislation should contain provisions in relation to rehabilitation including medical and psychological assistance.**

## 10. Domestic Violence

### Article 16 (1) CAT

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

99. The State Report refers to the Domestic Violence Act 1996 within the generic chapter setting out relevant domestic legislation, without any elaboration on how this legislation fulfils the State's obligations under CAT.

100. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, has stated that domestic violence may amount to gender-based torture, under Article 2 of CAT, "if States fail to act with due diligence".<sup>225</sup> In 2000, the UN Human Rights Committee indicated that domestic violence can give rise to violations of the right to freedom from torture or ill-treatment under Article 7 (freedom from torture or cruel, inhumane or degrading treatment or punishment) of the International Covenant on Civil and Political Rights.<sup>226</sup>

### 10.1 Amendments to the Domestic Violence Act 1996

101. The Civil Law (Miscellaneous Provisions) Bill 2010 amended the Domestic Violence Act 1996 to extend Safety and Barring Orders to cohabiting and same-sex couples. However, this legislation lapsed following the dissolution of the previous Government in early 2011. In any event, this provisional legislation did not provide adequate protection, in line with internationally recognised best practice. The conclusion of an expert group meeting organised by the UN Division for the Advancement of Women was that, at a minimum, domestic violence legislation should apply to "individuals who are or have been in an intimate relationship, including marital, non-marital, same sex and non-cohabiting relationships; individuals with family relationships to one another; and members of the same household".<sup>227</sup>

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<sup>225</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak (A/HRC/7/3 of 15 January 2008), para 44, p. 13 available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/101/61/PDF/G0810161.pdf?OpenElement> (last accessed 25 March 2011).

<sup>226</sup> Human Rights Committee, General Comment No. 28 on Article 3 (The equality of rights between men and women), 29 March 2000, UN Doc. CCPR/C/21/Rev.1/Add.10, para. 11.

<sup>227</sup> Department of Economic and Social Affairs Division for the Advancement of Women, *Handbook for Legislation on Violence against Women*, Advance version, United Nations, New York, 2009, p. 26.

## 10.2 Barriers to Safety for Migrant Women experiencing Domestic Violence

102. Migrant women experiencing domestic violence face additional barriers when seeking help. Many migrant women come to Ireland as the dependant spouse of a migrant worker.<sup>228</sup> However, the right of their spouses to reside in Ireland is dependent on the existence of the relationship. Therefore, migrant women who leave the family home as a result of domestic violence may be in danger of losing their immigration status and this well-founded fear may prevent migrant women and children from leaving a home life of violence. This difficulty can also be encountered by migrant women who are married to, or in a *de facto* relationship with, Irish nationals.<sup>229</sup> Furthermore, migrant women may be excluded from the social welfare system if they do not satisfy the Habitual Residence Condition;<sup>230</sup> thus leaving them in a financially precarious situation.<sup>231</sup>

### Box 6: Violence against women

Since 1996, 168 women are known to have been murdered in Ireland, 103 of whom (61%) were killed in their own homes. In the resolved cases, 65 women (51%) were murdered by a partner or ex-partner. Another 46 women were killed by someone they knew (e.g. brother, son, neighbour). Thus, a total of 111 women (88%) were killed by someone known to them. In all of the resolved cases, 99% of perpetrators were male and 1% were female.

*Source: Women's Aid, Female Homicide Media Watch, December 2010, available at <http://www.womensaid.ie/16daysblog/2010/12/10/16-facts-day-16-female-homicide/#> (last accessed 15 March 2011).*

A national survey on domestic abuse conducted by the National Crime Council found that one in seven women reported having experienced severe abusive behaviour of a physical, sexual or emotional nature from a partner at some times in their lives. The survey estimated that 213,000 women in Ireland may have been severely abused by a partner.

*Source: National Crime Council and ERSI, Domestic Abuse of Women and Men in Ireland: Report on the National Study of Domestic Abuse, 2005.*

<sup>228</sup> Their partner may be resident in Ireland through the work permit and green card schemes. Both schemes allow migrant workers to be joined in Ireland by family members.

<sup>229</sup> Women's Aid, *Making the Links Towards an Integrated Strategy Towards the Elimination of Violence against Women in Intimate Relationships with Men* (1995).

<sup>230</sup> The Habitual Residency Condition was introduced by the Department of Social and Family Affairs after EU accession in May 2004. Since then, all new applicants (including Irish nationals) must satisfy this condition in order to qualify for means tested payments and Child Benefit. In making a determination of an applicant's eligibility, factors such as length of residence in the country, employment history, intentions for the future and others will be considered.

<sup>231</sup> Immigrant Council of Ireland, *Briefing Paper on Migrant Women Who are Experiencing Domestic Violence*, available at [http://www.immigrantcouncil.ie/images/stories/Domestic\\_violence\\_briefing\\_paper.pdf](http://www.immigrantcouncil.ie/images/stories/Domestic_violence_briefing_paper.pdf) (last accessed 29 March 2011).

**Recommendations:**

- **The Domestic Violence Act 1996 should be amended to include clear criteria to grant Safety and Barring Orders and extend eligibility to all parties who are or have been in an intimate relationship regardless of cohabitation, in line with internationally recognised best practice.**
- **Migrant women with dependant immigration status, who are experiencing domestic violence, should be afforded independent status under legislation and be facilitated to access the labour market and/or the social welfare system.**

## 11. Corporal Punishment

### Article 16 (1) CAT

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

103. Under section 24 of the Non Fatal Offences Against the Person Act 1997 corporal punishment by teachers is a criminal offence.<sup>232</sup> However, the ban on corporal punishment of children has not been extended to actions by parents and those in care settings.<sup>233</sup> Following a collective complaint brought by the World Organisation Against Torture (OMCT), the Council of Europe's European Committee of Social Rights ruled in 2005 that Ireland's common law 'reasonable chastisement' defence is in violation of Article 17 (the right of children and young persons to social, legal and economic protection) of the Revised European Social Charter.<sup>234</sup> The Government made a commitment to introduce legislation according to developing social standards, but no draft legislation, nor timeline for its introduction, has been proposed. The Concluding Observations of the UN Convention on the Rights of the Child in 1998 and 2006 also recommend that Ireland introduces a legal ban, in tandem with education programmes, to eliminate corporal punishment. As of August 2010, 21 European countries have banned corporal punishment in the home.<sup>235</sup>

104. The Office of the Minister for Children and Youth Affairs (OMCYA) published a study in June 2010, *Parenting Styles and Discipline: Parent's and Children's Perspectives*, which found that just over one-third of parents (34%) felt that smacking should remain legal. Almost one-quarter (24%) stated that whether smacking is made illegal should depend on the age of the child, while 42% said that smacking should be made illegal.<sup>236</sup>

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<sup>232</sup> See <http://www.irishstatutebook.ie/1997/en/act/pub/0026/index.html>. This provision followed a recommendation Law Reform Commission. Refer to Law Reform Commission, *Report on Non-Fatal Offences against the Person*, (LRC 45-1994) p. 284.

<sup>233</sup> There is a common law defence of 'reasonable and moderate chastisement' in the discipline of children within the home. Although the statutory version of this defence which existed in section 37 of the Children Act, 1908 has been repealed by the Children Act, 2001, the common law defence remains valid.

<sup>234</sup> Ireland was one of four European countries against which the complaint was brought.

<sup>235</sup> See End All Corporal Punishment of Children, States with full abolition, updated August 2010 [http://www.endcorporalpunishment.org/pages/progress/prohib\\_states.html](http://www.endcorporalpunishment.org/pages/progress/prohib_states.html) (last accessed 8 February 2011).

<sup>236</sup> Office of the Minister for Children and Youth Affairs (2010), *Parenting Styles and Discipline: Parent's and Children's Perspectives*, p. 4

At the time of publication, the OMCYA said that prohibition is being kept “under review” and attempts by other countries to legislate for an outright ban were being examined.<sup>237</sup>

**Recommendations:**

- **Legislation should be introduced without delay to remove the common law defence of ‘reasonable chastisement’ within the family and in care settings.**
- **Positive parenting support systems that lay down a clear standard for the way society aspires to treat its children should be strengthened.**

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<sup>237</sup> ‘Outright ban on smacking children being considered’, *The Irish Times*, 29 June 2010, available at <http://www.irishtimes.com/newspaper/ireland/2010/0629/1224273558288.html> (last accessed 8 March 2011).

## 12. Mental Health Services

### Article 16 (1) CAT

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

105. The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has stated that:

[...] [w]hereas a fully justified medical treatment may lead to severe pain or suffering, medical treatments of an intrusive and irreversible nature, when they lack a therapeutic purpose, or aim at correcting or alleviating a disability, may constitute torture and ill-treatment if enforced or administered without the free and informed consent of the person concerned.<sup>238</sup>

The UN Special Rapporteur on the right to health has said that:

[...] policies and legislation sanctioning non-consensual treatments ... aimed at correcting or alleviating a disability, including electro-convulsive therapy and unnecessarily invasive psychotropic therapy, violate the right to physical and mental integrity and may constitute torture and ill-treatment.<sup>239</sup>

106. Part 4 of the Mental Health Act 2001 deals with consent to treatment and fails to deal with the need to respect patient autonomy and the right of a competent person to refuse treatment.

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<sup>238</sup> Interim report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/63/175 (28 July 2008) p. 11. In a clarification provided by the UN Special Rapporteur on Torture, Manfred Nowak, to Amnesty International Ireland by email dated 28 August 2009, Manfred Nowak stated: "If the person lacks capacity to give free and informed consent, ECT may still be administered to that person, provided that there is an emergency and that the necessary safeguards are in place and respected". In the same email, Mr Nowak emphasised the importance of providing appropriate supports to enable persons with mental health problems to exercise their legal capacity, in accordance with Article 12 CRPD.

<sup>239</sup> *Report of the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, UN Doc A/64/272 (10 August 2009), para 73.



For instance the provisions of section 59<sup>240</sup> of the Act allow a programme of electroconvulsive therapy (ECT) to be administered to an involuntary patient (i.e. a person involuntarily admitted or detained in an inpatient facility) where the patient is “unable **or unwilling [emphasis added]** to give consent”. In practice this means that competent refusals of treatment can be overridden and as there is test of incapacity or ‘incapability’, an almost unfettered discretion remains with the consulting psychiatrist making these decisions.

107. The provisions of the 2001 Act are also at odds with Ireland’s common law position applicable to general health care that treatment cannot be given without consent save where it is an emergency situation and consent cannot be obtained for this reason (because, for example, the patient is unconscious) and the treatment is necessary to save the life or preserve the health of the patient (under the common law doctrine of necessity).<sup>241</sup> In addition, no formal weight is given to advance directives or decisions of substitute decision makers (such as a donee of an Enduring Power of Attorney or a court appointed Personal Guardian).

**Recommendations:**

- **A test of legal capacity should be introduced in relation to informed consent to treatment.**
- **ECT should never be administered to a competent patient who is unwilling to be subjected to this procedure.**

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<sup>240</sup> This is not just an academic point; 11 people who were deemed able but unwilling were administered ECT without consent in 2008. In addition 6 people who were deemed ‘unwilling’ by either their treating consultant psychiatrist or the second consultant psychiatrist were also administered ECT without consent during that period. Mental Health Commission *Report on the Use of Electroconvulsive Therapy in Approved Centres in 2008* (Mental Health Commission, November 2009), p. 16.

<sup>241</sup> See Denham J. *In the matter of a Ward of Court (Withholding Medical Treatment) (No. 2)* [1996] 2 I.R. 100 discussed in O’Neill pp. 264, 605-609.

## 13. Immigration-Related Detention

### Article 16 (1) CAT

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

108. Irish law provides for immigration-related detention in a variety of circumstances.<sup>242</sup> Persons detained for immigration-related reasons are held in ordinary prisons, on occasion, sharing accommodation with persons suspected or convicted of criminal offences. In 2008, the UN Human Rights Committee expressed its concern that migrants are detained for immigration-related reasons in “ordinary prison facilities together with convicted and remand prisoners and about their subjection to prison rules”. The Committee recommended that the State review its detention policies to give “priority to alternative forms of accommodation” and “take immediate and effective measures to ensure that all persons detained for immigration-related reasons are held in facilities specifically designed for this purpose”.<sup>243</sup>

#### Recommendation:

- **In line with the recommendations of the UN Human Rights Committee if, exceptionally, it is necessary to detain people for immigration-related reasons, the State should ensure that they are held in facilities specifically designed for that purpose.**

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<sup>242</sup> See sections 9 and 10, Refugee Act, 1996 (as amended), section 3, Immigration Act 1999 (as amended) and Section 5 Immigration Act 2003.

<sup>243</sup> Concluding Observations of the Human Rights Committee on Ireland, 30 July 2008 UN Doc: CCPR/C/IRL/CO/3, para. 17.