



Submission of FLAC (Free Legal Advice Centres), Irish Council for Civil Liberties and the Irish Penal Reform Trust

To the United Nations Human Rights Committee

List of Issues

**With regard to the examination of Ireland's third report under
Article 40 of the International Covenant on Civil and Political
Rights**

21 December 2007

Background Information and Contact Details for the Organisations:

FLAC - FREE LEGAL ADVICE CENTRES

Is an independent human rights organization dedicated to the realisation of equal access to justice for all. It campaigns through advocacy, strategic litigation and authoritative analysis for the eradication of social and economic exclusion. FLAC offers information and referral over the telephone and free legal advice at local centres throughout the

country. FLAC's areas of work include: credit and debt law; social welfare; public interest/human rights; comprehensive civil legal aid and access to the courts/ to justice.

THE IRISH COUNCIL FOR CIVIL LIBERTIES (ICCL)

Is an independent human rights watchdog, which monitors, educates and campaigns in order to secure full enjoyment of human rights for everyone. The ICCL is involved in advocacy for positive changes in the area of human rights and monitoring policy and legislation to make sure that it complies with international standards. The ICCL also publishes reports and runs campaigns to raise public and political awareness of human rights, justice and equality issues.

IRISH PENAL REFORM TRUST (IPRT)

Is a NGO campaigning for the rights of people in prison and the progressive reform of Irish penal policy. The IPRT's 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.

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Introduction

This list of issues has been compiled as part of a joint project undertaken by three organisations, FLAC (Free Legal Advice Centres), the Irish Council for Civil Liberties and the Irish Penal Reform Trust. A comprehensive shadow report is being finalised and will follow in due course.

The Concluding Observations of the UN Human Rights Committee in 2000 contained nineteen principle concerns. Of these nineteen, fifteen could be repeated today as many have not been addressed in the intervening period since Ireland's last examination by the Committee. The list of issues raised in this document reflect these and others issues which have occurred and highlight questions regarding Ireland's compliance with its obligations under the UN International Covenant on Civil and Political Rights (ICCPR). It has been compiled in order to assist the Committee in its work to prioritise areas of Covenant-related law and practice of concern in Ireland today.

1. Provision to Withdraw from Reservations to the UN International Covenant on Civil and Political Rights

Ireland has entered reservations under four of the Covenant's articles.¹ These are:

- (i) the separation of unconvicted and convicted prisoners, and of unconvicted juveniles and adults under Article 10 paragraph 2;
- (ii) the right to have minor offences against military law dealt with summarily in accordance with current procedures, which may not, in all respects, conform to the requirements of Article 14 of the Covenant;
- (iii) the right to confer a monopoly on or require the licensing of broadcasting enterprises under Article 19 paragraph 2;
- (iv) the prohibition on propaganda for war under Article 20 paragraph 1.

We encourage the Committee to ask the State when it is likely to withdraw its reservations and if it does not intend to do so, to seek the rationale from the State. On entering this reservation under Article 10 paragraph 2 the State noted that it reserved the right to regard full implementation of the principles therein as objectives to be achieved progressively. We ask the Committee to discuss this issue with the State and any steps that it has take to achieve the objectives of Article 10 paragraph 2 progressively.

¹ Ireland has entered reservations with regard to Article 10(2), Article 14, Article 19(2) and Article 20(1) of the ICCPR.

2. Incorporation of the UN International Covenant on Civil and Political Rights into domestic Irish law (Article 2, paragraph 2)

The Committee has repeatedly expressed concern that not all Covenant rights are guaranteed in Ireland's domestic law. It has recommended that the State incorporate all Covenant rights and freedom, and that effective remedies should be available to any person whose rights or freedoms are encroached upon. Both the Committee on the Rights of the Child (CRC) and the Committee on the Elimination of All Forms of Racial Discrimination (CERD)² have rejected the State's argument that the dualist legal system of the State prevents it from incorporating international human rights treaties save where domestic law has previously been brought into conformity with the relevant human rights standards. Since no measures have been taken to incorporate the Covenant into national law, **we request that the Committee to discuss this issue with the State.**

² Concluding Observations of the UN Committee on the Rights of the Child on Ireland, 1998, UN document CRC/C/15/Add.85 and Concluding Observations of the UN Committee on the Elimination of All Forms of Racial Discrimination, 2005, UN Document: CERD/C/IRL/CO/2

3. Attitude of the State to Committee's recommendation made in *Kavanagh v. Ireland*³ (Article 2, paragraph 3)

In 1998, the Committee heard a complaint from an Irish applicant and found that the State had breached the applicant's right to equality before the law under Article 26 by failing to provide a reasonable and objective justification for denying the applicant his right to a trial by jury. This is the only case in which the Committee has found a violation of the Covenant by Ireland. The Committee required the State to provide the applicant with an "effective remedy" and said that Ireland was "also under an obligation to ensure that similar violations do not occur in the future; it should ensure that persons are not tried before the Special Criminal Court unless reasonable and objective criteria for the decision are provided" and it asked the Government to outline the steps it was taking to ensure this.⁴ In the intervening years, the Government has taken no steps to address this systematic problem or to ensure that persons are not tried before a non-jury court without providing a reasonable and objective justification. In the case of Kavanagh, the Minister for Justice, Equality & Law Reform offered the author £1,000 (€1270)⁵ in acknowledgement of the Committee's views. The cheque was returned to the Minister notifying him that this was entirely inadequate and that it did not constitute an effective remedy.

In July 2002, Kavanagh was again before the Committee, attempting to claim a violation under Article 2, paragraph 3 of the Covenant due to the State's failure to provide an effective remedy. This was deemed inadmissible by the Committee because of a lack of any new factual developments and because he had "no claim under the Covenant that would go beyond what the Committee has already decided in the author's initial communication to it."⁶

We would encourage the Committee to question the State as to why it has not taken steps to ensure that similar violations to those in the Kavanagh case do not occur in the future as required in that case by the Committee.

4. The Right to Life of the Unborn and Abortion (Articles 6)

³ Communication No 819/1998 : Ireland 26/04/2001, UN Doc. CCPR/C/71/D/819/1998

⁴ Paras. 12-13, Communication No: 819/1998

⁵ To contextualise this sum of money, the gross national income per capita in Ireland in 2000 was €25,970 and in 2003 it was €30,910. Figures from United Nations Environmental Programme, http://globalis.gvu.unu.edu/indicator_detail.cfm?country=IE&indicatorid=140

⁶ Para. 4.2, Communication 1114/2002

Approximately 6,000 women travel to the United Kingdom (UK) from Ireland every year to avail of abortion services,⁷ without medical and other pre- and post- abortion support, endangering and stigmatising women.⁸ Article 40.3.3° of the Irish Constitution states that the right to life of a mother and that of her unborn child have equal status, though the meaning of the word “unborn” remains undefined. In the 1992 *X Case*,⁹ which involved a pregnant fourteen year old victim of rape who wished to leave the State to have an abortion, the Supreme Court ruled that abortion is permissible within the State: “if it is established . . . that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such termination is permissible.”¹⁰ This includes a risk to the life of the mother including that arising from the threat of suicide. There is, as yet, no legislative framework in place to reflect this decision and, as a result, medical practitioners are reluctant to perform abortions in these circumstances.

Successive governments have neglected their duties with regard to the health of women in Ireland, by failing to put legislation before the Oireachtas (Irish Parliament) aimed at clarifying the legal implications of the various constitutional referenda held on the issue to date. The courts have at various stages requested that this be done¹¹ and the Committee on the Elimination of Discrimination against Women has urged the State “to continue to facilitate a national dialogue on women’s right to reproductive health, including on the very restrictive abortion laws”.¹² Women are still forced to travel to a foreign country if their health is at risk.

We encourage the Committee to ask the State to account for its failure to provide for a modern legislative framework for the provision of safe and legal abortion in Ireland.

⁷ 6,320 women in 2003 and 5,585 women in 2005 provided Irish addresses for terminations in the UK Department of Health, Abortion statistics 2005, published 4 July 2006 Statistical Bulletin 2006/01, http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsStatistics/DH_4136852

⁸ Over 110,000 women made the journey to the UK in the 23 year period from 1980 to 2003. In 2006, 5,042 Irish women travelled to the UK for an abortion, accounting for 67.8% of all non-UK resident abortions in 2006. The 2006 figure for Irish women who had an abortion in the UK is a decrease of approx. 500 on the 2005 figure. These figures have been compiled by comparison of the 2005 and 2006 Abortion Statistics Reports from the UK Department of Health. A link to the Abortion Statistics 2005 is above and the 2006 report is at http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsStatistics/DH_075697

Anecdotally, abortion service providers think this fall is not a reflection of less Irish women requiring abortions but is because Irish women are increasingly travelling to European countries other than the UK for the procedure.

⁹ Para. 37, *A.G. v. X* [1992] IESC 1; [1992] 1 IR 1 (5th March, 1992)

¹⁰ Para. 37, *A.G. v. X* [1992] IESC 1; [1992] 1 IR 1 (5th March, 1992)

URL: <http://www.bailii.org/ie/cases/IESC/1992/1.html>

¹¹ See for example, *Attorney General v. X & Ors.* [1992] ILRM 401, Per McCarthy J. “*In the context of the eight years that have passed since the Eighth Amendment was adopted the failure by the legislature to enact the appropriate legislation is no longer just unfortunate: it is inexcusable.*”

¹² Para. 39, UN Committee on the Elimination of Discrimination against Women: Concluding Comments on Ireland, UN Doc.: CEDAW/C/IRL/4-5/CO, 22 July 2005

5. Extraordinary Rendition (Article 7)

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 ‘stopovers’ for flights involving the unlawful transfer of detainees by foreign agencies such as the CIA and their operation of aircraft which came from or were bound for countries associated with extraordinary rendition routes, the transfer of detainees and their illegal detention.¹³

The report by the European Parliament also names a number of people who were transferred through Irish airports for this purpose. 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”.¹⁴

There have been no searches of flights by Irish authorities and no independent inquiry has been initiated to establish whether Irish airports assisted in the rendition process. The State is arguing that it is entitled to rely on diplomatic assurances from the United States Government to the effect that Irish airports have not been used to facilitate rendition. The Irish Human Rights Commission (IHRC) has stated that mere acceptance of diplomatic assurances is not adequate to discharge Ireland’s positive obligations to actively ensure that torture, inhuman or degrading treatment or punishment is not facilitated by the State¹⁵ under the Article 7 and paragraph 9 of General Comment 20 of the Covenant¹⁶ and under section 4 of the Criminal Justice (United Nations Convention Against Torture) Act 2000.¹⁷ Having conveyed their concerns to the State in late 2005, the Irish Human Rights Commission received a letter on 5 April 2006 from the Minister for Foreign Affairs stating that he rejected their advice regarding the impermissibility of diplomatic assurances in this context and failing to address the Commission’s concerns with regard to the State’s obligation to investigate allegations of rendition.¹⁸

The new Programme for Government indicates that it will prioritise effective enforcement of the Criminal Justice (UNCAT) Act, 2000 and the Geneva Convention Acts 1962-1998 together with encouraging/supporting the Gardaí in investigation under these statutes; however, it does not state that the State will hold a public inquiry as recommended by

¹³ European Parliament Report: RR\382246EN.doc of 30 January 2007, para. 121-126, http://www.europarl.europa.eu/comparl/tempcom/tdip/final_report_en.pdf

¹⁴ 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

¹⁵ Irish Human Rights Commission, *Resolution in Relation to Claims of US Aircraft carrying Detainees*, 23 December 2005, http://www.ihrc.ie/_fileupload/banners/ResoluitionDecemder2005.doc

¹⁶ General Comment 20: Replaces General Comment 7 concerning prohibition on torture, inhuman and degrading treatment or punishment (Art. 7), 10 March 1992 [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c12563ed004c8ae5?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument)

¹⁷ Section 4(1) Criminal Justice (United Nations Convention Against Torture) Act 2000 No. 11 of 2000 http://www.bailii.org/ie/legis/num_act/2000/en.act.2000.0011.1.html

¹⁸ Irish Human Rights Commission, *Submission to the European Parliament’s Temporary Committee on Rendition*, 28 November 2006, p. 2 http://www.ihrc.ie/_fileupload/banners/Submission-to-European-Temporary-Committee-on-Rendition-of-the-European-Parliament.doc

the Parliamentary Assembly of the Council of Europe. Moreover, the ICCL remains concerned about the State's persistence in accepting diplomatic assurances from the United States.

We therefore ask the Committee to pay particular attention to this issue in preparation of Ireland's examination under the ICCPR.

6. The Right to Liberty and the Security of Persons in Detention (Article 6, 7 and 9)

The Committee has previously expressed concern¹⁹ that periods of detention without charge are provided for under the Criminal Justice (Drug Trafficking) Act 1996 and were increased under the Offences against the State Acts 1939-1998²⁰. The Criminal Justice Act 2007²¹ further extends the categories of offences for which a person may be held in Garda custody for up to seven days.

We ask the Committee question the State with regard to their objective justifications for the extension of periods of police detention under the Criminal Justice Act 2007.

Given that there is no formal right for a person to have a lawyer present during police interrogation, together with the encroachment upon the right to silence and the fact that inferences may be drawn in certain circumstances in police questioning under the Criminal Justice Act 2007, **the Committee might consider asking the State to outline the safeguards that are in place to ensure that miscarriages of justice do not occur?**

Complaints of unwarranted use of force by Gardaí (members of the Irish police force) continue and a number of cases of deaths in Garda custody have occurred. As regards the deaths in custody that occurred before the creation of the Garda Síochána Ombudsman Commission and those that are investigated by the Garda Síochána Ombudsman Commission, **we urge the Committee to question the State in relation to any steps it intends to take in order to ensure that deaths in Garda custody are fully investigated in a human rights compliant manner, that respects the legitimate interests of the next-of-kin of the deceased and how the State intends to ensure that human rights are mainstreamed into Garda training.**

¹⁹ The UN Human Rights Committee expressed this concern in paras. 15, 17 of the Concluding Observations on Ireland, 24 July 2000, UN Doc.: A/55/40

²⁰ Section 30(4A) of the Offences against the State Act 1939 was amended by the Offences against the State (Amendment) Act 1998.

²¹ Accessible at: <http://www.oireachtas.ie/documents/bills28/acts/2007/a2907.pdf>

7. Conditions of Detention in Ireland (Article 10)

Conditions of detention in both prisons and police stations are of concern in Ireland. In four Irish prisons, (Mountjoy, Cork, Limerick and Portlaoise prisons²²) sanitation facilities are inadequate and prisoners are still required to “slop-out” every morning.²³ They eat in proximity to their chamber pots which is particularly degrading in shared cells. The assertion in the State’s report that “a small number of prisons operate in excess of capacity” and that overcrowding has been “largely eliminated”²⁴ are incorrect. There have been occasions where there have not been enough mattresses, duvets or pillows due to chronic levels of overcrowding.²⁵ This remains a serious issue and although the new prison to be built in Dublin is proposed to alleviate this problem, it remains serious for those currently detained in Irish prisons.

Following its visit to Ireland in 2006, the CPT found three Irish prisons (Limerick and Mountjoy Prisons and St. Patrick’s Institution for young offenders) to be unsafe both for prisoners and prison staff.²⁶ In particular, this situation relates to a worrying level of inter-prisoner violence, which is in turn related to the wide availability of drugs and the lack of meaningful activities/poor regime in the prisons. Two prisoners were killed by fellow inmates in 2006 (Gary Douch) and 2007 (Derek Glennon-Kennedy). A related issue is the lack of an effective, independent mechanism to deal with prisoners’ complaints. CPT noted that prisoners ‘did not have confidence in the (internal) complaints system and did not wish to file a complaint, even when it involved to ill-treatment’ (para 37).

We ask the Committee to request that the State detail the concrete steps it intends to take in order to ensure that the different categories of people deprived of their liberty in Ireland (including remand and sentenced prisoners, immigration detainees, unconvicted persons in prisons for non-payment of debt, young people and those with mental health problems) are – in accordance with the requirements under Article 10 – held in humane conditions which recognise their particular legal status and personal needs, including that children no longer be held in adult prisons and that those detained for immigration-related reasons are not held with persons suspected or convicted of criminal offences. Given the lack of progress on addressing the issue of overcrowding, we urge the Committee to ask the States intention to provide adequate security for the increasing numbers of prisoners seeking protection in Ireland’s prisons and the measures the State taking to address the very serious problems of drugs, lack of meaningful regime and sentence management programmes and violence in Irish prisons and how is it proposed to ensure that these problems will not reoccur in the new prison.

²² Irish Penal Reform Trust, *Submission of the Irish Penal Reform Trust to the European Committee for the Prevention of Torture, Inhuman or Degrading Treatment or Punishment (CPT) in preparation for the 2006 CPT visit to Ireland*, 3 March 2006, p. 4

²³ The process of “slopping out” is required in cells which do not have sanitary facilities and prisoners are required to use chamber pots which they then have to empty.

²⁴ Third Report by Ireland on the Measures Adopted to Give Effect to the Provisions of the Covenant, 2007, Paras. 210 and 211

²⁵ Third Report by Ireland on the Measures Adopted to Give Effect to the Provisions of the Covenant, 2007, Paras. 211 and 213

²⁶ Committee for the Prevention of Torture, Inhuman or Degrading Treatment or Punishment, *Report to the Government of Ireland on the Visit to Ireland of the CPT*, from 2 – 13 October 2006, paras 38 and 62-66

8. The Right not to be Imprisoned for Failure to Fulfil a Contractual Obligation (Article 11)

In its response to the Committee members' expression of concern in 1999 over the use of imprisonment for failure to pay a debt in Ireland, the State announced that legislative proposals to end imprisonment where practicable for civil debt and inability to pay fines were then being prepared in the Department of Justice, Equality and Law Reform'.²⁷ No legislation has been introduced or passed in this area. Yet from January 2002 to September 2006, almost 1,000 people were imprisoned for periods of up to 3 months in Ireland for 'offences related to debt' with 94 people re-committed for the same debt.²⁸ In 2005 it cost €275 per day to keep a prisoner in Mountjoy prison not to mention the Garda time and other costs involved.²⁹ The State insists that there is no remission for those imprisoned for debt who may only obtain early release by paying their debt or "purging their contempt"³⁰ which is only possible by paying the debt.

We encourage the Committee to ask the State when legislation will be introduced to end imprisonment for inability to fulfil a contractual obligation and further the steps have been taken to promote appropriate legal services and advice on money and their rights for people who have been imprisoned for failure to fulfil a contractual obligation.

²⁷ CCPR/C/IRL/98/2 pages 44 – 45 April 28th, 1999

²⁸ Figures provided to FLAC by the Irish Prison Service, October 2006

²⁹ Irish Prison Service, Annual Report 2006, p. 68,
http://www.irishprisons.ie/files/pdf/Prisons_Report_2005.pdf

³⁰ State party report 1998 par.196

9. Summary Deportation of Unauthorised Migrants (Article 13)

One month before Ireland's General Election on 24 May 2007, the Government introduced the Immigration, Residence and Protection Bill 2007.³¹ The purpose of the Bill is to set out a consolidated regulatory framework for the "management of inward migration to Ireland" as well as dealing with claims for protection. Sections 5, 51 and 52 are of particular concern as they provide the State with the power to arrest, detain and remove any person who is unlawfully in the State. This is a significant change. Currently if the Minister for Justice, Equality and Law Reform wishes to remove an individual then that person is given notice and 14 days to make representations.³²

We urge the UN Human Rights Committee to review section of the Immigration, Residence and Protection Bill 2007 and for its compatibility with the ICCPR.

³¹ The Immigration, Residence and Protection Bill is accessible at: <http://www.oireachtas.ie/documents/bills28/bills/2007/3707/b3707s.pdf> The Bill fell subsequently, however, it is likely to be reintroduced in January 2008 and some provisions of the Bill may change.

³² Refer to Section 3 of the Immigration Act 2004 accessible at: <http://www.irishstatutebook.ie/2004/en/act/pub/0001/index.html>

10. Independent Refugee Appeals (Article 14)

The Refugee Appeals Tribunal³³ has been plagued by allegations of non-transparency, unfairness and bias. This may be partly due to the fact that as an institution, it lacks the basic hallmarks of independence (security of tenure for members, a transparent appointments system, rules on case allocation).

The Refugee Appeals Tribunal was established as an *independent* body to process asylum appeals from the Office of the Refugee Applications Commissioner (ORAC).³⁴ For many years, the Tribunal refused to publish its own decisions and when this practice was challenged before the High Court, McMenamin J held that it did not accord with “the principles of natural and constitutional justice, fairness of procedure or equality of arms”.³⁵

The Tribunal has also been accused of bias against asylum applicants. Tribunal members have been appointed at the discretion of the Minister for Justice, Equality and Law Reform. The only professional requirement for the post is that they must be a practicing lawyer of five years standing and they have no security of tenure once appointed. With no regulations on the allocation of cases to Tribunal, and members paid by the number of cases they process, statistics obtained by media sources revealed that one member earned 10 per cent of the total earned by 33 members.³⁶ This led to the suspicion that work was being allocated with the rate of affirmation of ORAC decisions.³⁷

With the enactment of the Immigration, Residence and Protection Bill, the Refugee Appeals Tribunal will be replaced with a new Protection Review Tribunal.³⁸ The Protection Review Committee will be responsible for hearing asylum appeals against the Minister for Justice, Equality and Law Reform.³⁹ In comparison to the provisions setting up the Refugee Appeals Tribunal, the Immigration, Residence and Protection Bill would appear to include additional safeguards guaranteeing asylum seekers an independent hearing. However, we are still concerned that several particular safeguards are missing. For example, persons appointed on a part-time basis to sit on the Protection Review Tribunal will not be recruited through the Public Service Appointments, instead they will be appointed by the Minister for Justice (section 76(3)(a)). Moreover, section 76(11) states that Tribunal members may be removed from office by the Minister for “stated reasons”, but no criteria is given. Further, section 77(4) makes clear that the Tribunal Chairperson can assign certain classes of business to particular Tribunal members but does not provide sufficient guarantee that cases will be distributed fairly i.e. in accordance with lots.

We ask the Committee to assess to review the provisions establishing the Protection Review Tribunal in order to ensure that asylum applicants receive a fair and independent hearing.

³³ <http://www.refappeal.ie/>

³⁴ <http://www.orac.ie/>

³⁵ McGarry, P. (31 March 2006) “Refugee Appeals Tribunal to publish important decisions”, *Irish Times*.

³⁶ Coulter, C. (2005) “Looking for fairness and consistency in a secretive refugee appeals system”, *Irish Times*.

³⁷ Coulter, C. (20 September 2006) “Strife preceded refugee body’s demise”, *Irish Times*.

³⁸ Section 75(1), Immigration, Residence and Protection Bill 2007, accessible at: <http://www.oireachtas.ie/documents/bills28/bills/2007/3707/b3707s.pdf>

³⁹ Section 79(1), Immigration, Residence and Protection Bill 2007.

11. Access to Fair Trial and Civil Legal Aid in Ireland (Article 14)

Unlike criminal legal aid, civil legal aid in Ireland is not free, nor is it allocated on the basis of the applicant's need for legal aid as assessed by a judge. Instead, it is administered through the centralised Legal Aid Board. A number of areas are excluded by law from the Legal Aid Scheme, ten of the State's thirty centres have waiting lists of three months⁴⁰ and a strict means test is applied in order for applicant's to qualify for civil legal aid which does not refer to a person's ability to have a fair trial without civil legal aid. Applicants must also prove that their case has merit and must make contributions towards the advice or representation they receive.

We request the Committee to ask the State to address the following questions. What measures are being taken to reduce delays in the time for solicitors taking on cases under the Civil Legal Aid Scheme? What steps are being taken to ensure that those who need civil legal aid for their effective access to justice can receive it, no matter what category of civil law or type of court or tribunal is involved? What steps are being taken to ensure that those who do not qualify under the restrictive means

⁴⁰ Source, FLAC, July 2007, based on figures received from the Legal Aid Board.

test, but cannot afford private legal services have access to civil legal aid when they need it to access the courts?

12. Continued Jurisdiction of the Special Criminal Court (Article 14)

No steps have been taken by the State to end the jurisdiction of the Special Criminal Court⁴¹ as recommended by the Committee in its Concluding Observations in 2000. The Special Criminal Court has different procedures from the ordinary Irish courts, for example, it is a non-jury court of three judges who reach their decisions by majority vote. An accused is not entitled to avail of preliminary examination procedures concerning the evidence of certain witnesses and trial in such a court is for cases where, as determined by law, the ordinary courts are “inadequate to secure the effective administration of justice, and the preservation of public peace and order.” The Committee expressed its concern that the Offences against the State Acts do not clearly stipulate the grounds on which a case will be assigned to the Special Criminal Court, a decision which is left to the discretion of the Director of Public Prosecutions (DPP).⁴²

⁴¹ Provision for the establishment of the Special Criminal Court is allowed for under Article 38.3 of the Irish Constitution which reads as follows:

1° Special courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order.

2° The constitution, powers, jurisdiction and procedure of such special courts shall be prescribed by law.

⁴² Section 14(3)(b) and (c) of the Offences against the State (Amendment) Act 1998; The Office of the Director of Public Prosecutions (DPP) was established under the Prosecution of Offences Act 1974, which provides for the transfer of all functions previously held by the Attorney General regarding criminal matters, election and referendum petitions to the Director of Public Prosecutions. The DPP is independent in the performance of his functions.
<http://www.dppireland.ie/>

A review of the Offences against the State Acts in 2002⁴³ supported the retention of the court though a minority, including the chair and a number of leading constitutional lawyers dissented on this recommendation. The retention of the Special Criminal Court was recommended on the grounds of security with regard to the continued threat from the operation of subversive organisations and that posed by organised criminal gangs (or based on either ground alone). It also said that in such circumstances the ordinary courts would be inadequate to respond to and secure the effective administration of justice and the preservation of public peace and order.⁴⁴ An amendment to the Offences Against the State Acts allows for the creation of further Special Criminal Courts.⁴⁵

We request that the Committee ask the State to disclose the circumstances under which it can see an end to the jurisdiction of the Special Criminal Court.

⁴³ Report of the Committee to review the Offences against the State Acts 1939-1998 and related matters, 2002 (Hederman Committee).

⁴⁴ Para. 9.28-9.29 Report of the Committee to review the Offences against the State Acts 1939-1998 and related matters, 2002,
<http://www.justice.ie/en/JELR/hederman%20report.pdf/Files/hederman%20report.pdf>

⁴⁵ Section 53 of the Criminal Justice (Terrorist Offences) Act 2005 amends section 49 of the 1939 Act

13. Discrimination Against Non-Traditional Families (Articles 17, 23 and 26)

As is the case in many other countries, domestic relationships in Ireland have become more diverse in the past 30 years. Cohabitation is a growing phenomenon that now has widespread social acceptance. Recent statistics from the Central Statistics Office (CSO) reveal that cohabiting couples represent 11.6 per cent of all family units in 2006.⁴⁶ The census also shows that the number of same-sex couples stood at 2,090 in 2006 and the number of lone parents at 189,200.

Despite these changes in the population, the Irish State has been slow to afford any legal recognition to these family groups and has traditionally promoted a narrow view of intimate relationships. The Irish Constitution, as interpreted by the Irish courts, only affords married families constitutional recognition and Article 41 has been used to uphold discrimination against children born outside marriage⁴⁷, unmarried fathers⁴⁸ and gay men.⁴⁹ This has serious consequences for the rights of children in these relationships. Moreover, the State has also enacted legislation that specifically discriminates against same-sex couples. For example, Section 19 of the Social Welfare (Miscellaneous Provisions) Act 2004 was introduced to amend the main social welfare act to restrict the definition of 'spouse' or 'couple' to a married couple and to opposite sex cohabiting couples for state welfare schemes. This amendment was included by the Department of Social and Family Affairs to reverse the outcome of a successful Equal Status case and has the effect of restoring discrimination against persons in same-sex couples.

The Residential Tenancies Bill 2003 also discriminates against same-sex couples. Section 39 relates to the termination of tenancies upon death and protects surviving family members from termination of a tenancy if the main tenancy holder dies. Surviving family members protected include: (i) a spouse of the tenant, (ii) a person who was not a spouse of a tenant but who cohabited with the tenant as husband and wife in the dwelling for a period of at least 6 months ending on the date of the tenant's death, (iii) a child, stepchild or foster child of the tenant, or a person adopted by the tenant under the Adoption 20 Acts 1952 to 1998, being in each case aged 18 years or more or a (iv) a parent of the tenant.

It is our view that both acts are in breach of Articles 17, 23 and 26.

The prospect of amending constitutional provisions on the family (Articles 41⁵⁰ and 42.1⁵¹) is extremely remote. An Oireachtas Report concluded in 2006 that do to so would cause 'deep and long-lasting division in our society and would not

⁴⁶ Refer to the *2006 Census of the Population – Volume 3 – Household Composition, Family Units and Fertility* http://www.cso.ie/census/census2006results/volume_3/volume_3.html

⁴⁷ *O'B v S* [1984] IR 316.

⁴⁸ *The State (Nicolaou) v An Bord Uchtála* [1980] IR 32.

⁴⁹ *Norris v Attorney General* [1984] IR 316.

⁵⁰ Article 41.1.1 "The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescribable rights, antecedent and superior to all positive law".

⁵¹ Article 42.1 "The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children".

necessarily be passed by a majority'.⁵² Yet no steps are being taken to create awareness about the importance of for such change. Earlier this year the Government indicated its intention to hold a referendum to insert children's rights into the Constitution. However, the Twenty-Eighth Referendum Bill does not include any proposals to amend the definition of the family based on marriage. FLAC, the ICCL and the IPRT believe that it is a fallacy to suggest that children's rights can be enhanced without changing the definition of the family and recommend that Articles 41 should be replaced with a definition that is closer to Article 8 of the ECHR.

We encourage the Committee to review Ireland's lack of progress in dealing with inequalities in family life.

⁵² The All-Party Oireachtas Committee on the Constitution, *Tenth Progress Report The Family* (Dublin: The Stationery Office, 2006) p122.

14. The Limits to Ireland's Anti-Discrimination Regime (Articles 2 and 26)

Ireland's equality regime essentially consists of formal equal treatment measures and is not designed to bring about substantive equality. The Employment Equality Acts (EEA) 1998-2004 prohibit discrimination in relation to employment on the basis of: gender, family status, marital status, age, disability, sexual orientation, religious belief, race and membership of the Traveller community.⁵³ The Equal Status Acts (ESA) 2000-2004 outlaw discrimination on the same grounds with regard to goods, services and education. While the range of grounds covered by Ireland's existing equality law compares favourably with other EU countries, in virtually all other respects we lag behind our European counterparts.⁵⁴ Lastly, the Equality Act 2004⁵⁵ amends the acts in order to transpose provisions from three EU directives.⁵⁶

Despite the introduction of these acts, FLAC, the ICCL and the IPRT are concerned that the State may not be fully committed to dealing with prejudice and discrimination. For example, the Equality Authority⁵⁷ and Equality Tribunal⁵⁸ are poorly resourced. In 2006 the Equality Authority only received an extra 1.5% in funding⁵⁹ with the result that it cannot perform all its functions⁶⁰ and there is currently a three year waiting list for persons taking a case to the Equality Tribunal.

⁵³ The Employment Equality Act 1998 is accessible at:

<http://www.irishstatutebook.ie/1998/en/act/pub/0021/index.html>

⁵⁴ The Equal Status Act 2000 is accessible at:

<http://www.irishstatutebook.ie/2000/en/act/pub/0008/index.html>

⁵⁵ The Equality Act 2004 is accessible at:

<http://www.oireachtas.ie/documents/bills28/acts/2004/A2404.pdf>

⁵⁶ The Race Directive (2000/43/EC); the Framework Employment Directive (2000/78/EC) and the Gender Equal Treatment Directive (2002/73/EC).

⁵⁷ The Equality Authority is an independent agency set up under the EEA to work towards eliminating discrimination in employment, promote equality of opportunity, provide information to members of the public, assist persons to take discrimination cases, prepare submissions for Ministers and invite businesses to carry out equality reviews. Refer to www.equality.ie

⁵⁸ The principal role of the Equality Tribunal (Office of the Director of Equality Investigations) is to investigate and mediate complaints of discrimination in relation to employment and access to goods, services and education. www.equalitytribunal.ie

⁵⁹ The EA received €5,451,000 in grant aid for 2005 and €5,531,000 in 2006. Source: Department of Justice, Equality and Law Reform (June 2006), *ibid*.

⁶⁰ Refer to Equality Authority Annual Report for 2006 (2007) available at:

<http://www.equality.ie/index.asp?locID=136&docID=684>

The State has also undermined the effectiveness the ESA by amending it to include new exemptions to allow for discrimination against non-citizens in relation to education and same-sex couples with regard to social welfare.⁶¹ Further, the State also amended the ESA because of approaches made by the Vintners Association to transfer jurisdiction from the Tribunal to hear complaints against publicans and hoteliers to the District Court.⁶² As a result it is much more difficult for vulnerable people to challenge discrimination by hoteliers and publicans as they generally require legal representation in District Court adversarial hearings, which was not the case in relation to Equality Tribunal inquiries. Other weaknesses in the ESA relate to its scope. It does not cover all state functions, activities and controlling duties and this has been acknowledged by the UN Committee Against Racism (CERD). CERD recommended that the ESA should be amended to include government functions.⁶³

Finally, it is worth mentioning that the State has not transposed all aspects of the aforementioned EU directives and as a result of which the European Commission is currently taking formal action against Ireland.⁶⁴

We urge the Committee to assess Ireland's progress in dealing with prejudice and discrimination paying particular attention to regressive measures adopted by the Irish State.

⁶¹ Section 49 of the Equality Act 2004 amended the Equal Status Act to allow the Minister for Education and Science to discriminate on the basis of nationality when providing further and higher education grants. This section is in direct response to a decision from the Equality Tribunal in 2003. The Tribunal decided that further and higher education grants are a service and that 'non-nationals' who are denied access to this service are being directly discriminated against. In its decision, the Tribunal advised the then Minister for Education and Science, Noel Dempsey TD, that his current scheme was discriminatory and should be amended accordingly. Instead of taking on board the Tribunal's recommendation, the Government decided to amend the ESA; Section 19 of the Social Welfare (Miscellaneous Provisions) Act 2004 was introduced to amend the main social welfare act to restrict the definition of 'spouse' or 'couple' to a married couple and to opposite sex cohabiting couples for state welfare schemes. This amendment was included by the Department of Social and Family Affairs to reverse the outcome of a successful Equal Status case and has the effect of restoring discrimination against persons in same-sex couples.

⁶² The Intoxicating Liquor Act 2001 is accessible at <http://193.178.1.79/2003/en/act/pub/0031/index.html>

⁶³ Committee on the Elimination of Racial Discrimination (14.04.05) *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Ireland*, (CERD/C/IRL/CO/2).

⁶⁴ Refer to European Commission Press Release (27.06.07) "Commission acts to close gaps in race" accessible at:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/928&format=HTML&aged=1&language=EN&guiLanguage=en> Refer to Equality Coalition (2004) *Equality Bill 2004*,

accessible from the ICCL website:

http://iccl.ie/DB_Data/publications/EqualityCoalitionSubmissionontheEqualityBill.pdf

15. Child Welfare (Article 24)

Despite its sustained economic wealth over the last decade, Ireland has failed to take meaningful action to effectively address the problem of child poverty. According to Barnardos⁶⁵, one in nine children live in consistent poverty, meaning that they live in households with incomes below 60% of the national median income and experience deprivation based on the agreed eight deprivation indicators (eg. lack of heating, lack of one substantial meal per day). Poverty falls disproportionately on a number of groups such as Traveller children, children in single parent families and migrant children, including those deprived the Child Benefit payment due to the 'habitual residence requirement'. The benefit discriminates between children, based on the status of their parents, and is contrary to the UN Convention on the Rights of the Child.

Certain social welfare payments in Ireland are subject to the "habitual residence condition". Introduced to discourage claims on Ireland's social welfare system by European Union(EU) workers from ten new countries which joined the EU in 2004, its effect on EU workers was later reduced because of potential conflict with EU freedom of movement rights. As a result, it now impacts most on those who apply through Ireland's immigration and asylum system for recognition as refugees, for subsidiary protection or for leave to remain. It has a particular impact on the *children* of people seeking asylum and those seeking subsidiary protection or leave to remain in Ireland, those who previously qualified for Child Benefit and whose children as a result are treated less favourably than others in the State.

Until 1 May 2004, Child Benefit was paid equally to every child living in Ireland regardless of their parents' status or income. No other welfare payment had this universal status. Government policy is that Child Benefit is the main instrument through which support is provided to parents with children. Irish constitutional jurisprudence has also recognised rights relating both to the welfare and health of the child and the duty of the State to fulfil these rights when the parent fails to do so.⁶⁶

There are no public figures on the number of children denied payment. However, based on the minimal statistics available, it appears that about 3,000 children, mostly living in direct provision, may be deprived and suffer discrimination as a result.

We urge the Committee to ask the State to re-instate the universal Child Benefit payment for all children in Ireland.

⁶⁵ Barnardos is a children's charity in Ireland which was founded in 1962. It supports children whose well-being is under threat by working with them, their families and their communities and by campaigning for the rights of children.

⁶⁶ In *G. v. An Bord Uchtála* [1980] IR 32, Walsh J at pg 67

16. Referendum on the Rights of the Child (Articles 24 and 26)

The Irish Constitution does not include express rights for children.⁶⁷ In 2006, the UN Committee on the Rights of the Child recommended that the Constitution should be amended to include express rights for children. In March 2007, the Government published the Twenty-Eighth Amendment to the Constitution Bill 2007⁶⁸ ostensibly to address this issue. Provision 1 of the Bill provides that the State will acknowledge and affirm “the national and imprescriptible rights of all children.” While this sub-article includes *inter alia* an acknowledgment by the State that children have: “natural and imprescriptible rights”, as noted by the Ombudsman for Children, it includes “no requisite commitment on the part of the State to defend and vindicate those rights.”⁶⁹ Moreover, its location in Article 42 of the Constitution (headed ‘Education’ but dealing primarily with family rights) rather than Article 40, which recognises the ‘personal rights of the citizen’ will significantly reduce its potential to realise independent rights for children.

The very high emphasis in the Constitution on the rights of and integrity of the family⁷⁰ will not change as a result of the proposed referendum and the proposals do nothing to enhance protection for children from abuse. This new sub-article is thus extremely disappointing and will at best result in no change in the treatment of children. The opportunity to place a child-focused rights-based provision into the Constitution, to recognize children’s rights in line with the CRC and the ICCPR, appears to have been lost for now.

We encourage the Committee to ask the State to what extent the proposed constitutional amendment will bring about enhanced protection for the independent rights of children, especially given that it is not proposed to amend the definition of the family. The Committee may also wish to examine provisions within the proposed Bill to determine whether they effectively fulfil Ireland’s international obligations under the ICCPR and the UN Convention on the Rights of the Child.

⁶⁷ Accessible at: <http://www.taoiseach.gov.ie/index.asp?docID=243>

⁶⁸ Accessible at: <http://www.oireachtas.ie/documents/bills28/bills/2007/1407/b1407d.pdf>

⁶⁹ Ombudsman for Children (6 March 2007) *Report to the Oireachtas on the Twenty-Eighth Amendment of the Constitution Bill 2006*, www.oco.ie

⁷⁰ *Kilkenny Incest Investigation: Report presented to Mr Brendan Howlin TD, Minister for Health by South Eastern Health Board (1993)*, Dublin Stationery Office.

17. Ethnicity of Irish Travellers (Article 27)

The State refuses to recognise Travellers as a distinct ethnic minority and they continue to experience discrimination in many aspects of their lives. Failure to recognise Travellers as a distinct ethnic group has serious implications for the protection of their rights. Travellers have identified themselves as an ethnic group, outlining the criteria that support this. Their view is endorsed by the Irish Human Rights Commission⁷¹ and the Equality Authority.

This issue has been reviewed by the UN Committee Against Racism (CERD). In his recent follow-up report on Ireland, Mr Morten Kjarem recommended that a dialogue should continue between the State and Traveller groups with a view to recognition of Travellers as an ethnic group.

We urge the Committee to look at the situation of Irish Travellers and at the State's reluctance to recognise them as an ethnic group.

⁷¹ Irish Human Rights Commission (2004) *Travellers as an ethnic minority under the Convention on the Elimination of Racial Discrimination: A Discussion Paper*, Irish Human Rights Commission: Dublin at p. 17.