

LAW SOCIETY SUBMISSION



SUBMISSION ON IRELAND'S COMBINED 5TH, 6TH AND 7TH PERIODIC REPORT TO THE UN COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

DEPARTMENT OF JUSTICE AND EQUALITY

JANUARY 2018

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

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1. Introduction

- 1.1. The Law Society of Ireland, through its Human Rights Committee welcomes the opportunity to submit observations to the Department of Justice and Equality (hereinafter the “Department”) on Ireland’s Combined 5th, 6th and 7th Periodic Report (hereinafter “the Report”), to the United Nations Committee on the Elimination of Racial Discrimination (hereinafter “UNCERD”). The Law Society of Ireland (hereinafter “the Society”) is pleased that the Report will address the progress made by the State since its previous periodic reports made in 2009, in its undertakings under the International Convention on the Elimination of All Forms of Racial Discrimination.
- 1.2. This submission will address issues arising out of the State’s Report in response to UNCERD’s Concluding observations on Ireland’s combined 3rd and 4th Report, which the Society believes to warrant further review during the consultation process. The Society is available to meet with the Department to expand upon and clarify any points raised within this submission.
- 1.3. The submission is being provided by members of the Human Rights Committee of the Society based on their extensive experience as solicitors in this area of law.

2. Summary of Recommendations

- 2.1. The National Consultative Committee on Racism and Interculturalism (NCCRI) should be reestablished as it is an indispensable resource in combatting racism and promoting interculturalism.
- 2.2. The Irish Traveller Movement Independent Law Centre should be reinstated, together with necessary funding. This would ensure that together with the social, health and educational initiatives that the State is carrying out, adequate and appropriate legal services are provided which address the specific needs of the Traveller community.
- 2.3. Focused and distinct legislation, beyond the constraints of the Offences Against the State Act, 1939, is required to address the nuanced issue of racist organisations. Prompt enactment of the Criminal Justice (Aggravation by Prejudice) Bill 2016 is urged to ensure the formal recognition of racial motivation and prejudice as an aggravating factor in sentencing criminal offences. The Society also supports the continuing review of current legislation on racially motivated crimes, including online hate speech, set out in the National Migrant Integration Strategy.
- 2.4. The State must reinforce its efforts to reduce the amount of time that protection applicants spend in direct provision and to ensure full implementation of all recommendations in the Mahon Report. The Society also encourages the State to move forward with its intention to give asylum seekers the right to work where their claim remains undetermined within nine months, on the basis that the right will promote greater integration and interculturalism.
- 2.5. The State is urged to widen the scope of family reunification and to consider the impact of the lack of formal appeal on applicants' right to access to justice. The Constitutional right of personal liberty and freedom, and international obligations arise in the treatment of immigration detainees and international protection applicants.
- 2.6. The State's report to UNCERD should include the recommendations made by the Inquiry conducted by the Ombudsman for Children into the 'Athlone Case', and the response of the State to those recommendations particularly in relation to the cultural competence within An Garda Síochána. A specific amendment is recommended to the Garda Síochána (Discipline) Regulations 2007, making it an actionable breach of discipline for a Member of An Garda Síochána to engage in racial profiling, and allow for complaints in that regard to be investigated by the Garda Síochána Ombudsman Commission (GSOC).
- 2.7. Consideration be given to the Minister for Justice and Equality prescribing by Order the Workplace Relations Commission as a Tribunal for the purposes of section 27(2) of the Civil Legal Aid Act 1995. This would mean that individuals who consider they have been discriminated against in their employment or in relation to accessing goods and services would have the possibility of being legally aided subject to the relevant means test and merits test that apply under the Civil Legal Aid Act.

3. Human Rights Bodies

- 3.1. As referred to under paragraph 11 of the Concluding Observations of UNCERD, the Society notes the welcome development of the establishment of the Irish Human Rights and Equality Commission (IHREC) under the Irish Human Rights and Equality Commission Act 2014. The IHREC is an independent body and enjoys an “A” status National Human Rights Institution by the International Coordinating Committee on National Human Rights.
- 3.2. However, the Society observes that the National Consultative Committee on Racism and Interculturalism (NCCRI), which UNCERD also mentions, has remained closed since 2009 on account of budget cuts and has not been reestablished. T
- 3.3. NCCRI served as a critical independent organisation that carried out vital work in combatting racial discrimination. In this regard, the Society is mindful of financial constraints and appreciates the difficulties in resourcing such bodies adequately. However, it suggests that the NCCRI would fulfil a vital independent role and the necessary funding would be of minimal impact in the broader budgetary concerns of the Department.

Recommendation: The Society recommends that consideration should be given to the reestablishment of the National Consultative Committee on Racism and Interculturalism (NCCRI) as an indispensable resource in combatting racism and promoting interculturalism.

4. Access to legal services for Travellers and Roma

- 4.1. The Society welcomes the initiatives, including those being undertaken by the State as part of the National Traveller and Roma Inclusion Strategy, to respect and strengthen the position of Travellers within Irish society. One of the ten themes identified as central to the success of the Inclusion strategy was that of anti-discrimination and equality. The Society observes that the Irish Traveller Movement Independent Law Centre previously offered a vital specialised legal service. However, lack of funds resulted in the Law Centre closing at the end of 2014.
- 4.2. The Law Centre addressed an unmet legal need within the Traveller community through a specialist, dedicated and free legal service, providing legal advice and representation on matters particular to Travellers. In light of the Law Centre’s closure, Travellers are likely to encounter difficulties in accessing legal services, which in turn raises the issue of equal access to justice for all members of Irish society.

Recommendation: The Irish Traveller Movement Independent Law Centre should be reinstated, together with adequate funding. This would ensure that together with the social, health and educational initiatives that the State is carrying out, adequate and appropriate legal services are provided which address the specific needs of the Traveller community.

5. Effectiveness of legislative responses

- 5.1. The Society notes that UNCERD recommends in paragraph 19 of its Report, *inter alia*, that legislation should be introduced to prohibit racist organisations and that racist motivation be consistently considered an aggravating factor in sentencing criminal offences. The State has indicated that the Offences Against the State Act 1939 provides for the declaration of any organisation as unlawful, including racist ones. The Society observes that the 1939 Act was drafted in the context of outlawing paramilitary and terrorist organisations and suggests that the issue of racist organisations may require separate and nuanced legislation.
- 5.2. Currently, the Prohibition of Incitement to Hatred Act 1989 provides for the prohibition of the creation or distribution of racist, homophobic or discriminatory materials. The Society notes that reports of figures available from the Courts Service of Ireland show that since 2000 there have been only 5 convictions under the 1989 Act and of those, only 2 resulted in imprisonment. It also observes that the European Network Against Racism Ireland have suggested that in light of such figures, the current law is “not fit for purpose”. The Society also observes that the Report explicitly references the National Migrant Integration Strategy and acknowledges the commitment within the strategy to strengthen the law against hate crime, including online hate speech.
- 5.3. The Society welcomes the fact that steps have been taken to introduce legislation addressing hate crime, although recommend a greater urgency in progressing relevant legislation through the Oireachtas. The Criminal Justice (Aggravation by Prejudice) Bill 2016 was referred to the Select Committee on Justice and Equality in October 2016 and it is hopeful that enactment of such legislation will shortly come to fruition. However, it notes that the Bill as it currently stands has a very narrow scope in that it only considers racist motivation at the sentencing stage and does not provide for a specific offence of hate crime.
- 5.4. In terms of sentencing, currently this is at the discretion of the sentencing judge to take into account all of the circumstances of the offence. There is no legal onus on the judge to consider any racist motivation in this context and anecdotal evidence from practitioners suggests that such motivation is not frequently considered when a sentence is being determined. The Society looks forward to the enactment of the Judicial Council Bill, which will ultimately make way for further judicial training and education in this area. Furthermore, the Aggravation by Prejudice Bill, once enacted, will provide a formal status for recognition of racist motivation as an aggravating factor.

Recommendation: The Society recommends that consideration be given to the enactment of focused and distinct legislation, beyond the constraints of the 1939 Act, to address the nuanced issue of racist organisations. Further, it also encourages the prompt enactment of the Criminal Justice (Aggravation by Prejudice) Bill 2016 to ensure the formal recognition of racial motivation and prejudice as an aggravating factor in sentencing criminal offences. The Society also supports the continuing review of current legislation on racially motivated crimes, set out in the National Migrant Integration Strategy, to strengthen the law against hate crime, including online hate speech.

6. Direct Provision

- 6.1 The Society notes that UNCERD at paragraph 20 of its Report expresses its concern over the “negative impact” that the policy of direct provision has had on the welfare of asylum-seekers. In this regard, UNCERD observes that lengthy delays and poor living conditions lead to grave physical and mental health problems. The recommendations of the Working Group Report on the Protection Process are welcomed, particularly the single application procedure. The Society notes the concern of other civil society organisations such as NASC, as well as academic commentators, in respect of the level of implementation of some of the recommendations. The Ombudsman in light of his recently published commentary, *The Ombudsman & Direct Provision: The story so far*, has observed that direct provision systems are “not suited to long-term stays and some improvements are needed”.
- 6.2 In their July 2017 submission to the United Nations Committee against Torture on Ireland’s second periodic report, IHREC reiterated its recommendation that direct provision should be placed on a statutory footing as well as introducing a time limited period of 6-9 months of stay. In this regard, the Society observes that the issue of delay remains a crucial concern even in light of the introduction of the new single application procedure. It welcomes the State’s efforts in adequately resourcing the new institutions including the International Protection Office and the International Protection Appeals Tribunal to ensure delays are alleviated.
- 6.3 The Society notes the State’s intention, in light of the Supreme Court ruling in *N.H.V -v- Minister for Justice & Equality and ors*, to opt-in to the European Union’s Reception Directive on the rights of asylum seekers. This will protect the right to work for those asylum seekers who have not had their asylum claim determined within nine months. The Society welcomes those initiatives which strengthen the human rights and dignity of asylum seekers as well as encouraging greater diversity and interculturalism. In this regard, it is mindful that the right to work should not be so restrictive as to become illusory and notes the importance of training and upskilling to promote greater integration.

Recommendation: The Society recommends that the State reinforce its efforts to reduce the amount of time protection applicants spend in direct provision and to ensure full implementation of all recommendations in the Mahon Report. It also encourages the State to move forward with its intention to give asylum seekers the right to work where their claim remains undetermined within nine months. It also recommends that the right to work is appropriately implemented to promote greater integration and interculturalism.

7. International Protection

- 7.1 The Society welcomed the commencement of the International Protection Act 2015 on 31 December 2016 as a vital single application procedure and made a number of submissions to the Department in its various draft stages. It notes that while the Act is intended to reduce the delays experienced under the old legislation, delays continue to be a concern, which as highlighted at 6.1 above is particularly challenging for applicants residing in the direct provision system. The Irish Refugee Council in December 2017 stated that hundreds of applications were backlogged since the new legislation had been introduced at the start of 2017 and that waiting times had reached 'crisis point'.
- 7.2 The Society restates its concerns as outlined in its submissions on the International Protection Act regarding the narrow interpretation of family within the context of family reunification. It looks forward to observing the impact that the new Family Reunification Humanitarian Admission Programme will have on family reunification.
- 7.3 The Society also notes the State's response to UNCERD's observation that an independent authority should provide an appeal process in family reunification applications. In this regard, the Report states that "Ireland does not accept that decision making in non-protection cases should be outside the control of the elected Government and its immigration service." The Society would encourage the State to consider in this instance the implications for access to justice whereby no designated process of appeal is provided for family reunification applications that are refused.
- 7.4 The most recent findings given by the Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) in its Second Periodic Report of August 2017 are also of relevance in the context of the use of immigration related detention within the international protection system. UNCAT recommended that Ireland should enshrine in legislation "the principle that asylum seekers should be detained only as a measure of last resort, for as short a period as possible and in facilities appropriate for their status".
- 7.5 UNCAT also expressed concern around immigration detainees, including international protection applicants, being detained in prisons and police stations together with remand and convicted prisoners. In this regard, the Society is conscious of the fundamental right to personal liberty and freedom enshrined under Article 40.4.1° of the Irish Constitution

together with the State's obligations under international treaties including the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Recommendation: The Society encourages the State to widen the scope of family reunification and to consider the impact of the lack of formal appeal on applicants' right to access to justice. It recommends that the State be mindful of the fundamental Constitutional right of personal liberty and freedom and international obligations in the treatment of immigration detainees and international protection applicants.

8. Policing

8.1 The Society notes the assurance of the State that An Garda Síochána does not, as an institution, engage in discriminatory profiling. However, the Society is mindful that during the relevant reporting period the Ombudsman for Children conducted an inquiry into the circumstances surrounding two Roma children being taken from their families by An Garda Síochána and placed in emergency care on suspicion that they had been abducted.¹

8.2 While the Inquiry noted that there was no formal instruction to members of An Garda Síochána to engage in ethnic profiling in the conduct of their duties, nonetheless the Inquiry came to the conclusion that the actions of An Garda Síochána in the cases concerning the Roma children conformed to the definition of ethnic profiling.² It follows that even if racial profiling is not part of the institutional norms of An Garda Síochána, racial profiling may occur at an operational level.

Recommendation: The Society would recommend that the State's report would provide the Committee with details of the recommendations made by the Inquiry conducted by the Ombudsman for Children into the 'Athlone Case' and the response of the State to those recommendations particularly in relation to the cultural competence within An Garda Síochána.³ More generally, the Society would recommend that consideration be given to a specific amendment being made to the Garda Síochána (Discipline) Regulations 2007, that would make it an actionable breach of discipline for a Member of An Garda Síochána to engage in racial profiling, and allow for complaints in that regard to be investigated by the Garda Síochána Ombudsman Commission (GSOC).

¹ Garda Síochána Act 2005 (section 42) (Special Inquiries relating to Garda Síochána) Order 2013, Report of Ms Emily Logan, July 2014.

² Ibid., at p.56.

³ Ibid., at p. 109.

9. Effective remedies

- 9.1 Under Article 4 of the UN Convention on the Elimination of All Forms of Racial Discrimination the State has included details of the domestic and policy framework for combating racial discrimination, including the establishment of the Workplace Relations Commission (WRC) in 2015. The WRC has subsumed the functions of the previous specialised Equality Tribunal. The Society notes the statement that “Ireland has comprehensive and robust equality legislation in place” but also notes that having such legislation in place does not always guarantee that individuals that experience discrimination are in a position to access the remedies available.
- 9.2 In relation to the WRC the Society observes that the title of the organisation and the scope of its work in the employment area may serve to obscure its role under the Equal Status Acts 2000 to 2015, and it is important in this regard that very specific efforts are made to ensure public awareness of the role of the WRC in investigating and remedying cases of discrimination outside of the employment context.
- 9.3 The Society also notes that the Civil Legal Aid Act 1995 includes a blanket exclusion of representation in respect of civil proceedings conducted before any tribunal unless designated by the Minister for Justice and Equality.⁴ The WRC has not been so designated and so an individual wishing to seek redress for discrimination, whether in relation to employment or access to goods and services, will not be able to seek representation through the State funded legal aid system at first instance. While the IHREC can provide legal assistance to individuals seeking to make a complaint to the WRC of discrimination, the resources of that organisation are applied on a strategic basis, and cannot substitute for a comprehensive system of legal aid for complaints of discrimination.

Recommendation: In order to ensure comprehensive protection from discrimination, the Society would recommend that consideration be given to the Minister for Justice and Equality prescribing by Order the Workplace Relations Commission as a Tribunal for the purposes of section 27(2) of the Civil Legal Aid Act 1995. This would mean that individuals who consider they have been discriminated against in their employment or in relation to accessing goods and services would have the possibility of being legally aided subject to the relevant means test and merits test that apply under the Civil Legal Aid Act.

⁴ Section 27(2) Civil Legal Aid Act 1995. It may be possible for a person to seek legal representation from the Legal Aid Board on appeal if the matter comes within the jurisdiction of the Circuit Court.

10. Conclusion

- 10.1 The Society welcomes Ireland's Report and the progress made to date in implementing the observations of UNCERD. The Society is hopeful that the above recommendations assist the Department in finalising the Report and offer practical insights into potential challenges of combatting racial discrimination.

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