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Consideration of reports submitted by States parties under article 19 of the Convention

Initial periodic report of States parties due in 2003

Ireland* **

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** Annexes can be consulted in the files of the secretariat.

Contents

I. Introduction

1. The present document is the first national report by Ireland on the measures taken in this State to give effect to the undertakings under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as required under article 19 of that Convention.

2. The report consists of a number of parts.

3. Part I describes the general political structure of the State and the legal framework within which human rights are protected within the State.

4. Part II contains a series of chapters devoted to the various articles of the Convention and demonstrates how Ireland has sought to comply with them. In the interests of clarity, the information provided in the context of each article or sub-article relates directly to the specific article or sub-article under discussion in that particular chapter.

5. Part III of the report contains details of the views of interested third parties on Ireland's compliance with the Convention, which were received following a public invitation issued by the State. The State also provides its response to the various matters raised by these individuals and organisations.

II. Information of a general nature

A. General political structure

1. The Constitution of Ireland

6. The basic law of the State is the Constitution of Ireland adopted by referendum in 1937. It is the successor to the 1919 Constitution of Dáil Éireann (the House of Representatives) and of the 1922 Constitution of the Irish Free State. The Constitution states that all legislative, executive and judicial powers of Government are derived from the people. It sets out the form of Government and defines the powers of the President of Ireland, the Parliament (in the Irish language, Oireachtas) and of the Government. It also defines the structure and powers of the courts, sets out fundamental rights of citizens and contains a number of directive principles of social policy for the general guidance of the Oireachtas.

7. The Constitution of Ireland can be amended only following the passage of a bill to amend the Constitution by a simple majority of both Houses of the Oireachtas and the subsequent approval of the proposal by a majority of those voting in a referendum. The Constitution has been amended on 23 occasions by means of referendum. The Constitution cannot, therefore, be amended by ordinary legislation, and legislation which conflicts with the Constitution is invalid to the extent of such inconsistency. The Superior Courts are empowered to deal with the issue of constitutionality of law and legislation. Judicial review of ordinary law on grounds of alleged unconstitutionality is dealt with below.

8. Irish law is based on common law as modified by subsequent legislation and by the Constitution of 1937. Statutes passed by the British Parliament before 1921 have the force of law unless repealed by the Irish Parliament (Oireachtas). In accordance with the Constitution, justice is administered in public in courts established by law.

2. Government

9. Ireland is a sovereign, independent, parliamentary democracy. The national Parliament (Oireachtas)/Legislature consists of the President and two Houses: a House of Representatives (Dáil Éireann) and a Senate (Seanad Éireann). The functions and powers of the President, Dáil and Seanad derive from the Constitution of Ireland and law. All laws passed by the Oireachtas must conform to the Constitution.

10. The President is Head of State; the office does not have executive functions. The President must generally act on the advice and authority of the Government. On the nomination of Dáil Éireann the President appoints the Taoiseach (Prime Minister) and, on the advice of the Taoiseach and with the prior approval of Dáil Éireann, the President appoints members of the Government. Government policy and administration may be examined and criticized in both Houses, but under the Constitution the Government is responsible to the Dáil alone.

Dáil Éireann (House of Representatives)

11. Dáil Éireann currently has 166 members called Teachtaí Dála (T.D.s). Members are returned by the 43 constituencies into which the State is at present divided and no constituency may return less than three members. The total number of members of the Dáil may not be fixed at less than one member for each 30,000 of the population or more than one member for each 20,000 of the population.

Seanad Éireann (Senate)

12. Seanad Éireann has 60 members. Eleven are nominated directly to the House by the Taoiseach, 43 are elected by outgoing members of the Seanad, by county and borough Council members and by members of Dáil Éireann from five panels of candidates – the Cultural and Educational Panel, the Agricultural Panel, the Labour Panel, the Industrial and Commercial Panel and the Administrative Panel. Each panel contains the names of persons with knowledge and practical experience of the interests represented by the panel. The remaining six are elected by the graduates of universities – three by the National University of Ireland and three by the University of Dublin.

13. The powers of the Seanad, as defined by the Constitution are, in general, less than those of the Dáil. It has complementary powers with the Dáil in broad areas such as the removal from office of a President or a judge; the declaration and termination of a state of emergency; the initiation of Bills other than Money Bills; and the annulment of statutory instruments. It has no powers in relation to financial matters.

3. The judiciary

14. Judges in Ireland are independent both of the executive and the legislature and this independence is given full protection by the Constitution. Judges are appointed by the President on the advice of the Government, which makes its decisions with reference to recommendations from the Judicial Appointments Advisory Board. Article 35.2 provides that all judges shall be independent in the exercise of their functions and subject only to the Constitution and the law. They may not be members of the Oireachtas (Parliament) or hold any other office or position of emolument (Art. 35.3). They may not be removed from office except for stated misbehaviour or incapacity and then only upon resolutions passed by both Houses of the Oireachtas calling for their removal (art. 35.4). This power has yet to be exercised. With the exception of the power of the Oireachtas to remove a judge, questions of discipline in relation to judges are regulated by the judiciary itself.

4. The court system

15. The courts in Ireland are structured on four levels: the District Court, the Circuit Court, the High Court and the Supreme Court. There is also a Court of Criminal Appeal. The District and Circuit Courts are courts of local and limited jurisdiction established by statute law and provided for by article 34.3.4 of the Constitution. The High Court is, by virtue of article 34.3.1 of the Constitution of Ireland, invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal. The Supreme Court is the court of final appeal and is established pursuant to Articles 34.2 and 34.4.1 of the Constitution.

The High Court

16. It has the appellate functions from the Circuit Court and (by way of case stated) from the District Court. Its decisions on appeal are final. The High Court has a full original jurisdiction in all civil and criminal matters. When the High Court sits with a jury to try crimes it is known as the Central Criminal Court. Treason, murder, rape and certain other serious sexual offences must be tried there. An appeal lies from the High Court in civil matters to the Supreme Court and in criminal cases to the Court of Criminal Appeal. The High Court is the only court with original jurisdiction to deal with a claim that a law enacted after 1937 is invalid having regard to the provisions of the Constitution.

The Court of Criminal Appeal

17. This consists of three judges of the Supreme and High Courts. It can hear appeals from all cases of indictable crime dealt with in the Circuit and Central Criminal Courts. It does so on the basis of a transcript from the lower court. It can vary the sentence of the lower court, and set aside a verdict and, if necessary, order a retrial. An appeal lies from its decisions to the Supreme Court where it or the Attorney-General certifies that the decision involves a point of law of exceptional public importance and that it is desirable in the public interest that such an appeal should be taken (The Courts of Justice Act, 1924, sect. 29).

The Supreme Court

18. It has the appellate jurisdictions already described. It has no original jurisdiction except in cases where, pursuant to article 26 of the Constitution, a bill is referred to it by the President prior to signing it for a decision on its constitutionality.

Special Criminal Court

19. In addition to the structure of courts described in the preceding paragraphs, provision for the establishment of special criminal courts is made in article 38.3.1 of the Constitution which states that: “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.” Accordingly, part V of the Offences Against the State Act 1939 authorises the establishment of special criminal courts following a proclamation by the Government, in the terms required by the Constitution, “that the ordinary courts are inadequate to secure the administration of justice and the preservation of public peace and order” and ordering that part V of the Act is to be in force.

20. The Court established in 1972 has always sat as a court of three serving judges, one from each of the High, Circuit and District Courts, sitting without a jury. The Court can act by majority decision but only one decision is pronounced. There is a right of appeal to the Court of Criminal Appeal. In May 2002 a report was published by the Committee to

Review the Offences Against the State Act 1939–1998 and Related Matters pursuant to the Good Friday Agreement. A majority of the Committee recommended the retention of the Special Criminal Court. The report remains under consideration of the Government.

21. The decision as to whether a particular case will be prosecuted before the Special Criminal Court is a matter for the Director of Public Prosecutions who is by law independent of the Government.

5. The civil service

22. The legal basis for the present Irish system of public administration is contained in the Ministers and Secretaries Act 1924. This Act, and its subsequent amendments, provides a statutory classification of the functions of Government under the various Departments of State. Ministers are responsible for all the actions of their Departments. However, the day-to-day administration of a Department's functions is overseen by its Secretary General, who is a civil servant. The Public Service Management Act 1997 gives a new statutory framework for the allocation of authority, responsibility and accountability within and across Government Departments.

6. Policing

23. Ireland has a single national police service, the Garda Síochána. It has approximately 13,500 full-time members. In addition, there are currently 100 part-time voluntary reserve members and it is intended to expand this reserve to reach 10 per cent of Garda strength. There are no other police services in the jurisdiction and the Garda Síochána also serves as the State's security and intelligence service.

24. The Garda Síochána is established by legislation and its internal management is subject to Regulations made by the Minister for Justice, Equality and Law Reform. The Garda Síochána has operational independence subject to the general financial and regulatory framework established by the Minister.

25. Section 7 of the Garda Síochána Act 2005 sets out the functional objectives of the Garda Síochána as:

(a) Preserving peace and public order;

(b) Protecting life and property;

(c) Vindicating the human rights of each individual;

(d) Protecting the security of the State,

(e) Preventing crime;

(f) Bringing criminals to justice, including by detecting and investigating crime;

(g) Regulating and controlling road traffic and improving road safety, and other functions conferred by law including those relating to immigration.

26. All senior officers, including the Commissioner, are appointed by the Government. The democratic accountability of the Garda Síochána has been strengthened by the provisions of the Garda Síochána Act 2005. The Garda Commissioner's Strategy Statements and Annual Policing Plans are subject to the approval of the Minister. The Commissioner must report to the Minister as required. The Minister is in turn politically accountable to the Irish Parliament for the Garda Síochána.

27. The powers of the police are set out in statute and all their actions are subject to review by an active and constitutionally independent judiciary.

7. Garda Síochána Ombudsman Commission

28. The Garda Síochána Ombudsman Commission is an independent statutory body established under the Garda Síochána Act 2005 and represents a model of independent oversight of policing in the State. Neither a member nor a former member of the Garda Síochána can be a member of the Commission. The Commission is chaired by a former Secretary General of the Department of Foreign Affairs. The statutory objectives of the Commission are to ensure that its functions are performed in an efficient and effective manner and with full fairness to all persons involved in complaints and investigations concerning the conduct of members of An Garda Síochána and also to promote public confidence in the process of resolving those complaints (see also the section below on article 12 for further detail).

8. Director of Public Prosecutions

29. The authority to prosecute a person for a criminal offence rests with an independent officer, the Director of Public Prosecutions.

B. General legal framework within which human rights are protected

1. The Constitution of Ireland – specified rights

30. A large number of rights are specifically provided for in the Constitution of Ireland. They are principally, although not exclusively, to be found in the chapter headed "Fundamental Rights" which comprises articles 40–44. These include the following rights:

(a) Equality before the law (art. 40.1);

(b) The right to life (arts. 40.3.2 and 3);

(c) The right to protection of one's person (art. 40.3.2);

(d) The right to one's good name (art. 40.3.2);

(e) Property rights, including the right to own, transfer, bequeath and inherit property (art. 40.3.2 in conjunction with art. 43);

(f) Personal liberty (art. 40.4);

(g) The inviolability of the dwelling (art. 40.5);

(h) Freedom of expression (art. 40.6.1 (i));

(i) Freedom of assembly (art. 40.6.1 (ii));

(j) Freedom of association (art. 40.6.1 (iii));

(k) Family rights (art. 41);

(l) The right of parents to provide for children's education (art. 42.1);

(m) The right of children to receive a certain minimum education (art. 42.3.2);

(n) Freedom of conscience and the free profession and practice of religion (art. 44);

(o) The right to vote (arts. 12.2.2, 16.1 and 47.3);

(p) The right to seek election (arts. 12.4.1 and 16.1);

(q) The right to have votes treated as being of equal weight (art. 16);

(r) The right to have justice administered in public by judges who are independent (arts. 34 and 35);

(s) The right to criminal trial in course of law (art. 38.1);

(t) The right to trial by jury (art. 38.5);

(u) The right not to have one's acts retrospectively declared to be unlawful (art. 15.5.1).

2. Unspecified Constitutional rights

31. Articles 40.3.1 and 40.3.2 of the Irish Constitution deal with the issue of personal rights and state:

(a) "The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen" (40.3.1);

(b) "The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen" (40.3.2).

32. The Irish courts have identified a number of rights which, although not expressly referred to in the Constitution are nonetheless provided for by it. The origin of this lies in the Courts holding that these rights are encapsulated in the general expression "personal rights" contained in article 40.3.1 or are corollaries of, or ancillary to, the specific rights contained in article 40.3.2.

33. The role the Irish Courts (and indeed the citizens of this State, for many of these rights have been established in cases brought by them) played in identifying these rights is particularly evident in the judgment of Kenny J in *Ryan v. Attorney General*, a judgment which also identified the right to bodily integrity as one such unspecified right. Justice Kenny stated that:

> "the "personal rights" mentioned in Article 40.3.1 are not exhausted by the enumeration of "life, person, good name, and property rights" in Article 40.3.2 as is, shown by the use of the words "in particular"; nor by the more detached treatment of specific rights in the subsequent sections of the Article. To attempt to make a list of all the rights which may properly fall within the category of "personal rights" would be difficult and, fortunately, is unnecessary in this present case."

34. In the context of the subject matter of the present report, the most notable of these unspecified rights and the relevant cases which gave rise to their identification are:

(a) **The right to bodily integrity** – *Ryan v. Attorney General [1965] IR 294*;

(b) **The right to travel within the State** – *Ryan v. Attorney General*;

(c) **The right to travel outside the State** – *The State (M) v. Attorney General [1979] IR 73*;

(d) **The right not to have health endangered by the State and freedom from torture and from inhuman or degrading treatment or punishment** – *The State (C.) v. Frawley [1976] IR 365*;

(e) **The right to litigate or have access to the courts** – *Macauley v. Minister for Posts and Telegraphs*;

(f) **The right to justice and fair procedures** – *The State (Howard) v. Donnelly*,[1] *The State (Gleeson) v. Minister for Defence*,[2] *Curran v. Attorney General*,[3] *The State (Walshe) v. Murphy*,[4] *The State (Williams) v. Kelleher*;[5]

(g) **The right to legal counsel** – *The State (Healy) v. Donoghue*;

(h) **The right to communicate** – *Attorney General v. Paperlink Ltd [1984] ILRM 343*;

(i) **The right to marry** – *Ryan v. Attorney General*;

(j) **The right to marital privacy** – *McGee v. Attorney General [1974] IR 284*;

(k) **The right to procreate** – *Murray v. Ireland [1991] ILRM 465*;

(l) **The rights of an unmarried mother concerning her child** – *G v. An Bord Uchtala [1980] IR 32*;

(m) **The rights of a child** – *Re the Adoption Board (No. 2) Bill 1987 [1989] IR 656*;

(n) **The right to an independent domicile and maintenance** – *CM v. TM (No. 2) [1991]*;

(o) **The right of access to the courts** – *Macaulay v. Minister for Posts and Telegraphs [1966] IR 345*;

(p) **The right to legal representation in certain criminal cases** – *The State (Healy) v. Donoghue [1976] IR 325*;

(q) **The right to fair procedure** – *Re Haughey [1971] IR 217*;

(r) **The right to earn a livelihood** – *Murphy v. Stewart [1973] IT 97*.

3. Enforcement of rights in practice

35. The Courts have held that the obligation on the State under the Constitution to guarantee to defend and vindicate the personal rights of an individual citizen must be balanced against its obligations to act for the good of the State's citizenry as a whole, so in that regard any rights which are derived from these articles cannot be construed as being unlimited insofar as their application to a particular individual is concerned.

36. In *W V Ireland* (No. 2) [1997] 2 IR 141, Costello J stated: "The rights guaranteed under the Constitution are not absolute rights (with the exception of an implied right not to be tortured which must be regarded as an absolute right never to be abridged) and their exercise and enjoyment may be, and frequently are, limited by reason of the exigencies of the common good."

37. This power was further illustrated in *The State (Murray) v. Governor of Limerick Prison*[6] where it was found that Rule 63 of the 1947 Rules for the Government of Prisons did not contravene a particular prisoner's unspecified right under the Constitution to

[1] On the subject of Natural Justice.
[2] On the subject of Natural Justice.
[3] On the subject of the need for sufficient time to prepare a defence.
[4] On the subject of the accused having an effective opportunity to meet the case against him.
[5] On the subject of the requirement that an accused be given advance notice of the evidence against him.
[6] High Court 23 August 1978.

communicate, by authorising the reading of his mail by prison authorities, a measure which is generally acknowledged as being in the interests of the security of a prison facility.

38. In addition to being subject to the common good, constitutional rights may also be qualified by reference to the constitutional rights of others. Two tests have been formulated in recent times for determining the validity of restrictions on constitutional rights. In *Tuohy v. Courtney*[7] the Supreme Court, per Finlay CJ held that in a challenge to the constitutional validity of any statute the enactment of which entailed balancing of constitutional; right and duties, "the role of the courts is … to determine from an objective stance whether the balance contained in the impugned legislation is so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights."

39. In *Heaney v. Ireland*,[8] Costello J stated:

> "The objective of the impugned provision must be of sufficient importance to warrant over-riding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:
>
> (a) Be rationally connected to the objective and not the arbitrary, unfair or based on irrational considerations;
>
> (b) Impair the rights as little as possible; and
>
> (c) Be such that their effects on rights are proportional to the objective."

4. Constitutionality

40. Under article 34 of the Constitution, both the High Court and the Supreme Court have the power to assess and determine the validity of any law in terms of its Constitutionality. Any person wishing to question the constitutionality of a law may seek to issue a High Court plenary summons seeking a declaration that the law in question is unconstitutional. Similarly matters of this nature may also arise by way, or in the course, of judicial review, that is through an application for certiorari seeking to quash a District Court decision.[9]

41. In the event that a Court concludes a particular law to be unconstitutional the law ceases to have any legal validity.[10]

5. Horizontal application of constitutional rights and duties

42. There are examples of case law where parties in private litigation have placed reliance on the Constitution. The Superior Courts have not yet addressed the question of whether a "State action" is required before constitutional rights and duties can be raised and enforced, however, there is a considerable body of law to suggest that constitutional rights and duties apply horizontally in private disputes.

43. For example in *Parsons v. Kavanagh* [1990] ILRM 560, the plaintiff, a private bus operator, obtained an interlocutory injunction restraining the defendant, a competitor, on the basis that the defendant had acted in breach of a statutory duty imposed under the Road Transport Acts and in violation of the plaintiff's unenumerated "right to earn one's living by any lawful means". The judgment proceeded on the basis that the Constitution, including

[7] [1994] 3 IR 1.
[8] [1994] 3 IR 593.
[9] For example, *The State (Healy) v. Donoghue* [1976] IR 326.
[10] *Murphy v. Attorney General* [1982] IR 241 at 307, J. Henchy.

the implied rights contained therein, has automatic application to a local dispute between private commercial undertakings.

6. Evidence

44. With regard to evidence, the general rule in Ireland is that evidence obtained as a result of a deliberate breach of a person's constitutional rights is inadmissible. A confession deemed involuntary due to a threat, inducement or oppression is automatically inadmissible in proceedings.

7. Legislation, conventions and treaties

Overview

45. Article 29.3 of the Constitution states that, "Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States". Like other common law countries, Ireland has a "dualist" system under which international agreements to which Ireland becomes a party are not automatically incorporated into domestic law. Article 29.6 of the Constitution of Ireland provides that: "No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas."

46. Where Ireland wishes to adhere to an international agreement it must, therefore, ensure that its domestic law is in conformity with the agreement in question. In some cases the entire contents of an international agreement are transposed into domestic law by providing that the agreement shall have the force of law within the State. An example is the Diplomatic Relations and Immunities Act 1967, which provides that the provisions of the Vienna Conventions on Diplomatic Relations and on Consular Relations have the force of law in Ireland. In other cases it is necessary to transpose only certain provisions of an agreement because other provisions are either already incorporated in domestic law or are of a nature not requiring incorporation. Sometimes it may be that for the same reason no transposition provisions at all are required.

47. The principles of dualism apply equally to human rights agreements such as the International Covenants and United Nations Conventions as well as the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Relevant domestic legislation

Criminal Law (United Nations Convention against Torture) Act 2000

48. Legislative provision for the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is made by way of the Criminal Law (United Nations Convention against Torture) Act 2000. The Convention was signed by Ireland on 28 September 1992. Further comment on the Act is included in the section below on article 2 of the Convention).

The European Convention on Human Rights Act 2003

49. The European Convention on Human Rights has been incorporated into domestic law by way of The European Convention on Human Rights Act, 2003. The Act came into effect on 31 December 2003. Briefly, the Act provides for rights under the Convention to be pleaded directly before Irish courts and tribunals rather than cases having to be taken before the Court of Human Rights in Strasbourg.

The Human Rights Commission Acts 2000 and 2001

50. Provision was made in the Human Rights Commission Acts 2000 and 2001 for the establishment of a Human Rights Commission. The Commission has been fully operational since July 2001 and is now in its second term of office. Its function involves the ongoing review of the adequacy and effectiveness of law and practice in the State relating to the protection of human rights. The Human Rights Commission has 15 members, appointed by the Government for a period of 5 years. Its membership is pluralist in line with the statutory requirement that the Commission must broadly reflect the nature of Irish society. In accordance with the legislation not less than 7 of the members of the Commission must be female and not less than 7 must be male.

Mental Health Act, 2001

51. The Mental Health Act, 2001 provides a modern legal framework for the admission and treatment of persons with a mental disorder including a high level of protective measures in relation to patients' rights, and brings Ireland's mental health law into compliance with international conventions.

Refugee Act 1996 – Geneva Convention

52. The Refugee Act 1996 was commenced in full on 20 November, 2000. The Act, inter alia, gives effect in Irish law to commitments under the Geneva Convention relating to the status of refugees to which the State is fully committed and places the procedures for processing applications for refugee status on a statutory footing. The Act resulted in the establishment of two independent statutory offices to provide for processing asylum applications, a Refugee Applications Commissioner and a Refugee Appeals Tribunal.

53. The scope of the Act is wide ranging; as well as dealing with first instance decisions and appeals it also covers the right to legal representation and interpretation and provides specifically for a direct contribution to be made by the Office of the United Nations High Commissioner for Refugees (UNHCR) to the asylum determination process.

54. On 10 October 2006 the European Communities (Eligibility for Protection) Regulations, 2006 were signed into domestic law. The Regulations give full effect in Irish law to the provisions of Council Directive 2004/83/EC on minimum standards for the qualifications and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

Immigration Act 1999; Immigration Act 2003 and Immigration Act 2004

55. The laws relating to the control of entry into the State, the duration and conditions of stay in the State, obligations while in the State and removal from the State of non-nationals is set out in the Immigration Act 1999, Immigration Act 2003 and Immigration Act 2004. The provisions governing deportation from the State are set out in section 3 of the Immigration Act 1999 and are subject to the overarching principle of non-refoulement contained in section 5 of the Refugee Act 1996. The provisions governing removal from the State of non-nationals who have been unlawfully present in the State for a continuous period of less than 3 months are set out in section 5 of the Immigration Act 2003 and are subject to the overarching principle of non-refoulement contained in section 5 of the Refugee Act 1996 and section 4 of the Criminal Justice (United Nations Convention against Torture) Act 2000. The Immigration, Residence and Protection Bill 2008 (see below) will, when enacted, restate and reinforce those protections.

The Immigration, Residence and Protection Bill 2008

56. The Immigration, Residence and Protection Bill 2008, which is at present before Parliament, proposes to integrate the processes for dealing with applications for protection in the State (at present covered by the Refugee Act 1996 and the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No 518 of 2006) and all other aspects of the desire of a protection applicant to remain in the State (at present dealt with under the Immigration Act 1999) into a unified process at the end of which each applicant has a complete answer to the question whether he or she will be permitted to remain in the State. In consequence, the Bill proposes to repeal the Refugee Act and the Regulations, and to subsume into the Minister's functions those at present carried out by the Refugee Applications Commissioner in relation to asylum applications. The Bill will also transpose into national law Council Directive 2005/85/EC[11] of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status ("Procedures Directive").

The Employment Equality Acts 1998 and 2004 and the Equal Status Acts 2000 to 2004

57. Ireland now has in place a broad-based anti-discrimination regime in the areas of employment and in the access to and provision of goods and services whether by the private or public sector, including the provision of education and access to accommodation. The Acts prohibit discrimination on nine grounds against those in employment, seeking access to employment or participating in vocational training, and those seeking goods and services. These grounds are gender, marital status, family status, sexual orientation, religious belief, age, disability, race and membership of the Traveller community. The Acts also outlaw victimisation, that is, discrimination against an individual because he or she has taken a case or is giving evidence under the equality legislation, or has opposed by lawful means discrimination which is prohibited under this legislation.

International Criminal Court Act 2006

58. The International Criminal Court Act of 2006 provides for the punishment by courts in the State and by courts-martial of genocide, crimes against humanity, war crimes and other offences within the jurisdiction of the International Criminal Court. Notable is section 63 which provides that diplomatic or State immunity shall not be a bar to proceedings under this legislation.

Child Trafficking and Pornography Act 1998

59. The Act provides for an offence of trafficking in children for the purpose of their sexual exploitation, punishable by up to life imprisonment. It also provides for a new offence of knowingly producing, printing, publishing, exporting, importing, distributing, selling or showing child pornography, for which the penalty will be up to 10 years imprisonment and makes it an offence to possess child pornography, punishable by up to 5 years imprisonment. Account has been taken of the European Union Joint Action to Combat Trafficking in Human Beings and the Sexual Exploitation of Children, in so far as it applies to children, as well as of article 34 of the United Nations Convention on the Rights of the Child which influenced the text of the Joint Action.

[11] OJ L326 of 13 December 2005.

Non-Fatal Offences against the Person Act 1997

60. The Act states that it is an offence to threaten to kill or cause serious harm to another person. Conviction brings with it a fine or possibly imprisonment for up to 10 years. It also states that it is an offence to cause harm to another person.

61. The Act states that it is an offence to coerce another person in to doing (or not doing) something that person has a lawful right to do. This coercion includes violence or intimidation to another or that person's family; damage to the victim's property; persistently following that person from place to place; watching or besetting a place where the victim lives, or works or "happens to be" or following the victim with other people in a disorderly manner in a public place. Conviction for the offence can bring with it a fine or possibly imprisonment up to 5 years.

62. The Act states that it is an offence to harass another person. Harassment means persistently following, watching, pestering, besetting, or communicating with the victim, without lawful, authority or reasonable excuse. It includes use of the telephone. The harassment must seriously interfere with the victim's peace and privacy or cause alarm, distress or harm to the victim. The court may fine or possibly imprison the perpetrator or direct that they do not attempt any further communication with the victim. Also the court may order that the perpetrator keeps away, at such distance as the court decides, from the victim's place of residence or employment.

63. It should be noted that whereas under the Domestic Violence Act (see below) it will normally be the victim who makes the application for the order, the 1997 Non-Fatal Offences Against the Person Act deals with criminal offences which are applicable to all persons.

Domestic Violence Act 1996

64. Where a partner or spouse has been violent or has behaved inappropriately proceedings under the Domestic Violence Act 1996 may be taken. The legislation provides for the following remedies:

(a) Barring Order: An Order preventing a spouse or partner (in certain circumstances) entering the place where the Applicant resides or using or threatening to use violence against the other Applicant or a dependant family member;

(b) Interim Barring Order: An Order pending the hearing of the Barring Order application;

(c) Protection Order: An Interim Order directing a person to cease using threatening or violent behaviour against the Applicant or their dependant children;

(d) Safety Order: An Order prohibiting a person from repeating acts of violence or threats of violence.

Child Care Act 1991

65. This Act focuses on the child and the promotion of the child's welfare. It also places a specific duty on the Health Service Executive to identify children who are not receiving adequate care and protection and, in promoting their welfare, to provide child care and family support services. This Act underpins the basic tenet that the welfare of the child is of paramount importance.

Criminal Law (Human Trafficking) Act 2008

66. The Act creates separate offences of trafficking in children for the purpose of their labour exploitation or the removal of their organs, trafficking in children for the purpose of

their sexual exploitation and trafficking in adults for the purposes of their sexual or labour exploitation or the removal of their organs. It also makes it an offence to sell or offer for sale or to purchase or offer to purchase any person, adult or child, for any purpose. It is an offence to solicit or importune a trafficked person for the purpose of prostitution.

67. Specifically, the Act creates the following offences in sections 2 to 5:

(a) Trafficking in children for the purpose of their labour exploitation and the removal of their organs and the selling or purchasing of a child for any purpose (section 2);

(b) Trafficking in children for the purpose of sexual exploitation (by means of substitution into the child Trafficking and Pornography Act 1998) (section 3);

(c) Trafficking in adults for the purposes of their sexual or labour exploitation or the removal of their organs and the selling or purchasing of adults for any purpose (section 4);

(d) Soliciting or importuning a trafficked person for the purpose of prostitution. Unlike the existing prostitution offences, the soliciting or importuning can be in private as well as in a public place and the trafficked person does not commit any offence (section 5).

68. Section 7 of the Act provides a wide range of jurisdictions for the Irish courts. Any trafficking offence committed abroad by an Irish person or person ordinarily resident in Ireland can be prosecuted in Ireland and any trafficking offence committed abroad against an Irish person or person ordinarily resident in Ireland can also be prosecuted in Ireland.

69. Sections 10 to 12 provide protection through the criminal law to alleged victims of trafficking. These include the exclusion of the public from proceedings in trafficking cases; the anonymity of victims of trafficking and the giving of evidence by victims of trafficking through a television link.

International treaties

70. Ireland is party to various international treaties including:

- Charter of the United Nations
- International Covenant on Civil and Political Rights
- Optional Protocol to the International Covenant on Civil and Political Rights
- Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty
- International Covenant on Economic, Social and Cultural Rights
- Convention on the Rights of the Child
- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict
- Convention on the Elimination of All Forms of Discrimination against Women
- Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women
- Convention on the Nationality of Married Women
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Prevention and Punishment of the Crime of Genocide
- Convention on the Reduction of Statelessness

- Convention relating to the Status of Stateless Persons
- Convention relating to the Status of Refugees
- Rome Statute of the International Criminal Court
- Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
- Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
- Geneva Convention (III) relative to the Treatment of Prisoners of War
- Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Slavery Convention, signed at Geneva on 25 September 1926 and amended by the Protocol

71. Ireland is party to the following Council of Europe treaties:

- Statute of the Council of Europe
- Convention for the Protection of Human Rights and Fundamental Freedoms
- Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms
- Protocol 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto
- Protocol 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty
- Protocol 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms
- Protocol 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances
- European Social Charter
- European Social Charter (revised)
- Framework Convention for the Protection of National Minorities

72. Ireland has signed but not yet ratified the following international agreements:

(a) Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms;

(b) International Convention for the Protection of all Persons from Enforced Disappearance;

(c) Convention on the Rights of Persons with Disabilities;

(d) The European Convention on the Exercise of Children's Rights.

Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

73. Ireland signed the Optional Protocol on 2 October 2007. The Attorney General has advised that legislation will be required prior to ratification of the Optional Protocol in order to provide for the creation of the national preventive mechanism arrangement. Work on draft legislation has commenced in the Department of Justice, Equality and Law Reform.

74. Furthermore, Ireland has not yet notified acceptance of the proposed amendment of articles 17/18 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

III. Information in relation to each of the articles in Part I of the Convention

Article 1

Article 1.1

75. The Criminal Justice (United Nations Convention against Torture) Act 2000 provides for the definition of torture and also creates offences relating to the carrying out of an act of torture by a public official, whatever his or her nationality may be, and whether within or without the State and provides for a penalty on conviction of imprisonment for life. The Act defines torture as: "an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person".

76. The Act also creates related offences of attempting to commit or conspiring to commit the offence of torture or doing any act with the intent to obstruct or impede the arrest or prosecution of another person, including a person who is a public official, in relation to the offence of torture, which again carries a penalty on indictment of imprisonment for life.

Article 1.2

77. No comment required.

Article 2

Article 2.1

Legislation

The Criminal Justice (United Nations Convention against Torture) Act 2000

78. Implementation of the Convention was given effect to in this State by the Criminal Justice (United Nations Convention against Torture) Act 2000.

79. The Act provides for the definition of torture and also creates offences relating to the carrying out of an act of torture by a public official, whatever his or her nationality may be, and whether within or without the State and provides for a penalty on conviction of imprisonment for life. The Act defines torture as: "an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person".

80. The Act also creates related offences of attempting to commit or conspiring to commit the offence of torture or doing any act with the intent to obstruct or impede the arrest or prosecution of another person, including a person who is a public official, in relation to the offence of torture, which again carries a penalty on indictment of imprisonment for life.

81. The Act also contains a prohibition on expulsion or refoulement of a person to another State where he or she may be tortured. The Act provides for the amendment of various pieces of relevant legislation including the Defence Act 1954 as amended and the Extradition Act 1965 (see below).

Amendments to extradition legislation

82. Section 9 of the above Criminal Justice (Convention against Torture) Act 2000 amends the First Schedule to the Extradition (Amendment) Act 1994 in order to include the offences created by the Act. The effect of their inclusion is that these offences will not be considered to be political offences and that extradition cannot be denied, therefore, on that ground.

83. The European Arrest Warrant Act 2003 (as amended) which came into effect on 1 January 2004 governs arrangements for surrender between Ireland and other member States of the European Union. Section 37 of the Act provides that a person shall not be surrendered if his or her surrender would be incompatible with Ireland's obligations under the European Convention on Human Rights or the Protocols thereto listed in the section.

European Convention on Human Rights Act 2003

84. Ireland has given further effect to the European Convention on Human Rights (ECHR) in Irish law by way of the European Convention on Human Rights Act 2003. The Irish courts must take account of ECHR jurisprudence under section 4 of the ECHR Act 2003.

Rome Statute of the International Criminal Court and Act of 2006

85. Ireland signed this treaty on 7 October 1998 and ratified it on 11 April 2002. The International Criminal Court Act of 2006 provides for the punishment by courts in the State and by courts-martial of genocide, crimes against humanity, war crimes and other offences within the jurisdiction of the International Criminal Court. Notable is section 63 which provides that diplomatic or State immunity shall not be a bar to proceedings under this legislation.

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

86. In addition Ireland is party to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the Geneva Conventions of 1949 and their two Additional Protocols of 1977 and the Convention on the Rights of the Child, all of which contain provisions relating to torture. It might also be noted that Ireland is a signatory to the Convention on the Rights of Persons with Disabilities and the International Convention for the Protection of all Persons from Enforced Disappearance, both of which contain anti-torture provisions. Since becoming a party to the Convention Ireland has been visited by the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment on four separate occasions.

The courts

87. In the case of *The State (C) v. Frawley* [1978] IR 131) Finlay P, then President of the High Court, said that "if the unspecified personal rights guaranteed by Article 40 of the Constitution follow in part or in whole from the Christian and democratic nature of the State, it is surely beyond argument that they include freedom from torture and from inhuman or degrading treatment or punishment." In the case of *Murray v. Ireland* [1985] IR 532 Mr. Justice Costello referred to the right not to be tortured as one of the personal rights protected but not expressly enumerated in article 40.3.1 of the Constitution. In *HMW v. Ireland* (No. 2) [1997] 2 IR 141 he referred to the implied right not to be tortured as an absolute right incapable of being abridged. Furthermore, Mr. Justice Kingsmill Moore in *The People (Attorney General) v. O'Brien* [1965] IR 142 also said that the infliction of torture to extract evidence would involve the State in moral defilement.

Administrative measures

An Garda Síochána

88. The Garda Síochána is established by legislation and its internal management is subject to regulations made by the Minister for Justice, Equality and Law Reform. The Garda Síochána has operational independence subject to the general financial and regulatory framework established by the Minister.

89. Section 7 of the Garda Síochána Act 2005 sets out the functional objectives of the Garda Síochána as:

(a) Preserving peace and public order;

(b) Protecting life and property;

(c) Vindicating the human rights of each individual;

(d) Protecting the security of the State;

(e) Preventing crime;

(f) Bringing criminals to justice, including by detecting and investigating crime;

(g) Regulating and controlling road traffic and improving road safety; and

(h) Other functions conferred by law including those relating to immigration.

90. All senior officers, including the Commissioner, are appointed by the Government. The democratic accountability of the Garda Síochána has been strengthened by the provisions of the Garda Síochána Act 2005. The Garda Commissioner's Strategy Statements and Annual Policing Plans are subject to the approval of the Minister. The Commissioner must report to the Minister as required. The Minister is in turn politically accountable to the Irish Parliament for the Garda Síochána.

91. The powers of the police are set out in statute and all their actions are subject to review by an active and constitutionally independent judiciary.

Criminal Justice Act 1984 (treatment of persons in custody in Garda Síochána Stations) Regulations 1987

92. The Criminal Justice Act 1984 makes provision for the above regulations which set in place a regulatory framework for the treatment of persons held in Garda custody. Specifically the regulations provide that a member of the force on duty in any station shall be designated as the "member in charge" and be responsible for the welfare of any persons held in the custody there.

93. Amongst the duties of the member in charge are:

(a) The maintenance of custody records and regular inspection of those held;

(b) The provision of information pertaining to the offence for which the person has been detained;

(c) That the person concerned be advised that they are entitled to notify another person of their being held in custody;

(d) The provision of access to a solicitor;

(e) In the case of a person under 17 years of age that a responsible adult be notified of their detention and that they should not be subjected to questioning unless in the company of a responsible relative or other adult;

(f) Oversight of any interview of the prisoner by a maximum number of Garda members;

(g) Oversight of searching, finger and palm-printing procedures; and

(h) In the case of foreign nationals that they be advised of their right to notify his or her consul.

94. The Regulations are kept under continuing review to ensure that the procedures in place continue to be sufficiently robust to protect the human rights of detained persons.

Garda Síochána Ombudsman Commission

95. The Garda Síochána Ombudsman Commission is an independent statutory body established under the Garda Síochána Act 2005 and represents a model of independent oversight of policing in the State. Neither a member nor a former member of the Garda Síochána can be a member of the Commission. The statutory objectives of the Commission are to ensure that its functions are performed in an efficient and effective manner and with full fairness to all persons involved in complaints and investigations concerning the conduct of members of An Garda Síochána and also to promote public confidence in the process of resolving those complaints (see also section below on article 12 for further detail).

Inspector of Prisons

96. The Prisons Act 2007 also provides for a statutorily independent Inspector of Prisons. The Inspector has the power to carry out regular inspections of prisons and to enter any such institution at any time of his choosing. He may inspect any records held there as he deems fit. He may also carry out investigations of a specific nature at the request of the Minister for Justice Equality and Law Reform. While it is not the function of the Inspector to investigate individual complaints made by prisoners, he may investigate the circumstances which give rise to the complaint.

Article 2.2

97. Irish law does not allow any justification for the use of torture. The Criminal Justice (United Nations Convention against Torture) Act 2000 Act does not provide for a defence in exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency. Ireland, in enacting the Act has given effect to the prohibition of the practice of torture.

Article 2.3

98. Irish law does not allow a defence of following orders as a justification for the use of torture. The Criminal Justice (United Nations Convention against Torture) Act, 2000 does

not provide for a defence of the nature outlined in article 2.3. Section 2.1 of the Act states that: "a public official, whatever his or her nationality, who carries out an act of torture on another person whether within or outside the State, shall be guilty of the offence of torture".

99. Furthermore, section 2.1 of the Act states, "a person whatever his or her nationality, other than a public official who carries out an act of torture on another person, whether within or outside the State at the instigation of, or with the consent or acquiescence of, a public official shall be guilty of the offence of torture".

The police (Garda Síochána)

100. Ireland has accepted the United Nations Code of Conduct for Law Enforcement Officials (1979) and the European Code of Police Ethics, adopted by the Committee of Ministers of the Council of Europe on 19 September 2001. Article 39 of the latter code emphasises that superior orders can never be relied on to justify the practice of torture. It states "Police personnel shall carry out orders properly issued by their superiors, but they shall have a duty to refrain from carrying out orders which are clearly illegal and to report such orders, without fear of any form of sanction."

101. The Codes were influential in the drafting of the Garda Síochána Declaration of Professional Values and Ethical Standards. This Garda Declaration is viewed by Garda management as a proactive leadership initiative for the inculcation and further improvement of the human rights compliant ethos and practices of An Garda Síochána. In its preamble, the Declaration stresses the requirement of Gardaí to protect and vindicate the fundamental human rights and dignity of every person.

102. The Garda Síochána Confidential Reporting of Corruption or Malpractice Regulations 2007 are a key part of the overall reform of policing accountability. They allow for Gardaí or civilian employees of An Garda Síochána to report corruption or malpractice which comes to their attention.

General information

103. The Universal Declaration of Human Rights has been printed in both national languages and has been widely distributed. At the time of ratification, the text of the International Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment was distributed to government departments. Copies have also been made available to the general public and circulated to members of Dáil Éireann. The text of the Convention was scheduled to the Act of 2000 and is thus available on the online Irish Statute Book. The text of all the main human rights conventions ratified by Ireland and the national reports submitted to the United Nations on the implementation of these conventions are on the website of the Department of Foreign Affairs.

Article 3

Article 3.1

Criminal Justice (United Nations Convention against Torture) Act 2000

104. Section 4 of the Criminal Justice (United Nations Convention against Torture) Act 2000 contains a prohibition on the expulsion or refoulement of a person to another country where the Minister for Justice, Equality and Law Reform is of the opinion that the person may be subjected to torture.

Extradition Act 1965

105. Section 11 of part II of the Extradition Act 1965, as amended, provides, inter alia, that extradition shall not be granted for an offence where there are substantial grounds for believing that, if the request for extradition is granted, the person claimed may be subjected to torture.

106. Section 33(3) of part II of the Extradition Act 1965, as amended, provides inter alia that the Minister for Justice, Equality and Law Reform shall not make an order for the surrender of a person where he/she is of the opinion that the extradition of the person whose surrender is requested would involve transit through any territory where there is reason to believe that he may be subjected to torture.

107. Section 19 of the Act provides that extradition shall not be granted for an offence which is punishable by death under the law of the requesting country. Where an offence is punishable by death extradition shall not be granted unless the requesting country gives such assurance as the Minister for Justice, Equality and Law Reform considers sufficient that the death penalty will not be carried out.

European Arrest Warrant Act 2003(as amended)

108. The European Arrest Warrant Act 2003 (as amended) which came into effect on 1 January 2004 governs arrangements for surrender between Ireland and other member States of the European Union. Section 37 of the Act provides that a person shall not be surrendered if his or her surrender would be incompatible with Ireland's obligations under the European Convention on Human Rights or the Protocols thereto listed in the section.

Refugee Act 1996

109. The State, by way of section 5 of the Refugee Act 1996, reflects the non-refoulement obligations contained in the 1951 Geneva Convention relating to the Status of Refugees.

110. Section 5 of the Refugee Act 1996 provides that:

> "(1) A person shall not be expelled from the State or returned in any manner whatsoever to the frontiers of territories where, in the opinion of the Minister, the life or freedom of that person would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.
>
> "(2) Without prejudice to the generality of subsection (1), a person's freedom shall be regarded as being threatened if, inter alia, in the opinion of the Minister, the person is likely to be subject to a serious assault (including a serious assault of a sexual nature)."

111. Many of those who are protected under article 3 of the Convention will also be protected by article 1 of the 1951 Geneva Convention relating to the Status of Refugees. The extensive consideration during the deportation stage of prohibition on refoulement as provided for in section 5 of the 1996 Act above fulfils the State's obligations under Section 4 of the 2000 Act.

112. Accordingly, in *any* consideration of whether deportation should not be ordered by reason of the provisions of section 5 of the Refugee Act 1996, the issues which arise under section 4 of the Act are thereby considered in full.

The Immigration, Residence and Protection Bill 2008

113. The Immigration, Residence and Protection Bill 2008 will, when enacted, retain the existing prohibition on refoulement and will contain provisions equivalent to those in existing Irish law to ensure compliance with that prohibition in each case.

114. Section 53 of the Bill expressly sets out the rule against refoulement as follows:

> "53.–(1) A foreign national being removed from the State under this Act shall not be sent to a territory if to do so would be a refoulement.
>
> "(2) Nothing in this Act prevents the extradition of a foreign national under the Extradition Acts 1965 to 2001 or the operation of the European Arrest Warrant Act 2003."

115. Section 52 of the Bill defines "refoulement" as follows:

> "'refoulement' means the sending of a foreign national from the State to a territory where:
>
> (a) In the opinion of the Minister, the life or freedom of the foreign national will be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, as these terms are construed *under section 65*,
>
> (b) The Minister has substantial grounds for believing that the foreign national will face a real risk of suffering serious harm, or
>
> (c) The Minister has substantial grounds for believing that the foreign national will be in danger of being subjected to torture or inhuman or degrading treatment or punishment."

116. Section 61 of the Bill defines "serious harm" as follows:

> "'serious harm' means:
>
> (a) Death penalty or execution,
>
> (b) Torture or inhuman or degrading treatment or punishment of a person in the country of origin, or
>
> (c) Serious and individual threat to a civilian's life or person by reason of indiscriminate violence in a situation of international or internal armed conflict."

Case law – European Court of Human Rights

117. The following cases outline the standards which apply, and guide Irish decision makers in this regard.

118. *Cruz Varas v. Sweden* (1992) 14 E.H.R.R.[12] where the European Court of Human Rights has previously ruled that the obligation in article 3 protects against refoulement of an individual to a State where there are substantial grounds for believing that the person faces a real risk of ill-treatment in violation of article 3.

119. *Chahal v. UK* (1997) 23 E.H.R.R. where the European Court of Human Rights specifically ruled that diplomatic assurances are an inadequate guarantee in relation to the proposed return of individuals to countries where torture is "endemic" or a "recalcitrant and enduring problem".

[12] European Human Rights Reports.

120. *Soering v. UK (1989)* 11 E.H.R.R. where the European Court of Human Rights found that the decision by a Contracting State to extradite a fugitive may give rise to an issue under article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of article 3 of the Convention.

Article 3.2

Criminal Justice (United Nations Convention against Torture) Act 2000

121. In considering whether to expel or return an individual, section 4 of the Act places an obligation on the Minister for Justice Equality and Law Reform to take all relevant considerations into account including the existence, in the State, concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Refugee Act 1996

122. All applications for refugee status are examined in accordance with the definition of a refugee as set out in section 2 of the Refugee Act 1996, which defines a refugee as someone:

> who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his or her former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

123. Where it is established that a well-founded fear of persecution exists, the applicant will be granted refugee status.

124. Under section 5 of the Refugee Act 1996 (dealing with the prohibition on refoulement), the Minister must satisfy himself with regard to the provisions and criteria set out in that section, which includes consideration of whether there are substantial grounds for believing a person would be in danger of being subject to torture if expelled from the State.

The Immigration, Residence and Protection Bill 2008

125. The Immigration, Residence and Protection Bill 2008, which is at present before Parliament, proposes to integrate the processes for dealing with applications for protection in the State (at present covered by the Refugee Act 1996 and the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No 518 of 2006)) and all other aspects of the desire of a protection applicant to remain in the State (at present dealt with under the Immigration Act 1999) into a unified process at the end of which each applicant has a complete answer to the question whether he or she will be permitted to remain in the State. In consequence, the Bill proposes to repeal the Refugee Act and the Regulations, and to subsume into the Minister's functions those at present carried out by the Refugee Applications Commissioner in relation to asylum applications. The Bill will also transpose into national law Council Directive 2005/85/EC[13] of 1 December 2005 on minimum

[13] OJ L326 of 13 December 2005.

standards on procedures in Member States for granting and withdrawing refugee status ("Procedures Directive").

126. The Bill will also restate the existing statutory prohibition on refoulement.

Immigration Act 1999

127. A deportation order may only be made in respect of a person under section 3 of the Immigration Act 1999 which requires the Minister to consider a list of 11 factors contained in section 3(6) related to the personal circumstances of the person including considerations of the common good (3(6)(j)) and humanitarian issues (3(6)(h)).

128. The Immigration, Residence and Protection Bill 2008 proposes to repeal and replace the Immigration Act 1999. The Bill will introduce a binary status whereby a foreign national is either lawfully present in the State or unlawfully present in the State and will place an obligation on those unlawfully present to leave. Persons in default of this obligation may be arrested and detained for the purposes of removing them.

129. Those whose lawful presence in the State is to come to an end through an administrative decision to terminate or not to renew a residence permission will have an opportunity (equivalent to the current pre-deportation process) to make representations as to why that decision should not be made or finalised. In addition, the possibility will always exist (as it does under present law) for any person, irrespective of the lawfulness of his or her presence in the State, to apply for protection and to be permitted to remain in the State while that application is being examined. Section 53 of the Bill provides that a foreign national being removed from the State under the Act must not be sent to a territory if to do so would be a refoulement. Thus, all removals from the State are subject to the overarching principle of non-refoulement.

130. In this way, the proposed law will continue to respect, in a practical way, the prohibition on refoulement.

Asylum applications and legal assistance

131. A comprehensive asylum determination process to meet the State's obligations under the 1951 Geneva Convention is in place. Asylum applications are considered by two independent statutory agencies, namely the Office of the Refugee Applications Commissioner at first instance and the Refugee Appeals Tribunal on appeal. The bodies concerned provide training and information to their staff and members, which includes comprehensive country of origin information. The country of origin information is kept under review to ensure its continued accuracy. UNHCR has access to this information and is fully involved in the operation of Ireland's asylum process and in staff training on international refugee and human rights law.

132. Access by asylum applicants to legal advice is also available and an independent agency, the Refugee Legal Service, has been established to provide this service.

133. As noted above, the Immigration, Residence and Protection Bill 2008 proposes to integrate the processes for dealing with applications for protection in the State into a unified process. In consequence, the Bill will subsume into the Minister's functions those at present carried out by the Refugee Applications Commissioner in relation to asylum applications. The Bill will also make provision for the establishment of a new appeals tribunal – the Protection Review Tribunal. The Bill proposes that the new tribunal will be modelled closely on the current Refugee Appeals Tribunal but with enhanced provisions to ensure greater transparency in decision making and consistency with the provisions of the Geneva Convention, the Convention against Torture, the applicable European Union Directives and the country's national law. In addition to considering appeals against refusal to grant

refugee status, the Protection Review Tribunal will also consider appeals against refusal to grant subsidiary protection.

Matters beyond the scope of article 1 of the Geneva Convention

134. In a range of situations where an individual could face risks outside the scope of article 1 of the Geneva Convention, the Minister for Justice, Equality and Law Reform has discretion to grant leave to remain in the State.

Article 4

Article 4.1

Criminal Justice (United Nations Convention against Torture) Act 2000

135. Section 2 of the Act provides for the offence of torture and sets out those categories of persons who may be guilty of torture. Under subsection 1, a person who is a public official, whatever his or her nationality, who carries out an act of torture on a person, whether within or outside the State, shall be guilty of the offence of torture. Subsection 2 provides that a person, whatever his or her nationality, other than a public official, who carries out an act of torture on a person, whether within or outside the State, at the instigation of, or with the consent or acquiescence of a public official, will also be guilty of the offence of torture. The effect of subsections 1 and 2 is that a public official, or person acting at his or her instigation, or with his or her consent or acquiescence, no matter what the nationality of either, who carries out an act of torture on another person, irrespective of where that act was carried out, will be guilty of torture under the Act. A person found guilty of the offence of torture is liable to imprisonment for life.

136. The terms “public official” and “torture” are defined in section 1 of the Act. Section 1 provides that a public official includes a person acting in an official capacity.

137. The definition of torture follows closely that contained in the Convention itself. In the first instance, it includes both acts and omissions by which severe pain and suffering is intentionally inflicted on a person, the pain and suffering may either be physical or mental. The definition further provides that the pain and suffering must be inflicted for one or more specific purposes, namely: obtaining from the person, or another person, information or a confession; punishing the person for an act which he or she, or a third party, has committed or is suspected of having committed; intimidating or coercing the person or a third party; or for any reason based on any form of discrimination. In line with the Convention, torture does not include any act arising solely from, inherent in or incidental, to lawful sanctions.

138. Section 3 of the Act creates a number of offences which may be committed by persons other than those who may be guilty of carrying out the act of torture, but whose actions contribute in some way to the offence of torture or are designed to frustrate efforts to prosecute others for the offence. It provides that any person, no matter what his or her nationality, will be guilty of an offence if he or she either inside or outside the State attempts or conspires to commit the offence of torture or tries to obstruct or prevent the arrest or prosecution of a person for the offence of torture. A person who is found guilty of any of these offences will be liable to imprisonment for life.

Criminal Justice Act 2006

139. Section 186 of the Criminal Justice Act 2006 amended the definition of torture contained in section 1 of the Criminal Justice (United Nations Convention against Torture) Act 2000 in order to clarify that torture is an act that is done by, or with the acquiescence

of, a public official and thereby brings the definition into line with that contained in the Convention.

Criminal Law Act 1997

140. The offence of torture will also automatically attract certain provisions of the Criminal Law Act 1997. Section 9 of that Act provides that where a person is being tried on indictment, an allegation of an offence shall be taken as including an allegation of attempting to commit that offence and further provides that, where a person is charged on indictment with attempting to commit an offence, the accused may be convicted of the offence charged notwithstanding that he or she has not been shown to be guilty of the completed offence.

141. Section 7 of the Criminal Law Act 1997 will also apply automatically to the offence of torture. Section 7 provides that any person who aids, abets, counsels or procures the commission of an indictable offence (offence which may be tried on indictment before a judge and jury) shall be liable to be indicted, tried and punished as a principal offender. Therefore any person who aids, abets, counsels or procures the commission of an offence of torture will be proceeded against as a principal offender and will be liable on conviction for the offence to imprisonment for life.

Defence Force Act 1954

142. Acts of torture committed by members of the Defence Forces may be dealt with in accordance with the relevant provisions of the Defence Act 1954 as amended or under Irish domestic civil jurisdiction as appropriate. The relevant provisions (some of which were amended pursuant to Section 6 and 7 of the Criminal Justice (United Nations Convention against Torture) Act 2000) are described below.

143. Section 122 of the 1954 Act provides that any person subject to military law who commits any offence against military law may be tried and punished for such offence at any place within or without the State.

144. Section 169 of the Defence Act 1954 as amended deals with offences punishable by ordinary law. Subsection 1 of that section provides inter alia that a person who is subject to military law (as defined by sections 118 and 119 of the Defence Act 1954 as amended) and who commits an offence against ordinary criminal law is also guilty of an offence against military law. Subsection 3, which deals with the various offences which constitute civil offences, expressly provides at subsection 3 (d) that a member of the Defence Forces, convicted of an offence under the Criminal Justice (United Nations Convention against Torture) Act 2000 shall be liable to imprisonment for life. This amendment to subsection 3 was inserted pursuant to the provisions of section 6 of the Criminal Justice (United Nations Convention against Torture) Act 2000.

145. The jurisdiction of courts-martial is set out in section 192 of the Defence Act 1954 as amended. Section 192 subsection 3 provides that a court-martial shall not have jurisdiction to try any person for, inter alia, an offence under the Act unless such an offence was committed while such a person was on active service or while the person was dispatched for service outside the State for any purpose specified in section 3 of the Defence (Amendment) Act, 2006. In the event of such an offence being committed by any person subject to military law while on active service, the standard of evidence required would be similar to the civil courts, i.e. the Director of Military Prosecutions would need to be satisfied that there is prima facie evidence of an offence having being committed. In the event of such an offence being committed by an individual while not on active service, jurisdiction would lie with the Director of Public Prosecutions (civil jurisdiction).

Article 4.2

Criminal Justice (United Nations Convention against Torture) Act 2000

146. Sections 2(3) and 3 of the Act provide that an individual found guilty of the offence of torture shall be liable to imprisonment for life.

Article 5

Article 5.1

Criminal Justice (United Nations Convention against Torture) Act 2000

147. The offence of torture, as defined in section 2 of the Act has been created with full extraterritorial jurisdiction. The practical effect of subsections 1 and 2 of section 2 is that a public official, or person acting at his or her instigation, or with his or her consent or acquiescence, no matter what the nationality of either, who carries out an act of torture on another person, irrespective of where that act was carried out, could be prosecuted for torture under the Act.

Article 5.2

Criminal Justice (United Nations Convention against Torture) Act 2000

148. Section 5 of the Act provides that proceedings for an offence under the Act can be taken anywhere in the State and may be treated as if the offence had been committed in that place. This will enable persons charged with the offence of torture or a related offence, which has been committed either in the State or abroad, to be tried anywhere in the State. However, a prosecution for an offence under the Act may only be taken by or with the consent of the Director of Public Prosecutions.

149. Section 8 of the Act amends the Criminal Procedure Act 1967 in two respects. Firstly, it limits the jurisdiction of the District Court (lower court) with regard to offences created by the Act and secondly, it provides that bail may only be granted by the High Court (higher court) in the case of a person charged with an offence under the Act.

Article 5.3

150. No comment required.

Article 6

Article 6.1

General comment

151. There are a number of statutory provisions of relevance which provide for the detention of suspects prior to being charged,[14] including those contained in:

(a) The Criminal Justice Act 1984;

(b) The Criminal Justice Act 2007;

[14] It should be noted that in all such cases of detention the individual(s) detained retain(s) an ongoing right to reasonable access to a lawyer or consular assistance where appropriate.

(c) Extradition Acts 1965–2001.

Criminal Justice Act 1984

152. Section 4 of the Criminal Justice Act 1984 provides for up to 24 hours detention (excluding rest periods) where the offence is an arrestable offence. An arrestable offence, as defined in the Criminal Law Act 1997, is an offence punishable by 5 years imprisonment or more and includes an attempt to commit any such offence. The 24-hour maximum arises from an initial period of up to 6 hours with the possibility of two extensions (the first of up to 6 hours duration and the second of up to 12 hours) on the basis of an authorisation from a more senior member of the Garda Síochána (police force).

Criminal Justice Act 2007

153. Section 50 of the Criminal Justice Act 2007 permits detention of up to 7 days for a number of specified offences (Schedule 2 – including murder, causing serious harm, false imprisonment, threats to kill or cause serious harm). The first 48 hours is made up of a period of 6 hours followed by two extensions of up to 18 hours and 24 hours on the authorisation of a more senior member of the Garda Síochána. Judicial authorisation is required to detain a person beyond this 48-hour period.

154. In all cases of detention, the senior Garda Officer must have reasonable grounds for believing that any extensions to a period of detention is necessary for the proper investigation of the offence for which the person has been detained.

Extradition Acts 1965–2001

155. Under the Extradition Acts 1965–2001 a person may be remanded in custody or on bail while extradition proceedings are ongoing. A person who is the subject of a provisional arrest under the Acts must be released if a formal request for extradition is not received within 18 days of his or her arrest. Within that 18-day period, the person may be remanded in custody or on bail. The length of remand is currently under review.

156. Under the European Arrest Warrant Act 2003 (as amended) a person may be remanded in custody or on bail while surrender proceedings are ongoing. A person arrested under the Act on foot of an alert for arrest and surrender on the Schengen Information System may be remanded in custody or on bail for a period not exceeding 14 days pending production to the High Court of the European arrest warrant but shall be released if the warrant is not produced to the Court in that period.

Article 6.2

Investigation of criminal acts

157. The investigation of suspected criminal acts is a matter for the State's police force, the Garda Síochána. In cases where a member of that force is suspected of such an offence, the State's police oversight body, the Garda Síochána Ombudsman Commission, provided for in the Garda Síochána Act of 2005, may investigate the matter (discussed in more detail in the Chapter on Article 12.)

158. A decision pertaining to prosecution is a matter for the Director of Public Prosecutions.

159. Acts of torture committed by members of the Defence Forces may be dealt with in accordance with the relevant provisions of the Defence Act 1954 as amended or under Irish domestic civil jurisdiction as appropriate.

Article 6.3

Diplomatic Relations and Immunities Act 1967

160. Section 6 of the Diplomatic Relations and Immunities Act 1967 gives the force of law in the State to the Vienna Convention on Consular Relations 1963. Under Article 36 of that Convention, consular officers must be free to communicate with nationals and have access to them and vice versa. If requested, the competent authorities of the receiving State, must without delay, inform the consular post of the sending State if a national of that State is arrested or committed to prison or to custody pending trial, or is detained in any other manner. Furthermore, communications addressed to the consular post by the detained person must be forwarded by the competent authorities without delay. Finally, the said authorities must inform the person concerned without delay of his/her rights under this Article. Consular officers have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him/her and to arrange for his or her legal representation.

Prison rules 2007

161. The Prisons Act 2007 provides a legislative basis for the drawing up of Prison Rules for the effective governance of prisons. The Prison Rules 2007 reflect international best practice in this area and the provisions of the European Prison Rules. Rule 16 states that a foreign national must be provided with the means to contact a consul and informed in particular of his or her entitlements in relation to a visit by a legal adviser or pertaining to court appearances.

Treatment of persons in custody in Garda Stations regulations 1987[15]

162. The Regulations places an obligation on the Garda Síochána to advise a foreign national in custody in a Garda Station of his or right to legal assistance and to contact and be visited by a diplomatic representative of their native State.

Article 6.4

163. Administrative arrangements have been put in place within the State's police force, An Garda Síochána, to comply with article 6, paragraph 4, which states: "When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction."

Article 7

Article 7.1

Procedure

164. Where a person has committed torture and that fact comes to the attention of the appropriate authorities, if it is not intended to extradite him or her, it is a matter for the relevant public authorities to investigate the allegations and, if necessary, to refer the file to

[15] See also chapter on article 2.

the Director of Public Prosecutions for consideration to be given to prosecution. In the majority of cases this function will be carried out by the Garda Síochána.

165. In cases where the person suspected of torture is a member of the Garda Síochána itself, the Garda Síochána Ombudsman Commission, the State's police oversight body, (discussed in more detail in the section below on article 12) may carry out an investigation and if so required, submit a file to the Director of Public Prosecutions.

166. Acts of torture committed by members of the Defence Forces may be dealt with in accordance with the relevant provisions of the Defence Act 1954 as amended (see the section above on article 4) or under Irish domestic civil jurisdiction as appropriate.

Article 7.2

167. There is no procedural distinction drawn, or differences in, the execution of the relevant procedures required to investigate or prosecute ordinary offences of a serious nature under the laws of this State and those referred to in articles 5.1 and 5.2. As previously stated, cases of this nature will normally be investigated by the Garda Síochána, a decision to prosecute or otherwise will be made by the Director of Prosecutions and section 5(4) of the Criminal Justice (United Nations Convention against Torture) Act 2000 provides for the matter to be tried in the Central Criminal Court.

Article 7.3

Basic rights and the protection of the individual

168. It should be noted that the presumption of innocence and the right of an individual to legal representation is enshrined in Irish Law.

169. The Irish Constitution guarantees the rights of all accused to due process at all stages of the proceedings. The constitutional guarantees are reflected in law and practice. The courts are charged with upholding rights in relation to persons brought before them.

Criminal Justice Act 1984 (Treatment of persons in custody in Garda Síochána Stations) Regulations[16]

170. The rights of persons in Garda custody are in particular governed by the Criminal Justice Act 1984 (Treatment of persons in custody in Garda Síochána Stations) Regulations 1987. Any breach of constitutional rights can result in evidence gained in that context being ruled inadmissible.

Article 8

Article 8.1

Legislation

171. Article 8 of the Convention is given effect in Irish law by virtue of the Criminal Justice (United Nations Convention against Torture) Act 2000, the Extradition Acts 1965–2001 and the European Arrest Warrant Act, 2003 (as amended).

172. Ireland's extradition arrangements with countries other than member States of the European Union are governed by part II of the Extradition Act 1965 (which is based on the

[16] See also section above on article 2.

1957 Council of Europe European Convention on Extradition). Surrender between member States of the European Union is now governed by the European Arrest Warrant.

173. Part II Orders (secondary legislation) are made under section 8 of the Extradition Act 1965, as amended, and are used to give effect to extradition arrangements arising on foot of either bilateral or multilateral arrangements to which the State becomes a party.

Article 8.2

174. The Extradition Act 1965 (Application of Part II) Order 2000, as amended most recently by the Extradition Act 1965 (Application of Part II) Order 2009, applies part II of the Act to the Convention and sets out the countries to which the extradition provisions apply in relation to torture. Consequently in the absence of other extradition arrangements, the Convention can be regarded as constituting an agreement between this State and another State party to the Convention for extradition purposes in respect of the relevant offences covered by the Convention.

Article 8.3

175. See 8.2 above.

Article 8.4

The Criminal Justice (United Nations Convention against Torture) Act, 2000

176. The Criminal Justice (United Nations Convention against Torture) Act 2000, criminalises the offences of torture, attempting to commit the offence of torture, and obstructing the arrest of a person in relation to the offence of torture. The offences are subject to the provisions of the Extradition Acts 1965–2001 and the European Arrest Warrant Act 2003 (as amended). Therefore the offences would be deemed to be included as extraditable in any extradition treaty existing between State Parties under the provisions of part II, section 8 of the Extradition Act 1965 and would be included as extraditable in every future extradition treaty concluded between the State parties under the terms of the Convention and subject to the terms of section 8 of the Extradition Act 1965 (as amended). In the absence of any such treaty, the offences covered by the Convention are nonetheless offences in relation to which extradition may be granted.

177. The offences criminalised under the Act would also be deemed to be included in the surrender arrangements between the member States of the European Union given effect in national law under the European Arrest Warrant Act 2003 (as amended).

Article 9

Article 9.1

Criminal Justice (Mutual Assistance) Act 2008

178. In April 2008, the Criminal Justice (Mutual Assistance) Act 2008 was enacted into Irish law. This Act repeals and replaces the provisions relating to mutual assistance contained in the Criminal Justice Act 1994. To the extent assistance was available to a State party under the 1994 Act it will continue to be available in accordance with the corresponding provisions of the new Act. The majority of the new legislation came into force on 1 September 2008 with remaining provisions (part 3) to come into operation in the near future.

179. The purpose of the Act is threefold:

(a) To give effect to the following international agreements and instruments providing for mutual legal assistance or to the relevant provisions thereof:

- The Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union done at Brussels on 29 May 2000 [the 2000 Convention]
- The Protocol to that Convention done at Luxembourg on 16 October 2001 [the 2001 Protocol]
- The Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the 2000 Convention on Mutual Assistance in Criminal Matters and the 2001 Protocol thereto [the Agreement with Iceland and Norway]
- Articles 49 (excluding paragraph (a) which has been repealed) and 51 of the Convention, signed in Schengen on 19 June 1990, implementing the Schengen Agreement of 14 June 1985 [the Schengen Convention]
- The Council Framework Decision of 22 July 2003 on the execution in the European Union of orders freezing property or evidence [the Framework Decision]
- Title III of the Co-operation Agreement between the European Community and its member States and the Swiss Confederation to combat fraud and any other illegal activity to the detriment of their financial interests, done at Luxembourg on 26 October 2004 [the EC/Swiss Agreement]
- The Council Decision of 20 September 2005 on the exchange of information and co-operation concerning terrorist offences [the Council Decision]
- The Second Additional Protocol of 8 November 2001 to the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 [the Second Additional Protocol to the European Convention]
- Chapter IV of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, done at Warsaw on 16 May 2005 [the 2005 Convention]
- Articles 13, 14, 18, 19 and 20 of the United Nations Convention against Transnational Organized Crime, done at New York 15 November 2000
- Articles 46, 49, 50 and 54 to 57 of the United Nations Convention against Corruption, done at New York on 31 October 2003
- The 2003 Agreement on Mutual Legal Assistance between the European Union and the United States of America and the related bilateral instrument to give effect to the Treaty on Mutual Assistance in Criminal Matters between Ireland and the United States

(b) To provide for certain amendments to the Criminal Justice Act, 1994; and

(c) To transpose the Criminal Justice Act 1994 (Section 46(6)) Regulations, 1996 into primary legislation.

180. The Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union supplements and builds on the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters by developing and modernising existing provisions governing mutual assistance between member States of the European Union.

181. The Protocol to the 2000 Convention on Mutual Assistance in Criminal Matters between the member States of the European Union provides for mutual assistance in relation to requests for information on bank accounts and banking transactions. Provision is also made for monitoring of banking transactions.

182. The Agreement between the European Union and the Republic of Iceland and Kingdom of Norway extends the provisions of the 2000 Convention on Mutual Assistance in Criminal Matters and the 2001 Protocol thereto to those States.

183. The Council Framework Decision of 22 July 2003 on the execution in the European Union of orders freezing property or evidence establishes the rules under which a member State of the European Union shall recognise and execute in its territory a freezing order issued by a judicial authority of another member State in the framework of criminal proceedings.

184. The Council Decision of 20 September 2005 improves the mechanisms for the exchange of information between Europol, Eurojust and other member States concerning terrorist offences.

185. The Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters improves and supplements the provisions of the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters and its additional Protocol.

186. The Agreement between the European Union and the United States of America on Extradition and Mutual Legal Assistance in Criminal Matters improves, supplements and facilitates further co-operation between the countries in relation to both mutual legal assistance and extradition.

Overview

187. Part 1 of the Criminal Justice (Mutual Assistance) Act 2008 is introductory and sets out some general matters in relation to the provision of mutual legal assistance.

188. Part 2 deals with the provision of information and monitoring arrangements in relation to financial transactions. The main purpose of this part is to set out the procedures for giving effect to the provisions in the 2001 Protocol in relation to financial transactions for criminal investigation purposes.

189. Part 3 deals with the provision of assistance between member States of the European Union in relation to the interception of telecommunications for criminal investigation purposes. This Part gives effect to articles 17 to 22 of the 2000 Convention.

190. Part 4 makes provision for the enforcement of freezing, confiscation and forfeiture of property. This Part gives effect to the Council Framework Decision of 22 July 2003 on the execution in the European Union of orders freezing property or evidence and also re-states those provisions of the Criminal Justice Act 1994 which this Act replaces.

191. Part 5 deals with the provision of evidence. Provision is made for the transfer of prisoners to give evidence to assist in criminal investigations and for evidence to be given by television and telephone link. Obtaining identification evidence for criminal investigations both inside and outside the State is also provided for in this part.

192. Part 6 deals with other forms of assistance. These forms of assistance include the service of documents, a legal basis for the restitution of articles obtained by criminal means to their rightful owners and provision for controlled deliveries both in the State and in other States designated for the purposes of this part.

193. Part 7 deals with mutual assistance in criminal matters between the State and the United States.

194. A range of miscellaneous matters, including standard provisions, are provided for in part 8 of the Act.

Article 9.2

195. The Department of Justice, Equality and Law Reform acts as the central authority handling incoming and outgoing requests and operates in close association with other agencies with functions in relation to requests for mutual assistance.

Article 10

Article 10.1

Garda Síochána

196. The Garda Síochána has a comprehensive education, training and information system for the professional development of all staff. This development programme incorporates training on the legal framework — international and national — applicable to professional public policing in Ireland. All members of the Garda Síochána are provided with training in Garda values, policies and procedures consistent with the legal framework and the community policing philosophy that underpins the Garda approach to public policing. The Garda Síochána Declaration of Professional Values and Ethical Standards sets out the fundamental values guiding public policing in Ireland and commits all Gardaí to observe, support and uphold the rights and human dignity of every person.

Garda Síochána student/probationer training – human rights

197. Education in compliance with human rights standards forms part of the syllabus for Garda students at the Garda College and during their work placements and assignments. In particular, students receive direction on:

- Promotion and protection of human dignity and rights
- Policing in democracies
- Policing and the rule of law/discretion
- Use of force – police holds and self-defence aimed at a proportional use of force
- Treatment of persons in custody (Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Stations) Regulations 1987)
- Training in the custody record (Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987)
- Fundamental rights under articles 40 to 44 of the Irish Constitution

Supervisory and management training

198. All supervisory and managerial development courses contain dedicated human rights, anti-racism and ethics training.

Specialist training

199. Public Order Commanders receive lectures on the key principles underpinning the European Convention on Human Rights. They also receive lectures on the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Training of instructors

200. Since 2004 a five-day human rights programme, the Garda Síochána "First Steps Generic Human Rights Training Programme for Trainers", has been delivered to approximately 50 per cent of all Garda Trainers. An evaluation of the programme conducted in January 2005 indicates that the programme has been successful in providing Garda Trainers with sufficient knowledge to identify areas in their own training where human rights issues can be addressed.

Declaration of professional values and ethical standards

201. This declaration was published and established as official Garda policy in 2003. A copy of the booklet has been circulated to each member of the Garda Síochána.

Human rights audit of An Garda Síochána

202. Following the completion of a human rights audit carried out by external consultants the Garda Commissioner has prepared a comprehensive Garda Action Plan arising from the recommendations of the audit. A multidisciplinary inter-agency Strategic Human Rights Advisory Committee has been established to advise the Commissioner and senior management on the implementation of human rights initiatives and to bring about cultural change across the organisation. The Strategic Human Rights Advisory Committee includes representatives from the Irish Human Rights Commission, the Equality Authority and Amnesty International.

Prison system

203. Every opportunity is taken in the Irish Prison Service to foster awareness and commitment to the prohibition of torture and other forms of cruel, inhumane or degrading treatment or punishment.

204. The core message of respect for the human rights of prisoners is woven into all training programmes for Prison Officers in the interest of ensuring that prisoners are treated with dignity and respect. Training for recruit Prison Officers takes particular account of the Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

205. Under Sections 2 and 3 of the Criminal Justice (United Nations Convention Against Torture) Act 2000, a Prison Officer who carries out or attempts to commit or conspires to commit an act of torture on a person, whether within or outside the State, shall be guilty of the offence of torture and be liable on conviction on indictment to imprisonment for life. Rule 93 of the statutory Prison Rules, 2007 limits the use of force by Prison Officers to the use of proportionate force only and specifically prohibits a Prison Officer from striking a prisoner unless compelled to do so in self-defence.

Defence Forces

206. The Defence Forces training philosophy recognises the requirement for a core of military training designed specifically for personnel of all ranks, satisfying the obligations of the State under the Geneva Conventions and United Nations Conventions, including the United Nations Convention against Torture.

207. Generic Law of Armed Conflict (LOAC) training is an integral part of all Defence Forces career courses and overseas training at both the individual and collective levels, with

the necessary and appropriate allocations of personnel and time. LOAC training includes instruction on the Convention.

208. The participation of Defence Forces legal officers in international humanitarian law courses (IHL) at the International Institute at San Remo, Italy is mandatory. Officers also attend human rights courses and seminars. Qualified officers provide for the early and continuous development of the values, attitudes and orientation necessary to perform all operational missions including peace support and peace enforcement operations in compliance with the obligations under the Convention.

209. The Irish Defence Forces Military (Training) College conducts courses on international human rights law including instruction on the Convention.

210. All military police personnel attend civil police seminars at the Garda National Training College and international humanitarian law seminars run by the United Nations Training School in the Military College, which includes instruction on the treatment of persons in custody.

Mental Health Commission

211. The Mental Health Commission has embarked upon an extensive multifaceted training and information programme to support mental health professionals in providing quality mental health services. The overall objective of the programme is to equip mental health care professionals, families, carers, advocates and the general public with knowledge on the Mental Health Act 2001.

212. The Mental Health Commission has also issued rules and codes of practices[17] governing the use of seclusion and restraint in centres for the care and treatment of people with mental illness. Compliance with these rules is monitored by the Inspector of Mental Health Services.

213. Section 69(2) of the Mental Health Act 2001 obliges the Mental Health Commission to make rules providing for the use of seclusion and mechanical means of bodily restraint on a patient. A "patient" under section 69(4) of the Act refers to a person to whom an admission or renewal order relates, a child in respect of whom an order under section 25 is in force and a voluntary patient as defined by the Act. Under the provisions of the 2001 Act, seclusion and mechanical means of bodily restraint can only be used where it is necessary for the purposes of treatment, or to prevent the patient from injuring himself or herself or others, and when used, must be in accordance with the Mental Health Commission rules.

214. Principle 11 of the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (1991) states: "Physical restraint or involuntary seclusion of a patient shall not be employed except in accordance with the officially approved procedures of the mental health facility and only when it is the only means available to prevent immediate or imminent harm to the patient and others. It shall not be prolonged beyond the period which is strictly necessary for this purpose." Thus, the key principle underpinning the use of seclusion and/or mechanical means of bodily restraint is that they shall only be used as a last resort when all other options have been considered and shall not be prolonged beyond the period of time that is necessary for their purpose.

[17] Mental Health Commission Rules Reference No. R-S69 (2) 02-2006 (Rules Governing the Use of Seclusion and Mechanical Means of Bodily Restraint) (see www.mhcirl.ie/Mental_Health_Act_2001/Mental_Health_Commission_Rules/Seclusion_and_Mechanical_Restraint/) and the Mental Health Commission's Code of Practice on the Use of Physical Restraint in Approved Centres (Reference Number: COP – S33(3)/02/2006).

215. The Mental Health Act 2001 provides for deprivation of liberty by means of seclusion and mechanical means of bodily restraint for voluntary patients. The Mental Health Commission is strongly of the view that the use of seclusion and mechanical means of bodily restraint on a voluntary patient must involve a consideration of whether involuntary admission of the patient on the grounds of mental disorder is warranted, and if so, the appropriate procedures must be followed.

Article 10.2

216. As previously stated torture is a criminal offence punishable by way of a life sentence. The prohibition on torture is self-evident in the context of the training provided by the various bodies.

Article 11

Article 11

Detention by the police (Garda Síochána)

217. The rights of persons in Garda Síochána custody are governed by the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987.

218. The multidisciplinary inter-agency Strategic Human Rights Advisory Committee referred to in Article 10 will advise the Commissioner and senior management on the implementation of human rights initiatives with a view to bringing about cultural change across the organisation, especially in the areas mentioned in article 11, which states that "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".

Recording of Garda interviews

219. The recording of Garda interviews with persons detained in Garda stations is an important safeguard against ill-treatment or torture where persons have been detained as suspects pursuant to the relevant statutory provisions. According to the most recent report of the Steering Committee on Audio and Audio/Video Recording of Garda Questioning of Detained Persons there are a sufficient number of Garda stations in all Garda Divisions to ensure that all interviews as specified in the Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997 are recorded.

220. This in effect means that interviews carried out with persons detained under section 4 of the Criminal Justice Act 1984, section 30 of the Offences Against the State Act 1939, pursuant to the Criminal Justice (Drug Trafficking) Act 1976 and section 2 of the Criminal Justice (Drug Trafficking) Act 1996, are being recorded. A survey carried out by the Garda authorities indicates that 98.1 per cent of all such interviews are being recorded. In the minority of cases where interviews were not recorded it is mainly because either the arrested person declines to have the interview recorded or the equipment is already in use or is otherwise unavailable.

Garda Síochána Inspectorate

221. The Inspectorate advises the Minister of Justice, Equality and Law Reform on best policing practice.

222. The main body of the Inspectorate's work relates to the operation and administration of the Garda Síochána. Inspections are carried out at the request of, or with the consent of, the Minister for Justice, Equality and Law Reform. In conducting inspections and inquiries, the Inspectorate engages with police officers at all levels from senior management at headquarters to those conducting front-line policing duties. The Inspectorate also interacts with the communities they serve. The Inspectorate undertakes comprehensive analyses of policies and procedures in the Garda Síochána and benchmarks them against best practices and standards of comparable police services. The policy of the Inspectorate is to produce succinct reports that contain action-oriented recommendations attuned to the unique cultural conditions of the Irish policing environment. By law, all reports of the Inspectorate must be laid before both Houses of the Oireachtas (Irish Parliament).

Garda Síochána Ombudsman Commission

223. The Garda Síochána Ombudsman Commission is an independent statutory body established under the Garda Síochána Act 2005 and represents a model of independent oversight of policing in the State. Neither a member nor a former member of the Garda Síochána can be a member of the Commission. The Commission is chaired by a former Secretary General of the Department of Foreign Affairs. The statutory objectives of the Commission are to ensure that its functions are performed in an efficient and effective manner and with full fairness to all persons involved in complaints and investigations concerning the conduct of members of An Garda Síochána and also to promote public confidence in the process of resolving those complaints (see also section below on article 12).

Detention in prison

224. The Prison Rules 2007 which replace the Rules for the Government of Prisons 1947 came into effect on 1 October 2007. The new Rules provide for close regulation of special observation cells, and enhanced procedures for inquiry into prisoner breaches of discipline. Overall, the new Rules provide a detailed modern regulatory framework for the protection of prisoners and the proper administration and operation of all the State's prisons.

225. As regards review of custodial methods and practices, these are subject to on-going review within the Irish Prison Service having regard to prevailing best practice. In addition, there are standing independent mechanisms for systematic oversight of the operation of the prison system and of the conditions of custody and the treatment of all persons detained therein. These are as follows:

(a) Prison Visiting Committees, which visit at frequent intervals the prison to which they are appointed and hear any complaints made to them by prisoners. Visiting Committees have free access, collectively or individually, to every part of the prison. Prison Visiting Committees report to the Minister for Justice, Equality and Law Reform. Their reports are published;

(b) Inspector of Prisons, a statutory and independent appointee who is responsible for inspecting and reporting on prison conditions, including the health, safety and well-being of prisoners; and

(c) Council of Europe Committee for the Prevention of Torture, Inhuman or Degrading Treatment or Punishment, which, during its visit to a State Party, has the right of unimpeded access at any time of the day or night to any place where persons are detained. To date, the Committee has visited Ireland on a total of four occasions in 1993, 1998, 2002 and 2006.

The Courts

226. The right of a detainee to medical assistance was recognised in the case of *In re the Emergency Powers Bill 1976* [1977] 1 IL 159. The Chief Justice in that case also said that families of detained persons must be able to ascertain their whereabouts on inquiry and Garda stations and prisons must keep records of persons detained.

227. In the case of the *People (DPP) v. Quilligan* (No. 3) [1973] 2 IR 305, Finlay CJ enumerated the protections which a person detained under section 30 of the Offences Against the State Act will enjoy. These included the right to legal assistance during his or her detention and the refusal to grant such a right when reasonably requested can make his detention unlawful. Furthermore, a detained person had a right to medical assistance and the right of access to the courts. That case also decided that a detained person had a right to remain silent and the associated right to be told of that right. Furthermore, Walsh J in that case indicated that a person detained must not be subject to any form of questioning which the courts would regard as unfair or oppressive, either by reason of its nature, the manner in which it was conducted, its duration or the time of day or of its persistence into the point of harassment, where it is not shown that the arrested person has indicated clearly that he is willing to continue to be further questioned.

Applications under article 40 of the Constitution (habeas corpus)

228. As previously stated, the fundamental rights of the citizen are guaranteed in articles 40 to 44 of the Constitution. Article 40 provides that all citizens are to be held equal before the law and obliges the State to vindicate the personal rights of the citizen. The term "personal rights", as interpreted by the courts, has led to the recognition and vindication of many rights not expressly provided for in the text of the Constitution. These "unenumerated rights" have already been discussed in earlier chapters.

229. The enumerated or express rights contained in the Constitution include, among others, the rights to freedom of expression, assembly and association. Article 40 also contains provisions governing the procedure known as habeas corpus through which an individual may challenge the legality of his detention by establishing that a flaw or irregularity in the detention has occurred. Article 40(4) (2) states:

> "Upon complaint being made by or on behalf of any person to the High Court or any judge thereof alleging that such person is being unlawfully detained, the High Court and any and every judge thereof to whom such complaint is made shall forthwith enquire into the said complaint and may order the person in whose custody such person is detained to produce the body of such person before the High Court on a named day and to certify in writing the grounds of his detention, and the High Court shall, upon the body of such person being produced before that Court and after giving the person in whose custody he is detained an opportunity of justifying the detention, order the release of such person from such detention unless satisfied that he is being detained in accordance with the law."

230. The form taken by the procedure is that the party complaining of unlawful detention applies ex parte to the Court for an initial order directed to the person alleged to be detaining the individual concerned (Prison Governor, Police) to appear and justify the detention. Should the detention be found to be unjustified or flawed the initial order is made absolute and the individual, the subject of the application is ordered to be released.

Involuntary detention of persons with mental disorder

231. A key function of the Mental Health Commission, established in 2002 under the Mental Health Act 2001, is to take all reasonable steps to protect the interests of persons involuntarily detained in approved centres. The Mental Health Commission has issued a

number of codes of practice and legally enforceable rules governing the care and treatment of detained patients. The Commission is committed to the systematic review of these rules governing the use of electro-convulsive treatment and the use of seclusion and mechanical means of bodily restraint. Such reviews will be undertaken at least every two years, following which the rules will be revised as necessary.

232. All hospitals or other in-patient facilities for the care and treatment of people suffering from mental illness must be registered by the Mental Health Commission as approved centres under the Mental Health Act 2001. Regulations for approved centres were introduced in November 2006. They specify the minimum standards required in a number of areas, including adequate and suitable accommodation, food and care for patients and the management of centres. It is an offence not to comply with the regulations.

Mental Health Tribunal

233. All involuntary admissions are automatically reviewed by an independent, three-person Mental Health Tribunal comprising a Barrister/Solicitor as Chair, a Consultant Psychiatrist and a lay person, which operates under the auspices of the Mental Health Commission. The review is independent, automatic and must be completed within 21 days of the admission or renewal order being signed. The function of the Mental Health Tribunal is to revoke or affirm the admission or renewal order. Patients have the right to attend their mental health tribunal and be represented by a legal representative who is appointed by the Mental Health Commission. The Commission also arranges for an independent medical examination of each involuntary patient to be carried out by a consultant psychiatrist, the report of which is considered by the Tribunal.

234. The Inspector of Mental Health Services, as provided for in the Mental Health Act 2001, is a consultant psychiatrist responsible for visiting and inspecting every inpatient centre for the care and treatment of people with mental illness in Ireland annually. The Inspector may also visit and inspect any other premises where mental health services are being provided. The Inspector is assisted by a multidisciplinary team.

235. As part of the inspection process, the Inspectorate ascertains the degree of compliance by centres with:

(a) Rules for the use of seclusion and mechanical means of bodily restraint;

(b) Rules for the use of electro-convulsive therapy; and

(c) Codes of practice prepared by the Mental Health Commission.

236. It also monitors compliance with the regulations for approved centres. The Inspectorate has various powers to enter and inspect centres, to obtain information from the staff and to take evidence under oath. The Inspectorate's report is published annually.

237. The operation of the Mental Health Act 2001 was reviewed by the Minister for Health and Children in 2006 and, arising from the review, a number of minor amendments are under consideration. A report on the operation of part 2 of the Act (Involuntary admission of persons to approved centres) was prepared and submitted to the Minister for Health and Children by the Mental Health Commission in April 2008 and its recommendations are currently under consideration.

Involuntary detention of persons with mental disorder in a criminal justice context and the role of the Mental Health (Criminal Law) Review Board

238. The Criminal Law (Insanity) Act 2006 provides a modern legislative framework for the treatment of individuals suffering from mental disorder who are charged with offences or found not guilty by reason of insanity in respect of such offences and consequently

detained in designated institutions or centres. The Act also provides a legislative basis for the treatment of prisoners who are found to be suffering from mental disorder and who require detention in these institutions also.

239. In particular, the Act provides for the Mental Health (Criminal Law) Review Board whose role it is to review the detention of such individuals. The Board has a duty to ensure that the detention of a patient is reviewed at intervals of such length (not more than 6 months) as it considers appropriate. The Board is independent in the exercise of its functions and provision is made for sittings for the purpose of review of a patient's detention in respect of which it may receive submissions and such other evidence as it thinks fit. Furthermore, the Board has a duty to assign a legal representative to a patient the subject of review, unless he or she proposes to engage one. Finally, the Board can make such order as it thinks proper in relation to a patient, whether for further detention, care or treatment in a designated centre, or for his or her discharge, whether unconditionally or subject to conditions for out-patient treatment or supervision or both.

240. The Government has approved proposals for the amendment of the Criminal Law (Insanity) Act 2006 and a Bill is currently being drafted.

241. The proposals address two areas of the Act. The first concerns cases where an accused person's fitness to be tried may be an issue. The amendment will provide for objective medical evidence to be considered by the trial Judge before he or she decides to refer a person for an initial psychiatric assessment in a designated centre.

242. The Act currently provides for the Mental Health (Criminal Law) Review Board established under the 2006 Act regularly to review the detention of persons committed to a designated centre under the 2006 Act. The Board may make an order for the release of such person either unconditionally or subject to conditions in certain circumstances. The second amendment will enable the Board to arrange for the supervision of patients released on a conditional basis from a designated centre.

Children detention schools

243. Offending children, subject to detention by the Courts, are detained in children detention schools. The operation of these schools is governed by the provisions of the Children Act 2001, as amended. The relevant provisions of that Act came into effect on 1 March 2007, at which time responsibility for the schools transferred from the Department of Education and Science to the Irish Youth Justice Service, an executive office of the Department of Justice, Equality and Law Reform. Historically, the schools accommodated children under the age of 16 years. This has been extended to girls up to the age of 18 from March 2007 and will be extended to boys under 18 as soon as sufficient accommodation can be provided for them.

244. The objectives of the children detention schools are set out section 158 of the Act, which states:

> "It shall be the principal object of children detention schools to provide appropriate educational and training programmes and facilities for children referred to them by a court and, by
>
> "(a) Having regard to their health, safety, welfare and interests, including their physical, psychological and emotional wellbeing;
>
> "(b) Providing proper care, guidance and supervision for them;
>
> "(c) Preserving and developing satisfactory relationships between them and their families;
>
> "(d) Exercising proper moral and disciplinary influences on them; and

"(e) Recognising the personal, cultural and linguistic identity of each of them,

"to promote their reintegration into society and prepare them to take their place in the community as persons who observe the law and are capable of making a positive and productive contribution to society."

245. In respect of discipline, section 201 of the Children Act 2001 provides that:

"(1) Any child who breaches the rules of a children detention school may be disciplined on the instructions of the Director of the school in a way that is both reasonable and within the prescribed limits.

"(2) Without prejudice to the power of the Minister to prescribe limits for the disciplining of children detained in children detention schools, the following forms of discipline shall be prohibited—

"(a) Corporal punishment or any other form of physical violence,

"(b) Deprivation of food or drink,

"(c) Treatment that could reasonably be expected to be detrimental to physical, psychological or emotional wellbeing, or

"(d) Treatment that is cruel, inhuman or degrading."

246. The children detention schools are subject to a range of inspection and monitoring provisions including annual inspections by an authorised person. The Health Information and Quality Authority was appointed in October 2008 to carry out inspections of the children detention schools. The schools come within the remit of the Ombudsman for Children who is entitled to visit the schools and investigate complaints by children.

Detention of asylum-seekers

247. While detention of asylum-seekers in Ireland is not the norm, section 9(8) of the Refugee Act 1996 provides for detention of asylum-seekers in a prescribed place of detention in specific circumstances namely:

"where an immigration officer or a member of the Garda Síochána, with reasonable cause, suspects that an applicant –

"(a) Poses a threat to national security or public order in the State,

"(b) Has committed a serious non-political crime outside the State,

"(c) Has not made reasonable efforts to establish his or her true identity,

"(d) Intends to avoid removal from the State in the event of his or her application for asylum being transferred to a convention country pursuant to section 22 or a safe third country (within the meaning of that section),

"(e) Intends to leave the State and enter another State without lawful authority, or

"(f) Without reasonable cause has destroyed his or her identity or travel documents or is in possession of forged identity documents, he or she may detain the person in a prescribed place (referred to subsequently in this Act as 'a place of detention')."

248. Such periods of detention are subject to the following controls as laid down in section 9(10) and subsequent sections of the Act.

249. Section 9(10)(a) provides that: "A person detained pursuant to subsection (8) shall, as soon as practicable, be brought before a judge of the District Court assigned to the District Court District in which the person is being detained."

250. Section 9(10) (b) provides that where a person is brought before a judge of the District Court pursuant to section 9(10) (a) the judge may, if satisfied that one or more of paragraphs (a) to (f), of section 9(8) (set out above) applies in relation to the person, commit the person concerned to a place of detention for a period not exceeding 21 days form the time of his or her detention.

251. Section 9(10)(b) also provides that a judge of the District Court may, instead of making an order for detention, order the release of the person who has been detained under section 9(8).

252. Section 9(12) (a) provides that the power of detention in section 9(8) shall not apply to a person who is under the age of 18 years. Section 9(12) (b) provides that: "If and for so long as the Immigration Officer or, as the case may be, the member of the Garda Síochána concerned has reasonable grounds for believing that the person is not under the age of 18 years, the provisions of sub section (8) shall apply as if he or she had attained the age of 18 years."

253. Section 9(12) (c) provides that where an unmarried child under the age of 18 years is in the custody of any person (whether a parent or a person acting in loco parentis or any other person) and such person is detained pursuant to the provisions of this section, the Immigration Officer or the member of the Garda Síochána concerned shall, without delay, notify the Health Board of the area in which the person is being detained of the detention and of the circumstances thereof.

254. Section 9(13) provides that where a judge of the District Court has ordered the release of a person under section 9(10) (b) subject to conditions then a member of the Garda Síochána may detain that person if he or she is of the opinion that they have failed to comply with such conditions. Under section 9(13) (b) a person so detained must be brought as soon as practicable before a judge of the District Court who may order the detention of that person for a period not exceeding 21 days or may order the release of that person subject to conditions.

255. Section 9(14)(a) provides that where a person has been ordered to be detained by a judge of the District Court under Section 9(10) or (13) then, a judge of the District Court may, if satisfied that one or more of the paragraphs of subsection 8, set out above, applies in relation to the person, commit him or her for further periods (each period being a period not exceeding 21 days), pending the determination of the person's application for a declaration of refugee status under section 8 of the 1996 Act.

256. Section 9(14) (b) provides that if a person who is detained pursuant to section 9(10) or 9(13) wishes to leave the State then they must be brought before a judge of the District Court and the judge shall, if he or she is satisfied that the person does not wish to proceed with his or her application for a declaration of refugee status under section 8 and wishes to leave the State, order the Minister to arrange for the removal of the person from the State.

257. Comprehensive rules exist in the form of the Refugee Act 1996 (Place and Conditions of Detention) Regulations 2000 governing the detention of asylum-seekers. Such persons are also covered by, where applicable, the custody rules governing prisons and police stations.

258. Section 71(1) of the Immigration, Residence and Protection Bill 2008 will set out the circumstances in which a protection applicant may be arrested and detained. The provisions of this section reflect the provisions of section 9(8) of the Refugee Act, but the addition of a power of arrest and detention of a person in circumstances where he or she

makes a protection application, or a subsequent protection application, for the purpose of delaying his or her removal from the State.

Defence Forces

259. The statutory powers dealing with arrest and service custody are set out under section 171 and section 172 of the Defence Act 1954 as amended. These provisions are currently under review. It is expected that a Bill amending these provisions to ensure that they are fully compatible with article 5 of the European Convention on Human Rights will be introduced in late 2009 or early 2010.

260. The Provost Marshal's Directive on the rights of persons in service custody provides safeguards for persons in service custody. These safeguards are made in addition to the requirements of the Defence Act 1954 as amended (sections 171 and 172) and Defence Force Regulations (DFR A. 7). Notwithstanding the provisions contained in the Provost Marshal's Directive, persons in service custody enjoy the same statutory protections as provided for in the "Judges Rules".

261. The treatment of persons in service custody must at all times be fully consistent with the provisions of article 5 of the European Convention of Human Rights and Garda Treatment of Persons Custody Regulations 1987.

Article 12

Garda Síochána

262. It is the duty of the appropriate public authority to investigate any alleged offences impartially, quickly and effectively. In the majority of cases this will fall to the Garda Síochána. Allegations of torture or mistreatment at the hands of members of the Garda Síochána may be investigated by the State's police oversight body, the Garda Síochána Ombudsman Commission.

Oversight of the Garda Síochána

263. The Garda Síochána Ombudsman Commission is an independent statutory body established under the Garda Síochána Act 2005 and represents a model of independent oversight of policing in the State. Neither a member nor a former member of the Garda Síochána can be a member of the Commission. The Commission is chaired by a former Secretary General of the Department of Foreign Affairs and its members are of high calibre. The statutory objectives of the Commission are to ensure that its functions are performed in an efficient and effective manner and with full fairness to all persons involved in complaints and investigations concerning the conduct of members of An Garda Síochána and also to promote public confidence in the process of resolving those complaints. The Commission is well resourced with almost 100 staff. This is five times the number of staff that the organisation's predecessor (the Garda Síochána Complaints Board) had at its disposal. An independent investigative resource with considerable professional expertise is included in that staffing complement.

264. The Commission is empowered directly to investigate all complaints, and must directly investigate complaints concerning the death of, or serious harm to, a person in Garda custody. Designated officers of the Ombudsman Commission have Garda powers of investigation for that purpose. If an allegation of torture was made against a member of the Garda Síochána the Commission has full powers to investigate and report to the Director of Public Prosecutions with a view to prosecution. Since the commencement of operations, the Garda Síochána Ombudsman Commission has not received any complaint which could be deemed as dealing with torture. The Ombudsman Commission can also refer complaints to

the Garda Commissioner for investigation, with or without supervision. It also has the power to investigate of its own motion, without a complaint having to be made, and where it is desirable in the public interest, any matter that appears to it to indicate that a member of the Garda Síochána may have committed an offence, or behaved in a manner that would justify disciplinary proceedings. The Ombudsman Commission is also empowered to investigate any practice, policy or procedure of the Gardaí with a view to reducing the incidence of related complaints. The Minister may also request the Ombudsman to investigate any such case, where he considers it desirable in the public interest to do so.

265. The Commission received 4,746 complaints in the period 9 May 2007 to 31 December 2008 and a further 374 matters were referred to it under section 102(1) of the Garda Síochána Act 2005 in that time. The latter are matters referred by the Garda Commissioner where it appears that the conduct of a Garda may have resulted in the death of, or serious harm to, a person. Such referrals are generally investigated under section 98 of the Garda Síochána Act 2005.

266. Arising from the 4,746 complaints noted above:

- 173 cases had been opened in Informal Resolution
- 980 cases had been investigated using section 94 Unsupervised powers
- 184 cases had been investigated using section 94 Supervised powers
- 1,280 cases had been investigated using section 98 powers
- 2,718 complaints had been closed in the period noted
- 1,909 cases had been deemed inadmissible
- 220 files were awaiting an admissibility decision

267. Among the cases investigated by the Garda Síochána Ombudsman Commission:

(a) 37 files had been sent to the Director of Public Prosecutions of which there has been one conviction to date; and

(b) 25 cases were subject to disciplinary action in line with the Garda Síochána (Discipline) Regulations 2007.

268. In this context it is important to bear in mind that the Commission is in essence an independent investigative body which reports the results of its investigations to the Garda Commissioner and, appropriate cases, to the Director of Public Prosecutions (section 67 of the Garda Síochána Act 2005).

269. The Ombudsman Commission acknowledges that a backlog of complaints and investigations has accumulated and cites a number of factors as having contributed to this, mainly staffing vacancies and lack of appropriate IT systems. However, additional investigators have taken up posts since January 2008 and a fully developed case management has been introduced.

Prison system

270. A prisoner may complain of ill-treatment to the Governor of the prison, a member of the Visiting Committee of the prison, the Director General of the Irish Prison Service or the Minister for Justice, Equality and Law Reform. It is also open to a prisoner to report a matter to the Garda Síochána (police force), pursue a civil action for damages in the courts or communicate a complaint to any appropriate third party. Rule 55 of the Prison Rules 2007 provides that a Governor shall meet any prisoner who desires to see him, or make any complaint.

271. Where a prisoner makes a complaint alleging ill-treatment, the complaint is investigated by the Governor. In any case where a criminal offence is disclosed, the Governor requests the Garda Síochána (police force) to undertake a police investigation with a view to obtaining evidence to support a criminal prosecution.

272. Based on the findings of the report of an investigation into a complaint of ill-treatment, the Governor may decide to take disciplinary action against a member of staff in accordance with the Prison (Disciplinary Code for Officers) Rules 1996.

Inspector of Prisons

273. The Prisons Act 2007 provides for a statutorily independent Inspector of Prisons. The Inspector has the power carry out regular inspections of prisons and to enter any such institution at any time of his choosing. He may inspect any records held there as he deems fit. He may also carry out investigations of a specific nature at the request of the Minister for Justice Equality and Law Reform. While it is not the function of the Inspector to investigate individual complaints made by prisoners, he may investigate the circumstances which give rise to the complaint.

Defence Forces

274. Section 192 (3) of the Defence Act 1954 as amended provides that a court-martial shall have jurisdiction to try any person subject to military law for an offence under the Criminal Law (United Nations Convention Against Torture) Act 2000 while such person was on active service or while the person was dispatched for service outside the State for any purpose specified in section 3 of the Defence (Amendment) Act, 2006. The Defence Forces would make every effort to ensure that a prompt and impartial investigation is made into any allegation of torture against a person subject to military law alleged to have been committed while on active service. Any allegation of torture against a person subject to military law alleged to have been committed while not on active service would be dealt with by the Garda Síochána with the full cooperation of the relevant military authority.

275. Any person subject to military law who incurs serious injury as a result of torture may be the subject of a court of inquiry convened pursuant to Defence Force Regulation A.5 and Rules of Procedure (Defence Forces) 2008.

276. Any person subject to military law who dies or is fatally injured as a result of torture while on active service may be the subject of a court of inquiry convened pursuant to paragraph 2 of Defence Force Regulation A.5 and Rules of Procedure (Defence Forces) 2008.

277. Any person subject to military law who dies or is fatally injured as a result of torture incurred whether or not on active service may, in addition to the aforementioned, be the subject of a Coroner's Inquest pursuant to the provisions of the Coroner's Act 1962.

278. Any allegation of torture against any person which is alleged to have been committed by a member of the Defence Forces serving overseas on peace support missions would be fully investigated by the Military Police (or Garda Síochána). Where prima facie evidence of torture is disclosed charges will be brought pursuant to section 169 of the Defence Act 1954 as amended by section 6 the Criminal Justice (United Nations Convention against Torture) Act 2000.

Review of involuntary admission to an approved centre by a Mental Health Tribunal

279. Since the full implementation of the Mental Health Act 2001 in November 2006, all involuntary admissions to approved centres or renewals of involuntary admission orders are subject to an automatic and independent review by a mental health tribunal.

280. The Mental Health Tribunal consists of a lawyer as chairman, a consultant psychiatrist and a lay person. The Mental Health Tribunal must review the admission or renewal order within 21 days of the making of the order. If the Mental Health Tribunal is satisfied that the patient is suffering from a mental disorder and that the proper procedures were followed then it affirms the order. If not satisfied, it revokes the order and directs that the patient be discharged.

281. In order to carry out its functions, the Mental Health Tribunal has similar powers to a court including the power to require the attendance of the relevant people and the production of documents.

Appeal to Circuit Court

282. A patient detained under the Mental Health Act 2001 may appeal the decision of a Mental Health Tribunal to the Circuit Court (within 14 days). It is up to the patient to prove his/her case that he/she is not suffering from a mental disorder. Patients may also appeal their detention under article 40 of the Constitution (habeas corpus).

Complaints of ill-treatment by psychiatric patients

283. A patient detained in accordance with the provisions of the Mental Health Act, 2001 has a statutory right under section 16 of the 2001 Act to inter alia legal representation and to communicate with the Inspector of Mental Health Services. All persons who have been detained must be given specified information within 24 hours of the making of an involuntary admission order or a renewal order. The written notice provided to the patient must include a statement to the effect that he/she is entitled to legal representation and to communicate with the Inspector of Mental Health Services. The Inspector is required by section 51 (1)(a) of the Mental Health Act 2001 to visit and inspect every approved centre annually, and to visit and inspect any other premises where mental health services are being provided, as the Inspector thinks appropriate. In the course of an inspection, the Inspector is legally obliged to see every resident who has requested an examination; such requests can be made by the resident or by any other person. These provisions ensure that a complaint may be made directly to the Inspector and that the Inspector can investigate any such complaint. The Inspector has wide powers to enter and inspect premises, to get information from staff and to take evidence under oath.

284. Legislation also provides that the Mental Health Commission may cause the Inspector or other specified person to inquire into the care and treatment provided to a specified patient. Such an inquiry must also be undertaken, where requested by the Minister for Health and Children in accordance with section 55 (1) of the 2001 Act.

285. In addition the Mental Health Act 2001 (Approved Centres) Regulations 2006 provide that an approved centre must have written operational policies and procedures relating to information, communication, risk management and the making, handling and investigation of complaints. The information provided to residents must include details of relevant advocacy and voluntary agencies; the registered proprietor must ensure that residents are free to communicate at all times having regard to his/her well being, safety and health. The risk management procedures must inter alia cover arrangements for the identification, recording and learning from serious or untoward incidents or adverse events involving residents. The complaints procedures must inter alia provide that complaints from any person about any aspects of the service, care and treatment provided in, or on behalf of, an approved centre must be investigated promptly.

286. The Health Act 2004 introduced a new complaints mechanism that applies to all public health facilities in Ireland, including mental health facilities. The Health Act 2004 (as amended) also provides for the protected disclosure of information in the health

services, including all public and private mental health facilities. Employees making protected disclosures in good faith and on reasonable grounds are protected from disciplinary action in the workplace and civil liability. This provision was commenced by order of the Minister with effect from 1 March, 2009.

Article 13

Role of Garda Síochána

287. As previously stated, it is the duty of the Garda Síochána to take complaints of, and investigate any, alleged offences of torture impartially, quickly and effectively. A proven neglect of this duty constitutes a breach of the Garda disciplinary code. The exception to this rule is where an allegation has been made against a member of the force itself.

The Garda Síochána Ombudsman Commission

288. The Garda Síochána Ombudsman Commission is an independent statutory body established under the Garda Síochána Act 2005 and represents a model of independent oversight of policing in the State. Neither a member nor a former member of the Garda Síochána can be a member of the Commission. The Commission is chaired by a former Secretary General of the Department of Foreign Affairs and its members are of high calibre. The statutory objectives of the Commission are to ensure that its functions are performed in an efficient and effective manner and with full fairness to all persons involved in complaints and investigations concerning the conduct of members of An Garda Síochána and also to promote public confidence in the process of resolving those complaints. The Commission is well resourced with almost 100 staff. This is five times the number of staff that the organisation's predecessor (the Garda Síochána Complaints Board) had at its disposal. An independent investigative resource with considerable professional expertise is included in that staffing complement.

289. The Ombudsman Commission is empowered directly to investigate all complaints, and must directly investigate complaints concerning the death of, or serious harm to, a person in Garda custody. Designated officers of the Ombudsman Commission have Garda powers of investigation for that purpose. If an allegation of torture was made against a member of the Garda Síochána the Commission has full powers to investigate and report to the Director of Public Prosecutions with a view to prosecution. Since the commencement of operations, the Garda Síochána Ombudsman Commission has not received any complaint which could be deemed as dealing with torture. The Ombudsman Commission can also refer complaints to the Garda Commissioner for investigation, with or without supervision. It also has the power to investigate of its own motion, without a complaint having to be made, and where it is desirable in the public interest, any matter that appears to it to indicate that a member of the Garda Síochána may have committed an offence, or behaved in a manner that would justify disciplinary proceedings. The Ombudsman Commission is also empowered to investigate any practice, policy or procedure of the Gardaí with a view to reducing the incidence of related complaints. The Minister may also request the Ombudsman to investigate any such case, where he considers it desirable in the public interest to do so. (See also additional detail on Garda Síochána Ombudsman Commission in chapter on Article 12).

Witness protection

290. The intimidation of witnesses is an offence pursuant to section 41 of the Criminal Justice Act 1999, which specifies the offence as harming, threatening or menacing or in any other way intimidating or putting in fear another person who is assisting in the investigation of an offence by the Garda Síochána, with the intention of causing the investigation or

course of justice to be obstructed, perverted or interfered with. The offence is punishable upon indictment by a fine or a term of imprisonment of up to ten years.

291. Since 1997 the Garda Síochána has operated a Witness Security Programme in response to attempts by criminal and other groups to prevent the normal functioning of the criminal justice system, including threats of violence and systematic witness intimidation. Legislation was not required to establish this Programme, but its operation is supported by complementary legislative provisions in section 40 of the Criminal Justice Act 1999 which makes it an offence for any person, without lawful authority, to try to identify the whereabouts or any new identity of a witness who has been relocated under the Programme. The offence is punishable upon indictment by a fine or a term of imprisonment of up to five years.

292. The Garda Síochána rigorously enforces the provisions relating to witness intimidation and protection contained in the Criminal Justice Act 1999. In circumstances where the Senior Investigation Officer in a case has identified a witness who is crucial to the case and the evidence to be preferred is not available elsewhere, and there is a serious threat to the life of the witness or his/her family an application can be made, with the consent of the witness, to have him/her included in the Witness Security Programme.

293. Where a threat to or intimidation of a witness or a potential witness arises during the course of criminal proceedings, the matter may be addressed through the trial judge, who has discretion to revoke bail or place other sanctions on the accused/suspect.

Prison system

294. As already mentioned, a prisoner may complain of ill-treatment to the Governor of the prison, a member of the Visiting Committee of the prison, the Director General of the Irish Prison Service or the Minister for Justice, Equality and Law Reform. Complaints are investigated promptly and impartially. Under section 3 of the Criminal Justice (United Nations Convention against Torture) Act 2000, any person who does an act with intent to obstruct or impede the arrest or prosecution of another person in relation to the offence of torture is liable on conviction on indictment to imprisonment for life.

295. The prisoner making a complaint 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.

Defence Forces

296. Any person subject to military law (as defined by sections 118 and 119 of the Defence Act 1954 as amended) who has been subjected to ill-treatment while in detention or service custody has an unfettered right of redress pursuant to the Defence Forces Redress of Wrongs Procedure as provided for by section 114(1) and 114(2) of the Defence Act 1954 as amended and the regulations made thereunder. It is the duty of the commanding officer to investigate any complaint. If the commanding officer cannot provide the redress sought by the complainant then the individual has the statutory right to have his complaint considered through the chain of command up to the Chief of Staff, and ultimately, if the matter cannot be redressed to his satisfaction, the matter may be referred to the Defence Forces Ombudsman pursuant to the provisions of the Defence Forces Ombudsman Act 2004. The Provost Marshal's Directive relating to the rights of persons in custody provides a procedure for the making of complaints by a person in custody.

297. Members of the Defence Forces on active service outside the State with a United Nations force, or a United Nations mandated force, may only detain persons in accordance with the United Nations mandate and then only for short periods. Such detention is subject to constant review and any report of ill treatment would be investigated by Military Police

and charges pursuant to the Defence Act 1954 as amended brought against an alleged perpetrator, where there is evidence to sustain such charges.

Mental health

298. In accordance with section 16 of the Mental Health Act 2001, all persons who have been detained, must be given specified information within 24 hours of the making of an involuntary admission order or a renewal order. The written notice provided to the patient must include a statement to the effect that he/she is entitled to legal representation and to communicate with the Inspector of Mental Health Services. The Inspector is required by section 51(1)(a) of the Mental Health Act 2001 to visit and inspect every approved centre annually and, to visit and inspect any other premises where mental health services are being provided, as the Inspector thinks appropriate. In the course of an inspection, the Inspector is legally obliged to see every resident who has requested an examination; such requests can be made by the resident or by any other person.

299. These provisions ensure that a complaint may be made directly to the Inspector and that the Inspector can investigate any such complaint and make a report to the Mental Health Commission. Section 51(2) of the Mental Health Act 2001 provides the Inspector with all such powers that are necessary or expedient for the performance of his functions including the powers to require persons in an approved centre to furnish information or records in their possession. In addition the Inspector can require any such person to attend before him and give evidence under oath. A person who is required to provide such information or evidence is entitled to the same immunities and privileges as a witness in a court.

300. In accordance with section 55 of the Mental Health Act 2001, the Mental Health Commission or the Minister can require an inquiry to be undertaken in relation to:

(a) The carrying on of any approved centre or other premises in which mental health services are provided;

(b) The care of an individual patient, or specified voluntary patient;

(c) Any appropriate matter having regard to the provisions of the Act or regulations or rules.

301. In addition the Mental Health Act 2001 (Approved Centres) Regulations 2006 provide that an approved centre must have written operational policies and procedures relating to information, communication, risk management and the making, handling and investigation of complaints. The information provided to residents must include details of relevant advocacy and voluntary agencies; the registered proprietor must ensure that residents are free to communicate at all times having regard to his/her well being, safety and health. The risk management procedures must inter alia cover arrangements for the identification, recording and learning from serious or untoward incidents or adverse events involving residents. The regulations also ensure that information relating to the complaints procedure is displayed in a prominent position; a nominated person is available to deal with all complaints; complaints are investigated promptly; complaints, investigations and any actions taken are recorded and that any resident who has made a complaint is not adversely affected by reason of the complaint having been made.

302. The Health Act 2004 introduced a new complaints mechanism that applies to all public health facilities in Ireland, including mental health facilities. The Health Act 2004 (as amended) also provides for the protected disclosure of information in the health services, including all public and private mental health facilities. Employees making protected disclosures in good faith and on reasonable grounds are protected from

disciplinary action in the workplace and civil liability. This provision was commenced by order of the Minister with effect from 1 March 2009.

Article 14

Systems of redress

303. The legal system in Ireland provides a mechanism for the recovery of damages for injuries suffered by an individual at the hands of others. Where a person suffers unjustly at the hands of the police or prison services or any other State agency an action lies against the State. A prisoner who alleges that he or she is a victim of an act of torture or other ill-treatment may also seek redress through the courts.

Payment of compensation

304. The Criminal Justice Act 1993 gives courts a general power to require convicted offenders to pay compensation. The court may make (on application or otherwise) an order requiring the convicted person to pay compensation to the victim in respect of any personal injury or loss resulting from the offence (or any other offence that is taken into consideration by the court in determining sentence). The power is to be exercised unless the court sees reason to the contrary. The compensation must not exceed the amount of the damages that the court thinks the injured party would be entitled to recover in a civil action for the injury or loss in question, but the court must have regard to the convicted person's means.

The Criminal Injuries Compensation Tribunal

305. The Criminal Injuries Compensation Tribunal administers the following schemes:

- The Scheme of Compensation for Personal Injuries Criminally Inflicted
- The Scheme of Compensation for Personal Injuries Criminally Inflicted on Prison Officers (which is similar in all respects to the General Scheme with the exception that compensation for pain and suffering is payable)

306. The tribunal considers applications from people who suffer a personal injury or death as a result of a crime of violence.

307. Compensation may be awarded on the basis of any vouched out-of-pocket expenses, including loss of earnings, experienced by the victim or, if the victim has died as a result of the incident, by the dependents of the victim.

308. The incident in which the injury was caused must have been reported to the Gardaí without delay.

309. Application must be made to the tribunal as soon as possible but not later than three months after the incident. The tribunal has authority under the scheme to extend this time limit in circumstances where the applicant can show that the reason for the delay in submitting the application justifies exceptional treatment of the application.

310. There is no time limit for fatal applications.

Prison system

311. In this regard, a prisoner will be facilitated in receiving visits from his or her legal representative and may make application to the courts for free legal aid.

Defence Forces

312. Any person subject to military law who incurs injury, loss or damage as a result of torture, incurred in the course of duty, active or otherwise has recourse to the civil courts to pursue a civil action for damages against any person responsible for such torture if that person is within the jurisdiction of the courts of Ireland without prejudice to any disability benefit, which may be added to existing pension entitlements.

313. In the event of the death of any person subject to military law as a result of an act of torture incurred in the course of duty, active or otherwise, the dependants of such a person shall have recourse to the civil courts to pursue a civil action for damages against any person responsible for such torture if that person is within the jurisdiction of the courts of Ireland without prejudice to any other payments they may receive as a result of death in service.

314. The same recourse to the civil courts in the State is available to any person not subject to military law whether the alleged torture occurs in Ireland or on an overseas United Nations mission. In the event of death the dependents of such person would have similar recourse to the civil courts in Ireland to pursue an action for damages against any person responsible for such torture if that person is within the jurisdiction of the courts of Ireland.

Article 14.2

315. See above. No comment required.

Article 15

Case law

316. Under the well-established case law of the Irish courts, in order to be admissible in evidence a statement must be voluntary.

317. A statement which is made as a result of torture is not a voluntary statement and is therefore not admissible as evidence.

318. In *State (C) v. Frawley* [1976] IR 365 the High Court stated that it was "surely beyond argument" that the unspecified personal rights guaranteed by Article 40 of the Constitution of Ireland included freedom from torture and from inhuman or degrading treatment and punishment.

319. In *People (DPP) v. Kenny* [1990] 2 IR 110 the Supreme Court held that evidence obtained by invasion of the constitutional personal rights of a citizen must be excluded unless a court is satisfied that either the act constituting the breach of constitutional rights was committed unintentionally or accidentally or is satisfied that there are extraordinary excusing circumstances which justified the admission of the evidence in the courts discretion. It is therefore inconceivable that evidence obtained by means of torture would be admitted in an Irish court.

320. In any criminal proceedings, the compilation of a book of evidence and the material to be included in it is a matter for the Director of Public Prosecutions.

Garda Síochána

321. This obligation is reflected in the Garda Declaration on Professional and Ethical Standards (2003), especially article 2.

Article 16

Article 16.1

Legislation

322. As previously stated, under Irish law conduct amounting to torture, or other cruel or inhuman treatment or punishment is prohibited. For example such actions would violate specific sections of the Non-Fatal Offences against the Person Act 1997. This Act provides for a range of offences against the person including assault causing harm, assault causing serious harm, threats to kill or cause serious harm, false imprisonment and coercion. Other legislation equally also violated includes the Criminal Justice (Public Order) Act 1994 and the Criminal Law Act 1976. Investigations into offences of this nature are in general carried out by the Garda Síochána. As previously stated, allegations of this nature made against members of the Garda Síochána may be investigated by the Garda Síochána Ombudsman Commission, the State's police oversight body.

Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

323. This Committee, which operates under the aegis of the Council of Europe, was established under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment in 1987. The Committee has visited and reported on its visits to Ireland in 1993, 1998, 2002 and 2006. During the 2006 visit the delegation from the Committee visited a number of Garda stations, prisons and places of detention and the Central Mental Hospital and indicated that the level of co-operation received during the visit from the Irish authorities was very good, both at central and local levels.

Garda Síochána Standards of Professional Behaviour

324. This obligation is reflected in article 2 of the Garda Declaration on Professional and Ethical Standards (2003) (to uphold and protect the human rights of all). The issue is also addressed in training interventions for all members of An Garda Síochána.

Article 16.2

325. No comment required.

IV. Consultation with the wider community

326. Recognising the benefit of broad-based consultations, advertisements were published in the national newspapers on 13 December 2005, inviting submissions from interested parties on the preparation of the present report by Ireland. The advertisement was also published on the website of the Department of Justice, Equality and Law Reform and forwarded to a number of leading non-governmental agencies in Ireland with a request for views and observations on the matter.

327. A copy of the advertisement published and the list of persons and organisations which made submissions are included at annexes I and II respectively. A number of issues were raised by those parties who made submissions and the key concerns are set out in the following paragraphs. Ireland's position on these is also outlined below.

1. Refoulement

328. Several parties expressed concern regarding the following issues pertaining to refoulement:

- Quality of decisions
- Independent evaluation of those decisions
- Lack of statistical material in relation to instances of refoulement
- Regard of personnel to obligations implicit in article 3
- The need for an independent review mechanism for decisions

Quality of decisions

329. All asylum-seekers have a right to enter this State for the purposes of having an application for asylum processed. The State has a comprehensive asylum system in place which compares favourably with other European Union States. Every asylum applicant with the exception of those to whom the Dublin II Regulation applies (see below) is guaranteed an investigation and determination of their claim by the Refugee Applications Commissioner (ORAC). In the event of a negative finding by the Commissioner the system also guarantees a right of appeal to the independent Refugee Appeals Tribunal. Additionally, the European Communities (Eligibility for Protection) Regulations 2006 provide for the making of an application for subsidiary protection to the Minister for Justice, Equality and Law Reform by an individual who has been issued with a notice of intention to deport by the Minister under section 3(3) of the Immigration Act 1999 and who considers that they are eligible for subsidiary protection. In that context, those who have been found to have no protection requirements have the option of making representations to the Minister as to why they should not be deported.

330. Both the agencies dealing with asylum applications are highly resourced and staff members receive specialised UNHCR training before processing cases. Due regard is particularly given to vulnerable applicants such as minors or victims of trauma. Each application is assessed on the basis of the circumstances of the individual case having regard to such elements as the applicant's own account and personal history and up-to-date information on the applicant's country or place of origin. Relevant statistics on this issue is at annex III of this document.

Independent evaluation and review of decisions

331. In addition to the above, all applicants have recourse to the Courts by seeking Judicial Review of decisions made by State agencies. This facility offers an effective independent means of scrutiny. UNHCR has a statutorily guaranteed right of access to all relevant files. In order to comply with the Supreme Court decision in the Atanasov case (293/05 – 26 July 2006), the Tribunal in 2006 provided facilities for accessing and searching a database of previous decisions of the Tribunal, as a means of facilitating bona fide legal research. The database, which is available to legal representatives, was launched on 31 October 2006. The system provides a user-friendly, informal and comprehensive means by which access to previous Tribunal decisions can be procured. All users of the system are required to operate under the guidelines and procedures which are outlined on a booking website.[18] Applications for access can be made online.

[18] www.ref-booking.ie.

332. The Tribunal manages an appointments system and redacts decisions identified post research. Redacting Guidelines have been drawn up and all redactors have been trained. The Tribunal is conscious of its statutory duty to maintain client confidentiality and users of the system are required to sign a Declaration of Confidentiality. The Tribunal monitors the operation of the system on an ongoing basis with a view to ironing out any practical problems that may arise. The Tribunal is satisfied that the letter and spirit of the Atanasov judgment are fully respected by the system of access now in operation and that the system is sufficiently flexible and comprehensive to facilitate reasonable legal research.

Training given to personnel

333. The law dealing with the processing of an application is provided for in the Refugee Act 1996. Section 9(1) of the Act requires that a person seeking asylum be granted leave to land by an Immigration Officer. Immigration Officers receive training (including training from a UNHCR representative) which emphasises inter alia their obligation to assist asylum-seekers in the making of their applications. The processing of applications is part of the day-to-day duties of members of the national police force (An Garda Síochána) who are employed on immigration duties. The training these officers receive also encompasses issues of equality and policing in a multicultural environment. Members of the Garda National Immigration Bureau also exchange learning experiences with their colleagues in Europe in relation to human rights and best practice in this area.

Regard to article 3

334. Ireland has a system of safeguards in place to ensure that no person can be sent to a State where there are substantial grounds for believing that the person would be subjected to torture. Article 3 of the Convention is given effect in Irish law by virtue of the Criminal Justice (United Nations Convention against Torture) Act 2000, section 4 of which states:

> "(1) A person shall not be expelled or returned from the State to another State where the Minister is of the opinion that there are substantial grounds for believing that the person would be in danger of being subjected to torture.
>
> "(2) For the purposes of determining whether there are such grounds, the Minister shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

335. The Dublin II Regulation provides the legal basis for establishing the criteria and mechanism for determining the State responsible for examining an asylum application in one of the member States of the European Union, Norway and Iceland by a third country national.

336. The Immigration, Residence and Protection Bill 2008 retains the existing statutory prohibition on refoulement. All of the existing safeguards for ensuring compliance with the State's international obligations under the Convention against Torture are being maintained.

2. Treatment of detained persons

Reports of the Inspector of Prisons and Places of Detention, Prison Visiting Committees and the National Prison Chaplains should be brought to the attention of the Committee

337. In the case of the first two bodies, their reports are published and are available on the website of the Department of Justice Equality and Law Reform.[19] The National Prison Chaplains produce their own report and make it available to the media.

Concerns at the detention of persons awaiting deportation in the prison

338. In practice, detention of this nature is only used as a means of last resort to ensure compliance with the deportation decision where the person concerned has failed to comply with less restrictive requirements such as a commitment to reside at a particular address and report to the authorities on a regular basis. The legislation also limits detention of this nature to those over the age of 18 and for a maximum period of 56 days. However, the Irish High Court has ruled that this period can be extended where the individual concerned has frustrated an earlier attempt to carry out deportation by engaging in disruptive behaviour.

3. Persons suffering from prescribed diseases

339. Concern has been expressed that a decision to refuse admission to a person on grounds that they are suffering from a prescribed disease can be taken by unqualified personnel and in the absence of a medical examination.

340. This matter is being addressed in the context of the new Immigration Residence and Protection Bill, 2008. The legislation will provide for an immigration official to request an entrant to this State to undergo a medical examination where that official is of the view that the individual seeking entry to the State is suffering from a prescribed disease.

4. Extraordinary rendition

Ireland may be facilitating either knowingly or unknowingly the trafficking of persons through its airports who may be illegally detained or become subject to torture

341. The Government is completely opposed to the practice of so-called extraordinary renditions. There is a specific commitment in the Programme for Government 2007–2012 to ensure that all relevant legal instruments are used so that the practice of extraordinary rendition does not occur in this State. The Government has made it clear that any person with information that Irish airports have been used for any alleged unlawful purpose should immediately report their concerns to the Garda Síochána (national police service), which would have responsibility for investigating such matters. Where complaints of alleged unlawful activity concerning the use of Irish airports have been made to the Garda Síochána, investigations have ensued and, where appropriate, files have been submitted to the Director of Public Prosecutions. In the very small number of cases investigated, no further action was found to be warranted, owing to a lack of evidence of any unlawful activity.

[19] www.justice.ie.

342. The assurances the Government has received from the United States authorities are specific that prisoners have not been transferred through Irish territory, nor would they be, without our permission.

343. In October 2008 the Government established a Cabinet Committee on Aspects of International Human Rights. The work of this committee includes an examination of the current legal framework and how systems of monitoring traffic might be improved.

5. Mental health of detained persons

344. Concern has been expressed, inter alia, about the extent of mental illness among the prisoner population; persons involuntarily detained under mental health legislation.

Persons detained under mental health legislation

345. The Mental Health Act 2001 provides a framework in which people requiring treatment for mental illness can be cared for. The Mental Health Commission is an independent statutory body whose primary function is the fostering and promotion of high standards and good practice in the area of mental health care. The Act also requires the Inspector of Mental Health Services to visit and inspect every approved mental health centre on an annual basis. All involuntary detentions in approved centres are subject to an automatic and independent review by a Mental Health Tribunal.

346. Reference has already been made to the Criminal Law (Insanity) Act 2006 which provides for the establishment of the Mental Health (Criminal Law) Review Board and that body's role in relation to the review of detentions of persons detained in designated centres under the Act.

6. Inspection and complaints mechanism for prisoners

347. The Prisons Act 2007 provides for a statutorily independent Inspector of Prisons. Prison Visiting Committees are appointed in respect of each prison and are empowered to hear complaints from prisoners. The Act also provides for an independent appeal mechanism for prisoners who have had disciplinary penalties involving the loss of remission imposed on them arising from breaches of prison discipline. Prisoners have recourse to free legal aid in such circumstances. The Prison Rules 2007 came into affect from 1 of October 2007 and represent the first major review of prisons regulation in this country since 1947. The new Rules take full account of international instruments (including the European Prison Rules), rulings of the European Court of Human Rights and best practice.

7. Various United Nations Convention against Torture articles under Irish law

348. Comments were received relating to this State's apparent failure to make articles 8, 9, 10, 13 and 14 justiciable in Irish legislation.

349. Ireland rejects any such criticism.

350. Article 8 is given effect by virtue of the Criminal Justice (United Nations Convention against Torture) Act 2000, the Extradition Acts 1965–2001 and the European Arrest Warrant Act, 2003 (as amended).

351. Ireland is fully compliant with article 9 by virtue of part VII of the Criminal Justice Act 1994. The Act, inter alia, permits the Minister for Justice, Equality and Law Reform to authorise an Irish court to take evidence in connection with criminal proceedings or investigations in another jurisdiction.

352. In the context of articles 10, 11 and 13, the Garda Síochána incorporates a comprehensive human rights dimension into its training curriculum. The Garda Síochána Disciplinary Code and the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987 expressly forbid the ill-treatment of detained persons. The Garda Síochána Act of 2005, the first major legislative review of the force since the foundation of the State, provides for the establishment of a Garda Síochána Ombudsman Commission. This is a statutorily independent body with its own investigative function and resources to inquire into incidents of alleged police misconduct. The Ombudsman Commission is empowered directly to investigate all complaints, and must directly investigate complaints concerning the death of, or serious harm to, a person in Garda custody.

353. In the context of article 14, any victim or relative of a victim of abuse by an agent of the State may seek redress to the courts in this regard.

8. Lack of express prohibition on torture in the Constitution

354. Protection from torture is encompassed by general rights protecting the person enshrined in Article 40.3 of the Constitution of Ireland, which states:

> "1 The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
>
> "2 The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

355. These fundamental rights are further underpinned by the relevant legislation, most notably the Criminal Justice (United Nations Convention against Torture) Act of 2000 and various judgments in the Courts, for example:

- **The right to bodily integrity** – (*Ryan v. Attorney General*) *[1965] IR 294*
- **The right to travel within the State** – (*Ryan v. Attorney General) [1965] IR 241*
- **The right to travel outside the State** – *(The State (M) V. Attorney General) [1979] IR 73*
- **The right not to have health endangered by the State and freedom from torture and from inhuman or degrading treatment or punishment** – *(The State (C.) v. Frawley [1976] IR 365*
- **The right to litigate or have access to the courts** – *(Macauley v. Minister for Posts and Telegraphs [1966] IR 345*
- **The right to justice and fair procedures** – *The State (Howard) v. Donnelly ([1966 IR51), The State (Gleeson) v. Minister for Defence [1976] IR 280, Curran v. Attorney General (unreported, 27th February 1941*), *The State (Walshe) v. Murphy [1981] IR 275, The State (Williams) v. Kelleher[1983] IR 112*
- **The right to legal counsel** – *(The State (Healy) v. Donoghue [1976] I.R. 325*
- **The right to communicate** – *Attorney General v. Paperlink Ltd [1984] ILRM 343*
- **The right to marry** – *Ryan v. Attorney General [1965] IR 294*

- **The right to marital privacy** – *McGee v. Attorney General [1974] IR 284*
- **The right to procreate** – *Murray v. Ireland [1991] ILRM 465*
- **The rights of an unmarried mother concerning her child** – *G v. An Bord Uchtala [1980] IR 32*
- **The rights of a child** – *Re the Adoption Board (No 2) Bill 1987 [1989] IR 656*
- **The right to an independent domicile and maintenance** – *CM v. TM (No. 2) [1991]*
- **The right of access to the courts** – *Macaulay v. Minister for Posts and Telegraphs [1966] IR 345*
- **The right to legal representation in certain criminal cases** – *The State (Healy) v. Donoghue [1976] IR 325*
- **The right to fair procedure** – *Re Haughey [1971] IR 217*
- **The right to earn a livelihood** – *Murphy v. Stewart [1973] IT 97*

9. State failure to investigate and prosecute incidents of individuals involved in torture (Ref to the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment)

356. Ireland would reject this assertion. An Garda Síochána may investigate any allegation of abuse or torture by an agent of the State. The Director of Public Prosecutions decides whether criminal proceedings should be taken and is fully independent of the Government in this regard. The Garda Síochána Ombudsman Commission is empowered to investigate any admissible allegation concerning a neglect of duty by members of the police force.

10. Investigation, prosecution or extradition of individuals involved in torture

357. The Criminal Justice (United Nations Convention against Torture) Act 2000 criminalises the offences of torture, attempting to commit the offence of torture and obstructing the arrest of a person in relation to the offence of torture. The offences are subject to the provisions of the Extradition Acts 1965–2001 and the European Arrest Warrant Act, 2003 (as amended). The penalty following conviction of one of these offences is life imprisonment.