



Free Legal Advice Centre, Trinity College Dublin

Trinity College Dublin United Nations Periodic Review Committee: A Review of Human Rights Practices in Ireland

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1.Introduction: The Trinity College Dublin UPR consultation committee was established in January 2011 under the guidance of the Trinity Free Legal Advice Centre (Trinity FLAC), a college branch of the National Free Legal Advice Centre (FLAC). Trinity FLAC is a student society run by undergraduate law students which offers legal advice clinics for all Trinity College Dublin students. This clinic runs on a regular basis throughout the academic year. FLAC as a national organisation has played a key role in shaping the changing landscape which eventually saw the Government's introduction in 1980 of the first ever civil legal aid scheme. With FLAC now over 40 years in existence, the need for radical and far reaching reform of the wider legal system has never been more pressing. In response to these issues the aims of Trinity FLAC are:

- a) To provide free legal advice to the students and staff of Trinity College Dublin through clinics staffed by voluntary, qualified solicitors or barristers, fortnightly or at such intervals as the committee sees fit.
- b) To promote awareness of legal rights and obligations amongst the students and staff of Trinity College Dublin, through talks, newspaper articles, pamphlets and other media.
- c) To campaign on issues of social justice, law reform and equality in the law in association with National FLAC.
- d) To conduct legal research into public interest law generally, and pass on the results to interested persons and bodies.

In pursuit of object (d) as outlined above the Trinity FLAC sub-committee was established in response to the United Nations Periodic Review Consultation Process taking place in Ireland throughout 2011. The mandate assigned to the Trinity FLAC committee was to:

-Investigate areas of human rights law which we, as undergraduate students of law encountered in the course in our studies and were concerned with in an Irish context.

-Hold a forum aimed at elaborating discussion on these key areas of human rights law and draft a core set of recommendations on this basis.

-Continue engagement with the various stages of the United Nations Periodic Review of Ireland after the preliminary process by working in tandem with State and NGOs campaigns.

-Proceed with the organisation of publicity campaigns and debates aimed at highlighting the various positions as outlined in the recommendations of our report.

Trinity FLAC would especially like to extend its thanks to Mr Marc Coen adjunct lecturer in Criminal Law and the Law of Evidence in Trinity College Dublin, Thomas O'Malley of NUI Galway and to Saoirse Brady and Eoin Coffey of National FLAC for their advice and comments in regards to the particular issues raised in this document. Error and omissions as to the accuracy of the law and law reform are the sole responsibility of the editorial board.

2.Direct Provision for Asylum Seekers: Trinity FLAC recognises that the current reception conditions for asylum seekers are wholly inadequate to meet International and Regional Human Rights obligations. The solutions proposed by Trinity FLAC are two fold in purpose. First it is sought to locate where the State has failed to live up to its duty to provide for asylum seekers within regional and international obligations. Secondly Trinity FLAC believe direct provision or alternatives therein, could be qualitatively enhanced by reforming defects within the asylum granting process. This would serve the dual purpose of enhancing transparency and highlighting issues around cost allocation while temporally and proportionately limiting the suffering an asylum seeker must endure before being granted or denied a leave to remain.

A system of direct provision and dispersal for individuals as a means of dealing with the reception of asylum seekers exists on an administrative basis in Ireland. However the system has been criticised by several

leading authorities in the area of human rights law. This is mainly due to the severity of the conditions that those seeking asylum are forced to endure as is evident from the ‘One Size Does Not Fit All’ research paper compiled by National FLACⁱ. The report highlights in particular the inadequate living allowance of €19.10 a week and the high percentage of applicants waiting in substandard and crowded conditions for unreasonable periods of time. Other studies have suggested this has had profound mental health law implications for those subjected to such conditions over a considerable period of time.

Ireland owes a number of legal duties to asylum seekers in this regard. Article 3 of the ECHR prohibits the use of inhuman or degrading treatment towards individuals. The committee contends that the current implementation of direct provision in Ireland amounts to inhumane and degrading treatment. As such it is a breach of the rights of those seeking asylum. Alternative obligations may also be attributed to Ireland through Article 14(1) of the Universal Declaration of Human Rights and also through the concept of disproportionate indirect discrimination under Article 14 ECHR. Claire Breenⁱⁱ contends Ireland's failure to provide adequate housing (the definition of adequate housing in this sense is taken from holistic view put forward by many international organisations.) places it in violation of “a raft of international human rights obligations that it has undertaken, stemming from Article 25(1) of the UDHR, Article 11 of the ICESCR (International Covenant on Economic, Social and Cultural Rights) and the latter’s expansive interpretation by the CESCR (Committee on Economic, Social and Cultural Rights)”.

Another limitation under the current administration of direct provision is the prohibition from working on those seeking asylum. Under Article 11 of the EU’s Reception Directive Member States are bound to determine a period of time during which an applicant shall not have access to the labour market. The Directive has also offered a wider positive framework to harmonise the minimum standards applicable to the reception of asylum seekers in EU Member States. However its lack of legal effectiveness is striking in this jurisdiction with Ireland continuing to exercise its ‘opt out’ clause. Some of the current conditions in Ireland may fall below the standard contained in the Directive.

Given current economic circumstances, the committee feel that this limitation on human rights would be permissible if applicants were asked to remain in these conditions for a proportionate amount of time. Currently two statutory offices deal with applications for refugee status, ORAC and RAT (Refugee Appeals Tribunal). The RAT was initially created as an appeals court but now resembles a court of first instance as statistics show it grants almost half of the refugee status annually. Its structure however has not been adapted/reformed to deal with the vast number of cases and thus has unnecessarily protracted the process. The tribunal currently consists of 35 part-time members with relatively short terms. They are not required to have any judicial experience and are appointed by the Minister of Justice, Equality and Law Reform effectively militating against consistency and specialisation. Furthermore only seventeen RAT decisions have been published to date and all proceedings are currently *in camera*. Mc Donaghⁱⁱⁱ highlights the systemic lack of consistency with the Refugee Appeals Tribunal decisions due to these failures.

The Irish Supreme Court^{iv} has recently decided to answer human rights activists calls for the greater scrutiny of the Refugee Appeals Tribunal by lowering the threshold for judicial scrutiny of the decision-making process through judicial review mechanism until the decision making process is improved. While this is to be broadly welcomed the committee feel that judicial review is a costly and time consuming exercise which encompasses a more limited remedy than a full appeal due to the practice of returning erroneous decisions back to first instance to be judged on again.

Trinity FLAC suggest that the Irish Government be asked to commence with the structural reform of the Refugee Appeals Tribunal. We recommend:

(a) That the Tribunal be reformed into an independent body by amending the appointments system. In this way the adverse political influence on the Tribunal shall be reduced.

(b) The appointment of full-time members to the Tribunal. These full-time appointees shall have either judicial experience or have qualified as Senior Counsel as is the procedure in the United Kingdom. In addition to this board members will be required to undergo an improved and regular training regime.

(c) The removal of the cloak provided by the “in camera” procedure to ensure the integrity of the tribunal.

(d) The full reporting of decisions from the Refugee Appeals Tribunal and the opening of public access to such decisions.

(e) That successful judicial review decisions, where appropriate, be encouraged to be granted as declaratory status of an asylum seekers right

Trinity FLAC also call for the urgent implementation of the Reception Directive. In particular we recommend the implementation of Article 11 of the Directive that Ireland follows the United Kingdom in mandating a decision to be made on the right to work after a period of 12 months.

This offers the potential for asylum seekers to improve their living conditions reduce the financial burden on the State while supporting social integration. Direct provision at present amounts to a breach of international and regional obligations to the human rights of asylum seekers. We believe that this could be addressed through the reforms as prescribed herein. Overall these provisions would help curtail the length a person may be subject to direct provision and would urge greater caution in decision-making at the level more generally.

3. Offences Against the State Act Legislation: Whilst the constitutional authority for the establishment of the Special Criminal Court cannot be doubted, the committee submit that the legislation establishing the Special Criminal Court (the Offences Against the State Act, 1939) is defective to the extent that it undermines the right to a fair trial as stated in Article 6 of the European Convention of Human Rights. Although other countries have “adopted anti-terror measures” to deal with organised crime, it has been remarked that Ireland is one of a limited number common law jurisdiction which has concluded that there are certain trials in which the risk of jury intimidation is such that justice could best be administered by means of a non-jury trial^v.

There are two main problems with such a contention. The first, as remarked Justice Anthony J. Hederman, Professor William Binchy and Professor Dermot Walsh in the “Report to Review the Offences Against the State Acts 1939-1998” is that while Ireland has experienced a growth of organised crime in recent years, it is not plausible to suggest that, Irish social conditions are so perilous as to warrant dispensing with jury trial.” The second is that the foundations for such reasoning are merely speculative as no research into juries has ever been conducted in Ireland thus it is impossible to conclusively prove the existence and measure the extent, if any, of jury intimidation. Furthermore, in serious cases involving organised crime, the possibility of witness intimidation must be of equal concern to jury intimidation and the Special Criminal Court is only equipped to deal with the latter. We would like to draw the Commissioner’s attention to several aspects of the Special Criminal Court which are of significant concern and reveal a disconcerting lack of transparency and accountability.

Trinity FLAC submits that the scheduling of offences in the court system of the Special Criminal Court is in need of urgent amendment in a number of places. Currently, the Director of Public Prosecutions can transfer non-scheduled offences to the Special Criminal Court without justification. The courts have also suggested that such decisions are immune from review. Some of the most alarming aspects of the legislation can be found in Subsection 2 of the Offences Against the State Act (Amendment) Act 1998. This allows for a failure to respond to questions as a possible admission of guilt and also allows for the belief of “an officer of the Garda Síochána not below the rank of Chief Superintendent” that “the accused was at a material time a member of an unlawful organisation” to be held as evidence. The legislation also allows a Garda Superintendent to plead privilege at such cases so as to be protected against cross-examination and the divulgement on established facts and sources.

In reviewing in the “Report to Review the Offences Against the State Acts 1939-1998”^{vi}, Judge Hederman, Binchy and Walsh dissented from the majority on this matter by suggesting the dangers of adverse inference drawing provisions mandate exceptional procedural protection. Further to this contention they also suggest that existing ECHR jurisprudence emphasising the centrality of Article 6 reflects the difficulties with relying

on such provisions. Former President and United Nations Human Rights Commissioner Further to this Dr. Mary Robinson^{vii} remarked that to allow a Garda Superintendent to plead privilege to be protected from cross-examination is ‘an extremely dangerous precedent which could undermine the democratic process.’

Trinity FLAC suggest that the Special Criminal Court in its current formulation is not satisfactory. Therefore we recommend that:

(f) Ireland should carefully monitor, on an ongoing basis, whether the exigencies of the situation in Ireland continue to justify the continuation of a Special Criminal Court with a view to abolishing it. In the interim, it should ensure that, objective and reasonable grounds are provided and that there is a right to challenge the grounds of the proceedings on the basis of an Article 6 right to a jury trial and a right to liberty.

(g) While jury intimidation may be a legitimate concern, alternative methods to protect jury members against intimidation should be adopted. These include providing for anonymous juries, screening the jury from public view, the protection of the jury during the trial or locating the jury in a different place from where the trial is being held with communication by video link, should be explored.

(h) The removal of the section of the 2009 Criminal Justice (Amendment) Bill which extended the remit of the Special Criminal Court to deal with certain organised crime.

(i) In the interests of the fair administration of justice and equal treatment, the trial judge should be entitled to cross-examine Garda Superintendent Intelligence in a *voir dire* procedure.

4. Prisoners Rights: Dostoevsky famously said that ‘*The degree of civilisation in a society can be judged by entering its prisons*’. The protection of prisoners’ human rights is essential to prevent abuse of a section of society that is most at risk of unjust treatment and who have the least means of speaking out for themselves.

Numerous international instruments recognise the importance of Prisoners Rights including Article 3 of the European Convention on Human Rights, Article 5 of the United Nations Declaration of Human Rights, and the European Prison Rules. It the view of Trinity FLAC that the Republic of Ireland has failed to meet its international requirements in respect of protection of prisoner’s human rights^{viii}. We would like to draw the Commissioner’s attention to a number areas of the Irish penal system that require significant reform; namely:

A report by the Irish Penal Reform Trust (IRPT)^{ix} suggests that there are significantly more prisoners incarcerated in Irish prisons than the prison system is capable of safely handling. Mountjoy has an operational capacity of 573 and a prison population of 632, Cork has an operational capacity of 257 and a design capacity of 309, and the Dochas Centre, a women’s prison in the Mountjoy complex has an operational capacity of 85 and a population of 115. Due to overcrowding prisoners have to share cramped living conditions with as many as four people sharing a cell. In the Dochas centre there have even been reports of prisoners having to share beds.

Overcrowding can lead to other problems. Just under 30% of Irish prisoners are ‘slopping out’ with no in cell sanitation^x. According to a study commissioned by the IPRT into prison facilities in Cork there are instances of prisoners having to use plastic bags and bottles to defecate^{xi}. The CPT^{xii} has called the current situation degrading not only those prisoners that have to relieve themselves but also to those who they share a cell with.

The IRPT^{xiii} also stresses that overcrowding places on Irish prisons has compromised ‘prisoner protection’ programmes designed to protect the general prison population from violent and dangerous inmates, or specifically vulnerable inmate from threats in the general prison population. Although each prisoner under protection is supposed to occupy a single cell in both Mountjoy and Cork prisons it is not uncommon for 3 people to be locked up together. Furthermore many prisoners are left languishing in their cells for periods of up to 23hrs, with no meaningful activities, in conditions not dissimilar to solitary confinement. These conditions are highly unsafe for the prisoners involved and numerous fatalities have been attributed to them^{xiv}. Trinity FLAC submits that every effort should be made to ensure that prisoners on protection do not

have to share cells and that in the interim individual risk and needs assessments should be made so prisoners do not have to share a cell with other inmates that may pose a risk to them.

Healthcare, both physical and mental, is inadequate to meet the needs of prisoners with the availability of doctors is extremely restricted and only possible at certain times. The Irish prison system contains many patients whose mental illnesses make prison an unsuitable environment. Unfortunately the Central Mental Hospital in Dundrum does not have enough space to accommodate them. Mentally ill inmates in Irish cells are kept in observational cells, many of which are dirty and unhygienic^{xv}.

The discipline and complaints procedures in Ireland are sorely inadequate to protect the rights of inmates.^{xvi} Prison authorities frequently placed inmates guilty of a breach of discipline in holding cells for 23 hrs a day at up to 60 days at a time. The Prison Act of 2007 states that the maximum any inmate can be held in such conditions is 3 days. The cells these prisoners were often held in are some cause for concern. In Cork the cells suffered from poor ventilation, one cell was noted for being particularly filthy and inmates were not even given detergent to clean the toilet. The Committee treats such breaches as coming within the ambit of Article 3 of ECHR. In some prisons, most notably Portlaoise Prison^{xvii}, investigations into alleged misconduct is cursory with little fair procedures. Prisoners complain of not being able to call witnesses, or assistance for the substantial number of illiterate that are in the prison population^{xviii}. Trinity FLAC is of the view that the current complaint systems in place do not inspire the confidence of the prison population.

Trinity FLAC urges the Government to prioritise the reduction of overcrowding in prisons. We contend that this can be achieved by:

(j)Expanding existing prison capacity or reducing the amount of people being sent to prison in the long term. In the interim, a reduction to the harm caused by slopping out should be effected by the ensuring that prisoners should never have to resort to using any unsuitable object in lieu of a toilet and those prisoners are afforded a degree of privacy when using such facilities.

In terms of improving health provisions the committee recommends that:

(k)The Government should prioritise the creation of more spaces at the Central Mental Hospital. This is to ensure mentally ill prisoners are not subjected to the unsuitable conditions of prison.

(l)In the interim prison staff dealing with mentally ill inmates should receive the appropriate training and every effort should be made to ensure that the observational cells are hygienic and fit for purpose.

(m)Doctors are made available to prisoners beyond the minimal hours they currently are and that any consultations are privy to patient-doctor confidentiality.

Trinity FLAC submits that proper fair procedures be adopted by all Irish prison authorities when dealing with an alleged breach of discipline. This is to be done by:

(n)Improving the complaints mechanisms against prison guards based on the best practise guidelines as per the 'One Size Fits All' recommendations^{xix}. Efforts should also be made to ensure everyone in the prison service be reminded of the importance of protecting prisoners rights and that strong mechanisms are put in place to ensure that fair complaints procedures are adhered to.

5. Conclusion: Trinity FLAC recognise that each of the aforementioned areas has a significant financial implication for public finances. However being intrinsically linked to basic human existence it is an imperative that these areas are dealt with efficiently and urgently.

6. References

- ⁱ *'One Size Does not Fit All': A Legal Analysis of the Direct Provision and Dispersal System in Ireland*, (FLAC 2009)
- ⁱⁱ Claire Breen, "The Policy of Direct Provision in Ireland: A Violation of Asylum Seekers' Right to an Adequate Standard of Housing", 2008 20(4) *International Journal of Refugee Law*, 611
- ⁱⁱⁱ Sunniva Mc Donagh, "Assessing the Refugee Appeals Tribunal: The Case for the Publication of Decisions" 2005 710(2) *Bar Review* 43
- ^{iv} See the judgment of Finlay J in *Meadows v Minister of Justice* [2010] IESC
- ^v Fergal Davis, *The History and Development of the Special Criminal Court-1921-2005* (Dublin: Four Courts Press, 2007)
- ^{vi} Report of the Committee to Review the Offences Against the State Acts 1930-1998 (the Hederman Report)
http://www.inis.gov.ie/en/JELR/Pages/Review_of_the_Offences_against_the_State_Acts
- ^{vii} Mary T.W. Robinson, *The Special Criminal Court* (Dublin University Press, 1974)
- ^{viii} See for example *Mulligan v Governor of Portlaoise Prison* [2010] IEHC 269
- ^{ix} Judge Micheal Reilly, *Report on an Inspection of Mountjoy Prisons*, (Office of the Inspectors of Prisons, August 2009) Also see the Fifth report on Ireland from the Council of Europe Committee for the Prevention of Torture and Degrading Treatment (Thursday, 10th February 2011).
- ^x See <http://www.iprt.ie/prison-facts-2> for a summary of facts. Also see the 'IPRT Briefing on Sanitation and Sopping Out in the Irish Prison System' as available on <http://www.irpt.ie>
- ^{xi} Inspector of Prisons, *The Irish Prison Population: An Examination of the Duties and Obligations owed to Prisoners*, (July 2010). This report outlines the lack of sanitary facilities in a number of facilities also.
- ^{xii} Op.;cit, CPT report at point vi
- ^{xiii} Report of an Investigation on the use of 'Special Cells' in Irish Cells, (Inspector of Prisons 2010)
- ^{xiv} Evening Herald: A Prison Service on the Edge, (26th August 2010) <http://www.iprt.ie/contents/1792> highlights in particular the deaths of Gary Douche and Derek Glennon as a result of the unsafe condition of Mountjoy Prison.
- ^{xv} The Irish Human Rights Commission has published its submission to this Working Group outlining research to this effect.
- ^{xvi} Report of the Inspector of Prisons Covering the Period 15th March 2009-10th September 2010. Available at <http://www.justice.ie/en/JELR/Inspector%20of%20Prisons%20Annual%20Report%20March%202009%20-%20September%202010.pdf/Files/Inspector%20of%20Prisons%20Annual%20Report%20March%202009%20-%20September%202010.pdf>
- ^{xvii} Prisoner Complaints: CPT criticism and IPS response (14 February 2011) <http://www.iprt.ie/contents/1966>.
- ^{xviii} Op.;cit 'Prisoner Complaints'
- ^{xix} "One Size Fits All" op;cit, at 1.10.2 page 41.