IRELAND

SUBMISSION TO THE UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

55 SESSION, 01 – 19 JUNE 2015

AMNESTY INTERNATIONAL

Amnesty International Publications

First published in 2015 by
Amnesty International Publications
International Secretariat
Peter Benenson House
1 Easton Street
London WC1X 0DW
United Kingdom
www.amnesty.org

Index: EUR 29/1629/2015
Original Language: English
Printed by Amnesty International, International Secretariat, United Kingdom

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INTRODUCTION

Amnesty International submits this briefing in advance of the examination of Ireland at the Committee on Economic, Social and Cultural Rights' Pre-sessional Working Group, during its 55th session in June 2015.[1] This briefing draws significantly on the pre-sessional briefing to the Committee,[2] which members will already have seen; as a result, this briefing highlights significant updates of interest to the Committee **in bold**.

The submission includes information regarding:

- The criminalization of abortion in all cases except where there is a "real and substantial" risk to the life of the pregnant woman or girl; the lack of clarity around how and when women or girls may access legal and safe abortion in risk to life cases; the lack of access to abortion in any other circumstances including in cases when there is a risk to health of the pregnant woman or girl, in cases of rape, sexual assault, incest and in cases of severe or fatal foetal impairment; the overly broad legal definition of conscientious objection; and the law restricting referrals for women seeking abortions abroad and information on abortion services.

- The two separate definitions of human rights in sections 2 and 29 of the 2014 Act establishing the Irish Human Rights and Equality Commission, with an overly broad application of the narrower definition to some of the Commission's functions.

- The delays caused by the multiple consecutive legal routes that are often required before individuals' asylum or other protection needs are determined, leading to many remaining for years in "direction provision" accommodation that was not designed, and is unsuitable for long stay residence, especially for families, children and victims of torture.

- The opportunity for Ireland to respond favorably to the government-established Constitutional Convention's recommendation that Ireland's Constitution be amended to give greater protection to economic, social and cultural rights.

A. HARMFUL IMPACT OF RESTRICTIVE LEGAL FRAMEWORK ON ABORTION

Ireland's extremely restrictive abortion legislation violates Articles 2, 3 and 12 of the International Covenant on Economic, Social, and Cultural Rights. Ireland's overall legal framework on abortion has been repeatedly criticized by human rights treaty monitoring bodies, including most recently by the UN Human Rights Committee,[3] and is the subject of European Court of Human Rights jurisprudence.[4] The Government has cited Article 40.3.3 of the Constitution, which enshrines the "right to life of the unborn", as a primary reason for its restrictive legislation. However, Ireland's constitutional protection of prenatal life cannot justify its non-compliance with the right to enjoyment of the highest attainable standard of physical and mental health and the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the Covenant.[5]

The Protection of Life during Pregnancy Act (PLDPA) was enacted in 2013 to respond to the European Court of Human Rights decision in *A, B and C v Ireland* with the stated goal of ensuring that women and girls have a meaningful pathway to abortion within Ireland where there

is a risk to life. The PLDPA only permits legal abortion where there is a risk to the life of the woman or girl, including the risk of suicide.[6] It does not permit abortion on any other ground, including in cases when a woman or girl's health is at risk, in cases of rape, incest and in cases of severe or fatal foetal impairment. The PLDPA states that the risk to life, as distinct from health, of the pregnant woman or girl must be "real and substantial".

Update: In June 2015, Amnesty International will be publishing a report on the impact of Ireland's abortion legislation on women and girls living in Ireland, and its effect on healthcare providers.[7] We intend to provide the Committee with a copy of this research, under embargo, in advance of the examination of Ireland.

CRIMINALIZATION

While sections 58 and 59 of the Offences against the Person Act 1861 have been repealed, the PLDPA re-criminalizes abortion in all other cases, with a potential penalty of 14 years imprisonment for the intentional "destruction of an unborn human life". In doing so, it reinforces the "chilling" effect of criminalization of abortion on access to lawful services, as identified by the European Court of Human Rights in *A, B and C v Ireland*.[8] The Committee has repeatedly raised concerns about the criminalization of abortion.[9] Criminalizing a procedure that is only required by women disproportionately impacts women, preventing their full enjoyment of protections offered under Article 3 of the Covenant.[10] The Special Rapporteur on the Right to Health has stated that the "[c]reation or maintenance of criminal laws with respect to abortion may amount to violations of obligations of States to respect, protect and fulfil the right to health."[11]

RAPE, SEXUAL ASSAULT, INCEST AND SEVERE AND FATAL FOETAL IMPAIRMENT

UN treaty monitoring bodies agree that abortion should be legal in cases where the pregnant woman or girl's health is in danger, where pregnancy is a result of rape, sexual assault or incest,[12] and where there are indications of severe and fatal foetal impairment.[13] However, in direct contravention of these human rights standards, the PLDPA does not allow for abortion in any of these circumstances.

Women and girls seeking an abortion in these and other circumstances have three options: seek a clandestine and hence, unsafe abortion in Ireland; continue with the pregnancy against their will; or, travel to another jurisdiction to obtain an abortion.

RISK TO HEALTH V LIFE

Even in the few cases where abortion is theoretically available within Ireland, the narrow construction of the life exception does not create meaningful access to abortion for women or girls whose lives are at risk. A guidance document published by the Government on 19 September 2014 to assist health professionals in the implementation of the PLDPA reflects and exacerbates the PLDPA's shortcomings and provides little practical assistance to medical professionals in grappling with the Act's most pressing issue: how exactly they are to assess when a pregnancy poses a "real and substantial" risk to the life of a woman or girl.[14]

The PLDPA draws a false distinction between risk to life and risk to health of the pregnant woman or girl. The emphasis on a "real and substantial" risk to life coupled with strong criminal penalties and a constitutional protection of prenatal life force medical professionals to separate patients with physical illnesses into those who are "close enough" to death to receive an abortion, and those whose health must deteriorate further before they can be treated. It is not possible in medical science to definitively distinguish between a risk to health and risk to life. The health risks arising from a relatively minor infection, for example, can quickly become life-threatening, depending on the overall health of the patient, contextual issues such as access to medicine and trained care, and many other factors. The PLDPA also fails to weigh longer-term risks to life, such as deteriorating health leading to early demise, which might be associated with

carrying a pregnancy to term despite serious health complications such as heart and vascular diseases, pulmonary diseases, kidney diseases, and oncological, neurological, gynaecological, obstetric and genetic conditions. Pregnancy may also exacerbate existing conditions such as epilepsy, diabetes, cardiac disease, auto-immune conditions and severe mental illness.[15]

Strict procedural barriers also inhibit lawful access to abortion. Under the PLDPA, a doctor is permitted to make a determination of need without consulting another doctor only "when he or she believes in good faith that there is an *immediate risk of loss of the woman's life from a physical illness*."[16] For a "real and substantial" risk without a perceived immediate loss of life, two medical practitioners must agree that an abortion is necessary.

The requirements for accessing an abortion in cases of a risk of suicide are even more burdensome, requiring unanimous approval from a three-person panel comprised of two psychiatrists and an obstetrician.

The PLDPA test also requires medical practitioners to "have, in good faith, had regard to the need to preserve unborn human life where practicable." Even when a woman qualifies for a legal abortion, her treatment may be subject to further scrutiny and assessment. While the PLDPA makes no reference to gestational age or viability, the Guidance Document states that treating clinicians will need to factor in the viability of the pregnancy in determining what care would be most appropriate, including the possibility of prolonging a pregnancy until early delivery is possible.[17] Forcing a woman or girl to continue with a pregnant until the foetus reaches viability can have serious implications for her life and physical and mental health.

Case of Ms. Y: This approach appears to have been recently employed in the case of 'Ms. Y', a young asylum-seeking survivor of rape who requested an abortion because she was suicidal, but instead was coerced into continuing the pregnancy until viability and then given a Caesarean section. The handling of Ms. Y's care is currently the subject of two separate inquiries by the Health Service Executive, and separately is subject to legal action initiated by her lawyer against various institutions. [Further detail on Ms. Y's case will be provided in the embargoed report that Amnesty International will publish in June 2015].

Case of PP: The influence of the 8th Amendment to the Constitution which grants the right to life of the 'unborn' on a equal footing with a pregnant woman's right to life, found a particularly tragic manifestation in December 2014, when healthcare providers invoked it to keep a clinically-dead pregnant woman on life support, against her family's wishes. Unsure of what was required of them under the 8th Amendment, and "in the absence of medico-legal guidelines," the medical staff at the hospital told the woman's father "that, for legal reasons, they felt constrained to put his daughter on life support because her unborn child still had a heart beat."[18] Their stated intent was to continue this treatment until the 15-week foetus had reached the point of viability.[19] The woman's father, partner and aunt all urged that she should be taken off life support.[20] Her father found the situation "very stressful" and "wanted her to have a dignified death and be put to rest." Ultimately, her father was forced to bring a case before the High Court and argue that these "measures are unreasonable and should be discontinued."[21]

Expert doctors who testified during the court hearings stated that "continuing the somatic support [to keep her body functioning] was not appropriate and amounted to 'experimental medicine'"[22] and that, given the woman's physical state, "continuance of the treatment would 'be going from the extraordinary to the grotesque.'"[23]

The court ultimately ordered the withdrawal of life support, on the grounds that the foetus had no chance of survival and therefore the maintenance of life support was "a futile exercise,"

which "would deprive [the pregnant woman] of dignity in death and subject her father, her partner and her young children to unimaginable distress."[24]

TRAVEL

Under the Constitution, women living in Ireland have the freedom to travel to another jurisdiction to access abortion services.[25] However, Ireland cannot rely on the fact that some women seek and get access to required care outside Ireland to declare its human rights obligations discharged. The failure of the State to ensure access to safe and legal abortion in Ireland has a disproportionate impact on poorer women and other women unable to travel outside Ireland. Travelling to access abortion services has both a financial and a mental health impact.

The estimated average cost of travelling to Great Britain for first trimester abortion services is €1,000-€1,500 on average, including clinic fees, flights and accommodation.[26] Later gestational abortions are more costly placing greater burdens on women with non-viable foetuses, as testing for these conditions is usually carried out at the 20th week of pregnancy.
In addition, Many of the women that Amnesty International interviewed mentioned the criminalization of abortion stigmatized them and made them feel like criminals for considering abortion, having to travel to another country to access services, and obtaining post-abortion care in Ireland.

Travel is not possible for many women and girls due to the high cost and legal or social limits on travelling. This is particularly true for girls, women from socio-economically marginalized groups such as Travellers, or undocumented migrants and asylum seekers.

Update: As a general rule, asylum-seekers cannot leave Ireland until their refugee or immigration status is determined; this may take years to resolve. However, the state *may* make an exception for a woman to travel abroad for an abortion, assuming she can complete the complicated paperwork, pay the associated costs and has the time to wait. Even then, issuing the necessary travel documentation remains at the government's discretion.

In order to travel, an asylum-seeker typically needs a temporary travel document and two visas: one for the country she is going to and one for Ireland, for when she returns. This process can take more than two months and can cost between €200-€240.[27]

The two closest and most common destinations for abortion, the UK and the Netherlands, require "at least 12 pieces of documentation" before a visa can be issued.[28] The paperwork required for these entry and re-entry visa applications includes confirmation of an appointment with an abortion clinic abroad and of attendance at a pregnancy counselling service in Ireland.[29]

Additionally, language barriers the strong stigma surrounding abortion, the small and close-knit nature of many refugee or migrant communities, and the lack of privacy and confidentiality for women living in accommodation centres for asylum-seekers, may also prevent girls and women from travelling to access abortion services.

THE REGULATION OF INFORMATION ACT 1995

UPDATE: Under the Regulation of Information Act, pregnancy counsellors, pregnancy-related advice centres and agencies, and doctors are criminally prohibited from giving a pregnant woman any information that may "advocate or promote" abortion.[30] The Act does not define what constitutes "advocacy or promotion of" abortion, leading to confusion among doctors and

counsellors as to what information they can provide and in what form. However, under the Act, they are permitted to advocate *against* abortion.

In addition, any information given to a woman on abortion services abroad—such as the contact information for a clinic abroad that provides abortions—may only be provided where a woman first requests it and must be accompanied by information on "all the courses of action that are open to her."[31] This would require discussions of adoption and parenting, even in situations where this may be inappropriate, such as fatal foetal impairments.[32]

If a woman chooses to travel for an abortion, healthcare providers and counsellors are prohibited from making "an appointment or any other arrangement" on her behalf with an abortion provider abroad.[33] This means, among other things, that they cannot make a referral, which can have serious implications for women's health.[34] Under the Regulation of Information Act, doctors and counsellors are only permitted to give a woman the names and addresses of abortion services abroad and to provide her with her medical records.[35]

If a healthcare provider or counsellor violates any of the Act's provisions, they face a criminal conviction and a fine of up to €4,000.[36] A judge may issue a warrant to police authorizing the search of counselling or healthcare premises if violations of the Act are suspected.[37]

These legal restrictions undermine women or girls' access to reproductive health care and time-sensitive services, with potentially grave consequences for their lives and health, and do not comply with the recommendations in General Comment 14 of the UN Committee on Economic, Social and Cultural Rights (CESCR), which recognises that "[t]he realization of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health."[38] The impact of Ireland's restrictions on referrals fall most heavily on women or girls who face literacy, language or other barriers to accessing abortion information and services, and for whom a provider's assistance in making arrangements for abortion may be critical to ensuring their health and well-being.

CONSCIENTIOUS OBJECTION

The PLDPA permits doctors, nurses and midwives to decline to provide services based on conscientious objection;[39] however, the PLDPA does not provide for any oversight mechanism to regulate this practice and ensure that it does not inhibit access to lawful services, as required under human rights laws and standards.[40] The overly broad provision allows for conscientious objection to be invoked not only by healthcare professionals who carry out a termination but also those who assist with carrying one out. The PLDPA does not clearly define "assistance," nor does it ensure the availability and accessibility of healthcare professionals who are willing and able to provide such services. Additionally, the PLDPA also does not explicitly debar medical practitioners who object to abortion in principle from serving on the review panel.[41]

This Committee has also expressed concern at the refusal of physician and clinics to perform legal abortions on the basis of conscientious objection. It has recommended, for example, that States 'take all effective measures to ensure that women enjoy their right to sexual and reproductive health, including by enforcing the legislation on abortion and implementing a mechanism of timely and systemic referral in the event of conscientious objection.'[42] The UN Committee on the Elimination of Discrimination against Women has specifically recognized that conscientious objection is a barrier to accessing reproductive health services, especially lawful abortion and have generally stated that governments have an obligation to ensure that the application of legislation that provides for conscientious objection does not violate women or

girls' right to access quality, affordable and acceptable sexual and reproductive health care services, including abortion.[43]

In monitoring Poland's compliance with the ICCPR, the Human Rights Committee raised concerns "that, in practice, many women are denied access to reproductive health services, including … lawful interruption of pregnancy" and recommended that Poland "introduce regulations to prohibit the improper use and performance of the 'conscience clause' by the medical profession."[44] The growing recognition of the problem is evidenced by the Committee against Torture's 2013 concluding observations on Poland in which it noted that:

"In accordance with the 2012 World Health Organization technical and policy guidance on safe abortion, the State party should ensure that the exercise of conscientious objection does not prevent individuals from accessing services to which they are legally entitled. The State party should also implement a legal and/or policy framework that enables women to access abortion where the medical procedure is permitted under the law."[45]

RECOMMENDATIONS

Amnesty International calls on the Irish authorities:

- To amend or repeal Article 40.3.3 (the 8th Amendment) of Bunreacht na hÉireann, the Irish Constitution, so as to remove protection of the right to life of the foetus, and enable the provision of a human rights compliant framework for abortion and information, in law and in practice;

- To decriminalize abortion;

- To repeal the PLDPA and replacing it with a legislative framework that ensures access to abortion both in law and in practice, at a minimum, in cases where the pregnancy poses a risk to the life or to the physical or mental health of a pregnant woman or girl, in cases of severe or fatal foetal impairment, and in cases where the pregnancy is the result of rape or incest; and

- To repeal the 1995 Regulation of Information Act.

- To make clear in legislation and policy that those who object to providing abortion services have a duty to make a timely referral to another healthcare provider who will offer the services and to always provide care, regardless of their personal beliefs or objections, in emergency circumstances or where a referral or continuity of care is not possible.

B. ASYLUM SEEKERS (ART. 2)

In its General Comment No. 20, the Committee has noted: "The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation."[46] Many of those seeking asylum or subsidiary protection face long delays before their claims are fully considered. This is of particular concern as asylum seekers do not have access to full range of their economic, social and cultural rights while in "direct provision".

Despite proposals to do so in the Immigration, Residence and Protection Bill 2010, Ireland continues to lack a single procedure to assess the entitlement to international protection through either refugee or subsidiary protection status concurrently, as is the practice in all other EU member states.

Update: In March 2015, the General Scheme of the International Protection Bill was published with the objective of introducing a single procedure,[47] but a formal bill on the issue has not yet been introduced.

Under the current asylum determination system, decision-makers at first exclusively assess whether a claimant is a refugee at risk of individual persecution, while the wider risk of refoulement, such as generalized or indiscriminate violence, is only considered through a separate procedure of subsidiary protection.[48] In May 2014 the Court of Justice of the European Union (CJEU) decided that a person applying for international protection in Ireland must be able to submit an application for refugee status and subsidiary protection at the same time and that there should be no unreasonable delay in processing a subsidiary protection application.[49] In addition, there are large numbers of High Court challenges to Refugee Appeals Tribunal decisions, with significant backlogs and delays for applicants to have their protection needs assessed by the Court.

While awaiting a decision on their protection claims, asylum-seekers are accommodated in hostels where they receive food and other basic necessities. Responsibility for accommodation, called "direct provision", lies with the Reception and Integration Agency (RIA), which contracts private companies to provide these services. The delays in the processing of claims for international protection cause many asylum-seekers to be in "direct provision" for lengthy periods of time. In 2013, of the 4,434 asylum-seekers accommodated in this system, 59 per cent were there for more than three years,[50] 31 per cent for over five years and 9 per cent for over seven years.[51]

Amnesty International is concerned at reports of overcrowding and lack of privacy in many centres, with families often living in one room or single-parent families required to share a room with another family and inadequate facilities for children such as homework or play areas.[52] The effect of living in these centres for long periods time on people who have experienced torture has also been criticised as making it impossible for their full rehabilitation to take place.[53] On 14 August 2013, the High Court of Northern Ireland handed down a judgement quashing a decision of the UK immigration authorities to return a Sudanese family to Ireland under the EU Dublin II Regulation, finding that it would not be in the best interests of the children to be returned to the direct provision accommodation system.[54] The judgment raised concerns not only about the impact of direct provision on children's physical and mental health, but also about serious delays in the legal process.

Update: In October 2014, the Government established a working group comprising nongovernmental organisations, academics and representatives from Government Departments and bodies to recommend improvements to the direct provision system and other supports for asylum seekers.[55] The working group's report has not yet been published.

RECOMMENDATIONS

Amnesty International calls on the Irish authorities:

- To establish without further delay a single protection procedure for the prompt, fair and effective determination of claims for international protection to prevent undue delays in the granting of subsidiary protection;

- To ensure that residents in the "direct provision" system have an adequate standard of living for themselves and their families and ensure their right to private and family life; and that the accommodation, living environment and support services are acceptable and appropriate to the

needs of all individuals, including children, families, survivors of torture and other vulnerable persons.

C. MANDATE OF THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION (ART. 2)[56]

In its General Comment No. 10, the Committee noted that one of the means through which states can achieve progressively the full realization of the Covenant rights, as required under Article 2(1), is "the work of national institutions for the promotion and protection of human rights".[57] Here the Committee "calls upon States parties to ensure that the mandates accorded to all national human rights institutions include appropriate attention to economic, social and cultural rights".[58]

In July 2014, the Irish Human Rights and Equality Commission Act (the IHREC Act) was enacted as the legislative basis for the merge of the Irish Human Rights Commission and Ireland's equality body, the Equality Authority, into a new national human tights institution (NHRI), the Irish Human Rights and Equality Commission (IHREC).

Amnesty International notes certain improvements in the IHREC Act as compared with the initial proposals made in the 2012 Heads of the Bill.[59] For instance, Amnesty International welcomes the application of the wider definition of "human rights" to the IHREC's amicus curiae function provided for in section 10(2)(e), as opposed to its coming under the narrower definition as had been proposed under Head 30 of the 2012 Heads of Bill. This means that in when offering its expertise in human rights law to the High Court or the Supreme Court in appropriate cases involving human rights, the IHREC may reference the full spectrum of human rights including economic, social and cultural rights rather than just such rights as have force of law in the state (see below). However, the organization believes that there remain certain aspects of the Bill that should be improved in order to ensure that IHREC can operate as an effective and independent NHRI.

MANDATE OF THE IHREC – HUMAN RIGHTS STANDARDS OVER WHICH IT HAS COMPETENCE

Amnesty International is concerned at the restricted definition of human rights which is applied in the Act to some of the functions of the IHREC. Article 2 of the 1991 UN Paris Principles , which set out the minimum standards required by NHRIs to operate effectively, states: "A national institution shall be given as broad a mandate as possible."[60] The Sub-Committee on Accreditation (SCA) of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), has held that "[a] National Institution's mandate should be interpreted in a broad, liberal and purposive manner to promote a progressive definition of human rights which includes all rights set out in international, regional and domestic instruments".[61]

Amnesty International is therefore concerned that the two definitions of human rights proposed in the 2012 Heads of the Bill remain within the IHREC Act. Section 2 of the Act, which applies to the general protection and promotional functions of the IHREC, provides a broad definition of "human rights"[62] in line with Article 2 of the Paris Principles. However the definition of "human rights" in section 29, which applies to Part 3 of the IHREC Act (described as the IHREC's enforcement functions and powers), is limited to "rights, liberties and freedoms" that have "been given the force of law in the State".[63] Therefore the majority of economic, social and cultural rights as set out in the Covenant, not having force of domestic law, would not come within the ambit of this definition.

This would preclude the IHREC from applying the full range of Covenant rights when exercising many of the functions under its mandate. Limiting the IHREC's enforcement powers to human rights standards that are incorporated into national legislation or otherwise have force of law in the state, does not allow the IHREC to fully meet the standard set by the SCA in relation to the mandate of NHRIs. Several of the functions in Part 3 of the Act are not in fact related to enforcement, so the restricted definition would apply outside of the IHREC's role in, for instance, bringing legal proceedings against public bodies. Furthermore, this restricted definition also applies to Section 42 of the IHREC Act, which sets out a public sector equality and human rights duty.[64] AI is therefore concerned at the wide application of this restricted definition of human rights to the IHREC's functions as provided in the Act, and does not see that a substantive case has been made for limiting the mandate the IHREC might have with respect to economic, social and cultural rights.

INQUIRIES BY THE IHREC

In July 2012, the UN Human Rights Council reaffirmed the importance of the investigative role that NHRIs can play, and the need for States to enhance this role.[65] Despite this guidance, the IHREC Act may not enhance the investigative role of the IHREC. Indeed, due to the limitation on its jurisdiction that comes from the restrictive definition of human rights referred to above, it may in fact narrow this investigative role.

First, Section 35 of the IHREC Act operates under the restricted definition of human rights, thus potentially precluding the IHREC from examining an issue in the course of an inquiry by reference to the full panoply of the State's international human rights obligations. Secondly, Section 35 of the Act sets out a very high threshold for triggering the IHREC's inquiry function. According to the Act, there must be evidence of either a serious violation of human rights (in the narrower section 29 sense) or equality of treatment obligations or a systemic failure to comply with human rights (in the narrower section 29 sense) or equality of treatment obligations, and the matter must be of grave public concern, before the IHREC may decide to conduct an inquiry.

INDEPENDENCE – LEGAL FRAMEWORK AND FINANCIAL MEANS

The UN General Assembly has repeatedly stressed "the importance of the financial and administrative independence and stability of national human rights institutions".[66] The General Assembly has also encouraged member States "to endow ombudsman, mediator and other national human rights institutions, where they exist, with an adequate legislative framework and financial means in order to ensure the efficient and independent exercise of their mandate".[67]

The SCA of the ICC has also stated that NHRIs "must be provided with an appropriate level of funding in order to guarantee its independence and its ability to freely determine its priorities and activities".[68] The Belgrade Principles on the relationship between NHRIs and parliaments, state: [p]arliaments should develop a legal framework for the NHRI which secures its independence and its direct accountability to parliament, in compliance with the [Paris Principles], and taking into account the General Observations of the [ICC] and best practices".[69]

The Act does contain some provisions that will ensure the accountability of the IHREC to parliament.[70] Nevertheless, this independence is put at risk by Section 26 of the Act, which sets out that the IHREC's funding is to be determined by the Minister for Justice and Equality in consultation with the IHREC.[71] Such close links to a government department in respect of its finances not only potentially jeopardises the independence of the IHREC, but would leave the IHREC vulnerable to funding cuts that were experienced by the IHRC (and the Equality

Authority) since 2008.[72]

RECOMMENDATIONS

Amnesty International urges the Irish authorities to guarantee the effectiveness and independence of the new IHREC by:

- Amending the IHREC Act to provide one unified definition of human rights which incorporates all of Ireland's international and domestic human rights obligations to all sections in the Act except section 41 (on the institution of legal proceedings by the IHREC) and sections 36 to 39 (on compliance notices); and

- Guaranteeing the functional independence of the IHREC from any government department, through clearly setting out the financial and administrative accountability of the IHREC to the Oireachtas (parliament), and ensuring that it will be adequately resourced.

D. CONSTITUTIONAL PROVISION FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS

As has been noted by the Committee in its previous concluding observations, very limited provision is made for economic, social and cultural rights in Ireland's domestic law or its Constitution, Bunreacht na hÉireann.[73] Articles 40-44 of the Constitution deal mostly with fundamental civil and political rights and are enforceable before the courts. Article 42 dealing with education and social rights is a major exception in this regard.[74] Certain protections are also afforded to property rights. The right to form associations and unions is protected in Article 40.6.1 (iii) of the Constitution. While the language of this article resonates more closely with the right to freedom of association in Article 19 of the International Covenant on Civil and Political Rights (ICCPR), there is also some overlap with Article 8 of the ICESCR, which protects the right to form and join trade unions. In addition, Article 45 of the Constitution, "Directive Principles of Social Policy", contain principles for the guidance of the State but are not enforceable by the courts.

In February 2014, the Constitutional Convention - a panel of 33 members of parliament, 66 citizens and an independent Chair established by the Government in 2012 to independently review certain aspects of the Constitution - voted for strengthening the constitutional protection of economic, social and cultural rights and making these rights enforceable before the courts.[75] Having considered the items set by the Government for it to review, the Constitutional Convention was then permitted to choose one final constitutional issue for deliberation. The final agenda item it chose to consider at its final session in February 2014was constitutional incorporation of economic, social and cultural rights. In its report to the Government following that consideration, it recommended that a provision be inserted into the Constitution that the state "shall progressively realise ESC rights, subject to maximum available resources and that this duty is cognisable by the Courts".[76] It rejected the option of recommending an updating of Article 45 of the Constitution, and also rejected the option of recommending a more explicit, yet still unenforceable, economic, social and cultural rights provision be inserted into the Constitution. Eighty per cent of the Convention members supported the protection of all rights contained in the Covenant.

However, no action has been taken by the Government to take this recommendation forward to a referendum to amend the Constitution, nor has the Government given any commitment to do so. The report of the Convention was submitted to the Government in March 2014. According to the

terms of reference of the Convention, the Government had four months to respond to its recommendations; however this response has been delayed. The Government may accept or reject the recommendation, or may decide that the matter requires further examination e.g. by a working group or taskforce set up to address the matter.

Finally it should be noted that Ireland has signed but not yet ratified the Optional Protocol to ICESCR. The Government has repeatedly stated that that ratification will be preceded by a screening of the obligations to be assumed, which will require extensive consultation with all government departments involved. Three years on from signing, the Government has given no indication of when this process towards ratification will begin.

RECOMMENDATIONS

Amnesty International urges the Irish authorities to:

- Accept the recommendation of the Constitutional Convention to strengthen the protection of economic, social and cultural rights in Bunreacht na hÉireann, the Constitution.

- Should it decide that the issue of constitutional economic, social and cultural rights requires further examination, ensure that such a process is robust, transparent and subject to clear timelines.

- Ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and opt in to its inquiry and inter-state procedures.

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[1] See also Amnesty International submission to the UN Human Rights Committee, AI Index: EUR 29/001/2014, 1 June, 2014: http://www.amnesty.org/en/library/info/EUR29/001/2014/en

[2] Ireland: Submission to the UN Committee on Economic, Social and Cultural Rights: Pre-sessional working group, 1-5 December 2014, AI Index: EUR 29/003/2014, October 2014, https://www.amnesty.org/en/documents/eur29/003/2014/en/

[3] See UN Human Rights Committee, Concluding observations on the fourth periodic report of Ireland, CCPR/C/IRL/CO/4, 19 August 2014, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fIRL%2fCO%2f4&Lang=en and, for example, Amnesty International, *Ireland must amend abortion laws after sharp UN criticism*, (24 July 2014) summarizing strong criticism from the Human Rights Committee review of Ireland's state compliance with the International Covenant on Civil and Political Rights.

[4] *A, B and C v Ireland* [2010] ECHR 2032, Application no. 25579/05. See also Amnesty International's submission to the Council of Europe Committee of Ministers: *A. B. and C. V. Ireland*, Application No 25579/05, 7 November 2014, AI Index: EUR 29/004/2014, https://www.amnesty.org/en/documents/eur29/004/2014/en/.

[5] In its General Comment No. 9: The domestic application of the Covenant, the Committee on Economic,

Social and Cultural Rights observed: "Questions relating to the domestic application of the Covenant must be considered in the light of two principles of international law. The first, as reflected in article 27 of the Vienna Convention on the Law of Treaties of 1969, is that '[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. In other words, States should modify the domestic legal order as necessary in order to give effect to their treaty obligations." (U.N. Doc E/C.12/1998/24, 3 December 1998, para 3.) See for example, Amnesty International, *Ireland must amend abortion laws after sharp UN criticism*, (24 July 2014) summarizing strong criticism from the Human Rights Committee review of Ireland's state compliance with the International Covenant on Civil and Political Rights.

[6] Abortion where there is a risk of suicide was found to be a constitutional right in the 1992 Supreme Court decision *Attorney General v X and Others* [1992] 1 I.R. 1 (S.C.) (Ir.) [1992 No. 8469].

[7] For this research Amnesty International has conducted a total of 60 interviews, including with 26 women[7] and six of their partners, as well as the mother of a teenage girl, about their first-hand experience of Ireland's restrictive abortion regime. In addition, Amnesty interviewed 11 members of the health care profession, including doctors and health care counsellors, as well as three sexual and reproductive healthcare organizations, 13 civil society organizations and two statutory entities, the Crisis Pregnancy Programme and the Irish Medical Council. Although Amnesty repeatedly requested interviews with the Department of Health and the Department of Justice and Equality, they declined to be interviewed for this report.

[8] *A, B and C v Ireland* [2010] ECHR 2032, Application no. 25579/05, para 254.

[9] Committee on Economic, Social and Cultural Rights, Concluding Observations: Nepal, para 55, U.N. Doc. E/C.12/1/Add.66 (2001); Chile, para 53, U.N. Doc. E/C.12/1/Add.105 (2004); Kuwait, para 43, U.N. Doc. E/C.12/1/Add.98 (2005); Malta, para 41, U.N. Doc. E/C.12/1/Add.101 (2004); Costa Rica, paras 25 and 46, U.N. Doc. E/C/12/CRI/CO/4 (2008); El Salvador, para 25 and 44, E/C/12/SLV/CO/2 (2007); El Salvador, para. 22, UN Doc. E/C.12/SLV/CO/3-5 (2014).

[10] In its General Comment 16, the UN Committee on Economic, Social and Cultural Rights (CESCR) indicates that ensuring equal enjoyment of article 12 "requires at a minimum the removal of legal and other obstacles that prevent men and women from accessing and benefiting from health care on a basis of equality. This includes, inter alia,…the removal of legal restrictions on reproductive health provisions."(CESCR, General Comment 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3) (34th Sess., 2005), 29, U.N.Doc. E/C.12/2005/4 (2005). In its General Recommendation 24, the UN Committee on the Elimination of Discrimination against Women (CEDAW) called on states to "refrain from obstructing action taken by women in pursuit of their health goals". (CEDAW, General Recommendation No. 24 (20th session, 1999) (article 12: Women and health)", contained in document A/54/38/Rev.1, chapter I.1999, para. 14.) The Committee explains that barriers that obstruct women's access to appropriate health care "include laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures". (CEDAW General Recommendation No. 24, para. 14). Abortion is a procedure only required by women. The Committee recommends that "when possible, legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion". (CEDAW General Recommendation No. 24, para. 14. This same Committee has consistently urged the State to decriminalize abortion in cases of rape, incest or threats to the health or life of the pregnant woman and to gather statistical data on illegal and unsafe abortion.

[11] UNGA 'Report of the Special Rapporteur of the Human Rights Council on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, in accordance with the Human Rights Council resolutions 15/22 and 6/29", A/66/150 (2011) at para 21.

[12] Committee on the Rights of the Child, *Concluding Observations: Argentina*, para. 59, U.N. Doc. CRC/C/ARG/CO/3-4 (2010) ("The Committee recommends that the State party… Take urgent measures to reduce maternal deaths related to abortions, in particular ensuring that the provision on non-punishable abortion, especially for girls and women victims of rape, is known and enforced by the medical profession without intervention by the courts and at their own request."); Committee on Economic, Social and Cultural Rights, *Concluding Observations: Peru*, para. 21, U.N. Doc. E/C.12/PER/CO/2-4 (2012) ("The Committee... recommends that the criminal code be amended so that consensual sexual relations between adolescents are no longer considered as a criminal offence and that abortion in case of pregnancy as a result of rape is not penalized."); Committee on Economic, Social and Cultural Rights, *Concluding Observations: Kenya*, para. 33, U.N. Doc. E/C.12/KEN/CO/1 (2008) ("The Committee recommends that the State party ensure affordable access for everyone, including adolescents, to comprehensive family planning services, contraceptives and safe abortion services, especially in rural and deprived urban areas, by ... decriminalizing abortion in certain situations, including rape and incest."); Human Rights Committee, *Concluding Observations: Guatemala*, para. 20, U.N. Doc. CCPR/C/GTM/CO/3 (2012) ("The State party should, pursuant to article 3 of its Constitution, include additional exceptions to the prohibition of abortion so as to save

women from having to resort to clandestine abortion services that endanger their lives or health in cases such as pregnancy resulting from rape or incest."); CEDAW, *LC v. Peru*, 2005, para. 9(b)(iii); Human Rights Committee, Concluding Observations to Guatemala, para. 20.

[13] UN Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Seventh and Eighth Periodic Reports of Peru,* U.N. Doc. CEDAW/C/PER/CO/7-8 (24 July 2014), para. 36(a); UN Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Fifth and Sixth Periodic Reports of Chile,* U.N. Doc. CEDAW/C/CHL/CO/5-6 (12 November 2012), para. 34.

The Human Rights Committee has recognised in the case of *KL v Peru* (U.N. Doc CCPR/C/85/D/1153/2003 (2005)) that the denial of therapeutic abortion to a minor when a scan had demonstrated that she was carrying an anencephalic foetus violated her right to be free from cruel, inhuman and degrading treatment, her right to privacy and the special protections for minors. The Committee's decision recognised the fact that carrying an impaired foetus caused KL immense mental distress that was foreseeable and preventable, and articulated an important interlink between foetal impairment, women's mental and physical health and rights to privacy and to be free from inhuman and degrading treatment.

State actors in Ireland have voiced inconsistent opinions about whether the existing constitutional protection of foetal life actually permits terminating pregnancies in cases of fatal foetal impairment such circumstances. See fn 11 to our pre-sessional briefing for a fuller exposition of theses opinions.

[14] Department of Health, Implementation of the Protection of Life during Pregancy Act: Guidance Document for Health Professionals, 2014.

[15] Irish Family Planning Association (IFPA), Submission to the Seanad Consultation Committee's consideration of Ireland's international human rights obligations in relation to Ireland's upcoming Fourth Periodic Examination under the International Covenant on Civil and Political Rights (ICCPR), available at: http://www.oireachtas.ie/parliament/media/committees/seanadpublicconsultationcommittee/submissions/IFPA-submission-to-Seanad-Committee-re-ICCPR-March-2014.pdf

[16] PLDPA, para. 8A (italics added).

[17] The Guidance states: "The clinicians responsible for her care will need to use their clinical judgment as to the most appropriate procedure to be carried out, in cognisance of the constitutional protection afforded to the unborn, i.e. a medical or surgical termination or an early delivery by induction or Caesarean section. Following certification, if the pregnancy is approaching viability, it is recommended that a multi-disciplinary discussion takes place to ascertain the most appropriate clinical management of the case." Guidance Document, para. 6.4.

[18] *PP v. HSE* [2014] IEHC 622 (26 Dec. 2014). All descriptions and facts concerning this case are taken from this published court decision.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.* (Testimony of Dr. Frances Colreavy, taken from court's decision).

[23] *Id.* (Testimony of Dr. Peter McKenna, taken from court's decision).

[24] *Id.*

[25] Article 40.3.3˚, Bunreacht na hÉireann, para 2.

[26] IFPA, available at http://www.ifpa.ie/node/506. Date accessed: 24 September 2014.

[27] IFPA, IFPA *Annual Report 2013: access, choice and advocacy* (2014) 12, available at http://www.ifpa.ie/sites/default/files/documents/annual-reports/ifpa_annual_report_2013.pdf [hereinafter IFPA Annual Report 2013]; IFPA Sexual Health & Asylum Handbook at 23.

[28] IFPA Annual Report 2013 at 12; Niall Behan, *Opinion: Ireland's law on abortion is a shambles entirely of the State's creation*, 27 September 2014), http://www.thejournal.ie/readme/abortion-laws-ireland-ms-y-1689733-Sep2014/.

[29] IFPA Sexual Health & Asylum Handbook at 23; IFPA Annual Report 2013 at 12.

[30] Regulation of Information Act, sec. 5.

[31] *Id.*

[32] See Amnesty International interviews with health care providers in Ireland in the embargoed report; see also Submission by Doctors for Choice, Ireland to the Human Rights Committee for Ireland's review under the ICCPR, (12 June 2014).

[33] Regulation of Information Act, sec. 8(1).

[34] WHO, SAFE ABORTION at 67. The World Health Organization is clear that "well-functioning referral systems are essential for the provision of safe abortion care. Timely referrals to appropriate facilities reduce delays in seeking care, enhance safety, and can mitigate the severity of abortion complications."

[35] Regulation of Information Act, sec. 8.

[36] *Id.* at sec. 10; Fines Act 2010.
[37] Regulation of Information Act, sec. 9.
[38] CESCR, General Comment 14: The Right to the Highest Attainable Standard of Health (Art.12) (22nd Sess., 2000); U.N.Doc. E/C.12/2000/4 (2000)
[39] PLDPA, sec. 17.
[40] See *RR v. Poland*, No. 27617/04 ECHR (2011) para. 206; *P. and S. v. Poland*, No. 57375/08 ECHR (2008) para. 107. See Annex of this report for additional information on human rights standards.
[41] See *International Planned Parenthood Federation v Italy,* European Social Committee, Council of Europe (2014), finding Italy in violation of the right to non-discrimination, including on grounds of residence and income, for failure to regulate the practice of conscientious objection and ensure availability of doctors willing to provide abortion services within reasonable geographical distances.
[42] See, e.g. Committee on Economic, Social and Cultural Rights, Concluding Observations: Poland, para 28, U.N. Doc. E/C.12/POL/CO/5 (2009).
[43] See, e.g., Committee on the Elimination of Discrimination against Women, Concluding Observations: Slovakia, paras 42-43, U.N. Doc. A/63/38 (2008).
[44] Human Rights Committee, Concluding Observations to Poland (2010), para. 12.
[45] UN Committee Against Torture, Concluding Observations to Poland, CAT/C/POL/CO/5-6 (Dec. 2013).
[46] Para 30.
[47] http://www.justice.ie/en/JELR/Pages/PR15000082.
[48] In December 2013 responsibility for processing subsidiary protection applications was transferred from the Minister for Justice and Equality to the Office off the Refugee Applications Commissioner.
[49] CJEU, Case C-604/12, Judgment of 8 May 2014 (http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d577bcb07f4bb6473b8218e0132d94cdec.e34KaxiLc3qMb40Rch0SaxuNbN10?text=&docid=151965&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=148549). This followed a reference from Ireland's Supreme Court to the CJEU for a preliminary ruling in the case of H. N. v Minister for Justice, Equality and Law Reform and Others, during its hearing of an appeal against the Government's decision that H.N. was not entitled to make an application for subsidiary protection without first applying for refugee status.
[50] http://www.unhcr.ie/news/irish-story/irish-asylum-trends-in-2013, accessed 24 September 2014.
[51] *The Organization of Reception Facilities for Asylum Seekers in Ireland*, European Migration Network Ireland, February 2014, at http://emn.ie/files/p_20140207073735p_20140206023602The%20Organisation%20of%20Reception%20Facilities%20for%20Asylum%20Seekers%20pdf.pdf.
[52] Ibid. Also, in an article on the issue in *Studies Irish Review,* Summer 2013, vol.102, no.406, the then Ombudsman said of the direct provision system: "The system as it currently operates has a negative impact on mental health and the ability to lead a "normal" life. It is an unfair system which does not adequately address the needs of the vulnerable group of people for whom it is meant to provide. The "provision" is superficial and meets only the very basic requirements of a person ...." (http://www.studiesirishreview.ie/lead-articles/67-asylum-seekers-in-our-republic-why-have-we-gone-wrong)
[53] Greg Straton, Director of SPIRASI, the centre for the care of survivors of torture, in Irish Refugee Council media release, "The treatment of asylum seekers in Direct Provision undermines the integrity of the asylum system, says Irish Refugee Council", 10 December 2013. Available at http://www.irishrefugeecouncil.ie/news/the-treatment-of-asylum-seekers-in-direct-provision-undermines-the-integrity-of-the-asylum-system-says-irish-refugee-council/2295. Date accessed: 24 September 2014.
[54] *ALJ and A, B and C's Application for Judicial Review* [2013] NIQB 88. Available at http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2013/%5B2013%5D%20NIQB%2088/j_j_STE8712Final.htm. Date accessed: 24 September 2014. Summary judgement available at http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/SummaryJudgments/Documents/Court%20delivers%20judgment%20in%20asylum%20case%20relating%20to%20Sudanese%20family/j_j_Summary%20of%20Judgment%20-%20ALJ.htm. Date accessed: 24 September 2014.
[55] http://www.justice.ie/en/JELR/Pages/WP14000336.
[56] This section contains information on inquiries conducted by the IHREC and the independence of the institution, which are additional to information previously provided by Amnesty International to the Committee in the pre-sessional briefing.
[57] General Comment No. 10:: The role of national human rights institutions in the protection of economic, social and cultural rights, U.N. Doc E/C.12/1998/25, 10 December 1998, para 1.
[58] Para 4.

[59] Available at http://www.oireachtas.ie/documents/bills28/bills/2014/2014/b2014d.pdf
[60] Principles relating to the Status of National Institutions, adopted by General Assembly 48/134, 20 December 1993.
[61] SCA, ICC, General Observations of the Sub-Committee on Accreditation, adopted in May 2013, general observation 1.2.
[62] See the United Nations Principles relating to the Status of National Institutions 1 UN Commission on Human Rights Res 59 (1992) 3 March 1992, UN General Assembly Res 48/134 20 December 1993, regarded as the chief source of normative standards for national human rights institutions.
[62] It states, "'human rights', other than in *Part 3*, means - (a) the rights, liberties and freedoms conferred on, or guaranteed to, persons by the Constitution, (b) the rights, liberties or freedoms conferred on, or guaranteed to, persons by any agreement, treaty or convention to which the State is a party, and (c) without prejudice to the generality of *paragraphs (a)* and *(b)*, the rights, liberties and freedoms that may reasonably be inferred as being - (i) inherent in persons as human beings, and (ii) necessary to enable each person to live with dignity and participate in the economic, social or cultural life in the State".
[63] It states, "'human rights' means (a) the rights, liberties and freedoms conferred on, or guaranteed to, persons by the Constitution, (b) the rights, liberties or freedoms conferred on, or guaranteed to, persons by any agreement, treaty or convention to which the State is a party and which has been given the force of law in the State or by a provision of any such agreement, treaty or convention which has been given such force, and (c) the rights, liberties and freedoms conferred on, or guaranteed to, persons by the Convention provisions within the meaning of the European Convention on Human Rights Act 2003".
[64] Requiring a public body, in the performance of its functions, to "have regard to the need to (a) eliminate discrimination, (b) promote equality of opportunity and treatment of its staff and the persons to whom it provides services, and (c) protect the human rights of its members, staff and the persons to whom it provides services.".
[65] Human Rights Council, Resolution 20/14, National institutions for the promotion and protection of human rights, A/HRC/RES/20/14, para. 17
[66] General Assembly, Resolution 68/171, National institutions for the promotion and protection of human rights, adopted on 18/12/2013, A/RES/68/171, para. 17
[67] General Assembly, Resolution 67/163, The role of the Ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights, adopted on 20/12/2012, A/RES/67/163, para. 2(b).
[68] SCA, ICC, general observation 1.10.
[69] The Belgrade Principles, Belgrade, Serbia 22-23 February 2012), http://nhri.ohchr.org/EN/Themes/Portuguese/DocumentsPage/Belgrade20Principles20Final.pdf, Principle I(A)(1)
[70] Section 28 of the IHREC Act provides for the IHREC's annual reports to be laid before each house of the Oireachtas (parliament)
[71] And with the consent of the Minister for Public Expenditure and Reform, which is a standard clause in Irish legislation.
[72] See for example the Concluding Observations of the Committee against Torture, CAT/C/IRL/CO/1, June 2011, para. 8, *"The Committee recommends that the State party should ensure that the current budget cuts to human rights institutions particularly the Irish Human Rights Commission do not result in the crippling of its activities and render its mandate ineffective."*
[73] In its 2002 concluding observations on Ireland's second periodic report, the Committee stated: "Affirming that all economic, social and cultural rights are justiciable, the Committee reiterates its previous recommendation (see paragraph 22 of the Committee's 1999 concluding observations) and strongly recommends that the State party incorporate economic, social and cultural rights in the proposed amendment to the Constitution, as well as in other domestic legislation." (U.N. Doc E/C.12/1/Add.77, 5 June 2002)
[74] For further information on the constitutional provision for this and other related rights, see Amnesty International Ireland 2014 publication, *Bringing ESC Rights Home: The case for legal protection of economic, social and cultural rights in Ireland*, at https://www.amnesty.ie/sites/default/files/news/2012/04/AI_ESC_Rights_Report.pdf.
[75] https://www.constitution.ie/AttachmentDownload.ashx?mid=adc4c56a-a09c-e311-a7ce-005056a32ee4.
[76] Available at https://www.constitution.ie/AttachmentDownload.ashx?mid=5333bbe7-a9b8-e311-a7ce-005056a32ee4.

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