

IHF FOCUS: domestic safeguards; freedom of expression; peaceful assembly; fair trial and detainees' rights; torture, ill-treatment and police misconduct; asylum seekers and immigrants; women's rights; rights of the disabled and mentally ill.

The establishment of the Irish Human Rights Commission and the measures taken to incorporate the European Convention on Human Rights (ECHR) into domestic law strengthened formal domestic human rights safeguards in Ireland although in both matters lawmakers did not go far enough to fulfil requirements set by civil rights organisations.

The human rights problems in Ireland in 2001 were related to funding of groups pursuing "political purposes", defamation-related issues, women's rights, the rights of refugees and immigrants, freedom of assembly and detainees' rights. There was still no proper mechanism of accountability for police misconduct, and the rights of asylum seekers were not sufficiently protected. The disabled and mentally ill were left in a vulnerable position and the women's rights became a focus due to the proposed restrictions to the already strict abortion law.

Domestic Safeguards

The Irish Human Rights Commission, promised since the Belfast Agreement of 1998, was finally established with the adoption of the Human Rights Commission (Amendment) Act 2001. The establishment of a Human Rights Commission had been campaigned for by national NGOs for many years. Many of those NGOs had also expressed concerns about several aspects of the original Government proposal, particularly the proposed method of appointing the members of the Commission. The majority of these concerns were addressed in the amended 2001 Act. However, certain matters remain unclear. In particular the financial independence of the Commission is still uncertain and its ability to carry out the extensive powers it has been

granted will be contingent on adequate staffing and resources.

In April the Government published a Bill to incorporate the ECHR into domestic law in Ireland. Ireland is the last member State of the Council of Europe not to have incorporated the Convention. The means of incorporation contained in the Government's Bill is an interpretative incorporation and at a sub-constitutional level. Under the Bill, litigants may now bring actions for a breach of convention rights in domestic Irish courts. In appeal proceedings (only at the High Court and Supreme Court), litigants would be able to seek a declaration of incompatibility.

However, many academics and NGOs have expressed reservations about the form of incorporation that has been proposed. The principal weakness is that, under the proposed Bill, there is no direct consequence for a piece of legislation that is successfully impugned as being incompatible with the Convention. The validity of such a law would not be affected (except where that law is also unconstitutional), but the Government may make an *ex gratia* payment to a litigant in such a case. This aspect of the proposed incorporation has particular significance for persons detained under a provision that is incompatible with the Convention. If the Irish courts rule that a provision is incompatible, but still constitutional, then the person's detention would not necessarily end.

The Bill, in its present form does not go far enough in committing Ireland to its international obligations and Irish courts are not obliged to follow Strasbourg authority, regardless how clear. A further shortcoming is that, while most statutory bodies will be subject to the Convention, the Irish courts will not. This anomaly greatly undermines the impact of the Convention.

Freedom of Expression

Defamation

The Law Reform Commission recommended changes to both the law on defamation and the law on contempt of court. Both areas continued to cause difficulties for journalists and reporters in 2001. The principal areas of concern related to the level of awards in defamation cases; the definition of what constituted defamation; procedural devices such as the use of court lodgements; and the defences available to defendants in defamation cases.

◆ A groundbreaking, though controversial, verdict was reached in the libel case taken up by the Irish parliamentarian Beverley Cooper-Flynn against RTÉ's (the state television and radio company) chief news correspondent, Charlie Bird. On 23 March the High Court jury ruled that RTÉ had proved Cooper-Flynn had advised or encouraged a number of persons to evade tax according to the *Irish Times*. Ms Cooper-Flynn was not awarded damages and was faced instead with a IRE2 million (2.5 million Euro) legal costs' bill.

◆ On 7 December, Sean Sherwin, a Fian-na Fáil organiser was awarded IRE250 (317 Euro) in damages after it was found he had been defamed in a *Sunday Independent* article. The award of such a token sum was a benchmark in Irish libel history. The Minister for Justice has apparently taken preliminary steps for a new draft of the libel laws although no concrete proposals had been published as of the end of 2001.

Access to Information

On a positive note, in 2001 there were no cases of journalists being forced to reveal their sources, as had been the case in the recent past. Also, media usage of the 1997 Freedom of Information Act was becoming more frequent. However, one sector that continued to lay outside the Act's catchment area was *An Garda Síochána* (the Irish police force). This constitutes a major flaw in the Act. While there are legitimate concerns

that much material relating to the *gardai* would be of a sensitive nature, that does not justify a blanket exclusion of all information relating to how the *gardai* are managed and disciplined. There was already a serious problem with a lack of transparency in the workings of the police force and this exclusion from the Freedom of Information Act has exacerbated that problem.

Censorship

The Advertising Standards Authority for Ireland (ASAI) decided that an anti-racism campaign by Amnesty International (Irish Section) brought advertising into disrepute. In particular it censured Amnesty for using the images of government members without their prior written consent.

The remit of the ASAI did not extend to considering complaints about advertisements whose "principal purpose" was to express a position on "a political, religious, industrial relations, social, or aesthetic matter or on an issue of public interest or concern" (Section 1.4(f) of its own Code of Advertising Standards). However, the ASAI decided that, because the newspaper advertisements contained a small stub for membership subscriptions and donations, this brought the complaint within the terms of its mandate which covers, by and large, commercial advertising.

Freedom of Association

The Electoral (Amendment) Act 2001 contains provisions relating to the funding of third parties. The funding of political parties is already covered under existing legislation. Under the new act a third party is defined as any individual or group, who for political purposes, other than as a registered political party or election candidate, accepting in a particular calendar year an amount in excess of IRE100 (127 Euro). All such donations over that amount must be registered.

Some groups have expressed concern that the definition of "political purposes" in

the act is so broad as to include a wide range of NGOs, containing as it does a reference to any organisation that is involved in "promoting or procuring a particular outcome in relation to a policy or function of the Government or any public body". Under the Act, third parties are prohibited from receiving any donations from an individual residing outside of Ireland or from an organisation that does not maintain an office in Ireland. Third parties are also barred from receiving any donation or series of donations from the same person in the same year. It is unclear how these provisions will impact on the workings of many NGOs who are wholly or partly funded from international sources.

Peaceful Assembly

Proposals were introduced to restrict the right of peaceful assembly in O'Connell Street, Dublin (the main thoroughfare in the capital city) by requiring 31 days notice of any protest. The effect of such proposals would have been to replace the right to spontaneous protest by a licensing system for protests. Many NGOs joined to object to this curtailment on the right to demonstrate and the proposals were dropped. However, it is feared that they may be introduced in another guise in the future.

There was also an increase in use of the 1994 Public Order Act in regard to political protests. When the Act was introduced, many civil liberties groups and opposition politicians had cautioned that the powers granted to the police under the Act were excessively broad and open to abuse. Some legal analysts had also questioned the constitutionality of the legislation in that the offences under the Act were not sufficiently precise.

Many of these fears were vindicated in 2001.

◆ In September five cyclists were arrested during European Car Free Day in Dublin under the Act.

◆ In October 14 protesters were arrested at an anti-capitalist protest outside a business conference.

Many groups felt that this legislation, introduced to deal with public disorder and street violence, was increasingly being targeted at political protest and this gave rise to serious concerns about the freedom to take part in peaceful demonstrations.

Fair Trial and Detainees' Rights

Emergency Legislation and Right to Silence

In August, the Hederman Review Committee, set up to review the Offences Against the State Acts issued an interim report dealing with the role of the Director of Public Prosecutions (DPP) in certifying cases for trial by the Special Criminal Court. The interim report was prepared in order to assist the Government in making a response to the UNHRC on the case of Joseph Kavanagh.

◆ Mr Kavanagh was convicted by the Special Criminal Court in 1997 of a range of offences arising from the kidnapping of National Irish Bank Chief Executive, James Lacey. He was tried on foot of a certificate issued by the DPP to the effect that the ordinary courts were "inadequate to secure the effective administration of justice" which he had unsuccessfully sought to challenge by way of judicial review. The Supreme Court effectively found that it was all but impossible to challenge such decisions of the DPP unless *mala fides* could be shown which, in turn, was impossible as there was no obligation on the DPP to give reasons for so certifying cases.

Mr Kavanagh then made an application under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), and the UN Human Rights Committee adopted its views in April. The Committee found that Ireland was in breach of the ICCPR in that it failed to demonstrate that the decision to try Mr Kavanagh before the Special Criminal Court was based upon

reasonable and objective grounds contrary to Article 26 of the Covenant. It said the State was obliged to provide Mr Kavanagh with an effective remedy and to give wide publicity to the decision. A ninety-day limitation period was imposed on the Government to inform the Committee as to how it proposed to give effect to its views. The Government responded to the Kavanagh decision at the very end of the 90-day limitation period. In its response it referred to parts of the majority opinion contained in the Interim Report of the Hederman Review Committee. It made no reference to the views of a dissenting minority or to the existence of such a dissent. Those dissenting opinions called for an end to the Special Criminal Court and argued for a strengthening of measures to protect jury trial. Mr Kavanagh was offered compensation of IRE1,000 (1,269 Euro) which he rejected.

The remainder of the Hederman Report was eagerly awaited as of the time of writing. It will, among other things, consider the issue of the right to silence, which has already led to adverse findings against Ireland before the European Court of Human Rights in the cases of Quinn and Heaney & McGuinness. The UN Human Rights Committee has previously (in 1993 and 2000) called for an end to the jurisdiction of the Special Criminal Court in its concluding observations on Ireland's two periodic reports under the ICCPR.

Detention Periods

Section 4 of the 1984 Criminal Justice Act allowed for detention for up to 12 hours (20 hours if the suspect was held overnight and given time to rest or sleep), and section 30 of the 1939 Offences Against the State Act provided for detention for up to 48 hours. Most allegations of brutality against detainees arose out of "section 30 detention".

In 1998, in response to the Omagh bombing, the Government introduced further emergency legislation in the Offences

Against the State (Amendment) Act. It provided for the extension of detention to three days on application to a court within 48 hours. No justification was put forward for the necessity of this longer period of detention and its only effect seemed to have been to put greater pressure on suspects to confess.

The 1996 Criminal Justice (Drug Trafficking) Act provided for seven-day detention for persons suspected of drug trafficking offences, including offences ranging from major drug importation to the supply of a small quantity of cannabis for a friend.

Torture, Ill-treatment and Police Misconduct

Police Misconduct and Accountability

There continued to be no independent body to investigate complaints relating to *An Garda Síochána* (police force). The procedures for making any such complaint were regulated by the 1986 *Garda Síochána* Complaints Act and this resulted in police officers being investigated by members of their own force, and any decision to prosecute a police officer was made by the Director of Public Prosecutions, which in practice had a close working relationship with *An Garda Síochána*. The system has been criticised by the European Committee for the Prevention of Torture and local NGOs have led calls for the establishment of an independent *Garda* Ombudsman, with powers to appoint its own investigating staff. In October, the Minister for Justice, Equality and Law Reform announced that a new *Garda* Inspectorate would be established to replace the Complaints Board, however no such Bill had been published by the end of 2001 and few details had been given regarding the powers of such an inspectorate.

A number of high profile instances of alleged *Garda* wrongdoing increased public disquiet about the lack of proper police accountability.

◆ In March the Government set up an *Oireachtas* (Parliamentary) inquiry into the shooting dead of John Carthy by the Garda Emergency Response Unit at Abbeylara in April 2000. However, in August the High Court, on an application by members of the *Garda Síochána* involved in the shooting, ruled that the *Oireachtas* inquiry into was unconstitutional. Many NGOs continued to insist that an independent judicial inquiry was necessary in this case, but the Government did not accept such a need, even when the *Garda* representative bodies subsequently joined in calling for such an inquiry.

◆ In November, during the trial of Colm Murphy in the Special Criminal Court for involvement in the Omagh bombing, Judge Barr criticised two *gardaí* as being “discredited witnesses” because of falsification of interview notes and ruled their evidence inadmissible. In that case, the behaviour of the two *gardaí* concerned was described as “outrageous”. The response of the *Garda Síochána* was to instigate another internal investigation into the circumstances of the investigation.

There were also allegations of wide-scale corruption, harassment and intimidation among members of the *Garda Síochána* in Donegal in what became known as the “McBrearty affair”. Yet again there was an internal *Garda* investigation that has not been made public and no members of the force have been charged with any offences.

Asylum Seekers and Immigrants

Government policy on asylum continued to be dictated by concern over reducing the number of applicants rather than an appreciation of the distinction between asylum and immigration. The asylum system was characterised, in many aspects, by ministerial discretion and non-judicial decision-making. This was accompanied by a marked absence of a coherent Irish immigration policy, which has contributed to an increase in

illegal immigrants arriving in Ireland and, in some cases, seeking asylum. This failure of policy contributed to blurring the distinction between immigration and asylum.

One area of serious concern relating to the asylum process was the system of dispersal and direct provision for asylum seekers. The system was objectionable in principle because of its infringement on respect for the individual's autonomy and dignity. Furthermore, the conditions of many centers of accommodation were unsatisfactory and even dangerous, as evidenced by the recent tragic death of a young child in Cork. The cash amounts granted to individuals (approximately IRE15, or 19 Euro, per week for adults) were wholly insignificant and there could be a wide discrepancy in the level of discretionary benefits that were granted in different parts of the country.

NGOs working in the area and asylum-seeker representatives argued that the present system should be abolished and that asylum seekers be catered for under the regular social welfare regime.

Other concerns related to the absences of any right to work of asylum seekers, even when they had been awaiting an asylum hearing for a long period of time. The Government's stated aim was to process asylum claims within six months after which period the granting of the right to work to asylum seekers would be both fair and reasonable. However, asylum seekers should not be penalised for the Government's failure to achieve its own goals in terms of efficient procedures. Granting of the right to work would also contribute significantly in addressing negative perceptions of asylum seekers as dependents on the social welfare system.

There have also been difficulties with the present system where the Minister has discretion in the granting of leave to remain. According to some evidence, there were “cutting-edge” cases, whereby appeals by asylum seekers to rejections of

their asylum claims might have succeeded and strengthened the interpretation of the 1996 Refugee Act allowing the Minister to deter the applicant by granting leave to remain. National NGOs have argued that decisions on leave to remain should be taken judicially and be based primarily on grounds of compassion.

In general, there was an almost total lack of available jurisprudence concerning the decision-making processes within the asylum process. Many decisions were taken by relatively junior civil servants, often without adequate training. Anecdotal evidence suggested that there were wide divergences in the success rates of application before different officers and there was a general absence of transparency within the system. All of these factors constituted violations of the right to due process.

There was also little protection for migrant workers in Irish law.

◆ On 19 January, Moldovan immigrant workers were released from Mountjoy Prison after being detained there at the instruction of immigration officials. The workers had papers to work in Ireland, but there was a technical difficulty in regard to their Irish employer. Their treatment by immigration officials and by the police gave rise to grave concern among civil liberties group, particularly as they were photographed being led into court in manacles. This incident was an example of the overall lack of proper training for overly zealous immigration officials.

The Government also announced proposals to introduce carriers' liability measures in line with legislation currently in force in other European states. However, international experience has indicated that such measures force asylum seekers and illegal immigrants alike into the hands of people smugglers. Carriers' liability has particular significance for Ireland as an island on the periphery of Europe and a wide coalition of trade unions, human rights organisations and ferry and airline companies have opposed the proposals. They have ar-

gued that any such measures have the effect of placing control over access to our asylum processes in the hands of ferry and airline staff. This undermines the Government's obligations under the 1951 Geneva Convention and places an unfair burden on workers who are not trained to deal with the complexity of asylum seekers who do not have proper documentation.

Women's Rights

In November the Government introduced the Twenty-Fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill, 2001. The Bill outlined proposals for the third referendum on the substantive issue of abortion since 1983 (there were also two further referenda on the right to travel for an abortion and the right to information about abortion in 1992). There were two principle elements of the proposal. Firstly, there was a proposal to further restrict the circumstances in which abortion could legally be carried out in Ireland by removing the threat of suicide by a pregnant woman as a ground for legal abortion. Secondly, the bill contained an amendment that would set out the circumstances in which abortions for medical reasons could legally be carried out in Ireland, confining such abortions to specified "approved places". These proposals were to be voted on by the electorate in early 2002.

The UN Human Rights Committee, in its concluding observations on Ireland's second report in 2002, stated that Ireland should ensure that women were not forced to continue their pregnancies in circumstances that would infringe their right to freedom from inhuman or degrading treatment or in circumstances that would infringe on their right to sexual equality. The Committee's General Comment No. 28 of 29 March 2000 also requests that member States provide information on the access to abortion for rape victims. No such access existed in Ireland in 2001.

The UN Committee monitoring the convention on the Elimination of All Forms

of Discrimination Against Women also expressed its strong concern at Ireland's very restrictive abortion law and its effect on women's health. In its concluding observations on Ireland's combined second and third reports under the Convention, delivered on 1 July 1999, the Committee stated that travelling abroad to obtain abortions creates hardship for vulnerable groups in Irish society. The Committee has also expressed the view that abortion should be available for victims of rape and incest.

Therefore, while existing abortion law was unsatisfactory and overly strict, the proposal for the twenty-fifth amendment would further restrict access to abortion in Ireland and constitutes an even greater infringement on the rights of women, particularly vulnerable groups of women who may not have access or the means to travel abroad for abortion.

Rights of the Disabled

◆ In the case of Jamie Synott, the Supreme Court overturned an earlier High Court judgment that had granted an autistic young man a constitutional entitlement to primary education. The High Court had held that a citizen's constitutional right to primary education, contained in Article 42.4 of the Irish Constitution, is a right based on the individual's need for education. However, the Supreme Court allowed the State's appeal on the grounds that the right to free primary education was confined by age and the State's duties in that regard ended at eighteen. In the case the State argued that the Constitution could not be sued "as a glorified agency meeting the needs of all". The Government's decision to appeal the High Court ruling and the sub-

sequent Supreme Court ruling led to a massive public outcry. The plaintiff's mother and many NGOs have called for a constitutional referendum to amend Article 42.4.

In December the Government published its long awaited Disability Bill. The bill set out a detailed series of commitments to reach targets on accessibility and the introduction of services for disabled people. However, the bill also contained a clause excluding any legal recourse where any of the objectives in the bill were not achieved. Disability and equality NGOs rejected this proposal as not being rights-based and have called on the Government to introduce legislation that is based on the principle of equality of outcome and condition as well as equality of access and participation.

Rights of the Mentally Ill

The Mental Health Act was finally signed into law in July. The Act was the first reform of the 1945 Mental Health Act and had been outstanding for many years.

However, the Act still poses some difficulties. According to the Act, the new Mental Health Tribunal will review detention after 28 days. As most patients would be released by that time, this period is excessively long. A period of initial review should be no more than 48 hours, with a full review within seven days at the very most.

There are also weaknesses in the Act regarding children's rights, where there is a conflict with their parents or guardians and the absence of a Patients' Charter is a major omission in the Act. The rules regarding consent to particular treatments and the distinction between voluntary and involuntary detention are also insufficiently clear.

Endnotes

¹ Based on a report from the Irish Council of Civil Liberties (ICCL) to the IHF, March 2002. For more information, please contact the ICCL, Dominick Court, 40 Lower Dominick St, Dublin 1, Tel. + 353-1-878 31 36, e-mail iccl@iccl.iol.ie