

The Centre for Disability Law and Policy, National University of Ireland (Galway)

**Submission to the Universal Periodic Review of Ireland
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Introduction

The Centre for Disability Law and Policy (CDLP) at the National University of Ireland Galway was formally established in 2008. The Centre's work is dedicated to produce research that informs national and international disability law reform. The Centre's work is guided by the Convention on the Rights of People with Disabilities, which entered into international law in 2006. This Convention does not create new rights but clarifies and confirms existing rights in the context of disability. Since its establishment, the CDLP has organized a number of key events to provide a space to discuss disability reform, such events include; International PhD Colloquium (2010) and conference on International Disability Day (2010) which was based on a major piece of research conducted by the CDLP on national disability strategies.

The CDLP is making this submission as a single entity that has consulted with a number of disability organisations, however sole responsibility for this submission lies with the CDLP.¹ This consultation was based on a discussion of key areas in disability law and policy, which the Irish government needs to implement immediate reform so that the rights of people with disabilities in Ireland are protected fully. As Ireland is a signatory of the Convention on the Rights of People with Disabilities and has yet to ratify, the CRPD could not in itself be used as a basis to highlight Ireland's record of disability and human rights. Instead, the submission links the key areas of reform to previous commitments made by the Irish government in its ratification of international treaties and provides recommendations to overcome the gaps, which currently exist.

Implementation of International Human Rights Obligations

1. Right to social security and to an adequate standard of living:

Gap: Article 9 of the ICESCR recognizes 'the right of everyone to social security, including social insurance' People with disabilities in Ireland are a group who are most at risk of living in poverty. Research carried out has found that over one-third (34.5 per cent) of those who are long-term ill or have disabilities are at risk of poverty. This figure represents an increase of over 5% from the 1994 statistics. This increase is set against the backdrop of Ireland's economic boom (1995-2001 and 2004-2007), and clearly with the current economic downturn this figure is likely to increase at an even greater rate. These facts coupled with the reductions in social welfare benefits of people with disabilities, the additional costs incurred because of disability and the reduction of the carers allowance in the 2010 budget puts additional pressure on people with disabilities who are already vulnerable to poverty and for those who provide the necessary care. Additionally, the UN Special Rapporteur visited Ireland in early 2011 and as part of her report highlighted the vulnerability of groups including people with disabilities to government cuts in social protection and services.²

Recommendation: Ireland should be cognizant of General Comment no. 19, section (h) which recognises the importance of providing adequate income supports to persons with disabilities in a dignified manner and one which recognises the additional cost of disability and should include recognition of family members and other informal carers.

2 Administration of justice and the rule of law

(a) Timely Access to administrative mechanisms for redress

¹ The following organisations participated in the consultation; National Siblings Parents Alliance, Inclusion Ireland, Disability Federation Ireland, Not for Profit Association, Federation of Voluntary Bodies

² See The United Nations independent expert on the question of human rights and extreme poverty on her recent mission to Ireland

Gap: The right to access justice and to obtain an effective remedy for past breach of rights are key components of our civic and political rights outlined in the Universal Declaration (Article 8) and the ICCPR (Arts 2, 14). The Equality Tribunal in Ireland is a key mechanism which enables access to justice for people with disabilities who feel discriminated against through an independent and quasi-judicial impartial forum to hear or mediate complaints of alleged discrimination under equality legislation (employment equality and equal status acts). Due to funding cutbacks in recent years (Budget 2010)³ the delay in hearing cases before the tribunal has increased, which impinges on the plaintiff's right to an effective remedy. This issue was highlighted in a recent EU report on national equality bodies, which noted that delays of 7 or 8 years were being reported for cases pending at the Equality Tribunal.⁴

Recommendation: In order to uphold the right to an effective remedy as outlined in the Universal Declaration, Ireland should provide the necessary resources to ensure that cases before the Equality Tribunal are heard in a timely manner.

(b) Advocacy services

Gap: Under Article 3(a) of the ICCPR and Article 8 of the UDHR, State Parties are obliged to uphold the right to an effective remedy for those whose fundamental rights have been violated. In the context of disability, the usual means of obtaining such a remedy, namely litigation, is costly, subject to delay and fails to produce results which adequately redress the problems experienced by the litigant. However, there are alternative mechanisms which enable access to justice for people with disabilities, such as the development of statutory advocacy services, where state-appointed advocates assist individuals to assert and enforce their legal entitlements. In Ireland, the National Advocacy Service for people with disabilities is to be established at the end of March.⁵ However, advocates appointed to this service to assist people with disabilities in enforcing legal rights to access essential services, will not have statutory powers to ensure that service providers co-operate with advocates in the course of their work.⁶

Gap: The advocacy service will be reviewed within the first 12-18 months of its operation to determine whether statutory powers need to be introduced or whether service providers are co-operating with advocates in ensuring access to justice. However, in order to ensure that advocates have the necessary legal authority to carry out their work on behalf of people with disabilities it is vital that statutory powers are introduced. These powers, as outlined in the Citizens Information Act 2007⁷ allow advocates to enter any premises where the client is receiving a service and obtain any information, which is relevant to their client's case, and the Act also creates a specific offence of obstructing the work of an advocate. Without these powers, it is difficult to imagine how advocates will be able to secure access to justice and effective remedies for people with disabilities.

Recommendations: Ireland must ensure that the right to an effective remedy (one which is individualized and meaningful for the plaintiff) can be equally upheld by people with disabilities via State-appointed advocates. This requires the introduction of statutory powers to ensure that advocates have the necessary legal authority to enforce the rights of people with disabilities they represent.

3. Access to public services and socio-economic rights

Gap: Social welfare and general public services for health, housing, education, community life are important to people with disabilities just as they are for the non-disabled. However, people with disabilities are still discriminated against in accessing mainstream services. For example, the Equality Authority Annual Report for 2009 identified the people with disabilities formed the largest group of

³ Department of Finance, *2010 Estimates for Public Services and Summary Capital Programme* (Dublin: Stationery Office, 2009) available at

<<http://www.budget.gov.ie/budgets/2010/Documents/Estimates%20Book%202010.pdf>>.

⁴ Ammer, M., Crowley, N., Liegl, B., Holzleithner, E., Wladasch, K. and Yesilkagit, K., *Study on Equality Bodies set up under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC: Synthesis Report* (Utrecht; Vienna: Human European Consultancy and Ludwig Boltzmann Institute of Human Rights, 2010), p. 124.

⁵ <http://www.welfare.ie/EN/Press/PressReleases/2010/Pages/pa051010.aspx>.

⁶ Lahert, H., "The Roll Out of the National Advocacy Service in Ireland in 2011" paper presented at the National Federation of Voluntary Bodies seminar *Advocacy in Ireland: Changing Times* 9 February 2011.

⁷ Section 7D, Comhairle Act 2000, as inserted by section 5, Citizens Information Act 2007.

queries under the Equal Status Act, which provides for access to goods and services.⁸ Additionally, the Equality tribunal report for 2009 identified people with disabilities as the largest group in taking cases on access to good and services. Access to inclusive education and accessible social housing for people with disabilities were highlighted as primary concerns during our consultation process. In particular the right to choose mainstream education and be reasonably accommodated to do so, was a key concern. Article 28 (1) of the CRC recognizes ‘the right of a child to education, and with a view to achieving this right progressively and on the basis of equal opportunity with others’. In practice, children with disabilities in Ireland face a range of barriers accessing mainstream education including recent budget cuts reducing special needs supports.

Gap: Alongside education, the right to adequate housing, particularly for people with intellectual disabilities and mental health difficulties. Art 11(1) of the ICESCR recognizes ‘the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The current housing systems options for people with intellectual disabilities and mental health difficulties remain with a focus on institutionalization despite being called community living options. Community options are opening up but this is against a background of little or no direct funding for people with disabilities. It is particularly worrying to note the example of St Ita’s, Portrane where 60 people with intellectual disability were moved from the old psychiatric hospital into 10 group homes in the grounds of the hospital. It is to be hoped that this development of mini-institutions in the community will not be replicated, but the then minister responsible stated that this model would be repeated around the country. With regard to people with mental health difficulties, the use of ‘*community residences*’ to accommodate people who would previously have remained in long-term wards in psychiatric hospitals is increasing. The average number of residential places provided in these community residences is 13 – ranging from 4 to 34 places. The 2009 Annual Report of the Mental Health⁹ recorded 1307 people living in community residences. People may remain living in such accommodation for several years and the sharing of bedrooms by residents is not uncommon.

Gap: Finally with regard to services, the Irish State carries certain responsibilities to provide services and supports to its citizens with disabilities through private providers. Funding for these services comes through regular block granting of funding to disability services without a robust monitoring and evaluation of service provision. The draft document developed by the Department of Health and Children arising from the Value for Money and Policy Review of Disability Services¹⁰ recommends the introduction of direct payments to people with disability with the goal of full inclusion and participation for people with disabilities. This has not yet been implemented. Additional to this the subcontracting of public services out to private providers, there are no standards of care, monitoring and evaluation of services in existence to protect people with disabilities. The Law Reform Commission in 2009¹¹ recommended that the development of standards for the regulation and monitoring of professional care/support providers in people’s homes. In order to enable people with disability to live in their own homes, access to good quality and reliable in-home support is essential. With regard to people with disabilities living in residential services. There is currently no statutory monitoring of these residential services. The Health Information Quality Authority published approved standards for residential services in 2009¹².

Recommendations: To ensure access for people with disabilities to public services, the Irish government must consider General Commentary No 3 of the CESCR and work towards the progressive realization of the right of people with disabilities to access services (e.g. housing, independent living, education). Additionally the Irish government should implement as a matter of urgency standards of care for people with disabilities living in institutions and or receiving care at home in order to promote full independence of people with disabilities.

4. Right to liberty and freedom from cruel, inhuman or degrading treatment or punishment.

⁸ Goods and services are broadly defined in the Equal Status Act as a facility or service (of any nature) available to the public.

⁹ Drawn from the Mental Health Commission Annual Report 2009, Book 1 Part 2.

¹⁰ Value for Money and Disability Policy Review, Summary of Key Proposals
www.dohc.ie/publications/efficiency_effectiveness_disability_services_ireland.html

¹¹ Law Reform Commission, *Legal aspects of Carers, consultation paper* (2009)

¹² National Quality Standards: Residential Services for People with Disabilities, HIQA 2009

Gap: Article 10 (1) of the ICCPR states that ‘All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.’ The CPT report of 2010 found that that Irish prisons continue to detain persons with psychiatric disorders too severe to be properly cared for in a prison setting; many of these prisoners are accommodated in special observation cells for considerable periods of time.¹³ Furthermore, Article 7 of the ICCPR states that ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation’. Article 5(b) of CERD ‘the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution’. The continued practice of physical restraints/chemical restraints and Electric Convulsive Therapy prevails in Ireland.

Recommendations: Ireland should review section 57(b) of the Mental Health Act, which allows for electro-convulsive therapy and other significant interventions to be performed on a person who is involuntarily detained. Ireland should also examine the current forms of detention and treatment provided for persons with mental health difficulties in the criminal justice system.

5. The right to participation in political and public life

Gap: The right to political participation was proclaimed in the Universal Declaration of Human Rights¹⁴ and became binding with its inclusion in the International Covenant on Civil and Political Rights¹⁵. The Universal Declaration states, that “everyone has the right to take part in the government of his country.”¹⁶ Under Irish law, the right to vote is covered under Article 16.2. A person qualifies as a registered elector if they have reached the age of eighteen, and on the qualifying date are a citizen of Ireland, and an ordinary resident of that constituency.¹⁷ In Ireland, “whenever possible, polling stations are situated in buildings that are accessible to people with disabilities.”¹⁸ Additionally, individuals with disabilities may either vote with the assistance of a companion at their polling location or vote by post.¹⁹ However, these options are limited in their application; only those with visual impairments, a physical disability, or severe illness may avail themselves of the accommodations.

Gap: With regard to civic duty, the ICCPR provides that every citizen shall have the right “to have access, on general terms of equality, to public service in his country”²⁰. However, in Ireland, this right is not available on an equal basis to all citizens. Under the Juries Act of 1976, there was a general exclusion to jury service for those persons who are deaf, blind, or have other “permanent infirmity”.²¹ Section 68 of the Civil Law (Miscellaneous Provisions) Act 2008 amended the Juries Act language. Currently, a person may be excused from service where he or she has “(a) an incapacity to read, or (b) and enduring impairment, such that it is not practicable for them to perform the duties of a juror.” While the 2008 amendments removed the express ban, it has not addressed the exclusion of persons with hearing impairment or deafness from jury service. Courts are now left to determine whether it is “practicable” for an “enduring impairment” to serve on a jury.²² The law is unclear and there is no statutory provision that requires the Court Service to provide reasonable accommodations to persons with “enduring impairments” that would enable them to undertake jury service.

Recommendations: The legislature should reform the *Juries Act 1976* to allow hearing impaired / deaf persons to undertake jury service and provide for reasonable accommodations of persons with disabilities including sign language interpreters Ireland should also significantly improve the accessibility of the political process, including voting processes for people with disabilities and introduce incentives to political parties to include more disabled people in their candidate

¹³ “Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)” (Council of Europe: 2010) at paragraph 85. Available at: <http://www.cpt.coe.int/documents/irl/2011-03-inf-eng.htm>.

¹⁴ Article 21, Universal Declaration of Human Rights (1949).

¹⁵ Article 25, International Covenant on Civil and Political Rights, 1966.

¹⁶ Article 21(1), Universal Declaration of Human Rights (1949).

¹⁷ Article 7(1) Electoral Act of Ireland 1992

¹⁸ http://www.citizensinformation.ie/en/government_in_ireland/elections_and_referenda/voting/facilities_for_voters_with_disabilities.html

¹⁹ http://www.inclusionireland.ie/documents/Factsheets_000.pdf

²⁰ Article 25(3), International Covenant on Civil and Political Rights, 1966.

²¹ Juries Act 1976

²² See, *Clarke v Galway County Registrar, the Courts Service the Attorney General* (determination of a person’s eligibility to serve must be made by the trial judge)

selections.

6. The right to equal recognition as a person before the law

Ireland's current law regarding capacity is governed by the Regulation of Lunacy (Ireland) Act 1871, which establishes the Ward of Court process for determining legal capacity. The Act provides that persons 'of unsound mind' who are incapable of governing their personal affairs and property should be made wards of court and have all legal decision-making powers removed from them and assigned to a Committee of the Ward. One's status (as having a medically diagnosed impairment) results in the removal of legal personhood from people with disabilities, who are no longer recognized before the law as persons capable of making decisions. Article 15 of CEDAW requires that States Parties shall accord to women equality with men before the law and shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. Article 15 (4) requires States Parties to accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

Section 5 of the Criminal Law (Sexual Offences) Act 1993 is the piece of legislation that deals specifically with sexual exploitation of persons referred to as "mentally impaired". Under the Act a "mentally impaired" person is defined as "suffering from a disorder of the mind, whether through mental handicap or mental illness, which is of such a nature or degree as to render a person incapable of living an independent life or of guarding against serious exploitation." This definition is problematical and there is uncertainty as to the scope of its application. It is clear that a person not "mentally impaired" will be liable for sexual conduct with a "mentally impaired" person, however, it is unclear whether two persons with an intellectual disability having consensual sexual relations are committing an offence under the Act. Under the Act the Director of Public Prosecutions decides on charges taken under section 5. The only defences in the criminal law to section 5 relate to where the sexual conduct happens within marriage or "... where that at the time of the alleged commission of the offence he did not know and had no reason to suspect that the person in respect of whom he is charged was mentally impaired." While the law makes it an offence to have sexual intercourse with an adult deemed to be "mentally impaired", section 5 does not extend to cover sexual offences that fall outside of sexual intercourse or buggery. In 2010 a jury was directed to return a verdict of not guilty because the law does not provide for oral rape as an offence.²³

Recommendations: Ireland must introduce capacity legislation, which recognizes and establishes a framework for supported decision-making, in addition to other less restrictive alternatives (including advocacy) to the imposition of substitute decision-making. The Irish government should also ratify the Convention on the Rights of People with Disabilities without delay. The legislature should review the sexual offenses legislation in question, in order to strike a more human rights centered balance between safeguarding against the sexual exploitation and respecting the capacity of persons defined as "mentally impaired" to consent to sexual relations.

²³ See "Jury directed to find man not guilty of sex assault on mentally disabled woman" (Irish Times, 16 November 2010) Available at: <http://www.irishtimes.com/newspaper/ireland/2010/11/16/1224283411345.html>,