



Pavee Point
Travellers Centre

IHRC

IRISH HUMAN RIGHTS COMMISSION
AN COMISIUN UM CHEARTA DUINE

Travellers Cultural Rights

The Right to Respect for Traveller Culture and Way of Life

NOVEMBER 2008



"Denial of Travellers' cultural identity exacerbates Travellers' daily experience of exclusion. Travellers' nomadic tradition is equated with vagrancy by some settled people; Traveller crafts and Traveller language is [sic] not recognised; Travellers' values, beliefs and customs are dismissed or ignored; the Traveller economy and work patterns are not acknowledged and, if they are, are denigrated. Accordingly, without respect for Traveller culture, progress in areas such as health, accommodation or education could be undermined. Respect for Traveller culture is also essential to nurture the development of Traveller children."

SECOND PROGRESS REPORT OF THE COMMITTEE TO MONITOR AND IMPLEMENT THE RECOMMENDATIONS OF THE TASK FORCE REPORT ON THE TRAVELLING COMMUNITY, 2005



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Glossary of Terms

Belfast/ Good Friday Agreement

The Northern Ireland Peace Agreement, the Agreement reached in the multi-party negotiations 10 April 1998

CEDAW

Convention on the Elimination of All Forms of Discrimination against Women

CERD

Convention on the Elimination of All Forms of Racial Discrimination

CRC

Convention on the Rights of the Child

Cultural Diversity Convention

UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions

Cultural Heritage Convention

UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage

FCNM

Council of Europe Framework Convention for the Protection of National Minorities

ECHR

European Convention for the Protection of Human Rights and Fundamental Freedoms

ECHR Act 2003

European Convention on Human Rights Act 2003

ECtHR

European Court of Human Rights

EU

European Union

ICCPR

International Covenant on Civil and Political Rights

ICESCR

International Covenant on Economic, Social and Cultural Rights

IHRC

Irish Human Rights Commission

Lund Recommendations

The Lund Recommendations on the Effective Participation of National Minorities in Public Life

NGO

Non-governmental organisation

NPAR

National Action Plan Against Racism

OSCE

Organisation for Security and Co-operation in Europe

Race and Ethnicity Directive

European Union Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

UDHR

Universal Declaration of Human Rights

UK

United Kingdom of Great Britain and Northern Ireland

UN

United Nations

UN Minorities Declaration

United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

PREFACE

The Irish Human Rights Commission (IHRC) and Pavee Point have collaborated to prepare this research report into the Right to Respect for Traveller Culture and Way of Life.

This report aims to outline the international human rights law and standards that relate to the right to enjoy cultural life and the application of these standards to the situation of the Traveller community. This right is recognized under international law in particular through Article 27 of the International Covenant on Civil and Political Rights which holds that in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

The report has been written on the basis of background research commissioned by the IHRC and Pavee Point on the right to enjoy cultural life under international human rights law.

This report explores the nature and content of the right to enjoy cultural life in international and regional human rights law and standards, and the significance of this right for members of the Traveller community. It includes a preliminary exploration of what is required in domestic law and policy to ensure that the right to enjoy cultural life for members of the Traveller community is protected and promoted.

The right to enjoy cultural life under international human rights law aims to protect the right of persons individually and as part of their cultural community to express freely the values, beliefs, convictions and knowledge that gives meaning to their identity and their development. Various elements of the right to enjoy cultural life serve the goals of social inclusion, equality and interculturalism.

The various international human rights law and standards referred to in this report also highlight the need to respect the right to enjoy cultural life at the early stages of policy-making and local decision-making in order to give rise to a more constructive relationship between the minority and majority communities. Effective minority participation facilitates fair processes and promotes decision-making that is sensitive to the needs of Travellers.

The analysis contained below brings together many divergent strands of contemporary law and policy with respect to human rights obligations in the specific context of Travellers. Two factors above all serve to draw these strands together.

First of all, the analysis supports the view that due to the cultural distinctiveness of Traveller culture and otherwise, there can be little doubt that Travellers form a distinctive ethnic group.

This is not just of academic or historical importance. It leads directly to the second major theme of this research which is that the appropriate response to such groups from within human rights theory and doctrine is not confined to protecting the group and its members against discrimination and violence.

Rather, and in recognition that such cultural distinctiveness adds to the richness of our democratic life, the appropriate response is one that not only protects, but also respects and actively values that cultural distinctiveness.

The IHRC and Pavee Point hope that the present research report will make a contribution to the promotion of understanding and awareness on the right to respect for Traveller culture and way of life in Ireland.

EXECUTIVE SUMMARY

The aim of this report is to outline the broad variety of international human rights standards relating to the right to enjoy cultural life for minorities, including Travellers. This report focuses on different aspects of the right to enjoy cultural life, in particular: the right of minorities to participate effectively in decisions that affect them, the principle of self-identification as an ethnic minority, the right to be treated equally before the law and without discrimination, the right to adequate housing and accommodation, and the right to culturally sensitive education and to equal participation in the labour force. A preliminary examination of what is required within Irish law, policy and practice to ensure improved compliance with the minimum standards contained in a variety of international human rights conventions and other instruments is carried out in this report.

International human rights law protects the right of everybody to enjoy his or her cultural life.¹ In the case of ethnic, religious and linguistic minority groups international human rights law protects the right of persons, both individually and as part of their community, to enjoy their own culture, profess and practice their own religion, and use their own language. Like all other people in Ireland, Travellers have the right not to be denied their ability to enjoy their cultural life both individually and as part the community. Moreover, in accordance with international human rights standards, in order to protect their identity as an ethnic minority it is necessary for the Government to put in place positive measures to promote the conditions necessary for Travellers to maintain and develop their culture.²

Irish Travellers are a minority ethnic group within Irish society. As defined in the Equal Status Act 2000, Travellers are a community who are identified, both by themselves and others, as people with a shared history, culture and traditions, including a nomadic way of life. The nomadic way of life of Travellers refers to the practice of some Travellers to travel from place to place, traditionally for commercial purposes to buy and sell goods and to go to markets and fairs. Travellers share common cultural characteristics, traditions and values which are evident in their organisation of family, social and economic life. Nomadism, in a range of forms, has been central to the development and expression of these characteristics, traditions and values.³ Throughout history Travellers have formed an important part of community life in Ireland. However, Travellers have also experienced marginalisation, racism and exclusion.

Travellers continue to constitute one of the most disadvantaged communities in Ireland. Indicators in relation to health, education and participation in the labour market contrast the position of Travellers to the general population of Ireland.⁴ The average life expectancy of Traveller males is 66 years (compared to 72 for the general male population) and the average life expectancy for Traveller females is 65 years (compared to 77 for the general female population).⁵ Only 2.82% of Travellers complete secondary education.⁶ In addition, 45% of Travellers are not economically active within the labour force.⁷ In relation to accommodation and housing, of the 4,371 Traveller households within Ireland, 1,221 live in what is described as 'temporary housing units'.⁸ Of such units, just 101 have central heating, while 295 have no access to piped water.⁹ As such, all major quality of life indicators point to Travellers as a seriously disadvantaged ethnic group within Irish society.

I. INTRODUCTION TO THE LEGAL SOURCES OF THE RIGHT TO ENJOY CULTURAL LIFE

This report examines the various international, European and domestic sources of law that seek to protect the right to enjoy cultural life. These sources are hard law binding sources, such as the United Nations (UN) human rights conventions including the International Covenant on Civil and Political Rights (ICCPR) which Ireland has signed and ratified; the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and the Council of Europe Framework Convention for the Protection of National Minorities (FCNM). In addition, a variety of other soft law standards

1. Article 27 of the International Covenant on Civil and Political Rights (ICCPR) and the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, amongst other human rights standards.

2. UN Human Rights Committee, General Comment No. 23: The Rights of Minorities (Article 27), CCPR/C/21/Rev.1/Add.5 (1994), at para. 6.2.

3. Niall Crowley, "Travellers and Social Policy," in *Contemporary Irish Social Policy*, UCD Press, Dublin, 2005.

4. See CSO, *Census 2006: Volume 5: Ethnic or Cultural Background (Including the Irish Traveller Community)*, Stationary Office, Dublin, 2007, at pp. 32-65.

5. See Department of Health and Children, *Traveller Health: A National Strategy 2002-2005*, Department of Health, Dublin, 2002, at p. 23.

6. CSO *Census 2006: Volume 5: Ethnic or Cultural Background (Including the Irish Traveller Community)*, Stationary Office, Dublin, 2007, at pp. 32-65.

7. *Ibid.*

8. *Ibid.*

9. *Ibid.*

are examined. These include the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UN Minorities Declaration), and recommendations of the Parliamentary Assembly of the Council of Europe and the United Nations Educational, Scientific and Cultural Organisation (UNESCO). While these standards are non binding, they provide guidance as to how to fully respect the right to enjoy cultural life. Ireland has a dualist legal system which means that only international legal treaties that have been incorporated into our legal system in the constitutionally appropriate manner may be relied upon before the Irish courts. In this regard, the ECHR has been incorporated into Irish law by means of the European Convention on Human Rights Act 2003 (ECHR Act 2003) although it is an indirect form of incorporation.

II. THE CONCEPT OF CULTURE IN INTERNATIONAL HUMAN RIGHTS LAW

This report explores the various definitions of the concept of culture proposed by UNESCO as well as experts in the field of international human rights law. The concept of culture embraces amongst other things: unity of a social group, possession of values, beliefs, shared knowledge, artistic and other creative mechanisms and a sense of kinship. The protection of the right to enjoy cultural life should not deny an individual the ability to possess and embrace other identities and should not undermine the principle of non-discrimination. All human rights are indivisible and interdependent and the right to enjoy a cultural life is necessary so as to ensure full enjoyment of all civil, political, economic and social rights.

III. THE RIGHT TO ENJOY CULTURAL LIFE UNDER HUMAN RIGHTS LAW

Article 27 of the ICCPR protects the right of ethnic, linguistic and religious minorities to enjoy their cultural life both individually and in community with the members of their minority. The Human Rights Committee, which monitors the ICCPR, has stated that Article 27 requires the Government to take positive measures to protect the identity of a minority and the right of its members to enjoy and develop their culture. Soft law instruments such as the UN Minorities Declaration and various UNESCO conventions provide for the removal of legal obstacles to cultural development, the need to promote, develop and celebrate the diversity of cultural life of such minorities and the need for Government action to ensure the transmission of cultural heritage. Furthermore, under the Council of Europe FCNM there is an obligation upon States Parties to promote and maintain conditions to enable national minorities to maintain, develop and promote their culture.

IV. PARTICIPATION AND CONSULTATION MECHANISMS

The right of minorities to effectively participate within society is protected under international human rights law.¹⁰ The Human Rights Committee has noted the need for States to take positive measures under the ICCPR to ensure minorities can participate in decisions which affect them.¹¹ The soft law UN Minorities Declaration contains standards in relation to the promotion of the right of minorities to effectively participate in the cultural, religious, political and economic life of the State. These requirements for effective participation are echoed within the FCNM. The Organisation for Security and Co-operation in Europe (OSCE) in its Lund Recommendations has focused on the general principles applicable to ensuring effective minority participation at local, regional and national levels.

In the National Action Plan Against Racism (NPAR) which runs until the end of 2008, the Irish Government made commitments to deal with a number of issues relating to racial discrimination against Travellers. In addition, a number of key objectives have been identified so as to ensure the development of Traveller specific service provision in education, accommodation, justice and participation in community and local development. NPAR comes to an end in December 2008 and it is unclear what mechanisms will be put in place to follow-up on the measures that focus particularly on Travellers. The recently established Office of the Minister for Integration will have responsibility for anti-racism measures. However it does not define Travellers as forming part of its remit.¹² Therefore, there is a real concern that progress made during the NPAR will not be built upon. It is essential that Travellers are firmly embedded in intercultural and anti-racism strategies.

^{10.} See Article 2(2) of the UN Minorities Declaration and Article 15 of the Framework Convention.

^{11.} UN Human Rights Committee, General Comment No. 23, *The Rights of Minorities (Article 27)*, UN Doc. CCPR/C/21/Rev.1/Add.5 (1994) at para. 6.2.

^{12.} Office of the Minister for Integration, *Migration Nation Statement on Integration Strategy and Diversity Management*, Office of the Minister for Integration, Dublin, 2008 2008, pp. 67-68 describe the functions of the Office of the Minister for Integration.

There are some mechanisms in place that facilitate Traveller participation including the National Traveller Monitoring Advisory Committee and the National and Local Traveller Accommodation Consultative Committees established under the Housing (Traveller Accommodation) Act 1998. The High Level Group on Traveller Issues (HLG) is a cross-departmental committee which aims to find better ways of securing outcomes for Traveller programmes which are implemented in various Government departments.¹³ A number of treaty monitoring bodies, as well as the European Commissioner for Human Rights, have criticised the lack of Traveller representation on this group and have emphasised the need for a Traveller inclusive approach which provides Travellers with the possibility of participating effectively in decisions that particularly impact upon them.¹⁴ Political participation amongst Travellers remains extremely low, something which the Council of Europe Commissioner for Human Rights, Mr. Thomas Hammarberg, noted in his most recent Report on Ireland.¹⁵ The Commissioner suggested the possibility of reserving a seat for Travellers in the Seanad.¹⁶

SUMMARY OF OBSERVATIONS

- International human rights standards provide that persons belonging to minorities have the right to participate effectively in decisions on a national, regional and local level concerning the minority to which they belong and that appropriate measures and structures should be in place to facilitate such participation.
- It is unclear what mechanisms will be put in place to follow-up on anti-racism strategies for Travellers when NPAR comes to an end in December 2008. The Office of the Minister for Integration who will have responsibility for anti-racism measures does not define Travellers as forming part of its remit. It is essential that Travellers are firmly embedded in intercultural and anti-racism strategies.
- There are a number of important mechanisms that facilitate Traveller participation including the National Traveller Monitoring and Advisory Committee and, in the area of accommodation, the National Traveller Accommodation Consultative Committee and the Local Traveller Accommodation Consultative Committee. However, Travellers are generally not consulted adequately and do not participate effectively in the formulation of the broad range of law and policy that can have a particular impact upon them. Improved mechanisms should be put in place to ensure effective consultation and participation by members of the Traveller community and representative organisations in the laws and policies that affect them.
- Various international treaty-monitoring bodies have expressed concern in relation to the lack of Traveller representation on the High Level Group. The High Level Group should actively participate on an ongoing basis with Traveller representatives. Any future mechanisms that are established to review either the formulation of policy or its operation in practice in relation to Travellers should always include Traveller representatives.
- The extremely low level of political participation of Travellers across all political levels is a matter of concern. Positive measures should be put in place to increase Traveller political participation, including possibly a reserved Seanad seat.

13. *The HLG is an inter-departmental group established under the aegis of the Cabinet Sub-Committee on Social Inclusion. The aim of the HLG is to find ways of securing better outcomes for Travellers and greater supervision across Government Departments for Traveller-specific measures. The HLG is chaired by an Assistant Secretary to the Department of Justice and comprises members of the Senior Official's Group on Social Inclusion and other senior public servants with key responsibility for the delivery of Traveller-specific services. The High Level Group has issued one report in 2006 which contains a number of recommendations including the recommendation that a coordinated interagency approach to the delivery of services and supports for Travellers is a key way of enhancing service delivery. See HLG, Report of the High Level Group on Traveller Issues, Department of Justice, Dublin, 2006, at p. 14.*

14. *See Advisory Committee on the FCNM, Second Opinion on Ireland adopted on 6 October 2006, ACFC/OP/II (2006)007, Council of Europe, Strasbourg, 2006, at para. 109; Concluding Observations of the Human Rights Committee on Ireland's Third Periodic Report, 30 July 2008 CCPR/C/IRL/CO/3 at para. 23.*

15. *Report by the Commissioner for Human Rights Mr. Thomas Hammarberg on his visit to Ireland, CommDH (2008)9, Council of Europe, Strasbourg, 2008, at para. 96.*

16. *Ibid.*

V. SELF-IDENTIFICATION AND RECOGNITION AS AN ETHNIC MINORITY

The UN Committee on the Elimination of Racial Discrimination, which monitors the Convention on the Elimination of All Forms of Racial Discrimination (CERD) has emphasised that the existence of an ethnic, religious or linguistic minority within a country depends on objective criteria and the UN Human Rights Committee has stressed the importance of self-identification.¹⁷ Both Committees have expressed concern at the failure by the Irish Government to recognise Travellers as an ethnic group.¹⁸ The Council of Europe's Advisory Committee on the FCNM, which monitors state reports on the FCNM, and the Council of Europe Commissioner for Human Rights have requested that the Irish government engage in dialogue with Travellers on the issue of Traveller ethnicity.¹⁹

SUMMARY OF OBSERVATIONS

- In accordance with international human rights standards, identification as a minority shall, if no justification exists to the contrary, be based on self-identification by the individual concerned. Furthermore, the existence of an ethnic minority does not depend on a decision by Government but is established by objective criteria that are applied uniformly among different groups.
- The jurisprudence in the United Kingdom, where Irish Travellers have been recognised as an ethnic minority, should be considered. Travellers possess a long shared history which distinguishes them from others and they possess a distinct cultural tradition of their own. Various treaty-monitoring bodies have criticised the Irish Government position on this issue and have called for dialogue.
- The Irish Government should engage in a dialogue with members of the Traveller community on the issue of membership of a minority ethnic group. Moreover, the Government should seriously consider the international human rights standards, the recommendations of treaty monitoring bodies addressed to the Irish Government on this issue, as well as the position of both the Irish Human Rights Commission (IHRC)²⁰ and the Equality Authority.²¹

VI. EQUALITY AND NON-DISCRIMINATION

A broad range of international human rights treaties prohibit discrimination on the basis of, *inter alia*, race and ethnicity.²² The FCNM guarantees equality to national minorities. In the Explanatory Report to the FCNM, the Council of Europe also recommends the adoption of special measures so as to take account of the specific conditions of minorities. Article 14 of the ECHR protects against discrimination in the enjoyment of Convention rights. The European Court of Human Rights (ECtHR) has stated that discrimination in the enjoyment of Convention rights on the basis of one's race is particularly invidious and is not capable of being objectively justified.²³ In cases concerning Gypsies, Roma and Travellers, the ECtHR has noted that in certain circumstances special consideration should be given to ensure protection of minority lifestyles.²⁴

The Irish Constitution contains a general equality provision²⁵ and the Employment Equality Act 1998 and the Equal Status Act 2000 distinctly prohibit discrimination on the basis of membership of the Traveller community.²⁶ However, assessments by international treaty monitoring bodies in relation to the situation of Travellers have queried the effectiveness of equality strategies, urging the Irish authorities to improve Travellers' access to education, the labour force, health services and accommodation suitable to lifestyle needs.²⁷

17. Committee on the Elimination of Racial Discrimination, General Recommendation VIII: Identification with a particular racial or ethnic group, A/45/18 (1990); Human Rights Committee, General Comment No. 23: The Rights of Minorities (Article 27), CCPR/C/21/Rev. 1/Add.5 (1994), at para. 5.2.

18. Concluding Observations of the Committee on the Elimination of Racial Discrimination: Ireland, 14/04/2005, CERD/C/IRL/CO/2 (2005), at para. 20; Concluding Observations of the Human Rights Committee on Ireland's Third Periodic Report, 2008 CCPR/C/IRL/CO/3, at para. 23.

19. Advisory Committee on the FCNM, Second Opinion on Ireland adopted on 6 October 2006, ACFC/OPII (2006)007, Council of Europe, Strasbourg, 2006, at para. 29; Report by the Commissioner for Human Rights Mr. Thomas Hammarberg on his visit to Ireland, CommDH (2008)9, Council of Europe, Strasbourg, 2008.

20. IHRC, Travellers as an ethnic minority under the Convention on the Elimination of Racial Discrimination - A Discussion Paper, March 2004; IHRC Submission to the Committee on the Elimination of All Forms of Racial Discrimination, March 2005 at pp. 48-49; IHRC Submission to the Human Rights Committee on the Examination of Ireland's Third Periodic Report, 2008, at pp. 49-52.

21. Traveller Ethnicity, - An Equality Authority Report, Equality Authority, Dublin, 2006.

22. Articles 1 and 2 of the UDHR; Articles 3 and 26 of the ICCPR; Articles 1 and 7 of CERD.

23. *Timishev v. Russia*, Judgement of 13 December 2005, at para. 56.

24. *Chapman v. The United Kingdom*, Judgement of 18 January 2001, (2001) 33 EHRR 399, at paras 73-74.

25. Article 40.1 of the Irish Constitution.

26. Section 6(2) of the Employment Equality Act 1998; Section 3(2) of the Equal Status Act 2000.

27. See generally Advisory Committee on the FCNM, Second Opinion on Ireland adopted on 6 October 2006, ACFC/OPII (2006)007, Council of Europe, Strasbourg, 2006, at paras 47-49, 58-60.

SUMMARY OF OBSERVATIONS

- In accordance with international human rights law and standards, governments are entitled to adopt affirmative measures to alleviate the effects of past historical racial discrimination.
- By virtue of the Belfast/ Good Friday Agreement²⁸ the Irish State is under an obligation to ensure the equivalence of human rights protection between the State and Northern Ireland. Under Section 75 of the Northern Ireland Act 1998 specific public authorities are required to have "due regard to the need to promote equality of opportunity" across all equality grounds including race.
- A positive statutory duty to promote equality may be a useful mechanism to tackle structural discrimination and bring about substantive equality for members of the Traveller community and other groups that experience discrimination.

VII. TRAVELLER ACCOMMODATION, NOMADISM AND THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

Article 8 of the ECHR protects the right of persons to enjoy private life, family life and the home. While a state may regulate the use of land, the ECtHR has held there is a positive obligation upon States parties to the ECHR to facilitate the Traveller and gypsy way of life in light of the vulnerable position of minority groups.²⁹ This includes the provision of culturally appropriate accommodation, but only where a local authority is in a position to provide such accommodation.³⁰ This does not, however, extend to the provision of a caravan space for each person who chooses to live in this way or the provision of caravan accommodation where the local authority is not in a position to provide this.³¹ Where Travellers are accommodated by the local authority in a halting site, there is a need to ensure there is procedural protection of an applicant's rights where eviction proceedings are being initiated.³²

The Housing (Traveller) Accommodation Act 1998 (1998 Act) requires housing authorities to introduce Traveller accommodation programmes based on an assessment of Traveller accommodation needs. In *O'Reilly and Others v. Limerick County Council*, Mr. Justice MacMenamin held that the statutory duty imposed by virtue of the 1998 Act is mandatory and not merely aspirational.³³ Mr. Justice MacMenamin stated that in carrying out its assessment of Traveller accommodation needs the local authority is required to have regard to the distinct needs and family circumstances of Travellers, the need to address accommodation requirements for Travellers other than at their normal place of residence, having regard to their annual patterns of movement, and the need to take reasonable steps for the purposes of implementation.³⁴ Subsequent cases have highlighted the failure by local authorities to perform their functions in a manner compatible with the ECHR as required under Section 3 of the ECHR Act 2003. In the case of *O'Donnell (A Minor) and Others v. South Dublin County Council*, Ms. Justice Laffoy found that the respondent housing authority had failed to act in a manner compatible with Article 8 of the ECHR in not providing adequate accommodation for a family with three severely disabled members, two of whom were minors who were living in severely overcrowded and inadequate accommodation.³⁵ The Committee of Ministers of the Council of Europe has found that the implementation of Traveller accommodation plans has been inadequate in a number of localities and has recommended that decisive measures be taken to ensure full implementation including the provision of halting sites.³⁶

This report highlights the human rights implications for Travellers of the Criminal Justice (Public Order) Act 1994 as amended. Section 24 of the Housing (Miscellaneous Provisions) Act 2002 amended the Criminal Justice (Public Order) Act 1994 by creating offences of entering and occupying privately owned or publicly owned land without the consent of the owner.

28. This term refers to the Agreement reached in the Multi-Party Negotiations which is set out in Annex I to the Agreement between the Government of Ireland and the Government of the United Kingdom of Great Britain

29. *Chapman v. The United Kingdom*, Judgement of 18 January 2001, (2001) 33 EHRR 399, at para. 96.

30. *Codona v. The United Kingdom*, Decision of 7 February 2006, at pp. 10-11.

31. *Ibid.*

32. *Connors v. The United Kingdom*, Judgement of 27 May 2004, (2004) 40 EHRR 189, at paras 83-84, 86, 92,94.

33. *O'Reilly and Others v. Limerick County Council* [2006] IEHC 174.

34. *Ibid.*

35. *O'Donnell (A Minor) and Others v. South Dublin County Council* [2007] IEHC 204.

36. Council of Europe Committee of Ministers, Resolution CM/ResCMN(2007) 10 on the implementation of the Framework Convention for the Protection of National Minorities by Ireland, adopted by the Committee of Ministers on 20 June 2007, at para. 1(b)5.

This Act empowers the Garda Síochána to remove any object from the land even without the presence or knowledge of the person who owns the object which may be disposed of if it is not claimed within one month of it being possessed. The IHRC has raised the due process concerns in relation to the Criminal Justice (Public Order) Act 1994 as amended in its *amicus curiae* submission in the case of *Anne Lawrence and Others v Ballina Town Council and Others*.³⁷ The Advisory Committee on the FCNM has noted the aggravating effects of Section 24 and its potential to criminalise Travellers as trespassers in cases of unauthorised encampment even where the relevant local authority has failed to provide adequate Traveller accommodation.³⁸

SUMMARY OF OBSERVATIONS

- In accordance with the jurisprudence of the EtCHR, special consideration should be given to the needs and different lifestyles of minorities such as Travellers, and there is a positive obligation on the State in certain circumstances to facilitate the Traveller way of life.
- The Council of Europe Committee of Ministers has criticised the insufficient delivery and implementation of Traveller accommodation strategies under the 1998 Act. Cases before the High Court also demonstrate a failure by housing authorities to carry out their functions in a manner that complies with the ECHR as required under the ECHR Act 2003.
- During the review of the operation of the 1998 Act carried out by the National Traveller Accommodation Consultative Committee, the lack of a mechanism to ensure effective implementation of Traveller accommodation strategies and to monitor whether housing authorities are effectively complying with their statutory obligations was raised. This area of law and practice will be kept under review having regard to the relevant human rights law and standards and the ECHR obligations of the housing authorities under Section 3(1) of the ECHR Act 2003.
- In relation to the Criminal Justice (Public Order) 1994 Act, as amended, it is noteworthy that the judge in the Lawrence case observed obiter that due process considerations do arise which may impact on the ECHR rights of the plaintiff, and that a criminal charge rather than a civil injunction may not be a proportionate response to the legitimate interest of all parties concerned. This area of law and practice will continue to be monitored having regard to the relevant human rights law and standards.

VIII. TRAVELLER CULTURE AND SERVICE PROVISION: EDUCATION AND THE LABOUR MARKET

All persons, including Travellers, have a right to education under international and domestic law.³⁹ Within Ireland, statistics from 2006 demonstrate that only 2.82% of Travellers have completed second level education.⁴⁰ For minorities, the Committee on Economic, Social and Cultural Rights has emphasised the need to ensure education which is "relevant, culturally appropriate and of good quality".⁴¹ The Committee on the Rights of the Child and the UN Minorities Declaration have highlighted the need for education to play a role in understanding and respect for different cultures.⁴² The implementation of the Traveller Education Strategy should go some way towards ensuring international obligations are adhered to. The Traveller Education Advisory Committee, which was established to advise on the drafting of the Traveller Education Strategy, has not been re-established to monitor the implementation of the Strategy.

37. *Anne Lawrence and Others v. Ballina Town Council and Others*, Unreported Judgement 31 July 2008.

38. *Advisory Committee on the FCNM, Second Opinion on Ireland adopted on 6 October 2006, ACFC/OPII (2006)007, Council of Europe, Strasbourg, 2006, at para. 61.*

39. *Article 26 of the UDHR; Article 13(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR); Articles 28 and 29, Convention on the Rights of the Child (CRC); Article 7 of the European Social Charter (Revised); Article 14 European Charter of Fundamental Rights; Articles 42.2 and 42.4 of the Irish Constitution.*

40. *CSO, Census 2006: Volume 5: Ethnic or Cultural Background (Including the Irish Traveller Community), Stationary Office, Dublin, 2007.*

41. *Committee on Economic, Social and Cultural Rights, General Comment 13: Right to Education - Scope and Implementation, UN Doc E/C.12/1999/10, at para. 6(c).*

42. *Committee on the Rights of the Child, General Comment No. 1: The Aims of Education, UN Doc. CRC/GC/2001/1 (17 April 2001), at para. 4.*

The right to work is protected under Irish constitutional law and is a fundamental human right.⁴³ The Committee on Economic, Social and Cultural Rights has noted that accessibility to the workforce includes the right to non-discrimination.⁴⁴ The right to work under international human rights law also includes the requirement for effective measures so as to ensure minority participation within the work force. The Task Force Report on the Travelling Community has noted how traditional Traveller occupations have now faded.⁴⁵ Strategies within FÁS have been somewhat effective in relation to Traveller training and employment. The Advisory Committee on the FCNM has noted the difficulties facing Travellers including access to financial services and the increased regulation which makes an industry unattractive to Travellers.⁴⁶ There is a need to ensure a joined up approach which takes account of the cultural identity of Travellers as well as anti-discrimination and social inclusion.

SUMMARY OF OBSERVATIONS

- The right to education is a fundamental human right and the manner in which it is provided should be culturally appropriate and aimed at fostering respect for a child's cultural identity, language and values and respect for the differing values of other children.
- While progress has been achieved in relation to increased participation of Travellers at different levels of education further measures are required. Effective implementation of the recommendations of the Traveller Education Strategy is of central importance to ensuring improved access to the right to education for Travellers. The Traveller Education Advisory Committee, which was established to advise on the drafting of the Traveller Education Strategy, should be re-established to monitor the implementation of this strategy.
- The right to work under international human rights law also includes the requirement for effective measures so as to ensure minority participation within the work force. Improved measures should be put in place to increase the participation of Travellers in the labour force.

43. Article 23 of the UDHR; Article 6 of the ICESCR; Article 1 of The European Social Charter; Article 45(2)(i) of the Irish Constitution.

44. Committee on Economic, Social and Cultural Rights, General Comment No. 18: The Right to Work, UN Doc. E/C.12/GC/18 (6 February 2006), at para. 12(b)(i).

45. Report of the Task Force on the Traveller Community, Stationary Office, Dublin, 1995.

46. *Ibid.*

I. INTRODUCTION

1. INTRODUCTION TO THE RESEARCH REPORT

This research report outlines the international human rights law and standards that relate to the right to enjoy cultural life and the application of these standards to the situation of the Traveller community. It is not intended to be a comprehensive study on the area, but to provide an outline of the applicable standards and observations in relation to their applicability to the Traveller community. This report has been written on the basis of background research commissioned by the IHRC and Pavee Point on the right to enjoy cultural life under international human rights law. In 1999, Pavee Point commissioned research on the issue of Travellers' cultural rights, which was carried out by Iain Byrne, former research associate with the University of Essex, under the direction of Professor Kevin Boyle. In order to update the research to take account of various legislative and policy developments in recent years, Pavee Point sought the collaboration of the Irish Human Rights Commission (IHRC), who commissioned further research on the issue, which was undertaken by Darren O'Donovan, a PhD candidate at the Centre for Criminal Justice and Human Rights, University College Cork. The IHRC and Pavee Point would like to thank warmly all the researchers who were involved in providing background research to this report and hope that it will make a contribution to the promotion of understanding and awareness on the right to enjoy cultural life for members of the Traveller community.

a. THE IRISH HUMAN RIGHTS COMMISSION

The IHRC has a statutory remit under the Human Rights Commission Act 2000 to ensure that the human rights of all people in Ireland are promoted and protected in law, policy and practice. The IHRC seeks to ensure that Ireland meets the standards of best international practice by reviewing the adequacy and effectiveness of law and policy in the State relating to the promotion and protection of human rights, and by making recommendations to the Government as it deems appropriate concerning the measures that should be taken to strengthen, protect and uphold human rights in Ireland. Under Section 8(g) of the 2000 Act the IHRC is mandated to prepare and publish reports on any research undertaken, sponsored or commissioned for the purposes of promoting understanding and awareness of the importance of human rights in the State. The IHRC is also Ireland's national human rights institution, recognised as such by the United Nations. In this role, the IHRC actively engages with international and regional human rights bodies, including with the United Nations treaty monitoring bodies, the Council of Europe and the European Union (EU) Fundamental Rights Agency. In its Strategic Plan 2007-2011 the IHRC has committed itself to researching and highlighting particular issues affecting ethnic minorities, including Travellers.

b. PAVEE POINT

Pavee Point is a national non-governmental organisation committed to the attainment of human rights for Irish Travellers. The group is comprised of Travellers and members of the majority population working together in partnership to address the needs of Travellers as a minority ethnic group experiencing exclusion and marginalisation. The aim of Pavee Point is to contribute to improvement in the quality of life and living circumstances of Irish Travellers, through working for social justice, solidarity, socio-economic development and human rights. The work of Pavee Point is based on two key premises:

- Real improvement in Travellers' living circumstances and social situation requires the active involvement of Travellers themselves.
- Non-Travellers have a responsibility to address the various process which serve to exclude Travellers from participating as equals in society.

The work of Pavee Point is based on an acknowledgment of the distinct culture of Travellers, and the importance of nomadism to the Traveller way of life. Innovation has been a key feature of the work done from its' starting point based on a community development approach, on an inter-cultural model and on a Traveller/settled partnership. It means working with, rather than for, Travellers in a manner that prioritises Traveller participation. The organisation seeks to combine local action with national resourcing, and direct work with research and policy formulation.

The organisation's work seeks to develop understanding and responses to a wide range of issues facing Travellers through programmes covering: community development; youth work and early years; education; health, drugs and violence against women; culture and heritage; mediation and conflict resolution; local and economic development.

The work of the programmes includes:

- Direct work with Travellers and Traveller organisations;
- Piloting and disseminating innovative approaches on Travellers issues;
- Networking with and supporting individuals and organisations working with Travellers and other marginalised groups;
- Formulating and making submissions to influence policies;
- Dissemination of information and the commissioning of research and its publication.

c. THE RESEARCH REPORT

This research report explores the nature and content of the right to enjoy cultural life in international and regional human rights law and standards, and the significance of this right for members of the Traveller community. The report includes a preliminary exploration of what is required in domestic law and policy to ensure that the right to enjoy cultural life for members of the Traveller community is protected and promoted. The right to enjoy cultural life under international human rights law aims to protect the right of persons individually and as part of their cultural community to express freely the values, beliefs, convictions and knowledge that gives meaning to their identity and their development. Various elements of the right to enjoy cultural life serve the goals of social inclusion, equality and interculturalism. The UN Development Programme (UNDP) in the 2004 UN Human Development Report has recognised that human development requires being able to choose one's identity, without losing the respect of others or being excluded from other choices important to them such as education, health or job opportunities.⁴⁷ The 2004 UN Human Development Report highlighted two main ways in which the right to enjoy cultural life may be denied. Firstly there may be *living mode exclusion*, where a group is denied recognition and accommodation of their identity and the state insists that individuals must live exactly like all others in society.⁴⁸ The second main form is participation exclusion, when people are discriminated against or suffer disadvantage in social, political and economic opportunities because of their cultural identity.⁴⁹ Given the potential for exclusion and discrimination against minorities, the right to enjoy cultural life is fundamental to improving peoples' enjoyment of other human rights such as the right to work, the right to be educated in a culturally sensitive manner and the right of access to health and social services.⁵⁰

While the right to enjoy cultural life belongs to every human being, it is cultural minorities who may be particularly vulnerable in the enjoyment of this right, as they and their interests may not be adequately represented in democratic decision-making structures.⁵¹ At a broad level, in their relationship with the State and local government, as a minority, Travellers can be outvoted or marginalised by the wider community which at best does not share their priorities, and at worst may perceive their priorities as being opposed to those of Travellers.

The various international human rights law and standards referred to in this report highlight the need to respect the right to enjoy cultural life at the early stages of policy-making and local decision-making in order to give rise to a more constructive relationship between the minority and majority communities. Effective minority participation facilitates fair processes and promotes decision-making that is sensitive to the needs of Travellers.

2. THE CULTURAL CONTEXT OF IRISH TRAVELLERS

The Report of the Government-appointed Task Force on the Travelling Community in 1995 recommended that the distinct culture and identity of Travellers should be taken into account. In doing so, it described culture in the following terms:

*Everybody has a culture. It is the package of customs, traditions, symbols, values, phrases and other forms of communication by which we can belong to a community. The belonging is in understanding the meanings of these cultural forms and in sharing values and identity.*⁵²

47. United Nations Human Development Report, *Cultural Liberty in Today's Diverse World*, United Nations Development Programme, New York, 2004, at p. 28.

48. *Ibid.*, at p.29.

49. *Ibid.*

50. *Ibid.*, at Chapter 3.

51. See generally, Will Kymlicka, *Liberalism, Community and Culture*, Oxford University Press, Oxford, 1989 and Will Kymlicka, (ed.) *The Rights of Minority Cultures*, Oxford University Press, Oxford, 1995.

52. Report of the Task Force on the Travelling Community, Stationary Office, Dublin, 1995.

This report signalled an important shift in its recognition of the importance of Traveller culture against the backdrop of official policies that had over the years adopted policies of assimilation towards Travellers.

Irish Travellers are a minority ethnic group within Irish society. As defined in the Equal Status Act 2000, Travellers are a community who are identified, both by themselves and others, as people with a shared history, culture and traditions, including a nomadic way of life. Travellers share common cultural characteristics, traditions and values, which are evident in their organisation of family, social and economic life. Nomadism, in a range of forms, has been central to the development and expression of these characteristics, traditions and values.⁵³

In its Second Progress Report in 2005 the Committee to Monitor and Implement the Recommendations of the Task Force Report on the Travelling Community observed that the strengths of Traveller culture are also its weaknesses.⁵⁴ Traveller's nomadic tradition and lack of formal institutions has meant that their cultural identity and heritage can be particularly fragile. As a result the Committee commented, "Travellers may require additional safeguards to protect and preserve their identity and heritage".⁵⁵ This Committee pointed out that,

*Denial of Travellers' cultural identity exacerbates Travellers' daily experience of exclusion. Travellers' nomadic tradition is equated with vagrancy by some settled people; Traveller crafts and Traveller language is [sic] not recognized; Travellers' values, beliefs and customs are dismissed or ignored; the Traveller economy and work patterns are not acknowledged and, if they are, are denigrated. Accordingly, without respect for Traveller culture, progress in areas such as health, accommodation or education could be undermined. Respect for Traveller culture is also essential to nurture the development of Traveller children.*⁵⁶

Pavee Point is of the view that at its narrowest it is possible to argue that Traveller culture and identity are important not only to the Traveller community but also to the majority community. Recognising the input made by Travellers to Irish culture is central to the integrity of the project of Irish intercultural solidarity. Protecting the cultural identity and heritage of Travellers has intrinsic value by ensuring diversity and enriching the shared cultural experience of Irish people.

Pavee Point considers that Traveller culture continues to play a role in the development of many aspects of Irish cultural life including traditional music, poetry, story telling and crafts. Among Travellers there is little doubt that theirs is a culture, vibrant, consistent, evolving, wholly applicable and unique. Travellers are unlikely to disavow the value and contribution of that culture either as an essential component of Traveller community life or to Irish society as a whole.

3. SOFT LAW AND HARD LAW SOURCES OF INTERNATIONAL HUMAN RIGHTS LAW

Hard law is generally what comes within the everyday understanding of law in the sense that it is legally binding upon States. Soft law on the other hand is not binding on individuals, national organisations or government agencies in the same way as hard law. Soft law is often derived from agreements between States or experts. Hard law in the international context refers to the conventions and other instruments which set out the human rights that States have guaranteed at the international level. As will be seen in this report, in interpreting hard law obligations, courts and monitoring bodies may employ soft law standards as indicating measures of best practice by states. In fact many human rights provisions in binding treaties evolved from the progressive development of soft law sources as these reflect an emerging international consensus on the scope and content of human rights.

This report refers to a number of soft law sources, including for example the General Comments of the international treaty monitoring bodies and the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities (UN Minorities Declaration). In particular this report refers to resolutions and recommendations of the Parliamentary Assembly of the Council of Europe and its Congress of Local Authorities. These are not legally binding, but can provide guidance on how measures to promote cultural life within international or regional agreements can be achieved.

53. Niall Crowley, "Travellers and Social Policy," in *Contemporary Irish Social Policy*, UCD Press, Dublin, 2005.

54. *Second Progress Report of the Committee to Monitor and Implement the Recommendations of the Task Force Report on the Travelling Community*, at para. 2.2.

55. *Ibid.*

56. *Ibid.*, at para. 2.3.

4. LEGAL SOURCES OF THE RIGHT TO ENJOY CULTURAL LIFE UNDER INTERNATIONAL HUMAN RIGHTS LAW

The right to enjoy cultural life is contained in a wide variety of legal sources, from international human rights Conventions to the general comments and jurisprudence of the treaty-monitoring bodies established under these Conventions. Ireland has ratified a broad number of international and regional human rights treaties that contain standards relating to the right to enjoy cultural life.

At the UN level, the foundational human rights law instrument is the Universal Declaration on Human Rights (UDHR) adopted in 1948. A number of international human rights conventions have been promulgated which transform the aims of the UDHR into binding legal rules. Ireland has ratified the following international human rights Conventions, which contain standards on the right to enjoy cultural life:

- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW)
- Convention for the Elimination of All Forms of Racial Discrimination (CERD)
- Convention on the Rights of the Child (CRC)

Each of these Conventions has a monitoring committee which is tasked with monitoring the implementation of the treaty at a domestic level. This is primarily achieved through assessing the regular reports submitted by states under the various Conventions and producing concluding observations or comments in relation to such reports. This process is aimed at measuring the extent to which states are complying with their treaty obligations and providing recommendations to guide states on such compliance. During the monitoring process national human rights institutions and non-governmental organisations submit so-called "shadow reports" on the Government's compliance with its treaty obligations, thereby providing the Committees with independent, objective and critical information on the extent to which the various Conventions are being complied with. The treaty-monitoring bodies also adopt General Comments or Recommendations, which provide further detail and guidance to states on the legal and policy measures they are required to take to implement the generally worded provisions of the Conventions.

This report also analyses the legal standards contained in two Conventions created by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) namely the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (Cultural Heritage Convention), which has not yet been ratified by Ireland and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Cultural Diversity Convention), which has been ratified by Ireland. Under these Conventions, states are placed under an obligation to formulate and implement their policies in relation to cultural rights in a manner that protects and promotes compliance with the purposes of the conventions. In terms of implementation, the Conventions also set up monitoring committees to analyse the reports which states are obliged to submit.

At the regional level, the Council of Europe has introduced two instruments that are of central relevance to the right to enjoy cultural life for Travellers. Ireland has ratified both of the following Conventions:

- European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)
- Framework Convention for the Protection of National Minorities (FCNM)

The ECHR was incorporated into Irish domestic law by means of the European Convention on Human Rights Act 2003 (ECHR Act 2003). In contrast to other international human rights law conventions that Ireland has ratified, the provisions of the ECHR can be relied on in the Irish courts through the ECHR Act 2003. Article 8 of the ECHR protects the right to respect for private and family life, home and correspondence and has been used by minorities including Travellers and Gypsies to uphold their cultural rights.⁵⁷

57. *Chapman v. The United Kingdom*, Judgement of 18 January 2001, (2001) 33 EHRR 399, at paras 93-96. Article 8 (2) provides there shall be no interference by a public authority with the exercise of this right except where it is in accordance with the law and such interference is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The second important Council of Europe instrument that Ireland has agreed to be bound by is the Framework Convention for the Protection of National Minorities. The FCNM differs from the UN Conventions in the sense that its provisions⁵⁸ set objectives for states in regard to the protection of national minorities. The description of the Convention as a “framework” means that states have a wider measure of discretion enabling them to take their own particular circumstances into account in domestic implementation. However, Ireland is still required to submit regular reports giving full information on legislative and other measures taken to give effect to the principles of the FCNM. These reports are submitted to an Advisory Committee of Experts, which issues an Opinion assessing Ireland’s compliance.⁵⁹ The report of the Advisory Committee is then passed to the Committee of Ministers of the Council of Europe, which issues final recommendations to the Member States.⁶⁰ In practice the Committee of Ministers’ recommendations have broadly mirrored the opinions of the Advisory Committee.

This research report also references a number of recommendations of the Committee of Ministers of the Council of Europe relating to the right to housing and accommodation for Travellers and nomadism. These recommendations are not legally binding. However, they are relevant to the interpretation of legal obligations as they represent the consensus view of Council of Europe Governments, and thus contribute to the development and content of standards across Europe. The legal importance of these documents is further strengthened by the fact that the Committee of Ministers is the ultimate monitoring and enforcement body of the FCNM; so its recommendations pertaining to minorities represent general findings which it is likely then to apply to specific States. This has been reflected in its monitoring of Ireland’s reports, where the Committee of Ministers has directly referenced some of its recommendations as necessary for Ireland’s compliance with the Convention.

5. THE DUALIST NATURE OF THE IRISH LEGAL SYSTEM

Ireland has a dualist legal system which means that international human rights treaties do not have direct legal effect in the Irish legal system until the Oireachtas transposes the international treaty to give it full legal effect in domestic law. Article 29.5 of the Constitution states that every international agreement to which the State becomes a party other than purely technical agreements “shall be laid before Dáil Éireann”. There is no requirement that the Dáil (the Irish Parliament) must approve the terms of the treaty unless it involves a charge on the finances of the State. Article 29.6 goes on to state that “No international agreement shall be part of the domestic law save as may be determined by the Oireachtas.” Read with Article 15.2.1 of the Constitution, which states that the “sole and exclusive power of making laws for the State is hereby vested in the Oireachtas...”, Article 29.6 establishes the dualist nature of the Irish legal order in respect of international treaties and excludes such treaties from having the force of law at the domestic level unless they have been explicitly incorporated or transposed into legislation by the Oireachtas (the Irish parliament).

The ECHR has been transposed into Irish law as a result of the ECHR Act 2003 and is therefore applicable in the Irish Courts. Section 2(1) of the ECHR Act 2003 requires the Courts, when interpreting or applying any statutory provision or rule of law, to do so in a manner which complies with the obligations of the State under the ECHR in so far as is possible. Furthermore, under Section 3(1) of the ECHR Act 2003 every organ of the State is required to perform its functions in a manner which is compatible with the State’s obligations under the ECHR, subject to any other statutory provision or rule of law.

The IHRC has outlined some of the various methods of incorporation that are available to the Irish Government to give more direct legal effect to the other international human rights treaties Ireland has ratified, and has recommended that the Government take steps to incorporate international human rights treaties so as to give them more effective legal significance.⁶¹

58. They are often referred to as “programmatically provisions”.

59. Articles 24–26 of the FCNM and Council of Europe Resolution (97)10.

60. The Committee of Ministers is the Council of Europe’s decision-making body. It comprises the Foreign Affairs Ministers of all the Member States, or their permanent diplomatic representatives in Strasbourg. It has the power to make recommendations to Member States on matters for which the Committee has agreed “a common policy”. Recommendations are not binding on Member States. Adoption of a recommendation requires a unanimous vote of all representatives present and a majority of those entitled to vote. However, at their 519 bis meeting (November 1994) the Ministers’ Deputies decided to make their voting procedure more flexible and made a “Gentleman’s agreement” not to apply the unanimity rule to recommendations. For more information see www.coe.int/cm.

61. IHRC, *Submission to the UN Human Rights Committee on the Examination of Ireland’s Third Periodic Report on the ICCPR*, IHRC, Dublin, 2008, at paras 10–25.

6. OUTLINE OF THE RESEARCH REPORT

Section Two of the present report explores various definitions of the concept of culture proposed by UNESCO as well as experts in the field of international human rights law. This Section also explores the indivisibility and interdependence of human rights.

Section Three outlines the obligations of the State under international and regional human rights law to promote and protect the right to enjoy cultural life. The right to enjoy cultural life is enshrined in the instruments of the UN, the Council of Europe, UNESCO and the Organization for Security and Co-operation in Europe (OSCE).

Section Four of the report deals with the principle of effective participation for minorities in the formulation of laws and policies that affect them. To promote the right to enjoy the right to cultural life the State is required to create new mechanisms to ensure effective participation and consultation with minority groups. In this section the current mechanisms that exist in Ireland are explored.

Section Five analyses the principles of self-identification and recognition as an ethnic minority under international human rights law. The position of the Irish Government that Travellers do not constitute an ethnic minority is examined in the light of international human rights standards and recommendations of treaty monitoring bodies on this issue.

Section Six discusses how the right to enjoy cultural life is protected under international human rights law and at the domestic level through the right to equality and non-discrimination.

Section Seven outlines the international human rights obligations of the Government concerning the right to private life, family life and the home, as it relates to Traveller accommodation and nomadism. This section provides an analysis of the recent case law on the right to respect for family life as recognised under Article 8 of the ECHR. Domestic cases concerning the statutory scheme for Traveller accommodation are also analysed.

Section Eight provides a consideration of the role of the right to enjoy cultural life in service provision to the Traveller community in the areas of education and labour market participation. Successful policies in these areas can create real and effective equality between Travellers and settled society in relation to educational and employment opportunities. The area of education bears particular significance as it offers a key opportunity for the promotion of cultural awareness and constructive relations between communities.

II. THE CONCEPT OF CULTURE IN HUMAN RIGHTS LAW

1. INTRODUCTION

A distinct right to enjoy cultural life was first outlined in Article 27 of the UDHR over 50 years ago. Article 27 of the UDHR provides that “[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”. In more recent times, human rights bodies within the UN and the Council of Europe have vastly improved the oversight and content of the right to enjoy cultural life. During this time however, there has been ongoing debate as to what constitutes “culture” and the principles which should underpin its protection.

2. DEFINITIONS OF THE CONCEPT OF CULTURE

The most recent definition of the term culture is provided within the Fribourg Declaration on Cultural Rights of the Interdisciplinary Institute for Ethics and Human Rights of the University of Fribourg in Switzerland (2007):

*The term “culture” covers those values, beliefs, convictions, languages, knowledge and the arts, traditions, institutions and ways of life through which a person or group expresses their humanity and the meanings that they give to their existence and to their development.*⁶²

The above definition represents twenty years of work by experts on culture and international law which demonstrates how difficult it is to provide a definition of the term “culture”. Nevertheless, it is clear that under international human rights law culture is viewed as a dynamic concept. The emphasis is not upon artefacts, tools, or static traditions but the way individuals and groups use and evolve these traditional elements in their current context. An inclusive approach has been adopted, particularly within the work produced by the main UN body charged with cultural matters, UNESCO.⁶³

*[C]ulture...comprehends all that is inherited or transmitted through society...its individual elements are...diverse. They include not only beliefs, knowledge, sentiments and literature...but also the language or other system of symbols which are their vehicles. Other elements are the rules of kinship, methods of education, forms of government and all the fashions followed in social relations.*⁶⁴

Further definition is provided in the preamble to UNESCO’s Declaration on Cultural Diversity, which states that:

*[C]ulture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.*⁶⁵

There are also significant definitions contained in two Conventions established by UNESCO namely the Convention for the Safeguarding of the Intangible Cultural Heritage⁶⁶ (Cultural Heritage Convention) and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Cultural Diversity Convention).⁶⁷ The Cultural Heritage Convention, which has not been ratified by Ireland, defines intangible cultural heritage as,

62. Article 2(a) of the Fribourg Declaration on Cultural Rights. The working group who drafted the Fribourg Declaration consisted of academics and experts with a specialisation in minority rights from a wide number of universities worldwide.

63. UNESCO was founded on 16 November 1945. As defined by its Constitution its purpose is to “contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms.”

64. See Michel Leiris, *Race and Culture*, UNESCO, 1958, pp 20-21.

65. Para. 5 of the Preamble to the UNESCO Universal Declaration on Cultural Diversity, adopted by the 31st Session of the UNESCO General Conference on 2 November 2001.

66. The Cultural Heritage Convention was adopted by the 32nd Session of the UNESCO General Conference on 17 October 2003.

67. The Cultural Diversity Convention was adopted by the 33rd Session of the UNESCO General Conference on 20 October 2005.

[T]he practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.⁶⁸

The 2005 Cultural Diversity Convention states,

'Cultural diversity' refers to the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies. Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used.⁶⁹

These definitions illustrate that international human rights law and standards adopt an understanding of culture that is inclusive and of specific relevance to Travellers. These definitions of culture include nomadism as well as those cultures that centre on language or territory.

3. THE RELEVANCE OF MULTIPLE IDENTITIES

The goal of protection under the main international human rights instruments is not the preservation of a frozen "culture", but rather the ability of people to promote, express and enjoy their identity in community with other members of their community or ethnic group. At an everyday level, each person possesses multiple identities and can identify with many groups. Each person has a different gender, nationality, age, class and sexual orientation, and uses these identities in different contexts throughout their life.⁷⁰ Members of the Traveller community illustrate this in the manner in which they combine, for example, their Irish identity or their female identity with their identification of themselves as Travellers. There is increased emphasis on these overlapping identities.

An understanding of Traveller culture cannot therefore be static or limited to ideas of the "traditional Traveller". Rather, recognition of the right to enjoy cultural life must be based on the principle that every individual should be empowered to find their own cultural understandings. Given that the individual is the bearer of the right to enjoy cultural life, no minority member should be compelled against his or her will to adopt a particular cultural identity. The protections surrounding the right to enjoy cultural life are enforceable only when they are consistent with respect for the freedom and autonomy of individuals as well as fundamental human rights norms.⁷¹ Support for cultural expression and choice of all members of the Traveller community must therefore be respected, whether they are nomadic or seek other ways of enjoying their cultural life.

4. THE RELATIONSHIP BETWEEN THE RIGHT TO ENJOY CULTURAL LIFE AND OTHER HUMAN RIGHTS

At the Vienna World Conference on Human Rights 1993 it was confirmed that all human rights are considered to be "universal, indivisible and interdependent and interrelated".⁷² The Vienna Declaration and Programme of Action calls on the international community to treat human rights globally in a fair and equal manner giving different rights the same weight and emphasis.⁷³ The Vienna Declaration and Programme for Action contains references to the relationship between different sets of rights addressing for example the relationship between poverty and human rights.⁷⁴ The Vienna Declaration and Programme for Action calls on States to ensure that persons belonging to minorities may exercise fully and effectively all human rights and fundamental freedoms without any discrimination and in full equality before the law.⁷⁵

68. Article 2(1) of the Cultural Heritage Convention.

69. Article 4 of the Cultural Diversity Convention.

70. For an examination of debates relating to multiple identities and gender, see generally, Seyla Behabib, *Situating the Self: Gender, Community, and Post-modernism in Contemporary Ethics*, Routledge, New York, 1992.

71. For an examination of the debate in relation to cultural relativism and application of rights, see generally Chapter 5 entitled "Rights, Duties and Cultural Relativism" of Philip Alston, Henry Steiner, and Ryan Goodman, *International Human Rights Law in Context*, Oxford University Press, Oxford, 2007, .

72. World Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc A/CONF.157/23, 1993, at para. 5.

73. *Ibid.*, at para. 5.

74. *Ibid.*, at para. 25.

75. *Ibid.*, at para. 19.

Deriving from the principle of indivisibility it can be observed that the right to enjoy cultural life can be dependent upon the right of the individual to effectively enjoy other human rights without discrimination.

Equality before the law is a fundamental principle of human rights regardless of whether or not persons belong to an ethnic minority.⁷⁶ In its General Comment No. 23 on the Rights of Minorities, the Human Rights Committee emphasises that where the State is taking positive measures to protect the identity of the minority, such positive measures must respect the provisions of Articles 2(1) and 26 of the ICCPR, both as regards the treatment between different minorities and the treatment between the persons belonging to such minorities.⁷⁷ Therefore measures to protect the right to enjoy cultural life for minorities are only legitimate in so far as such measures are consistent with the principle of non-discrimination.⁷⁸ Will Kymlicka who is an academic expert in the rights of minorities considers that societal cultures and practices can be important aspects of a person's freedom.⁷⁹ However he has expressed the view that minority rights can be endorsed only in so far as they are consistent with the "respect for freedom or autonomy of individuals."⁸⁰

There has been a longstanding debate amongst experts in international human rights law on the potential differences that can emerge between cultural norms and international human rights standards.⁸¹ It is not within the remit of this research report to provide an in-depth examination of this debate. In broad terms those who assert the universal nature of human rights argue that such human rights should be available to all based on the universal value of human dignity.⁸² On the other hand those who assert the cultural relativist position regard universalism as a form cultural imperialism.⁸³ It is clear that human rights law allows persons to freely enjoy their cultural life, but only in so far as the enjoyment of cultural life does not undermine the equality and liberty of others.⁸⁴ True equality recognises the need to accommodate difference; however, this can not be done through the violation of the human rights of those within or outside a specific minority culture.⁸⁵

76. UN Human Rights Committee, *General Comment No. 23: The Rights of Minorities (Article 27)*, CCPR/C/21/Rev.1/Add.5 (1994), at para. 4.

77. *Ibid.*, para. 6.2.

78. *Ibid.*

79. Will Kymlicka, *Multicultural Citizenship*, Clarendon Press, Oxford, 1995, at p. 75. Will Kymlicka is the Canadian Research Chair in Political Philosophy in Queen's University, Kingston, Ontario, Canada.

80. *Ibid.*, p. 75.

81. For an examination of the debate in relation to cultural relativism and application of rights, see generally Chapter 5 entitled "Rights, Duties and Cultural Relativism" of Philip Alston, Henry Steiner, and Ryan Goodman, *International Human Rights Law in Context*, Oxford University Press, Oxford, 2007. See also Siobhán Mullally, *Gender, Culture and Human Rights: Reclaiming Universalism*, Hart Publishing, Oxford, 2006.

82. Henry Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals*, Oxford University Press, Oxford, 2007, at p. 519.

83. *Ibid.*, at p. 518.

84. Kymlicka, *Multicultural Citizenship*, Clarendon Press, Oxford, 1995, at p. 107.

85. *Ibid.*, at pp. 108-116.

III. THE RIGHT TO ENJOY CULTURAL LIFE UNDER INTERNATIONAL HUMAN RIGHTS LAW

1. INTRODUCTION

As noted above, the right to enjoy cultural life is enshrined in the legal conventions and other instruments of the UN, the Council of Europe and UNESCO. These rights are often expressed as broad statements, such as the duty of states to promote conditions which are favourable to cultural development. The broad statements provided in hard law legal conventions are then supplemented and given further detailed expression in the general comments and concluding observations of treaty monitoring bodies. This chapter provides an outline of the relevant international human rights law in this area.

2. THE RIGHT TO ENJOY CULTURAL LIFE UNDER THE UNITED NATIONS SYSTEM

a. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The first minority-specific legal obligations within the UN system were established under the ICCPR. The general nature of the legal duties contained in this instrument is outlined in Article 2 of the ICCPR. Article 2 requires the states parties to adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations. In its General Comment No. 31, the Human Rights Committee also states that "[a]ll branches of government...and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State Party."⁸⁶

Article 27 of the ICCPR provides that,

In those States, in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

This Article is phrased negatively and appears to oblige the state not to interfere with, rather than to actively protect, minorities' cultural life. However the UN Human Rights Committee, which is a body of independent experts responsible for monitoring implementation of the ICCPR, has stated in its General Comment No. 23 that:

[...]positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group.⁸⁷

In addition to the Human Rights Committee, a majority of experts and other international bodies have stated that Article 27 requires "active and sustained" measures by the state to protect minority cultures.⁸⁸ The former UN Special Rapporteur on Minorities of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Professor Francesco Capotorti, provided a clear endorsement of this interpretation in his widely cited study of the content of Article 27:

86. Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 2004, at para. 4.

87. Human Rights Committee, General Comment No. 23: The Rights of Minorities (Article 27), UN Doc. CCPR/C/21/Rev.1/Add.5 (1994), at para. 6.2.

88. Patrick Thornberry, *International Law and the Rights of Minorities*, Oxford University Press, Oxford, 1991, at pp. 180-181; Ian Brownlie, *Principles of Public International Law*, 7th ed. Clarendon Press, Oxford, 2008; Ryszard Cholewinski, "State Duty towards Ethnic Minorities: Positive or Negative?" (1998) 10(3) *Human Rights Quarterly*, pp. 344-371; Jelena Pejic, "Minority Rights in International Law" (1997) 19(3) *Human Rights Quarterly*, pp. 666-685.

It is hard to imagine how the culture and language of a group can be conserved without, for example, a special adaptation of the educational system of the country. The right accorded to members of minorities would quite obviously be purely theoretical unless adequate cultural institutions were established[...]only the effective exercise of rights set forth in Article 27 can guarantee observance of the principle of real, not only formal equality of persons belonging to minority groups. The implementation of these rights calls for active and sustained intervention by States.⁸⁹

b. OTHER UNITED NATIONS HUMAN RIGHT TREATIES

The right to enjoy and take part in cultural life is provided for in a number of other international human rights treaties ratified by Ireland including the ICESCR (Article 15) and CEDAW (Article 13). In addition, Article 30 of the CRC provides that,

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Furthermore, Article 29(1)(c) of the CRC provides that the education of the child should be directed towards the development of respect for the child's parents as well as his or her own cultural identity, language and values.

c. UNITED NATIONS DECLARATION ON THE RIGHTS OF PERSONS BELONGING TO NATIONAL OR ETHNIC, RELIGIOUS OR LINGUISTIC MINORITIES

The UN Minorities Declaration was adopted unanimously by the UN General Assembly in 1992.⁹⁰ While the Declaration is non-binding on states it is the only UN instrument dealing exclusively with minority rights and can be viewed as providing a statement of prevailing international consensus in the area. The Declaration specifically states that the provisions are inspired by Article 27 of the ICCPR. The Declaration lists all international instruments applicable to minorities and describes its purpose as "reaffirming" these principles.

Article 1 of the declaration provides that states:

1. [...] shall protect the existence of minorities and shall encourage conditions for the promotion of that identity[...]
2. [...] shall adopt appropriate legislative and other measures to achieve those ends.

Article 4(2) further provides that:

States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.

Thus the UN Minorities Declaration clearly endorses the importance of positive action by the state under Article 27 of the ICCPR. The positive duties contained in the UN Minorities Declaration require states to encourage favourable conditions for the expression of minority identity.⁹¹ In his interpretation of Article 27 of the ICCPR, Thornberry summarises the prevailing international consensus on what the "encouragement of conditions" involves as follows:⁹²

- Removal of legal obstacles to cultural development;
- Facilitating cultural development, including through the growth of the necessary institutions which underpin a flourishing culture;
- Respect for characteristics and contribution of minorities in the life of the State;

89. Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/Sub.2/384/Rev.1, at para. 217.

90. UN General Assembly Resolution UN GA Res. 47/135, *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, adopted at its 92nd plenary meeting on 18 December 1992.

91. Article 1 of the UN Minorities Declaration.

92. Patrick Thornberry, *International Law and the Rights of Minorities*, Oxford University Press, Oxford, 1991, at pp. 180-181.

- In appropriate cases, respect for association with traditional territories;
- The provision of State resources cannot be ruled out from among the provisions.

This list is borne out by the text of the Declaration and the accompanying commentary to the Declaration written by the head of the Working Group on Minorities, Asbjørn Eide. The commentary on the Declaration is a recognised source of interpretation for the Declaration's provisions and expressly endorses the need for positive duties:

*The Declaration on Minorities makes it clear that these rights often require action, including protective measures and encouragement of conditions for the promotion of their identity (art. 1) and specified, active measures by the State (art. 4).*⁹³

d. UNESCO CONVENTIONS

Under the UNESCO Cultural Heritage Convention, State Parties are placed under an obligation to take "necessary measures" to safeguard, and at the most basic level to identify and define intangible cultural heritage (Article 11). Ireland has not yet ratified this Convention. However, ratification could enhance the protections afforded to the Traveller community and the following brief summary illustrates the possible benefits of doing so. Each State Party is obliged to:

*[a]dopt a general policy aimed at promoting the function of the intangible cultural heritage in society, and at integrating the safeguarding of such heritage into planning programmes;*⁹⁴

*designate or establish one or more competent bodies for the safeguarding of the intangible cultural heritage present in its territory.*⁹⁵

Each State is also under an obligation, under Article 13(d), to:

*[a]dopt appropriate legal, technical, administrative and financial measures aimed at: transmission of [intangible cultural] heritage through forums and spaces intended for the performance or expression thereof.*⁹⁶

Article 14 provides for the recognition of, respect for and enhancement of intangible cultural heritage in society.⁹⁷ A right to participation is provided under Article 15 which provides for the "widest possible participation" of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and that States "involve them actively in its management". Under Part II of the Convention, the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage is established. This Committee compiles lists recognising certain cultural elements as subject to protection. The ratification of the Cultural Heritage Convention by Ireland would provide for a more comprehensive protection of the cultural rights of Travellers and would provide a useful forum for the examination of Traveller rights by an international committee of experts.

The second new instrument passed by UNESCO is the Convention on the Protection and Promotion of the Diversity of Cultural Expressions. This was passed on 20 October 2005 and was ratified by Ireland on the 22 of December 2006. The Preamble states that:

*cultural diversity creates a rich and varied world, which increases the range of choices and nurtures human capacities and values, and therefore is a mainspring for sustainable development.*⁹⁸

The Convention obliges states to incorporate culture as a strategic element in national and international development. The aims of the Convention include, *inter alia*:

93. Asbjørn Eide, *Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, E/CN.4/Sub.2/AC.5/1998/WP.1, at para. 33.

94. Article 13(a) of the Cultural Heritage Convention

95. Article 13(b) of the Cultural Heritage Convention

96. Article 13(d)(i) Cultural Heritage Convention

97. The Convention lays particular emphasis on education, with Article 14(c) placing states under an obligation to "promote education for the protection of natural spaces and places of memory whose existence is necessary for expressing the intangible cultural heritage."

98. *Cultural Diversity Convention*, at para. 3.

- a. to protect and promote the diversity of cultural expressions;
- b. to create the conditions for cultures to flourish and to freely interact in a mutually beneficial manner;
- c. to encourage dialogue among cultures with a view to ensuring wider and balanced cultural exchanges in the world in favour of intercultural respect and a culture of peace;
- d. to foster inter-culturality in order to develop cultural interaction in the spirit of building bridges among peoples;
- e. to promote respect for the diversity of cultural expressions and raise awareness of its value at the local, national and international levels;
- f. to reaffirm the importance of the link between culture and development for all countries [...].⁹⁹

Article 6 includes a general call for states to take measures to protect the diversity of cultural expressions. It provides instances of such measures including regulatory and public financing measures as well as encouraging non-profit organisations, public and private institutions to develop and promote cultural expression and activities.¹⁰⁰ The Convention mandates the promotion of cultural expression through the creation of an environment which allows individuals and social groups:

*to create, produce, disseminate, distribute and have access to their own cultural expressions, paying due attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples.*¹⁰¹

The UNESCO Universal Declaration on Cultural Diversity also states a number of fundamental principles to aid interpretation of the aforementioned UNESCO Convention. Article 2 is entitled "From cultural diversity to cultural pluralism" and provides that:

*In our increasingly diverse societies, it is essential to ensure harmonious interaction among people and groups with plural, varied and dynamic cultural identities as well as their willingness to live together. Policies for the inclusion and participation of all citizens are guarantees of social cohesion, the vitality of civil society and peace. Thus defined, cultural pluralism gives policy expression to the reality of cultural diversity. Indissociable from a democratic framework, cultural pluralism is conducive to cultural exchange and to the flourishing of creative capacities that sustain public life.*¹⁰²

Article 5 of the Declaration further states that cultural rights represent "an enabling environment for cultural diversity" and are therefore core to any processes of integration. The UNESCO instruments, with their focus on more modern concepts such as interculturality, intangible cultural heritage and expression, stress the lasting importance of culture in modern governance.

3. THE RIGHT TO ENJOY CULTURAL LIFE UNDER THE COUNCIL OF EUROPE SYSTEM

a. THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES

On 10 November 1994, the Committee of Ministers of the Council of Europe adopted the FCNM.¹⁰³ It is the first legally binding multilateral international legal instrument focused entirely on national minorities.¹⁰⁴

99. Article 1 of the Cultural Diversity Convention.

100. Article 6(2), Cultural Heritage Convention.

101. Article 7(1)(a) of the Cultural Heritage Convention.

102. Article 5 states that all "[c]ultural rights are an integral part of human rights, which are universal, indivisible and interdependent. The flourishing of creative diversity requires the full implementation of cultural rights...all persons are entitled to quality education and training that fully respect their cultural identity; and all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms." UNESCO, Universal Declaration on Cultural Diversity, adopted by 31st Session of the UNESCO General Conference on 2 November 2001.

103. The adoption of the FCNM was the direct result of the instruction given to the Committee of Ministers by the Vienna Summit of Heads of State and Government, held on 8 and 9 October 1993.

104. See Advisory Committee of the FCNM, Introduction to the Framework Convention for the Protection of National Minorities, H(1998)005 rev. 11, Council of Europe, Strasbourg, 2002.

The evaluation of the adequacy of the implementation of the FCNM by states is carried out by the Council of Europe Committee of Ministers, which is assisted by an Advisory Committee. States parties are required to file a report every five years containing comprehensive information on legislative and other measures taken to give effect to the principles of the FCNM.

An obligation to take positive measures to preserve and develop minority culture is set out in Article 5(1):

The Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve essential elements of their identity, namely their religion, language, traditions and cultural heritage.

Article 5(2) of the FCNM may allow for some limitation of the principles in Article 5(1) by allowing for a general integration policy. However, States are required under Article 5(2) to refrain from carrying out assimilationist practices. Indeed, reporting under the FCNM has illustrated that Article 5(1) requires the State to take positive steps to protect cultural identity.¹⁰⁵

4. SUMMARY OF APPLICABLE INTERNATIONAL HUMAN RIGHTS LAW

- In accordance with Article 27 of the ICCPR the Irish Government should not take measures that deny Travellers the right to enjoy their cultural life both individually and in community with other members of their group.
- Where necessary, the Irish Government should take positive measures to protect the identity of Travellers and their right to enjoy and develop their culture and language in community with other members of the group. Such positive measures should aim to promote the conditions necessary for Travellers to maintain and develop their culture and preserve their identity, including their traditions and cultural heritage.

¹⁰⁵ See generally the Advisory Committee on the FCNM, *First Opinion on the Ukraine ACFC/SR 99 14*, at para. 32 where the Committee found that providing for autonomy arrangements regarding a minority was insufficient without further definition and development of its content and reach.

IV. PARTICIPATION AND CONSULTATION MECHANISMS

1. INTRODUCTION

In the previous section the general standards relating to the protection of the right to enjoy cultural life under international human rights law were outlined. This section of the report will examine specific elements of the right to enjoy one's culture, in particular the right to participate effectively in decisions at a national and local level in cultural, social, economic and public life.

Minority participation is based on inclusive citizenship which consists of three main principles: the equality principle, the due process principle and the consent principle. The "equality principle" presumes that Government must treat similarly situated individuals alike. The "due process" principle requires the Government to deal fairly with all individuals who are affected by its actions. The "consent principle" emphasises that political membership must be grounded in a continuing two-way relationship between the government and citizen. Though each minority group will have differing levels of organisation and competence, it is important to recognise that persons belonging to a minority should have a role in the formulation, passage and implementation of public policies that affect them. This chapter will explore the international human rights standards relating to participation and the protection of minority groups.

2. THE UNITED NATIONS SYSTEM

In terms of the evolution of participatory rights, paragraph 7 of General Comment No. 23 on Article 27 of the ICCPR provides:

The enjoyment of [...] rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.

The first express mention of the concept of participation in a minority-specific instrument arose in the above-mentioned UN Minorities Declaration, Article 2(2) of which provides that:

Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.

This is elaborated further by Article 2(3):

Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong [...].

A number of Articles respond to the need to ensure that the interests and participatory rights of minorities influence national planning, in particular economic strategy:

States should consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development in their country.¹⁰⁶

Article 5(1) provides that "[n]ational policies and programmes shall be planned and implemented with due regard for the legitimate interests of persons belonging to minorities."

¹⁰⁶. Article 4(5) Minorities Declaration.

3. THE COUNCIL OF EUROPE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES AND OTHER STANDARDS

The FCNM contains important standards relating to inclusive decision-making, dialogue and process for persons belonging to a national minority. The key Article in this regard is Article 15 which states:

The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them.

Article 15 has implications for a wide number of fields in society which contrasts with the UN Minorities Declaration which limits participatory rights to political matters and matters particularly affecting minorities. Dr. Marc Weller, Director of the European Centre for Minority Issues, argues that "it represents a vision for governance and life in modern, diverse societies" with its goal being "genuine integration and co-governance".¹⁰⁷ Effective participation is a unifying theme across the catalogue of rights, and states must focus upon fair decision making and the effect which majority-based democracy has on minorities. Article 15 obliges states to include and respect the interests of minorities in decision making. Paragraph 80 of the explanatory report of the FCNM provides examples of some measures to promote this:

- *[c]onsultation with [national minorities], by means of appropriate procedures and, in particular, through their representative institutions, when Parties are contemplating legislation or administrative measures likely to affect them directly;*
- *involving these persons in the preparation, implementation and assessment of national and regional development plans and programmes likely to affect them directly;*
- *undertaking studies, in conjunction with these persons, to assess the possible impact on them of projected development activities;*
- *effective participation of persons belonging to national minorities in the decision-making processes and elected bodies both at national and local levels.*¹⁰⁸

The analysis of state reporting under Article 15 of the FCNM demonstrates that the Advisory Committee has on some occasions questioned whether a simple advisory function for minority consultative bodies suffices. Dr. Marc Weller¹⁰⁹ infers that Article 15 is not satisfied if the consultative bodies are made up of a majority (or exclusively) of public officials and notes that Slovakia was commended for increasing minority representation to a majority.¹¹⁰ The Advisory Committee Opinions also indicate that beyond simply setting up these bodies, the state must ensure that they can effectively function by providing for timely contact with parliamentary committees and Government departments, early consultation and adequate resources.

Across the relevant Council of Europe instruments, there is clear recognition of the particular difficulties experienced in the implementation of cultural rights at the *local* level. A Recommendation of the Committee of Ministers of the Council of Europe in 2004 recognised the need for "a coordinated, coherent system of legal safeguards for their freedom of movement".¹¹¹ The Congress of Local and Regional Authorities of Europe in Resolutions 11 and Resolution 44 paid particular attention to local exclusion. This suggested the establishment of national centres for mediation and dialogue between the authorities and Roma/Gypsy communities as well as for a "solidarity covenant" (an agreement of fundamental principles) between Roma/ Gypsies and local or regional authorities with the participation of international bodies. Another innovative provision was the encouragement of the signing of quality contracts or charters between local authorities and Travellers. As previously noted, the recommendations and resolutions of the Parliamentary Assembly and the Congress of Local and Regional Authorities of Europe are not legally binding on Member States, but their proposed possible solutions may be worthy of exploration to secure compliance with the obligations of the FCNM.

107. Marc Weller, "Workshop 1: Participation" in *Filling the frame: 5 years of monitoring the Framework Convention for the Protection of National Minorities*, Council of Europe, Strasbourg, 2004, at pp. 70-71.

108. Council of Europe, *Framework Convention for the Protection of National Minorities and Explanatory Report H(1995)010*, at para. 80.

109. Marc Weller, "Workshop 1: Participation" in *Filling the frame: 5 years of monitoring the Framework Convention for the Protection of National Minorities*, Council of Europe, Strasbourg, 2004, at pp. 70-71.

110. Advisory Committee on the Framework Convention for the Protection of National Minorities, *First Opinion on Slovakia, ACFC/INF/OP/I (2001)001*, adopted on 22 September 2000, at para. 46.

111. Council of Europe Committee of Ministers, *Recommendation Rec (2004) 14 of the Committee of Ministers to member states on the movement and encampment of Travellers in Europe*, adopted on 1 December 2004 at the 907th meeting of the Ministers' Deputies.

4. THE LUND RECOMMENDATIONS OF THE ORGANISATION FOR SECURITY AND CO-OPERATION IN EUROPE

The concept of participation received its most detailed examination in the 1999 Lund Recommendations on the Effective Participation of National Minorities in Public Life (Lund Recommendations).¹¹² These recommendations are not legally binding but are an important source in that they summarise existing arrangements and identify best practice. The Lund Recommendations were drafted following the call of the OSCE High Commissioner for National Minorities upon the Foundation on Inter-Ethnic Relations, in co-operation with the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, to bring together a group of internationally recognised independent experts to elaborate recommendations and outline alternatives on the right of national minorities to effective participation in line with the relevant international standards.¹¹³

Under the general principles section of the Lund Recommendations, it is stated that when creating institutions and procedures to enable minority participation, "both substance and process are important" and that:

*Governmental authorities and minorities should pursue an inclusive, transparent and accountable process of consultation in order to maintain a climate of confidence.*¹¹⁴

The obligation to foster participation also applies at a local level so that the structure and decision-making processes of regional and local authorities should be "transparent and accessible".¹¹⁵ Consultative bodies should also be set up "within appropriate institutional frameworks to serve as channels for dialogue between governmental authorities and national minorities."¹¹⁶ The Recommendations provide that such bodies might also include special purpose committees for addressing such issues as housing, education, and culture.

The composition of such bodies should contribute to more effective communication and should practically advance minority interests. In terms of operating mandates, these bodies should be entitled to raise issues with decision makers, prepare recommendations, formulate legislative and other proposals, monitor developments and provide views on proposed governmental decisions that may directly or indirectly affect minorities. Governmental authorities should consult these bodies regularly regarding minority-related legislation and administrative measures in order to contribute to the satisfaction of minority concerns and to the building of confidence.¹¹⁷

Recommendation 18 lists education, culture and other matters important to minorities as "the issues most susceptible to regulation by these arrangements". Recommendation 20 provides that solutions should "correspond to the specific historical and territorial circumstances of national minorities". The need to take into account past difficulties is particularly relevant for the relationship between the Traveller community and local authorities.

Lund Recommendation 22 states that arrangements for promoting participation "may be determined by law or other appropriate means". This underlines that stability is required in order to provide some security and continuity for those participating in these bodies, especially persons belonging to national minorities. This is further underlined by Recommendation 24 which "...requires established channels of consultation for the prevention of conflicts and dispute resolution, as well as the possibility of ad hoc or alternative mechanisms when necessary." Concrete examples provided by the Recommendation include "[j]udicial resolution of conflicts, such as judicial review of legislation or administrative actions...additional dispute resolution mechanisms, such as negotiation, fact finding, mediation, arbitration, an ombudsman for national minorities, and special commissions, which can serve as focal points and mechanisms for the resolution of grievances about governance issues."

112. *The Lund Recommendations on the Effective Participation of National Minorities in Public Life developed from a conference of all OSCE States and relevant international organisations entitled: 'Governance and Participation: Integrating Diversity' which was held in Locarno, Switzerland, in October 1998. As a follow-up to the Locarno Conference the High Commissioner for National Minorities called upon the Foundation on Inter-Ethnic Relations, in co-operation with the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, to bring together a group of internationally recognised independent experts to elaborate recommendations and outline alternatives, in line with the relevant international standards. See Foundation of Inter-Ethnic Relations, The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note, Foundation on Inter-Ethnic Relations, Lund, 1999, at pp. 3-4.*

113. *Ibid.*

114. *Ibid.*, at Recommendation 5.

115. *Ibid.*, at Recommendation 11.

116. *Ibid.*, at Recommendation 12.

117. See generally Lund Recommendations 12 and 13.

5. ASSESSMENT BY INTERNATIONAL TREATY-MONITORING BODIES OF IRELAND'S PARTICIPATION AND CONSULTATION ARRANGEMENTS

a. HIGH LEVEL GROUP ON TRAVELLER ISSUES

The arrangements for Traveller participation have been re-shaped following the formation of the High Level Group on Traveller Issues in 2003. Previously the Task Force Report on the Travelling Community was one of the main forums for Traveller participation. The High Level Group on Traveller Issues is a cross-departmental group established under the aegis of the Cabinet Sub-Committee on Social Inclusion. The aim of the High Level Group on Traveller Issues is to find ways of securing better outcomes for Travellers and greater supervision across government departments for Traveller specific measures.¹¹⁸ The High Level Group on Traveller Issues is chaired by an Assistant Secretary to the Department of Justice and comprises members of the Senior Official's Group on Social Inclusion and other senior public servants with key responsibility for the delivery of Traveller specific services.¹¹⁹ The High Level Group on Traveller Issues has issued one report in 2006 which contains a number of recommendations including the recommendation that a coordinated interagency approach to the delivery of services and supports for Travellers is a key way of enhancing service delivery.¹²⁰ The report further identifies as a priority issue effective consultation between Travellers, Traveller organizations and statutory bodies to support the development of an interagency approach and to improve communication at national, regional and local level.¹²¹

Members of the Traveller community are not represented on the High Level Group on Traveller Issues and this has been the subject of criticism by international treaty monitoring bodies. In particular the Advisory Committee on the FCNM observed in its second opinion on Ireland in 2006 that while it recognises the commitment that a Ministerial-level group demonstrates, it regrets that the High Level Group on Traveller Issues has "no members from the Traveller community [and] has carried out its work with limited direct input from, and involvement of, the main non-governmental organisations dealing with Traveller issues."¹²² The Advisory Committee highlighted the fact that Traveller organisations regard the composition of the High Level Group on Traveller Issues as a step back in terms of participation of Travellers.¹²³ While the Advisory Committee approved the role of the High Level Group on Traveller Issues in inter-departmental dialogue, it stressed the importance of the principle that where the group addresses "the formulation or prioritization of key policy initiatives on Travellers, it is essential that the involvement of Traveller organisations, from local to the central level, is ensured more comprehensively than is currently the case." The Advisory Committee concluded as follows:

*Bearing in mind the principles of Article 15 of the Framework Convention, it is instrumental that the role of civil society actors representing Travellers is not limited to the provision of service, but involves also critical input to the decision-making processes and to the evaluation of policies and practices. The importance of this principle is accentuated by the low number of Travellers in the public bodies involved in these processes, and it should be kept in mind also in the development of policies in relation to new minority groups, such as Roma.*¹²⁴

In May 2008, Thomas Hammarberg the Council of Europe Commissioner for Human Rights released his report on his visit to Ireland in 2007.¹²⁵ In that report he noted that the "level of participation of Travellers in elected bodies remains low at all levels, while Travellers are not always represented on the key bodies which implement public policies on Travellers, such as the High Level Group on Traveller Issues."¹²⁶ The Commissioner stated that in order to promote participatory governance and to produce sustainable results, it is especially important that the authorities work closely with Travellers when preparing, implementing and monitoring policies and programmes designed for Travellers.¹²⁷

118. *Report of the High Level Group on Traveller Issues, March 2006, pp. 14-15.*

119. *Ibid.*

120. *Ibid.*, at p. 4.

121. *Ibid.*

122. *Advisory Committee on the FCNM, Second Opinion on Ireland adopted on 6 October 2006, ACFC/OPII (2006)007, Council of Europe, Strasbourg, 2006, at para. 109.*

123. *Ibid.*

124. *Ibid.*, at para. 110.

125. *Report by the Commissioner for Human Rights Mr. Thomas Hammarberg on his visit to Ireland, CommDH (2008)9, Council of Europe, Strasbourg 30 April 2008.*

126. *Ibid.*, at para. 93.

127. *Ibid.*, at para. 96.

The report of the Commissioner made the following recommendation:

*The Commissioner urges the Irish authorities to adopt a Traveller inclusive approach in all policy and coordination bodies dealing specifically with Traveller-related issues both at national and local level, including the High Level Group on Traveller Issues.*¹²⁸

In its recent examination of Ireland's Third Periodic Report under the ICCPR the Human Rights Committee has expressed concern that members of the Traveller community are not represented on the High Level Group on Traveller Issues and has recommended that representatives from the Traveller community should always be included.¹²⁹

b. NATIONAL TRAVELLER MONITORING AND ADVISORY COMMITTEE

The Committee to monitor and implement the recommendations of the Task Force Report has been reconstituted as the National Traveller Monitoring and Advisory Committee. The National Traveller Monitoring and Advisory Committee no longer monitors the recommendations of the Task force Report. The Terms of Reference of National Traveller Monitoring and Advisory Committee are as follows:

1. *To serve as a forum for consultation on current issues of national importance affecting the Travelling Community.*
2. *To identify issues of national importance to the Traveller Community which might not be dealt with adequately through existing mechanisms.*
3. *To suggest appropriate responses to issues identified under 2 above, in cooperation with relevant state agencies and other stakeholders.*
4. *To monitor developments in the position of Travellers in Irish society generally and with particular reference to issues identified at 2 above.*
5. *To report to the Minister for Justice, Equality and Law Reform, every two years, identifying key issues of ongoing concern.*

The Department of Justice has stated that the function of the National Traveller Monitoring and Advisory Committee is complementary to the High Level Group on Traveller Issues and it will provide a forum where the views of a wide cross-section of stakeholders can be expressed. It represents an important mechanism for securing Traveller participation with Traveller organizations and a number of individual Traveller representatives represented on this Committee. The Department of Justice has stated that it will have "a cross-cutting role and will address issues other than those being addressed in existing Departmental Committees."¹³⁰ It remains to be seen what impact the work of the National Traveller Monitoring and Advisory Committee will have.

c. CONSULTATION MECHANISMS FOR ACCOMMODATION

The National Traveller Accommodation Consultative Committee, which is provided for under Sections 19 and 20 of the Housing (Traveller Accommodation) Act 1998, has been reconvened since early 2007.¹³¹ The National Traveller Accommodation Consultative Committee has twelve members who are appointed by the Minister for Environment, Heritage and Local Government following receipt of nominations from specified bodies. It includes local authority members and officials, representatives of Traveller organisations and officials from Government Departments.¹³² A review of the operation of the Housing (Traveller Accommodation) Act 1998 by the National Traveller Accommodation Consultative Committee, published in 2004, stated that the National Traveller Accommodation Consultative Committee provides a useful structure for consultation and debate on Traveller accommodation and related issues and that the opportunity for Government Departmental officials, local authority members and officials, Traveller representatives, and other experts in Traveller issues to discuss and advise the Minister on matters regarding Traveller accommodation was significant.¹³³

128. *Ibid.*

129. *Concluding Observations of the Human Rights Committee on Ireland's Third Periodic Report, 2008 CCPR/C/IRL/CO/3, at para. 23.*

130. *Statement from the Department of Justice, Equality and Law Reform, Press Release 5 April 2007.*

131. *Department of Environment, Press release 31/01/07, "Appointment of the National Traveller Accommodation Consultative Committee".*

132. *Sections 19 and 20 of the Housing (Traveller Accommodation) Act 1998.*

133. *National Traveller Accommodation Consultative Committee, Review of the Operation of the Housing (Traveller Accommodation) Act 1998: Report of the NTACC to the Minister for Housing and Urban Renewal, NTACC, Dublin, 2004, at paras 7.4.1-7.4.2.*

However, concerns were expressed by Traveller representatives regarding the inability of the National Traveller Accommodation Consultative Committee to influence the implementation of Traveller accommodation programmes.¹³⁴ The National Traveller Accommodation Consultative Committee has no specific powers to influence implementation of Traveller Accommodation Plans as it acts in an advisory capacity to the Minister only. The reconvened National Traveller Accommodation Consultative Committee is currently examining the issue of Traveller participation in Local Traveller Accommodation Consultative Committees.¹³⁵ It should be noted that during the review of the 1998 Act the proposal for a specific Traveller Accommodation Agency was put forward by Traveller organisations to address the weaknesses in the effectiveness of the National Traveller Accommodation Consultative Committee.¹³⁶ However, this proposal has not been adopted.

The Local Traveller Accommodation Consultative Committees were established under Sections 21 and 22 of the Housing (Traveller Accommodation) Act 1998. The local authorities appoint these local committees to advise on the provision and management of accommodation for Travellers.¹³⁷ The Local Traveller Accommodation Consultative Committees are made up of members of the appointing local authority, officials of the local authority, representatives of local Travellers and Traveller bodies and one member from each relevant housing authority within the administrative county council, where the Local Traveller Accommodation Consultative Committee has been appointed by the council of a county.¹³⁸ The number of members of a Local Traveller Accommodation Consultative Committee who are members or officials of a local authority may not exceed one half of the membership of the Local Traveller Accommodation Consultative Committee; and the number of members who are representatives of local Traveller bodies may not be less than one quarter of the membership of the committee.¹³⁹

d. POLITICAL REPRESENTATION OF TRAVELLERS

The level of political representation amongst members of the Traveller community at both local and national level remains extremely low. A number of international treaty-monitoring bodies have expressed concern on this issue and have made recommendations in this regard. In particular, the Committee on the Elimination of Racial Discrimination has recommended that the authorities "consider adopting affirmative action programmes to improve the political representation of Travellers, particularly at the level of Dáil Éireann and/ or Seanad Éireann."¹⁴⁰

In May 2008, the Council of Europe Commissioner for Human Rights noted that the level of participation of Travellers in elected bodies remains low at all levels. The Commissioner stated that he "encourages further efforts to involve Travellers in political decision-making. Traveller communities should be adequately represented in local councils, and the possibility of reserving a specific seat for the Traveller community in the Irish parliament, perhaps in the Seanad, would merit serious consideration".¹⁴¹

6. NATIONAL ACTION PLAN AGAINST RACISM

The National Action Plan against Racism (NPAR) committed the State to 'combat racism and to develop a more inclusive, intercultural society in Ireland.' The NPAR identifies five principles which are core to the State's intercultural policy:

- Participation;
- Recognition;
- Accommodation of diversity in service provision;
- Economic inclusion; and
- Effective protection and redress against racism.

134. *Irish Traveller Movement, Lost Opportunity? A Critique of Local Authority Traveller Accommodation Programmes, Summary of Concerns and Recommendations, ITM, Dublin, 2001, at p. 5.*

135. *See generally National Traveller Accommodation Consultative Committee, Consultation Guidelines for Travellers – specific accommodation project.*

136. *Irish Traveller Movement, Lost Opportunity? A Critique of Local Authority Traveller Accommodation Programmes, Summary of Concerns and Recommendations, ITM, Dublin, 2001, at p. 6.*

137. *Section 21(1) of the Housing (Traveller Accommodation) Act 1998.*

138. *Section 22(1) of the Housing (Traveller Accommodation) Act 1998.*

139. *Ibid.*

140. *Concluding Observations of the Committee on the Elimination of Racial Discrimination on, Ireland, CERD/C/IRL/CO/2, at para. 22. "Dáil Éireann" refers to the Irish parliament and "Seanad Éireann" refers to the Irish Senate.*

141. *Report by the Commissioner for Human Rights Mr. Thomas Hammarberg on his visit to Ireland, CommDH (2008)9, Council of Europe, Strasbourg, 2008, at para. 96.*

142. *Department of Justice, Planning for Diversity - the National Action Plan against Racism 2005-2008, Department of Justice, Dublin, at p. 27.*

143. *Ibid., p. 27.*

Racism against Travellers and the particular issues that impact upon Travellers have been recognised in the plan. Under some of the key principles a number of objectives have been identified that specifically relate to Travellers, including:

- Service provision generally: develop targeted initiatives focussing on access to key public services for Travellers, refugees and migrants;¹⁴⁴
- Service provision in education: enhance access and education service delivery for Travellers;¹⁴⁵
- Service provision in accommodation: address housing related inequalities that impact on cultural and ethnic minorities;¹⁴⁶
- Service provision in accommodation: ensure greater progress is made in the implementation of the local authority Traveller Accommodation Programmes; ¹⁴⁷
- Service provision in administration of Justice: develop targeted intercultural strategies focussing on the inclusion of Travellers;¹⁴⁸
- Participation: enhance the participation of cultural and ethnic minorities in community and local development.¹⁴⁹

In its Second Opinion on Ireland, the Advisory Committee on the FCNM praised the NPAR but concluded that the goals of the NPAR had "not fully penetrated into the society at large".¹⁵⁰ This statement was supported by the reporting system of the National Consultative Committee on Racism and Interculturalism in 2005 which illustrated that "manifestations of racism and intolerance towards minorities continue to be a problem in Ireland".¹⁵¹

The NPAR, which was launched in January 2005, comes to an end in December 2008 and it is unclear what mechanisms will be put in place to follow up on it, in particular on the measures that focus on Travellers in NPAR. Much of the current focus of Government policy on racial discrimination has been on new communities in Ireland. The recently established Office of Integration will have responsibility for anti-racism measures. However, it does not define Travellers as forming part of its remit. Therefore, there is a real concern that progress made during the NPAR will not be built upon. While there are many different issues affecting newcomers to Ireland which do not overlap with Travellers, there are also many issues of common concern. These issues of common concern, including combating racism, have not been adequately spelt out in a common strategy. Travellers need to be firmly embedded in intercultural and anti-racism strategies.

7. THE ROLE OF THE MEDIA IN INTERCULTURAL SOCIETY

The role of and access to the media is particularly important in shaping perceptions and plays a key role in promoting interculturalism and anti-racism.

Article 9 of the FCNM provides that states shall ensure that persons belonging to a national minority will not be discriminated against in their access to the media. Furthermore, within the framework of their legal systems, states are required to adopt adequate measures in order to facilitate access to the media for persons belonging to national minorities and in order to promote tolerance and permit cultural pluralism.¹⁵²

The Council of Europe's Committee of Ministers Recommendation *On the Media and the Promotion of a Culture of Tolerance* provides an aid to the interpretation of Article 9 of the Framework Convention. Article 2 of this recommendation calls upon the media to pay particular attention to:

- *reporting factually and accurately on acts of racism and intolerance;*
- *reporting in a sensitive manner on situations of tension between communities;*
- *avoiding derogatory stereotypical depiction of members of cultural, ethnic or religious communities in publications and programme services;*
- *treating individual behaviour without linking it to a person's membership of such communities where this is irrelevant;*
- *depicting cultural, ethnic and religious communities in a balanced and objective manner and in a way which also reflects these communities' own perspectives and outlook;*

144. *Ibid.* p. 31.

145. *Ibid.* at p. 32.

146. *Ibid.* at p. 33.

147. *Ibid.*

148. *Ibid.* at p. 131.

149. *Ibid.* at p. 145.

150. *Advisory Committee on the FCNM, Second Opinion on Ireland adopted on 6 October 2006, ACFC/OPII (2006)007, Council of Europe, Strasbourg, 2006, at para. 68.*

151. *Ibid.*, at para. 67.

152. *Article 9 of the Framework Convention for the Protection of National Minorities.*

- alerting public opinion to the evils of intolerance;
- deepening public understanding and appreciation of difference;
- challenging the assumptions underlying intolerant remarks made by speakers in the course of interviews, reports, discussion programmes, etc;
- considering the influence of the source of information on reporting
- the diversity of the workforce in the media enterprises and the extent to which it corresponds to the multi-ethnic, multicultural character of its readers, listeners or viewers.¹⁵³

In its most recent opinion on Ireland, the Advisory Committee on the FCNM found that “[r]eporting based on, and promoting, negative stereotypes concerning minorities continues in some sectors of the Irish media”, instancing in particular the reporting of criminal suspects’ ethnic background.¹⁵⁴ The Advisory Committee welcomed the steps taken towards the establishment of a Press Council and stated that it looked forward to the preparation of a Press Code of Conduct, including standards in dealing with concerns relating to minority reporting, and complaint procedures.¹⁵⁵

The new Press Code of Practice provides under Principle 8 that:

Newspapers and periodicals shall not publish material intended or likely to cause grave offence or stir up hatred against an individual or group on the basis of their race, religion, nationality, colour, ethnic origin, membership of the travelling community, gender, sexual orientation, marital status, disability, illness, or age.

It is notable that membership of the Traveller community was not originally contained in this list of the grounds for incitement to hatred. The Press Code of Conduct was subsequently amended following a campaign initiated by Pavee Point on this issue. In pursuance of its statutory functions the IHRC also wrote to the Press Council recommending that the Code of Practice be amended to include “membership of the Traveller community” in its definition of incitement to hatred. It remains to be seen how effective the Press Code of Conduct will be in preventing the promotion of negative stereotypes concerning minorities in the Irish media.

8. SUMMARY OF APPLICABLE INTERNATIONAL HUMAN RIGHTS LAW

International human rights law provides that persons belonging to minorities have the right to participate effectively in decisions at a national, regional and local level concerning the minority to which they belong and that appropriate measures and structures should be in place to facilitate such participation.

9. SUMMARY OF OBSERVATIONS

- The extremely low level of political participation of Travellers across all political levels is a matter of concern. Positive measures should be put in place to increase Traveller political participation, including possibly a reserved Seanad seat.
- There are a number of important mechanisms that facilitate Traveller participation in Ireland including the National Traveller Monitoring and Advisory Committee and, in the area of accommodation, the National Traveller Accommodation Consultative Committee and the Local Traveller Accommodation Consultative Committee. However, Travellers are generally not consulted adequately and do not participate effectively in the formulation of the broad range of law and policy that can have a particular impact upon them. Improved mechanisms should be put in place to ensure effective consultation and participation by members of the Traveller community, in particular representatives from community and voluntary organisations, in the formulation of the laws and policies that affect them.
- Various international treaty-monitoring bodies have expressed concern in relation to the lack of Traveller representation on the High Level Group on Traveller Issues. The High Level Group on Traveller Issues should actively consult on an ongoing basis with Traveller representatives. Any future mechanisms that are established to review either the formulation of policy or its operation in practice in relation to Travellers should always include Traveller representatives.

153. Council of Europe Committee of Ministers, Recommendation No. R (97) 21 of the Committee of Ministers On the Media and the Promotion of a Culture of Tolerance, adopted by the Committee of Ministers at the 607th meeting of the Ministers’ Deputies on 30 October 1997.

154. At para. 83 of its second opinion on Ireland the Advisory Committee expressly mentioned a case where “[t]here were disconcerting examples of this in 2005, when manslaughter of a Traveller led some press to defend the killing and to label Travellers en masse as criminals.”

155. Advisory Committee on the FCNM, Second Opinion on Ireland adopted on 6 October 2006, ACFC/OPII (2006)007, Council of Europe, Strasbourg, 2006, at 82.

V. SELF IDENTIFICATION AND RECOGNITION AS AN ETHNIC MINORITY

1. INTRODUCTION

The Report of the Task Force on the Travelling Community stated that “Traveller culture needs to be recognised as the foundation for the other sections of the Report.”¹⁵⁶ This report signalled a shift in State policy measures towards some recognition of the need to protect Traveller culture and identity. The Second Report of the Committee to Monitor and Implement the Recommendations of the Task Force Report on the Travelling Community provided a broad assessment of the characteristics and vulnerabilities of the Traveller community’s identity:

Even at its narrowest it is possible to argue that Traveller culture and identity is important not only to the Traveller community but also to the settled community...The strengths of Traveller culture are also its weaknesses. Traveller’s nomadic tradition and lack of formal institutions means that their cultural identity and heritage can be particularly fragile[...]As a result Travellers may require additional safeguards to protect and preserve their identity and heritage[...]

Denial of Travellers’ cultural identity exacerbates Travellers’ daily experience of exclusion. Travellers’ nomadic tradition is equated with vagrancy by some settled people; Traveller crafts and Traveller language is not recognised; Traveller values, beliefs and customs are dismissed or ignored; the Traveller economy and work patterns are not acknowledged and, if they are, are denigrated. Accordingly, without respect for Traveller culture, progress in areas such as health, accommodation or education could be undermined. Respect for Traveller culture is also essential to nurture the development of Traveller children.¹⁵⁷

One of the prominent issues concerning the right to enjoy cultural life for Travellers in recent years has been the position adopted by Government that Travellers do not form an “ethnic group”. The IHRC has raised this position as an issue of concern for the protection of the human rights of the Traveller community on a number of occasions.¹⁵⁸ In addition, the Equality Authority has carried out a comprehensive report on this issue.¹⁵⁹

2. RELEVANT INTERNATIONAL HUMAN RIGHTS LAW

Under the UN system, the Committee on the Elimination of Racial Discrimination has highlighted the importance of minority self-identification in its General Recommendation VIII:

...identification shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned.¹⁶⁰

In General Recommendation XXIV the CERD Committee further provides that:

[A] number of States parties recognize the presence on their territory of some national or ethnic groups or indigenous peoples, while disregarding others. Certain criteria should be uniformly applied to all groups, in particular the number of persons concerned, and their being of a race, colour, descent or national or ethnic origin different from the majority or from other groups within the population.¹⁶¹

156. Report of the Task Force on the Travelling Community, Stationery Office, Dublin, 1995, at p. 20.

157. Second Progress Report of the Committee to Monitor and Co-Ordinate the Implementation of the Recommendations of the Task Force Report on the Travelling Community, Department of Justice, Dublin, 2005, at paras 2.2-2.3.

158. IHRC, Travellers as an ethnic minority under the Convention on the Elimination of Racial Discrimination- A Discussion Paper’, March 2004; IHRC Submission to the Committee on the Elimination of All Forms of Racial Discrimination, March 2005 pp. 48-49; IHRC Submission to the Human Rights Committee on the Examination of Ireland’s Third Periodic Report, March 2008, pp. 49-52.

159. Equality Authority, Traveller Ethnicity: An Equality Authority Report, Equality Authority, Dublin, 2006.

160. Committee on the Elimination of Racial Discrimination, General Recommendation VIII: Membership of Racial or Ethnic Groups based on Self-Identification, UN Doc. A/45/18 at 79 (1991).

161. Committee on the Elimination of Racial Discrimination, General Recommendation XXIV: Information on the demographic composition of the population, UN Doc. A/54/18, Annex V at 103 (1999), at para. 2.

The Human Rights Committee in its General Comment No. 23 has stated that:

*[t]he existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria.*¹⁶²

3. THE POSITION OF THE IRISH GOVERNMENT

Ireland's First Periodic Report under the ICCPR, submitted in 1992, referred to the "Travelling community" and noted that some Travellers' bodies claimed that they constituted a distinct ethnic group. The Government queried the basis for this, stating that Travellers were not a distinct group in terms of religion, language or race. The Government did not mention the question of "ethnic origin". In Ireland's First and Second Combined Periodic Report under the CERD, submitted in 2004, the Government for the first time explicitly denied that Travellers constitute a distinct group in terms of "ethnic origin", as well as "race, colour, descent or national [...] origin". Among other things, this position would appear to take Travellers outside the ambit of the definition of racial discrimination in the Convention. Somewhat inconsistently, the report goes on to say that the Government is committed to extending to Travellers all the protections afforded by CERD. The report states that, "[t]he Government's view is that Travellers do not constitute a distinct group from the population as a whole in terms of race, colour, descent or national or ethnic origin".¹⁶³

In the section of the Government Report under CERD which records NGO concerns about the characterisation of Travellers, the Government states that "[t]o define Travellers as an ethnic minority would not entitle Travellers to any additional rights or protections."¹⁶⁴

4. ASSESSMENT BY INTERNATIONAL HUMAN RIGHTS BODIES OF THE QUESTION OF ETHNICITY AND TRAVELLERS

a. THE UNITED NATIONS

From the perspective of its international human rights obligations relating to intercultural dialogue and participation, the Government decision is unnecessarily restrictive. International human rights law mandates a decision-making process which is not unilateral and which is based on objective criteria.

In its concluding comments regarding the Irish Government's first report under CERD in which the Government denied that the Traveller community represents an ethnic minority, the Committee stated,

*...the Committee expresses concern at the State party's position with regard to the recognition of Travellers as an ethnic group. The Committee is of the view that the recognition of Travellers as an ethnic group has important implications under the Convention.*¹⁶⁵

The Committee welcomed the "open position" of the Government delegation and it encouraged the State to work more concretely towards recognising the Traveller community as an ethnic group.

In its examination of Ireland's Third Periodic Report in July 2008, the Human Rights Committee expressed concern that the Irish authorities do not intend to recognise the Traveller community as an ethnic minority and recommended that the State "should take steps to recognise Travellers as an ethnic minority group".¹⁶⁶

162. Human Rights Committee, General Comment No. 23: The Rights of Minorities (Article 27), UN Doc. CCPR/C/21/Rev. 1/Add.5, at para. 5.2.

163. Concluding Observations of the Committee on the Elimination of Racial Discrimination: Ireland, 14/04/2005, CERD/C/IRL/CO/2 (2005), at para. 27.

164. *Ibid.*, at para. 393.

165. *Ibid.*, at para. 20.

166. Concluding Observations of the Human Rights Committee on Ireland's Third Periodic Report, 2008 CCPR/C/IRL/CO/3, at para. 23.

b. COUNCIL OF EUROPE SYSTEM

(i) FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES

The Advisory Committee on the FCNM has generally aimed at preserving the Framework Convention's openness rather than at proposing its own definition of national (or ethnic) minority. This may be seen as a pragmatic decision rather than an attempt to deny the relevance of express recognition of minorities. The Advisory Committee has regularly stated that the instrument should not be a source of unjustified distinctions. In Ireland's First Report under the FCNM in 2001, Travellers were described in terms that brought them clearly within the definition of an ethnic minority used in the UK Race Relations Act, 1976. Despite denying that Travellers formed a distinct group in terms of religion, language or race, the Government went on to discuss Travellers' distinctive culture and long shared history:

*Their history, cultural values, language (Cant), customs and traditions make them a self-defined group, and one which is recognisable and distinct. The Traveller community is one whose members, like the Gypsies in other countries, travelled from place to place in pursuit of various different traditional vocations. Despite their nomadic origins and tendencies, the majority of the Traveller community now live in towns and cities. Their culture and way of life, of which nomadism is an important factor, distinguishes Travellers from the sedentary (settled) population. While Travellers do not constitute a distinct group from the population as a whole in terms of religion, language or race, they are, however, an indigenous minority who have been part of Irish society for centuries. The Government fully accepts the right of Travellers to their cultural identity, regardless of whether they may be described as an ethnic group or national minority.*¹⁶⁷

In Ireland's Second Report (2005) under the FCNM, the Government expressly stated that Travellers were not ethnically different from the majority of Irish people.¹⁶⁸ As the term used in the Convention is "national" and not "ethnic" minority the Government statement did not impact on the continuing application of the FCNM to the Traveller community. Nevertheless, the Advisory Committee noted that the Government statement was "regrettable" and found that the decision did not meet the Government's obligations to ensure the institution of intercultural dialogue,

*Such a conclusion [denying ethnicity] appears to be, at best, premature, bearing in mind, inter alia, that there are no procedures or criteria in place for the authorities to determine the issue and that several Traveller groups and a number of other stakeholders have presented a range of arguments in favour of an opposite conclusion.*¹⁶⁹

The final recommendation of the Advisory Committee was for the Irish authorities to "refrain from conclusive statements" and take into account the principle of self-identification.¹⁷⁰

(ii) COMMISSIONER FOR HUMAN RIGHTS OF THE COUNCIL OF EUROPE

In May 2008, Thomas Hammarberg, the Council of Europe Commissioner for Human Rights, released his report on his visit to Ireland in 2007.¹⁷¹ In that report he encouraged active dialogue on the question of Traveller ethnicity between the Traveller community and the authorities. The Commissioner stated that he considered it essential that members of the Traveller community are effectively protected against discrimination and racism at national, European and international levels.¹⁷²

5. A HUMAN RIGHTS ASSESSMENT OF THE QUESTION OF TRAVELLER ETHNICITY

The IHRC has expressed the view that the lack of recognition of Travellers as an ethnic minority may exclude Travellers from legal and administrative protections, including the EU Race Directive of 2000.¹⁷³

167. Ireland's First Report under the Framework Convention on the Protection of National Minorities ACFC/SR(2001)006, 2001, at pp. 15-17.

168. Ireland's Second Report under the Framework Convention on the Protection of National Minorities, ACFC/SR/II (2006)001 (2006), at pp. 39-41.

169. Advisory Committee on the FCNM, Second Opinion on Ireland adopted on 6 October 2006, ACFC/OPII (2006)007, Council of Europe, Strasbourg, 2006, at para. 29. The Advisory Committee expressly warned against any potential loss of the protections offered by the Race Directive 2000/43/EC. See para. 30.

170. *Ibid.*, at para. 31.

171. Report by the Commissioner for Human Rights Mr. Thomas Hammarberg on his visit to Ireland, Council of Europe, Strasbourg, 2008, Comm DH (2008)9.

172. *Ibid.*, at para. 97.

173. IHRC, Submission to the Committee on the Elimination of Racial Discrimination, IHRC, Dublin, 2005, p. 54.

Refusing to recognise Travellers as an ethnic minority potentially takes Travellers outside the ambit of the provisions in the international human rights treaties, which provide protection for ethnic minorities. A recent report by the Equality Authority raised the concern that international agreements and EU legislation do not name specific ethnic groups from particular States within their provisions on ethnicity. Accordingly, Traveller ethnicity must be recognised by the State in order to ensure that Travellers can enjoy the protections and benefits that flow from these agreements and legislation, alongside other ethnic groups.¹⁷⁴

In an IHRC discussion paper on Traveller ethnicity, the Commission outlined how the Courts in the United Kingdom have categorised Irish Travellers as an ethnic minority when construing the Race Relations Act, 1976.¹⁷⁵ In *Mandla v. Dowell Lee*, a UK decision interpreting the Race Relations Act 1976, an understanding of ethnicity was set out.¹⁷⁶ According to the court, to constitute an ethnic minority a group must regard itself and be regarded by others as a distinct community by virtue of certain characteristics. The UK courts applied the *Mandla* test to the Irish Travelling Community in *O’Leary v. Allied Domecq* London County Court and found that they constituted an ethnic group.¹⁷⁷ Judge Goldstein held that Irish Travellers met the two essential conditions laid down in *Mandla*:

1. possessing a long shared history which distinguished them from other groups and
2. having a distinct cultural tradition of their own.

Indeed the definition set out in the Equal Status Act 2000 recognises that Travellers possess a shared history and a distinct cultural identity. Section 2 of the Equal Status Act 2000 provides,

“Traveller community” means the community of people who are commonly called Travellers and who are identified (both by themselves and others) as people with a shared history, culture and traditions including, historically, a nomadic way of life on the island of Ireland.

6. SUMMARY OF APPLICABLE INTERNATIONAL HUMAN RIGHTS LAW

- In accordance with the relevant international human rights law and standards, identification as a minority shall, if no justification exists to the contrary, be based on self-identification by the individual concerned.
- The existence of an ethnic minority does not depend on a decision by Government but is established by objective criteria that are applied uniformly among different groups.
- The jurisprudence in the United Kingdom, where Irish Travellers have been recognised as an ethnic minority because they meet certain objective criteria should be considered. Travellers possess a long shared history which distinguishes them and they possess a distinct cultural tradition of their own. Various treaty-monitoring bodies have criticised the Irish Government position on this issue and have called for dialogue.

7. SUMMARY OF OBSERVATIONS

- The Irish Government should engage in a dialogue with members of the Traveller community and representative organisations on the issue of membership of a minority ethnic group. Moreover, the Government should seriously consider the relevant international human rights standards, the recommendations of treaty monitoring bodies addressed to the Irish Government on this issue, as well as the position of both the IHRC and the Equality Authority.

174. Equality Authority, *Traveller Ethnicity: An Equality Authority Report*, Equality Authority, Dublin, 2006, at p. 9.

175. IHRC, *Travellers as an ethnic minority under the Convention on the Elimination of Racial Discrimination: A Discussion Paper*, IHRC, Dublin, 2004, at pp. 4-9.

176. *Mandla v. Dowell Lee* [1983] 2 A.C. 548, p. 562.

177. *O’Leary and Others v. Allied Domecq & Others*, Unreported 29th August 2000.

VI. EQUALITY AND NON-DISCRIMINATION

1. INTRODUCTION

This chapter will focus on the role of equality in promoting the right to enjoy cultural life and the importance of equality within international human rights instruments. It will then consider how Ireland's present equality framework has responded to the goals of protecting the right to enjoy cultural life for the Traveller community.

2. EQUALITY UNDER INTERNATIONAL AND REGIONAL HUMAN RIGHTS LAW

a. EQUALITY AND INTERNATIONAL HUMAN RIGHTS LAW

The UDHR affirms that all persons are born "free and equal in dignity and rights."¹⁷⁸ Article 27 of the ICCPR, which protects cultural rights, exists side by side with equality protections in Article 26¹⁷⁹ and Article 3,¹⁸⁰ illustrating that cultural rights and equality co-exist and are complementary. Discrimination under the ICCPR means any exclusion, restriction, distinction or preference based on age, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status which impairs or restricts the enjoyment of rights under the ICCPR.¹⁸¹ In relation to Article 3, the Human Rights Committee has stated that, along with Article 26, there is a need for the adoption of affirmative measures so as to ensure full enjoyment of rights between men and women.¹⁸²

CERD defines racial discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin" in the enjoyment of fundamental human rights.¹⁸³ The provisions of CERD allow States parties to adopt affirmative measures so as to alleviate the effects of past historical racial discrimination.¹⁸⁴ States parties are also under an obligation to take a variety of measures so as to combat prejudices which lead to racial discrimination.¹⁸⁵

b. EQUALITY UNDER THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES

Similar to CERD, the FCNM also guarantees equality to national minorities.¹⁸⁶ In addition affirmative measures which seek to combat the effects of past discriminatory practices are also allowed under the FCNM,¹⁸⁷ and are not considered acts of discrimination.¹⁸⁸ The need for effective targeting of equality measures was highlighted in the Advisory Committee's Second Opinion on Ireland where it stated:

*Ireland is called on to ensure decisive follow-up to the sectoral and other programmes and policies initiated to advance non-discrimination, and to make sure that they are adequately resourced and monitored in co-operation with minority representatives and others concerned.*¹⁸⁹

178. Article 1, UDHR.

179. Article 26 of the ICCPR states "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

180. Article 3 of the ICCPR states "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."

181. UN Human Rights Committee, General Comment No. 18, Non-Discrimination, CCPR (1989), para. 7.

182. UN Human Rights Committee, General Comment No. 28, Equality Between Men and Women,, CCPR/C/21/Rev.1/Add.10 (2000).

183. Article 1, CERD.

184. Article 1(4) of CERD states "Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved." Article 2(2) states "States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved."

185. Article 7, CERD.

186. Article 4(1) of the FCNM states, "The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited."

187. Article 4(2), "The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities."

188. Article 4(3), "The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination."

189. Advisory Committee on the FCNM, Second Opinion on Ireland adopted on 6 October 2006, ACFC/OPII (2006)007, Council of Europe, Strasbourg, 2006, para. 49.

In analysing positive measures which allow minorities to enjoy the full array of social and economic rights, the Advisory Committee insists on the targeting of minority groups, along with monitoring the enjoyment by minorities of their rights. According to the Explanatory Report accompanying the FCNM, the promotion of full and effective equality may require the adoption of "special measures that take into account the specific conditions of the persons concerned."¹⁹⁰ This contemplates positive measures tailored to the specific needs and problems facing Travellers.

3. EQUALITY UNDER THE ECHR

(i) ARTICLE 14

Article 14 of the ECHR prohibits discrimination in the enjoyment of rights on the basis of one's sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Article 14 is not a free-standing guarantee of equality, but complements the other substantive provisions. Unless a claim of discrimination can be linked to the other provisions of the ECHR (and its Protocols), then Article 14 will not apply.

Discrimination means treating persons "in relevantly similar situations" differently without any reasonable and objective justification.¹⁹¹ The ECtHR has also noted that failing to take into account relevant differences may also lead to a finding that Article 14 (along with another ECHR right) was violated.¹⁹² Article 14 protects against direct discrimination that is actions which may specifically be aimed at a group. In *Abdulaziz, Cabales, Balkandali v. United Kingdom* the ECtHR found that applying different rules to the husbands of female permanent residents in comparison with the wives of male permanent residents violated Article 14, taken together with Article 8.¹⁹³ Article 14 also protects against indirect discrimination. Indirect discrimination occurs whereby a policy applies to all persons equally; however, it has more of an impact on a particular group. Racial discrimination is regarded by the ECtHR as a particularly invidious form of discrimination.¹⁹⁴ The ECtHR has held that discrimination on the basis of one's race or ethnicity is not capable of being objectively justified.¹⁹⁵ Moreover, for those members of minority groups such as the Roma, Gypsy or Traveller minorities, the Court has stated that special consideration should be given to their needs and forms of lifestyle.¹⁹⁶ The Court noted in *Chapman* that an international consensus was emerging in relation to the special needs of minorities and the obligation to protect their security, identity and lifestyle so as to preserve cultural diversity within States.¹⁹⁷

In the *Czech Roma Education* case, the applicants challenged their placement within special schools for those who were mentally retarded on the basis of *inter alia* Article 14, in conjunction with Article 2 of Protocol 1.¹⁹⁸ The applicants produced statistics which showed that Roma children were far more likely than non-Roma children to be placed within these "special"¹⁹⁹ educational establishments.²⁰⁰ The ECtHR stated that such evidence can go to show indirect discrimination.²⁰¹ There was no need to show discriminatory intent on behalf of the authorities, once this was the effect of the action; it fell back on the authorities to show that the actions were not discriminatory in nature.²⁰²

The ECtHR noted that Roma children of average or above average intelligence were placed in these special schools. The fact that the poorly educated parents of these children signed a form giving permission for their children to be put into such schools was not relevant, a "waiver" of rights cannot justify racial discrimination.²⁰³

190. Council of Europe, *Framework Convention for the Protection of National Minorities and Explanatory Report H(1995)010 E*, para. 39.

191. *D.H. and Others v. The Czech Republic* Judgement of 7 Feb 2006, (2008) 47 EHRR 3, para. 175.

192. *Belgium Linguistic Case*, Judgments of 9 February 1967 and 23 July 1968, (1979-1980) 1 EHRR 241, 252, para. 10.

193. *Abdulaziz, Cabales, Balkandali v. United Kingdom*, Judgement of 28 May 1985, (1985) 7 EHRR 471, para. 83.

194. *Timishev v. Russia*, Unreported, ECtHR, 13 December 2005, Application nos. 55762/00 and 55974/00, para. 56.

195. *Ibid.*, para. 58.

196. *Chapman v. UK* Judgement of 18 January 2001, (2001) 33 EHRR 399, para. 96.

197. *Ibid.*, paras 93-94.

198. *D.H. and Others v. Czech Republic* Judgement of 7 Feb 2006, (2008) 47 EHRR 3, para. 200. The relevant part of Article 2 of Protocol 1 states "No person shall be denied the right to education...".

199. The ECtHR described these schools as being for children who were "mentally retarded",

200. *D.H. and Others v. Czech Republic* Judgement of 7 Feb 2006, (2008) 47 EHRR 3, paras. 133-134. Within the Czech Republic, the applicants claimed that Roma made up just 5% of the total school population, yet constituted 50% of the total population within the special education schools. At para. 192 the ECtHR noted the finding of the Advisory Committee on the Framework Convention who stated that according to unofficial estimates 70% of the children with the special schools were Roma.

201. *Ibid.*, para. 195. The Court said that while the applicant's statistics may not be wholly accurate, along with other statistics, it showed a pattern which suggested that the majority of persons within these special schools were Roma.

202. *Ibid.*, paras 194 and 195.

203. *Ibid.*, paras 194 and 195.

The different systems of schooling led to Roma children being separated from their peers and compromised their subsequent personal development, including their ability to find gainful employment.²⁰⁴ While recognising the Czech authorities' efforts to ensure Roma children received schooling, the Roma were disproportionately put into special schools for those who were mentally retarded, and there were no objective or legitimate reasons for doing this.²⁰⁵ There was therefore a violation of Article 14 in conjunction with Article 2 of Protocol 1, which protects the right to receive education.²⁰⁶

In the *Sampanis v. Greece* case the Court held that the failure to register Roma children for the commencement of education, even though not all administrative steps to redress the situation had been undertaken, constituted discrimination under Article 14 in conjunction with Article 2 of Protocol 1.²⁰⁷ Roma, as a particularly vulnerable group, needed special protection and the authorities should have facilitated the registration of the children into the education system. The simplified enrolment procedure within the Greek education system was not utilized. The ECtHR also found that the segregation of Roma children from mainstream education was contrary to Article 14 in conjunction with Article 2 of Protocol 1. After protests by parents of non-Roma children, the Roma children were placed in segregated educational establishments. This was purportedly done so as to prepare Roma children for the mainstream educational setting. The Court noted that in the two years of operation of this segregated educational set-up, not one Roma child had moved into the mainstream educational setting. There were no indicators or procedures so as to facilitate such a move. In both instances, the discrimination could not be justified.

In *Oršuš and Others v. Croatia* the applicants had, at various stages of their education, been educated in Roma only classes.²⁰⁸ Within the relevant schools, the majority of Roma was taught in mixed classes, alongside non-Roma.²⁰⁹ Many of the applicants in the case had at various stages of their education also attended mixed classes, however most left school at an early age.²¹⁰ The applicants firstly claimed that their placement in separate classes constituted inhuman and degrading treatment under Article 3 of the ECHR.²¹¹ The Court rejected this claim. The ECtHR stated that "the feelings of inferiority or humiliation triggered by discriminatory segregation based on race in the field of education could, in the exceptional circumstances of an individual pupil, amount to treatment contrary to the guarantees of Article 3 of the Convention."²¹² However, in this case the applicants had failed to show such treatment. The applicants had often been mixed with other non-Roma children, in both an educational and extra-curricula setting.²¹³

On the Article 14 and Article 2 of Protocol 1 issue, the ECtHR distinguished the *D.H.* case on the basis that Croatia had a system in place wherein the Roma regularly transferred into mainstream classrooms.²¹⁴ The rationale in the first place for placing some Roma children into the special classrooms was to ensure that the children had an adequate command on the Croatian language.²¹⁵ While it would be preferable to have a standard set of procedures for determining when a student could switch into a mainstream class, the data submitted as regards the numbers of Roma in separate classes suggested that language was the only criterion for accommodation within a mainstream setting.²¹⁶

(ii) PROTOCOL 12

Protocol 12 of the ECHR was opened for signature and ratification on 4 November 2000. This Protocol adds a general prohibition of discrimination to the prohibition of discrimination in relation to the rights within the ambit of the ECHR currently to be found in Article 14 of the ECHR. The Irish Government has not signed or ratified Protocol 12.

The potential impact of the Protocol stems especially from Article 1(2) of Protocol 12 which states that "no one shall be discriminated against by any public authority on one of the specified grounds."

204. *Ibid.*, para 207.

205. *Ibid.*, para 208.

206. *Ibid.*, para 209.

207. *Sampanis v. Greece*, Unreported, 5 June 2008.

208. *Oršuš and Others v. Croatia*, Unreported, 17 July 2008.

209. *Ibid.*, para. 5.

210. *Ibid.*, paras 6 et seq.

211. *Ibid.*, para. 36, the applicants claimed that being required to attend Roma only classes led to severe educational, psychological and emotional harm, "...which resulted in their stigmatisation, feelings of alienation and lack of self-esteem..." for a prolonged period of time. Since the Roma were a particularly disadvantaged minority, and given the effects the segregation had on the applicants, the treatment could be described as 'inhuman and degrading'.

212. *Ibid.*, para. 38.

213. *Ibid.*, para. 39.

214. *Ibid.*, para. 65.

215. *Ibid.*, para. 60.

216. *Ibid.*, para. 69.

Discrimination on the basis of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status is prohibited. The precise impact of Protocol 12 is difficult to gauge as the ECtHR has yet to give a judgement on its interpretation.

4. EQUALITY UNDER EUROPEAN UNION EQUALITY LEGISLATION

The EU Council Directive Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Race and Ethnicity Directive)²¹⁷ seeks to prohibit direct and indirect discrimination on the basis of a person's racial or ethnic origin in relation to access to employment, conditions of employment, membership of employee representative bodies, social security and social advantages and access to goods and services.²¹⁸ The Directive does not define the precise contours of the terms "race" or "ethnicity". The preamble of the Race and Ethnicity Directive, states that the EU "rejects theories which attempt to determine the existence of separate human races..." and the term "racial origin" does not imply acceptance of such theories. The Race and Ethnicity Directive also allows for preferential measures to be adopted in order to compensate racial or ethnic groups for the past effects of discrimination.²¹⁹ Article 7(2) of the Race and Ethnicity Directive provides that Member States shall ensure that associations, organisations and other legal entities which have a legitimate interest in ensuring that the provisions of this Directive are complied with may engage on behalf of or in support of the complainant with his or her approval in any judicial procedure provided for the enforcement of obligations under the Directive.

The extent to which the Race and Ethnicity Directive positively affects the rights of persons within Ireland is questionable. As shall be discussed in the next section, the Equal Status Act 2000 and the Employment Equality Act 1998 provide greater equality protection measures than those contained within the Race and Ethnicity Directive.

5. EQUALITY UNDER IRISH LAW

The Irish Constitution contains a general equality provision.²²⁰ The Irish Courts have adopted a cautious approach to the interpretation of the equality provision and it has been asserted that this provision of the Constitution is underdeveloped.²²¹ Ms. Justice Denham has noted that the concept of equality "means that all citizens as human persons are equal before the law...the organs of government shall act with due regard to the concept of equality."²²²

While the Irish superior courts have yet to comprehensively examine issues surrounding Travellers and the constitutional equality guarantee, direct discrimination against Travellers, solely because they are Travellers, may be contrary to Article 40.1 where different treatment cannot be justified, is not for a legitimate purpose or rationally connected to the achievement of a legitimate aim. This could be on the basis of ethnic or social group, whereby Travellers are treated as "inferior or superior to other individuals".²²³ In the area of indirect discrimination, the Irish Courts have proved unwilling to find a violation of the constitutional equality guarantee. In the *Norris* case, for example, the fact that the prohibition of sodomy affected more homosexuals than heterosexuals was deemed to be irrelevant.²²⁴ Within a criminal trial however, Mr. Justice Walsh noted that if a Judge allowed comments in relation to a defendant's status as a Traveller to "creep into the evidence or to colour the case in a way which caused them [the defendants] to be the objects of discrimination at the trial...the conviction would be quashed without hesitation on the grounds that the trial violated the provisions of Article 40.1 of the Constitution."²²⁵

217. Council Directive 2000/43/EC of June 2000 Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] Official Journal L 180/24 (19 July 2000).

218. Article 3(1) of the Race and Ethnicity Directive. However, this does not prohibit Member States from discriminating on the basis of a person not being an EU national (Article 3(2)).

219. Article 5 of the Race and Ethnicity Directive.

220. Article 40.1 of Bunreacht na hÉireann provides "All citizens shall, as human persons, be held equal before the law." The State can have "due regard to differences of capacity, physical and moral, and of social function." For a comprehensive account of equality law in Ireland see www.equality.ie; see also, O. Doyle Constitutional Equality Law, Thomson Roundhall, Dublin, 2004.

221. Constitutional Review Group, Report of the Constitutional Review Group, Dublin 1996; G. Hogan and G. Whyte J.M. Kelly: *The Irish Constitution* Lexis Nexis, Butterworths, Dublin 2004, p. 1324, para. 7.2.05. See generally, O. Doyle Constitutional Equality Law, Thomson Roundhall, Dublin, 2004.

222. *Howard v. Commissioner of Public Works* [1994] 1 IR 101, pp. 160-161.

223. *Brennan v. Attorney General*, [1983] ILRM 449, p. 480.

224. In the High Court, *McWilliams J.* stated that "[a] certain act is declared to be unlawful. It may be preformed by either homosexual or heterosexual men with either men or women. Although it is perfectly obvious that such acts will usually be performed between homosexual males, which is probably what the legislature had in mind, that does not constitute an invidious or arbitrary discrimination against homosexual citizens..." [1984] IR 36, p. 44.

225. *The People (Attorney General) v. O'Driscoll*, (1972) 1 Frewen 351, p. 353, as quoted in O. Doyle, *Constitutional Equality Law* (Dublin, Thomson Roundhall, 2004), p. 240.

Ireland's international and EU obligations in the area of equality are implemented by the Employment Equality Act 1998, the Equal Status Act 2000 and the Equality Act 2004. Both the Employment Equality Act 1998²²⁶ and the Equal Status Act 2000²²⁷ prohibit discrimination on the grounds of gender, marital status, family status, age, race,²²⁸ religion, disability, sexual orientation, or membership of the Traveller community. Section 8 of the Employment Equality Act 1998 provides that an employer shall not discriminate against an employee or prospective employee whether in regard to access, training, conditions or promotion. The principle that positive action in the area of employment does not constitute discrimination is laid down by Section 33(1) of the 1998 Act. Such action is legitimate where it is attempting to prevent or compensate for disadvantages linked to any of the discriminatory grounds or to create or maintain facilities for safeguarding or promoting the integration of such persons into the working environment. The Equal Status Act 2000 came into force in October 2000 as a complement to the Employment Equality Act 1998. It extends the prohibition of discrimination beyond the workforce and into the public arena where people shop, use services, socialise,²²⁹ attend educational establishments²³⁰ or obtain accommodation.²³¹

It may be noted that in implementing the Race and Ethnicity Directive, Member States must ensure that effective, proportionate and dissuasive sanctions are in place to prevent discrimination.²³² In addition, under Article 7(2) of the Race and Ethnicity Directive, there is an obligation to facilitate the involvement of associations, organisations or other legal entities in assisting a person bringing a claim of discrimination by engaging on behalf of or supporting an applicant before a judicial or administrative body which enforces obligations. The IHRC in 2004 criticised the Government for failing to allow such bodies to represent the victims of discrimination before the District Court (or if appealed before the Circuit Court).²³³ The transfer of jurisdiction in relation to discrimination by pubs and clubs from the quasi-judicial Equality Tribunal to the District Court²³⁴ was also criticised by a coalition of equality NGOs as undermining access to justice for Travellers who may be discriminated against in relation to service provision.²³⁵

More broadly, under Ireland's equality legislation, upper limits are set on the level of compensation that can be awarded under the Equal Status Act 2000. Under the 2000 Act awards are limited to the maximum that can be awarded by the District Court. Eilis Barry argues that such upper limits on compensation may not be acceptable under EU law.²³⁶ EU equality law requires that the remedy be effective, proportionate and dissuasive. In addition, the enforcement of equality legislation may be limited by the willingness and ability of individual victims to bring cases. In particular the lack of injunctive relief and delays within the Equality Tribunal may to some extent undermine the remedies available.

6. EXAMPLES OF DOMESTIC EQUALITY CASES CONCERNING THE TRAVELLER COMMUNITY

In the recent case of *Doherty and Anor v. South Dublin County Council*²³⁷ the issue of equal treatment for Travellers under various legal provisions was examined. The applicants were elderly members of the Irish Traveller community. The facilities on the site upon which they were staying were basic, with a limited electricity supply and no internal plumbing. The Council refused to provide a new caravan, and the applicants applied for judicial review. Following the issuing of this court action, the Council offered temporary accommodation in bricks and mortar for 18 months whilst re-development work was carried out at the site to improve the facilities there, but that offer was refused.

226. Section 6 of the EEA 1998.

227. Section 3(2) of the ESA 2000.

228. In this regard, it should be noted that race for the purposes of the Employment Equality Act 1998 and the Equal Status Act 2000 includes discrimination on the grounds of an individual's race, colour, nationality, national or ethnic origin.

229. Equal Status Act 2000, Section 5.

230. Equal Status Act 2000, Section 7.

231. Equal Status Act 2000, Section 6.

232. Article 15 of the Race and Ethnicity Directive.

233. IHRC, *Observations on the Equality Bill 2004*, p. 4.

234. Section 19, *Intoxicating Liquor Act 2003*.

235. *Joint Response of Equality and Human Rights Organisations to the Report of the Commission on Liquor Licensing and Admission and Service in Licensed Premises*, February 2004.

236. Eilis Barry, *Legal Advisor to the Equality Authority, Paper in Report of the Seminar held in Dublin on 5th October 2006 on the theme of 'The role of Positive Action in Pursuing Traveller and Roma Employment Equality'* Traveller & Roma Action for Implementation of Legal & Equality Rights.

237. [2007] I.E.H.C. 4.

The applicants submitted that the Council's failure to provide the caravan sought was in breach of the Equal Status Act 2000 and the Equality Act 2004.²³⁸ They argued discrimination on the basis that while a Traveller would only receive a site with services pursuant to a Council's powers to provide and manage such sites, a non-Traveller would receive a site and a house or physical accommodation.²³⁹ The applicants noted that the Council was only empowered to provide very limited loans and grants for the acquisition of caravans.²⁴⁰ The High Court rejected this argument, holding that the 2000 and 2004 Acts created a separate legislative and administrative scheme and were not enforceable outside the Equality Tribunal.²⁴¹ Even if the case was to be considered under the Equal Status Acts, 2000–2004, Mr. Justice Charleton would not have found discriminatory treatment had occurred.²⁴² In the pleadings on behalf of the applicants it was contended that discrimination in the provision of accommodation to members of the Traveller community was contrary to the Race and Ethnicity Directive.²⁴³ However, Mr. Justice Charleton made no detailed reference to the Directive during the course of his judgement.²⁴⁴ Mr. Justice Charleton did not recognise a statutory right for members of the Traveller community to opt for caravan accommodation instead of bricks and mortar accommodation in any and all circumstances:

*Such an interpretation would mean that those who are very elderly, very infirm or very ill and who would be unsuited, for that reason alone, to caravan accommodation would be entitled to caravans adapted to their needs; and adapted ever more extremely as their disability grew. Such a right would be in contradistinction to the ordinary adaptations which every member of the community must make as they are stricken by age, infirmity or illness. People, in the ordinary course of life, often leave the homes which they occupied with their family for flat accommodation, for single storey accommodation, for a retirement village or for a nursing home. Often, this is a traumatic transition.*²⁴⁵

Mr. Justice Charleton did observe that it was "not impressive" that the applicants had to use temporary accommodation for a period of six years and that two offers were made to the applicants only after proceedings had commenced.²⁴⁶

In *Edward Reilly v. The Health Service Executive*²⁴⁷ the practice of the Health Service Executive in sending Travellers to its central unit in Dublin to receive Supplementary Welfare Allowance rather than at their local health centre was found to amount to discrimination for the purposes of the Equal Status Act 2000. The historical reasoning for this arrangement was outlined by the Health Service Executive. In 1984, a decision was taken to transfer the delivery of Community Welfare services to the Traveller community from local Community Welfare Officer areas to a central unit in Dublin. Two reasons were advanced for this: firstly that it would provide a service better focussed on the particular needs of Travellers. Secondly, due to the mobility of Travellers and the lack of computer system at the time, many Community Welfare Officers felt that they did not have effective control over payments being made to Travellers.²⁴⁸ In 1994, a decision was taken to provide a localised service to Travellers who held tenancies with Local Authorities while the remaining members of the Traveller community would continue to be dealt with in the central Dublin unit. In 1999, as the system was now computerised, it was decided to localise all services.

The Equality Officer at the Equality Tribunal found that discrimination had occurred noting that since the Equal Status Act 2000 had been enacted, no real progress had been made in decentralising the service. It was found that the centralisation of payment to Travellers had been based on anecdotal evidence of fraud with no in-depth analysis or consultation having taken place.²⁴⁹ The Tribunal Member noted that the mobility of some Travellers was used to justify their distinction from "settled" Travellers.²⁵⁰ The Tribunal Member further noted that Travellers had to receive payment at the Dublin based homeless unit. Homeless people themselves, once registered in homeless unit, could collect their allowance in any post office. Mr. O'Reilly was awarded €6,350, the maximum award which can be made under the Equal Status Act 2000.²⁵¹

238. *ibid.*, para. 9.

239. *ibid.*, para. 22.

240. *ibid.*, para. 26..

241. *ibid.*, para. 16.

242. *ibid.*, para. 18.

243. *ibid.*, para. 9.

244. *ibid.*, para. 9 Mr. Justice Charlton stated that in so far as claims were based on the Race and Ethnicity Directive "the Court finds no evidence on the papers before it that the respondents have acted out of prejudice against Travellers."

245. *ibid.*, para. 24.

246. *ibid.*, para. 10.

247. *Edward Reilly v. The Health Service Executive*, Equality Tribunal, Dec-S2007-059 (25 July 2007).

248. *ibid.*, para. 5.1.

249. *ibid.*, para. 6.1.

250. *ibid.*, para. 6.2.

251. *ibid.*, para. 8.1.

7. ASSESSMENT BY INTERNATIONAL TREATY MONITORING BODIES OF IRELAND'S EQUALITY FRAMEWORK

In its most recent Opinion on Ireland, the Advisory Committee on the FCNM called for the State to bolster its support for the Equality Tribunal in order to resolve the prevailing delays in the system.²⁵² The Opinion also noted the importance of a gender dimension and the need to collate data which would assess the degree to which Traveller women enjoy "full and effective equality."²⁵³ Similarly, in its 2005 Concluding Observations, the UN Committee on the Elimination of Racial Discrimination called on the State to ensure that:

*all necessary measures be taken urgently to improve access by Travellers to all levels of education, their employment rates as well as their access to health services and to accommodation suitable to their lifestyle.*²⁵⁴

Treaty-monitoring bodies have stressed the need for measures to be taken to ensure equality of opportunity and results. The Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in 2001 recognised the linkages between underdevelopment, marginalization, social exclusion and economic disparities with racial intolerance and xenophobia which can generate poverty.²⁵⁵ The Programme of Action of the Conference called upon States to combat racism and xenophobia and to enforce measures aimed at reducing income and wealth inequalities and protecting economic, social and cultural rights on a non-discriminatory basis.²⁵⁶

It can be noted that by virtue of the Belfast/ Good Friday Agreement²⁵⁷ the State has made a commitment to ensure the equivalence of human rights protection between the State and Northern Ireland.²⁵⁸ The Belfast/ Good Friday Agreement states that the Irish Government must "take steps to further strengthen the protection of human rights in its jurisdiction."²⁵⁹ Within Northern Ireland, public authorities are under a duty to promote equality of opportunity in carrying out their public functions.²⁶⁰ A duty to promote good relations is imposed in respect of race, religion and political belief. In assessing the consequences for this jurisdiction, O'Cinnéide argues that within the State there is a need to ensure a similar "positive equality duty (or a similar set of duties) as that applying in Northern Ireland."²⁶¹ Putting in place a statutory duty to promote equality would recognise that to implement full and substantive equality in practice requires equality proofing at the early stage to tackle structural discrimination.

8. SUMMARY OF THE APPLICABLE INTERNATIONAL HUMAN RIGHTS LAW

- Human rights law prohibits all forms of discrimination on the following grounds: age, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
- Irish domestic law prohibits discrimination specifically on the ground of membership of the Traveller community in access to goods and services as well as employment.
- Discrimination means treating persons in relevantly similar situations differently without reasonable or objective justification. It includes direct discrimination, i.e. actions which may be specifically aimed at a group, and indirect discrimination, which occurs where a policy applies to all persons equally but has a disproportionate impact on a particular group and it cannot be objectively justified.

252. *Advisory Committee on the FCNM, Second Opinion on Ireland adopted on 6 October 2006, ACFC/OPII (2006)007, Council of Europe, Strasbourg, 2006, para. 43.*

253. *Ibid.*, para. 51.

254. *United Nations Committee on the Elimination of Racial Discrimination, Concluding Observations: Ireland UN Doc. CERD/C/IRL/CO/2 (14 April 2005), para 22.*

255. *Declaration and Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance UN Doc. A/CONF.189/12, para. 18.*

256. *Ibid.*, para. 207.

257. *This term refers to both the Multi-Party Agreement (MPA) made between political parties and the British and Irish Governments and the British-Irish Agreement (BIA) between the States of Ireland and Britain. In popular usage both agreements are commonly known as the Good Friday Agreement.*

258. *Section 6, Part 1 of the Belfast/Good Friday Agreement, 1998.*

259. *Section 6, Part 1, para. 9 of the Belfast/Good Friday Agreement, 1998. In addition the Irish Government committed itself to "establish a Human Rights Commission with a mandate and remit equivalent to that within Northern Ireland".*

260. *The Northern Ireland Act 1998 Section 75.*

261. *O' Cinnéide, Colm 'Equivalence in promoting equality: the implications of the multi-party agreement for the further development of equality measures for Northern Ireland and Ireland.' Joint Publication of the Equality Authority and Equality Commission for Northern Ireland, 2005, at p. 57.*

- Racial discrimination is regarded under the ECHR to be a particularly invidious form of discrimination and discrimination on the basis of this ground is not capable of being objectively justified.
- Ireland is entitled to adopt affirmative measures so as to alleviate the effects of past historical discrimination.
- By virtue of the Belfast/ Good Friday Agreement the State has made a commitment to ensure the equivalence of human rights protection between the State and Northern Ireland.

9. SUMMARY OF OBSERVATIONS

- By virtue of the Belfast/ Good Friday Agreement the State has made a commitment to ensure the equivalence of human rights protection between this jurisdiction and Northern Ireland. Under Section 75 of the Northern Ireland Act 1998 specific public authorities are required to have "due regard to the need to promote equality of opportunity" across all equality grounds including race.
- A positive statutory duty to promote equality may be a useful mechanism to tackle structural discrimination and bring about substantive equality for members of the Traveller community and other groups.

VII. TRAVELLER ACCOMMODATION, NOMADISM AND THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

1. INTRODUCTION

The issues of Traveller specific accommodation, nomadism and the right to enjoy respect for private and family life for members of the Traveller community are issues of particular concern to Travellers and such issues have come before the Irish courts and ECtHR on a number of occasions.

2. ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The main provision of relevance in cases concerning Traveller/ Gypsy accommodation before the ECtHR has been Article 8 of the ECHR. Article 8, relating to respect for private and family life, has particular significance in relation to accommodation, with its protection of respect for the home.

Article 8(1) provides:

Everyone has the right to respect for his private and family life, his home and his correspondence.

There is a right of access to, occupation of and peaceful enjoyment of the home.²⁶² 'Home' has been considered to be an autonomous concept, which does not depend on the classification afforded to it under domestic law.²⁶³ In addition, the concept of a "home" is not confined to dwellings or land, which are lawfully occupied or owned²⁶⁴ and includes the human dimension of living and having relationships.²⁶⁵ All proceedings for possession of a home engage Article 8,²⁶⁶ although under Article 8(2), some forms of lawful interference with the rights to respect for family or home can be justified if that interference is "necessary in a democratic society" and proportionate to the aim sought to be achieved.²⁶⁷

Article 8 has been an important legal avenue for minorities seeking protection of their right to respect for family life, private life and the home. In *Buckley v. The United Kingdom*, the ECtHR stated that regulating the use of land whereby Gypsies were prevented from moving their caravans onto tracts of land without permission, while amounting to an interference with family and private life,²⁶⁸ was "in accordance with law",²⁶⁹ pursued a legitimate aim²⁷⁰ and was necessary in a democratic society.²⁷¹

The case of *Chapman v. The United Kingdom* concerned the refusal of planning permission to the applicants who were Gypsies to station caravans on their own land.²⁷² The ECtHR found that while the fact of belonging to a minority with a traditional lifestyle does not confer immunity from laws intended to further the general interest, such as the environmental protections, it may have an influence on the manner in which such laws are implemented.²⁷³

262. *Novoseletskiy v. Ukraine*, Judgement of 22 February 2005; *Selcuk and Asker v. Turkey*, Judgement of 24 April 1998, (1998) 26 EHRR 477.

263. See *Chapman v. The United Kingdom*, Judgement of 18 January 2001, (2001) 33 EHRR 399.

264. See *Buckley v. The United Kingdom*, Judgement of 25 September 1996, (1997) 23 EHRR 101, para. 53; *O'Rourke v. The United Kingdom*, Judgement of 26 June 2001.

265. Lorna Fox, *The Meaning of Home: A Chimerical Concept or a Legal Challenge?* 29 *Journal of Law and Society* 580, (December 2002).

266. *Lambeth LBC v. Howard*, [2001] CA, para. 32.

267. See *Connors v. The United Kingdom*, Judgement 27 May 2004 (2004) 40 EHRR 189, para. 81; *Chapman v. UK*, Judgement of 18 January 2001, (2001) 33 EHRR 399, para. 90; *Beard v. UK*, Judgement of 18 January 2001, (2001) 33 EHRR 442, para. 101.

268. *Buckley v United Kingdom*, Judgement of 25 September 1996, (1997) 23 EHRR 101, paras. 56-60.

269. *Ibid.*, para. 61.

270. *Ibid.*, paras. 62-63. *The legitimate aims pursued were the enforcement of planning control, preservation of the environment and public health, which the Court considered were within the realms of public safety, the economic well being of the country, the protection of health and the protection of rights of others in accordance with Article 8(2) of the ECHR.*

271. *In relation to this ground, the applicant claimed that while Gypsies should not be immune from planning controls, giving the lack of 'official' quality sites, which would impede her ability to raise her children in a safe and stable environment, the UK in seeking to remove her was acting disproportionately. The UK in response stated that planning laws were necessary to ensure the preservation of urban and rural landscapes. In addition, guidelines had been agreed whereby local authorities would take the needs and views of Gypsy populations into account. The Court found in favour of the UK. Ibid.*, at paras. 64-84.

272. *Chapman v. United Kingdom*, Judgement of 18 January 2001, (2001) 33 EHRR 399.

273. *Ibid.*, para. 96.

The ECtHR accepted that the vulnerable position of gypsies as a minority means that some special consideration should be given to their needs and their different lifestyles, both in the relevant regulatory planning framework and in reaching decisions in particular cases. The ECtHR stated that to that extent, there is "a positive obligation imposed on Contracting States by virtue of Article 8 to facilitate the Gypsy way of life."²⁷⁴ The ECtHR then went on to state that even if statistically, the number of Gypsies was greater than the number of available spaces on authorised Gypsy sites, it could not recognise that the Government had an immediate legally enforceable obligation to make available to the Gypsy Community an adequate number of suitably equipped sites. Article 8 could not be interpreted as involving "such a far reaching positive obligation of general social policy", with the ECtHR holding that "[w]hether the State provides funds to enable everyone to have a home is a matter for political, not judicial decision."²⁷⁵

In relation to evictions from designated halting or transient sites, local authorities cannot operate a policy of summary eviction, any more than it can do so for other tenants.²⁷⁶ In the case of *Connors v. The United Kingdom*, the applicant and his family (who were all Irish Travellers) were summarily evicted from a site where they had lived lawfully for 15 years for allegedly causing a nuisance which the local authority stated was a breach of the licence conditions governing the site.²⁷⁷ In this case the central issue to be decided was whether the legal framework applicable to the removal of the applicants from local authority sites provided the applicants with sufficient procedural safeguards. The Court observed that in light of the serious interference with the applicant's rights under Article 8, particularly weighty reasons of public interest would have to be put forward by way of justification for any eviction. In these circumstances, the Court observed, the margin of appreciation to be afforded to the national authorities must be regarded as correspondingly narrow. The Court also concluded that a power to evict without the burden of giving reasons liable to be subject to review as to their merits by an independent tribunal would constitute an unacceptable, serious interference with the applicants' rights.²⁸⁰

In the more recent admissibility decision of *Codona v. The United Kingdom*, the applicant claimed that she had an entitlement by virtue of the positive obligations of the UK Government under Article 8 of the ECHR to be provided with caravan accommodation as she had always lived in a caravan.²⁸¹ The ECtHR stated that *Chapman v. United Kingdom* does not rule out the possibility of a positive obligation on authorities to provide Gypsy accommodation.²⁸² However, this only arises where the local authority is in a position to provide culturally appropriate accommodation. In *Codona v. The United Kingdom*, it was accepted by both parties that the local authority had no access to sites. Therefore, there could be no positive obligation on the local authority to provide such accommodation.²⁸³

3. NOMADISM AND OTHER COUNCIL OF EUROPE STANDARDS

One of the most developed considerations of the protection of nomadic identity has occurred under the Council of Europe system. Nomadism falls to be protected under the general obligation to promote conditions to allow for cultural expression contained in Article 5 of the FCNM. The specific content of the obligation to facilitate nomadism is dealt with directly in the Committee of Ministers Recommendation 2004(14) on the *movement and encampment of Travellers in Europe*.²⁸⁴ As has been previously pointed out, Committee of Ministers Resolutions are not legally binding, but are important interpretive aids to the general provisions of the FCNM. This resolution includes an express commitment to promote Traveller nomadism and Traveller specific accommodation:

*...those among the Roma/ Gypsy and Traveller communities who wish to continue to lead a traditional nomadic or semi-nomadic lifestyle should have the opportunity, in law and in practice, to do so, by virtue of the freedom of movement and settlement guaranteed to all citizens of member states and the right to preserve and develop specific cultural identities.*²⁸⁵

274. *Ibid.*.

275. *Ibid.*, para. 98-99.

276. *Connors v the United Kingdom*, Judgement of 27 May 2004, (2004) 40 EHRR 189.

277. *Ibid.*

278. *Ibid.*, para. 86.

279. *Ibid.*

280. *Ibid.*, paras. 94-95.

281. *Codona v. The United Kingdom*, Judgement 7 February 2006.

282. *Ibid.*

283. *Ibid.*

284. This grew out of a decision of the Council of Europe's Special Group on Roma/Gypsies (MG-S-ROM) to initiate a study by Steinberger and Keller entitled 'The movement of travellers in Council of Europe member states, 2002'. This consisted of empirical work on the situation of Travellers in Council of Europe states and a number of recommendations which were to broadly mirror the subsequent Committee of Ministers Resolution.

285. Preamble of Council of Europe Recommendation of the Committee of Ministers to member states on the movement and encampment of Travellers in Europe, Rec(2004)14, (1 December 2004).

4. TRAVELLER ACCOMMODATION AND IRISH LAW

Until the enactment of the Housing Act 1988 Travellers and settled people were treated alike under the Housing Act 1966 for the purposes of housing. However, prior to the enactment of the Housing Act 1988, it was established by the Supreme Court that Travellers' housing needs were to be considered under the Housing Act 1966.²⁸⁶ In *O'Reilly v. Limerick Corporation*, the applicants claimed, *inter alia*, that Limerick Corporation had a statutory duty under the Housing Act 1966 to provide serviced halting sites.²⁸⁷ Mr. Justice Costello stated that there was no duty under the 1966 Act to provide serviced halting sites to members of the Traveller community. However, he held there was a duty on Limerick Corporation to prepare and adopt a programme in relation to housing, which could include provision for Traveller accommodation.²⁸⁸

Subsequently, Section 13 of the Housing Act 1988 gave implicit power to the local authorities to provide for the provision of serviced halting sites, including the improvement, control or provision of services in a halting site.

One of the terms of reference set by the Government for the Task Force on the Travelling Community in 1995 was to report on the implementation of measures to meet the Government target of providing permanent serviced caravan site accommodation to all Traveller families who require it by 2000.²⁸⁹ This seemed to indicate recognition by the Government that Travellers are entitled to culturally appropriate accommodation which respects their culture and identity. The Task Force recommended the provision of 3,100 units of additional Traveller accommodation (including group and standard housing, serviced units and transient units).²⁹⁰ All but one of the Members of the Task Force recommended the establishment of a Traveller Accommodation Agency. The proposed role of the Traveller Accommodation Agency was to supplement the role of local housing authorities and was to support, co-ordinate and advance the Government's aim for 2000.²⁹¹ As of 2008, this recommendation has not been adopted. Within the Task Force Report, it was also recommended that each local authority establish a Traveller Tenant Accommodation Committee.²⁹² Therefore, in implementing this obligation, Statements of Policy on Housing Management must seek to involve Traveller tenants in the development of a participation programme and should include anti-discrimination commitments.

Finally, in 1998, the Housing (Traveller Accommodation) Act 1998 introduced the requirement for housing authorities to introduce Traveller accommodation programmes based on an assessment of accommodation needs. Furthermore, under the 1998 Act, the National Traveller Accommodation Consultative Committee and the Local Traveller Accommodation Consultative Committees were established.

5. THE SCOPE OF THE DUTY TO PROVIDE TRAVELLER ACCOMMODATION UNDER IRISH LAW

a. O'REILLY AND OTHERS V. LIMERICK COUNTY COUNCIL

The applicants in *O'Reilly and others v. Limerick County Council* were two Traveller families who wished to be located in halting site accommodation in Kilmallock, Co. Limerick.²⁹³ As a result of an ownership claim, an existing Kilmallock site could not be expanded to include them as the Council had no control over it. Both families had accepted offers of housing from the respondent in circumstances where they otherwise felt that they would be evicted from the side of the road. After experiencing difficulties in adapting to settled accommodation they subsequently returned to caravans at the side of the road. The Traveller Accommodation Programme for County Limerick 2005-2008 stated the intention to improve accommodation on the existing Kilmallock site. As this had effectively been ruled out, it had no proposal to meet the applicants' needs. The County Development Plan for County Limerick 2005-2011 designated no areas for the development of Traveller accommodation anywhere in the county.²⁹⁴ Notices pursuant to the Planning and Development Acts had been issued against the applicants, and threats of prosecution had been made.

286. Whyte notes the case of *McDonald v Feely* (Unreported, Supreme Court, 23 July 1980), which established that prior to the eviction of Travellers from an illegal site, there was a need to consider (though not an automatic obligation to provide for) accommodation needs. Gerry Whyte, *Social Inclusion and the Legal System Public Interest Law in Ireland*, 2002, pp. 221-223. Whyte also discusses a number of other cases subsequent to *McDonald* which were less successful.

287. *O'Reilly and Others v. Limerick Corporation* [1989] ILRM 181.

288. *Ibid.*

289. *Report of the Task Force on the Travelling Community, Stationary Office, Dublin, 1995 at p. 10.*

290. *Ibid.*, p. 108, Recommendation DR. 1.

291. *Ibid.*, pp. 117-119, Recommendations DR.22 et seq.

292. *Ibid.*, p. 119 et seq.

293. *O'Reilly and Others v. Limerick County Council*, [2006] IEHC 174.

294. *Ibid.*, para. 65.

The High Court found that the local authority had failed to provide for the rational implementation of its statutory duties. Mr. Justice MacMenamin found that the Housing (Traveller Accommodation) Act 1998 imposed on the respondent the following duties:

- a. the identification of accommodation needs;
- b. the specification of measures for the provision of accommodation;
- c. the implementation of those measures;
- d. the provision of the range of accommodation required to meet the needs identified.²⁹⁵

Furthermore, Mr. Justice MacMenamin stated that in carrying out the foregoing accommodation assessment the local authority should have regard to the following factors:

- (i) the distinct needs and family circumstances of travellers
- (ii) the need to address such accommodation requirements other than at their normal place of residence and having regard to their annual patterns of movement; and
- (iii) to take any reasonable steps as were necessary for the purpose of such implementation.²⁹⁶

None of these requirements were fulfilled in this case. Moreover, there had also been a failure of duty on the part of the respondent under the Planning and Development Act 2000 to provide in its development plan objectives for the provision of accommodation to Travellers.

In summarising the broader consequences of this case, it is of clear significance that the Court found that the duty under the Housing (Traveller Accommodation) Act 1998 to provide accommodation to Travellers is mandatory, and not merely aspirational:

*The statutory obligation which devolves upon the respondent is to **specify** the provision of accommodation required to address the **needs** of persons such as the applicants. The obligations which devolve upon the respondent under s. 7 are not a mere formulaic statement. Nor on any proper interpretation is the duty imposed upon the respondent merely aspirational.*²⁹⁷

Mr. Justice MacMenamin noted that the applicants in the present case had possessed little formal education. Consequently there was a duty on the part of the council to ensure that they were fully and properly advised in relation to their housing requirements. Mr. Justice MacMenamin noted the continually expressed desire of the applicants to be accommodated in a halting site in or near Kilmallock. He stated that this was not an unreasonable position to adopt and that “[i]t may be one shared by other members of the Traveller community there.”²⁹⁸

b. DOHERTY AND ANOR. V. SOUTH DUBLIN COUNTY COUNCIL AND OTHERS

Doherty and Anor v. South Dublin County Council and Others concerned the plight of an elderly couple whose home was unfit for habitation and who had refused to be housed within bricks and mortar accommodation.²⁹⁹ Mr. Justice Charleton recalled the observations of the Court of Appeal in England and Wales in the case of *Anufrijeva and Anor v. Southwark London Borough Council* which found that, while Article 8 imposes positive obligations to provide accommodation, these obligations are not absolute. The Court stated that before inaction by the local authority amounts to a violation, “there must be some element of culpability” with the impact on private or family life “sufficiently serious” or “foreseeable”.³⁰⁰ The central question in the *Doherty and Anor v. South Dublin County Council and Others* case focussed on was whether having to relocate to bricks and mortar accommodation in the 18 months before their promised bay was made available represented a “reasonable” limitation on the Doherty’s right to family life.

²⁹⁵. *Ibid.*, para. 63.

²⁹⁶. *Ibid.*, para. 63.

²⁹⁷. *Ibid.*, para. 58.

²⁹⁸. *Ibid.*, para. 79.

²⁹⁹. *Doherty and Anor v. South Dublin County Council and Ors.*, [2007] IEHC 4.

³⁰⁰. *Ibid.*, p. 719.

Mr. Justice Charleton noted the case law of the ECtHR and in particular the judgement in *Chapman v. The United Kingdom* whereby the Court stated that the provision of a house to all was a political, rather than judicial, matter. Mr. Justice Charleton found no violation of Article 8. The Court held that it would be "impossible" to infer culpability on the local authority where a number of offers of accommodation had been made (albeit only at the start of the proceedings) and the family would be provided with "the best form of halting site accommodation" within 18 months.³⁰¹ It should be noted that the housing offer came after seven to eight years living in a very basic halting site and a number of years after proceedings against the council were commenced. Only at the beginning of the proceedings was the offer of housed accommodation made.

c. O'DONNELL (A MINOR) AND OTHERS V. SOUTH DUBLIN COUNTY COUNCIL

*O'Donnell (A Minor) and Others v. South Dublin County Council*³⁰² concerned siblings living with their parents in Lynch's Lane temporary halting site in Dublin. The three plaintiffs suffered from a condition known as Hurler's Syndrome which is severely disabling and required assistance with dressing, washing and a range of other daily activities. At the time of the case their mobile home was occupied by ten persons, sharing two bedrooms, a living area and a bathroom. As required under the Housing (Traveller Accommodation) Act 1998, the defendant Council had in place a Traveller Accommodation Programme. During its preparation, Mrs. O'Donnell expressed a preference for a bay as permanent accommodation for her and her family. The defendant was in the course of developing a permanent facility at Lynch's Lane. Senior Executive Officer of the Housing Department testified that development had been delayed between 2000 and 2005 for a variety of reasons including local opposition and litigation but was now on target and should be ready by the middle of 2008. The evidence was that the O'Donnell family would be provided with a large bay in that development which would be fully serviced to accommodate their needs.

The plaintiffs claimed that the defendant was in breach of Article 8 the ECHR. They sought an order requiring the defendant to provide accommodation for them in the form of an additional wheelchair-accessible mobile home, as had been assessed as being suitable to their needs. The defendant denied any breach of Article 8, saying that it had assessed the plaintiffs' long term accommodation needs and that appropriate permanent accommodation would be provided for them in the medium term. No offer of short-term bricks and mortar accommodation had been made by the authorities in this case.

A key factor in Ms. Justice Laffoy's decision to rule in favour of the plaintiffs was a UK case concerning Article 8 of the ECHR. In *R (Bernard) v Enfield London BC*,³⁰³ which is a decision of the Queens Bench Division of the English High Court, the claimants sought damages for breach of their rights under Article 3 (the right not to be subjected to torture, inhuman or degrading treatment), and Article 8 of the ECHR. The defendant local authority had not provided them with accommodation in accordance with an assessment of their needs. The main plaintiff was severely disabled and the accommodation had not been adapted to her needs. In that case, Mr. Justice Sullivan noted that the primary plaintiff had a statutory right to care facilities under the National Assistance Act (as found by the local authority) and positive measures had to be put in place to ensure that she could enjoy private and family life.³⁰⁴

Mr. Justice Sullivan stated that:

Respect for private and family life does not require the State to provide every one of its citizens with a house...However, those entitled to care under s..21 [of the National Assistance Act] are a particularly vulnerable group. Positive measures have to be taken (by way of community care facilities) to enable them to enjoy, so far as possible, a normal private and family life...Whether the breach of statutory duty has resulted in an infringement of the claimants' art. 8 rights will depend upon all the circumstances of the case. Just what was the effect of the breach in practical terms on the claimants' family and private life?³⁰⁵

301. *Ibid.*, para. 40.

302. *O'Donnell (a minor) and Others v. South Dublin County Council*, [2007] IEHC 204.

303. *R (Bernard) v. Enfield London BC*, [2003] L.G.R. 423.

304. *Ibid.* para. 32.

305. *Ibid.*, para. 32.

In a critical portion of the judgement, Mr. Justice Sullivan discussed the consequences of suitably adapted accommodation. This "would not merely have facilitated the normal incidence of family life" but would have "secured her physical and psychological integrity... [and she]... would have been able to operate again as part of her family and as a person in her own right rather than being a burden."³⁰⁶ In view of the severity of the failure, Mr. Justice Sullivan awarded damages to the plaintiffs.

In the case of *Anifrijeva v Southwark London BC*,³⁰⁷ the Court of Appeal reviewed the Bernard decision, and found that the only circumstances where a court could order a suitable home to be provided were those which were sufficiently severe to constitute a violation of Article 3, that is, those that amount to degrading treatment. However, in *O'Donnell (A Minor) and Others v. South Dublin County Council*, Ms. Justice Laffoy concluded that there may be a breach of Article 8 even where it is not appropriate to make a finding that inhuman or degrading treatment had occurred. Ms. Justice Laffoy noted that the case before her was very unusual, if not unique:

*This is not a case which is based on an assertion that the State or any of its organs has a positive obligation to make certain provision for every traveller family...[t]his case is about the particular circumstances of one family, which has three severely disabled members, two of whom were minors when these proceedings started, who to the knowledge of the defendant have been living in unacceptable conditions since 2005 and whose plight is not going to be alleviated until August 2008 at the earliest, if it will be then.*³⁰⁸

The Court found that this case was very similar to the Bernard case, if not worse, and that a breach of Article 8 had occurred. Ms. Justice Laffoy stated that this did not amount to the Court "second guessing" the housing authority or acting as a "shadow housing authority". She found that if there is no statutory protection for the particular difficulties of the plaintiffs to ensure suitable and appropriate accommodation for them having regard to their age, mental condition, disability, dependency and family circumstances, the gaps into which they have fallen must represent a failure of the State to fulfil its Article 8 obligations.³⁰⁹

d. MARY O' DONNELL AND OTHERS V. SOUTH DUBLIN COUNTY COUNCIL AND OTHERS

In *Mary O'Donnell and Others v. South Dublin County Council and Others*,³¹⁰ the applicants were a family of nine members one of whom, Ellen O'Donnell, had cerebral palsy and was confined to a wheelchair. The family was residing in an adapted mobile home located in a temporary halting site which was described as overcrowded, cramped and unsuitable for the fourth named applicant, having regard to her disability. The applicants claimed that they were entitled to suitable, adequate and accessible caravan accommodation and that in failing to provide this the respondents were in breach of their statutory duty under the Housing Acts 1966 to 2004 and had acted contrary to Section 3 of the ECHR Act 2003.

The first named respondents accepted that the family was living in conditions that were not just sub-standard but which were overcrowded and unfit for human habitation. However, the respondents asserted that these conditions were as a result of the actions of the applicants who had let the mobile home fall into a state of disrepair not maintaining it themselves and had given away a caravan which had been specifically provided by the respondent to alleviate the overcrowding.

Mr. Justice Edwards observed that the overcrowding situation and state of disrepair in the mobile home effectively set at nought the adaptations that were made to accommodate Ellen's disability and that the first named respondent was aware of this situation since 2005 and had allowed it to continue. Mr. Justice Edwards asserted that the council ought to have had regard, on an ongoing basis, to the particular needs of the fourth named applicant and should have intervened in some fashion to effect a restoration of the amenities that she particularly required. Mr. Justice Edwards found that the applicants' Article 8 rights were not being vindicated in light of the overcrowding situation. The Judge ordered that South Dublin City Council exercise its statutory powers under the Housing Acts 1966-2004 to provide the applicants, with whom the fourth named applicant dwells as part of a family unit, with adequate temporary accommodation pending their placement in permanent accommodation under the Traveller Accommodation Programme 2005-2008. Mr. Justice Edwards stated that he was not prepared to specifically order the provision of another caravan stating that it was a matter for the respondents as to what steps it needs to take to comply with the order granted.

306. *Ibid.*, para. 33.

307. [2004] 1 All E.R. 833.

308. *O'Donnell (a minor) and Others v. South Dublin County Council*, [2007] IEHC 204.

309. *Ibid.*

310. *Mary O'Donnell and Others v. South Dublin County Council and Others*, Unreported 11 January 2008.

6. NOMADISM AND THE HOUSING (MISCELLANEOUS PROVISIONS) ACT 2002

Section 24 of the Housing (Miscellaneous Provisions) Act 2002 amended the Criminal Justice (Public Order) Act 1994 by creating offences of entering and occupying privately owned or publicly owned land without the consent of the owner. Section 19(F) of the Criminal Justice (Public Order) Act 1994, as amended, empowers An Garda Síochána to remove any object from the land even without the presence or knowledge of the person who owns the object which may be disposed of if it is not claimed within one month of it being possessed.

The recent case of *Lawrence and Others v. Ballina Town Council and Others*³¹¹ concerned plaintiffs who are Travellers who were residing in caravans on publicly owned land. The plaintiffs had applied for housing accommodation and were on the housing lists of two of the defendants. Prosecutions under Section 19 of the Criminal Justice (Public Order) Act 1994 as inserted by Section 24 of the Housing (Miscellaneous Provisions) Act 2002 were pending against the plaintiffs. Among other declarations the plaintiffs sought a declaration that Section 19(C) of the Criminal Justice (Public Order) Act 1994 is unconstitutional for failure to provide for a trial in due course of law. The charges against the plaintiffs under the 1994 Act as amended were subsequently withdrawn at a later point in the proceedings.

Pursuant to Section 8(h) of the Human Rights Commission Act 2000, the IHRC was granted permission to be joined as *amicus curiae* in the proceedings. In its *amicus brief* to the Court the IHRC submitted that Section 19(C) raised due process concerns as it does not provide for a defence of "reasonable excuse".³¹² In addition, the IHRC submitted that it is a disproportionate response to the legitimate aim of protecting private owners of land from unauthorised encampments. The IHRC stated that it purports to criminalise persons who, like the applicants in that case, have no real alternative but to enter upon lands which are owned by a public housing authority. The IHRC expressed the view that the wrong committed by persons who enter public lands could be addressed without recourse to criminal sanction. The IHRC concluded that Section 19C(1) does not, therefore, respect the notion of minimal restraint but, rather, constitutes an unnecessarily obtrusive invasion of the legitimate interests of nomadic persons seeking a place to reside. The Equality Authority also appeared as *amicus curiae* in this case and submitted that the provisions of the relevant legislation have a disproportionate impact on members of the Traveller community due to their nomadic way of life and that the plaintiffs had established a *prima facie* case of indirect discrimination.

Notwithstanding the fact that the criminal aspect of the case was resolved between the parties and the relief sought against the State in this regard was no longer a live issue, Mr. Justice Murphy nevertheless remarked *obiter* that firstly, "there are due process considerations which arise in relation to Section 19(1)(C) which may impact on the Convention right of the second named plaintiff to a fair trial" and secondly, "a criminal charge rather than a civil injunction may not be a proportionate response to the legitimate interest of all parties concerned". The Judge further stated that while there may indeed be a conceptual possibility of indirect discrimination as argued by the Equality Authority, in that Travellers, by their nature, are more likely to be at a disadvantage under the Criminal Trespass Legislation, there are conceptual reasons whereby the measure may be objectively justified by legitimate aim.

7. ASSESSMENT BY INTERNATIONAL TREATY MONITORING BODIES OF IRELAND'S TRAVELLER ACCOMMODATION FRAMEWORK

The Council of Europe Committee of Ministers Resolution on Ireland's Second Report to the FCNM found that the implementation of Traveller accommodation plans under the Housing (Traveller Accommodation) Act 1998 had been inadequate in a number of localities and that "decisive measures" needed to be taken to ensure full implementation.³¹³ It also called for "particular attention" to be paid to the improved provision of halting sites.³¹⁴ The Opinion of the Advisory Committee on the FCNM welcomed the Irish Government's commitment to the implementation of the recommendations of the 2004 Review of the operation of the Housing (Traveller Accommodation) Act 1998, the introduction of Traveller Accommodation Programmes for 2005-2008 by all local authorities and the inclusion of targets in these.³¹⁵

311. *Anne Lawrence & Ors. v. Ballina Town Council & Ors.*, Unreported Judgement 31st July 2008.

312. IHRC, *Amicus Submission in the case of Lawrence and Ors. v. Ballina Town Council and Ors.*

313. Resolution CM/ResCMN(2007)10 on the implementation of the Framework Convention for the Protection of National Minorities by Ireland, adopted by the Committee of Ministers on 20th June 2007, para.1(b)4 (Issues of concern)

314. *Ibid.*

315. Advisory Committee on the FCNM, *Second Opinion on Ireland* adopted on 6 October 2006,

Noting instances of authorities failing to meet their own targets, the Opinion called for “more concerted efforts to remove obstacles and “to step up the accommodation provision rate” and for genuine and effective consultation structures in achieving this objective.³¹⁶ The Opinion also gave particular prominence to the issue of transient sites:

While noting the persisting delivery shortcomings in terms of permanent housing, the Advisory Committee considers the lack of appropriate transient halting sites continues to be one of the key problems relating to the accommodation of Travellers.³¹⁷

The Advisory Committee analysed Traveller accommodation from a macro viewpoint, focusing on issues such as the rate of provision, including the provision of transient sites.

The Committee of Ministers Recommendation 2004(14) on the *movement and encampment of Travellers in Europe* provides further detail on the obligations of local authorities concerning the format and quality of the sites themselves. Paragraph 23(i) of the Recommendation states that that all sites should have “minimum facilities, in particular sanitation”. In the definition section, “minimum facilities” is defined (non-exhaustively) as including “water supply, connection to the electricity network, sanitary facilities and a rubbish bin”. Sites must be sufficient in number, take into account “the demographic trends among the families concerned” and should be in areas habitually frequented by Travellers.

The State should also provide Travellers with information on how to buy private plots of land and how these may be used. Committee of Ministers Recommendation (2005)4 *on improving the housing conditions of Roma and Travellers in Europe* called for the same level of services for Roma accommodation and other population groups, “while keeping in mind the need for sustainable solutions”. Beyond simple accommodation delivery, the authorities:

should act so as to improve the overall quality of life in Roma settlements by promoting better management of daily life, that is: area-based administrative, commercial, social and sanitary services, public transportation, refuse disposal, the upkeep of public apartments, buildings or camp sites and their surroundings, adequate management of neighbourhood conflicts and the problem linked to non-payment of rent and services, and so on.³¹⁸

In relation to the Housing (Miscellaneous Provisions) Act 2002, in its Second Opinion on Ireland the Advisory Committee noted the aggravating effects of Section 24 of that Act and its potential to criminalize Travellers as trespassers in cases of unauthorised encampments even where the relevant local authority has failed to provide adequate Traveller accommodation. The Advisory Committee described the use of such powers to remove families waiting for local authorities to provide them with statutory accommodation as “particularly disquieting” and noted the serious consequences this has for Traveller women “whose situation merits particular attention.”³¹⁹ The Committee called for a review of the anti-trespass legislation and its related procedures, finding that these should be “as appropriate, amended, in consultation with those concerned, to ensure they comply with Article 5 of the Framework Convention...”.³²⁰ The Advisory Committee noted past recommendations of the Committee of Ministers in relation to the right of people to pursue nomadic lifestyles, including resolving the issue of illegal encampments.³²¹

The Advisory Committee described as “encouraging” the advice of the then Minister for Justice, Equality and Law Reform, who urged An Garda Síochána to avoid removing families where they were awaiting accommodation. However, this voluntary restraint may not be sufficient for full compliance with Article 5 obligations under the FCNM.

316. *Ibid.*, para. 58.

317. *Ibid.*, para. 59.

318. Council of Europe, Committee of Ministers, Rec (2005)4 *on improving the housing conditions of Roma and Travellers in Europe*, adopted on 23 February 2005 at the 916th Meeting of Ministers’ Deputies, para. 27.

319. Advisory Committee on the FCNM, Second Opinion on Ireland adopted on 6 October 2006, ACFC/OPII (2006)007, Council of Europe, Strasbourg, 2006 para. 61.

320. *Ibid.*, para. 63.

321. See Council of Europe, Committee of Ministers, Rec (2005)4 *on improving the housing conditions of Roma and Travellers in Europe*, adopted on 23 February 2005 at the 916th Meeting of Ministers’ Deputies.

8. SUMMARY OF THE APPLICABLE INTERNATIONAL HUMAN RIGHTS LAW

- Article 8 of the ECHR protects the right to private life, family life and the home. The concept of a “home” is not confined to dwellings or land, which are lawfully occupied or owned and includes the human dimension of living and having relationships.
- Under Article 8(2) any interference with the rights to respect for family or the home can be justified if that interference is in accordance with law, is in pursuance of a legitimate aim, necessary in a democratic society and proportionate to the aim sought to be achieved.
- The ECtHR has held that the vulnerable position of gypsies and Travellers as a minority means that some special consideration should be given to their needs and their different lifestyles both in the relevant regulatory planning framework and in reaching decisions in particular cases. Therefore, there is a positive obligation on the State in certain circumstances to facilitate the gypsy and Traveller way of life.

9. SUMMARY OF OBSERVATIONS

- The Council of Europe Committee of Ministers has criticized the insufficient delivery and implementation of Traveller accommodation strategies under the 1998 Act. Cases before the High Court also demonstrate a failure by the housing authorities to comply with their ECHR obligations.
- During the review of the operation of the 1998 Act carried out by the National Traveller Accommodation Consultative Committee, the lack of a mechanism to ensure effective implementation of Traveller accommodation strategies and to monitor whether housing authorities are effectively complying with their statutory obligations was raised. This area of law and practice will be kept under review having regard to the relevant human rights law and standards.
- It is noteworthy that the judge in the *Lawrence* case observed obiter that due process considerations do arise which may impact on the Convention rights of the plaintiff, and that a criminal charge rather than a civil injunction may not be a proportionate response to the legitimate interests of all parties concerned. This area of law and practice will continue to be monitored having regard to the relevant human rights law and standards.

VIII. TRAVELLER CULTURE AND SERVICE PROVISION: EDUCATION AND THE LABOUR MARKET

1. INTRODUCTION

State services for members of the Traveller community should be provided on the basis of equality and in a manner that takes account of cultural diversity. The 2004 UN Development Report stated that cultural liberty is a critical element of human development.³²² Cultural liberty relates to the freedom to choose and embrace an identity, be it based on religious outlook, cultural affinity or ethnic background.³²³ Lack of respect for cultural liberty can lead to discrimination, a rise in xenophobic attitudes and the denial of service provision on the basis of one's identity.³²⁴

2. THE RIGHT TO EDUCATION AND TRAVELLERS

The right to education is recognised under international³²⁵ and domestic law.³²⁶ Under international law, there is a recognition that education should be provided in a culturally sensitive manner, which promotes "...understanding, tolerance and friendship among all nations, racial or religious group".³²⁷ The ICESCR reiterates this idea and includes tolerance of racial and ethnic groups, as well as those outlined within the UDHR.³²⁸

In its General Comment on the Right to Education, the UN Committee on Economic, Social and Cultural Rights laid down four hallmark elements of compliance: availability, accessibility, acceptability and adaptability.³²⁹ In assessing the educational needs of minorities, the Committee has stated that education should be "relevant, culturally appropriate and of good quality."³³⁰

The CRC further obliges education to instil respect for a child's cultural identity, language and values as well as respect for the differing values of other children.³³¹ The Committee on the Rights of the Child has noted that education plays a key role in promoting understanding and tolerance of different cultures.³³² Diverse values can be respected through dialogue and respect for difference.³³³

Education rights under the FCNM are provided by Article 6³³⁴ and Article 12.³³⁵ States parties to the FCNM agree to promote equal opportunities for all those belonging to national minorities. In addition, education is to play a role in informing students of different cultures and national minorities.

322. *United Nations Development Programme, United Nations Human Development Report 2004, Cultural Liberty in Today's Diverse World*, (New York, 2004), p. 1.

323. *Ibid.*, p. 1.

324. *Ibid.*

325. Article 26, *Universal Declaration of Human Rights*; Article 13(1) of the *International Covenant on Economic, Social and Cultural Rights*, Article 28 and Article 29, *Convention on the Rights of the Child* and Article 7 of the *European Social Charter (Revised)*; Article 14 *European Charter of Fundamental Rights*.

326. Article 42.4 of the *Irish Constitution*.

327. Article 26(2), *Universal Declaration of Human Rights*.

328. Article 13(2), *International Covenant on Economic, Social and Cultural Rights*.

329. *Committee on Economic, Social and Cultural Rights, General Comment 13, Right to Education- Scope and Implementation*, UN Doc E/C.12/1999/10 (1999).

330. *Ibid.*, para. 6.

331. Article 29(1)(c), *Convention on the Rights of the Child*.

332. *Committee on the Rights of the Child, General Comment No. 1, The Aims of Education*, UN Doc. CRC/GC/2001/1, at para. 4.

333. *Ibid.*, para. 4.

334. Article 6 provides: "The Parties shall encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory...in particular in the fields of education, culture and the media."

335. Article 12 provides: "(1) The Parties shall, where appropriate, take measures in the fields of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority. (2) In this context the Parties shall inter alia provide adequate opportunities for teacher training and access to textbooks, and facilitate contacts among students and teachers of different communities. (3) The Parties undertake to promote equal opportunities for access to education at all levels for persons belonging to national minorities."

The importance of education is also stressed in the UN Minorities Declaration as follows:

*States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory.*³³⁶

International human rights law has a broad understanding of education as involving the full development of human personality, with cultural identity forming an aspect of this. Education should be available without distinction and promote the value of cross cultural understanding.

Within the domestic sphere, the Report of the Task Force on the Travelling Community noted that in the past, education was often aimed at "settling" Traveller children.³³⁷ In this context it is also significant that the Second Report of the Committee to Monitor the Implementation of the Recommendations of the Task Force on the Travelling Community noted the "need to continue to build interculturalism into the curriculum, approaches, services, practices and ethos of educational institutions."³³⁸ In the practice of the Advisory Committee on the FCNM, failure to include minority experiences in textbooks has been criticised and anti-racist education encouraged.³³⁹ Given the importance attached to participation under the FCNM, minorities should also play an active role in the curriculum drafting process.

The Traveller Education Strategy contained recommendations from key stakeholders within the educational setting including parents of Traveller children, representative Traveller groups and those involved with primary school provision.³⁴⁰ The general recommendations of the report include a focus on the need to meaningfully engage with parents of Traveller children, in particular through Community development and relationship building with educational providers.³⁴¹ Inclusionary education strategies within pre-school,³⁴² primary³⁴³ and post-primary educational settings³⁴⁴ were viewed as essential in allowing Traveller children to fully enjoy their right to education. Further, recommendations included an emphasis on equality, inter-agency support and adequate funding of specialised assistance programmes.³⁴⁵ Within third level education, the Strategy emphasized the need for alternative entry routes, support and mentoring of those Travellers' entering third level education.³⁴⁶

The goals of the Traveller Education Strategy include, *inter alia*,

- a. to obtain access to all mainstream provision;
- b. to participate as equals, achieve their full potential, and have outcomes similar to those of their settled peers;
- c. to gain qualifications, obtain access to mainstream employment, aspire to promotion and participate fully as members of society;
- d. to respect and be respected for their culture and identity in an Ireland where diversity, equality and interculturalism are the norm and reciprocally respect other cultures and identities; and
- e. to contribute to Ireland's social, cultural and economic development.³⁴⁷

336. Article 4(4) of the Declaration.

337. Report of the Task Force on the Traveller Community, Stationary Office, Dublin, 1995.

338. Second Progress Report of the Committee to Monitor and Co-Ordinate the Implementation of the Recommendations of the Task Force on the Travelling Community, Dublin, 2005, para. 7.33.

339. See for example the Second Opinion of the Advisory Committee under the Framework Convention for the Protection of National Minorities on Norway ACFC/OP/III(2006)006, para. 127.

340. Department of Education and Science, Report and Recommendations for a Traveller Education Strategy

341. *Ibid.*, pp. 25-27.

342. *Ibid.*, pp. 32-33.

343. *Ibid.*, p. 40.

344. *Ibid.*, p. 54.

345. *Ibid.*, Chapter 11: Conclusions and Recommendations.

346. *Ibid.*, pp. 68-71.

347. *Ibid.*, p. 99.

3. CURRENT EDUCATION SITUATION OF TRAVELLERS

The Second Report of the Committee to Monitor the Implementation of the Recommendations of the Task Force on the Travelling Community noted that the latest figures found that 94.3% of Traveller children completed Primary level. At second level however, the figure fell to 51% to completion of Junior Certificate. Only a small percentage of Travellers transferred to senior cycle.³⁴⁸ According to the Irish Census 2006, of the 13,134 Travellers over the age of 15, just 370 completed secondary education.³⁴⁹ This represents 2.8% completion rate of secondary school amongst all Travellers over the age of 15. This may be contrasted with the high level of secondary school completion amongst the population as a whole, which ranges from 41.8% for those between the ages of 55 to 64 to 86.5% for those between the ages of 20 and 24.³⁵⁰ The area of education was the subject of over half (167) of the recommendations of the Report of the Task Force on the Travelling Community. The Committee to Monitor the Implementation of the Recommendations of the Task Force on the Travelling Community found that the single most important priority is the development of a comprehensive Traveller Education Strategy based on:

- (i) a root and branch review and evaluation of all the existing schemes and measures targeted at Travellers; and
- (ii) Traveller equality proofing of all other education policies, measures and schemes.³⁵¹

The Committee found that there was a need for a better balance of emphasis between access, enrolment and retention on the one hand and generation of equality of outcomes from educational provision on the other.³⁵² The Committee also called for procedures to ensure that Traveller children have equal access to education provision that is best suited to their needs.³⁵³ In terms of relationships between Travellers and the school community, the report stated that there was a need to put in place information on school procedures for Traveller parents and direct contact between Traveller parents and school teachers.³⁵⁴ In addition, there was a need to consult Traveller interests before formulating policies on issues relating to Traveller children.³⁵⁵

4. ASSESSMENT BY INTERNATIONAL BODIES OF IRELAND'S PERFORMANCE

The Advisory Committee on the FCNM gave its second opinion on Ireland's compliance with the FCNM in October 2006. The Committee highlighted the need to combat separation and isolation of Travellers and to ensure there is no direct or indirect bias against them.³⁵⁶

The Advisory Committee praised several promising initiatives, particularly those aimed at facilitating Traveller access to post-primary education and the community development work of Traveller organisations.³⁵⁷ The publication of guidelines on intercultural education, prepared for primary schools by the National Council for Curriculum and Assessment in 2005, were also welcomed.³⁵⁸ However the Committee found that "the educational situation of Travellers remains disconcerting" and noted that "in some cases negative societal attitudes are felt also in schools."³⁵⁹ The Advisory Committee also found that resource teaching was being given on the basis of their Traveller affiliation and that some schools did refer Traveller children to other schools who had already enrolled a number of other Travellers.³⁶⁰ It was stressed that "the risk of isolation and separation" exists in mainstream schools and that this was in some cases "stirred by negative attitudes amongst parents of majority children."³⁶¹

348. *Second Progress Report of the Committee to Monitor and Co-Ordinate the Implementation of the Recommendations of the Task Force on the Travelling Community, Dublin, 2005, para. 7.11.*

349. *Central Statistics Office, Census 2006, Vol. V Ethnic or Cultural Background (including membership of the Travelling Community, p. 45.*

350. *Central Statistics Office, Census 2006, Measuring Ireland's Progress 2006, p. 52.*

351. *Second Progress Report of the Committee to Monitor and Co-Ordinate the Implementation of the Recommendations of the Task Force on the Travelling Community, Dublin, 2005., para. 7.33.*

352. *Ibid., para. 7.33.*

353. *Ibid., p. 182.*

354. *Ibid., p. 98.*

355. *Ibid., p. 98.*

356. *Advisory Committee on the Framework Convention for the Protection of National Minorities, Second Opinion on Ireland, ACFC/OP/II 2006(007), para. 97.*

357. *Ibid., para. 91.*

358. *Ibid., para. 93.*

359. *Ibid., para. 94.*

360. *The Advisory Committee stated that, "[i]n some schools, there is a tendency to give Traveller children unchallenging tasks and 'resource teacher' support merely on the basis of their Traveller affiliation. Risks of undue isolation exist also at the enrolment stage: While there are positive enrolment practices, interviews conducted in the context of the above-mentioned Surveys suggest that some schools do not welcome Traveller children but refer them to another school, known to have enrolled a number of other Travellers." Ibid., para. 96.*

361. *Ibid., para. 96.*

5. THE RIGHT TO WORK UNDER INTERNATIONAL HUMAN RIGHTS LAW

The right to work is a fundamental socio-economic right recognised under international law.³⁶² The right to earn a livelihood is an unenumerated right under Article 40.3 of the Irish Constitution.³⁶³ The UN Committee on Economic, Social and Cultural Rights has stated that the right to work includes the right freely to undertake employment as well as the right not to be deprived of work unfairly.³⁶⁴ Accessibility in entering the workforce includes the right not to be discriminated against, *inter alia*, in relation to social origin.³⁶⁵ Specific legal obligations upon states include refraining from limiting access to the workplace for minorities.³⁶⁶ States parties to the ICESCR are under an obligation to ensure that legislation, strategies and policies for the achievement of full employment allow marginalized or disadvantaged groups to access employment.³⁶⁷

Greater economic opportunities for members of national and ethnic minorities can help to break down divisions in society and foster the establishment of multiethnic networks. Thus the positive interaction of social inclusion policies and the right to cultural identity is a key element of state compliance. The FCNM obliges states parties to "create conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them."³⁶⁸ The UN Minorities Declaration provides that States should take appropriate measures so as to allow minorities participate in "...the economic progress and development in their country."³⁶⁹ Article 30(a) of the Revised European Social Charter obliges the state to combat social exclusion by taking measures to ensure effective access for excluded societal groups to "employment, housing, training, education, culture and social and medical assistance."³⁷⁰

6. THE IRISH POLICY CONTEXT

The Report of the Task Force on the Travelling Community stated that it was important that the full range of employment and training options are open to Travellers and that institutional or discriminatory obstacles are removed. The links between Travellers cultural identity and traditional employment types were recognised.³⁷¹ In order to fully exploit these links, Cossée has identified the need to take account of traditional structural characteristics of Traveller economic activity in implementing culturally reinforcing employment policies.³⁷² This involves a community development model which establishes a "logic of empowerment" which aims "to help remove shame of self or the will to hide one's differences when they are compared to the "norm" of majority"³⁷³. The Committee to Monitor the Implementation of the Recommendations of the Task Force on the Travelling Community found shortcomings in implementation and disparities "...between the objectives of the Task Force and the opportunities offered by a range of State sectors."³⁷⁴ The main recommendations of the Task Force report addressed the effective organisation of trading activities, the development of recycling and waste management strategies, the development of strategies to increase participation by Travellers in mainstream employment and training/ employment schemes.³⁷⁵ FÁS, the Irish National Training and Employment Authority, accepted the Task Force Report and Travellers are now included on a range of programmes.

362. Article 23, UDHR; Article 6, ICESCR. Article 1 of The European Social Charter contains an express obligation for States for the "achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment." See also Article 15, European Charter of Fundamental Rights.

363. Article 45.2 of the Constitution states that all men and women have "the right to an adequate means of livelihood". In *Murtagh Properties v Cleary* [1972] IR 330, Kenny J. stated that this right was not enforceable against the State. In *Attorney General v Paperlink* [1984] ILRM 373, Costello J. stated that the right to earn a livelihood is an unspecified personal right protected by Article 40.3.1. However, restriction on access to certain livelihoods does not necessarily violate Article 40.3.1.

364. Committee on Economic, Social and Cultural Rights, General Comment No. 18, *The Right to Work*, UN Doc. E/C.12/GC/18 (2006), para. 4. See also para. 31(a).

365. *Ibid.*, para. 12(b)(i).

366. *Ibid.*, para. 23.

367. *Ibid.*, paras. 38-45.

368. Article 15 of the Framework Convention.

369. Article 4(5) of the United Nations Declaration on the Rights of Minorities

370. Article 30(a) of the Revised European Social Charter.

371. Report of the Task Force on the Traveller Community, Stationary Office, Dublin, 1995.

372. Claire Cossée, *Travellers Economy in Europe "What Recognition? (A Study for the ETAP transnational project/EQUAL European programme)*.

373. *Ibid.*, p. 19.

374. *Second Progress Report of the Committee to Monitor and Co-Ordinate the Implementation of the Recommendations of the Task Force on the Travelling Community*, Dublin, 2005, para. 8.10

375. Report of the Task Force on the Traveller Community, Stationary Office, Dublin, 1995.

Schemes such as the Local Training Initiative, the FÁS external training budget and Community Employment have been effective.³⁷⁶ However, the Monitoring Committee called for further study into the interface between the community schemes and the Traveller community, noting that many community schemes “have become an end in themselves”.³⁷⁷ An Equality Authority study also expressed concern over the lack of employment opportunities following training.³⁷⁸ There are a number of employment areas in which regulation has had particular impacts on Travellers. Given the role of many Travellers in recycling and the increasing regulation in this area, it would be important to ensure that Travellers are supported to maintain and develop their own initiatives in keeping with the regulations.³⁷⁹

7. ASSESSMENT BY INTERNATIONAL BODIES OF IRELAND’S PERFORMANCE

The Advisory Committee on the FCNM noted that the shortcomings in education contribute to difficulties in the area of employment. The Advisory Committee noted that with increased regulation in the work areas associated with Travellers, opportunities to continue self-employment have become more difficult.³⁸⁰ The Opinion of the Advisory Committee also expressed concern at access to financial services by Travellers.³⁸¹ The Advisory Committee concluded with a general recommendation on the need to eliminate practical and legal obstacles for Travellers by the protection of self-employment opportunities, access to employment and equal access to finance.³⁸²

It appears that there is a need to secure common outcomes in service provision for Travellers and to increase the visibility of Travellers in social inclusion strategies. This requires a joined up approach involving respect for Travellers’ cultural identity, anti-discrimination and social inclusion.

8. SUMMARY OF THE APPLICABLE INTERNATIONAL HUMAN RIGHTS LAW

- The right to education is a fundamental human right and the manner in which it is provided should be culturally appropriate and aimed at fostering respect for a child’s cultural identity, language and values and respect for the differing values of other children.
- The right to work under international human rights law also includes the requirement for effective measures so as to ensure minority participation within the work force.

9. SUMMARY OF OBSERVATIONS

- While progress has been achieved in relation to increased participation of Travellers at different levels of education, further measures are required. Effective implementation of the recommendations of the Traveller Education Strategy is of central importance to ensuring improved access to education for Travellers. The Traveller Education Advisory Committee, which was established to advise on the drafting of the Traveller Education Strategy, should be re-established to monitor the implementation of this strategy.
- Improved measures should be put in place to increase the participation of Travellers in the labour force.

376. A number of Travellers have been trained as primary health care workers through these schemes and are now employed in the health care sector. Building on this success it was recommended in the Report of the Committee to Monitor the Implementation of the Recommendations of the Task Force on the Travelling Community that FÁS fund a coherent and national accredited programme for the training of Travellers in primary health care. Second Progress Report of the Committee to Monitor and Co-Ordinate the Implementation of the Recommendations of the Task Force on the Travelling Community, Dublin, 2005, para 8.9.

377. *Ibid.*, para 8.1.3.

378. The Equality Authority, *Travellers Experiences of Labour Market Programmes- Barriers to Access and Participation*, p. 12.

379. See Second Progress Report of the Committee to Monitor and Co-Ordinate the Implementation of the Recommendations of the Task Force on the Travelling Community, Dublin, 2005, para. 8.7. The Monitoring Committee noted that the Casual Trading Act 1995 provided that a market trader requires a licence in each local authority area. In the past one licence allowed people to trade anywhere in the country. The Monitoring Committee noted the study commissioned by the Competition Authority, *Report on the Implementation of the Casual Trading Act 1995*, (22 August 2002). The Competition Authority recommended, *inter alia*, that where one local authority issues an individual with a casual trading licence, there could be a scheme in place for mutual recognition with other local authorities, p. 66, para. 10.13.

380. Advisory Committee on the Framework Convention for the Protection of National Minorities, *Second Opinion on Ireland, ACFC/OP/II 2006(007)*, para. 116.

381. *Ibid.*, para. 117.

382. *Ibid.*, para. 117.

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Concluding Observations

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