

**Submission to the United Nations Committee Against Torture as part of the  
follow-up procedure to Concluding Observations on the second periodic  
report of Ireland issued on 11<sup>th</sup> August 2017**

**Concluding observations of the Committee against Torture**  
*(Extracts for follow-up of CAT/C/IRL/CO/2)*

**12<sup>th</sup> November 2018**

## Background: Sage Advocacy

The right to have your voice heard and to participate in making decisions which affect you is a fundamental principle in a democratic society. It is a principle simply stated as "Nothing about you /without you".

Many people face challenges to their independence due to physical or mental illness, intellectual, physical or sensory disability, lack of family and community supports or an inability to access public services that meet their needs. Some people communicate differently and with difficulty and some people slowly lose their ability to make and communicate decisions as a condition, such as dementia, develops over time. Some are abused and exploited because of their vulnerability. Others feel disregarded or let down by healthcare services while some are harmed through adverse events or medical negligence. In circumstances where people may be vulnerable, or have to depend on others, there is a need to ensure that their rights, freedoms and dignity are promoted and protected. Through support and advocacy the will and preference of a person can be heard and acted on; independently of family, service provider or systems interests.

The development of Sage Advocacy has been influenced by domestic scandals of Leas Cross in 2005, and Áras Attracta and Portlaoise Hospital in 2014. First established in June 2014 as a support and advocacy service for older people by the Health Service Executive (HSE), The Atlantic Philanthropies and Third Age, it was in 2016 asked to explore how it might address some of the more systemic issues relating to people with intellectual disabilities in the South-East of Ireland. Sage Advocacy clg was established in September 2017 and on March 1st 2018 it assumed full responsibility for the governance and future development of the service. On July 1st 2018 the patient advocacy services, previously provided by Patient Focus, moved to Sage Advocacy which is now a support and advocacy service for vulnerable adults, older people and healthcare patients.

The main Objective of Sage Advocacy clg is *“To promote, protect and defend the rights and dignity of vulnerable adults, older people and healthcare patients, the prevention of cruel, inhuman and degrading treatment and deprivation of liberty and the enhancement of personal autonomy and decision making in all care settings and in the transition between them within the Republic of Ireland”*.

## Independent monitoring of places of deprivation of liberty and the Optional Protocol

In the concluding observation on the second periodic report of Ireland issued on 11<sup>th</sup> August 2017, the Committee against Torture requested the State to provide information on the ratification of the Optional Protocol to the Convention. Included in the recommendations of the Committee regarding ‘Independent monitoring of places of deprivation of liberty and OPCAT’ is that the State should ratify OPCAT and establish a national preventative mechanism, ensuring that this body has access to all places of deprivation of liberty in all settings.

*Consultation Process on ratification of OPCAT*

The State's follow-up report to the Committee on 9<sup>th</sup> August 2018 referred to the Irish Human Rights and Equality Commission (IHREC) commissioned research *Ireland and the Optional Protocol to the UN Convention against Torture*<sup>1</sup> and the Department of Justice and Equality's role in circulating the research to relevant stakeholders for comment and observations, focussing on identified critical issues from the research.<sup>2</sup>

In the State's follow-up report, the Department of Justice and Equality has indicated the organisations that the Department engaged with regarding observations and comments on the IHREC research. The Minister for Justice and Equality has referred to this as a process of consulting with relevant agencies, Departments and other stakeholders.<sup>3</sup> From the information provided in the State's follow-up report it is apparent that this consultation process has been limited and has not had participation from the public or adequate representation of organisations working in the non-justice area, particularly the health and social care sector. The Subcommittee on Prevention of Torture (SPT) states in its Guidelines on National Preventive Mechanisms that the identification of the NPM should be an open, transparent and inclusive process involving all relevant stakeholders, including civil society.<sup>4</sup> The consultation process to date falls short of being open and inclusive.

The first stated next step from IHREC's research *Ireland and the Optional Protocol to the UN Convention against Torture*, which is referred to in the State's follow-up report, is the need for further national consultation and debate on OPCAT involving a full range of stakeholders including civil society. In a submission to the Department of Justice and Equality this organisation has indicated its view that as OPCAT, and a NPM established under this treaty, would be for the benefit of all people who are, or may be, deprived of liberty to ensure they are treated with dignity and are free from ill-treatment it is crucial that a consultation process is inclusive of organisations and people connected to the broad health and social care sector where deprivation of liberty can occur. The need for this process to be conducted in conjunction with the Department of Justice and Equality but separate from the process for considering a criminal justice inspectorate is highlighted by the IHREC research which clearly states that previous and current debate around the proposed criminal justice inspectorate are not sufficient to meet the requirements of OPCAT<sup>5</sup>. The measures to develop legislation to establish the NPM is welcomed, however a limited consultation process that is not proactively inclusive prior to developing the draft legislation is not in keeping with the requirements of OPCAT. It is a missed opportunity to have meaningful contribution from all stakeholders, civil society, and all involved or affected by deprivation of liberty in places that are not in the criminal justice area, such as health and social care settings.

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<sup>1</sup> Murray, R. & Steinerte, E., 2017. *Ireland and the Optional Protocol to the UN Convention Against Torture*. Dublin: Irish Human Rights and Equality Commission

<sup>2</sup> Committee against Torture 2018, Concluding observations on the second periodic report of Ireland, Addendum, Information received from Ireland on follow-up to the concluding observations. CAT/C/IRL/CO/2/Add.1, available from [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2FIRL%2FCO%2F2%2FAdd.1&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2FIRL%2FCO%2F2%2FAdd.1&Lang=en) [accessed 10/11/2018]

<sup>3</sup> Parliamentary Question, Question 291 of 30<sup>th</sup> January 2018, 4122/18, available from <http://www.justice.ie/en/JELR/Pages/PQ-30-01-2018-291>, [accessed 10/11/2018]

<sup>4</sup> Subcommittee on Prevention of Torture, Guidelines on National Preventive Mechanisms, UN Doc CAT/OP/12/5 (2010), para 16.

<sup>5</sup> Murray, R. & Steinerte, E., 2017. *Ireland and the Optional Protocol to the UN Convention Against Torture*. Dublin: Irish Human Rights and Equality Commission, page 53

The point has been made to the Department of Justice and Equality by this organisation and others that broad consultation should not impede the ratification of OPCAT. The Minister for Justice and Equality indicated that the consultation process of receiving and considering submissions on the IHREC research would be concluded in July 2018, and draft Inspection of Places of Detention Bill to enable ratification OPCAT would be before Government by the end of 2018<sup>6</sup>. In the State's follow-up report the timeframe indicated is for September 2018 to complete a consideration of submissions on the IHREC research, and no timeframe is given for presentation to Government of draft legislation for ratification. There has been minimal progress towards ratification since Ireland signed the Optional Protocol in 2017, and the Inspection of Places of Detention Bill was first listed in the Government's legislative programme seven years ago.

### *Remit of a National Preventive Mechanism in Ireland*

The Committee Against Torture in its Concluding Observations following Ireland's review in 2017 noted that '...existing bodies do not systematically carry out visits to all places of deprivation of liberty such as Garda stations, residential care centres for people with disabilities, nursing homes for the elderly and other care settings' and made recommendations that Ireland should immediately ratify OPCAT and establish a NPM that '...has access to all places of deprivation of liberty in all settings;'<sup>7</sup>.

The Committee further recommended that the State 'should also ensure that the Inspection of Places of Detention Bill provides for independent monitoring of residential and congregated care centres for older people and people with disabilities within the National Preventive Mechanism, and that people residing in such facilities can submit complaints, including regarding clinical judgments, to these independent monitors.'<sup>8</sup>

The Subcommittee on Prevention of Torture (SPT), as referenced in the IHREC research which was the basis of the Department of Justice and Equality recent engagement with Stakeholders, has provided the following guidance:

*'The Subcommittee therefore takes the view that any place in which persons are deprived of their liberty, in the sense of not being free to leave, or in which the Subcommittee considers that persons might be being deprived of their liberty, should fall within the scope of the Optional Protocol, if the deprivation of liberty relates to a situation in which the State either exercises, or might be expected to exercise a regulatory function'<sup>9</sup>*

The guidance from the UN Committee to the State has been explicit in the requirement that any National Preventative Mechanism established in Ireland following ratification of OPCAT should include all places of deprivation of liberty in all settings. The Minister for Justice and Equality has indicated that it is the responsibility of other Government Departments to

<sup>6</sup> Parliamentary Question, Question 29922 of 5<sup>th</sup> July 2018, 29922/18, available from <https://www.oireachtas.ie/en/debates/question/2018-07-05/1/?highlight%5B0%5D=opcat&highlight%5B1%5D=opcat&highlight%5B2%5D=opcat&highlight%5B3%5D=opcat&highlight%5B4%5D=opcat#pg-answers-1>, [accessed 10/11/2018]

<sup>7</sup> Committee Against Torture, Concluding Observations on the second periodic report of Ireland (31 August 2017) UN Doc CAT/C/IRL/CO/2, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fIRL%2fCO%2f2&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fIRL%2fCO%2f2&Lang=en), para 7

<sup>8</sup> Ibid, Concluding Observations para 36, [accessed 10/11/2018]

<sup>9</sup> Subcommittee on Prevention of Torture. Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. UN Doc CAT/OP/C/57/4 (2016) Annex, at para 3 as in Murray, R. & Steinerte, E. Ibid 6, page 21

identify the facilities within their remit, and outside of the justice area, that should be subject to OPCAT.

### *Protection of Liberty Safeguards in Ireland*

Despite the signing into law in December 2015 of the Assisted Decision-Making (Capacity) Act 2015 this legislation has not yet been commenced. As a result, Ireland continues to operate a ward of court system under the Victorian-era paternalistic legislation *Lunacy Regulations (Ireland) Act, 1871*. The current legal framework for substituted decision making for people deemed of “unsound mind” under the Regulations amounts to a complete denial of a vulnerable adult’s human rights.

The continued use of the ward of court system, and detention of individuals pursuant to the consideration of a ward of court application, along with a recent Court of Appeal decision in Ireland<sup>10</sup> further emphasises the need for legislation to protect the liberty of the person through a process prescribed in law, that is in compliance with the international human rights conventions which Ireland has signed up to and ratified.

In December 2017 The Department of Health, with the assistance of the Department of Justice and Equality, drafted preliminary heads of bill on Deprivation of Liberty Safeguards which were open to public consultation.<sup>11</sup> The legislation was drafted to meet Ireland’s obligations under the UN Convention on the Rights of Persons with Disabilities, which had not been ratified by Ireland at that time but subsequently was in March 2018. The purpose of the legislation was to set out a process to ensure that people are not unlawfully deprived of their liberty, and to provide safeguards for older people, persons with a disability and certain categories of people with mental health illness who “...are living in, or it is proposed that they will live in, a residential facility and there is reason to believe they lack the capacity to decide to live there.”<sup>12</sup> It is intended the provisions regarding protection of liberty will form Part 13 of the Assisted Decision-Making (Capacity) Act 2015, legislation which provides statutory recognition of presumption of capacity and a framework for adults to be assisted and supported with their decision making. The draft heads of bill on Deprivation of Liberty Safeguards were not in compliance with the existing Assisted Decision-Making (Capacity) Act 2015 or the UN Convention on the Rights of Persons with Disabilities regarding presumption of capacity, supporting decision-making and functional assessment of capacity. Following the public consultation an Advisory Group was established by the Department of Health to advise on amendments to the legislation and as the Minister for Health stated to “...ensure the approach taken integrates effectively with existing legislation.” This revised legislation has not yet been introduced.

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<sup>10</sup> A.C. -v- Cork University Hospital & Ors A.C -v- Clare & Ors [2018] IECA 217

<http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/176a7cb31cfd15e6802582bf004c0af6?OpenDocument> [accessed 10/11/2018]

<sup>11</sup> Department of Health, Preliminary Draft Heads of Bill for Public Consultation Purposes Only, available at <https://health.gov.ie/wp-content/uploads/2017/12/Deprivation-of-Liberty-Safeguard-Heads-draft-for-public-consultation.pdf> [accessed 10/11/2018]

<sup>12</sup> Department of Health, *Deprivation of Liberty: Safeguard Proposals Consultation Paper* <https://health.gov.ie/wp-content/uploads/2017/12/Public-Consultation-paper-on-draft-deprivation-of-liberty-proposals.pdf> para 5, [accessed 10/11/2018]

In July 2018 the Court of Appeal in Ireland<sup>13</sup> issued a judgement on the unlawful detention of a woman in an acute hospital, in the case in question the person had expressed a wish to leave, however it was considered that the person lacked the capacity to do so. The judgement highlighted that if an institution had such power to detain, and this was unchecked, it could lead to widespread abuse, and if it was accepted that an institution had power to detain

“...the logical consequence would be that tens of thousands of the infirm elderly who are suffering from dementia (or whose capacity is otherwise impaired) and who are presently residing in nursing homes and other similar institutions could equally be restrained from leaving. In many cases this would doubtless be for good clinical reasons. In other instances, however, this decision could be simply for reasons of convenience and, perhaps in a small minority of cases, for even less noble motives.”<sup>14</sup>

Mr. Justice Hogan in giving judgement states that it is the role of the Government to introduce legislation and policy with adequate safeguards for the person if there is a proposed restriction on their liberty.

The emerging concept and understanding of deprivation of liberty should be considered by the State when developing legislative provisions that relate to deprivation of liberty and the designation of a National Preventative Mechanism. It has been noted<sup>15</sup> in the context of a review of Deprivation of Liberty Safeguards in England and Wales that for human rights to be meaningful it should be looked at from the perspective of the person. Safeguards and related processes should be examined from the perspective of how the person will benefit, and how their rights and quality of life will be enhanced as they experience them. A person may be subject to care and treatment to the extent that care is intrusive, or they are completely dependent on the provision of care, and how care is provided to them creates a risk of deprivation of liberty.

The Scottish Government’s proposals for reform of the Adult with Incapacity (Scotland) Act 2000<sup>16</sup> considers recent cases of the European Court of Human Rights and suggests *...that significant restrictions on liberty are as much about how a person lives as where the person lives and it is important to distinguish between decisions as to where a person lives and the conditions that should apply there:*

- *If a regime looks like detention it does not lose that characteristic just because the person does not display opposition.*
- *If a regime does not look like detention but the adult displays opposition to staying there, then that should be considered as placing significant restrictions on that adult’s liberty*

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<sup>13</sup> A.C. -v- Cork University Hospital & Ors A.C -v- Clare & Ors [2018] IECA 217  
<http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/176a7cb31cfd15e6802582bf004c0af6?OpenDocument>  
 [accessed 10/11/2018]

<sup>14</sup> Ibid, para 43

<sup>15</sup> Bartlett, P., "Reforming the Deprivation of Liberty Safeguards (DOLS): What Is It Exactly that We Want?", (2014) 20(3) Web JCLI.  
<http://webjcli.org/article/view/355/465> [accessed 07/03/2018]

<sup>16</sup> Scottish Government, 2018 *Adults with Incapacity (Scotland) Act 2000 Proposals for Reform*, page 12, available from  
<http://www.gov.scot/Resource/0053/00530800.pdf> [accessed 07/03/2018]

- *A person may be perfectly content to agree to move to another place of residence but may not agree with aspects of their care there which amount to significant restrictions on their liberty.*
- *A person may remain in the same residential setting but become subject to changes in aspects of their care which in themselves mean they become subject to significant restrictions on their liberty.*

## *Conclusion*

As Ireland is in the process of preparing legislation to ratify OPCAT and to develop a NPM, and at the same time is developing legislation to ensure protection of liberty safeguards exist it has the opportunity to develop legislative provisions that are integrated to provide a framework for prevention of torture and ill-treatment. There is an opportunity to develop an innovative NPM that is empowered to carry out its functions in any place where a person may be deprived of their liberty, is *de facto* detained, or where the conditions a person experiences places significant restrictions on their liberty. There is an opportunity for Ireland to adopt the broadest interpretation of deprivation of liberty and to ensure the NPM is mandated to apply its preventative role in this context. To achieve effective legislation that ensures the State is fulfilling its obligations to prevent torture, or cruel, inhuman or degrading treatment of people there is a responsibility on the relevant Government Departments drafting legislation relating to the State's mechanisms to protect liberty and monitor places of detention to work collaboratively and in consultation with all relevant stakeholders.