



**SAFER
FROM
HARM**

**IRELAND AND
THE HUMAN
RIGHTS OF
PEOPLE WHO
USE DRUGS**

List of Abbreviations

AGS	An Garda Síochána
CEB	Chief Executives Board for Coordination of the United Nations
CESCR	United Nations Committee on Economic, Social and Cultural Rights
CJEU	Court of Justice of the European Union
CND	United Nations Commission on Narcotic Drugs
CoE	Council of Europe
DFAT	Department of Foreign Affairs and Trade
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ESC	European Social Charter
EU	European Union
GCDP	Global Commission on Drug Policy
HSE	Health Service Executive
IBHR	International Bill of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICHRDP	International Centre on Human Rights and Drugs Policy
IHREC	Irish Human Rights and Equality Commission
OHCHR	Office of the United Nations High Commissioner for Human Rights
IPRT	Irish Penal Reform Trust
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNCAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNCRC	Convention of the Rights of the Child
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UNGASS	United Nations General Assembly Special Session
UNHCHR	United Nations High Commissioner for Human Rights
UNHRC	United Nations Human Rights Council
UNODC	United Nations Office on Drugs and Crime
WHO	World Health Organization

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Foreword

Human rights are the basic and fundamental rights and freedoms that belong to everyone. Both domestically and internationally, we recognise the importance of these rights. We have put in place legal structures and have made many commitments to protect them. However, these steps alone are not sufficient – we must also constantly work to ensure that our policy choices are grounded in human rights and are consistent with the structures we have built and the commitments we have made. Failure to do so results in bad policies – those which ignore or curtail the human rights of one group of citizens with little or no justification for doing so.

As we consider modernising our drug policy in Ireland, it's critical to note that people who use drugs in Ireland are one such group who experience discrimination, stigmatisation and violations of their human rights in multiple ways, including through the persistent use of the criminal justice system to address what national policy recognises as a health issue. The criminalisation of possession of drugs for personal use is problematic on many levels. It infringes on the right to health, because it creates a barrier to accessing health care services and to support systems. Numerous cases from around the world show that criminalisation is inconsistent with the right to privacy. The subordination of a health issue to criminal justice interferes with the prohibition of discrimination in the context of vindicating rights.

A policy of criminalisation deliberately and consciously generates social disapproval and stigma of people who use drugs. It is important to note that this is the intent of criminalisation, and not merely a consequence of it. Stigmatisation is harmful – it can push people into unsafe environments, exposing them to health risks and isolation. It can have serious consequences for the physical and mental well-being and health of individuals, and can negatively impact their relationships, families and communities. In addition to stigma, criminalisation also creates unnecessary barriers to employment, housing, travel, education and other areas of life. Criminalisation impacts

the opportunity to live a full life free from discrimination. One of the most concerning aspects of a policy of criminalising the possession of drugs for personal use is that it risks disproportionately impacting those who are already marginalised. There is a clear link between problematic drug use and disadvantage, and identified factors that increase vulnerability to drug misuse are mental health problems, poverty, lack of resources and social exclusion.

These issues need to be at the forefront of discussion in Ireland today, as we are at a critical juncture for decision making for drug policy. The government has proposed adopting a new approach to the possession of small amounts of drugs for personal use. Framed as a 'Health Diversion Approach', the policy could end up as a 'three strikes' approach to simple possession. Unless great care is taken, it is likely that this policy will concentrate negative consequences on those who are already marginalised. This is deeply concerning. As we move forward as a nation, we must be confident that our chosen policy is fully consistent with our commitments to international human rights standards, and supports our public bodies to comply with their statutory obligations under Irish law. We must ensure that policy in this area is consistent with the health led, person centred approach enshrined in our national drugs strategy and we must avoid using the criminal law to deal with our public health and social issues. To reach a policy that guarantees this, the protection and vindication of the human rights of people who use drugs in Ireland need to form the bedrock of the discussion.

In this context, I very much welcome this short paper on Ireland and the human rights of people who use drugs. It is a timely and much needed input into a contemporary issue in drug policy, and I trust it will be of value to all those involved in policy formation to this area.

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Introduction

As a country, Ireland has seen positive policy change in a number of areas in recent years, including in the sphere of drug policy. Ireland's current drug strategy, "Reducing Harm, Supporting Recovery 2017-2025" was launched in July 2017, and is a clear statement of the country's strategic direction. As An Taoiseach¹, Leo Varadkar TD, notes in the foreword:

"For the ideal of a Republic of Opportunity to be meaningful, it must apply to all. Treating substance abuse and drug addiction as a public health issue, rather than as a criminal justice issue, helps individuals, helps families, and helps communities. It reduces crime because it rebuilds lives. So it helps all of us."²

Action 3.1.35 of the strategy mandates the establishment of a working group to consider alternative approaches to possession of small amounts of drugs for personal use. This working group met a number of times from 2017 to 2019 and submitted their report to the relevant Ministers, the Minister of State with responsibility for the National Drugs Strategy, Catherine Byrne TD, Minister for Health Simon Harris TD, and minister for Justice Charlie Flanagan TD in April 2019.³ The working group report ultimately recommended three distinct policy approaches it considered suitable for the Irish context – a health diversion approach, an extension of the adult cautioning scheme to include possession offences, and an extension of the adult cautioning scheme to allow multiple applications of that scheme in the context of simple possession offences. However, there was not unanimity among the

group's members, and the Chairperson also submitted a minority report noting that he was opposed to "leaving any form of decriminalisation on the table as an option for government."⁴

Following consideration of the reports, the government has proposed the 'Health Diversion Approach', a policy that does not adopt one or other of the working group's recommendations but rather is a conflation of the health and adult caution approaches, and represents a staged approach to dealing with simple possession.⁵ It sets out that the first time a person is caught for simple possession, they are referred by An Garda Síochána (AGS) to a health assessment with the Health Service Executive (HSE), from which they can be offered further supports if necessary. On the second occasion, AGS has the discretion to issue an Adult Caution. On the third occasion, it appears that the person will be prosecuted through the criminal justice system, as is currently the case.

The precise detail of the proposed policy remains to be worked out and a second working group is being established for this purpose. Nonetheless, the basic contours of the policy are available for analysis. Although the shift towards a health approach is welcome - as it represents an explicit acceptance that criminalising simple possession is not the correct policy approach - the policy seems set to ultimately continue to do just that, despite the fact that there is broad support for decriminalisation in Ireland from civil society,⁶ politicians,⁷ physicians⁸ drug policy experts,⁹ as well as from the general public.¹⁰

The proposed policy is particularly problematic when we reflect on the group of people that is likely to be caught three times for simple possession and hence seem destined to be dealt with through the criminal courts system.

1. The Irish Prime Minister.

2. Department of Health, Reducing Harm, Supporting Recovery – A health-led approach to drug and alcohol use in Ireland 2017-2025. (Dublin: An Roinn Sláinte, 2017), <https://health.gov.ie/wp-content/uploads/2017/07/Reducing-Harm-Supporting-Recovery-2017-2025.pdf>, 3.

3. See Working Group to Consider Alternative Approaches to the Possession of Drugs for Personal Use, April 2019, <https://assets.gov.ie/24036/d7e89187ce284bde9ea70f0334c1894a.pdf>.

4. See Minority Report of the Chairperson of the Working Group, April 2019, <https://assets.gov.ie/24037/460f-ca4307634454862bea787d7b2540.pdf>.

5. Department of Health, Press Release, August 2, 2019: Ministers Harris, Flanagan, and Byrne announce health-led approach to the possession of drugs for personal use. Accessed September 19, 2019, <https://health.gov.ie/blog/press-release/ministers-harris-flanagan-and-byrne-announce-health-led-approach-to-the-possession-of-drugs-for-personal-use/>.

6. See, for example, <https://www.citywide.ie/news/2019/07/16/an-open-letter-to-the-taoiseach> See also www.saferfromharm.ie for a list

of coalition partners, including civil society organisations and businesses supporting the SaferFromHarm campaign to decriminalize people who use drugs. <https://www.saferfromharm.ie/>.

7. See, for example, the following online articles reporting on statements by various members of government, accessed March 21, 2019: <https://www.fiannafail.ie/examining-viability-of-decriminalisation-could-help-us-turn-a-corner-in-drugs-pandemic-curry/>; <https://www.independent.ie/irish-news/politics/decriminalising-possession-of-small-quantities-of-drugs-would-give-people-back-an-opportunity-at-their-life-minister-claims-35938561.html>; <https://www.independent.ie/irish-news/news/sick-people-dont-need-to-be-in-court-senator-aodhno-riordain-backs-decriminalising-all-drugs-for-personal-use-35631661.html>; <http://www.universitytimes.ie/2019/03/sinn-fein-to-support-cannabis-decriminalisation-says-party-senator/>.

8. See, for example, <https://www.irishtimes.com/opinion/letters/cannabis-medicine-and-the-law-1.3914609>.

9. See, for example, <https://www.irishtimes.com/opinion/letters/cannabis-medicine-and-the-law-1.3917133>.

10. See, for example, RED C Poll on Attitudes to Decriminalisation of Drugs for Personal Possession (February 2019), <https://www.saferfromharm.ie/resources/8-in-10-irish-adults-believe-the-response-to-drug-use-should-be-health-led>.

Drug use in Ireland is widespread.¹¹ The vast majority of it goes undetected by the state. The reality is that it is easy to avoid detection for possession of controlled substances in Ireland for most people. The reality is also that the cohort of people who will be caught multiple times will likely comprise people who are already struggling with their drug use, and who maybe facing other serious challenges in their life, such as homelessness, with the result that they are more visible in the public domain. Hence, there is a serious concern that the proposed policy will end up only end up serving to further criminalise those who are already marginalised, and it is incumbent on us to consider the policy in this context. To adopt a policy that risks further marginalising people who are already vulnerable is deeply concerning from a human rights point of view.

Human rights are intended to be central to policy making and implementation in Ireland. For example, section 42 of the Irish Human Rights and Equality Commission Act 2014¹² (IHREC Act 2014) places a statutory obligation on public bodies to have regard to the need to protect human rights in the performance of their functions. As the Irish Human Rights and Equality Commission (IHREC) has noted:

“The Public Sector Equality and Human Rights Duty (‘the Duty’) places a statutory obligation on public bodies to eliminate discrimination, promote equality of opportunity and protect the human rights of those to whom they provide services and staff when carrying out their daily work. It puts equality and human rights in the mainstream of how public bodies execute their functions.”¹³

Given the importance of ensuring a human rights approach is afforded due weight in Irish policy solutions, and ensuring that our policy choices are consistent with enabling public bodies to be in compliance with the positive obligations imposed on them by the public sector duty, this short paper sets out some key issues for consideration in the specific context of the state’s approach to personal drug use and human rights.

It is intended as a general overview, and it is hoped that it will be of use to both expert and non-expert audiences. As they read, we invite readers to consider the following questions, which are central to the discussion:

- Whether criminalising possession of small amounts of drugs for personal use in any circumstances is compatible with:
 - Supporting and recognising the human rights of people who use drugs in Ireland.
 - Broader Irish drug policy, which clearly frames drug use as a public health issue.
 - Supporting those public bodies engaged in executing the policy discharging their positive obligations pursuant to section 42 of the IHREC Act 2014?
- Whether there are policy options other than the current and the proposed approach of that might deliver better results for public health and are less rights limiting for people who use drugs?

11. National Advisory Council on Drugs and Alcohol, Prevalence of Drug Use and Gambling in Ireland and Drug Use in Northern Ireland, (Dublin: NACDA, 2016).

12. Section 42, Irish Human Rights and Equality Commission Act 2014, <http://www.irishstatutebook.ie/eli/2014/act/25/section/42/enacted/en/html>.

13. Irish Human Rights and Equality Commission, Implementing the Public Sector Equality and Human Rights Duty (Irish Human Rights and Equality Commission, 2019), https://www.ihrec.ie/app/uploads/2019/03/IHREC_Public_Sector_Duty_Final_Eng_WEB.pdf, 2.



Criminalisation or Public Health?

Criminalisation can be defined as the action of turning a behaviour or activity into a criminal offence, or the action of turning someone into a criminal by making their actions illegal.¹⁴

The criminalisation of activities related to personal drug use such as possession of drugs, is a central pillar of drug control,¹⁵ domestically and globally. Internationally, the current regime on drug control lies in three United Nations (UN) Conventions governing drug control, to which Ireland is a party - the 1961 Single Convention on Narcotic Drugs (and the 1972 Protocol Amending the Single Convention);¹⁶ the 1971 Convention on Psychotropic Substances;¹⁷ and the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.¹⁸ The conventions are largely prohibitive in nature, and seek to restrict all non-medical or non-scientific use of drugs.

In Ireland, drugs are controlled through the Misuse of Drugs Acts 1977-2017 and associated legislation and regulations.¹⁹ With the exception of opium, there is no crime of consumption in Irish law, nor are there laws prohibiting the possession of paraphernalia which are seen in other jurisdictions.²⁰ Thus, in considering the human rights impact of laws focused on solely personal drug use, the most relevant offence is that of simple possession, which is criminalised under section 3 of the Misuse of Drugs Act 1977.²¹ In 2018, there were 13,426 recorded incidents of possession for personal drug use, making up for over 73% of all drug related offences.²²

There are legitimate concerns that any policy which criminalises possession will end up criminalising people who are already marginalised. Although current publicly available statistics do not record detailed demographic profiles

of people who are charged with or prosecuted for simple possession, it can be noted that, on a population level, heroin use is generally very rare. Amongst all people who have used any drug in the last month, the cohort of people who have used heroin is less than one percent.²³ At the same time, it's estimated that people in possession of heroin use make up for 9% of all recorded offences associated with personal possession.²⁴ Thus, in the context of personal possession, people who use heroin seem to be overrepresented with respect to what might be expected given the proportion they make up of the entire population of people who use drugs.

It is also important to note that heroin use has long been associated with marginalisation and disadvantage. As an example, a study on the profile of problematic opiate users suggests that the majority of those using opiates are male (70%) and in the 35-64 age-group, and treatment data from 2016 shows that 66% of those in treatment for opiate use were unemployed and that 10% were homeless.

It's also important to note that the public consultation process by the Department of Health reported strong agreement amongst people with lived experience of criminal prosecution for simple possession that their social class had an influence on the likelihood of being found in possession and prosecuted.²⁵ It is critical that any new policy does not inadvertently end up punishing people who are already marginalised.

Since the introduction of the Misuse of Drugs Acts in 1977, a lot has changed and our understanding of drugs, drug use and what is achievable and desirable as policy solutions in the area have developed significantly. This is

14. Oxford Dictionary Online, accessed June 27, 2019, <https://en.oxforddictionaries.com/definition/criminalization>.

15. Steve Rolles and Niamh Eastwood, "Drug decriminalisation policies in practice: A global summary," in *Harm Reduction International, The global state of harm reduction 2012* (HRI: London, 2012), 158.

16. 1961 Single Convention on Narcotic Drugs (and the 1972 Protocol Amending the Single Convention), United Nations, https://www.unodc.org/pdf/convention_1961_en.pdf.

17. 1971 Convention on Psychotropic Substances, United Nations, https://www.unodc.org/pdf/convention_1971_en.pdf.

18. 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, United Nations, https://www.unodc.org/pdf/convention_1988_en.pdf.

19. Misuse of Drugs Act 1977, <http://www.irishstatutebook.ie/eli/1977/act/12/enacted/en/html>.

20. See, for example, Section 11 of the NSW Drug Misuse and Trafficking Act 1985, http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/dmata1985256/s11.html.

21. Section 3, Misuse of Drugs Act 1977, <http://www.irishstatutebook.ie/eli/1977/act/12/section/3/enacted/en/html#sec3>.

22. "Recorded Crime Offences Under Reservation by Type of Offence and Year," Central Statistics Office, accessed June 28, 2019, <https://www.cso.ie/pv/pwiresstat/Statire/SelectVarVal/saveselections.asp>.

23. See NACDA Survey, 2016, p.14: Total number of people surveyed: 5409. Last year prevalence of use of any drug amongst those was 8.9%, and of heroin use was 0.2%.

24. See report on "Costing of an alternative approach to personal drug possession", IGEEES and Department of Justice and Equality, 2019, 10.

25. Working Group to Consider Alternative Approaches to the Possession of Drugs for Personal Use, August 2019, Department of Health, <https://assets.gov.ie/24036/d7e89187ce284bde9ea70f0334c1894a.pdf>, 49.

reflected in the National Drug Strategy “Reducing Harm, Supporting Recovery 2017-2025”²⁶ which clearly positions drug use within the sphere of public health.

The strategy is underpinned by a number of values – including compassion, respect, equity, and inclusion – which, taken together:

“...reinforce the Government’s commitment to adopt a health-led approach to substance misuse and to provide the supports that are necessary to help people recover their health, wellbeing and quality of life.”²⁷

There is also explicit recognition within the strategy that the human rights of people who use drugs need to be at the centre of how Ireland responds to the challenges of drug use in our communities. For example, action 4.2.43 of the drug strategy requires the delivery of services within a Quality Assurance Framework, which, inter alia, “reflect a human rights based and person centred approach.”²⁸

Internationally, there is growing support for moving firmly away from the criminal law in the context of possession of small amounts of drugs for personal use. In January 2019, the Chief Executives Board for Coordination (CEB) of the UN adopted a common position on drug policy that endorsed decriminalisation of simple possession and personal use.²⁹ The CEB is the longest standing and highest level coordination forum of the UN and represents 31 organisations, including the lead agency on drug policy, the UN Office on Drugs and Crime (UNODC).³⁰ In their discussions on the matter, the CEB members ‘[r]eaffirmed the importance of a human-centred and rights-based approach firmly anchored by the 2030 Agenda’,³¹ and positions drug policy firmly within the human rights, public health and sustainable development agendas.³² The CEB’s directions for action include promoting “a rebalancing of drug policies and interventions towards public health approaches...”³³ as well as to promote “alternatives to conviction and punishment in appropriate cases, including the decriminalization of drug possession for personal use, and to promote the principle of proportionality.”³⁴

Prior to this statement by the CEB, other UN bodies have voiced similar support. For example, the report by the UN High Commissioner for Human Rights (UNHCHR) on the

impact of the world drug problem on the enjoyment of human rights recommended that:

“Consideration should be given to removing obstacles to the right to health, including by decriminalizing the personal use and possession of drugs; moreover, public health programmes should be increased.”³⁵

In looking at law reform more generally in Ireland, there are many areas in which behaviours which were previously treated as criminal have been decriminalised.³⁶ This can happen for a variety of reasons – a clear violation of the individuals’ fundamental rights, counterproductive consequences or increased risks for the individual or others, for example.

Unfortunately, the proposed policy reform ultimately vindicates neither the position of drug use as a health issue, nor the importance of the human rights in our policy formation process. To understand why this is the case, we need to consider further the context of human rights. There are a number of ways in which criminalising people who use drugs for possession for personal is inconsistent with a policy approach that is grounded in human rights.

26. Department of Health, *Reducing Harm, Supporting Recovery – A health-led approach to drug and alcohol use in Ireland 2017-2025*, (Dublin: An Roinn Sláinte, 2017), <https://health.gov.ie/wp-content/uploads/2017/07/Reducing-Harm-Supporting-Recovery-2017-2025.pdf>.

27. *Ibid.*, 16

28. *Ibid.*, 68.

29. Chief Executive Board for Coordination, *Second Regular Session of 2019, CEB 2018/2* (New York: United Nations, 2019), <https://www.unsceb.org/CEBPublicFiles/CEB-2018-2-SoD.pdf>.

30. “Chief Executives Board for Coordination,” *United Nations System*, accessed June 24, 2019, <http://www.unsceb.org/content/ceb>.

31. Chief Executive Board for Coordination, *Second Regular Session of 2019, CEB 2018/2* (New York: United Nations, 2019), <https://www.unsceb.org/CEBPublicFiles/CEB-2018-2-SoD.pdf>, 3.

32. “Key UN board endorses reform,” *Transform*, accessed June 24, 2019, <https://transformdrugs.org/un-chief-executives-endorse-decriminalisation/>.

33. Chief Executive Board for Coordination, *Second Regular Session of 2019, CEB 2018/2* (New York: United Nations, 2019), <https://www.unsceb.org/CEBPublicFiles/CEB-2018-2-SoD.pdf>, 13.

34. Chief Executive Board for Coordination, *Second Regular Session of 2019, CEB 2018/2* (New York: United Nations, 2019), <https://www.unsceb.org/CEBPublicFiles/CEB-2018-2-SoD.pdf>, 14.

35. Human Rights Council 30th session, *Report of the United Nations High Commissioner for Human Rights (2015), Study on the Impact of the World Drug Problem on the Enjoyment of Human Rights*, A/HRC/30/65, 16.

36. For example, suicide was a criminal offence in Ireland until the passing of the Criminal Law (Suicide) Act, 1993, <http://www.irishstatutebook.ie/eli/1993/act/11/section/2/enacted/en/html#sec2>.

Criminalisation and Human Rights

Right to Health

The right to health is provided for in the International Covenant on Economic Social and Cultural Rights (ICESCR). Article 12 of the ICESCR enshrines the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health”.³⁷ The ICESCR also obliges signatories to implement the right to health of their citizens on a non-discriminatory basis. In the context of drug use, the United Nations Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health (the Special Rapporteur on the right to health) has noted that people who use drugs and people who are dependent on drugs possess the same right to health as everyone else.³⁸ The UN Committee of Economic, Social and Cultural Rights (CESCR) note that the right to health includes and depends upon the realisation of other human rights, such as the right to food, housing, work, education, human dignity, life, non-discrimination, equality, privacy and access to information.³⁹ The criminalisation of people who use drugs often interferes with many of these components.⁴⁰

In 2010, the then UN Special Rapporteur on the right to health, Anand Grover, noted that:

“The primary goal of the international drug control regime, as set forth in the preamble of the Single Convention on Narcotic Drugs (1961), is the “health and welfare of mankind”, but the current approach to controlling drug use and possession works against that aim. Widespread implementation of interventions that reduce harms associated

with drug use — harm-reduction initiatives — and of decriminalization of certain laws governing drug control would improve the health and welfare of people who use drugs and the general population demonstrably. Moreover, the United Nations entities and Member States should adopt a right to health approach to drug control, encourage system-wide coherence and communication, incorporate the use of indicators and guidelines, and consider developing a new legal framework concerning certain illicit drugs, in order to ensure that the rights of people who use drugs are respected, protected and fulfilled.”⁴¹

In doing so, he highlighted the inherent conflict between the right to health in the context of the UN human rights treaties on the one hand, and the implementation of the UN drug control regime on the other hand. The reality is that the drug control regime was established at a time when eradication of non-medical or scientific use of drugs was seen as an achievable goal, which we now know is not the case. The Special Rapporteur noted the following of the prohibitionist paradigm:

“Mounting evidence (...) suggests this approach has failed, primarily because it does not acknowledge the realities of drug use and dependence. While drugs may have a pernicious effect on individual lives and society, this excessively punitive regime has not achieved its stated public health goals, and has resulted in countless human rights violations. People who use drugs may be deterred from accessing services owing to the threat of criminal punishment, or may be denied access to health care altogether. Criminalization and

37. International Covenant on Economic Social and Cultural Rights, 16 December 1966, United Nations Human Rights Office, <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>, art. 2 (2), 3, 12. See also “The Right to Health,” Office of the UN Commissioner for Human Rights and World Health Organization, fact sheet no. 31.

38. Human Rights Council 30th session, Report of the United Nations High Commissioner for Human Rights (2015), Study on the Impact of the World Drug Problem on the Enjoyment of Human Rights, A/HRC/30/65, 3.

39. UN Committee of Economic, Social and Cultural Rights, “General Comment No. 14: The Right to the Highest Attainable Standard of Health (August 2000) para. 3, <https://digitallibrary.un.org/record/425041>.

40. Richard Lines, *Drug Control and Human Rights in International Law* (Cambridge: Cambridge University Press, 2017), 143.

41. “Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health,” Anand Grover, UN General Assembly 65th session (August 2010), <https://www.ohchr.org/Documents/Issues/Water/ContributionsStigma/others/SPhealthl.pdf>, 1.

excessive law enforcement practices also undermine health promotion initiatives, perpetuate stigma and increase health risks to which entire populations – not only those who use drugs– be exposed.”⁴²

This view is consistently reinforced by key stakeholders in the international community. The UNHCHR recommended in a report to UN Human Rights Council (UNHRC) in 2015 that consideration be given to decriminalising the personal use and possession of drugs.⁴³ Speaking in 2018 on the right to health at the 38th Session of the UNHRC, the current Special Rapporteur on the right to health, Dainius Puras noted that:

“...the criminalization of drug related offences is not an effective way of curbing drug abuse or drug trafficking: It drives individuals away from the needed health services and seriously undermines public health efforts.”⁴⁴

More recently, and as mentioned earlier, the CEB, which comprises the leadership of 31 member organisations, including the UN, the WHO, the UNODC, the UN Development Programme (UNDP), and UN Women, has adopted a common position on drug policy that endorses decriminalisation of simple possession and use, committing, inter alia:

“[T]o promote alternatives to conviction and punishment in appropriate cases, including the decriminalization of drug possession for personal use...; To call for changes in laws, policies and practices that threaten the health and human rights of people.”⁴⁵

In addition, the International Guidelines on Human Rights and Drug Policy, established by the International Centre on Human Rights and Drug Policy (ICHRDP), UNAIDS, WHO and UNDP, call for states to:

“Address the social and economic determinants that support or hinder positive health outcomes related to drug use, including stigma and discrimination of various kinds, such as against people who use drugs.”⁴⁶

Criminalising people who use drugs for possession for personal use represents an unwarranted barrier to the realisation of the right to health. It frames people who use drugs as worthy of stigma, discrimination and punishment. This is particularly true in the context of the proposed health diversion approach, which provides only a single opportunity for a person found in possession of drugs for personal use to avail of a health intervention which is mandatory before reverting to law enforcement interventions as a policy.

In essence, despite the fact that drug use is recognised as a health issue, it is treated through policy as a criminal matter. In recent years, leading international bodies and voices have encouraged seeking alternative approaches, including successive Special Rapporteurs on the right to health, the UNHCHR and the CEB. Simply put, the continuation of a policy which punishes people for nothing more than their own personal drug use fails to vindicate the rights of people who use drugs to the highest attainable standard of health as per Ireland’s international commitments.

42. “Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health,” Anand Grover, UN General Assembly 65th session (August 2010), <https://www.ohchr.org/Documents/Issues/Water/ContributionsStigma/others/SPhealth1.pdf>, 2.

43. Human Rights Council 30th session, Report of the United Nations High Commissioner for Human Rights (2015), Study on the Impact of the World Drug Problem on the Enjoyment of Human Rights, A/HRC/30/65, 16.

44. “Statement by Mr Dainius P. ras, Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health at the 38th Session of the Human Rights Council,” UN Human Rights Office (June 2018), accessed June 8, 2019, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23396&LangID=E>.

45. “Chief Executives Board for Coordination,” United Nations System (January 2019), <https://www.unsceb.org/CEBPublicFiles/CEB-2018-2-SoD.pdf>, 14.

46. International Guidelines on Human Rights and Drug Policy, see <https://www.humanrights-drugpolicy.org/>.

Prohibition of Discrimination

The European Convention on Human Rights (ECHR) prohibits discrimination in the context of any right set forth in it,⁴⁷ as does the ICESCR.⁴⁸ As noted previously, people have an acknowledged right to health pursuant to Article 12 of the ICESCR. For people who use drugs and for people who are living with a substance use disorder, the criminalisation of simple possession subordinates their health-care needs to criminal policy when compared to other conditions (e.g. self-inflicted tobacco or alcohol related diseases, diet-related related diseases, and extreme sport-related injuries) which remain a purely medical matter.⁴⁹ In this context, criminalising this group for possession for personal use risks being discriminatory. The former UN Special Rapporteur on the right to health notes that:

“The right to health seeks, inter alia, to ensure access to quality health facilities, goods and services without discrimination, including on the grounds of physical or mental disability, or health status. Article 2, paragraph 2, and article 3 of the International Covenant on Economic, Social and Cultural Rights also prohibit discrimination in achieving realization of all rights within the Covenant (...) People who use drugs and people who are dependent on drugs possess the same freedoms and entitlements guaranteed by international legal instruments, and both groups experience violations of their rights under the current international drug control regime.”⁵⁰

It has also been noted that the high social stigma associated with drug use can result in people who use drugs being discriminated against in their workplace and within their communities.⁵¹ Using criminalisation as a policy can be seen as validating and compounding this discrimination, despite the fact that many people who use drugs problematically may already be struggling with other issues. Risk factors which can contribute to increased vulnerability to problematic drug use include trauma and childhood adversity such as child abuse and neglect, mental health problems and poverty.⁵²

Given the link between disadvantage and drug misuse, and the recognition of this link in Ireland’s national drug and alcohol strategy,⁵³ proposing a new policy approach to personal drug use which is still rooted in the criminal justice system is particularly problematic, as it is likely to disproportionately affect those already experiencing disadvantage. The above mentioned example of risk of discrimination against problematic heroin users, illustrates one way in which a policy risks further punishing disadvantaged communities.

The Right to Privacy

A right to privacy is set out in a number of human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR),⁵⁴ the UDHR⁵⁵ and the ECHR.⁵⁶

The UNODC affirms that the right not to be subjected to arbitrary or unlawful interference with privacy, family or home⁵⁷ is one of the rights relevant to their work, noting that:

“Any interference with the right to privacy, family, home or correspondence should be authorized by provisions of law that are publicly accessible, precise and proportionate to the security threat, and offer effective guarantees against abuse.”⁵⁸

In recent years, the interaction of this right to privacy has come under increased scrutiny in a number of areas, including its interaction with drug control both at international and national level. There have been a number of legal cases which have found the criminalisation of possession of small amounts of drugs for personal use to be inconsistent with privacy rights. For example, consider the recent decision of the South African Constitutional Court, which held that provisions prohibiting the use or possession of cannabis in private were inconsistent with the right to privacy entrenched in the constitution.⁵⁹ There have been similar judicial outcomes noted in a number of other countries, such as Argentina and Colombia.⁶⁰ In this context it is worth noting that a right to privacy is not only guaranteed by international commitments, but is also one of the unenumerated rights under Bunreacht na hÉireann.⁶¹

47. European Convention on Human Rights, 2 October 2003 (Strasbourg: European Court of Human Rights), https://www.echr.coe.int/Documents/Convention_ENG.pdf, art. 14.
48. International Covenant on Economic Social and Cultural Rights, 16 December 1966, United Nations Human Rights Office, <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>, art. 2 (2), 3.
49. Irish Council for Civil Liberties (August 2015) Submission to the Houses of the Oireachtas Joint Committee on Justice, Defence and Equality on the review of Ireland's approach to the possession of limited quantities of certain drugs, <https://www.drugsandalcohol.ie/25444/1/CCJL%20Submission%20to%20Oireachtas%20JCIED.pdf>.
50. "Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health," Anand Grover, UN General Assembly 65th session (August 2010), <https://www.ohchr.org/Documents/Issues/Water/ContributionsStigma/others/SPhealthl.pdf>.
51. See, for example, Count the Costs, "The war on drugs: promoting stigma and discrimination", <http://www.countthecosts.org/sites/default/files/Stigma-briefing.pdf>, 3-5.
52. See, for example, World Drug Report 2018, UNODC, Booklet 4 – Youth, https://www.unodc.org/wdr2018/prelaunch/WDR18_Booklet_4_YOUTH.pdf, 9.
53. Department of Health, Reducing Harm, Supporting Recovery – A health-led approach to drug and alcohol use in Ireland 2017-2025, (Dublin: An Roinn Sláinte, 2017), <https://health.gov.ie/wp-content/uploads/2017/07/Reducing-Harm-Supporting-Recovery-2017-2025.pdf>, goal 4.
54. International Covenant on Civil and Political Rights, 16 December 1966, United Nations Human Rights Office, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, art.17.
55. "Universal Declaration of Human Rights General Assembly resolution 217 A, 10 December 1948, United Nations, <https://www.un.org/en/universal-declaration-human-rights/>, art. 12.
56. European Convention on Human Rights, 2 October 2003 (Strasbourg: European Court of Human Rights), https://www.echr.coe.int/Documents/Convention_ENG.pdf, art. 8.
57. International Covenant on Civil and Political Rights, 16 December 1966, United Nations Human Rights Office, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, art. 17.
58. UNODC and the Promotion and Protection of Human Rights, Position paper, 2012, https://www.unodc.org/documents/justice-and-prison-reform/UNODC_Human_rights_position_paper_2012.pdf, 14.
59. Minister of Justice and Constitutional Development and Others v Prince, National Director of Public Prosecutions and Others v Rubin, National Director of Public Prosecutions and Others v Acton and Others [2018] ZACC 30.
60. See, for example Niamh Eastwood, Edward Fox and Ari Rosmarin, A quiet revolution: Drug decriminalisation across the globe (2nd ed.), (London: Release, 2016), <https://www.release.org.uk/sites/default/files/pdf/publications/A%20Quiet%20Revolution%20-%20Decriminalisation%20Across%20the%20Globe.pdf>.
61. The Irish Constitution.



Criminalisation, Rights and Proportionality

Proportionality

Part of the role of a state is to protect and promote the human rights of its citizens. The policy choices made by the state and the laws enacted by lawmakers to give effect to those policy choices should reflect this responsibility.⁶² However, states can also have a legitimate interest in restricting individual rights. Generally, such restrictions are justified with reference to some larger or more important imperative – such as national security, public safety, or the protection of the rights and freedoms of others.⁶³ Thus, individual rights are not always unqualified and states often have to balance rights in their policy choices.⁶⁴

Nonetheless, when the state interferes with a person's rights, there is a duty to consider if the interference is proportionate. In applying this principle of proportionality decision makers will typically consider "whether an interference with a right is proportionate, the impact upon the right in question, the grounds for the interference, the effects upon the applicant and the context..."⁶⁵

This consideration can be applied to the proposed policy for possession of drugs for personal use on both specific and general terms. Specifically, we can look at each element of the proposed policy as it develops and consider whether it is defensible as proportionate within a human rights framework. For example, is it proportionate for the

state to make attendance at a health assessment mandatory in nature? National policy recognises drug use as a health issue – in this context, can any sort of coercive approaches be proportionate? Would we find such an approach proportionate in addressing other health issues? More generally, we can ask the bigger question of whether using the weight of the criminal law is a proportionate response to the impugned behaviour of possessing small amounts of drugs for personal use? On this broader point, it is hard to argue that it is. There is no reliable 'greater good' argument that can be made – the evidence shows that there is no consistent link between the harshness of a country's policy on possession and rates of drug use in that country. The simple truth is that criminalisation of simple possession does not deter people from using drugs in any meaningful or consistent way. Contextually, drug use is widespread. Lifetime prevalence figures show that over a quarter of Irish adults have used illicit substances at some point in their lives,⁶⁷ a grouping that includes some of the country's foremost political, cultural and business leaders. Despite AGS detecting, on average, almost 1.4 episodes of possession per hour, 24 hours a day, 365 days a year in Ireland,⁶⁸ only a fraction of possession offences are detected. The simple reality is that the prohibition of possession of drugs for personal use is not a law that is respected by a significant proportion of the people of Ireland. Unfortunately, although the effect of the law itself in terms of curbing drug possession or use is negligible, the impacts of criminalisation are all too real.

62. "Responsibility of the State," Social Protection – Human Rights, accessed March 7, 2019, <https://socialprotection-humanrights.org/key-issues/governance-accountability-and-democracy/responsibility-of-the-state/>.

63. See for example, restrictions in the context of the right to respect for family and private life. European Convention on Human Rights, 2 October 2003 (Strasbourg: European Court of Human Rights), https://www.echr.coe.int/Documents/Convention_ENG.pdf, art. 8.2.

64. See, for example <https://www.coe.int/en/web/echr-toolkit/definitions> for brief definitions of qualified and unqualified rights.

65. Greer, S. Human Rights Files No. 17: "The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights", Council of Europe Publishing: Strasbourg, 20.

66. See, for example, UK Home Office, Drugs: International Comparators (London: Home Office, 2014), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/368489/DrugsInternationalComparators.pdf, 52.

67. Lifetime prevalence figure for any illicit drug use in Ireland among 15–64 year olds was 26.4% in 2014/2015. See the National Advisory Council on Drugs and Alcohol, Prevalence of Drug Use and Gambling in Ireland and Drug Use in Northern Ireland, (Dublin: NACDA, 2016), 6.

68. Based on 12,201 recorded incidents of possession in 2017.

Impacts of Criminalisation

Being criminalised for personal drug use can have profound negative effects on an individual – direct and indirect. Direct effects include the possible limitation of an individual's future access to the labour market, restriction of the ability to travel and taking up opportunities to live a full life free from discrimination.⁶⁹ In the Irish context, numerous bodies have stressed these impacts as the country considers how best to address simple possession. Submissions to a parliamentary committee noted that criminalisation creates barriers to training, housing, and to getting insurance⁷⁰ and highlighting the fact that criminalisation does not act as a deterrent to drug use, but rather increases and causes significant harm to the individual's future prospects.⁷¹

The Irish Penal Reform Trust (IPRT) notes that using a criminal justice response to tackle a condition such as a substance use disorder is counter-productive, both for the individual and for the community, as it does little or nothing to tackle the root causes of drug use or misuse. At the same time, it has significant financial costs and is not supported by a strong evidence base of effectiveness in reducing the numbers of repeat possession offences.⁷²

Further, criminalisation marginalises and stigmatises people who use drugs. In thinking about this, it is important to remember that such consequences are deliberate, not unintended. When society criminalises a behaviour, the very aim is to stigmatise that behaviour and those who engage in it. Criminalisation intentionally generates social disapproval of people who use drugs,⁷³ in the hope that this will deter drug use. In fact, it does not achieve this aim. As the Global Commission on Drug Policy (GCDP) have noted:

“Punitive drug law enforcement is predicated on the idea that criminalization serves as a deterrent. Notwithstanding its popularity, this theory is not supported by evidence. Instead, research indicates that criminalizing drug users actually worsens drug-related problems.”⁷⁴

Stigma can drive people to hide their drug use, deterring people who use drugs from approaching services for help or information, and undermining drug education, prevention and harm reduction efforts and acting as an unnecessary barrier to treatment for people in high-risk groups.⁷⁵

In short, the negative consequences of criminalisation for an individual can be far broader and deeper than any harms related to the drug use itself. Criminalising people can impact negatively on their ability to enjoy other rights, such as access to the employment market or access to essential services such as medical care, housing, social services and education. It also impacts on wider life options, such as personal finances, insurance, travel, and personal relationships.⁷⁶ Criminalisation not only burdens the individual with long-lasting, sometimes lifelong negative consequences, but often also negatively affects their families and communities.⁷⁷

69. See, for example, “Collateral Consequences of Criminal Convictions: Considerations for Lawyers”, Canadian Bar Association, https://www.cba.org/CBAMediaLibrary/cba_na/PDFs/Sections/CollateralConsequencesWebAccessible.pdf.

70. “North East Drugs & Alcohol Task Force Ltd. Submission to the Joint Committee on Justice, Defence and Equality, Houses of the Oireachtas, Ireland on Drug Policy Reform,” 31/JDAE/035 (November 2015), <https://webarchive.oireachtas.ie/parliament/media/committees/justice/archivejustice/appendix-3---submissions.pdf>, 239-241.

71. “Local Drug and Alcohol Task Force Coordination Network: Submission to the Joint Committee on Justice, Defence and Equality, Houses of the Oireachtas, Ireland on Drug Policy Reform,” 31/JDAE/035 (November 2015), <https://webarchive.oireachtas.ie/parliament/media/committees/justice/archivejustice/appendix-3---submissions.pdf>, 171.

72. “IPRT’s Submission to the Joint Committee on Justice, Defence and Equality, Houses of the Oireachtas, Ireland on Drug Policy Reform,” 31/JDAE/035 (November 2015), <https://webarchive.oireachtas.ie/parliament/media/committees/justice/archivejustice/appendix-3---submissions.pdf>, 373-370.

73. Steve Rolles and Niamh Eastwood, “Drug decriminalisation policies in practice: A global summary”, in Harm Reduction International, *The global state of harm reduction 2012* (HRI: London, 2012), 158.

74. Global Commission on Drug Policy, *Taking Control: Pathways to Drug Policies that Work* (Global Commission on Drug Policy, 2014), https://www.globalcommissionondrugs.org/wp-content/uploads/2016/03/GCDP_2014_taking-control_EN.pdf, 21.

75. See, for example, Steve Rolles and Niamh Eastwood, “Drug decriminalisation policies in practice: A global summary”, in Harm Reduction International, *The global state of harm reduction 2012* (HRI: London, 2012), 158.

76. “Submission to the Oireachtas Committee on Justice, Defence and Equality in Relation to Arguments in Favour and Against Altering the Present Approach to Sanctions for Possession of Certain Amounts of Drugs for Personal Use,” Dublin North East Drug and Alcohol Task Force, 31/JDAE/035 (November 2015), <https://webarchive.oireachtas.ie/parliament/media/committees/justice/archivejustice/appendix-3---submissions.pdf>, 239-240.

77. See, for example, the IDPC Policy Guide, 3rd Edition, http://fileserver.idpc.net/library/IDPC-drug-policy-guide_3-edition_FINAL.pdf, 64.

Conclusions

People enjoy individual rights under a number of international instruments to which Ireland is a party,⁷⁸ as well as in domestic law. As noted earlier, such rights are not unfettered - the state can lawfully interfere with the rights of people in its jurisdiction, but only to the extent that such interference is warranted and is not arbitrary. In the context of drug policy, it can be noted that criminalising simple possession interferes with the rights of people in Ireland in a number of areas. It interferes with the right to health, subjecting people who use drugs to unnecessary and unwarranted barriers to accessing healthcare. It also interferes with the right to non-discrimination, promoting and perpetuating stigma and discrimination, ensuring that people with substance use issues are treated and viewed differently to those who engage in other behaviours which may be damaging to their health. Finally, it can be argued, as has been done in other jurisdictions that criminalising the possession of drugs for personal use is an unlawful interference in the context of privacy rights.

Such interferences cannot be justified by reference to external issues such as the need to protect public health or the rights of others, and are not necessary to having an adequate system of drug control. Irish policymakers now have the opportunity to design a policy approach that is truly health-led and grounded in human rights, and reduces the stigmatisation and discrimination that people who use drugs often experience. Unfortunately, the policy as proposed does not achieve this aim. Instead, it is unnecessarily intrusive - demanding people attend healthcare interventions - and punitive - using the criminal law to prosecute those who do not comply, or who offend on multiple occasions. This approach is neither in line with official government strategies,^{79,80} nor with domestic and international human rights standards.

Domestically, section 42 of the IHREC Act 2014 imposes a positive duty on all public bodies in Ireland to protect human rights⁸¹, noting that:

“A public body shall, in the performance of its functions, have regard to the need to– (a) eliminate discrimination, (b) promote equality of opportunity and treatment of its staff and the persons to whom it provides services, and (c) protect the human rights of its members, staff and the persons to whom it provides services.”⁸²

It is hard to see how the proposed policy supports state bodies to discharge their legal obligations in circumstances where it is likely to disproportionately impact those citizens who are already marginalised, and treats possession of drugs either as a health issue or criminal justice issue based simply on the amount of times the state is aware of a person having engaged in that activity.

Returning to the questions we asked at the outset, we can see that:

- Any policy approach of criminalising possession of small amounts of drugs for personal use certainly infringes on the human rights of people who use drugs in Ireland, in a manner which cannot be justified with reference to external factors.
- Equally, a policy of criminalisation is inconsistent with how drug use and addiction are conceptualised in national strategy documents, which is as a health issue
- In such circumstances, it is hard to see how the current approach is supportive of those public bodies engaged in executing the policy in discharging their positive statutory obligations pursuant to section 42 of the IHREC Act 2014.

78. For a list of human rights treaties to which Ireland is a party, see Appendix B.

79. See principles set out by the working Group to Consider Alternative Approaches to the Possession of Drugs for Personal Use, April 2019, <https://assets.gov.ie/24036/d7e89187ce284bde9ea70f0334c1894a.pdf>, 7.

80. Department of Health, Reducing Harm, Supporting Recovery – A health-led approach to drug and alcohol use in Ireland 2017-2025. (Dublin: An Roinn Stáinte, 2017), <https://health.gov.ie/wp-content/uploads/2017/07/Reducing-Harm-Supporting-Recovery-2017-2025.pdf>, 8.

81. “Public Sector Equality and Human Rights Duty,” Irish Equality and Human Rights Commission, accessed March 19, 2019, <https://www.ihrec.ie/our-work/public-sector-duty/>.

82. Section 42, Irish Human Rights and Equality Commission Act 2014, <http://www.irishstatutebook.ie/eli/2014/act/25/section/42/enacted/en/html>.

In relation to the last question, as to whether there are policy options other than the proposed approach that might deliver better results for public health and are less rights limiting for people who use drugs – yes, there are. For example, it would be possible to make the diversion to healthcare wholly and explicitly voluntary. Similarly, it would be possible to make such an offer of diversion available not just the first time, but every time a person is found to be in possession of drugs for personal use. Such an approach would be health-led is in line with core objectives of the NDS⁸³ and other national principles that aim to support people to address the harms of their drug use in a person-centred, non-stigmatising, evidence-based way. In addition, it does not unnecessarily infringe on the right to health, the freedom of discrimination and the right to privacy of people who use drugs and is proportionate in its approach.

Our policy response does not have to infringe rights unnecessarily. There are responses available which are compatible with upholding the human rights of people who use drugs, and we should be brave in pursuing them. As a country, we can move away from criminalising people who use drugs and ensure that any consequences for being in possession of drugs for personal use are voluntary, supportive and health focused as opposed to based in stigma, fear and punishment.

83. Department of Health, Reducing Harm, Supporting Recovery – A health-led approach to drug and alcohol use in Ireland 2017-2025, (Dublin: An Roinn Slainte, 2017), <https://health.gov.ie/wp-content/uploads/2017/07/Reducing-Harm-Supporting-Recovery-2017-2025.pdf>, 81.

Appendices

A. The Human Rights Framework

Post World War II, an international consensus emerged that individual rights and liberties should be identified and agreed upon, with mechanisms put in place to ensure that states respected those rights and avenues available for addressing serious breaches.⁸⁴ This consensus led to the establishment of human rights frameworks by a number of intergovernmental or supranational bodies, including, and most relevant to the Irish context, by the UN, by the Council of Europe, and, later, by the European Union.

The United Nations Human Rights System

The principal UN human rights document is the UDHR.⁸⁵ The declaration was adopted in 1948 by General Assembly resolution, and sets out 30 articles detailing fundamental rights and freedoms:

“...as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance...”⁸⁶

Together with the ICESCR (and its optional protocol),⁸⁷ the ICCPR (and its two optional protocols),⁸⁸ the UDHR forms the International Bill of Human Rights (IBHR).⁸⁹ The ICESCR commits signatory states to respect the economic, cultural and social rights of their citizens - the right to health, the right to education, to an adequate standard of living and labour rights, for example. The ICCPR commits signatory states to respect political and civil rights such as the right to life, to freedom of religion and to freedom of speech. Ireland has signed and ratified both Covenants, which means that the state is legally bound by their terms.⁹⁰

In addition to the IBHR, there are a number of other human rights treaties at UN level, dealing with particular spheres of activity, such as the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (UNCAT).⁹¹ At the UN level, human rights are globally promoted and protected by the UNHRC.⁹² In addition, multiple bodies created under the international human rights treaties monitor the implementation of the core international human rights treaties by governments. The UN also has an Office of the High Commissioner for Human Rights (OHCHR) which is the leading entity within the UN secretariat on human rights.⁹³

84. “Overview of the Human Rights Framework,” International Justice Resource Center, accessed February 20, 2019, <https://ijrcenter.org/ihr-reading-room/overview-of-the-human-rights-framework/>.

85. Universal Declaration of Human Rights General Assembly resolution 217 A, 10 December 1948, United Nations, <https://www.un.org/en/universal-declaration-human-rights/>.

86. Ibid, preamble.

87. International Covenant on Economic Social and Cultural Rights, 16 December 1966, United Nations Human Rights Office, <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>.

88. International Covenant on Civil and Political Rights, 16 December 1966, United Nations Human Rights Office, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

89. United Nations Human Rights Office, Fact Sheet No.2 (Rev. 1), The International Bill of Human Rights (Geneva: United Nations, June 1996), <https://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>.

90. See, for example, Irish Human Rights and Equality Commission, Human Rights Explained - Guide to Human Rights Law (Irish Human Rights and Equality Commission, 2015), https://www.ihrec.ie/download/pdf/ihrec_human_rights_explained.pdf.

91. Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, 10 December 1984, United Nations Human Rights Office, <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>.

92. “Human Rights Council,” OHCHR, accessed March 19, 2019, <https://www.ohchr.org/en/hrbodies/hrc/pages/aboutcouncil.aspx>.

93. “About Us,” OHCHR, accessed March 19, 2019, <https://www.ohchr.org/EN/AboutUs/Pages/WhoWeAre.aspx>.

The European Human Rights System

The European human rights system is underpinned by two institutions - the Council of Europe (CoE) and the European Union (EU).

The Council of Europe

The CoE is an intergovernmental organisation with 47 member states, comprising the 28 EU members and nearly all other European countries. It was founded in 1949 to protect human rights, democracy and the rule of law. Ireland was amongst the founding members of the CoE.⁹⁴ The two key treaties on human rights under the CoE structure are the European Convention on Human Rights (ECHR), and the European Social Charter (ESC). The ECHR sets out core civil and political freedoms in Europe, and the ESC sets out fundamental economic and social rights. The two core organs for defining and overseeing states' compliance with their fundamental human rights obligations are the European Court of Human Rights (ECtHR) which enforces the ECHR, and the European Committee of Social Rights which oversees the ESC.⁹⁵ The CoE has a Commissioner for Human Rights, responsible for promoting respect for human rights in all member states through reports, dialogue and recommendations. Interestingly, the CoE also has a body specific to drug policy. The Pompidou Group is:

"...the Council of Europe's drug policy cooperation platform. It is an inter-governmental body established in 1971 at the initiative of the then French President Georges Pompidou. It upholds the core values of the Council of Europe – human rights, democracy and the rule of law – and promotes a balanced approach in the response to drug use and illicit trafficking in drugs, supporting both demand and supply reduction."⁹⁶

In a recent statement, the Pompidou Group found it of "extreme importance and relevance to emphasise that drug policy – as all other policy fields – must be developed, implemented and evaluated in light of and in full respect of human rights...", further noting that "[p]eople who use drugs have an uncontested right to equitable access to health care services for their drug use disorder and other drug or non-drug related health problems."⁹⁷

The European Union

Within the EU, the fundamental rights of citizens are guaranteed through the Charter of Fundamental Rights (CFR),⁹⁸ which was adopted in 2000. All EU institutions have a role to protect their citizen's human rights, and the charter lays down the fundamental rights that are binding upon EU institutions and bodies. The charter is also consistent with the ECHR which has been ratified by all EU member states.⁹⁹ The Court of Justice of the European Union (CJEU) oversees the application and interpretation of EU law, including the charter. The Charter applies to institutions and bodies of the EU, and to national authorities when they implement EU law.¹⁰⁰

The Irish Human Rights System

Ireland has a long history of recognising human rights both at home and abroad. As the Department of Foreign Affairs and Trade (DFAT) notes:

"Ireland is committed to having human rights both at the heart of both our national and foreign policy. The 1937 Constitution of Ireland, Bunreacht na hÉireann, predates both the Universal Declaration of Human Rights and the European Convention on Human Rights and contains strong emphasis on fundamental rights, which are in effect, human rights principles by a different name."¹⁰¹

DFAT is responsible for facilitating the ratification of international human rights treaties and instruments. The Human Rights Unit of DFAT reports in relation to two of the ten core UN human rights treaties. DFAT also has a NGO Standing Committee on Human Rights that acts as a framework for exchange between the department and representatives of civil society. The Department of Justice and Equality (DJE), and the Department of Children and Youth Affairs (DCYA) coordinate the response regarding the other UN treaties and review and reporting processes.¹⁰²

Legally, it's important to note that Ireland operates a 'dualist' system in relation to international accords such as treaties and conventions. Article 15.2.1 of the Irish Constitution, Bunreacht na hÉireann, reserves the power of making laws for the state to the Oireachtas alone. Thus, the rights enshrined in international treaties are directly

94. Irish Human Rights and Equality Commission, Human Rights Explained - Guide to Human Rights Law (Irish Human Rights and Equality Commission, 2015), https://www.ihrec.ie/download/pdf/ihrec_human_rights_explained.pdf, 14.

95. "Protection of Human Rights," Council of Europe, accessed February 20, 2019, <https://www.coe.int/en/web/portal/home>

96. "Pompidou Group – Co-operation Group to Combat Drug Abuse and Illicit Trafficking in Drugs," Council of Europe, accessed February 20, 2019, <https://www.coe.int/en/web/pompidou>.

97. Pompidou Group Statement for the CND 2018, P-PG (2018) 3 (final), March 2018, https://www.unodc.org/documents/commissions/CND/CND_Sessions/CND_61/Statements/61st_CND_General_Debate_Statement_Pompidou_Group.pdf.

98. "Charter of Fundamental Rights of the European Union," EUR-Lex, accessed March 19, 2019, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>.

99. "Human Rights", European Union, accessed February 20, 2019, https://europa.eu/european-union/topics/human-rights_en.

100. Irish Human Rights and Equality Commission, Human Rights Explained - Guide to Human Rights Law (Irish Human Rights and Equality Commission, 2015), https://www.ihrec.ie/download/pdf/ihrec_human_rights_explained.pdf, 23-24.

101. "Human Rights in Ireland," Department of Foreign Affairs and Trade, accessed February 21, 2019, <https://www.dfa.ie/our-role-policies/international-priorities/human-rights/human-rights-in-ireland/>.

102. Ibid.

enforceable in Ireland only to the extent to which they have been transposed into Irish law by an Act of the Oireachtas. Nonetheless, Ireland is bound to upholding human rights under international law, and arguments referencing our international commitments are accorded appropriate authority in formal legal settings such as courts, and political deliberations in the Seanad and the Oireachtas.¹⁰³

In terms of directly enforceable sources of Irish law, the European Convention on Human Rights Act 2003 was implemented to give effect to the standards set out in the ECHR in national law, and requires that “[j]udicial notice shall be taken of the Convention provisions”.¹⁰⁴ There are also human rights protections contained in various other Acts of the Oireachtas, including the Employment Equality Acts 1998-2015 and the Equal Status Acts 2000-2015. Bunreacht na hÉireann itself also guarantees the protection of rights, both explicitly and as a result of judicial interpretation.¹⁰⁵

Ireland also has a national human rights institution in IHREC. Established under the IHREC Act 2014, the commission is an independent public body and has a mandate to give guidance to public bodies in developing policies and practices in relation to human rights and equality. It has identified three key steps that public bodies must take to implement their duty (assess, address, report), and suggest a number of actions to facilitate this process.¹⁰⁶ IHREC can also provide legal assistance in helping individuals to protect their rights and can assist in legal cases that deal with a person’s equality or human rights. Finally, Ireland introduced a public sector equality and human rights duty in section 42 of the IHREC Act 2014.¹⁰⁷ This duty requires public bodies to take proactive steps to promote human rights and equality, and fight discrimination in relation to their functions and powers.¹⁰⁸ It includes most government departments, local authorities and state agencies.¹⁰⁹

B. List of Human Rights Treaties

The following is a list of international human rights instruments to which Ireland is a party:¹¹⁰

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Optional Protocol of the Convention against Torture
- International Covenant on Civil and Political Rights
- Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty
- Convention for the Protection of All Persons from Enforced Disappearance
- Convention on the Elimination of All Forms of Discrimination against Women
- International Convention on the Elimination of All Forms of Racial Discrimination
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
- Convention on the Rights of the Child
- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict
- Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography
- Convention on the Rights of Persons with Disabilities
- European Social Charter
- Charter of Fundamental Rights
- European Convention on Human Rights

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