

WORK PERMITS IN IRELAND A Recommendation for Change

Author

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MIGRANT RIGHTS CENTRE IRELAND (MRCI)

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WORK PERMITS IN IRELAND:
A RECOMMENDATION FOR CHANGE

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This paper aims to build on work already completed by others to highlight aspects of migration policy in Ireland. In doing this, it offers an overview of a broader context for the policy and advocacy work of the MRCI over the next period.

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LIST OF ABBREVIATIONS

CEDAW	Convention on the Elimination of Discrimination against Women
CERD	Convention on the Elimination of Racial Discrimination
CHR	UN Commission on Human Rights
COM	EU Commission Communication
CRC	Convention on the Rights of the Child
CSO	Central Statistics Office
CTA	Common Travel Area between Ireland and UK
DET&E	Department of Enterprise, Trade & Employment
DJE&LR	Department of Justice, Equality & Law Reform
ECHR	European Convention on Human Rights
EEA	European Economic Area (EU, Norway, Iceland, Liechtenstein)
ESRI	Economic & Social Research Institute
EU	European Union 15 States (25 States after May 2004)
FAS	Training & Employment Authority
GNIB	Garda National Immigration Bureau
HRC	UN Human Rights Committee (to monitor ICCPR)
IHRC	Irish Human Rights Commission
ICCPR	International Convention on Civil & Political Rights
ICESCR	International Convention on Economic, Social & Cultural Rights
ICI	Immigrant Council of Ireland
ILO	International Labour Organisation
IOM	International Organisation for Migration
MRCI	Migrant Rights Centre Ireland
NAPAR	National Action Plan Against Racism
NAPS	National Anti-Poverty Strategy
NAPs/incl	National Action Plan against Poverty & Social Exclusion
NCCRI	National Consultative Committee on Racism & Interculturalism
NDP	National Development Plan
NEAP	National Employment Action Plan
NESC	National Economic & Social Council
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Co-operation & Development
SP	Sustaining Progress (Social Partnership Agreement)
WCAR	World Conference Against Racism

FOREWORD

This first briefing Paper of the Migrants Rights Centre Ireland is presented at a time when the migrants with the most tenuous status here, those on work permits, feel increasingly vulnerable and uncertain in the light of legislative and other changes. They have made, and continue to make, large unsung, undocumented contributions to our economy and social fabric over the past six years. As the Paper graphically points out they deserve better from us.

It is not that we are unfamiliar with these issues. Many of them enriched my own previous work with Irish emigrants in the UK. But in the UK and the US (with some restrictions) Irish emigrants are free to move from one, albeit sometimes unsatisfactory job to another. Employer 'ownership' of work permits in Ireland constitutes a major insecurity for migrant workers who feel controlled and, as Nuala Kelly points out in the Briefing Paper, extremely reticent to access their rights.

We are extremely grateful to Nuala for bringing together and contextualising so eloquently and comprehensively, these issues which have been brought to the Centre by migrants since we opened our doors in 2001. The policy and practice recommendations she outlines provide practical possibilities towards developing the first comparative framework for migration policy and integration of migrants, which is essential for Ireland and the EU in this twenty first century.

The Migrants Rights Centre, Ireland is committed to supporting and influencing the development of that framework. For us, it is the only just response to the needs and problems we encounter daily from migrants, throughout Ireland. I take this opportunity to thank all who have worked in and been supportive of the work of the Centre in that endeavour, and in particular, the Missionary Society of St. Columban and the Joseph Rowntree Charitable Trust for their support of this publication, the first in a series, through which we aim to document and discuss the issues faced by migrants.

Migrants are here to stay because in a number of fundamental areas we need them. And, our greying demographics indicate that we will need more support in the future. Migrants are not blocks of labour but men and women with families. We know the difficulties they face from the experience of our own diaspora and from other host societies. We have an opportunity to constructively use these experiences to shape policy or, ashamedly, ignore them to our long-term loss.

Work towards creating a positive, diverse, intercultural Ireland is underway. NGOs and state officials, often in difficult circumstances, have responded to new needs. We offer this paper to them and most importantly to politicians and policy makers as food for thought and direction in the essential journey forward

*Bobby Gilmore SSC
Chairman MRCI*

European migration policy has the stated aim of promoting a managed approach to migration flows that would highlight the positive and essential contribution that migrant workers can make to economies and society. It should also fully comply with international human rights norms, particularly those pertaining specifically to migrant workers.

To date, the revision and updating of immigration legislation in Ireland is happening in an ad hoc and segmented manner in response to a variety of pressures including increased levels of immigration, EU legislation and policy, human rights obligations as well as security needs, and labour market needs. The response at times reflects a pragmatic approach to inadequate or non-existent services although many officials at all levels work hard beyond the call of duty in their response to migrants. There is also confusion surrounding the demands of international obligations and protections. Although the language of comprehensive and co-ordinated policy approaches is increasingly used in policy reports and action plans, there is as yet little evidence, from the experience of migrant workers and those working with them, that this is happening in practice or even at interdepartmental level. In fact, in the months leading up to the accession of ten new States to the EU, migrant support projects are reporting even more disjointed approaches, particularly in the “grey” areas between policy and regulations.

While the Irish labour immigration system itself relies primarily on the issuing of short-term permits to employers, there is an acceptance at EU levels and among those concerned with migration internationally that migration is frequently a permanent process.¹ This needs to be acknowledged and appropriate and humane provision made for the dignity of those who will help to build the fabric and economy of our country over the next period.

The spirit with which we treat our immigrants today will reproduce itself in future generations as well as in our health and care services, our hospitality industries, our infrastructure and commercial life. To use the, by now, clichéd idea of developing a rights-based approach to immigration policy is only to say that, by nature of their humanity, these workers are entitled to be treated with dignity. If that means that we need legislation and programmes to ensure that that happens then this is our opportunity. The international human rights standards that are available for guidance are one set of tools to help us think that through and plan such an approach.

The interests of Irish workers and migrant workers must be seen as two sides of the same coin if wage standards and work conditions are to be maintained according to international human rights standards. Therefore the enforcement of labour market rights for migrants although not the subject of this paper are nevertheless crucial to protecting the dignity of all workers.

However, the overriding aspect of the current system is a lack of coherence, humanity or efficiency. Managing labour supply on the basis of temporary labour as need arises or on a

¹ “Past experiences of immigration have demonstrated that it is extremely difficult to sustain temporary immigration schemes, because people who want to stay generally find ways of doing so.” EU COM(2003) 336: 16.

three-month supply basis is Dickensian and impractical. Temporary work permits will always be needed to fill gaps in some sectors (such as arts and entertainment) but this should not be the main entry system for managing labour migration over a long period as it is at present for over 47,000 workers. It is inefficient for migrant workers, their families, civil servants who carry a heavy administrative burden, the Gardai, employers, the economy, and the broader fabric of society. Migrant workers should be allowed at least the prospect of permanency and to make a broader contribution without fear of discrimination or social exclusion.

1.1 OVERVIEW

In its work to date, the MRCI has identified concerns about the capacity of the work permit system itself to impact on the human rights and dignity of migrant workers. Specifically, its concerns focus on the:

1. operation of the work permit system for migrant workers and the related issues of:
2. provision of social protection for migrant workers in Ireland;
3. absence of initiatives to support migrant workers in Irish society.

This briefing paper, the first in a series of MRCI papers, examines selected issues related to the entry, integration and inclusion of migrant workers and their families in Irish society. It makes a number of proposals in relation to the operation of the work permit system. It also sets out recommendations on:

- access to social protection and social benefits for migrant workers and their families i.e. health care, accessing FAS services, provision of social benefit and social assistance;
- family reunification and integration measures for migrant workers on permits, progression routes and access to training opportunities.

It strongly recommends that the Irish Government sign and ratify the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. At minimum, a legislative programme is needed that will enable ratification within a reasonable timeframe.

Section 2 of this paper locates these issues in a broader context, identifying five key factors that have a bearing on the Irish approach to migration policy and practice:

- changing patterns of migration;
- lessons to be learned from our own emigration experience;
- the EU legislative and policy context;
- the Irish social policy context;
- the international human rights framework.

In Section 3 the evidential basis (especially in 3.4 and 3.5), unlike other sections, is anecdotal in nature in that it relies on the experiences of migrant workers. The Section however also describes and analyses aspects of the operation of work permits in Ireland. These relate to (a) the weak regulation or monitoring of agencies who recruit migrant workers both in Ireland and abroad; (b) the potential vulnerability of migrant workers and abuse of the permit

system by some employers arising from the vesting of ownership of the permit with the employer; (c) the lack of clarity, consistency or transparency about renewals and terminations of employment permits or of approvals of “leave to remain” and (d) the temporary nature of permits. Other practical problems arise as a result of inconsistencies and discrepancies in administrative procedures for immigration and permit regulation and oversight.

A secondary but important set of concerns emerge as a result of inadequate or unequal access to pursue rights protections or remedies when abuse of rights occurs. This arises either because the person has no further leave to remain or they feel too vulnerable to avail of procedures to challenge abuse or discrimination. Sometimes too, the basis of the discrimination is not protected by current law e.g. employment in the private home. Whilst due process rights are essential to all migrants they are particularly relevant to women migrants in very vulnerable social and employment situations. Although migrants sign forms confirming that they have been informed and are aware of their rights prior to entry, this is rarely the case in practice according to various centres working with migrants.

Thirdly, reinforcing the above concerns are issues relating to the quality of life and integration of migrant workers. These include the lack of opportunities for social or civic participation by migrant workers even in the case of relatively good work conditions. Also relevant is access to healthcare or other social welfare services and supports as needed (e.g. in the case of pregnancy or dismissal) and where deskilling processes require access to educational/training opportunities. In relation to integration of migrant workers, current wisdom on the relationship of social inclusion measures to a competitive economy, suggests that family unity is conducive to better integration and productivity. In general, this is only facilitated for families or spouses as dependents without a right to work, which in practice is rarely feasible. Recent announcements by the Minister for Enterprise, Trade and Employment purport to change this for specific groups of skilled, non-EEA nationals (IT specialists, nurses and other medical professionals and construction professionals) but not for workers for whom permits are sought in the lower skilled sectors. Furthermore, regulations to that effect have not yet been introduced at time of going to print.

Section 4 sets out conclusions and recommendations based on EU policy commitments and human rights obligations of the State. The recommendations relate to issues such as data needs as well as administration, duration, ownership and renewals of permits, information provision, access to remedies, entitlements, training, education, and social protection, monitoring of recruitment agents and of workplace conditions, gender issues, protection of EU and non-EU nationals, family re-unification and integration and the need for progress towards the implementation of protections offered under a UN Convention on the Protection of the Rights of All Migrant Workers and their Families. Section 4 concludes that, to date, the revision and updating of immigration legislation in Ireland is happening in an ad hoc and segmented manner in response to a variety of pressures. Protecting state sovereignty and promoting sustainable economic development are important objectives. But a more open debate is required about the sometimes, conflicting objectives of different aspects of migration policy and about how best to respect the human rights of all involved.

1.2 METHODOLOGY

This paper draws on secondary sources as well as on material documenting the experiences of migrant workers and their families produced by the MRCI itself. It aims to situate the work permit system and proposals for new mechanisms in the wider context of globalisation, increased mobility, EU and domestic legislative and policy developments.

There are a variety of mechanisms for migrant worker entry to Ireland. This paper deals primarily with the work permit system and not the work visa or other systems for skilled labour or student entry. However the debate about whether in fact such a distinction should be made at all between the highly skilled few and the rest on work permits is relevant to many of the concerns raised in this paper. For a summary of these other systems, an Immigration Council of Ireland (ICI) study (2003) on labour immigration into Ireland, which was launched in the course of preparation of this paper and the International Organisation for Migration (IOM) comparative study (2002) of migration legislation and practice, are both very useful. They are referenced widely here, as is the UN Migration Report 2002.

Three main themes guiding the literature review on work permit systems were integration, family re-unification and access to social protection. Other matters to do with recruitment, or employment itself such as conditions of work and worker protections do not form part of this paper. Conroy's study "Migrant Workers and their Experiences" for the Equality Authority provides useful material in this regard. It should be noted however that most protection issues relate to unskilled workers, given that they occupy the least stable and lowest paid jobs.

1.3 DEFINITIONS

A range of terms are used to refer to non-nationals who work or who have worked in a host state. Brief explanations are offered below for these and other terms used in this paper.

Migrant worker: the definition used in this paper is that of the *1990 UN Convention on the Protection of all Migrant Workers and their Families*:

"a person who is to be engaged, is engaged or has been engaged in remunerated activity in a State of which he or she is not a national". The UN definition specifically includes those migrant workers who may currently be out of work, but who have worked in the host state. It is interesting to note that this definition also includes Irish people working in the UK as well as Accession Country nationals working in Ireland after May 2004.

Long-term migrant. (United Nations, 1998) is a person who moves to a country other than his or her usual residence for a period of at least a year and a short-term migrant as a person who moves for at least three months but less than a year. To date, only a few countries have implemented strictly these definitions in their reporting to the UN. (Migration Report 2002:11)

Irregular worker: this term, favoured by the ILO over the terms 'illegal' or 'undocumented' worker, both acknowledges the contribution of migrant workers to the host economy and

reminds us that behind so-called illegal workers, there are usually illegal local employers and/or intermediaries and often contradictory State policies and practices in the field of immigration and employment. For further discussion see Taran, P (2003:6).

Third country nationals (TCNs): this term features predominantly in European Union legislation and policy to refer to non-EU nationals.

Work permit system: refers to Irish procedures whereby permits are granted to employers to recruit named migrant workers for specific sectors of work in which it has proved impossible to recruit native labour. It should be distinguished from the system to obtain residency status or "leave to remain" (or a duration of stay stamp on passport) which all non-EEA nationals must obtain. While work permits and residency status are interlinked they are administered by different government departments and they are not always coterminous.

Interculturalism: this term is used, rather than the term multiculturalism, to refer to the development of strategy, policy and practice that promotes interaction, understanding, respect and integration between different cultures and ethnic groups on the basis that cultural diversity is a strength that can enrich society, without glossing over issues such as racism. (Spectrum, 2003:25)

Before examining the operation of the work permit system and its impact on migrant workers, it is important to identify those factors that influence the operation of the system and those which may shape its future development. These include national as well as regional (i.e. European) and international legislative and policy measures.

2.1 CHANGING PATTERNS OF MIGRATION

More than 150 million people, 2% of the world's population, live and work in countries other than their country of origin (Kofi Annan, UN Gen Sec). UN and Regional reports from the ILO and the EU Commission confirm that global patterns of migration are changing at an unprecedented pace.² More than 60% of migrants living outside their country of origin live in developing countries. Remittances sent home by migrant workers is a larger sum than all overseas development aid and the ILO estimates that it is second only to the value of global petroleum exports in international commodity trade. Ireland, as well as being a country of origin, is changing to become a country of transit and of destination for migrants. Recent census statistics and migration studies testify to this. While less than 20,000 people left Ireland in 2002, over 47,000 people entered the country, a figure steadily increasing over the previous seven years, and one of the highest rates in the EU. (CSO Population and Migration Estimates, September, 2002). Many of those included in this figure are returning emigrants although that rate has declined slightly to around 40% of all migrants. Also included in these numbers are just under 12,000 asylum seekers in 2002, although figures for 2003 were just under 8,000 as a result of new legislation and practice which prevents entry to the country.

Estimates of the level of immigration from countries outside the EEA indicate a small but steadily increasing trend. Some studies suggest that the true figure for this source of migration is greater than CSO figures indicate given the discrepancies between their figure of approximately 15,500 from outside the USA and the EU and the number of work permits/visas/authorisations issued – almost 40,000 in 2002; furthermore, students and spouses do not need permits. This upward trend continued with just over 47,000 permits issued in 2003.

Ireland has moved from being a country of net emigration to one of net immigration. Therefore, it is all the more urgent that policies attempt to address changing needs in economic and human terms.

² UN Migration Report 2002; ILO Fact Sheet on Migrant Labour 2003; EU COM 2003 (336)

2.2 EMIGRATION

Despite the decline in emigration rates from Ireland, it must be borne in mind that emigration continues at a not insignificant rate. Almost 20,000 people left in 2001 and from Northern Ireland, 11,000 left in the same year. The figures for 2002 indicate only a slight drop. Some counties, in particular in South Ulster, have not gained from the recent influx of population and the continuing loss of young people (16-24 year olds), even in times of net immigration, can be a cause for concern. However this does not mean an absence of immigrants in these counties. Indeed, certain sectors such as mushroom production have experienced an almost total dependency on migrant workers in some border counties. The 2002 report of the Task Force on Policy regarding Emigrants *"Ireland and the Irish Abroad"* urges the adoption of a strategic and integrated approach to meeting the needs of the Irish abroad including policy objectives, an action plan and the necessary structures and resources to implement them. It acknowledges the diversity of our emigrant population and their needs emphasising that in meeting those needs full account should be given to the protection of their rights.³

While the subject of immigration into Ireland by non-nationals does not fall within the Task Force's remit, aspects of its Report are of direct relevance here. The Task Force was clear in that *"the needs of Irish emigrants should be viewed in the context of the increasingly multicultural nature of Irish society that is emerging as the level of migration into Ireland continues to grow. The more we appreciate the needs of foreign nationals coming to Ireland, the better we will be able to respond to the challenges facing our own emigrants abroad. Conversely, we can learn from the successes and failures of our emigrants how best to assist the integration of foreign immigrants into our society. (paragraph 1.5)"* In other words, responding in policy terms to the needs of Irish emigrants requires similar initiatives for the creation of an intercultural society in Ireland e.g. education to prepare potential emigrants to deal with diversity. Given that returning emigrant families can be multi-cultural in nature, the development of a multicultural Ireland where diversity and human rights are respected and promoted is in their interest also.

The protection of Irish emigrants' rights in host societies is linked to the need to take a global approach to the protection and integration of migrants in Ireland and to welcome their economic, social and cultural contribution. The Irish Government accepts that both outward and inward migration is likely to continue to be a reality of Irish life for the foreseeable future. A central aspect of the Special Initiatives in the Social Partnership Agreement, **'Sustaining Progress'** (2003-2006), locates this work in the context of interculturalism and migration. It is important that the Task Force Recommendations are implemented in the lifetime of that agreement and links made to the development of a sustainable migration policy. The **National Action Plan against Poverty and Social Exclusion** (2003-5: 34) sets the policy task of developing and implementing a comprehensive framework on migration *"covering the regulation of inflows into the state, as well as integration issues, racism and interculturalism, ...in respect of immigrants, emigrants and returning emigrants."* This work is to be implemented with a view to *"combating their social exclusion and accommodating cultural diversity"* (:13). These policy initiatives are discussed further in Section 2.4.

³ Stated policy objectives range from the prevention of involuntary emigration, preparation for independent living of intending emigrants, protection of the Irish abroad and particularly those at risk of social exclusion to facilitating the reintegration of returning migrants especially the elderly or the vulnerable.

2.3 EU LEGISLATIVE AND POLICY CONTEXT

Until the Amsterdam Treaty in 1997, the EU and Ireland operated in an ad hoc way in dealing with the variety of matters thrown up by increased immigration either for migrant workers, asylum seekers or irregular migrants. This resulted in a demand-led approach without assessment of the short, medium or long-term needs of economy or society. The impetus for policy had come primarily from the point of view of security concerns or the 'admission logic' of individual states. Labour and Social Ministries across the EU, however, are now becoming more proactive. In fact, Niessen (2003) argues that immigration is finally being used as a policy tool to address labour shortages arising from demographic imbalances and labour mismatches in the EU. A common EU policy of managed migration is seen now as central to the implementation of the agenda set at Tampere (1999) to protect rights and promote social inclusion of migrants.

2.3 (i) Migration Policy in the EU

The Treaty of Amsterdam 1997 provided for a framework and a programme of work, later articulated at the Tampere Council in 1999, for a common immigration and asylum policy to manage migration flows to the EU within a timeframe of five years (1999-2004). Tampere sought to promote a holistic approach to migration management with more open policies linking labour migration and the need for social integration and the protection of the rights of migrants. The Tampere programme comprises two phases: first, the establishment of a basic common legislative framework incorporating minimum standards in key areas and second, a gradual convergence of policy and implementation through 'open co-ordination' methods of consultation between Member States. Measures taken to date have included Schengen-type provisions for free movement across internal borders; increased controls on external borders of the EU; measures to control entry and residence, particularly of third country nationals, measures to ensure integration of migrants and the development of an asylum policy.

At the Thessaloniki Council in June 2003, the Greek Presidency of the EU stressed that "*...immigrants come to Europe not only to improve their lives, but also to contribute to the improvement of ours as well.*" It went on to call for a focus on the benefits of a managed migration policy to maintain economic growth and competitiveness in the face of an ageing and shrinking population. The Greek Presidency's reinforcement of the Tampere agenda provided a useful focus, to argue for highest standards during and after the Irish EU Presidency in Spring 2004.

2.3 (ii) Current EU Migration Policy Initiatives

The Tampere Council explicitly endorsed an integration policy that would grant equivalence of rights and obligations for legal immigrants. Some of the directives arising from this process, and reaffirmed at the Thessaloniki Council, are those which confirm the importance of immigrants for the EU's economic future as well as their effective integration.

The Commission has agreed a number of directives within the framework of a common migration policy although some remain to be adopted. These include:

- **Right to family reunification for third country nationals** (COM 2002/ 225 final): this facilitates family reunification for those third country nationals holding a residence permit of one year or more who have reasonable prospects of obtaining permanent residence. Such persons may be obliged to comply with integration measures in accordance with national law. Access to employment, education and vocational training will be an essential provision for integration of family members as well as the applicant. Under the terms of the proposed Directive, the family members of third country nationals have the same rights as family members of EU nationals who have moved within the Union. Reliance on public funds is prohibited.
- **Status of third country nationals who are long-term residents** (2003/109/ EC adopted 23.01.04; date for implementation 23.01.06): this regularises the position of those who have had a period of continuous legal residence of five years. Such migrants would have the right to equal treatment with nationals in a number of respects in the socio-economic fields and should be entitled to reside in another member state for employment or study.
- **Conditions of entry and residence of third- country nationals for the purpose of paid employment and self- employed economic activities** (COM 2001/386): this establishes rights for migrants on an incremental basis corresponding with length of stay. It also establishes a more permanent status for those who remain in work and a secure legal status while in the EU for those on temporary permits. In essence, the proposed Directive in many ways aligns the rights of temporary workers with those for long-term residents. Holders of such permits can also pass through other Member States. The Directive should also lead to the establishment of a single residence and work permit. According to the IOM (2002: 58), this would be an incentive to Member States to streamline and reduce administrative burdens on their internal administration.

Although some of these measures have not yet been adopted, they are included in this paper to describe the parameters of possible protections. Caution is required in assessing these measures, however, as the eventual protections and measures may be substantially different to the agreed Directives depending on the political and economic context for implementation. Furthermore, it is also worth noting that a challenge has been lodged by the European Parliament with the European Court of Justice in relation to the Directive on Family Reunification.⁴

2.3 (iii) Anti-Discrimination Policies in the EU

As well as establishing a legal basis for the development of a common migration policy, the Treaty of Amsterdam also provided the basis for further action in the field of anti-discrimination law (Article 13 EC Treaty). This forms part of a broader EU human rights agenda agreed at Amsterdam and supplements long established European gender equality

⁴ The basis of the case is that the proposed Directive is in breach of procedures governing consultation with the Parliament and that it breaches fundamental rights guaranteed by the ECHR. The Parliament argues that the proposed measure requires integration conditions that are disproportionate to the goals pursued to control immigration and that it also limits the right to family reunion because the right can only be exercised in a very partial manner. (European Co-ordination for Foreigners Right to Family Life, Brussels, November 2003).

laws. In 2000 the EU adopted two anti-discrimination directives and supporting action programme. These directives establish important legal rights that are of relevance to migrant workers.

- **Employment Equality Directive:** this extends protection from discrimination in employment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation to EU and non-EU nationals. It prohibits direct and indirect discrimination as well as harassment in employment. Several features of the Directive are worth noting. First, once the applicant has made out a prima facie case, the burden of proof shifts to the respondent to show that discrimination did not occur. Second, it gives a right of standing to interest groups, such as trade unions and NGOs to act on behalf of, or in support of, victims of discrimination. Third, it requires that sanctions for a violation of the principle of equal treatment are 'effective, proportionate and dissuasive.' Finally, rather than simply requiring the implementation of non-discrimination measures, the Directive imposes positive obligations on states: to make 'reasonable adjustment' to accommodate and to 'take active steps' to achieve the principle of non-discrimination. This should lead to the development of a new culture of equality.
- **Race Directive:** this prohibits discrimination on the grounds of race or ethnic origin in employment or in access to goods and services. As in the Employment Equality Directive it includes provisions on effective enforcement. The date by which the State is obliged to transpose this Directive has already passed (July 2003). It had been expected that the Directive would be fully transposed into Irish law during the Irish EU Presidency of Spring 2004. However at time of going to print this has not happened.
- **Community Action Programme to Combat Discrimination** was launched in 2001 in support of the new equality Directives. It seeks to promote the dissemination of best practice as well as capacity building through core funding for NGOs working to challenge discrimination. (Council Decision 2000/750EC.) It builds on the **Joint Action Programme concerning Action to Combat Racism and Xenophobia** (96/443/JHA)

2.3 (iv) Human Rights in the EU

Fundamental rights have been protected within the sphere of Community law by the European Court of Justice. Since the early 1970s respect for fundamental rights has formed part of the general principles of law which guide the European Court of Justice in its interpretation of Community law.⁵ The Amsterdam Treaty formally committed 'the Union to respect fundamental rights' (Article 6 EU). Building on this commitment, a **Charter of Fundamental Rights of the European Union** was agreed in December 2000 and proclaimed at the Nice Council meeting. As the Charter was not formally incorporated into the Nice Treaty it does not create directly enforceable rights before the Court of Justice.

The Charter sets out an extensive range of civil and political rights as well as economic, social and cultural rights. These are broadly categorised into rights to dignity (Chapter I) freedoms (Chapter II), equality (Chapter III), solidarity, including worker's rights (Chapter IV) and justice (Chapter VI). Chapter V deals with citizen's rights.

⁵ *Internationale Handelsgesellschaft mbH* [1970] ECR 1125.

Of relevance to migrants are Article 45 which provides for freedom of movement for third country nationals legally resident in the territory of a Member State and Article 15 which states that 'nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.'

It is widely anticipated that the Charter will be incorporated into a future constitution of the European Union.

2.3 (v) EU Employment & Social Inclusion Policies

Another major and interlinked development at EU Council level was the launch of the Lisbon⁶ strategy in 2000. It set itself a goal for the EU for the next decade to "*become the most competitive and dynamic knowledge based economy in the world; capable of sustainable economic growth with more and better jobs and greater social cohesion.*" In the context of changing demographic and economic needs, labour shortages and labour mismatches were recognised as playing an even more central role in formulating policies to attract migrant labour. Simultaneously, access to the EU labour market is identified as an essential component of the integration process for immigrants into host societies.

The following broad policy instruments to promote and underpin employment and social cohesion were thus developed to implement the Lisbon agenda. They include references to the need to attract, and provide for the integration of, migrant workers as part of broader labour market policies:

- The **European Employment Strategy (1997); Economic Policy Guidelines and Employment Guidelines:** Integration of migrant workers (and also disadvantaged groups) forms an important aspect of these policy instruments. While the focus is predominantly on undeclared work and irregular immigration they nonetheless offer useful guidelines in relation to promoting anti-discrimination and participation of second generation migrants and immigrant women. Labour market programmes to research the role and contribution of migrant labour are to be implemented across the Member States. An 'open method of co-ordination' for a common EU immigration policy requires Member States to implement better mechanisms for gathering information and data.

The Employment Guidelines address the key common employment challenges posed by globalisation, the speed of economic, social and demographic change, the demands of a modern economy and EU enlargement. Through the use of appropriate targets, the Guidelines aim to deliver the medium term goals of the Employment Strategy agreed at Lisbon. They offer guidelines for the employment policies of each Member State (see Section 2.4 (i)) and crucially, seek greater co-ordination between economic and social policies. They also require States to foster the integration of vulnerable groups, among them immigrants and ethnic minorities.

⁶ The Lisbon agenda set 3 complementary objectives for the employment policies of each member state as follows: full employment, quality and productivity at work, and social cohesion and inclusion.

- **EU Social Inclusion Process:** in December 2000, a common set of EU objectives⁷ to combat social exclusion and poverty were agreed.

The Process consists of two parts. Stage one involves the submission of national action plans (NAPs/incl) setting out strategies for the achievement of these objectives, including specific measures and institutional arrangements to combat social exclusion and poverty and their assessment by both the European Commission and Council. Stage two is the development of an EU action programme to encourage transnational projects and co-operation among member States in the fight against social exclusion.

In the Social Inclusion Process, ethnic minorities and immigrants were explicitly identified as being at high risk of social exclusion and discrimination. Member States were asked to report on measures and initiatives taken to promote *"social integration of women and men at risk of facing persistent poverty, for instance because they... belong to a group experiencing particular integration problems such as those affecting immigrants"* (Com 2003/336:32).

- The **Economic and Social Cohesion Policy 2000–6**, now at its mid-term review is another important strand of EU policy of relevance to the integration of migrants. The lessons to be drawn from Equal projects in relation to human resources, access to employment, racism in the workplace and integration of immigrants may generate further targets for social inclusion programmes.

2.4 IRISH SOCIAL POLICY CONTEXT

Irish social policy has evolved in the past decade, at times in response to the demands of European Union law and policy and international human rights law (see Section 2.5), towards a greater recognition of groups vulnerable to social exclusion. In recent years, immigrants and minority ethnic communities have been identified as requiring specific measures to ensure integration.

There is a plethora of labour market and social inclusion policies where migration is either implicitly covered or specifically named. As part of Ireland's commitments to common EU approaches to migration, racism and employment and to greater open co-ordination of economic and social policies, Irish policy now is directed to name social integration measures and protections for migrant workers.

The **National Development Plan** and the **NESC** strategy report 2002 *"Investment in Quality: Services, Inclusion and Enterprise"* set the scene for government approaches to managing the economy and *"achieving fair and sustainable economic and social progress."* The NESC Report notes that the *"skilled and unskilled work of non-nationals from outside the EEA has been, and is, playing an important role in enabling Irish growth rates to remain high, international companies to remain here, public services to be improved and private services to expand."* It goes on to recommend that relevant authorities pay particular attention to

⁷ These include: (i) participation in employment and access to resources; (ii) access to the rights and services necessary for such participation; (iii) prevention of social exclusion, including help for the most vulnerable and (iv) the involvement of a wide range of relevant actors (policy makers, community and voluntary sector, excluded people and groups) in the formulation/implementation of the policy.

"ensuring that the terms and conditions of employment, access to accommodation, and where it applies, protection of human rights and civil liberties enjoyed by non-nationals comply with national standards." Positive aspects of the Report include the recognition of the importance of monitoring standards of migrants' accommodation and its encouragement of the development of pre-emptive policies to ensure *"a continuing welcome here not just for low-skilled labour but for the persons who provide it"*.

Sustaining Progress (SP), the social partnership agreement for 2003-2005 sets out, in response to demand from community development groups and NGOs, cross-cutting issues which include immigration and interculturalism. Section 18 of the Agreement deals specifically with migrant workers. It commits to a planned approach to meeting the need for skilled and unskilled foreign labour, insofar as possible, from within the EEA. It also promises, in conjunction with the parties to the Pay Agreement, a review of labour supply and workplace issues as an input to **"Government economic immigration policy [including] consideration of the work permits and related systems"**. Consultative mechanisms are also promised to allow for local labour and business interests to contribute their views in identifying the need for migrant labour to the FAS assessment of local conditions and changing labour market realities. Proposals are awaited as to how this consultation should take place.

The related issues of immigration and interculturalism form one of the ten **Special Initiatives** in SP requiring cross-sectoral, organisational and governmental co-ordination of resources to find practical solutions to these issues. These initiatives will involve choices between the *"various demands for the use of scarce resources- financial and otherwise"* (:17) The concern here would be to ensure that certain kinds of trade-offs that are potentially harmful to vulnerable groups are ruled out. This would require that accountability and compliance with minimum human rights standards are built into any policies that emerge to regulate inflows of migrants, encourage social integration and interculturalism or prevent racism, as well as policies on pay and conditions of work for migrants.

2.4 (i) Irish Employment & Social Inclusion Policies

As part of its EU requirements (outlined in Section 2.3(v)), the Irish Government has to provide National Action Plans on employment and also on measures to promote social inclusion. As stated earlier, the plans must include measures and initiatives to promote integration of migrants. To date the following plans have been produced:

- The **Employment Action Plan (2003-5)** identifies the need for sourcing foreign labour, but contains no significant reference to the social integration of migrants or provision for their access to education and training. In this regard, the Plan does not comply with the priorities for Action set out in the EU Employment Guidelines, (EU Com, 2003/578/EC). In accordance with Union migration policy, the Guidelines refer to the need to exploit the employment potential of all groups, including migrants, in particular to solve labour market bottlenecks. They also require Member States to foster the *"integration of persons facing particular difficulties on the labour market, such as early school leavers, low-skilled workers, people with disabilities, immigrants and ethnic minorities, by developing their employability, increasing job opportunities and preventing all forms of*

discrimination against them." (Specific Guideline 7). There is little evidence of compliance with the aspects relating to employment of migrants, in the plan to date.

- The **National Action Plan Against Poverty and Social Exclusion (NAPs/incl) 2003 –2005** identifies groups vulnerable to poverty and social exclusion, including migrants. The overall objective of the Plan is to prevent the development of an indigenous 'underclass'. There is also a growing recognition of the need to include similar concerns about the development of a foreign underclass to replace it in labour terms; and to ensure they are not more likely to experience poverty than nationals. It sets a policy task to '*improve the effectiveness of the regulation of migration and develop and implement a comprehensive policy for the integration of migrants with a view to combating their social exclusion and accommodating cultural diversity*' (NAPs/incl 2003-5:13). But legislative proposals to regulate the entry to and stay of non-nationals in Ireland and to restrict access to welfare benefits, introduced during that same period, made no reference to integration measures. Rather the **Immigration Act 2004** makes provision for the potential criminalization of migrants who find themselves out of work or irregular for reasons beyond their control.
- A framework has been proposed for the **National Action Plan Against Racism (NAPAR)** in response to the **UN World Conference Against Racism (WCAR) Declaration and Programme of Action, 2001** (see section 2.5). A key outcome of the WCAR was the commitment by states to develop national action plans against racism. This presents Ireland with an opportunity to address the need for an integrated policy on migration based on anti-racist and intercultural standards contained in the Declaration as well as in other international instruments.

The five objectives in the proposed **Framework for a National Action Plan against Racism** (NAPAR Steering Group, 2003) are central to a holistic policy on immigration particularly those on the **provision** of services and social **inclusion**. For each objective, there is a range of key priorities and indicative actions relating to employment, women and children and linked immigration policies. These are set in the context of international human rights standards. The proposed Framework calls for, *inter alia*, a planned policy based not solely on control and also for significant revision to the work permit/visa scheme. This includes its establishment on a statutory basis; the vesting of permits with the employee on a similar basis to the visa scheme and a broadening of the range of visas and permits available (NAPAR Steering Group, 2003: 19). The proposed framework also calls for the development of anti-racism and intercultural strategies for "support, provision and standards in key services and also in policy areas such as health, accommodation, education and training". Emphasis is further placed on language provision for migrant groups. However, the draft Framework stresses adds that targeting provision should seek to avoid the development of segregated services, and prevent the development of institutional and systemic racism. In acknowledgement that some groups have additional or a diversity of needs not being met through existing provision, the report cautions against the persistence of the 'one cap fits all' approach.

2.4 (ii) Irish Anti-Discrimination Framework

In addition to the Constitutional (Bunreacht na hÉireann) guarantee of the right of citizens to equality before the law (Article 40.1), Irish legislation on equality matters includes the

Employment Equality Act (1998) and the Equal Status Act (2000) both of which prohibit discrimination on nine grounds in total, including race and ethnic origin. As the parameters of Irish equality legislation are now largely set by the requirements of compliance with EU law, it is anticipated that both pieces of legislation will shortly be amended to implement the new EU anti-discrimination Directives. The Employment Equality Act and the Equal Status Acts 2000 will be amended to give effect to the employment and non-employment aspects of the Race Directive as well as those on the Gender and the Employment Equality Directive (amended Directive 76/207) - for example, the definition of indirect discrimination will apply to all nine grounds covered by equality legislation. In order to do this, a single Equality Bill was proposed in January 2004 to transpose the Directives into Irish law.

2.4(iii) Irish Human Rights Protections

The fundamental rights of citizens are protected in Ireland through the Constitution (Articles 40-44). Additionally, human rights are protected in Ireland by means of the European Convention on Human Rights Act (2003) which incorporates the ECHR into national law.

In January 2004, the European Convention on Human Rights was incorporated into Irish law by way of the European Convention Act (2003). The Act creates obligations on the organs of the State (courts are excluded from the definition of 'organ of the state') as a matter of national law to comply with the Convention in the performance of their functions. The Courts are required to interpret and apply national law in a manner compatible with the Convention. The Act provides that damages may be sought where the State has failed to comply with Convention rights. The Act is important in that it creates enforceable legal rights to rely upon the ECHR as a matter of national law. This should reduce the number of instances whereby recourse is had to the European Court of Human Rights in order to enforce Convention rights, with all its associated delay and expense. Moreover, although the Act does not require 'Convention-proofing' of new legislation, it is likely that the obligation to comply with Convention standards will have important consequences for the future formulation and application of law and policy in the State, including the regulation of migration policy. However the recently passed Immigration Act 2004 has been criticised by the Irish Human Rights Commission (IHRC) for its potential to undermine Ireland's compliance with international norms and standards including the ECHR. (Observations of the IHRC on the Immigration Bill 2004, Feb 2004)

2.5 INTERNATIONAL HUMAN RIGHTS CONTEXT: RELEVANT NORMS AND STANDARDS

Ireland has obligations as a matter of international law under a range of international and regional human rights instruments.⁸ Although, with the exception of the European Convention on Human Rights, these instruments are not incorporated into Irish law, Ireland is bound in international law by those instruments which it has ratified. In respect of those instruments which Ireland has signed but not yet ratified, the State has indicated its intention to be bound by the measure as a matter of international law.

The international community has only recently taken up the issue of migration in the context of human rights protections. There is a growing recognition of the need for a policy founded on the rule of law and with basic parameters enshrined in law and human rights norms and monitored and elaborated in the context of international scrutiny. The most relevant standards are listed below concentrating on the aspects relevant to migration. Further details are included in Appendix 1.

2.5 (i) United Nations Instruments

General Instruments

Ireland has ratified those core instruments forming the International Bill of Rights: the Universal Declaration on Human Rights (1948); International Covenant on Civil and Political Rights (1966) (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR). These require states to guarantee to everyone within their territory, and not simply to nationals, all the rights set out in the instruments. They also require that these rights be protected without discrimination.

- The **ICCPR**, requires state Parties to guarantee to '*all individuals within its territory*' the civil and political rights set out therein. The Convention guarantees to those lawfully within the State the right of liberty of movement, subject to public order requirements. Aliens, lawfully resident in the State may only be expelled after a decision reached in accordance with law. Unless national security dictates otherwise, aliens are to be afforded the opportunity to present reasons against their expulsion and to have their case reviewed by the relevant designated authority (Article 13). General Comment No.15 of the Human Rights Committee (HRC) on the position of aliens under the Convention elaborates on the nature of state obligations to guarantee to aliens the rights in the Convention. As noted earlier, new Irish immigration legislation provides no safeguards or appeal procedures for non-nationals who are refused permission to enter at the discretion of an immigration officer.
- The **ICESCR** imposes progressive obligations on state Parties to 'take steps ... to the maximum of its available resources, with a view to achieving progressively the full realisation of the economic, social and cultural rights ... in the Convention.

⁸ Information for this section is drawn from a range of sources including reports from the Council of Europe, IOM, UN, NCCRI, IHRC, *Task Force on Policy Regarding Emigrants*, unpublished papers by Farrell, M. and by O'Hare, U.

Ireland has obligations to submit periodic reports on its progress in complying with both these instruments. The hearings for these reports provide opportunities to raise concerns about the treatment of migrant workers. Ireland has accepted the right of individual petition under the ICCPR. No individual complaints mechanism yet exists under the ICESCR.

Thematic Instruments

Ireland has also ratified the **International Convention on the Elimination of All Forms of Race Discrimination** (1965) (CERD), the **International Convention on the Elimination of All Forms of Discrimination Against Women** (1979) (CEDAW) and the **Convention on the Rights of the Child** (1989) (CRC). As with the ICCPR and the ICESCR, Ireland has periodic reporting obligations under all of the above instruments. An individual complaints procedure is available under the CERD and the CEDAW but not under the CRC. Ireland has accepted the competence of both the CERD and CEDAW Committee's to receive individual complaints.

Both the CERD and CEDAW require states to take positive steps to eliminate race and sex discrimination respectively. The CRC obliges states to respect the rights in the Convention without discrimination, irrespective of the child's or parent's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status (Article 2(1)). Article 10 requires that the matter be dealt with in 'a positive, humane and expeditious manner.'

The **UN Convention on the Protection of the Rights of All Migrant Workers and their Families** (1990), which entered into force in July 2003, has **not** been signed or ratified by Ireland⁹ or by any other member state of the EU. The Convention's standards fill gaps left by other instruments in relation to workers' rights, minority rights and protections against racism. The Preamble to the Convention acknowledges "*the impact of the flows of migrant workers on States and people concerned, and [aims] to establish norms which may contribute to the harmonisation of the attitudes of States through the acceptance of basic principles concerning the treatment of migrant workers and members of their families*". It also acknowledges that migration is often the cause of problems for the families and the migrant workers themselves, "*in particular because of the scattering of the family.*"

The Convention does not set criteria for admission of migrant workers or their families but it sets standards as to how they must be treated once in a host country and provides for effective remedies in judicial or administrative systems in the event of breaches of the provisions.

Although the Convention has not been ratified by Ireland, the norms remain relevant insofar as the standards may be used to guide the development of a transparent and common framework for the admission and conditions of residence of migrant workers and their families. However, it is only if the Convention is ratified and enforced in Ireland, that the

⁹ Reasons offered by the Department of Foreign Affairs for non-ratification suggest that significant changes would be required across a wide range of existing legislation, including employment, social welfare, education, tax and electoral law with major implications for government policy across these areas, for relations with EU & Accession States and possibly for the Common Travel Area between Ireland and Britain. No EU member or accession states have indicated intention to ratify.

state would be obliged to provide a report on how they are implementing the provisions in the Convention within one year and thereafter every five years.

The **Declaration and Programme of Action from the World Conference against Racism (WCAR)** in South Africa (2001) contains approximately 30 paragraphs on non-nationals. They provide a value-based definition of standards to encourage states to establish a comprehensive and sustainable policy in compliance with international standards. The Declaration also urged states to ratify the UN Migrant Workers' Convention above. Ireland approved the Declaration and is currently preparing a National Action Plan against Racism but has yet to ratify the Convention.

The Platform for Action and Beijing Declaration (1995) recognises that certain groups of women are particularly vulnerable to violence. These include women migrants and women migrant workers.

2.5 (ii) Instruments of the Specialised Agencies

International Labour organisation (ILO)

The ILO offers technical assistance to states to develop humane standards for migration management, including legislation, codes of practice and setting appropriate goals and targets. ILO Conventions address fundamental standards at work and in social security and reaffirm non-discrimination principles. They apply to both foreign workers and to nationals. However, the ILO is important mainly through workplace organisations. Two ILO Conventions specifically address the rights of migrant workers. Neither of these has been ratified by Ireland nor has another Convention on social security.

- **Migration for Employment (Revised), C 97 – 1949**
- **Migrant Workers (Supplementary Provisions), C.143 – 1975**
- **Maintenance of Social Security Rights C.157 – 1982**

The first two of these Conventions are to be reviewed by the Government in the light of unprecedented immigration to Ireland in recent years.

Another relevant ILO Convention includes:

- **Equality of Treatment (Social Security) C. 118 –1962:** this has been ratified by Ireland. It obliges Ireland to grant to the nationals of any other participating State equality of treatment with its own nationals in terms of both coverage and also right to benefit in the areas ratified (medical care, sickness benefit, employment injury benefit, unemployment and family benefit) The parts that have not been ratified are those concerned with maternity, invalidity, old age and survivors benefits.

2.5 (iii) Regional Instruments - Council of Europe

The European Convention on Human Rights (1950) (ECHR), which Ireland ratified in 1953, requires that state Parties to the Convention secure to 'everyone within their jurisdiction' the rights contained therein. The Convention is widely regarded as the pre-eminent instrument for protecting human rights within the European region, not least because of the enforceable nature of its rights before the European Court of Human Rights. The material scope of the

Convention is largely limited to the protection of civil and political rights and not economic, social and cultural rights.

The ECHR and Anti-Discrimination

All the rights in the Convention are to be protected without discrimination on the grounds of '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). Crucially, however, the right to non-discrimination applies only in the context of a claim in respect of a substantive violation of another Convention right. In 2000 a new protocol to the Convention was opened for signature. Protocol No. 12 establishes a general right to be free from discrimination. The Protocol will enter into force upon the tenth ratification. Ireland has signed but not yet ratified the Protocol. Indeed very few EU states have done so.

The ECHR and Migration

The ECHR does not grant a right of migration and residence for non-nationals into the territory of a state Party. The exercise of migration control, however, must be in compliance with Convention standards. Thus a number of cases have been brought before the Strasbourg institutions claiming that the refusal to admit or the expulsion of a non-national violates certain Convention rights.

Ireland has not signed or ratified key Council of Europe instruments in the social field which contribute to improving access to certain social rights, and particularly, for certain vulnerable categories of persons in Europe. These include the **Convention on the Legal Status of Migrant Workers (1997)** and also those on social security co-ordination.

Ireland has, however, ratified both the **European Social Charter (1961) and the revised version (1996)** both of which contain important protections of economic and social rights. These rights relate mainly to employment and the labour market and the rest deal with social rights. Rights are framed in terms of undertakings by states to provide an institutional and legal framework for the rights to be realised e.g. right to adequate and free information, family re-union. Certain rights are regarded as core rights and states have to accept a certain number of them.¹⁰ Article 19 specifically protects the migrant workers and their families of other Council of Europe member States who are party to the Convention (right to protection and assistance). As in the UN Convention on the Rights of all Migrant Workers and their Families, states are required to promote the language of the host state and, insofar as possible, the migrants' own language

The **European Committee of Social Rights** assesses State reports on compliance with the terms of the European Social Charter. Under the collective complaints mechanism, trade unions and NGOs can bring complaints directly to the Committee.

A Council of Europe report on Access to Social Rights, suggests that the architecture

¹⁰ They are the right to work, to organise, to bargain collectively, to social security, to social and medical assistance; the right of the family to social, legal and economic provision, the right of migrant workers and their families to protection and assistance.

Other rights set out in the Convention include the rights to vocational guidance and training, to health protection, social security, social and medical assistance and social welfare services. Under the revised Charter, the right to equality and non-discrimination and to protection against poverty and social exclusion and to decent housing at a reasonable price are also affirmed.

necessary for the achievement of social rights is already in place in Europe. “While there are some gaps, problems where they exist, derive in many cases from shortcomings in the operation or functioning of existing provision or from a lack of precision in the legal specification of rights.” (Daly, 2002:73). Some service providers may need to adapt to changing or new needs, she says, but a comprehensive legal and policy framework which gives a legal basis to entitlement and makes a commitment to putting in place the appropriate mechanisms for giving effect to rights is critical.

The emerging form of exclusion of migrants via immigration and social welfare laws is especially worrying then in this context. The relevant instruments need to be ratified if norms are to change a culture of exclusion. On the other hand, some states have expansive recognition of social rights but poor provision in practice. Formal entitlement in itself will not guarantee realisation. Specific situations, such as lack of a permanent address or transient employment, can prevent people accessing their rights and sometimes even debar them from a right.

2.6 SUMMARY

This section of the briefing paper sets out the broader policy and legislative context in which the Irish work permit system operates. It draws lessons from the Irish experience of emigration that can assist in the formulation of policy on entry, residence, integration and intercultural initiatives to deal with the changing scenario of net immigration as well as continuing emigration.

On another level, EU migration policies are also changing from those based purely on ‘security’ logic to those that address demographic and labour shortages. A common EU policy of managed migration is now seen as central to a holistic approach which links labour migration with employment policies and policies to protect rights and promote social inclusion of migrants. Various EU Directives remain to be implemented towards this end in most EU states, including Ireland.

As part of Ireland’s commitments to common EU approaches to migration, racism and employment and to greater open co-ordination of economic and social policies, Irish policy now is directed to name social integration measures and protections for migrant workers.

Progress on these matters has been less than noteworthy: the NDP and SP do name migrants and migrant workers as specific target groups but, although the NAPS, NEAP and NAPS/incl name migrants as vulnerable to poverty and social exclusion, they contain no significant reference to the social integration of migrants or the provision of access to education or training. Similarly, the Immigration Act 2004 omits any reference to integration. It also provides broad discretionary powers for immigration officials without effective safeguards or protection for the rights of migrants (HRC 2004). The National Action Plan against Racism is not yet produced; the Equality Bill 2004 omits from protection a vulnerable group of migrants – those who work as carers or child minders in the private home.

State sovereignty remains to a large extent the overriding principle in the control of entry of non-nationals to the State. The development of international human rights protections for

migrant workers is in its infancy. UN and regional European instruments offer some protections to those legally within the State but they have little to say in relation to the protection of migrant workers in the grey area between work permit and residency status.

The one Convention that offers protections to migrant workers and their families has not been signed or ratified by Ireland or any other EU state. The norms and standards in that Convention offer a framework to assess migration policies and practice specifically in relation to work permits.

Other Convention monitoring bodies (ICCPR, ICESCR, CEDAW, CRC or CERD) and extra-Conventional procedures may provide an opportunity to raise concerns about Irish policy or legislation that discriminates against or does not provide for integration, training or social protection of migrants. NGOs can provide shadow reports to the European Committee of Social Rights (responsible for monitoring compliance with the European (Revised) Social Charter which Ireland has signed and ratified). It could be a useful forum for raising the exclusionary effect of immigration and social welfare regulations which prevent access to rights or even debar migrants in practice from availing of their rights.

Finally the ECHR may prove to be of significance as the rights contained in it apply to everyone within the jurisdiction. Migration control for example, must be in compliance with ECHR standards and recourse to the courts may offer some protections in the future now that the ECHR has been made part of Irish law.

This section examines aspects of Irish legislation and practice in relation to the work permit system. It also focuses on the social protection of migrant workers as well as issues of integration and family reunification.

The main legislation governing immigration at the domestic level is the **Aliens Act 1935** and the more controversial **Immigration Act 1999**, introduced to make provisions (especially deportation) of the Aliens Order 1946 lawful but sections of which were found to be unconstitutional by the High Court in January 2004. The more recent **Illegal Immigration and Trafficking Act 2003** (which among other provisions penalises carriers bringing passengers to Ireland without adequate immigration documentation), the **Immigration Act 2004** and **Employment Permits Act 2003** are the other main instruments. A further Bill on work permits has been promised for over a year now. However, long awaited immigration legislation to clarify broader matters of citizenship, residency, methods of entry and management of immigration flows has not materialised yet.

Other Acts such as the **Refugee Act (1996)** as well as various Orders deal more specifically with refugees and asylum seekers. These are not dealt with in this paper. Neither are labour laws or procedures. It is important to note however that the **Protection of Employment Act 1977** and the Protection of **Employees (Part-time Work) Act 2001** confer rights on persons irrespective of their nationality or place of residence if they have an employment relationship in the State. Likewise, employment equality laws apply where relevant to all those within the jurisdiction of the State.

The following section seeks to clarify the present scope and operation of the work permit system.

3.1 WORK PERMITS: PROCEDURES AND PRACTICE

- **General Entry:** EEA/Swiss nationals and, after 1 May 2004, nationals of the ten Accession States joining the EU in 2004, can freely come to live and work in Ireland. Neither entry visas or work permits are needed, although, at the last minute, Ireland introduced restrictions on access to social assistance in line with other EU states. This will have implications for migrants who end up out of work for reasons beyond their control. From our own experience of emigration to the UK, despite the CTA, free movement does not necessarily mean that positive integration and intercultural provision exist or are even adequate or that discrimination does not happen.
- **Visas & Authorisations:** all other migrant workers¹¹ from outside the EEA have to either apply for a work visa or find an employer who will seek a work permit to hire them.

¹¹ This paper does not address other forms of entry to the state for work such as corporate programmes, bilateral agreements or students who can work for up to 20 hours work per week without a permit although they do have to obtain a residence permit from the Dept Justice E&LR and register with the Gardai. Similarly, procedures relevant to refugees or asylum seekers are not the subject of this paper.

Since 2000, two-year work visas (or authorisations for countries for which entry visas to Ireland are not required) are issued for high skills occupations that have been designated as those with labour shortages. They carry a specified range of rights and entitlements and are administered through Irish Embassies, although the Department of Enterprise, Trade & Employment (Dept ET&E) has formal responsibility for the scheme.

- **Residency Permits:** holders of visa/work authorisations as well as workers on permits must, on arrival at port of entry, present themselves to an immigration officer and seek “permission to land”. Then they have to report, within one month of arrival (or less if stated otherwise), to the registration office, usually the garda station in the area in which they are to live or, in Dublin, the Garda National Immigration Bureau (GNIB). A current passport, a work authorisation/visa/work permit document and other related documents such as a contract, professional registration number or letter from the employer are required to obtain a Certificate of Registration which states the length of permission to remain and carries a photo ID and GNIB number. Renewals must be sought from the Gardai on expiry. If non-nationals relocate to a new district, they must inform the local immigration officer, within 48 hours, of their presence in the area. They also must carry their documents at all times.
- **Work Permits:** Employers who have a vacancy, which cannot be filled within four weeks by Irish or EU workers via the FAS/EURES information system, can apply to the Department of Enterprise, Trade & Employment for work permits for a restricted range of low or semi-skilled jobs. There are no quotas or ceilings on the number of applicants granted permits. Named workers must be sourced prior to application for the permit. A key aspect of the work permit scheme is the fact that permits to work in the State are temporary. The permits are valid for up to 12 months and cost €500 for employers. Charges cannot be passed on to the migrant worker either by the employer or a recruitment agency. The Department posts a list of employers who obtain permits on their website. Permits can be renewed on an application by the employer but the procedures for renewal lack clarity. This leaves a grey area open to subjectivity and also to exploitation by unscrupulous employers. It is possible for a permit worker to change jobs if another employer applies for a permit in respect of him or her and if the permission to remain in the State is still valid. In this instance the original permit is supposed to be returned to the Department, with an explanation as to why the worker was let go, before a permit is issued to a new employer for the worker.

There are fewer protections for this group of migrant workers than there are for those on work visas. They are entitled to all relevant employment rights and these are explained in an information booklet published by the Department of Enterprise, Trade & Employment in nine languages. They are also entitled to the same benefits as Irish nationals in relation to health, education, and social welfare although the latter is unclear, especially with regard to non-contributory benefits. One sector which employs a significant number of migrant workers as carers, nannies or “domestic” workers in the private home, however, lacks protection against discrimination due to the exemption of the private home from the provisions of the **Employment Equality Act 2000**. This affects women migrants primarily and those in isolated jobs.

Those on work permits have no automatic right to family reunification but may apply after one year if it can be shown that the permit is to be renewed for another year. In

contrast, those on work **visas/authorisations** are entitled to apply after 3 months, for permission to bring their family to Ireland and some do this. There are requirements such as the worker must have sufficient earnings which eliminates, in practice, many of the lower income group of migrant workers. Spouses outside the State are eligible to apply for work permits but there is no automatic right to work without a permit. This right to apply is further restricted, in practice, by new administrative preferences for Accession country migrants thereby reducing the likelihood of entry for Eastern European, Asian or African family members via the work permit route. Dependent spouses in the State are not entitled to work although there seems to be more flexibility in relation to spouses of visa workers.¹² The Department is considering other matters raised by these issues such as how to provide low-income housing or who bears the cost of family support. The special initiatives in Sustaining Progress will be an important arena for addressing some of these matters.

One of the more disturbing aspects of the permit system is that migrant workers on work permits can only apply in their own right for an unlimited permit **after 6 years** and only if they have been with the same employer for 5 years and intend to stay with that employer. If they change employers they have to **start the whole process** again which seems an inhuman approach to workers who have contributed not only to the growth of the economy but also to the broader society.

3.2 WORK PERMITS: LEGISLATIVE DEVELOPMENTS

Recent changes in employment permit legislation aim to meet, in part, the challenge to developing a more managed and transparent approach to migration. Forthcoming employment permits legislation looks likely to bring that process further.

3.2(i) The Employment Permits Act (2003)

The **Employment Permits Act 2003** put the issuing of permits on a statutory basis rather than being merely controlled by in-house rules. It was introduced speedily in order to comply with requirements of the EU Accession treaty in April 2003.¹³ It removed the provisions that make it a criminal offence to employ a non-national without a permit from the **Immigration Bill 2003**, thus separating it to some extent from the refugee and asylum measures that were the substance of that Bill. The Act permits full freedom of movement for all accession country migrants for the purposes of work. Restrictions on access to social assistance, including a two year habitual residency test, however have been introduced and this may have unforeseen consequences. The Act also includes a provision to reintroduce a permits system for this group should a downturn in the economy warrant this or should the labour market suffer a very serious disturbance in the first few years following accession (NEAP

¹² In February 2004, the Minister for Enterprise, Trade & Employment promised to bring proposals to Cabinet to allow spouses of non-EU nurses, IT, construction professionals and foreign diplomats to work without a work permit. The exact status and entitlements of such workers have yet to be clarified.

¹³ It allows nationals of the 10 Accession States (Poland, the Czech Republic, Hungary, Slovenia, Slovakia, Lithuania, Latvia, Estonia, Malta and Cyprus) to take up employment in the Irish labour market after Accession (May 2004) without requiring a work permit.

2003-2005). An employer can be indicted before the circuit court for minor offences but, if found to be hiring a large number of irregular, non-nationals, this will be treated more seriously with fines up to a maximum of €250,000 and/or a prison sentence of up to 10 years. Section 2 of the Act also provides for fines of up to €3,000 and/or a prison sentence of up to one year for non-nationals in employment without permits unless they are permitted to work in the state under other provisions.

Shortly after the passage of the 2003 Act, a number of restrictions¹⁴ were introduced to what is in effect the main labour recruitment scheme in the State due to concerns that employers were bypassing local workers in favour of less costly migrant workers. FAS had already indicated in its Labour Market Review 2002 that while immigration could significantly increase labour supply, there was also a need for a proactive and holistic approach to reach out to both those in the job market but also to those who have become “detached from the mainstream job market [and] tackle the often multiple disadvantages faced by persons in this group” (FAS, 2002:27). This is an important policy objective but it should also be remembered that OECD (1997) studies have shown that the long-term unemployed are excluded from the labour market regardless of whether migrant labour is available or not. Therefore, there is a need to address broader issues of disadvantage and social exclusion whilst simultaneously developing a structured migrant labour supply with simultaneous integration programmes to prevent future social exclusion. (EU Com2003/336:11)

A number of concerns have been highlighted by a range of individuals and NGOs about certain provisions and gaps in the 2003 Act and its operation:

- Migrant workers need clear and accessible information, for example, they should be in a position to clarify whether a work permit renewal has actually been sought by an employer. This appears not to be covered in the legislation as the Department sees this a customer care issue rather than a matter for legislation. The establishment of a helpline may be useful but clarity on entitlements and regulations is a prerequisite.
- It is unclear how the Gardai could exercise powers of distinction between the different categories of work visas, permits and other situations. Asylum seekers will have documents issued by the Department of Justice, Equality & Law Reform (DJELR); others will have permits or visas issued by the Department of Enterprise, Trade & Employment but students are the most difficult group to regulate because they do not need permits; they can work for up to 20 hours but there is no limit on the number of workplaces in which they can work these hours. DJE&LR control this area.
- There is no reference in the Act to the EU Council Framework Decision on Combating Trafficking in Human Beings (OJL203/1, 01.08.02). It also lacks powers for extra-jurisdictional prosecutions of traffickers or unethical recruitment agents.
- The Department of Enterprise, Trade & Employment wants to put the onus on employers to work with ethical recruitment agencies but many of those who pose problematic are

¹⁴A list of occupational sectors was introduced for which work permit applications would no longer be accepted. The list is determined by FAS and the Department of Enterprise, Trade and Employment, on the basis of experience and local labour market analysis that appropriate skills exist locally. These sectors are reviewed on a quarterly basis and modified if necessary. (National Employment Action Plan 2003-2005)

agents rather than agencies and are difficult to monitor and regulate. Moreover, the Department is concerned with the ease with which work visas and authorisations are sometimes issued through consulates, especially for highly skilled areas such as in IT sector. They hope to have a provision in forthcoming legislation to prevent a work permit being transferred into a work visa once in the country.

3.2(ii) Forthcoming Working Permits Legislation

Further legislation has been promised to clarify immigration rules and regulations in relation to applicants for work permits, working visas/authorisations for professions; inter company transfers; transfers for training; companies bringing in other company employees. Heads of Bill on further work permit legislation were placed before the Cabinet early in 2003 but a Bill has yet to be presented to the Dail. Policy areas within this Bill are likely to cover matters such as:

- Required immigration status;
- Content and duration of permit;
- Rules and guidelines on granting, refusal, surrender or transfer of permits to employers including non-nationals
- Appeal system;
- Maintaining of records (under employment law as well as this Bill)
- Register of employment permits and unauthorised deductions of pay & charges for work permits
- Offence for employer to mislead immigrant worker as to nature of job or conditions

It has been indicated by the Department of Enterprise, Trade and Employment that this Bill will not include:

- Employment agency regulation
- Citizenship and residency
- Quotas, categories of skills etc. This will be covered in immigration legislation *per se* but the timeline on this is unknown.

The Heads of the Bill, insofar as they can be ascertained at this stage, suggest that the Department is attempting to further improve and clarify immigration practices and procedures. This is to be welcomed. However, there is no indication that standards in the Revised European Social Charter (to which Ireland is a party), or in the UN Convention on the Protection of the Rights of All Migrant Workers and their Families will be referenced in the Bill.

3.3 OPERATION AND CRITIQUE OF WORK PERMIT SYSTEM

Migration Under the Work Permit System & Accession Country Impact

The ICI study on Labour Migration into Ireland (2003) shows the remarkable spread of migrant workers (in 2001, 21 countries sent 500 or more workers and a further 113 sent

smaller numbers). Work permits have been acquired for every sector of the economy, particularly in agriculture, horticulture, hotels and catering industry and for a range of unskilled work. Work permits have been issued for every county although cities and large towns predominate. This raises questions for interculturalism and integration needs at both regional and national levels.

The IOM study (2002) also draws attention to the unusual fact that some Baltic States send large numbers of workers while others (Estonia) do not. This suggests that recruitment practices and promotion of Ireland as a work destination would merit further scrutiny and that standardised and more sophisticated data collection methods should be implemented. As ten new member States join the EU in 2004, what was previously termed 'immigration' from those States will become known as 'internal mobility', a definition at odds with the UN definition of a migrant worker! Approximately 35% of work permits have gone to nationals from the accession countries in recent years and Department officials believe that this number is likely to double after accession.¹⁵ Some skills gaps in the work permits categories e.g. technical skills, may be filled from that source in future. However, other skills may have to be sourced elsewhere as an EU study (2001) on "The Free Movement of Workers in the Context of Enlargement" estimates that the impact of accession countries as sources of migrant labour for Ireland will be minimal. "Recent estimates suggest that labour mobility from new Member States may be moderate to limited, with specific situations in border regions" (Com, 2003/336:10). Previous expansions of the EU did not generate the level of mobility anticipated. There is no evidence either of large movements of unemployed people from new to old member states to claim social assistance during previous enlargement periods.

Ironically, some nationals from these countries who are already in the country on work permits are not allowed to seek alternative employment when an employer makes them redundant. It is difficult to understand the rationale for this as it is neither efficient for the economy or the administration of permits and residency stamps. More importantly it is unfair to the migrant workers who have already made a contribution to the economy and breached no rules or laws during their stay. An interim measure is required to address this special group of workers over the next year to ensure that their rights as EU citizens are protected.

The vast bulk of non-EEA migrant workers are here on work permits. Over 47,500 were issued by the Dept Enterprise, Trade and Employment last year (42,000 in 2002) compared to over 2,500 on work visas/authorisations which suggests that low skilled migrant workers are recruited mainly from outside the EEA and many of the posts that are thus filled have become increasingly difficult to fill with Irish or EU workers. Overall there has been a dramatic increase of more than 600% in the number of employment permits issued since 1999, a matter of some concern to labour market and anti-poverty strategy policy makers especially in relation to rises in youth unemployment in recent years (2001&2). However, experience from other countries and OECD studies suggest that general unemployment levels for host populations are not adversely affected by immigration inflows and the presence of migrant workers. Therefore, refusing applications from outside the EEA or

¹⁵The National Employment Action Plan 2003-5 (2.5.2) suggests that "employers will be able to fill the majority of their labour needs from the extended EU."

Accession Countries may neither affect unemployment levels nor answer the needs of the economy. It cannot address the mismatch between the skills on offer by workers from Accession Countries and the demand for particular categories of workers such as carers or nannies.

FAS has warned that the current system, based primarily on work permits, mainly encourages the inflow of unskilled labour and would seem to be inconsistent with the medium term needs of the economy. Overall they believe that the work permit system is essentially a vacancy or employer driven system rather than one based on a national skills needs approach. They argue that while it is possible that wage inflation and costs are being moderated due to the work permit system, there *"would seem to be a need to move to a new system based on nationally identified, occupation/skill-linked, immigration needs and procedures. From an economic perspective, future immigration policy for non-EEA nationals should be administered transparently by the State, with a fair system of selection."* (FAS 2002 LMR:34)

The recommendation for transparency is welcome. It will not address, however, the labour mismatch that may occur if Accession country workers do not take up specific posts. MRCI reports that, already, work permits for Philippino carers and nannies are more difficult to get on the basis that workers should be sourced from Accession countries. But this has not traditionally been the source of such workers; rather they offer more in the line of skilled, technical workers or agriculture and agribusiness workers rather than carers. There will remain a need for non-EEA workers even after May 2004 and concerns regarding the status of those already working here after this date need to be addressed.

Aspects of the Operation of the System

The overriding features of the operation of the current work permit system for low skill labour entry are:

- weak regulation of **recruitment** practices (3.3 i);
- lack of **ownership** by migrant workers themselves **of work permits** (3.3 ii);
- **lack of clarity** in the operation and administration of rules and regulations (3.3 iii); **and**
- **the temporary nature of the permit** (3.3 iv).

3.3 (i) Recruitment

Little is known about actual recruitment processes for migrant workers on permits as opposed to visas. Conroy's study (2003) for the Equality Authority and the IOM report (2002) give some attention to the experiences of migrants in this regard as do anecdotal reports to NGOs. MRCI has documented the negative impact of some recruitment agents and practices on the type of work, conditions and employer relationships that migrant workers experience. These include cases of migrants recruited to work as office workers but who end up working as general domestic staff in private homes, in massage parlours, with no jobs at all on arrival in Ireland, or are even passed on to other recruitment agencies.

There are also instances where migrant workers pay large sums of money to agents and on occasion end up with no job; others sign legal contracts and enter into agreements prior to departure based on little or inaccurate information about the Irish context.

There is a need for further attention to this area, especially as it impacts on serious matters of trafficking and human rights protections as well as socio-economic concerns. Section 18 on Migrant Workers in the Partnership Programme, **Sustaining Progress** commits to a review, before Summer 2003, of the Employment Agency Act 1971 to “consider the most appropriate approach to the regulation of agencies and their recruitment and placement activities in Ireland” and to take account of EU discussions on a draft Directive on Temporary Agency Workers. It is unclear whether this has been progressed as of Spring 2004. A monitoring system to furnish reports on recruitment agents acting unlawfully, or encouraging migrants to travel for work that is in breach of labour laws or permit conditions, is needed. It could be based in consular services and feed back through the Department of Foreign Affairs to the work of the departments that process employment permits and permission to stay.

Pre-departure information for migrants and policies to address relevant issues in sending countries are important aspects of the Tampere and Lisbon agendas for the common management of migration flows and for employment strategies of the EU member States. Based on their experience of responding to the economic, social and cultural needs of migrant workers, the MRCI is planning a pilot project to research the type and nature of pre-departure, information needs of migrant workers in two countries of origin.

3.3 (ii) Ownership of the work permit

Two issues arise here. The main criticism of the work permit system is that because they are owned by employers rather than a worker, work permits are perceived as (by both employers and employees), and can be in practice, a form of bonded or indentured labour with potential for exploitation and wage depression. While many employers are fair and operate to high standards, the MRCI has documented cases of workers who have been unable to leave situations of serious abuse because of the fear of deportation or poverty. An employer owned permit system has the potential to facilitate exploitative recruitment practices (particularly for workers in the private home) as well as trafficking of very vulnerable migrants, including women and children. The Department has expressed concern about problems that would arise if permits were to be given to the employee rather than to the employer: to whom should they be sent, how can addresses be checked, how many should be issued, to whom and to what sectors, should strict sanctions and time limits apply? Many of these same problems, however, apply to employers too, both inside and outside the State.

Secondly, a further criticism of the employer owned and driven permit system is that it is economically inefficient. A not insignificant voice in this respect is the ESRI which argues that permits should not be tied to a specific employer or sector as this can lead to economic inefficiencies. It does not allow for a flexible workforce although, in 2002, 70 migrant workers per week changed employers and the DET&E tried to facilitate this liberally because of the economic situation. ICI estimate the number who change jobs to be in the region of 10 % of immigrants. 40% of permits were renewed in 2001 and 50% in 2002. FAS, in its first Labour Market Review (2002:34), suggests a more customised model based on a points system, lotteries or quotas. This would require a skills shortages analysis for the country in the medium term. Then migrants with relevant skills and specific other attributes such as age, language proficiency, personal and health characteristics, proven track record in business

or work skills could apply for entry to work. A different system such as a lottery could be designed to allow a quota of immigrants to fill low skill jobs if this still proves necessary.

The cost of administering a work permit system has never been properly assessed. One international study for the ILO suggests that a system of tradeable work permits, which could include a charge for infrastructure costs of monitoring of migrants, employers and workplaces to ensure that programmes are functioning as intended might be worth exploration (Weinstein, 2001).

3.3(iii) Lack of Clarity

The process for renewal of permits lacks clarity and does not involve the migrant worker. Anecdotal evidence exists that employers frequently forget, refuse or neglect to furnish the relevant documents for renewal. In the event of dismissal, workers can then be, and often are left without protection or remedy. It is important that workers do not end up without documents through no fault of their own. Currently, migrant workers do not have the right to be issued with a copy of the work permit under which they are employed. If a copy of the work permit were to be issued to the migrant worker also, it might serve to minimise potential for abuse or even confusion. It would also create a more positive dynamic between the permit holder and migrant worker. One study of migrant workers (Conroy, P. 2003) found that many were unaware of or did not use free information services provided by the State. In some instances they paid for services of lawyers to get information, even though when clarity could not be established.

This lack of clarity is particularly acute in the space between renewal of residency permits or Certificate of Registration and issuing of work permits. A single process should be explored to rectify this .

3.3 (iv) Temporary nature of permits

The experience of the MRCI and other NGOs suggests a strong need for permits to last for a period in excess of a year. It would reduce administrative burdens on employers and the State. It would allow some sense of security and dignity to those workers who might wish to avail of an extended period of employment. It would acknowledge the reality that approximately 50% of permits issued in 2002 were actually for renewals (16,562) or for changed employers (about 3,000). However, the overriding aspect of the current system is a lack of coherence, humanity or efficiency. Managing labour supply on the basis of temporary labour as need arises or on a three-month supply basis is impractical. Temporary work permits will always be needed to fill gaps in some sectors but this should not be the main route of entry system for managing labour migration over a long period as it is at present for over 40,000 workers. It is inefficient for migrant workers, their families, civil servants who carry a heavy administrative burden, the Gardai, employers, the economy, and the broader fabric of society. Workers should be allowed at least the prospect of permanency and to make a broader contribution without fear of discrimination or social exclusion.

3.4 SOCIAL PROTECTION

Access to Social Rights: protection, employment services, health, housing and education.

A Council of Europe report on Access to Social Rights defines social rights as “those provisions, expressed in legal and other forms, which are necessary for the fulfilment of people’s social needs and for the promotion of social cohesion and solidarity....referring to social protection, housing, employment, health and education” (Daly, 2002:30).

Most EU policies now concede that social rights serve to reduce social tensions and contribute to economic development. But access to these rights is affected by the framing of the rights, the procedures and resources for delivering the rights and the situation and capacities of the potential claimants of the rights. Daly’s report (2002:34) highlights evidence from across Europe that formal entitlement to a social right is no guarantee that a right will or can be realised in practice. A range of obstacles to realisation exists. Some of those most relevant to this paper are

- the lack of clarity in specifying an entitlement,
- limitation to particular sectors or groups,
- gaps in social safety net,
- lack of even minimum standards,
- design of entitlement or eligibility especially if it serves to exclude people and
- a mismatch between the structure of provision and the nature of the demand or need .

A Council of Europe Group of Specialists on access to social protection highlight an emerging form of social exclusion: the use of immigration and social welfare laws to exclude immigrants and/or asylum seekers from access to social assistance and services and to justify their separate treatment under a two-tier set of rights. This can lead to no or reduced access to employment, training or educational opportunities, poverty and non participation in the social fabric of the society. It “goes against the spirit and logic of human rights to exclude anyone present on the territory.” (Daly, 2002:36). It also raises questions about the recently introduced restrictions on Irish social welfare entitlements for other EU citizens and in the light of EU social security directives could lead to a two-tier set of rights.

Three key areas of importance to migrant workers are access to unemployment benefit or assistance and social welfare; access to training and services such as FAS and access to health protections, especially maternity cover and costs. There are various dimensions to this but a crucial gap exists in many instances between a right of access in central policy terms and the local interpretation of policy which can at times be unnecessarily negative or even oblivious to actual provisions or entitlements. This raises questions of clarity of entitlement, rules, regulations, policies and provision of information as well as training of frontline staff.

Social Protection for out-of-status migrant workers

MRCI has experience of migrant workers on permits who have been sacked or let go for whatever reason prior to the expiry of the permit and who have been refused social welfare assistance .

- *One woman couldn't show evidence that she had complied with the requirement to register with FAS even though migrant workers on permits are not eligible to register with FAS or avail of their services (other than to receive job vacancy information).*
- *One applicant, despite having sufficient PRSI contributions to qualify for benefits, could not access her entitlements due to this operational rule or to a local interpretation of a rule. But a migrant worker who enters the country on a legal basis has a right to apply for social protection.*
- *In another case, a Superintendent Community Welfare officer refused assistance to a migrant worker on the grounds that a work permit is for work purposes only and the worker has to have sufficient means to sustain herself outside employment periods. However, at the time of the decision, this was not a regulation set out by any government department either for a work permit or for social welfare entitlement. In fact they are entitled to access the same rights as other employees. (Ref Com 336:26)*

The difficulty for advocacy groups is the lack of clarity in the operation of rules and procedures and also the absence of policy to address irregular situations.

When a migrant worker is sacked or constructively dismissed their residency permit continues to exist at least until renewal date. Their vulnerability is acknowledged in the UN Convention on the Protection of the Rights of All Migrant Workers and their Families contains specific protections for migrants in such situations. Anecdotal evidence suggests that while many staff in garda offices are courteous and accurate in their advice to migrant workers in these circumstances, some can be less than helpful and even at times wrong in their information or decisions. *MRCI has received complaints from some migrant workers in this situation who had deportation orders served on them when they went to the local garda station to check their formal status. In other cases, local Gardai have retained passports, in one instance for five months, presumably until such time as a residency permit was sent from Head Office in Dublin. In the meantime the migrant worker was without documents and therefore could not access social welfare even though he was eligible.* Furthermore, under recently passed legislation, migrants in this position can be criminalized, fined or imprisoned.

The lack of clarity about access to social protections or employment services both at policy and local level hinges on the temporary nature of the permit system and the parallel procedure for issuing registration certificates. The IOM, in a comparative study on Migration Legislation and Practice (2002) suggests that the introduction of a permanent residence permit could alleviate pressures faced by the current system of "leave to remain" which requires at least a second decision making step on each such case.

Transparent procedures and entitlements for a more permanent migrant entry system would assist not only migrants themselves but also the relevant agencies who have to process and deal with claims or requests. It would eliminate some of the administrative burden and remove many of the grey areas where migrants find themselves falling between all the regulations. Greater clarity would benefit everyone, both migrants and nationals accessing the social protection system. Unfortunately amendments have the potential to create a two-tier set of rights and lead to fragmentation and crisis management rather than an effective and sustainable migration policy.

- *In a recent case supported by MRCI, three Latvians working on permits for a shipping company could not get their employer to release their documents to enable them to register for a residency stamp at the local Garda station. The employer then sacked them after one month as the ship had broken down. Those workers found themselves in a precarious situation without documentation even though they entered the country legally.*
- *In another case, the home of four Romanian workers was searched by Gardai at 6.0 am and their passports held. No charges were made. All had valid documents but one man was awaiting a copy of a permit from his new employer. He still has not received his passport back. They sought advice from the MRCI. They had paid \$3000 each for work permits to a fellow Romanian hired by an Irish security firm. On arrival in Ireland two of them got work for two months and the other two got no work at all despite the employer having obtained permits for them. As a result they were out of status and in substantial debt through no fault of their own.*

Need for Special Measures

The gap in provision for permit workers who end up out of work through no fault of their own needs special measures to protect their rights to access remedies and subsistence. At minimum, they should be allowed to remain for sufficient time to sort their situation with dignity. The UN Convention on the Protection of All Migrant workers and their Families offers useful principles on this subject.¹⁶ Ireland has not ratified this Convention but nonetheless it has moral value in setting standards that can guide policy formation.

At present there are few agreed policies or procedures and the de facto practice is to keep the vast majority of migrant workers in a temporary situation without rights or clarity of entitlement. The effect on the psyche never mind the physical health of such workers is not yet known but it has the potential, judging by our own emigrant experience, to lead to disproportionate rates of mental and physical health and social problems as the report of the Task Force on Policy Regarding Emigrants noted.¹⁷

3.5 INTEGRATION

Most governments recognise that effective integration of migrant workers is essential for social cohesion which, in turn, is a pre-requisite for economic efficiency. The **European Employment Strategy** acknowledges that the “contribution of immigrants to employment and economic growth will depend on their integration in the labour market and their successful inclusion into society.” It refers to the need to reduce the unemployment gap between EU and non-EU nationals, promote full participation for second generation migrants

¹⁶Articles 51 and 54 state that if a migrant worker loses a job prior to expiration of a work permit, they should have equal right with nationals to protections and benefits and to seek alternative employment, [and] retraining during the remaining period of their authorisation to work.

¹⁷“In addition to above average levels of socio-economic disadvantage, there is evidence that Irish people in Britain as a group experience higher than average levels of mental illness...the health of Irish-born men in middle age is poorer than the national average...a higher proportion of Irish experience poor housing conditions...[they] are over-represented among the homeless” Ireland and the Irish Abroad (2002:43-45).

and for immigrant women. Finally it recommends the development of policies aimed at granting immigrants rights and responsibilities comparable to those of EU citizens in order to ensure their full participation in social, cultural and civil life" (EU Com, 2003/6/final:2.2.6). The new EU anti-poverty process (NAPs/incl) also sets as one of six priorities, the integration of ethnic groups and migrants at national level.

In Ireland however, there is no integration policy at all. Integration, insofar as it is even considered, takes place in the context of the labour market. Trade Unions and employers are trying to come to terms with the new situations facing them and are devising, in some instances, anti-racist projects and guidelines. Community and voluntary organisations and groups like the NCCRI have also been developing initiatives at regional and national level. These are important developments but there is an even greater need for legislative or other integration measures and programmes that are holistic and founded on an anti-racist and intercultural approach. Section 2.4 described the EU requirement for National Employment Action Plans to promote integration in the labour market but also across policies for accommodation, education, training, social protection and health. But the Irish Plan for 2003–2005 contains no significant reference to the social integration or provision for access to training or education of migrant workers.

The EU Commission **Communication on Immigration, Integration and Employment** (2003)336 underlines the importance of civic citizenship and the concept, however, is rather vague and does not seem to focus on political rights and nationality as tools to facilitate positive integration. Thus migrant workers would have certain core rights and corresponding obligations to assist in settlement. Ireland offers a positive entitlement to vote in local elections. This is to be welcomed. While greater political participation may not be possible for short-term migrant workers, there is no reason why those living in the country for a year or longer and who are interested should not be able to participate in national elections as happens in Sweden.

The Declaration from the World Conference against Racism 2001 contains recommendations urging states to eliminate the barriers that exist for migrant workers in relation to their access to and participation in vocational training, employment activities, judicial and administrative tribunals, security, education, health care, social services, and respect for cultural identity.

3.5 (i) Family Reunification

Many Governments wanted to implement a zero migration policy in the mid-1970s and hoped that by halting the recruitment of labour migrants this would be achieved but, as a result, family reunification became the main legal means of migration, apart from asylum. It was only in the second-half of the 1990s that migration for family reunification was formally addressed.

Immigration for family reunification largely exists as a privilege granted by national authorities to the individual based on both the right to family life and the right to travel. Implementation of family reunification is, therefore, discretionary, although international norms and human rights agreements have placed some moral and political constraints on the State.

The role of the family can vary from culture to culture but it is still recognised as playing a central role in the integration process for migrants.

"Beside human rights considerations, countries of permanent immigration have traditionally valued family reunification as being conducive to integration, and therefore have facilitated reunification. In contrast, in labour-importing countries, much of the debate has focused on the cost of providing migrants' dependents with health, education and welfare benefits." (UN migration Report 2002: 24-25).

As Section 3.1 in this paper describes, there is limited provision for family reunion for workers on permits in Ireland. This is compounded by both the lack of national integration measures or programmes for migrant workers and their families as well as by limited access to social and economic supports. The result is that bringing family to Ireland becomes prohibitive in practice for many lower income, migrant workers.

In recent years, the Council of Europe passed many recommendations on the right to family reunification. Family reunification for EU nationals who are workers is enshrined in the Treaty of Rome. Belgium, France, Germany, Italy, the Netherlands and Spain amended their legislation to recognize a right to family reunification in the second half of the 1990s. The real problem remains however, access to benefits in some instances

With the exception of the Gulf countries, most migrant-receiving countries have some basic provision for family reunification. There are, however, many variations in definitions of the family, criteria for eligibility and the rights accorded to migrants entering a country under family reunification procedures. In all countries, family reunification provisions apply to spouses and unmarried, dependent, minor children. However, there is no consensus on the age of children. The more humane include Australia which gives priority to reuniting immediate family with children (particularly those under 18 years but will also consider those up to the age of 25); Canada will consider those under 22 years as children or immediate family.

Most EU States rule out polygamous family reunion. Un-married partners do qualify for reunification under certain conditions in an increasing number of countries but not in Ireland. Australia and the Netherlands, and to some extent the United Kingdom, also recognize homosexual partners. In some countries, parents as well as brothers and sisters and other relatives may also qualify under conditions of dependency, age and sponsorship.

In most countries, only nationals and holders of long-term residence permits (holding a residence permit for one year or longer, or permanent residence permit) may act as sponsor. However, in Belgium, a three-months authorization of stay suffices. Most countries also require proof of the sponsor's ability to support incoming family members and to provide them with adequate accommodation. In a number of countries, assessing whether these conditions are met is left to local authorities, which results in a great deal of variability in the actual implementation of these provisions.

Some of the issues to be addressed in devising a system for family reunification are matters such as where the balance of family live (Australia, Denmark), tests of self sustainability, employability and also compatibility with Article 8 ECHR.¹⁸

¹⁸Right to respect for family and private life.

3.5 (ii) Gender, Racism & Discrimination

The intersection of gender and racism for women migrant workers makes them particularly vulnerable. This is more likely to occur in the low paid, unregulated or hidden sectors that offer job opportunities for women migrants such as domestic work either for agencies or in the private home, the catering industry or in agriculture. ILO studies show that, internationally, women have less access to information on migration/job opportunities or to recruitment channels, and often have less preparation than men to cope with the working and living conditions in countries of destination. *“Gender- selective migration policies and regulations for admission and entry often reproduce and intensify existing social, economic and cultural inequalities between male and female migrants”* (Taran, 2003: 10)

In Ireland, the non-application of Equality legislation to work in the private home renders the invisibility of domestic, child-care or carers’ work even greater. This is a vitally important area and it is regrettable that it has once again been excluded from the provisions of the Equality Bill 2004, recently introduced to transpose the EU Race and Equality Directives.

The ownership of work permits by employers in such situations facilitates exploitation and racism, especially against women, which can also be difficult to prove. In the case of pregnancy, a migrant worker has very little rights in practice. In a number of instances reported to the MRCI, pregnant women were asked to leave employment and, consequently, accommodation.

Female migrant workers in very isolated sectors can experience poor working and living conditions, below minimum wage, lack of clarity re contracts, difficulty in practising religion or adhering to cultural traditions of choice. These factors become more problematic for migrant workers who work as ‘live-in’ carers or childminders. The Domestic Workers Support Group (under the aegis of MRCI) has identified a number of core needs.¹⁹

Difficulty in getting family reunification weighs particularly heavily on migrant mothers. This needs to be addressed as a matter of urgency and in line with international norms for the protection of children and women ‘in a positive, humane and expeditious manner’ (see Appendix 1 Article 10 CRC). The EU Directive on Family Reunification provides that the female spouses of migrant workers who find themselves in particularly difficult situations such as domestic violence should be able to get independent status. This is an important principle. The **Beijing Declaration and Programme of Action** (1995) also urges that state programmes to counter violence against women should include migrant women in them.

¹⁹Access to Healthcare, social rights and opportunities for training; Clarity of legal status irrespective of employer; Equality with men and other women; Access to full range of laws and protections available to other workers; Freedom from discrimination and racism in work and private lives; Opportunities to meet and organise; Family reunification; Respect for own culture; Freedom from manipulation and control by recruitment agencies.

3.5 (iii) Need for Integration Programme & Measures:

The issues raised by a critique of the work permit system suggest that a broad range of independent initiatives and measures or a comprehensive programme for integration and immigration management are necessary to establish a managed system based on the rule of law and international standards which would be transparent, accessible and protect human dignity. It is vital that any such programme or initiatives would have clear objectives with well-defined anticipated outcomes and a focus on how migrants affect and benefit host societies. There is no government agency or single department at present responsible for the general array of immigration matters, including help for migrant workers to integrate, such as there is in Australia. To develop such a co-ordinated approach in Ireland, requires exploration and consultation with all relevant players, including migrant workers and those working with them.

Effective integration and contribution of migrants to the labour market will take some time. Permanent immigration will most likely be required to redress demographic imbalances in the current labour force. Integration programmes and measures will then need to establish criteria to assess factors like the protection of rights and well being of migrant workers, family life, contribution to the economy and social integration as well as willingness/ability to integrate, language capacity, etc. Integration programmes and initiatives could also perform a role in relation to the resettlement of returning emigrants and help to keep mainstream policy and law makers mindful of the need to include migrant workers in areas such as healthcare, education, culture and language.

The IOM states that one thing is clear from the experiences of other countries: if we are to meet both the needs of Government and the labour market, the “front door” needs to be opened more for employers and the “back door” closed for the credibility of good governance.

It is impossible to set out a blueprint for a labour immigration system in Ireland as other international models do not easily fit. We have a different history of emigration, a lack of experience of immigration until relatively recently, current labour shortages combined with a laissez faire approach to integration and an ambivalence about sharing our society and resources with migrants. However, as well as the principles offered by international human rights standards on migration there are also lessons to be gleaned from the experiences of other countries if effectively managed migration policies and procedures are to be developed for Ireland .

There are a range of systems to consider, be they based on a **points system** as in Australia, New Zealand or Canada where immigrants themselves apply and are selected on the basis of potential for integration and employability, or on **quota systems** as in the US and Australia where annual ceilings apply. Points systems are transparent, consistent and efficient in selecting needed skills and are also based on labour market tests but they cannot identify gradation of skills or less tangible factors such as adaptability. In the US, the quota system has been hugely bureaucratic and cumbersome leading to poor take-up and unmet quotas. Lawyers are frequently needed to process applications and, like the Irish system for permits, it leads to frustration for both employers and migrant workers because of delays, detailed

departmental guidelines and a local advertising requirement to show that there is no indigenous worker available. The result is that there are large numbers of undocumented or irregular migrants despite draconian legislation and sanctions.

It could be instructive, however to learn some of the lessons from the Australian and Canadian experiences²⁰ of moving from immigration/visa decisions based on broad discretion or executive powers in the early 1980s to a heavily regulated system in the 1990s. Landmark court review of decisions based on discretion, in Australia, had led to weakened control by government of their migration programme. Therefore, legislation was introduced to codify criteria for entry with a view to making procedures consistent and transparent and outcomes more certain both for officials and applicants. However, the IOM has detailed how the system was then getting too cumbersome and so a number of discretionary powers for the Immigration Minister were re-introduced where the Minister is asked to consider special cases on a regular basis after they have been unsuccessfully reviewed.

The recent proposals mooted by the President Bush of the USA to allow undocumented/illegal migrant workers to apply for three-year work permits and to subsequently apply for longer-term residence offers a further useful example of how labour market needs of the economy and human rights of migrant workers might be simultaneously addressed.

3.6 SUMMARY

The fact that Ireland has two main types of legal instruments (Aliens and Immigration legislation and Employment permit legislation) for the admission of third country nationals for paid employment leads to much confusion and a set of complex and unclear set of administrative procedures. Furthermore the association of migrants and migration with criminality in official and public discourse (control of migration is categorised with control of trafficking, fraud, arms and drugs), combined with immigration legislation and measures lacking in basic safeguards to protect the rights of migrants, have the capacity to generate racism and violence against migrants. There is, therefore an urgent need to open legitimate and coherent routes of access and thereby deter irregular migration.

This will require two key strands of action: effective enforcement of positive legislation along with well regulated, labour standards for all workers. In this regard, it is interesting to note that employer sanctions for hiring irregular migrant workers have been discredited by civil rights and labour advocates in the US for contributing to discrimination or at least providing a convenient cover for employers disposed to discriminate (Taran, 2003:9). On the other hand, German and French experiments to provide incentives (tax rebates for employing documented workers) and more positive measures (fast-tracking visa process for a fee) have proved to be successful in the reduction of employment of irregular migrants. In Ireland,

²⁰Policy, legislative and operational responsibility for immigration is fully centralised in both countries: The Australian Department of Immigration, Multicultural and Indigenous Affairs and the Citizenship and Immigration Ministry in Canada. New Zealand, on the other hand has a dual system like Ireland, with responsibility for immigration visas in the Department of Labour and for citizenship in the Department of Internal Affairs. The USA has a very dispersed system of management for migration matters in various federal agencies and state departments.

there is at minimum a need to double the number of Labour Inspectorate personnel and back this with interpretative services project workers, including workers from minority ethnic backgrounds as in the social services.

While the Irish labour immigration system itself relies primarily on the issuing of short-term permits to employers, the permanency of migration for some needs to be acknowledged and appropriate measures for integration devised. The labour market focus of any measures that do exist are geared to the protection of the social welfare system and to overlapping security aspects of migration rather than any genuine concern for the migrants who help to make our economy competitive and society vibrant. These workers are entitled to be treated with dignity. Legislation, standards and programmes are needed to ensure that that happens.

SUMMARY OF EMERGING ISSUES, CONCLUSIONS & RECOMMENDATIONS

It is difficult to make recommendations for good practice in the absence of an overall policy on immigration. Therefore, a range of measures and initiatives are suggested. But overall, a framework is needed for the formulation of a holistic migration policy based on human dignity and the needs of the economy rather than one based solely on a security approach. To ensure that social cohesion is promoted as well as economic progress and respect for human rights, as agreed in the Tampere agenda of the EU, we need clear, transparent and accountable labour admissions policy and practice developed with social partners, employers, workers and migrants.

Global inequalities are a major 'push' factor in increased migration but it is also clear that 'pull' factors here are based on demographic needs. The challenge we face then is to promote diversity, mobility and integration not as a charitable mission but rather as a vital and absolutely necessary aspect of building a socially cohesive and inclusive society and economy. A strategy is needed to highlight the positive and essential contribution that migrant workers can and do make to our economy and society. This also offers an opportunity to promote human rights standards in domestic policy. We already have important developments in the social arena in Ireland and we can build on these.

4.1 DATA NEEDS

Two key themes emerge in both UN and regional material about migration: the need to manage migration flows and to reduce the flow of irregular migrants. Documenting the range of current migration policies remains a major challenge to doing this effectively. The information needed to describe, monitor and evaluate the impact of migration-related policies requires both policy information and migration statistics. This information should cover key aspects of migration, such as labour migrants, refugees, undocumented, short-term and return migrants. It should also aim to raise "awareness of the contribution migrants bring to economic, social and cultural life in the EU." (Com 2003/336:35) Migration policies since the 1970s have had both short-term and longer-term impacts on migratory movements, not all of which were anticipated. For example, the increase in family immigration, the number of asylum seekers and the emergence of transit countries during the 1990s were unintended consequences of the decision by many labour-importing countries to drastically reduce the recruitment of migrant labour in the 1970s. Given the current climate of debate about the impact of immigration, and in the context of post - September 11 security concerns, we face an important challenge. This challenge hinges on the extent to which migration flows will or can be managed in an orderly and humane manner, while halting or significantly reducing the movement of undocumented migration and of trafficked people. Accurate and standardized data are crucial to this.

A recent EU Action Plan for the collection and analysis of Community Statistics in the field of Migration (Com 2003: 179) contains a commitment to establish annual country reports on the development of a common migration policy within the EU. This will involve the

development of a framework for collection, analysis and reporting of common data. To facilitate that, contact points have been set up in each State. The ESRI is the contact point in Ireland, and its new section dealing with migration data should prove an important source of data for the development of policy. Data (standardised and disaggregated) will play an essential role in highlighting trends and needs. Inter-censal data yields substantial undercounting of asylum seekers and it is likely that the same is true for data on migrant workers. Migrants need to be included in income surveys and in the CSO data on income for poverty analysis. Migrant workers need to be named and included in policy developments rather than being interpreted under other categories such as ethnic minority groups. This then will form part of an EU wide approach to monitoring and reporting on trends in migration legislation, policy and practice. Consultation with interested groups, including migrants themselves, should form a vital component of this.

In Ireland the CSO data for population is not computed on a calendar year whereas most other data is. There are also discrepancies in migration data gathered on a household basis as many migrants live in multiple occupancy situations and sometimes hostels. Other data gaps exist in relation to irregular or black economy employers and in relation to the inconsistent enforcement of registration requirements. The NAPs/incl Data Strategy is being developed to inform and support policy development and to measure progress in meeting the targets of the strategy. Data will be needed on groups vulnerable to poverty or exclusion. Migrant workers need to be included in this as a specific category.

Migration Data & Recommendations

- Data deficiencies must be rectified and a strategy developed to gather standardised and disaggregated information on patterns, trends, labour market needs, key issues in relation to anti-poverty and social inclusion measures, socio economic status of foreign-born residents, workers and irregular migrants insofar as is possible.
- Migrants need to be included as a specific group in income surveys and in the CSO data on income for poverty analysis. Migrant workers need to be named and included in policy developments rather than being interpreted under other categories such as ethnic minority group. This should also form part of EU wide approaches to monitoring and reporting on trends in migration legislation, policy and practice.

4.2 THE OPERATION OF THE WORK PERMIT SYSTEM AND RECOMMENDATIONS

- **Temporary work permits should be used only in selected and limited situations** of labour need such as the entertainment business or seasonal work. However even in the case of seasonal work, clear criteria and guidelines are needed for regulation of entry, residence and protection of rights. Overall, permits should not be the main route of entry or the main system for the management of labour migration over a long period as it is currently for 47,000 migrant workers.
- The experience of the MRCI and other NGOs suggests a strong **need for permits to last for a period in excess of a year**. It would reduce administrative burdens on employers

and the State. It would allow some sense of security and dignity to those workers who might wish to avail of an extended period of employment

- **The IOM suggests that the introduction of a permanent residence permit** could alleviate pressures faced by the current system of “leave to remain” which requires at least a second decision-making step on each such case. Bureaucratic difficulties and logjams would also be minimized if the procedures for issuing Certificate of Registration or leave to remain could be administered by the same department that issues work permits.
- **Work permits should be detached from the employer** in order to avoid the potential for exploitation and wage depression. The ESRI argues that employer ownership leads to economic inefficiencies. Many employers are fair and operate to high standards but even they acknowledge that permits can be perceived by the holder to be a form of bonded or indentured labour. At minimum, information about the renewal of a permit and a copy of a permit itself should be made available to the worker. The Australian Points system offers a good example of transparency although over-regulation can create its own problems. Even if employers still have to apply for permits, workers should be able to have joint ownership with obligations and responsibilities on both parties. The proposed Framework for a National Action Plan against Racism calls for the vesting of employment permits with the employee on a similar basis to the visa scheme as well as a broadening of the range of visas and permits available.
- In the absence of a system of worker owned permits, there is at minimum a **need to double the number of Labour Inspectorate personnel** and back this with interpretative services project workers, including workers from minority ethnic backgrounds as in the social services.
- **Pre-departure information for migrants** and policies to address relevant issues in sending countries are important aspects of EU (Tampere and Lisbon) agendas for the common management of migration flows and for employment strategies of EU member States. Models need to be explored to respond effectively to the economic, social and cultural information needs of migrant workers. This will require funding for NGO as well as State projects so that relevant lessons are drawn. A proposed MRCI pilot project to research the type and nature of pre-departure, information needs of migrant workers in two countries of origin should be resourced.
- **Provision of information to migrant workers** as well as to employers is essential **in appropriate languages** and in an accessible fashion. The information provided by the Department of Enterprise, Trade & Employment is useful. Efforts are needed to improve dissemination as not all migrant workers receive this information. Procedures should be put in place to ensure that, in practice, migrants are made aware of their rights, and are provided with **relevant and accessible information on their entitlements and obligations**. Citizen information Centres (CICs), Trade Unions (ICTU) and Free Legal Advice Centres (FLAC) should be encouraged and facilitated to promote their information services (a) within the Departments responsible for permits and registration to stay and (b) through consular outreach to prospective immigrant target groups.
- An interim measure is required over the next year to address the **special needs of workers from Accession Countries** who are already in the country on work permits to ensure that their rights as EU citizens are protected.

- As a corollary of that, **non-Accession country applicants should be treated fairly** also and not cut out of the process, especially those for whom a renewed permit is sought. EU studies suggest that the impact of Accession countries as sources of migrant labour for Ireland may be small. This source of migrant labour will not address the mismatch between the skills on offer and the demand for particular categories of workers (carers, catering, nannies). As a general principle, the contribution to the economy of migrant workers already in the country should be respected. The FAS recommendation that a future immigration system for non-EEA nationals should be administered transparently by the State with a fair system of selection is an important principle to support.
- **The gap in provision for permit workers who end up out of work** through no fault of their own needs a special measure to protect their rights of access to remedies and subsistence. At minimum, they should be allowed to remain a sufficient time to sort their situation with dignity be it to reclaim their documents, their employment rights or source another job. Articles 51 and 54 of the UN Convention on the Protection of Migrant Workers and their Families, provide that migrant workers shall *“neither be regarded as in an irregular situation nor shall they lose their authorisation of residence”* by the loss of their job prior to the expiration of their work permit, except where the residency permit is linked to the specific activity for which they were admitted. They should have equal right with nationals to protections, to unemployment benefits and to *“seek alternative employment, participation in public work schemes and retraining during the remaining period of their authorisation to work”*.
- **Adequate migrant worker representation and access to remedies** for discrimination or harassment on the grounds of race or ethnic background is essential. This is particularly important for those in anomalous situations or forced to leave an employer who owns a permit and is engaging in racist, sexist or other discriminatory behaviour. Migrant workers need support to access and avail of remedies.
- **The gendered nature of migrant experiences has received insufficient attention.** Women migrants have some different needs and research is required into specific sectors especially in domestic or isolated workplaces. Female migrant workers in unregulated or isolated sectors can experience poor working and living conditions, below minimum wage, lack of clarity re contracts, difficulty in practising religion or adhering to cultural traditions of choice and limited access to maternity services. These factors become more problematic for migrant workers who work as ‘live-in’ carers or childminders. Equality legislation should be amended to cover workers in the private home or the domestic setting especially when engaged in the provision of personal services.
- **Difficulty in getting family reunification** weighs particularly heavily on migrant mothers. This needs to be addressed as a matter of urgency and in line with international norms for the protection of children and women. There is also a need for greater focus on the linkage between the CERD and CEDAW mechanisms to protect migrant women.
- The EU Directive on Family Reunification provides that female spouses of migrant workers who find themselves in particularly difficult situations, such as **domestic violence**, should be able to get independent status. This important principle should be implemented as soon as possible.

- In order to promote justice and avoid racism, it is of the utmost importance that **training is provided for local officials, in frontline services** and in local Garda offices where residency renewals are sought. This training should follow the 'whole organisation approach' recommended in the Proposed Framework for the National Action Plan against Racism 2003. This would include awareness of equality and diversity issues, at three different levels of an organisation or service: the ethos, the workplace itself (staff and management) and the service itself.
- MRCI has documented the **negative impact of some recruitment agents** and practices on the type of work, conditions and employer relationships that migrant workers experience. Further measures need to be developed in this area, especially as it impacts on serious matters of trafficking and human rights protections as well as socio-economic concerns.
- Provisions should be put in place to **improve the effectiveness of the regulation (legal and administrative) and monitoring of recruitment agencies**. The Sustaining Progress commitment to review the Employment Agency Act (1971) and the recruitment and placement activities of agencies is scheduled for 2004. A monitoring system to furnish reports on recruitment agents acting unlawfully, or encouraging migrants to travel for work that is in breach of labour laws or permit conditions, is needed. It could be based in consular services and direct feed back through the Department of Foreign Affairs to the work of the Departments that process employment permits and permission to stay.
- **Detention should not be used for those in breach of immigration legislation** and access to legal advice is necessary for those threatened with deportation. Procedures for deportation and return especially should be transparent and non-discriminatory. The ECHR allows for the detention, in accordance with a procedure prescribed by law, of someone trying to enter the country illegally or prior to deportation or extradition. However, the standard set by the European Committee for the Prevention of Torture (CPT) is that ordinary prisons are unsuitable for such purposes when a migrant is neither convicted or suspected of a criminal offence. The Council of Europe Commissioner for Human Rights states that wherever possible detention must be replaced by other supervisory measures, such as the provision of guarantees or surety or other similar measures...and neither prison or police stations are to be used systematically. (Latif, N 2004:13)

4.3 MEASURES TO ENSURE SOCIAL PROTECTION AND INTEGRATION OF MIGRANT WORKERS AND RECOMMENDATIONS

- **family re-unification should be facilitated** for immediate family after a reasonable period such as six months to one year along with the right for family members to seek work. The vast majority of migrant workers are in the 15 to 35-year age group. Opportunities therefore must be available for families to join them.
- Develop a broad range of independent **initiatives and measures to co-ordinate and promote integration of migrant workers**. In its Action Plan to meet EU objectives on combating social exclusion, Ireland has proposed the commissioning of a research study

on how best to reduce and prevent the risk of exclusion for migrants. The Task Force on Policy regarding Emigrants 2002 urged the government to give priority to this issue during its Presidency of the EU in 2004. Furthermore it adds that given our long history of emigration and suffering in many instances, Ireland is in a unique position to contribute to policy formation at EU and the wider international level in this area. It can draw on the experiences and concerns of emigrants in relation to their needs and rights in helping to create just and transparent migration policies, which should also inform and enhance national policy.

- **Legislative and other integration measures and programmes** that are holistic and founded on an anti-racist and intercultural approach are required both at national and regional level given the spread of migrant workers throughout every county in Ireland. The National Employment Action Plan should promote integration in the labour market and also across policies for accommodation, education, training, social protection and health. The Social Partnership Agreement, the National action Plan Against Racism and the proposed NCCRI Intercultural Forum also have potential to contribute to such measures.
- **Migrant workers should be given the means to access entitlements** to health care, housing and social protection at least on an equal basis with nationals. There is also a need to develop positive measures to ensure that migrant workers can avail of their entitlements rather than relying on a 'one cap fits all' approach which ignores the diversity of migrant needs. Special needs of temporary workers should be recognised both at central policy level and in the local interpretation of procedures and regulations.
- Similarly, migrant workers on permits need to be afforded the means of **access to education and training** where relevant with FAS and other statutory bodies, in line with EU developments towards completion of the Lisbon agenda (full employment, quality and productivity at work, social cohesion and inclusion).
- There is greater recognition of the importance of **civic citizenship** and nationality as tools to facilitate positive integration. Migrant workers should have certain core rights and corresponding obligations to assist in settlement. While greater political participation may not be possible for short- term migrant workers, there is no reason why those living in the country for a year or longer and who are interested should not be able to participate in national elections too.
- **Family Policy:** Families are pivotal in allowing for change and adaptation but they need support especially in minority ethnic families. Many of these families provide caring services to indigenous families thereby accommodating a more affluent lifestyle. But minority ethnic families and children have been until recently excluded from mainstream developments. The Family Support Unit in the Department of Social & Family Affairs and the Family Support Agency as well as NGOs are engaging in consultations towards a more integrated and inclusive approach. The role of ethnic minority families is vital to this process either as providers of many of the required services or as consumers. Consultation is needed to address the diversity of needs of different family structures and also culturally diverse needs both for normal family life and also for specialist interventions. For those migrant workers who cannot get family reunification, there is a

need to facilitate and support contact especially with children in their home countries.

- The NESC Report (2003:125) insofar as it indicates the medium term approach of government to management of the economy and social progress, contains useful references **to monitoring standards of migrants' accommodation and integration initiatives**. However one of the more worrying references is the concern for civil liberties rather than for international standards of human rights protections. The former tradition requires the State not to interfere in our lives even to protect groups vulnerable to exclusion or exploitation; rather it treats all equally which is insufficient to either redress ingrained discrimination or acknowledge difference with positive measures to promote inclusion. Placing the focus on integration before coherent immigration policies have been formulated is problematic. Furthermore, the reference, in the NESC report, to the protection of rights of non-nationals "where it applies" is relatively meaningless to migrants who enter under the work permit system unless international human rights standards relevant to all migrant workers and their families are implemented in Ireland.
- OECD studies show that the **long-term unemployed** are excluded from the labour market regardless of whether migrant labour is available or not. Therefore there is a need to address broader issues of disadvantage and social exclusion whilst simultaneously developing a structured migrant labour supply with simultaneous integration programmes in order to prevent future social exclusion. It would be helpful if NESC could encourage such an approach in future reports.

4.4 SAFEGUARDS AND HUMAN RIGHTS PROTECTIONS AND RECOMMENDATIONS

- **Implementation of the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families** would offer symbolic and practical support for proper wages and working conditions for migrants. It would also ensure standards for family reunification, equality (with nationals) of treatment in relation to social, education and health services and the provision of facilities to protect migrants own language, culture and traditions. It would contribute to a more positive image of migrants as people with families and not just economic units. At the same time it protects native workers insofar as it protects equality of pay and conditions and thereby prevents depression of wages. If the Government is not in a position to sign and ratify, it can still adopt the principles and standards that the Convention offers for the treatment of migrant workers and implement specific measures towards its ratification. These could include measures, for example, in relation to the provision of education, training, support for own language and culture and for protection of migrants who are made redundant.
- **Security Concerns alone should not dictate the type of immigration legislation** that is developed. At a global level some of the biggest challenges facing states arise in the post Sept 11 context and from the worldwide movement of populations. The claim of protecting national security can allow the rights of people within a nation to be compromised. It is precisely at such times of vulnerability that the rights of the truly vulnerable can be brushed aside and there may be popular support for removal of rights and freedoms in exchange for other benefits. The Immigration Act 2004 gives cause for

concern insofar as it gives broad powers without safeguards or training to immigration and other officials to refuse permission to land to non-nationals in the interests of national security or if the presence of the non-national could be "contrary to public policy". Migrants are among the most vulnerable of people and need extra protection. But they are also "part of the solution and not part of the problem. A closed Europe would be a meaner, poorer, weaker, older Europe. An open Europe will be a fairer, richer, stronger, younger Europe – provided [we] manage migration well" (Kofi Annan, Irish Times, 30 Jan 2004)

- The recent proposals mooted by the President Bush of the USA to allow undocumented / illegal migrant workers to apply for three-year work permits and to subsequently apply for longer-term residence offer a further useful example of how labour market needs of the economy and human rights of migrant workers might be simultaneously addressed.

CONCLUSION

The overriding aspect of the current system for low and semi-skilled labour entry to Ireland is a lack of coherence, humanity or efficiency. Managing labour supply on the basis of temporary labour as need arises or on a three-month supply basis is impractical. **Temporary work permits will always be needed** to fill gaps in some sectors (such as arts and entertainment) but **this should not be the main route of entry for managing labour migration over a long period as it is at present for over 47,000 workers**. It is inefficient for migrant workers, their families, civil servants who carry a heavy administrative burden, the Gardai, employers, the economy, and the broader fabric of society. Evidence suggests that the economy will continue to require low-skill migrants notwithstanding an increase in other categories of workers such as women or socially disadvantaged people returning to work or Accession Country migrants. As in the case of visa workers, permit workers should be allowed at least the prospect of permanency and to make a broader contribution without fear of discrimination or social exclusion. A two or three-tier system of migrant labour is undesirable especially if one of the groups is only able to enter the country on permits owned by employers.

The Heads of the forthcoming Employment Permits Bill, insofar as they can be ascertained at this stage, do not inspire hope. It would indeed be a positive contribution if the Bill were to incorporate some or all of the standards in either the Revised European Charter (to which Ireland is a party), or in the UN Convention on the Protection of the Rights of Migrant Workers and their Families. The recent Immigration Act 2004 did not offer re-assurance in this regard particularly as it lacks safeguards to prevent abuse of power.

What is needed now is a framework for the formulation of a holistic migration policy based on human dignity and the needs of the economy as well as security. For better or worse, a transparent and accountable labour admissions policy and practice, based on international human rights standards, is what will help to prevent further crisis and avoid intolerable situations for vulnerable migrants.

Although not the material of this paper, the MRCI supports the call in the Immigrant Council of Ireland study for a right of permanent residence and citizenship. This will require further

research and elaboration of models for participation and systems for documentation. The need to regulate recruitment agents is also a complex and difficult area but one urgently needing attention if the rights of migrants (particularly those in vulnerable positions such as women and children) are to be protected and trafficking prevented. Finally the interests of Irish workers and migrant workers must be seen as two sides of the same coin if wage standards and work conditions are to be maintained according to international human rights standards. Therefore the enforcement of labour market rights for migrants, although not the subject of this paper, are nevertheless crucial to protecting the dignity of all workers and vice versa.

We need only recall the harrowing accounts by Irish novelists Patrick Magill and Peadar O'Donnell of the separation of families and children and the harsh working lives of so many of our own emigrants. While times have changed, it is only relatively recently that the rights of our emigrants have been seriously jeopardised by discrimination in courts, in access to services and in respect for their culture. It is vital that lessons are drawn from our efforts -or lack of them- to protect their rights when we come to develop a clear sustainable, rights-based migration and integration policy in Ireland and in the EU.

Additional Information about the Human Rights Standards of relevance to migrant workers. (Reference Section 2.5)

The **ICCPR**, requires state Parties to guarantee to '*all individuals within its territory*' the civil and political rights set out therein. These include the right to life, liberty, equality, expression as well as freedom from torture, inhuman and degrading treatment and fair trial guarantees. The Convention recognises the family as the fundamental group unit of society and its entitlement to protection by the State (Article 22). The Convention also prohibits all forms of slavery and servitude (Article 8). The right to equality and non-discrimination is explicitly protected by Article 26 which has been interpreted as prohibiting discrimination in respect of any matter which a state Party regulates by law.²¹

Ireland's third periodic report is due to be submitted to the Committee in 2005. An individual complaints procedure under the Optional Protocol to the Convention permits individuals to lodge a 'communication' with the HRC alleging that their rights under the Convention have been violated. A communication may only be considered on its merits by the HRC where the applicant has exhausted all effective domestic remedies. Ireland has ratified this.

The **ICESCR** contains key rights including the right to just and favourable conditions of work, the right to join a trade union and the right to social security (Articles 7 – 9). The Convention requires that state Parties recognise that the 'widest possible protection and assistance should be accorded to the family' (Article 10). Rights to education, to an adequate standard of living and to 'the highest standard of physical and mental health' and the right to social security are also affirmed (Articles 13, 11, 12 & 9 respectively).

Both the **CERD** and **CEDAW** require states to take positive steps to eliminate race and sex discrimination respectively. This includes, measures to ensure effective review of policy; the amendment of legislation which has the effect of creating or perpetuating discrimination; the adoption of positive measures to eradicate all incitement to or acts of discrimination (Article 2 & 4 CERD).

The CERD guarantees the right to enjoyment without discrimination of civil and political rights as well as social and economic rights. These include the right to the free choice of employment and to just and favourable conditions of work as well as the right to public health, social security, education and training (Article 5).

CEDAW requires states to eliminate discrimination against women in political and public life (Article 7); in access to education and training (Article 10); in employment (Article 11) and in health care and social security (Article 12 & 13). States are particularly obliged to ensure to women 'appropriate services in connection with pregnancy' (Article 12(2)). States further undertake to suppress all forms of trafficking in women (Article 6) and to grant women equal rights to acquire, change or retain their nationality (Article 8).

²¹See decisions of the Human Rights Committee in *Zwan de Vries v The Netherlands*, Comm. No. 182/1985, Doc. A/42/40 and *Broeks v The Netherlands*, Comm. No. 267/1987, Doc. A/43/30.

The overriding principle informing the **CRC's** approach to the rights of the child is that 'the best interests of the child shall be the primary consideration.' Article 9 provides that a child shall not be separated from his/her parents, except in accordance with relevant laws and procedures. In circumstances of an application for entry or for leave to remain in a state for the purposes of family reunification, Article 10 requires that the matter be dealt with in 'a positive, humane and expeditious manner.' Where a child resides in a different state from that of his/her parents, the Convention, save in exceptional circumstances, grants the child the right to personal and direct contacts with both parents (Article 10(2)). The Convention further guarantees the right of the child to the highest attainable standard of health, the right to benefit from social security, the right to a standard of living adequate for the child's development and the right to education (Articles 24, 26, 27 & 28 respectively).

The **UN Convention on the Rights of All Migrant Workers and their Families** (1990), does not set criteria for admission of migrant workers or their families but it sets standards as to how they must be treated once in a host country and provides for effective remedies in judicial or administrative systems in the event of breaches of the provisions.

Articles 8-35 in the Convention apply to **all** migrant workers and members of their families regardless of their status. These provisions protect (and strengthen) many of the rights in other Conventions, such as freedom from slavery or forced or compulsory labour, freedom of thought, conscience or religion, the right to equal status and to a fair trial. But they also include extra protections more specifically directed at migrant workers. Article 21, for example, prohibits the destruction by anyone of the passport of a migrant worker or of a family member. Articles 42 and 45 urge states to consider the establishment of procedures or institutions to take account of the special needs, aspirations and obligations of migrant workers and their families; to consult with them and to provide language training both in that of the host country and their own language.

Articles 36-56 deal with **documented or regular migrant** workers & their families. Articles 51 & 54, provide that migrant workers shall "*neither be regarded as in an irregular situation nor shall they lose their authorisation of residence*" by the loss of their job prior to the expiration of their work permit, except where the residency permit is linked to the specific activity for which they were admitted. They should have equal right with nationals to protections, to unemployment benefits and to "*seek alternative employment, participation in public work schemes and retraining during the remaining period of their authorisation to work*".

The ILO participates in the Convention Committee. There is also an individual complaints mechanism but it has not yet come into force.

Thematic Extra-Conventional Procedures for protecting Migrants Rights

The **UN Special Rapporteur on the Human Rights of Migrants** appointed in 1999 by the Commission for Human Rights has the following mandate:

- (a) To request and receive information from all relevant sources, including migrants themselves, on violations of the human rights of migrants and their families;

- (b) To formulate appropriate recommendations to prevent and remedy violations of the human rights of migrants, wherever they may occur;
- (c) To promote the effective application of relevant international norms and standards
- (d) To recommend actions and measures applicable at the national, regional and international levels to eliminate violations of the human rights of migrants;
- (e) To take into account a gender perspective when requesting and analysing information, as well as to give special attention to the occurrence of multiple discrimination and violence against migrant women;

The Special Rapporteur (Gabriela Rodriguez Pizarro) has also prepared a questionnaire by which cases may be submitted to her for consideration, upon receipt of which she may pursue the matter with the relevant state. NGOs may present concerns to the Special Rapporteur.

(b) Instruments of the Specialised Agencies

International Labour organisation (ILO) Conventions not ratified by Ireland

- **Migration for Employment (Revised), C 97 – 1949:** this Convention relates to the provision of accurate, adequate and free information to migrants about national policies, laws and employment conditions. It requires measures within the state to facilitate departure, journey and reception of migrants for employment. (Note: provisions similar to Art 19 of the European Social Charter which Ireland has ratified)
- **Migrant Workers (Supplementary Provisions), C.143 – 1975:** this Convention updates C 97 and permits the free circulation of workers, and the development of standards to eliminate abuses of migrants and ensure equal treatment in terms of employment conditions or social security.
- **Maintenance of Social Security Rights C.157–1982:** this Convention covers all branches of social security ratified and not ratified in C118. It has not been ratified by Ireland as the administrative machinery necessary “could not be justified in the absence of a sizeable migrant population.” Task Force on Policy Regarding Emigrants (2002:86)

(c) Regional Instruments - Council of Europe

The European Convention on Human Rights (1950) (ECHR)

The ECHR and Migration

The ECHR does not grant a right of migration and residence for non-nationals into the territory of a state Party. The exercise of migration control, however, must be in compliance with Convention standards. Thus a number of cases have been brought before the Strasbourg institutions claiming that the refusal to admit or the expulsion of a non-national violates certain Convention rights. The majority of cases which have come before the European Court of Human Rights concerning migration issues have been based on the right to family life (Article 8). A number of cases have also been based on the right to be free from degrading treatment (Article 3).²²

²² *East African Asians v UK* (1970) 13 Yearbook 928; *Abdulaziz, Cabales & Balkandali v UK* (1985) 7 EHRR 471.

Article 8 issues arise in relation to the admission or expulsion of family members of migrants residing in the territory of a state Party. In *Gül v Switzerland* the Court stated that 'where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory.'²³ Case law under Article 8 indicates that the important factors that will be considered by the Court in assessing whether a refusal to admit the family members of a non-national residing in the territory of a state Party includes:

- the nature of the family relationship i.e. the closeness of the relationship between the persons ;
- the degree of dependency e.g. between parent and child;
- whether it would be possible to preserve the family unit in the country of origin or in the country to which the migrant is to be expelled.

Protocol No.12: Article 1 provides that: 'The enjoyment of *any right set forth by law* shall be secured without any discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, birth or other status.' It further provides that: 'No one shall be discriminated against by any public authority' on any of the prohibited grounds. The Protocol thereby establishes an autonomous right to non-discrimination in the enjoyment of any right granted to an individual under national law. This may include economic and social rights. The Explanatory Memorandum to the Protocol explains that discrimination is prohibited by a public authority 'in the exercise of discretionary power' and by any 'act or omission by a public authority.' The Protocol therefore has potential to significantly enhance the legal protection against discrimination, including for migrants. The Protocol will enter into force upon the tenth ratification. Ireland has signed but not yet ratified the Protocol. Indeed very few EU states have done so.

Other Council of Europe Conventions not signed or ratified by Ireland

The European Convention on the Legal Status of Migrant Workers (1977) regulates the legal status of migrant workers to ensure equality of treatment with nationals in all aspects of living and working conditions (in housing, social security, social and medical assistance, vocational training and employment services) as well as their social advancement and that of their families.

Two other Conventions on **Social Security** and **on Social and Medical Assistance** offer access to services for migrant workers and their families.

²³ (1996) 22 EHRR 93. See also *Abdulaziz, Cabales & Balkandali v UK* (1985) 7 EHRR 471; *Berrehab v The Netherlands* (1989) 11 EHRR 322; *Moustaquim v Belgium* (1991) 13 EHRR 802; *Beljoudi v France* (1992) 14 EHRR 801.

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