EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

9 October 2012

Case Document No.2

European Confederation of Police (EuroCOP) v. Ireland
Complaint No. 83/2012

SUBMISSIONS BY THE GOVERNMENT ON ADMISSIBILITY AND MERITS

Registered at the Secretariat on 27 September 2012

EUROPEAN COMMITTEE OF SOCIAL RIGHTS

EUROPEAN CONFEDERATION OF POLICE (EUROCOP)

COMPLAINANT

V

IRELAND

RESPONDENT

COMPLAINT NO 83/2012

OBSERVATIONS OF THE RESPONDENT ON ADMISSIBILITY AND MERITS

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27 SEPTEMBER 2012

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APPENDICES

I. Introduction and Summary

1. The Complainant in this case is the European Confederation of Police ("the Complainant"). It has launched a collective complaint ("the Complaint") against Ireland ("the Respondent") with respect to the application of Articles 5, 6 and 21 of the Revised European Social Charter ("the Charter") to the Respondent's police force, the Garda Síochána (also "the Gardaí"). In particular, the Complainant asserts as follows with respect to four issues:

   (1) ***Affiliation with a National Organisation:*** There is non-compliance with Article 5 of the Charter insofar as associations representing the police ("the Representative Associations), and in particular, the Association of Garda Sergeants and Inspectors ("AGSI") are not entitled to affiliate with a national umbrella organisation, namely, the Irish Congress of Trade Unions ("ICTU"), which is an affiliation of trade unions;

   (2) ***Fair Pay Agreement Discussions:*** There is non-compliance with Articles 6 and 21 of the Charter insofar as the Representative Associations allegedly do not have access to fair pay agreement discussions;

   (3) ***Access to the Labour Court:*** There is non-compliance with Article 6 of the Charter insofar as the Representative Associations allegedly do not have access to the Labour Court of the Respondent; and

   (4) ***Right to Collective Action:*** There is non-compliance with Article 6(4) of the Charter insofar as the Gardaí do not enjoy a right to collective action.

2. The Respondent refutes the Complainant's assertions in their entirety and in sum, responds as follows:

   (1) By way of preliminary objections to the admissibility of the Complaint:

      (a) On a specific point, the Respondent has not accepted Article 21 of the Charter, and as such— by virtue of Article 4 of the Additional Protocol to the European Social Charter Providing for a System of Collective

Complaints ("the Protocol")—the Complainant is not entitled to raise any complaint by reference to Article 21;

(b) Generally, the Complaint is unparticularised and vague and the Respondent respectfully submits that the Complainant should not be regarded as having properly identified the alleged non-compliance with the Charter within the meaning of Article 4 of the Protocol;

(c) While appreciating that exhaustion of domestic remedies is not a requirement for admissibility, the Respondent nonetheless observes that the Complaint raises assertions of breaches of the Charter that have not been raised with the Respondent previously, whether nationally or in the context of the Respondent's reports to the European Committee of Social Rights ("the Committee").

(2) By way of substantive response to the Complaint:

(a) ***Affiliation with a National Organisation:*** The restriction on the Representative Associations from affiliating with ICTU does not constitute a violation of Article 5 of the Charter;

(b) ***Fair Pay Agreement Discussions:*** The Respondent is fully compliant with Article 6 of the Charter and the Complainant's assertion that the Representative Associations do not have access to fair pay agreement discussions is factually inaccurate. Moreover, even if it were applicable, there has been no violation of Article 21 of the Charter;

(c) ***Access to the Labour Court:*** As just observed, the Respondent is fully compliant with Article 6 of the Charter and access to the Labour Court is not necessary to ensure compliance with Article 6; and

(d) ***Right to Collective Action:*** A prohibition on the right to strike of the police does not give rise to a breach of Article 6(4) of the Charter, as is well-established by the jurisprudence of the Committee.

3. As will be seen, the separate grounds raised in the Complaint involve interlinking factual issues. Consequently, in these Observations, following its preliminary objections, the Respondent will engage in an overview of the factual background, followed by an assessment of the four grounds of the Complaint.

II. Preliminary Objections to the Admissibility of the Complaint

A. Objection to Admissibility on the Basis of Article 4

4. Article 4 of the Protocol contains three requirements for admissibility of a complaint:

   (1) First, the relevant complaint must be lodged in writing;

   (2) Second, it must relate to a provision of the Charter accepted by the Contracting Party concerned; and

   (3) Third, it must "*indicate in what respect the latter has not ensured the satisfactory application of this provision*".

5. In two respects, the Complaint does not comply with Article 4:

   (1) ***Article 21:*** Given that the Respondent has not accepted Article 21 of the Charter, the Complainant is not entitled to rely upon this provision at all in the Complaint. Article 4 makes it clear that the Respondent's actions cannot be reviewed for conformity with a provision which it has not accepted.

   (2) ***Indication of Non-Satisfactory Application:***

      (a) The precise and particular grounds for the Complaint are not fully articulated in it and in particular, the grounds of the Complaint entitled "*b. Right to fair pay agreement discussions*" and "*c. Access to labour court*" are unclear; consequently, the Complaint fails to indicate in what respect

the Respondent has not ensured the satisfactory application of the provisions invoked, as is required by Article 4.

(b) In these circumstances, the Respondent respectfully submits that the Complaint should be regarded as inadmissible in its entirety.

(c) In the alternative, it is observed that it is difficult to respond at this stage with particularity to the grounds of the Complaint. As such, if the Complaint is not declared inadmissible, the Respondent respectfully requests that the Committee accept further observations from it once the precise nature of the Complaint has become apparent.

B. Preliminary Objection Regarding the Complainant's Failure to Raise its Complaints Domestically

6. The Respondent also observes that this appears to be the first occasion on which it has been asserted:

(1) That the restriction on the ability of AGSI (and/or the other Representative Associations) to affiliate with a national umbrella organisation breaches Article 5 of the Charter (AGSI has simply raised the issue of affiliating with ICTU previously); and

(2) That the Chairperson of the Conciliation Council is not independent thereby giving rise to a breach of Article 6 of the Charter.

7. For example, in relation to the Respondent's last report to the Committee in which it reported on Articles 5 and 6 of the Charter, no reference to the issue of the Gardaí having full association rights can be found. Moreover, the Respondent is not aware of any claim being brought by AGSI in the Respondent's courts to the effect that its constitutional rights of association (or other constitutional rights) have been infringed by its inability to become a member of ICTU or any other body.

8. Moreover, as will be considered further below, the Representative Associations have not previously complained that the Chairperson of the Conciliation Council is not independent.

9. While accepting that it does not go to admissibility *per se*, the Respondent respectfully submits that the fact that these issues are only being raised for the first time now should be regarded as undermining the strength of the claims made.

III. Factual Background

A. The Garda Síochána

10. The Garda Síochána was established by statute with the passing of the Garda Síochána Act 1924. That Act has been amended several times since and has been largely consolidated into the Garda Síochána Acts 2005—2007 **(Appendix I).**

11. As will be considered further below, the Garda Síochána is a single national police force, which deals with all aspects of policing matters including regular policing, state security and immigration control. In most other jurisdictions, these latter two functions are dealt with by separate agencies.

12. As of 31 August 2012, the strength of the Garda Síochána was as follows:

Rank	Strength
Commissioner	**1**
Deputy Commissioner	2
Assistant Commissioner	9
Chief Superintendent	41
Superintendent	156
Inspector	266
Sergeant	1,930
Garda	11,126
Total	13,531

B. The Freedom of Association of the Garda Síochána

(i) The Legislation and the Representative Associations

13. Section 18 of the Garda Síochána Act 2005 ("the 2005 Act") provides as follows:

> "*(1) For the purpose of representing members of the Garda Síochána in all matters affecting their welfare and efficiency (including pay, pensions and conditions of service), there may be established, in accordance with the regulations, one or more than one association for all or any one or more of the ranks of the Garda Síochána below the rank of Assistant Garda Commissioner.*
>
> *(2) An association established under subsection (1) must be independent of and not associated with any body or person outside the Garda Síochána, but it may employ persons who are not members of the Garda Síochána.*
>
> *(3) A member of the Garda Síochána shall not be or become a member of any trade union or association (other than an association established under this section or section 13 of the Garda Síochána Act 1924) any object of which is to control or influence the pay, pensions or conditions of service of the Garda Síochána.*
>
> *(4) If any question arises whether any body or association is a trade union or association referred to in subsection (3), the question shall be determined by the Minister whose determination shall be final.*
>
> *(5) The Minister [for Justice and Equality] –*
>
> *(a) may, notwithstanding subsection (2), authorise an association established under this section to be associated with a person or body outside the Garda Síochána in such cases and in such manner and subject to such conditions or restrictions as he or she may specify, and*

(b) may vary or withdraw any such authorisation.

(6) An association established under this section for the purpose of representing members of the Garda Síochána holding the rank of Garda may include persons admitted, in accordance with the regulations, to training for membership in the Garda Síochána."

14. There are four Representative Associations representing the members of the Garda Síochána and these are:

(1) The Garda Representative Association ("GRA"), which represents the Garda rank;

(2) The Association of Garda Sergeants and Inspectors (ie AGSI), representing Sergeants and Inspectors;

(3) The Association of Garda Superintendents, which represents Superintendents; and

(4) The Association of Chief Superintendents, which represents Chief Superintendents.

15. The structure and organisation of the Representative Associations are determined by secondary legislation, including in particular: the Garda Síochána (Associations) Regulations 1978 (SI No 135 of 1978) ("the 1978 Regulations"); the Garda Síochána (Associations) (Amendment) Regulations 1983 (SI No 151 of 1983); the Garda Síochána (Associations) (Amendment) Regulations 1998 (SI No 63 of 1998); and the Garda Síochána (Associations) (Amendment) Regulations 2011 **(Appendix II)** .

16. However, the secondary legislation has no impact on the internal affairs of each association, which is a matter for that association: see, 1978 Regulations, Regulation 6.

(ii) State Support for the Representative Associations

17. While each of the Representative Associations is primarily funded from members' subscriptions, the Respondent, through monies provided by the national Parliament pays a subvention to each of the Representative Associations, by way of an annual grant, to contribute towards the costs of rent, telephone and postage. It is understood that no other association or union in Ireland receives similar state subventions.

18. In addition and specifically in the case of the GRA and AGSI, two members of the Garda Síochána are seconded with pay from the force to work full time in each of these associations.

19. Details of the subventions for 2011 are as follows:

Organisation	Postage & Telephone	Accommodation Subvention	Other Grants	Total
GRA	**€31,484.42**	**€92,958.16**	**0**	**€124,442.58**
AGSI	**€15,099.72**	**€46,613.18**	**0**	**€61,712.90**
Association of Garda Superintendents	**0**	**0**	**€58,000.00**	**€58,000.00**
Association of Chief Superintendents	**0**	**0**	**€58,000.00**	**€58,000.00**
Total	**€46,584.14**	**€139,571.34**	**€116,000.00**	**€302,155.48**

(iii) Affiliations of the Representative Associations

20. The Representative Associations are permitted to affiliate with international police organisations.

21. With respect to ICTU, the Respondent—through the predecessor of its Minister for Justice and Equality (previously the Minister for Justice, Equality and Law

Reform) ("the Minister")—has on one prior occasion received a formal request from AGSI to be permitted to affiliate with ICTU.

22. This request was raised in March 2008. At a meeting of 11 March 2008, the Minister undertook to regard any proposal regarding affiliation with ICTU neutrally and accepted a submission on behalf of AGSI of 27 March 2008. It was apparent from the submission that AGSI's primary concern was to gain better access to national wage negotiations, with affiliation with ICTU being suggested as a means to achieving this objective.

23. Between March 2008 and June 2008, the Minister engaged in careful and extensive consultation with the following:

    (1) AGSI itself;

    (2) The Department of the Taoiseach;

    (3) The Department of Finance;

    (4) The Department of Defence;

    (5) The Management of the Garda Síochána**;**

    (6) The Garda Commissioner;

    (7) The other Representative Associations; and

    (8) ICTU.

24. Notably, ICTU indicated that it would not be possible for the Representative Associations to affiliate with ICTU on a trial basis.

25. The Minister ultimately concluded that a case had not been made for affiliation with ICTU. However, in order to address the underpinning concern raised by AGSI, the Minister stated that his Department would do everything possible to optimise the input of AGSI and the other Representative Associations into the

negotiations then taking place and that officials of his Department and of the Department of the Taoiseach were in discussions to increase the intensity of interactions and to provide more regular opportunities for the exchange of information and views on the national negotiating process. In this way, the Minister responded to the central concern raised by AGSI.

C. Negotiation of Salaries and Working Conditions

26. There are a number of mechanisms available to the Gardaí to negotiate salaries and working conditions.

(i) The Garda Conciliation and Arbitration Scheme

27. The Garda Conciliation and Arbitration Scheme ("the Scheme"), which is similar to schemes operating elsewhere in the Respondent's Public Service, was established in 1959 and updated as recently as 2004. It provides for a Conciliation Council, an Arbitration Board and an Adjudicator, all of which are designed to deal exclusively with pay and other conditions of service of members of all ranks of the Garda Síochána up to and including the rank of Chief Superintendent. A copy of the current Scheme is attached at **Appendix III** to these Observations.

28. The aim of the Scheme is stated to be (at § 1) as follows:

> "*to enable the Minister for Justice, Equality and Law Reform*[1]*, the Minister for Finance*[2] *and the Commissioner of the Garda Síochána on the one part, and the Association of Chief Superintendents, the Association of Garda Superintendents, the Association of Garda Sergeants and Inspectors and the Garda Representative Association on the other part, to provide means acceptable to the Government and to these representative bodies for the determination of claims and proposals relating to conditions of service of members of the ranks*

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[1] Currently the Minister for Justice and Equality.
[2] Currently the Minister for Public Expenditure and Reform.

they represent and to secure the fullest co-operation between the State, as employer and the members, as employees, for the better discharge of the functions of the Garda Síochána."

a. The Conciliation Council

29. The Conciliation Council consists of a Chairperson - appointed by the Minister for Justice and Equality and the Minister for Finance (Scheme, § 10) - and not more than six "*official side*" representatives and six staff representatives. The "*official side*" representatives are representatives of the Department of Justice and Equality, the Garda Commissioner and the Department of Public Expenditure and Reform, while the "*staff side*" are selected by the Representative Association/Associations representing the rank or ranks to which a claim or proposal which has been referred to the Conciliation Council relates (Scheme, § 11). The number of representatives may be increased exceptionally by agreement between both sides (Scheme, § 12).

30. In administrative terms, the Conciliation Council has two secretaries, one appointed by the Minister for Justice and Equality and the other appointed by the staff representatives on the Council (Scheme, § 12). Regular meetings must take place pursuant to the Scheme, and not less or more than one in any two-month period, unless otherwise agreed between the official and staff secretaries (Scheme, § 14). Meetings are summoned, on the direction of the Chairperson, "*jointly*" by the official side secretaries at the request of either the official side or the staff side (Scheme, § 15).

31. The following matters are deemed by the Scheme to be appropriate for discussion (ie, they are conciliable) at the Conciliation Council (Scheme, § 18):

(1) Claims relating to pay and allowances and other emoluments whether in cash or kind (§ 18(a));

(2) Hours of duty (§ 18(b);

(3) Claims in relation to loss of earnings (§ 18(c));

(4) Standards of accommodation officially provided(§18(d));

(5) Principles governing the provision and allocation of living accommodation officially provided (§ 18(e));

(6) Principles governing superannuation (§ 18(f));

(7) Principles governing the grant of annual, sick and special leave (§ 18(g));

(8) Principles governing recruitment (§ 18(h));

(9) Principles governing promotion (§ 18(i));

(10) Principles governing discipline (§ 18(j));

(11) Principles governing transfers (§ 18(k)); and

(12) Suggestions of general application for promoting the efficiency of the Force (§18(l)).

32. The staff representatives may bring forward for discussion subjects not included in the above list (Scheme, § 19), and the usual practice is that a liberal and flexible attitude is adopted by the official representatives to any such requests.

b. The Chairperson

33. The Chairperson of the Conciliation Council is a very senior civil servant of the Department of Justice and Equality. His function is by and large to facilitate discussions at the Council and to record agreement or disagreement on a particular claim as the case may be. The Chairperson does have the power to decide whether a matter may be discussed at the Conciliation Council or not, and in

recent history two such questions have arisen, with one being decided in favour of the association and the other in favour of the official side.

34. The impartiality of the Chairperson has never been questioned by any association at any meeting. In this respect, the Respondent is extremely surprised by the assertion in the Complaint that the Conciliation Scheme is somehow not independent because the Council is chaired by an employee of the Department of Justice and Equality. This is the first time such a criticism has been brought to the Respondent's attention.

c. Adjudicator and Arbitration Board

35. Where agreement is not possible between the parties at Council, certain matters may proceed to adjudication or arbitration (Scheme, §§ 29-41). It is agreed at Council whether a matter should go to a single Adjudicator or a Board of Arbitration. The general rule is that minor matters are referred to adjudication and major matters are referred to the Board of Arbitration.

36. ***Arbitrable Matters:***

(1) The following matters are deemed to be arbitrable pursuant to the Scheme (§ 37):

(a) Claims for adjustments of rates of pay and allowances (including claims for new allowances);

(b) Claims in regard to periods of annual leave and sick leave;

(c) Claims in regard to total weekly hours of work; and

(d) Claims in regard to overtime.

(2) Pursuant to the Scheme (§ 39), all arbitrable claims for revisions of pay or significant changes in other remuneration or conditions of members of the

Garda Síochána, and any other claims involving significant extra expenditure shall, subject to the provisions of the scheme, be capable of being referred to the Board. All other arbitrable claims will be capable of being referred to the Adjudicator save that any such claim may by agreement between the official side and representative associations concerned be capable of being referred to the Board.

37. ***Arbitration Board:*** The Arbitration Board consists of three representatives, one nominated by the staff representatives, one nominated by the official representatives and an independent chair (Scheme, § 30). It is important to emphasise that the Chairperson, although appointed by the Government, is appointed "*on the nomination of the Ministers* ***<u>in agreement with</u>*** *the representative associations*" (Scheme, § 31) (emphasis added).

38. ***Adjudicator:*** The Adjudicator is appointed in the same way as the Chairperson of the Arbitration Board (Scheme, § 33).

d. The Practical Operation of the Scheme

39. The length of time required to settle a claim within the context of the Scheme varies depending on the complexity of the issue. If both sides agree to the claim, it can take as little as three months to finalise matters. However, if a claim is extremely complicated it can take longer to resolve. The reality of the Scheme is that the claim is lodged by either side and then formally presented at the next Council meeting, where the other side is given an opportunity to make an initial response. In normal practice the matter would then be adjourned so that full consideration can be given to the submission. At the next Council meeting the other side may respond to the claim, or raise queries in relation to the claim. If the query is complex, one side can adjourn the claim and make a response to the query at the next Council. Depending on the claim and queries this process can be repeated, and in some cases where there is a cost analysis involved or further research on the issue the length of time to reach a conclusion can vary.

(ii) ***The Croke Park Agreement***

40. In addition to having access to the Scheme, the Representative Associations have also been fully involved in discussions leading to the Public Service Agreement 2010-2014 ("the Croke Park Agreement" **Appendix IV**), which was negotiated across all of the Respondent's Public Sectors and is the principal agreement underpinning reform and change across the Respondent's Public Service. In this respect, the Representative Associations were not treated in any way differently from the remainder of the Respondent's Public Service.

41. The talks between the Representative Associations and the official representatives—namely of the Department of Finance, Department of Justice and Equality, Garda Management—on the reform agenda which was agreed as part of the Croke Park Agreement were facilitated by a member of the Labour Relations Commission ("the LRC") acting in an *ad hoc* capacity. These talks proceeded in parallel with similar discussions with other unions and representative bodies. The Croke Park Agreement concluded that in return for a Government commitment that there would be no further pay reductions for the lifetime of the Agreement, there would be a reduction in public service numbers and a set of reforms with deadlines agreed by each sector.

42. In line with the implementation arrangements established for other areas of the public service, an Implementation Body was established for the Garda Síochána, the Garda Síochána Implementation Body, ("the GIB") to oversee implementation of the Croke Park Agreement (**Appendix IV)**, and an associated Garda sectoral (**Appendix V)** agreement which had been agreed. Mr PJ Fitzpatrick, Chairperson of the National Implementation Body, also chairs the GIB and is supported at the meetings by members from the Department of Public Expenditure and Reform. Members of the GIB include representatives of staff, which consists of two members of each of the Representative Associations and the official representation, which includes two members of Garda Management and two members of the Department of Justice and Equality. Significantly, there are

actually more staff representatives than official representatives on the GIB, ie, eight staff representatives and four official representatives.

43. The GIB meets approximately every six weeks to discuss the progress of the reform agenda. The Chair has offered and has provided his services as a facilitator, between GIB meetings, where negotiations between the parties, particularly between Garda management and the Representative Associations have required assistance.

44. There is a specific mechanism under the Agreement to resolve disagreements as follows:

> "*1.24 Where the parties involved cannot reach agreement in discussions on any matter under the terms of this agreement within 6 weeks, or another timeframe set by the Implementation Body to reflect the circumstances or nature of the particular matter, the matter will be referred by either side to the LRC and if necessary to the Labour Court; where a Conciliation or Arbitration Scheme applies, the issue will be referred within 6 weeks, or another timeframe set by the Implementation Body to reflect the circumstances or nature of the particular matter, by either side to the Conciliation machinery under the Scheme and, if unresolved, to the Arbitration Board, acting in an ad hoc capacity. The outcome from the industrial relations or arbitration process will be final. Such determination(s) will be made within 4 weeks, or another timeframe set by the Implementation Body to reflect the circumstances or nature of the particular matter.*"

45. Significantly, to date no matter has been referred to arbitration from the GIB.

(iii) The Memorandum of Understanding

46. It is important to observe also that, prior to the conclusion of the Croke Park Agreement, in order to allow members of executive committees of the Representative Associations to fully represent their members in discussions with the Commissioner and officials from the Department of Justice and Equality, a Memorandum of Understanding between Officials and the Garda Associations ("the Memorandum") was drawn up between all the parties[3]. A copy of this memorandum is attached at **Appendix VI** to these Observations.

47. The following aspects of the Memorandum are of particular importance:

(1) The "*important role*" of the Representative Associations is recognised (Memorandum, § 2.1);

(2) It is stipulated that the police force "***must***" have within it the organisational structures to enable personnel policies to be discussed with the elected representatives of the various ranks (Memorandum, § 2.1) (emphasis added);

(3) There is an emphasis on attempting to resolve problems at district or divisional level (§§ 2.2, 2.3);

(4) Representatives must be facilitated in discharging their responsibility to resolve problems at the lowest level, including through regular meetings between appropriate officers and representatives of the Representative Associations (§ 2.3);

(5) It is stressed that members will face no discrimination whatsoever, either in the context of promotion or otherwise, as a consequence of representative body activity (§§ 2.5, 2.6). Indeed, the reassurance provided by the Memorandum in this respect is particularly emphatic:

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[3] This memorandum is between the Minister on the one hand and "the R.B.I.S.S. and the R.B.G." on the other. The RBISS was the Representative Body for Inspectors, Sergeants and Station-sergeants and the RBG was the Representative Body for Gardaí. Both these bodies were replaced by the AGSI and GRA respectively in 1978 and the memorandum obviously predates their formation.

"*The Garda authorities have already made it clear that it is not their policy to discriminate in any way, either in the context of promotion or otherwise, against members as a consequence of a representative body activity. They recognise however that, if there were any widespread feeling to the contrary, it not only would be misconceived but could in the long term have the effect of especially discouraging from representative body activity the most able, dedicated and responsible members - a development that would be clearly contrary to the interest of both sides.* ***The present opportunity is therefore taken to give in writing this categorical assurance that, in carrying out his legitimate duties on behalf of a representative body, a member does not run any risk whatsoever of discrimination in relation to his career in the Force.***" (Emphasis added).

(6) In addition, pursuant to the Memorandum, a new "Review Body" was established to review, on appeal, individual transfers and cases of discipline, other than cases in which the member can, as of right, appeal to the Appeal Board under the disciplinary regulations (Memorandum, § 6.1).

(iv) Access to the Labour Relations Commission

48. Although it arises in the context of individual cases rather than in the context of collective bargaining, the Respondent notes that the Gardaí also have access to the LRC in respect of a very wide range of issues, a point which, very significantly, the Complaint omits to note. The LRC was established pursuant to s. 24 of the Industrial Relations Act 1990 (**Appendix VII)** and Gardaí may pursue the issues arising in the following contexts before it:

(1) Terms of Employment (Information) Act 1994;

(2) Maternity Protection Acts 1994—2004;

(3) Adoptive Leave Acts 1995—2005;

(4) Carer's Leave Act 2001;

(5) Parental Leave Acts 1998 – 2006;

(6) Payment of Wages Act 1991; and

(7) Safety, Health and Welfare at Work Act 2005.

49. Members also have access to the LRC in cases of harassment and the Garda Síochána utilises the LRC mediation service when members agree, as part of its Bullying and Harassment Policy.

(v) Access to the Equality Tribunal

50. Individual members of the Gardaí may also raise claims pursuant to the Employment Equality Acts 1998-2011 before the Equality Tribunal.

(vi) The Prohibition on the Right to Strike of the Gardaí

51. The Industrial Relations Act 1990—which makes strikes and peaceful picketing lawful in the context of trade disputes and confers extensive immunities from suit on trade unions—does not apply to members of the Garda Síochána (who are excluded from the Act's scope by s. 8, **Appendix VII**).

IV. The Alleged Breach of Article 5

A. The Complaint

52. The only trade union prerogative which the Complainant actually asserts has been denied to the Representative Associations is the entitlement to affiliate with ICTU. It is respectfully submitted is that this restriction on the activities of the Representative Associations does not violate Article 5.

B. The Legal Principles

(i) Article 5

53. Article 5 of the Charter provides as follows:

> "*With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom.* ***The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations****. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations*." (Emphasis added).

54. It is well-established in the Committee's jurisprudence that, in the context of the exercise of Article 5 of the Charter by the police, the following principles apply:

(1) ***The Article 5 Guarantees of the Police can be Restricted:*** Article 5 of the Charter, as the Committee has held, "*authorises restrictions on or the removal of the right to organise for two categories of employees, namely members of the police and members of the armed forces*": *Conclusions XVIII-1, Poland,* p. 633. By contrast with the express possibility of restricting the Article 5 entitlements of the police, other measures aimed at restricting or abolishing the right to organise of members of the security and intelligence service must be considered in light of Article G of the Charter: *Conclusions XVIII-1, Poland,* p. 633.

(2) ***The Police cannot be Deprived of All Article 5 Guarantees:*** While a state may be "*permitted to limit the freedom of organisation of the members of the police, it is not justified in depriving them of* ***all the guarantees*** *provided for in the article*": *Conclusions I, Statement of Interpretation on Article 5*, p. 31.

(3) ***The Police cannot be Entirely Prohibited from Joining Trade Unions:*** It is apparent that police officers cannot be entirely prohibited from joining trade unions (see, eg, *Conclusions 2010, Armenia, Article 5*, 22 October 2010; *Conclusions 2010, Georgia, Article 5*, 22 October 2010).

(4) ***Police Officers should Enjoy the Main Trade Union Rights:*** Police officers must therefore enjoy the main trade union rights, which are the right to negotiate their salaries and working conditions, and freedom of association. As the Committee observed in *European Council of Police Trade Unions (CESP) v Portugal*, Complaint No 11/2001, Decision on the Merits of 22 May 2002 (at §§ 25-26) ("the *Portugal Complaint*"):

> "*The Committee recalls that Article 5 permits states to restrict but not to completely deny police officers' right to organise. It follows, firstly, that police personnel must be able to form or join genuine organisations for the protection of their material and moral interests and secondly, that such organisations must be able to benefit from* ***most*** *trade union prerogatives.*" (Emphasis added).

(5) ***Membership of Police Associations***: In the *Portugal Complaint*, the Committee also noted that Article 5 of the Charter allows national legislation to require that professional police associations be composed exclusively of members of the police force (at § 35).

(6) ***Affiliations of Police Associations***: In the *Portugal Complaint*, it was also held (at § 37) that national legislation may require that professional associations of police personnel only be authorised to affiliate to police trade

union organisations, whether national or international. See also: *Conclusions VIII*, p. 80; *Conclusions IX – 1*, p. 51; and *Conclusions XIII – 3*, p. 107.

(ii) Comparative Experience

55. The Respondent also notes that it has been held in the context of the European Convention on Fundamental Rights and Freedoms ("the ECHR") that a prohibition on membership of a political party by police officers did not violate the right to freedom of association, as protected by Article 11 ECHR: see *Rekvényi v Hungary* [GC], no. 25390/94, ECHR 1999-III ("*Rekvényi*") §§ 58-62.

C. The Application of the Legal Principles

56. Insofar as the Complaint raises the fact that the Representative Associations are not permitted to affiliate with ICTU, the Respondent observes that this restriction is "*determined by national laws or regulations*"—as is required by Article 5—given that, as observed above at § 13, s. 18(2) of the 2005 Act expressly provides that the Representative Associations "*must be independent of and not associated with any body or person outside the Garda Síochána*".

57. In addition, the position of the Representative Associations is similar to that of the associations in the Portugal Complaint in which no breach of Article 5 was found by the Committee.

58. The Committee's jurisprudence also establishes clearly that the onus on Contracting States is qualified, and as held by the Committee in the *Portugal Complaint*, its duty is to ensure that police organisations benefit from "***most***" trade union prerogatives. It is apparent from the above that the Representative Associations easily enjoy *"most*" trade union prerogatives:

(1) The Gardaí enjoy freedom of association and are not prohibited from joining associations and in fact, as noted above, four different Representative Associations exist for different ranks of Gardaí.

(2) Not only is Gardaí participation in associations permitted, in fact, it is actively promoted by the Respondent, in the form of the subventions paid by the Respondent to each of the Representative Associations and in the form of the secondment with pay of members of the Garda Síochána to work full time in the GRA and AGSI.

(3) The Gardaí enjoy the main trade union rights, namely rights to negotiate their salaries and working conditions, as is required by the Committee's case law. In particular, in this respect, as has been outlined above, there are two mechanisms to which the Representative Associations have access which facilitate the negotiation of salaries and working conditions, namely:

(a) The Scheme; and

(b) The Croke Park Agreement.

(4) Individual members of the Gardaí also have access to the LRC in respect of a wide range of issues and to the Equality Tribunal in respect of equality matters.

(5) The Memorandum strongly endorses the importance of the participation of the Representative Associations in negotiation and problem-resolution. The Memorandum also emphasises—as was held to be required in the *Portugal Complaint*—that the Gardaí in Ireland are entitled to "*joint genuine organisations for the protection of their material and moral interests*".

59. Overall therefore, the Respondent respectfully submits that it is apparent that the requirements of Article 5 of the Charter have been satisfied fully.

60. Moreover, given that Article 5 of the Charter expressly authorises restrictions on the Article 5 guarantees of the police, the Respondent submits that it is not necessary for it to justify any such restrictions by reference to Article G of the Charter (see, in this respect, *Conclusions XVIII-1, Poland,* p. 633).

61. However, without prejudice to that position, it is submitted that the prohibition on the Representative Associations affiliating with ICTU is capable of justification by reference to Article G, which requires that restrictions on the rights guaranteed by the Charter are acceptable if they are: (1) prescribed by law; and (2) necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health or morals. Here:

(1) As just observed, the restriction which prohibits the Representative Associations from affiliating with ICTU is prescribed by s. 18(2) of the 2005 Act;

(2) It serves a legitimate purpose insofar as, given the role of the Gardaí in national security (as well as the protection of other public interests, public health and morals), it is imperative that the Representative Associations not be bound by the decisions of another entity, like ICTU, which would not be constrained by such concerns.

(3) That this case is reinforced by the broad range of functions performed by the Gardaí for the Respondent; the Gardaí are not just responsible for policing, but, as observed above, are also responsible for the Respondent's state security more generally and immigration control.

(4) In addition, it is imperative that the public perception of the Gardaí's impartiality is not undermined.

(5) Particularly when viewed in the context of the panoply of association rights enjoyed by the Representative Associations as outlined above, the restriction imposed is minimal and sufficiently well-tailored to comply with the requirements of Article G. In this respect, the restriction is also significantly narrower in its scope and effect than the prohibition on political party membership upheld by the European Court of Human Rights in the *Rekvényi* case.

62. Finally, the Respondent also notes that the freedom of association rights enjoyed by the Gardaí appear to be more extensive than those of similar police forces in other jurisdictions. For example:

(1) In the United Kingdom, members of the police force are not allowed to be a member of a trade union, or of any association having an object to control or influence the pay, pensions or conditions of service of any police force (see, e.g., in the Northern Ireland context, Police (Northern Ireland) Act 1998, s. 35). Members of the police forces in the United Kingdom may join the Police Federation or other representative bodies which are authorised to represent them on matters of pay etc. These matters are settled at the national Police Negotiating Board at which the Police Association members are represented.

(2) In Bulgaria, Cyprus, the Czech Republic, Hungary, Malta, the Netherlands, Slovenia members of the police force are not allowed to be members of a trade union.

(3) In Bulgaria and Malta, members of the police force do not enjoy freedom of association.

V. The Right to Fair Pay Agreement Discussions

A. The Complaint

63. The criticisms made by the Complainant include:

(1) Cases determined pursuant to the Scheme "*take too long to be solved or aren't solved at all*";

(2) Negotiations are chaired by an employee of the Department of Justice and consequently, the Scheme fails to ensure parity in the bargaining strength of both parties; and

(3) Access to the Labour Relations Commission ("the LRC") would be "*fairer and more independent*".

64. These criticisms of the Scheme are not accepted by the Respondent.

B. The Legal Principles

65. Article 6 of the Charter provides as follows:

> "*With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:*
>
> *1* *to promote joint consultation between workers and employers;*
>
> *2* *to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;*
>
> *3* *to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes;*
>
> *and recognise:*
>
> *4* *the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.*"

66. Each aspect of Article 6 of the Charter will be considered in turn (with Article 6(4) being considered separately below).

(i) Article 6(1): Joint Consultation

67. The Committee has held that Article 6(1) contains the following elements:

(1) ***The Obligation to Promote Joint Consultation:*** Joint consultation is consultation between employees and employers or the organisations that represent them: *Conclusions I, Statement of Interpretation on Article 6§1*, pp. 34-35. The term is understood broadly and can "*be interpreted as being applicable to* ***all kinds of consultations*** *between both sides of industry – with or without any government representatives - on condition that both sides of industry have an equal say in the matter*": *Conclusions V, Statement of Interpretation on Article 6§1*, p. 41 (emphasis added). Such consultation can take place within tripartite bodies provided that the social partners are represented in these bodies on an equal footing: *Conclusions V, Statement of Interpretation on Article 6§1*, p. 41.

(2) ***Institutional Duties*****:** It is well-established that if consultation does not take place spontaneously between the trade unions and employers' organisations, "*the State should establish permanent bodies and arrangements in which unions and employers' organisations are equally and jointly represented*": *Conclusions XVI-2, Hungary*, pp. 408-409; *Centrale générale des services publics (CGSP) v Belgium*, Complaint No. 25/2004, Decision on the merits of 9 May 2005, § 41.

(ii) Article 6(2): Collective Agreements

68. According to Article 6(2), domestic law must recognise that employers' and workers' organisations may regulate their relations by collective agreement. If necessary and useful, ie, in particular if the spontaneous development of collective bargaining is not sufficient, positive measures should be taken to facilitate and encourage the conclusion of collective agreements. Whatever the procedures put in place are, collective bargaining should remain free and voluntary: *Conclusions I, Statement of Interpretation on Article 6§2*, p. 35.

(iii) Article 6(3): Conciliation

69. According to Article 6(3), conciliation, mediation and/or arbitration procedures should be instituted to facilitate the resolution of collective conflicts. They may

be instituted by law, collective agreement or industrial practice: *Conclusions I, Statement of Interpretation on Article 6§3*, p. 37. Such procedures should also exist for resolving conflicts which may arise between the public administration and its employees: *Conclusions III, Denmark, Germany, Norway, Sweden*, p. 33.

C. The Application of the Legal Principles

(i) The Criticism Regarding the Length of Time Taken Pursuant to the Scheme

70. Given that, as was observed above, a claim pursuant to the Scheme can be resolved in as little as three months, the criticism regarding the length of time taken to resolve matters pursuant to the Scheme is without foundation.

(ii) Equality

71. The Complainant's assertions that the requirements of Article 6 have not been satisfied is without foundation:

(1) Joint consultation within the meaning of Article 6(1) of the Charter is promoted by the Respondent and it has established "*permanent bodies and arrangements*" to facilitate consultation, namely, the Scheme with its Conciliation Council, Adjudicator and Arbitration Board; The Memorandum also emphasises the value placed by the Respondent on joint consultation.

(2) The ***equal*** representation of employees and employers required by Article 6(1) is evidenced by the following:

(a) The official side and the staff side are equally represented on the Conciliation Council (Scheme, § 10(a));

(b) The staff side representatives are selected by the Representative Associations (Scheme, § 11);

(c) There are two secretaries to the Conciliation Council, one nominated by the Minister for Justice and Equality and the other nominated by the staff representatives (Scheme, § 12);

(d) The number of representatives may be increased exceptionally "*by agreement* ***between both sides***" (Scheme, § 12) (emphasis added);

(e) The scheduling of meetings is partially dependent upon the agreement of the official and staff side secretaries (Scheme, § 14);

(f) There is no basis for concluding, as the Complainant suggests, that the fact that the Chairperson of the Conciliation Council is nominated by the Ministers detracts from the equality which integral to the structure of the Scheme. As was observed above (at §§6-9), the first time the impartiality of the Chairperson appears to have been questioned by any Representative Association is in this Complaint. Moreover, as also noted above (at §33), the Chairperson does not have power to determine the merits or otherwise of matters discussed at the Conciliation Council. Questions on the admissibility of matters for discussion at council have been raised and have been resolved in the past in equal measure in favour of the staff representatives and the official representatives.

(g) The Chairperson of the Arbitration Board can only be appointed with the agreement of the Representative Associations (Scheme, § 31); and

(h) The extent of consultation with the Representative Associations is also evidenced by the Croke Park Agreement.

(3) The importance of ***collective agreement*** within the spirit of Article 6(2) is promoted by the Scheme and evidenced by the Croke Park Agreement.

(4) In accordance with Article 6(3), the Respondent has established the Scheme to resolve collective conflicts.

(iii) Access to the LRC

72. As observed above, individual members of the Gardaí already have access to the LRC in respect of a number of a broad range of issues.

73. Given that the Respondent does not accept the Complainant's criticisms of the Scheme, it also does not accept that access to the LRC would be preferable to the Scheme.

74. In any event, the Respondent observes that the LRC process operates in a similar manner to the Scheme: as with the Scheme, participation in the LRC conciliation process is voluntary. Solutions are reached only by consensus, whether by negotiation or by agreements facilitated between the parties themselves.

D. Article 21 of the Charter

75. As noted above at § 5(1), the Applicant is not entitled to rely on Article 21 of the Charter, given that the Respondent has not accepted this provision.

76. In any event, the alleged infringement of Article 21 is entirely unsubstantiated.

77. Without prejudice to this position, the Respondent makes a number of observations regarding Article 21 and reserves its entitlement to respond further if necessary.

78. Article 21 provides as follows:

> "*Workers have the right to be informed and to be consulted within the undertaking*
> *With a view to ensuring the effective exercise of the right of workers to be informed and consulted within the undertaking, the Parties undertake to adopt or encourage measures enabling workers or their representatives, in accordance with national legislation and practice:*

a *to be informed regularly or at the appropriate time and in a comprehensible way about the economic and financial situation of the undertaking employing them, on the understanding that the disclosure of certain information which could be prejudicial to the undertaking may be refused or subject to confidentiality; and*

b *to be consulted in good time on proposed decisions which could substantially affect the interests of workers, particularly on those decisions which could have an important impact on the employment situation in the undertaking*."

79. Article 21 has the following requirements:

(1) Workers and/or their representatives (trade unions, worker's delegates, health and safety representatives, works councils) must be informed on all matters relevant to their working environment except where the conduct of the business requires that some confidential information not be disclosed. Furthermore, they must be consulted in good time with respect to proposed decisions that could substantially affect the workers' interests, in particular those which may have an impact on their employment status.

(2) These rights must be effectively guaranteed. In particular, workers must have legal remedies when these rights are not respected*: Conclusions 2003, Romania*, p. 420.

(3) There must also be sanctions for employers which fail to fulfil their obligations under this Article: *Conclusions 2005, Lithuania*, p. 378.

80. The Complainant has not identified how any of these obligations have not been fulfilled.

VI. Access to the Labour Court

81. The Respondent has already indicated its reasons for regarding the mechanisms that have been set up as being fully compliant with Article 6 of the Charter.

82. In those circumstances, the Respondent submits that it is not necessary for the Representative Associations to be granted access to the Labour Court to achieve compliance with Article 6 of the Charter.

VII. The Right to Strike

A. The Complaint

83. Insofar as the Complaint alleges a breach of Article 6(4) of the Charter due to the exclusion of the Gardaí from the entitlement of the right to strike, this allegation is rejected.

B. The Legal Principles

(i) The Charter

84. A number of principles emerge from the Committee's decisions:

(1) First, it is permissible to exclude certain categories of employee from the protection of the right to strike: see, *Conclusions I, Statement of Interpretation on Article 6§4,* pp. 38-39, in which the Committee observed as follows:

> "*As regards the right of public servants to strike, the Committee recognises that, by virtue of Article 31 [now Article G of the Revised Charter], the right to strike of certain categories of public servants may be restricted,* ***including members of the police and armed forces, judges and senior civil servants****. On the other hand, the Committee takes the view that a denial of the right to strike to public servants as a whole*

cannot be regarded as compatible with the Charter." (Emphasis added).

(2) Second, as was held in *Confederation of Independent Trade Unions in Bulgaria (CITUB), Confederation of Labour "Podkrepa" and European Trade Union Confederation (CES) v Bulgaria, Complaint*, No 32/2005, Decision on the merits of 16 October 2006, §§ 44-46:

> "*... the Committee recalls that restrictions to the right to strike of certain categories of civil servants, for example those whose duties and functions, given their nature or level of responsibility are directly affecting the rights of others, national security or public interest may serve a legitimate purpose in the meaning of Article G (see Conclusions I, Statement of Interpretation, pp. 38-39).*"

(ii) Comparative and International Experience

85. In this respect, the Respondent also invokes both comparative and international experience.

86. Comparatively, the Respondent understands that the right to strike is prohibited for the police in a large number of Contracting States, including, for example: Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Hungary, Italy, Luxembourg, Malta, Poland, Slovenia, Spain, Sweden and the United Kingdom.

87. Internationally, the Respondent also observes that Article 9(1) of Convention No 87: Convention Concerning Freedom of Association and Protection of the Right to Organise of the International Labour Organisation provides as follows: "*The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations*." The ILO has observed that it is not uncommon for members of the police to be

subject to an exception from the Convention on the basis of their responsibility for the external and internal security of the Contracting State: General Survey, 1994, § 55.

C. The Application of the Legal Principles

88. It is submitted that the prohibition on the right to the strike of the Gardaí is clearly justifiable by reference to the principles established by the Committee:

(1) The prohibition on the right to strike is in accordance with law and as observed above, the Industrial Relations Act 1990 does not apply to members of the Garda Síochána.

(2) The prohibition pursues a legitimate aim: the activities of the Gardaí directly affect the rights of others, national security or public interest and the prohibition pursues the legitimate aim of ensuring that national security is not jeopardised by strike action on the part of the police.

(3) The prohibition is necessary. In particular:

(a) The Respondent, as noted above, has only one police force; it does not have metropolitan or city forces upon which reliance could be placed in the event of a strike by the Gardaí. In this respect, the Respondent stands in contrast with other States (for example, Italy) which have a number of different police forces. Indeed, the Respondent observes also that even in Portugal and Spain, where there are multiple police forces, the entitlement to strike is not extended to the all of the various forces.

(b) The Respondent relies upon the Gardaí to perform functions that might not be performed by the police force in other jurisdictions in the context of immigration control.

(c) The Respondent relies upon the Gardaí for policing and for state security more generally.

(d) Given the integral role of the Gardaí in national security, and the Respondent's extensive reliance on them, it is submitted that precluding the Gardaí from striking is strictly necessary in pursuit of legitimate purposes.

VIII. Conclusion

89. For the reasons set out above, the Committee should declare the Complaint inadmissible, or, if admitted, without merit.