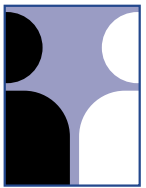


# Advocacy Paper Series



**NCCRI**

**The Citizenship Referendum: Issues, Observations and Concerns**

**Paper No. 3**

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**National Consultative Committee  
on Racism and Interculturalism**

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## **Introduction**

This report is the third of a new series of advocacy papers produced by the National Consultative Committee on Racism and Interculturalism (NCCRI). The first advocacy paper focussed on the reform and harmonisation of migration policy in Ireland, the second focussed on international perspectives relating to the future of Irish born children and their non-national parents in Ireland.

This third advocacy paper considers issues relating to the Citizenship Referendum, to be held on 11 June, 2004.

The purpose of these advocacy papers is:

- To provide a focus on key public policy issues related to the remit of the NCCRI
- To make a range of policy recommendations/options
- To contribute to broader public discourse, including identifying new issues and bringing new perspectives.

This paper contains four sections. The first section outlines the nature of the constitutional and legislative changes proposed by the Government. The second section examines the arguments for constitutional change. It provides some observations and raises concerns about the possible effect of the proposed change. The third section looks past the Referendum to examine the content of the Government's proposals for implementing legislation. It proposes a framework within which the debate around legislation might be constructively conducted, should the Referendum be passed. The fourth section outlines conclusions and recommendations.

Through this advocacy paper, the NCCRI raises issues that should be considered as part of the debate around the Referendum and the proposed legislation that would follow in the event of a 'yes' vote. The NCCRI does not seek to advocate or imply a 'yes' or a 'no' vote.

The NCCRI welcomes the fact that the debate linked to the Referendum has by and large been carried out in a responsible way, notwithstanding examples of inaccuracies or reducing the arguments down to ‘sound-bites’ an element of which is perhaps inevitable in relation to an issue as complex as a citizenship Referendum, even when held in optimum circumstances.

It is of concern that as the Referendum draws closer, the NCCRI continues to receive reports that many people are still confused about what the Referendum is about and national opinion polls show that many are still undecided about how they will vote. This may result in many people choosing not to vote in the Referendum or voting ‘yes’ or ‘no’ based on a lack of, or partial, understanding of the complex issues involved.

This advocacy paper is the outcome of a range of inputs, including an NCCRI roundtable discussion held on 27 May 2004. The NCCRI would like to thank Ciara Smyth of the Law Department, NUI Galway who provided much of the background research used in the paper.

## **Section One. The proposed change**

### *1.1 The background to Article 2 of the Constitution*

Before the Belfast Agreement, the Constitution conferred citizenship on only one category of persons – those who had been citizens at the time of the coming into operation of the Constitution. Otherwise, it stated, the acquisition of Irish citizenship was to be determined in accordance with law.<sup>1</sup> The Irish Nationality and Citizenship Act 1956 provided for an entitlement to citizenship either by birth in Ireland<sup>2</sup> or by descent from a parent who was an Irish citizen at the time of the birth.<sup>3</sup> It also provided for acquisition of citizenship, subject to various conditions and at the Minister's discretion, by naturalisation.<sup>4</sup>

However, 'birth in Ireland' had to be read in the light of 'old' Article 2 of the Constitution which claimed that the national territory consisted of the whole island of Ireland, its islands and the territorial seas. This implicit legal claim to Northern Ireland meant that persons born in Ireland included those born in Northern Ireland. Old Article 2, with its legal claim to 32 county sovereignty, was perceived as a stumbling block to the signing of the Belfast Agreement by Northern Unionists, but on the other hand its removal would deprive Northern Nationalists of an entitlement to be citizens of Ireland. In view of both of these concerns, Article 2 was amended by referendum in 1998. 'New' Article 2 reads in part:

*It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation.*

This is generally interpreted as meaning that anyone born on the island of Ireland is automatically entitled to citizenship.

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<sup>1</sup> Article 9.

<sup>2</sup> Section 6(1) Every person born in the Island of Ireland is entitled to be an Irish citizen.

<sup>3</sup> Section 7(1) A person is an Irish citizen from birth if at the time of his or her birth either parent was an Irish citizen or would if alive have been an Irish citizen.

<sup>4</sup> Part III.

## 1.2 *The proposed amendment*

The proposed amendment to the Constitution is an amendment to Article 9, which will qualify the meaning of Article 2 (in other words, Article 2 will be interpreted in the light of Article 9).<sup>5</sup> A new subsection will be inserted into Article 9 which will read:

*1° Notwithstanding any other provision of this Constitution, a person born in the island of Ireland, which includes its islands and its seas, who does not have, at the time of his or her birth, at least one parent who is an Irish citizen or entitled to be an Irish citizen is not entitled to Irish citizenship or nationality, unless otherwise provided for by law.*

*2° This section shall not apply to persons born before the date of the enactment of this section.*

This means that the acquisition of citizenship by a child born in Ireland, neither of whose parents is an Irish citizen at the time of birth, will no longer be determined by the Constitution, but by ordinary legislation. Such children will not have a constitutional right to citizenship, though they may have a legislative entitlement to citizenship, depending on what the legislation says. This is a partial return to the pre-Belfast Agreement situation where acquisition of citizenship was governed by ordinary legislation - partial in the sense that it only applies to children of non-national parents. It will be prospective only: children born in Ireland to non-national parents before the Referendum will retain their entitlement to Irish citizenship.

## 1.3 *The proposed implementing legislation*

If the constitutional amendment is passed, the Government will then introduce a bill in the Oireachtas which, if passed, will amend the Irish Nationality and Citizenship Act 1956. The amendment will establish how children born in Ireland to non-national parents can qualify for citizenship. According to the Government's proposals, a person born in Ireland (North or South), whose parents are both non-nationals, will be

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<sup>5</sup> Details of the proposed amendment and implementing legislation are laid out in *Citizenship Referendum, The Government's Proposals*, April 2004, available at: [www.justice.ie](http://www.justice.ie)

entitled to citizenship if one of the parents has been lawfully resident in Ireland (North or South) for three of the four years preceding the birth. In other words, citizenship of such children is to be premised on a minimum length of lawful residence in Ireland (North or South) by one of the parents.

The rule doesn't apply to:

- Children born in Ireland (North or South) with a parent who is entitled to be an Irish citizen or is a British citizen at the time of the birth
- Children born in Ireland (North or South) with a parent who is entitled to reside in Ireland (North or South) without any restriction on his/her period of residence at the time of the birth
- Children born in Ireland (North or South) who would be otherwise stateless.

## **Section Two. The need for constitutional change: A divergence of opinion**

### *2.1 Policy reasons*

The Government seeks to distinguish between children born in Ireland to Irish citizens and children born in Ireland to non-nationals, and remove the automatic citizenship entitlement of the latter. The Government has cited two central policy reasons for the proposed change.

The first is an immigration-related reason. It is felt that the citizenship ‘loophole’ in the Constitution is acting as a pull factor for non-nationals who wish their children to acquire Irish and/or EU citizenship. The Government’s publication on the Referendum states:

*People with no other claim to be present in the EU and no substantial connection with Ireland are arranging their affairs so as to ensure the birth of a child in Ireland in order that it will acquire the status and these rights, with an eye to increasing the chances of the parents of securing for themselves, by association with the EU national child, some claim to be able to remain within Ireland or the wider EU territory or some right within that territory.<sup>6</sup>*

Since the Supreme Court decision in *Lobe & Osayande*, it is clear that there is no automatic right to residence in Ireland for non-national parents of Irish children. Therefore, if the prospect of Irish citizenship continues to be a potential pull factor, it is more likely to be for EU-related reasons. Such reasons were highlighted by the recent opinion of the Advocate General in the *Chen* case.<sup>7</sup> That case sought to establish that a citizen of one EU Member State has a right to reside in another Member State under EC law, and furthermore that if the citizen is a child, his/her parent has a derivative right of residence along with the child. The Advocate General in the *Chen* case accepted this proposition in a preliminary ruling. The Government’s concern is that non EU nationals will come to Ireland with a view to having an Irish

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<sup>6</sup> *Citizenship Referendum, The Government’s Proposals*, April 2004, para. 3.

<sup>7</sup> Opinion of Advocate General Tizzano, delivered on 18 May 2004, Case C-200/02, Man Lavette Chen and Kunqian Catherine Zhu v Secretary of State for the Home Department.

(and hence EU) citizen child, and then move to another EU Member State where they will assert the child's right to residence and their own derivative right to residence.

However, there is need for caution around the *Chen* case because:

- While the European Court of Justice confirms preliminary rulings in 80% of cases, the ruling is a preliminary one that could be overturned or amended by the European Court of Justice
- The child's right of residence in one EU Member State on the basis of his/her citizenship of another Member State is subject to the condition that s/he and the members of his/her family "are covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence".<sup>8</sup>

There is a division of legal and political opinion as to whether the final ruling may only benefit Irish born children whose parents are financially self-sufficient. There are those that contend that the ruling could exclude the children of most asylum seekers and non-EEA nationals without offers of employment. On the other hand some contend that it would be difficult for such distinctions to be made in practice.

As regards the parents' right of residence, the Advocate General based this right on two separate reasons. Firstly, as the child would be unable to avail of his/her right of residence without the parents also being resident, the parents acquire a derivative right of residence. Since this right is not a stand alone right under EC law, it is likely to attract particular scrutiny from the Court in its ruling in due course.

The second reason relates to the particular circumstances of the *Chen* case and, specifically, the fact that the *Chen* family sought to establish a right of residence in the UK. Under present UK law, parents of British nationals are guaranteed a right of residence. By denying a right of residence to the *Chen* family, the UK was effectively

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<sup>8</sup> Para 65. The right of residence of a non-worker (as a child must necessarily be) is derived from Art 18 EC which confers on every citizen of the Union the right to move and reside freely in the territory of the Member States, subject to the limitations and conditions laid down by the Treaty and by the rules of secondary law. Those limits and conditions are defined by Directive 90/364, which establishes the rule relating to financial independence from the state.

making a distinction between residence rights of British nationals and residence rights of nationals of other EU Member States. This, according to the Advocate General, was unfair discrimination on the grounds of nationality.<sup>9</sup> As a preliminary point, it is worth noting that if a significant number of non-national parents of Irish children start asserting residence rights in the UK, it is always open to the UK to change its own residency rules in a non discriminatory manner. But a more important point is that this part of the *Chen* ruling on parents' residency rights is based on UK law and may not necessarily imply a similar right in all other EU Member States.

The NCCRI urges caution in the debate in regard to being definitive about the outcomes of the *Chen* ruling. It is not possible to ascribe one factor as being the sole reason for someone deciding to migrate from one country to another. The reasons for migration are complex. There are numerous, often overlapping, reasons why people become migrants such as search for employment or better paid employment, education, family reunification, returning emigrants or human rights related issues. While economic conditions play a major role, more research needs to been conducted on motivations for migration into Ireland.

The second policy reason cited by the Government for constitutional change is that the numbers of non-national women arriving to give birth at late stages of their pregnancy is causing a crisis in Dublin's maternity hospitals. The Government's publication on the Referendum states:

*Maternity hospitals in Dublin in particular are experiencing a high incidence of unannounced arrival in their facilities of non-national women in late pregnancy, or in the early stages of labour and have expressed concern that as a result the lives of the mothers and of their children are put at risk.<sup>10</sup>*

There is a division of opinion on the extent, and impact, of the numbers, and reasons, for unannounced arrival of non national women in late pregnancy, which have been well rehearsed in the public discourse on this issue. Aside from the merits of the

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<sup>9</sup> Under Art 12 EC Treaty.

<sup>10</sup> As above.

arguments for and against this being a substantive reason for a citizenship referendum, the NCCRI would raise a number of issues relating to such cases.

Those involved in public service provision, including health, need to ensure that minority ethnic groups are not blamed for being the main or only cause of resource problems in the delivery of public services, and that vulnerable groups are not used in an inappropriate ways to seek further resources. The NCCRI calls for guidelines on the way that statistics are collected and used by public services. in particular to ensure that such statistics are used *in context*. For example the increase in non-national mothers attending maternity services coincided with increased migration to Ireland, mainly as a consequence of people working, including those working in our health services.

The NCCRI is further concerned about the emergence of the term ‘citizenship tourism’ which is derogatory and has its origin in the similarly pejorative term ‘benefit tourism’. It should be recalled that the term benefit tourism emerged as part of a xenophobic and unfounded scare campaign by British tabloids in the run up to the enlargement of the EU on 1 May 2004. Such terms serve no role in promoting reasoned debate. In the case of enlargement they were not substantiated in any research undertaken by the EU prior to 1 May or in any previous enlargement of the EU.

## 2.2 *Legal reasons*

In order to change the citizenship entitlements of children born in Ireland to non-national parents, the Government argues that it is necessary to change the Constitution. This is because Article 2 is interpreted as granting a constitutional right to everyone born on the island of Ireland to be an Irish citizen. It is useful at this point to remember what Article 2 says:

*It is the entitlement and birthright of every person born on the island of Ireland...to be part of the Irish nation. This is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland.*

The Government interprets the phrase ‘part of the Irish nation’ in the first sentence as being equivalent to citizenship. Consistent with this interpretation, the words ‘otherwise qualified’ in the second sentence refer to ways of acquiring citizenship other than by virtue of the first sentence i.e. by descent, marriage and naturalisation as laid down in ordinary legislation. This interpretation of Article 2 as conferring citizenship is supported by its Belfast Agreement antecedents.

There is a divergence of opinion on this interpretation. Being ‘part of the Irish nation’ is not necessarily the same thing as being a citizen (though what, exactly, it means to be ‘part of the Irish nation’ remains unclear). If the two concepts were synonymous, why is there the need to state in the second sentence that people who are citizens by virtue of ordinary legislation are *also* entitled to be part of the Irish nation? Under this interpretation, the key words in the second sentence are ‘otherwise qualified in accordance with law’. The reference to being born in Ireland in the first sentence is just one, among a number of ways, in which a person can qualify for citizenship in accordance with law. Therefore Article 2 simply acknowledges the existing legislative position and does not confer any citizenship rights.

This interpretation was articulated by one of the majority Supreme Court judges in the *Lobe & Osayande* case. Judge Hardiman J. stated:

*The concepts of nationality and of citizenship are distinguished in the first two sentences of Article 2. This corresponds to the distinction drawn in the Constitution between “the Nation” and “the State”. It is not clear to me that, as regards citizens, the first sentence of Article 2 confers, as opposed to acknowledges, any right.<sup>11</sup>*

If this interpretation is correct as has been contended by some in the ‘No’ campaign, then all citizenship derives from ordinary legislation and not the Constitution, and a constitutional amendment is not needed to change the present rules; The changes to citizenship sought by the Government could be achieved by way of ordinary legislation. This would avoid casting the issue of citizenship of children born to non-nationals as a problem of constitutional dimensions.

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<sup>11</sup> Keane CJ acknowledged that there is an interpretative issue to be resolved but felt that it was unnecessary for the purposes the case. Two other majority judges took the opposing view.

## **Section Three. Beyond the Referendum**

### *3.1 Content of the proposed implementing legislation*

If the amendment is passed in the Referendum, the Government will move to introduce a bill to amend the present legislation governing citizenship by establishing separate rules governing citizenship of children of non-national parents. The following sub-sections seek to identify key issues arising from the Government's proposals for the bill.

#### *3.1.1 The policy rationale*

The goal of the proposed Referendum and implementing legislation is that entitlement to Irish citizenship will be restricted to people who have a "substantial connection with the State".<sup>12</sup> As a newborn child is incapable of having such a connection, its relationship with the State is mediated through its parents. Hence at least one parent is required to have a substantial connection with the State. This appears to be reasonable, however the Government needs to ensure that it is consistent with the other ways of acquiring citizenship. In particular how the entitlement to citizenship based on descent laid down in the Irish Nationality and Citizenship Act 1956 conforms to this approach.

#### *3.1.2 Period of residence*

The lawful residency requirement which non-national parents (or one of them) must meet before they have an Irish citizen child is stated in the Government's proposals to be a minimum of three of the four years preceding the birth.

#### *3.1.3 'Lawful residence'*

Non-national parents (or one of them) are required to have been 'lawfully resident' in the State for at least three of the four years preceding the birth. The Government's proposals state that for non-EEA national parents, periods spent in the State while awaiting the determination of an asylum claim will not count. The clear implication

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<sup>12</sup> Citizenship Referendum, The Government's Proposals, April 2004, para. 3.

is that an asylum seeker is not lawfully resident in the state and that lawful residence begins the moment he/she is recognised as a refugee.

However, asylum seekers *are* lawfully resident in the State under both the 1951 Convention relating to the Status of Refugees<sup>13</sup> and the 1996 Refugee Act (as amended).<sup>14</sup> This is underscored by the fact that refugee status is declaratory, not constitutive. This means that when an asylum seeker is recognised as a refugee, the recognition is simply an acknowledgement of a previously existing state of affairs, namely that the person is unable to go home because of a well founded fear of persecution on a Convention ground. The act of recognition does not *make* the person a refugee.

In reality, there is very little to be gained by stigmatising asylum seekers as unlawful, when they are in fact lawful. If an asylum seeker is recognised as a refugee, his/her children born thereafter are automatically entitled to Irish citizenship, as is explained in the next section. If an asylum seeker is not recognised as a refugee, the asylum decision would normally be made well within three years, precluding the applicant from fulfilling the residence requirement. If a negative asylum decision is followed by a successful or prolonged application for temporary leave to remain, taking the applicant over the three year threshold, then it can hardly be denied that he/she has a substantial connection with the State by virtue of the duration of residence.

#### *3.1.4 Residence without restriction*

One of the exceptions to the proposed new rule relates to non-national parents (or one of them) who have an entitlement to reside in Ireland (North or South) without any restriction on his/her period of residence. The only people who fall into this category in Ireland are refugees (recognised in either Ireland or the UK). Therefore a child born in Ireland to a refugee will be automatically entitled to Irish citizenship. This is a welcome exception. However, the exception would appear to exclude persons who have been granted temporary leave to remain in Ireland, or its equivalent in the UK, as their residency is time-limited. Of particular concern are persons who are granted leave to remain as a form of complementary protection. These people already suffer a

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<sup>13</sup> Article 31.

<sup>14</sup> Section 9(1).

disadvantage as compared with refugees; They have a valid protection reason for not being able to return to their countries of origin, and yet they are not afforded the full gamut of rights associated with refugee status. Now they are to be further disadvantaged, in so far as, a distinction is to be drawn between their children and the children of refugees.

### 3.1.5 Possible amendments

The Government states that it:

*...is committed to the basic principles of the draft Bill, and its intention is that those principles will be carried through into practical operation in the Act that will ultimately be in place.<sup>15</sup>*

However, it adds:

*The Government will, when the time comes to launch this draft as an actual Bill, be well disposed to proposed amendments, and support amendments proposed to it by others, which it considers will improve the final product consistent with the Government's policy on citizenship.<sup>16</sup>*

While the Oireachtas debates will be a forum for making positive changes to the bill, in line with the above suggestions, the NCCRI is concerned that the positive aspects of the bill may be diluted or removed.

### 3.2 Framework for change

One of the Government's stated reasons for the proposed changes to the citizenship regime is an immigration-related reason i.e. that the possibility of having an Irish citizen child is acting as an enticement to non-nationals to come to Ireland. Therefore the Government's policy on citizenship is not a stand-alone policy but is part of a broader immigration policy.

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<sup>15</sup> Citizenship Referendum, The Government's Proposals, April 2004, para. 8.

<sup>16</sup> As above.

In 2002, the Government undertook a public consultation on immigration policy. The document asked people to express their views on how immigration policy should be formulated and outlined the issues which an effective immigration policy and new immigration legislation would need to address. As well as migration control measures, the document raised such issues as application and selection modalities, family reunification and other migrant rights and integration policies. This approach is consistent with the framework for immigration proposed at an EU level.<sup>17</sup>

Immigration legislation has indeed been introduced since the consultation process but it has been almost exclusively been concerned with one dimension of a comprehensive immigration framework, i.e. immigration control.<sup>18</sup> The Irish Human Rights Commission and the NCCRI have called for a comprehensive immigration policy to be introduced by the Irish Government, which covers all the dimensions of the EU Framework, which is summarised as follows:

1. Conditions of entry and residence
2. Family reunification
3. Freedom of movement
4. Freedom from discrimination and racism
5. Fundamental rights
6. General instruments on employment and social inclusion.

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<sup>17</sup> IHRC/NCCRI, (2004). Safeguarding the Rights of Migrant Workers and Their Families  
[www.nccri.com](http://www.nccri.com)

<sup>18</sup> E.g. Immigration Act, 2003; Immigration Act 2004.

## **Section Four: Conclusions and Recommendations**

The NCCRI is not advocating or implying a ‘yes’ or ‘no’ vote in the forthcoming Referendum but wishes to highlight the following issues.

### **1. Continuing uncertainty regarding what people are being asked to vote on**

The NCCRI is concerned that from calls we have received and from existing opinion polls carried, there remains considerable uncertainty among a significant number of people about what they are being asked to vote ‘yes’ or ‘no’ to in the forthcoming Citizenship Referendum. It will be a significant challenge to ensure that these concerns are met in the remaining days before the Referendum. Given the complexity of the issues involved this would have been a difficult challenge at any time but coinciding with local and European elections, the NCCRI is concerned that the Referendum is not being held in the optimum circumstances.

### **2. Caution in relation to the *Chen* case**

While observers have agreed that the *Chen* case is of significance to the forthcoming Referendum, there is need for caution around the preliminary ruling in the *Chen* case because:

- While the European Court of Justice confirms preliminary rulings in 80% of cases, the ruling is a preliminary one that could be overturned or amended by the European Court of Justice
- The child’s right of residence in one EU Member State on the basis of his/her citizenship of another Member State is subject to the condition that s/he and the members of his/her family “are covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence”.<sup>19</sup>

### **3. Codes of conduct on the use of statistics**

There is a division of opinion on the extent, and impact, of the numbers, and reasons, for unannounced arrival of non national women in late pregnancy, which have been

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<sup>19</sup> Para 65. The right of residence of a non-worker (as a child must necessarily be) is derived from Art  
<sup>18</sup> EC which confers on every citizen of the Union the right to move and reside freely in the territory of the Member States, subject to the limitations and conditions laid down by the Treaty and by the rules of secondary law. Those limits and conditions are defined by Directive 90/364, which establishes the rule relating to financial independence from the state.

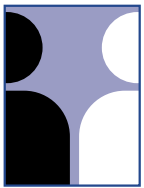
well rehearsed in the public discourse on this issue. Aside from the merits of the arguments for and against this being a substantive reason for a citizenship referendum, the NCCRI calls on those involved in public service provision, including health, to ensure that minority ethnic groups are not blamed for being the main or only cause of resource problems in the delivery of public services. and that vulnerable groups are not used in an inappropriate way to seek further resources.

The NCCRI calls for a code of conduct on the way that statistics are collected and used by public services, including the health service. In particular those statistics relating to ethnic minorities and other potentially vulnerable groups are used carefully and in context. This code of conduct should be carefully monitored and the media have a role to play in ensuring that such data is reported in a balanced way.

#### **4. Need for a comprehensive immigration framework and plan for diversity**

Whatever the outcome of the forthcoming Referendum new urgency is needed in bringing in a comprehensive immigration framework in Ireland. The NCCRI welcomes, and looks forward to, the forthcoming National Action Plan Against Racism ‘Planning for Diversity’ has the potential to provide a framework for developing a more inclusive and intercultural Ireland. In this context, we call on the Government to consult widely and carefully on the legislation that will be introduced, should the Referendum be passed, to develop a comprehensive immigration framework that goes beyond control and security issues in particular to take into account the overall framework for immigration advocated by the EU:

1. Conditions of entry and residence
2. Family reunification
3. Freedom of movement
4. Freedom from discrimination and racism
5. Fundamental rights
6. General instruments on employment and social inclusion.



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