FUNDAMENTAL RIGHTS SERIES

E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS
(CFR-CDF)
RÉSEAU U.E. D'EXPERTS INDÉPENDANTS EN MATIÈRE DE DROITS FONDAMENTAUX

REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN IRELAND IN 2003

January 2004

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* Submitted to the Network by Donncha O'Connell. The research upon which the report is based was carried out by Mr. David Keane, LL.M although the content of the report is the responsibility of its author, Mr. Donncha O'Connell, Irish Member, EU Network of Independent Experts on Fundamental Rights, Faculty of Law, National University of Ireland, Galway.

Le **Réseau UE d'Experts indépendants en matière de droits fondamentaux** a été mis sur pied par la Commission européenne (DG Justice et affaires intérieures), à la demande du Parlement européen. Depuis 2002, il assure le suivi de la situation des droits fondamentaux dans les Etats membres et dans l'Union, sur la base de la Charte des droits fondamentaux de l'Union européenne. Chaque Etat membre fait l'objet d'un rapport établi par un expert sous sa propre responsabilité, selon un canevas commun qui facilite la comparaison des données recueillies sur les différents Etats membres. Les activités des institutions de l'Union européenne font l'objet d'un rapport distinct, établi par le coordinateur. Sur la base de l'ensemble de ces (26) rapports, les membres du Réseau identifient les principales conclusions et recommandations qui se dégagent de l'année écoulée. Ces conclusions et recommandation sont réunies dans un Rapport de synthèse, qui est remis aux institutions européennes. Le contenu du rapport n'engage en aucune manière l'institution qui en est le commanditaire.

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PRELIMINARY REMARKS

This report on the situation regarding fundamental rights in Ireland covers the period January-December 2003. The research upon which the report is based was carried out by Mr. David Keane, LL.M although the content of the report is the responsibility of its author, Mr. Donncha O'Connell, Irish Member, EU Network of Independent Experts on Fundamental Rights, Faculty of Law, National University of Ireland, Galway.

In terms of international instruments Ireland dealt mainly with CPT, CERD and CEDAW in the period under review and there were few cases involving Ireland decided by the European Court of Human Rights.

A number of relevant issues of concern not falling directly under one of the articles of the EU Charter arose during the year under examination. They are, however, worth noting by way of introduction because of their general relevance to fundamental rights. These include the European Convention on Human Rights Act, 2003 which came into force at the start of 2004 and is mentioned under various headings of this report.

The Irish Human Rights Commission published a report in 2003 under Section 24 of the Human Rights Commission Act, 2000 outlining a number of operational concerns about the work of the Commission since its establishment in the previous two years and calling for its funding to be organised other than through the Department of Justice, Equality & Law Reform in the interests of independence. The report and all documentation of the Commission are available on the website of the IHRC: www.ihrc.ie/. Since its establishment the Commission has made a most positive contribution to debates on the relevance of international human rights standards to domestic legislation and policy and is beginning to raise its profile with members of the general public in a promising manner.

CHAPTER I : DIGNITY

Article 1. Human dignity

There is an express reference to human dignity in the preamble to *Bunreacht na hEireann, 1937* (the Irish Constitution) which seeks to promote the common good so that the dignity of the individual may be assured. In *Lobe & Osayande v. Minister for Justice, Equality and Law Reform*, a case involving the residency rights of non-national parents of Irish-born children (entitled to Irish citizenship as a birthright) Murray J. did not think it necessary to consider the philosophy underlying the aforementioned constitutional provisions as the terms of the Constitution were sufficiently explicit in themselves. They were not, he thought, "wholly unique". He drew attention, *inter alia*, to the terms of the Universal Declaration of Human Rights and "the inherent dignity…of all members of the human family."[1]

In the period under review, there has been no case taken solely or mainly on the basis of human dignity nor have any national legislative measures been taken primarily on that basis.[2]

Article 2. Right to life

National legislation, regulation and case law

Euthanasia / Assisted Suicide:

It was confirmed in September 2003 by the Press Office of An Garda Siochana (the Irish Police) that the extradition of a 'right to die' activist who was present at the suicide of an Irish woman in January 2002 was being sought. The Director of Public Prosecutions (DPP) had recommended that charges be brought in the case.[3]

Use of firearms by security forces:

Following the April 2002 Supreme Court ruling in *Ardagh v. Maguire,*[4] where the court held that the Joint Oireachtas Committee on Justice, Equality, Defence and Women's Rights could not conduct an inquiry into the events surrounding the death of Mr. John Carthy, who was fatally shot by members of the Garda Emergency Response Unit (ERU) after a siege at his home in Abbeylara, County Longford on 20 April 2000, a Tribunal of Inquiry was established under the chairmanship of retired High Court judge, Mr. Justice Barr, (known as the Barr Tribunal) which began its public deliberations in January 2003.[5] The inquiry has six modules: the background to the fatal shooting; the circumstances surrounding it; the response of the Garda ERU; the cause of Mr. Carthy's death; how the police in other jurisdictions deal with such situations; and a review of statute law regarding gun licences and police training.[6]

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[1] Lobe v. Minister for Justice, Equality and Law Reform [2003] IESC 1 (23 January 2003), paragraph 518; the case will be discussed in detail under Article 9.

[2] See generally: O'Dowd, "Dignity and Personhood in Irish Constitutional Law", in Quinn, Ingram and Livingstone (eds), *Justice and Legal Theory in Ireland*, (Dublin: Oak Tree Press, 1995), pp 163-181.

[3] *The Irish Times*, 22nd September, 2003.

[4] [2002] IESC 19 (11th April 2002)

The Supreme Court, in dismissing the State's appeal against a High Court decision (*Maguire v. Ardagh* [2001] IEHC 133 (23 November 2001)), ruled that "the conducting by the Joint Oireachtas subcommittee of an inquiry into the fatal shooting at Abbeylara on April 20th, 2000 leading to adverse findings of fact and conclusions (including a finding of unlawful killing) as to the personal culpability of an individual not a member of the Oireachtas so as to impugn their good name is *ultra vires* in that the holding of such an inquiry is not within the inherent powers of the Oireachtas." (Conclusion, paragraph 369)

[5] The Inquiry was established under the Tribunals of Inquiry (Evidence) Acts, 1921 to 2002

[6] Mr. Justice Barr, preliminary opening statement, made on 7th January 2003 at the Four Courts, Dublin

At the time of writing the public proceedings of the tribunal are under way and a number of modules have been opened for consideration.

Trafficking in human beings:

While policy development and implementation in relation to combating people trafficking is the responsibility of the Minister for Justice, Equality and Law Reform, operational strategies in this area are the responsibility of the *Garda National Immigration Bureau* which was established in May 2000. Its remit includes: the effective co-ordination of activities leading to the execution of deportation orders; the effective co-ordination of operational strategies and resources from point of entry into the State (airports, ports and border crossings); the co-ordination and direction of strategies to combat trafficking in illegal immigrants; the strengthening of international liaison arrangements on relevant immigration issues including liaison with Garda Liaison Officers based abroad; the provision of non-national registration service and the enforcement of immigration law generally.

The Immigration Act, 2003[7] amended and supplemented pre-existing legislation of relevance to the issue of trafficking in humans. It made provision, *inter alia*, for carriers' sanctions and amended the Refugee Act, 1996 in a number of significant respects. (These changes are discussed further under Articles 18 & 19).

Domestic violence:

The Domestic Violence (Amendment) Act, 2002[8] resulted from the Supreme Court decision in *Keating v. Crowley*[9] whereby the Court ruled that the failure to provide a fixed period of relatively short duration under the Domestic Violence Act, 1996 for an interim barring order made *ex parte* deprived the respondents to such applications of the protection of the principle of *audi alteram partem* in a manner and to an extent which was disproportionate, unreasonable and unnecessary.[10] Section 4 subsection 3 of the Domestic Violence Act 1996 was therefore amended so that an interim barring order made *ex parte* shall have effect for a period not exceeding eight working days unless the order is confirmed within that period by order of the court.

[7] No. 26 of 2003
[8] No. 30 of 2002 (18 December 2002)
[9] [2002] IESC 47 (9 October 2002)
The Court noted in paragraph 48 that an interim barring order will typically be granted in a case where the relationship between the parties has effectively broken down and disputes have arisen, or will arise, in relation to matters such as custody of children, the payment of maintenance and adjustment of property rights. The granting of an interim order in the absence of the defendant may in such cases crucially tilt the balance of the entire litigation against him or her to an extent which may subsequently be difficult to redress. In particular, the order ultimately made by the court dealing with the custody of the children of the marriage may necessarily be affected by the absence of one spouse from the family home for a relatively significant period as the result of a barring order : necessarily , because the paramount concern of the court on such an application will be the welfare of the children and the removal of one spouse from the home by legal process for a relatively lengthy period , even though subsequently found to have been wrongful, may be a factor to which the court may have to have regard in determining a custody issue. Seen in that context, the Court concluded, the failure of the legislation to impose any time limit on the operation of an interim barring order, even when granted *ex parte* in the absence of the respondent, other than the provision that it was to expire when the application for an interim barring itself was determined, was inexplicable.
[10] Mr Geoffrey Shannon, of the Family Law Committee of the Law Society of Ireland, had pointed out that the 1996 legislation also breached Article 6 of the European Convention on Human Rights, in that the accused did not have the automatic right to see the sworn evidence on which the application for an interim order was based. (Reported in *The Irish Times,* 10 October 2002)

Practice of national authorities

A new programme aimed at preventing domestic violence by integrating the work of the criminal justice system with that of victim support agencies was inaugurated by the Minister of State for Health & Children on 7th May, 2003. It is to be based in the Dun Laoghaire and Bray District Court areas and to be overseen by the National Domestic Violence Intervention Agency. Perpetrators of domestic violence are to be referred to the programme by the District Court and their progress will be monitored by the Probation & Welfare Service and the courts[11].

On 27th November, 2003 a report was published by the Coroners' Rules Committee. The Committee was established to standardise the rules governing the Coroner's Court and included representatives from the Coroners' Society of Ireland, the Faculty of Pathology of the Royal College of Physicians of Ireland, the Office of the Attorney General, representatives of An Garda Siochana and the Samaritans. Welcoming the report, the Minister for Justice, Equality & Law Reform indicated that comprehensive reforming legislation would be brought forward in 2004 to address "urgent issues" affecting the work of the Coroners' Court including the refusal of witnesses to attend inquests, the restriction on the numbers of medical and other witnesses at inquests, a more coherent restatement of the scope of provisions for mandatory inquests to include all deaths-in-custody situations.[12]

Reasons for concern

While it is to be welcomed that the demonstrable shortcomings in the legislative framework for post-mortem inquiries is to be improved there remain other practical concerns (such as delays in the forensic science laboratory) that can only be addressed by increased resourcing of the relevant services.

The complex legal issues regarding conflicts between the right to life of pregnant women and girls and the right to life of the unborn remain unresolved as a matter of Irish constitutional and statutory law, as well as medical practice. The rate of abortion by Irish women (through services available in other jurisdictions) remains high.

Article 3. Right to the integrity of the person

National legislation, regulation and case law

The equivalent right in Irish constitutional law is the right to bodily integrity first enunciated in the landmark case of *Ryan v. Attorney General*[13] in a challenge to legislation on the fluoridation of water. The right, which is one of the unenumerated constitutional rights, has been invoked in subsequent cases[14].

On 3 July 2003, the Supreme Court rejected an appeal by Dr. Michael Neary and Our Lady of Lourdes Hospital, Drogheda against a High Court decision in the case of Ms Alison Gough, who claimed her womb was unnecessarily removed after she gave birth to her only child in October 1992.[15] Mr. Justice Johnson in the High Court had found that Dr Neary was negligent

[11] *The Irish Times*, 8th May, 2003
[12] *The Irish Times*, 28th November, 2003
[13] [1965] IR 294.
[14] Casey, *Constitutional Law in Ireland* (3rd Edition), (Dublin: Round Hall Sweet & Maxwell, 2000), pp 420-423. Note: This textbook refers to the right as "the right to the protection of one's health".
[15] Dr Neary and the hospital had argued in the Supreme Court that Ms Gough's action had been statute barred. Our Lady of Lourdes Hospital was, from 1939 until April 1997, a private Catholic hospital, run by the Medical Missionaries of Mary.

in his treatment of Ms Gough at the time of the birth of her only child in 1992. He held that, had Dr Neary carried out certain procedures on Ms. Gough, it would not have been necessary to remove her womb shortly after the birth. Some 65 cases involving women who say their wombs were unnecessarily removed by the Drogheda-based Consultant Obstetrician are the subject of High Court proceedings.

A three-year inquiry by the Medical Council's Fitness to Practise Committee into the allegations against Dr. Neary ruled (on 23 July 2003) that he committed professional misconduct in removing the wombs of ten women, and struck him from the medical register. The Council has been criticised by former patients of Dr Neary over the delay in making its findings. The Council decision comes four and a half years after the first complaint was made against Dr Neary. More than 100 women have alleged he performed unnecessary Caesarean Hysterectomies on them during a 20-year-period up to 1998.[16]

Criticism over delays in reforming the investigative procedures of the Medical Council have come from several sources, including the Council President, Professor Gerard Bury, who said that the Council had been lobbying successive ministers since 1998 about the need to amend the 25-year-old legislation relating to professional standards. The Council had proposed a range of preventative measures, including the introduction of a 'competence assurance' scheme guaranteeing the periodic monitoring of specialists clinical audits and peer reviews. The Council also sought more flexibility in inquiries, noting complaints at present must be either upheld or dismissed. In some instances, noted Prof Bury, mediation or a 'middle course' would be more appropriate.[17]

A Medical Practitioners Bill dealing with the foregoing concerns was due to be published before the end of 2003 but no such legislation is forthcoming at the time of writing.

Therapeutic cloning:

Following a recommendation in the Government Report of the Inter-Departmental Group on Modern Technology, 2000, the Irish Council for Bioethics was established in May 2002 by the Royal Irish Academy as an "independent, autonomous body to consider the ethical issues raised by recent developments in science and medicine." The Council's membership of twenty-one consists of lawyers, philosophers, ethicists, physicians, geneticists, food scientists, biologists, microbiologists, biochemists, and journalists. The council has established three working groups; the Biological Collections Working Group (Chairperson: Dr. M. Lawlor), the Genetically Modified Organisms Working Group (Chairperson: Professor P. Whittaker), and a Working Group on Ethics Committees (Chairperson: Professor C. Kelleher)[18].

A sub-committee of the Irish Medical Council (the governing body of the medical profession in Ireland) is currently drafting the Council's Sixth Guide to Ethical Conduct and Behaviour. The new rules, which will affect medical research into stem-cells and gene therapy in Ireland, are expected to be presented to the Irish Medical Organisation's General Council for approval shortly.[19] Section 26.1 of the current guidelines reads "the creation of new forms of life for experimental purposes or the deliberate intentional destruction of human life already formed is professional misconduct." Section 26.2 adds that "if the intention is…the creation of embryos for experimental purposes it would be professional misconduct." Finally, Section

[16] *The Irish Times*, 30 July 2003; A 1999 report commissioned by the North Eastern Health Board, which took over the hospital in the mid-1990s, found a normal rate for a hospital of Drogheda's size should have been one a year. The Caesarean Hysterectomy rate at the hospital between 1996 and 1998 was nine per year.
[17] *The Irish Times*, 31 July 2003
[18] For further information on the work of the Council see: www.ria.ie/
[19] *The Irish Times,* 28 August 2003

26.2 states that "any fertilized ovum must be used for normal implantation and must not be deliberately destroyed."[20]

The Commission on Assisted Human Reproduction was established by the Department of Health & Children in 2000 to prepare a report on the possible approaches to all aspects of assisted human reproduction and the social, ethical and legal factors to be taken into account in determining public policy in the area. Its report on embryo research and cloning is overdue at the time of writing and it is understood that a number of differences of opinion between members of the Commission remain unresolved especially in relation to legal issues. In February 2003, the Commission held a public conference in Dublin Castle on the regulation of assisted human reproduction, the legal and ethical issues surrounding the *in vitro* embryo, and creating families through assisted reproduction. The final report of the Commission is expected in March 2004.

The opposition Labour Party published a Private Member's Bill, the Human Reproduction Bill, 2003[21] which proposed to prohibit the bringing into being of a human embryo otherwise than by a process of fertilisation intended to lead to childbirth. Under Section 1(4)(a), an embryo comes into being on the coming into being of a two-cell zygote. Fertilisation does not include the bringing into being of a zygote by a process where an unfertilised female gamete is modified by cell nuclear replacement or transplantation (in other words, by cloning).

In the Explanatory Memorandum to the Bill, it is stated that the Bill has no general implications for assisted human reproduction (by means, for example, of *in vitro fertilisation*). Nor does it attempt to deal with the family law consequences of fertilisation and childbirth achieved by means of sperm donation or 'surrogate' motherhood. These aspects – and also questions as to whether there should be a statutory, license-based regime governing genetic research, human embryology and so on – will be dealt with in later legislation. The purpose of the Bill is to provide, by the creation of two specific criminal offences, limits within which any such research or licensing regime should operate.

Section 1 (1) provides that a person who brings into being a human embryo otherwise than by a process of fertilisation shall be guilty of an offence. This is the provision of the bill that prohibits human 'cloning'. Subsection 2 provides that a person who brings into being a human embryo otherwise than by sexual intercourse shall be guilty of an offence. In other words, it shall not be lawful to create embryos for purely research purposes. The subsection does not require that every one of the embryos created in the process of assisted fertilisation must survive, or be intended to survive, to viability. But embryos can only be brought into being in a process where childbirth is the ultimate aim of the treatment.

All of the foregoing issues came into sharp focus towards the end of 2003 in a controversy surrounding and Irish government decision to support an EU proposal on the funding of stem-cell research despite the fact that some of the research involved would not be permitted in this jurisdiction. The Irish Government supported the UN ban on human cloning.

Practice of national authorities

On 31 July 2003, the Supreme Court upheld an appeal by Professor Patrick Meenan against an earlier ruling of the High Court, and held that the direction (to him) to attend the Commission to Inquire into Child Abuse under the chairmanship of Miss Justice Mary Laffoy was in breach of his rights to natural and constitutional justice, his constitutional rights to

[20] The Medical Council, *'A Guide to Ethical Conduct and Behaviour'* (Fifth Edition, 1998). For general information on the work of the Council and access to its publications see further: www.medicalcouncil.ie/
[21] No.2 of 2003. The Bill was sponsored by Dr. Mary Upton, T.D.

privacy and to bodily integrity.[22] The Supreme Court did not challenge the remit of the Commission; the Chief Justice, Mr Justice Keane, raised the question of whether alternative ways could be found of obtaining evidence from the Professor. The court found that the requirements being imposed on Prof Meenan were excessive in the light of his age and infirmity.

Although not directly connected to the decision of the Supreme Court in this case the Chairperson of the Commission of Inquiry resigned in September 2003. Her decision arose from the manner in which the inquiry was being dealt with by the Department of Education and was detailed in a long letter of resignation eventually published by the Government following considerable public pressure. Miss Justice Laffoy was replaced as Chairperson of the Commission by a newly-appointed High Court judge, Mr. Justice Sean Ryan.

Reasons for concern

There is concern that the unresolved questions regarding the status of unborn persons arising from the constitutional guarantee of the right to life may add to the complex questions to be addressed in the context of the ongoing debate on stem-cell research and gene therapy.

Article 4. Prohibition of torture and inhuman or degrading treatment or punishment

International case law and concluding observations of international organs

The Report of European Committee for the Prevention of Torture (CPT) on its May 2002 visit to Ireland was published on 19 September 2003.[23] It was the Committee's third visit to Ireland. The CPT visited a number of police stations, prisons and psychiatric establishments, in particular in Dublin and Cork. In the Report, the Committee paid particular attention to the treatment of persons detained by the An Garda Síochána (The Irish Police) and measures taken to improve conditions of detention and health care services in prison. It also examined the situation of detained children and of persons cared for in the Central Mental Hospital and in institutions for the mentally disabled. The following is an outline of some of its findings.[24]

Police establishments:

While many of the persons interviewed by the CPT's delegation about their experience while in police custody stated that they had been treated correctly by the police, a not inconsiderable number of persons claimed that they had been physically ill-treated by Gardai (police officers). Most of the allegations received concerned the time of arrest, including after the detained person had been brought under control, or during transport to a police station; some complaints related to ill-treatment in cells or detention areas in police stations. In certain cases the ill-treatment alleged was said to have been inflicted by officers trying to obtain information or secure a confession from the detained person. The allegations involved, in the main, blows with

[22] Past residents of children's homes had campaigned for a public inquiry into the conduct of vaccination trials on infants who were resident in children's homes trials, and in 2001 the Commission to Inquire into Child Abuse under the chairmanship of Ms Justice Laffoy, set up to examine allegations of sexual, physical and emotional abuse of residents of residential institutions, was asked to add this issue to its work. At the time of the vaccination trials in the 1960s, Prof Patrick Meenan held the chair of microbiology in University College Dublin (UCD) and, in 1973, was appointed Dean of the Medical Faculty. He was responsible for importing the vaccines, and was one of six authors of the study; he was therefore central to any investigation of what happened during the trials.

[23] Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 May to 28 May 2002, Strasbourg, 18 September 2003. Available at http://www.cpt.coe.int/documents/irl/2003-36-inf-eng.htm. For an initial analysis of the Report see: O'Donnell, "Preventing the Ill-Treatment of Detainees" (2003) *Irish Criminal Law Journal*, Vol.13, No.2, pp 2-3.

[24] See also *infra,* Articles 48 and 49

batons as well as kicks and punches to various parts of the body. On occasion, the ill-treatment alleged was of a severe nature. In a few cases, the delegation was told that the ill-treatment had been administered in such a way as to avoid leaving visible marks, e.g. baton blows to a telephone directory placed against the detainee's head or pressure with a baton behind the knee.[25] According to the report, the number and consistency of the allegations of ill-treatment heard by the delegation lent them credibility. Moreover, in some cases, the delegation's doctors gathered medical evidence consistent with the allegations received.

After the 1993 visit, the CPT was led to conclude, in the light of all the information at its disposal, that persons held in certain police establishments in Ireland ran a not inconsiderable risk of being physically ill-treated. In 1998, the CPT also gathered considerable evidence of police ill-treatment. The information gathered by the CPT's delegation during the 2002 visit underscored the need for the Irish authorities to intensify their efforts to prevent ill-treatment by the police, according to the Report.

Prisons:

Many of the inmates interviewed by the delegation indicated that they had reasonably good and constructive relations with most of the prison staff. However, in all three prisons visited, the delegation heard complaints of verbal abuse. In Dublin, it also heard some allegations of physical ill-treatment (kicks, slaps and rough treatment) of prisoners by staff, frequently relating to placements in the padded-cells - in Cloverhill Prison – or cell searches - in Mountjoy (Men's) Prison. The CPT agreed with the Irish authorities that staff are entitled to protection from vexatious accusations (cf. CPT/Inf (99) 16, page 41); however, complaints procedures should offer appropriate guarantees of independence and impartiality, and persons who may have been ill-treated should not be discouraged from pursuing a complaint.

The use of 'padded-cells' for the management of persons in need of psychiatric care and, more particularly, of in-patient hospital treatment, was a source of great concern. The CPT's delegation found that prisoners in need of psychiatric care were frequently placed in unfurnished padded – or, so-called, cladded–cells. In general, the cells had poor lighting and were dirty. The persons concerned were provided with disposable chamber-pots and with a mattress and blankets; however, the latter were often filthy. It would appear that on occasion the prisoners were left naked or in their underwear. In most cases, the persons concerned remained in the padded-cells throughout the day.

In all of the establishments visited, the CPT's delegation heard accounts of inter-prisoner violence and/or bullying. As regards more particularly Cloverhill Prison, health-care staff indicated that they frequently had to treat prisoners for injuries following assaults by, or altercations with, fellow inmates.

Central Mental Hospital and other places of psychiatric detention:

No complaints of ill-treatment were received at the Central Mental Hospital and there was no evidence of over-medication.[26] However, allegations of sexual abuse of female patients by certain staff members and the death of a patient who was being restrained were noted by the CPT[27].

The CPT visited three establishments for mentally disabled persons in which many of the residents had been in institutional care for lengthy periods. There were no allegations of ill-

[25] *Ibid.,* paragraph 11
[26] See further: Inspector of Mental Hospitals, *Report of Year Ending 31 December 2002*, (Stationery Office, Dublin, 2003), pp 45-54
[27] In the latter case a file has been sent to the DPP and a decision on whether or not to prosecute is awaited. In the former case the DPP decided not to prosecute but a staff member was dismissed for gross misconduct.

treatment and staff were found to be professional and caring. The Committee did, however, express concern at the lack of a clear administrative or legal framework governing the involuntary admission of such patients.

The Government was required to respond to the CPT's recommendations, having regard to Article 10 of the Convention. The following is a brief outline of that response:[28]

Police establishments:

The Irish Government indicated its intention to publish legislative proposals for an independent Garda Inspectorate with the power to investigate complaints against An Garda Siochana and which will also have the powers of a Police Ombudsman. The Irish Government also pointed out that, while the Inspectorate will have an important role in the independent investigation of complaints against the Gardai, it believes that the emphasis given by An Garda Síochána through its training programmes (see below) to respect human rights will also play an important part in continuing to promote the highest standards of policing, and will reinforce the Garda image and reputation for impartial, fair and just policing.

While in no way wishing to detract from the serious issues raised by the CPT delegation, the Government was encouraged by the experience of the delegation in that many persons with whom they spoke indicated that they had been correctly treated while in Garda custody. With regard to specific cases of ill-treatment outlined the Report, without sufficient evidence of the alleged behaviour being put forward in support of a complaint about that behaviour, the Government felt precluded from commenting in a substantive way on these allegations.

The Garda authorities employed a number of strategies for the protection of the human rights of all those with whom they came into contact in the course of their duties. Garda management strove to ensure that the core values which underpin policing policies are of the highest internationally accepted standards. The following strategies are currently being pursued: Garda Human Rights Advisory Committee - There are a number of initiatives being progressed in the areas of Human Rights, Quality Service, and Community Policing, including a public attitudes survey. An Implementation Committee is also to be established to ensure the promotion of, compliance with and oversight, on behalf of the Commissioner, of the Declaration of Professional Values and Ethical Standards throughout the organisation. The proposals put forward to establish a Garda Human Rights Advisory Committee will take account of these initiatives. It is hoped to establish a Garda Human Rights Advisory Committee at the earliest opportunity; Human Rights Audit - Professional Management Consultants are currently conducting a human rights compliance audit of Garda core values inherent to Garda policies and strategies. This audit will be based on the Council of Europe's Auditing Guide and will outline how this guide can be augmented so as to provide a comprehensive auditing instrument for evaluating compliance by an Garda Síochána. The audit will, *inter-alia,* identify the current compliance status of policies and strategies in An Garda Síochána with values enshrined in international human rights standards and values inherent in best international policing practice; A generic human rights training course for Garda teachers/trainers is to be provided for Garda College Training staff and Divisional Training staff throughout the country.

[28] Response of the Government of Ireland to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Ireland from 20 to 28 May 2002, Strasbourg, 18 September 2003, CPT/Inf (2003) 37. Available at http://www.cpt.coe.int/documents/irl/2003-37-inf-eng.htm

Prisons:

In general, staff in all prisons maintain a good rapport with prisoners, according to the Government. They are also constantly reminded that incidents of verbal and physical abuse will not be tolerated and are aware that that ill-treatment of any kind is not acceptable. The Irish Prison Service (the government agency charged with operating the Irish prison service) is fully committed to the ongoing reinforcement of this message and all allegations of ill treatment are thoroughly investigated.
The Irish Prison Service welcomed the comments of the CPT to the effect that senior management were determined to take appropriate action where allegations of ill-treatment of inmates by staff came to their attention. Where allegations of assault or ill-treatment are made, the Garda Síochána are called to investigate. A prisoner may also make a complaint to the Prison Visiting Committee, to the prison chaplain, to the prison doctor, to the Minister for Justice, Equality & Law Reform and he or she also has access to the courts. They may also complain to the European Court of Human Rights and to the CPT. There is free access by prisoners to these avenues of complaint. The CPT had noted the low level of complaints filed. It was suggested that, given the variety of avenues open to the prisoners to raise such matters and the proven commitment of prison management to pursue any allegations made, this low level of complaints should be seen in a positive light as reflecting well on the management and staff of the prisons rather than necessarily being a symptom of any deficiency in the complaints procedures.

In relation to the use of padded-cells, the Irish Government stressed its commitment to replacing, as soon as possible, all traditional padded-cells with new safety observation cells which, while soft-surfaced so as to protect the prisoner from self-harm, would fully meet the needs and respect the dignity of prisoners in every way consistent with their safety. The Minister for Justice, Equality & Law Reform has requested the Irish Prison Service to replace padded-cells in all prison institutions by June 2004.

The Irish Prison Service has also set up a Working Group on Inter-Prisoner Assaults to refine its approach on this issue. Part of the Group's remit is to agree a standard, clearly understandable system of classification and recording of assaults across prison estates. The Group's work is well advanced and will, following implementation of its recommendations, allow for annual audits to be conducted of all inter-prisoner assaults.

National legislation, regulation and case law

Criminal Law (Insanity) Bill, 2002:

The main purpose of the legislation (which was published in 2002 but on which most discussion has taken place in 2003) is to "clarify, modernise and reform the law on criminal insanity and fitness to be tried, to bring it into line with the jurisprudence of the European Convention on Human Rights."[29] (It is considered under this heading as the principal concerns currently arising relate to the issues surrounding the detention of persons found 'guilty but insane'). The Bill implements the main recommendations of the *Third Report of the Inter-Departmental Committee on Mentally-Ill and Maladjusted Persons* chaired by Mr. Justice Seamus Henchy and published in 1978. It contains detailed provisions on substantive matters such as fitness to plead, a statutory definition of criminal insanity, a new verdict of not guilty by reason of insanity - instead of the older verdict of guilty but insane - and a new plea of guilty but with diminished responsibility in cases of murder. It also introduces a statutory Mental Health Review Board.

[29] Minister for Justice, Equality and Law Reform (M. McDowell), Criminal Law (Insanity) Bill 2002: Second Stage, Seanad Eireann, 19 February 2003

With regard to definitions under Sections 1 and 2 of the Bill, the designation of a prison as a designated centre (which was not recommended by the Henchy Committee) is included to cater for situations where it might be appropriate to detain a person in a prison rather than in a psychiatric hospital. Section 3 deals with the issue of 'fitness to be tried'. This term is being adopted instead of the term 'fitness to plead' which is used in the relevant provisions of the Lunacy (Ireland) Act 1821. The latter provisions are being repealed. Section 5 introduces into Irish law the concept of diminished responsibility. Sections 9 and 10, and the First Schedule to the Bill, provide for the establishment of an independent Mental Health Review Board. The Mental Health Review Board will replace the existing *ad hoc* Advisory Committee (that advises Government on the continued detention of persons found 'guilty but insane') and, in order to comply with obligations under the European Convention on Human Rights, will act independently of the Executive, in this case, the Minister for Justice, Equality and Law Reform or the Government.[30]

Practice of national authorities

First Annual Report of the Inspector of Prisons and Places of Detention:

The *First Annual Report of the Inspector of Prisons and Places of Detention* comprised one general report and four separate reports on Mountjoy, Cloverhill, Limerick and Portlaoise prisons. The office is established on a non-statutory basis and has been held by a retired High Court judge, Mr. Justice Dermot Kinlen, since April 2002.

The General Report criticised the lack of funding or budgetary arrangements for the Inspector's office – funding came only from the Irish Prison Service. The Inspector could not therefore "spend a penny piece or employ anyone without the consent of the Prison Authorities."[31] The Report called for an independent budget to be provided each year by the Minister for Justice, Equality and Law Reform in consultation with the Minister for Finance. Mr Justice Dermot Kinlen also said that he was concerned at the large costs of running the Prison Service and how little of the budget reaches the prisoners' needs.

The Inspector noted that the Irish Prison Service and Department of Justice, Equality and Law Reform were:

> "…slow to provide any information to the Inspectorate. The fact that they wanted me to take six months off to read myself into the job and wanted me to go on a tour of Western Australia and possibly New Zealand shows their peculiar mindset. While many interpretations will be put on these offers, I took them as meaning that I was not to do any real work."[32]

The Inspector also described a meeting with the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), where he spent over an hour with the Committee explaining that while they were promised that the Inspectorate would exist, in fact it was "a facade". As a matter of urgency, the Inspector requested the Minister to establish as soon as possible the Inspectorate as a statutory and independent unit without waiting for the anticipated Prisons Bill.[33]

The Inspector found that the condition of the buildings of Mountjoy, Portlaoise and a small part of Limerick Prison were very poor. The sanitary facilities were appalling, and for prisoners and staff to have to live and work in such conditions in this age was unacceptable.

[30] *Ibid.*
[31] First Annual Report of the Inspector of Prisons and Places of Detention, Section 4. Mr. Justice Kinlen adds, in block capitals, "I WAS APPALLED."
[32] *Ibid.*
[33] *Ibid,* Section 5

These old prisons needed to be knocked and rebuilt or replaced elsewhere. He stated, with regard to Mountjoy Prison, that the main building needed to be replaced, not refurbished, as a matter of urgency. Similarly, he recommended that in view of the age and condition of Portlaoise Prison, consideration should be given to rebuilding the whole premises.[34]

The Inspector identified homelessness as a major problem for many prisoners on discharge from prison. He remarked that it says a lot for our caring society when people prefer to remain in custody rather than be released into the community where they have no homes or shelters to return to (last Christmas, eleven women refused to leave prison because they had "nowhere to go".)[35]

In Ireland there is one criminal psychiatric hospital, the Central Mental Hospital, Dundrum (discussed above in relation to the CPT Report), which is inadequate.

The Inspector quoted Dr. Harry Kennedy, Medical Director of the Central Mental Hospital, who pointed out certain conflicts between the Criminal Law (Insanity) Bill 2002 (see below under "Reasons for concern") and the Mental Health Act 2001. Dr. Kennedy also stated that the introduction of 'designated units' within the prison system was unworkable and unacceptable. Prisons could not function as hospitals as the prison environment is inherently anti-therapeutic.

Dr. Kennedy described how one of the oddities of the Irish jurisdiction was that judges were 'victims' of this system as well. It was not uncommon for him to see in his clinics people who had been remanded into custody with a request from the judge that they may receive care and treatment because the judge did not have the power to find treatment for these people in any other way. Judges also do not have the power to seek a hospital bed for someone. It is a very simple matter in other jurisdictions to draft laws that allow judges to obtain opinions and to organise a psychiatric disposal when it is obvious to everyone that that is the right thing to do. Dr. Kennedy noted that such powers could be introduced into a forthcoming bill. He pointed out that they were in the Green Paper on Mental Health (1992), as well as the White Paper on Mental Health (1995), but they were dropped from the Mental Health Act 2001.[36]

The Inspector recommended that the Department of Health and Children take responsibility for prisoners with psychiatric illnesses, personality disorders and other disabilities, in order to ensure that the services and facilities which are available to the public in psychiatric hospitals or units are also available to prisoners.

Reasons for concern

In relation to the most recent Report of the CPT a number of recurring themes are confirmed in relation to Ireland and there appears to be a lack of urgency on the part of the state about taking remedial action to address these deficiencies.

In 1993 the CPT was informed that the drafting of new prison rules was "at an advanced stage" with a view to having them in force in the latter half of 1995.[37] Draft rules were published (as an appendix to a Department of Justice document, *The Management of Offenders*) in 1994. In 1998 the CPT were informed that the new rules would probably enter into force in early 1999. In 2002 the Committee were told that the process of introducing new rules was expected "to bear fruit shortly". According to Dr. Ian O'Donnell of the Institute of

[34] *Ibid,* Section 9 - Conclusions
[35] *Ibid,* Section 6 – A Matter of Grave Concern
[36] *Ibid,* Section 8 – Mental Health
[37] This was in belated recognition of the fact that the 1947 Prison Rules were virtually obsolete.

Criminology, UCD: "The fact that they remain an aspiration is slothful progress by any standard".[38]

On the question of detention in police facilities, it should be acknowledged that proposals to replace the Garda Siochana Complaints Board (which has been severely criticised by, among others, the CPT) with a Garda Inspectorate with powers akin to that of a Police Ombudsman are to be brought forward early in 2004 in a Garda Siochana Bill. It remains to be seen whether this body will have the requisite degree of autonomy and independence and, already, concerns have been expressed in this regard by the Irish Human Rights Commission in its commentary on the Heads of Bill published in 2003.[39]

To appreciate fully the importance of and the need for the Criminal Law (Insanity) Bill, 2002 it should be noted that most of the legislative provisions dealing with criminal insanity date back to the 19th century and some to the early-1800s. However, there are significant shortcomings in the proposed legislation. While the Bill deals with those who are found unfit for trial or not guilty by reason of mental disorder, it will not introduce any power for judges to deal with the mental disorder of a convicted person at sentencing stage. Reform of this area of law was suggested in the White Paper on Mental Health in 1995, and Ireland has been criticised by the European Committee for the Prevention of Torture for failing to introduce such a change. Reform of the law concerning transfers from prisons to mental hospitals could also have been included in the Bill. The Bill imports some of the features of the new legislation concerning civil commitment in the Mental Health Act 2001, and applies them to criminal procedures, but it fails to adopt some of the more progressive features of that Act. For example, those detained under the 2001 Act will have a specific right to information concerning the reason for their detention and the fact that it will be reviewed by a tribunal, whereas there is no equivalent right for those detained after criminal charges. Similarly, the 2001 Act requires that the best interests of the patient be paramount at all times but this principle has not been imported into the 2002 Bill. The retention of the archaic term 'insanity' in the Bill is surprising as it could quite easily have been replaced with a more modern term such as 'mental disorder', which applies in Canada, or 'mental impairment', the term used in Australia. It is ironic that the pejorative connotations of the old 'guilty but insane' verdict have been only partly removed - the person will now be referred to as 'not guilty' but will continue to be classified as 'insane'. [40]

Article 5. Prohibition of slavery and forced labor

International case law and concluding observations of international organs

On 18 and 19 June 2003, Mr Colm O'Gorman, Director of the *One In Four* organisation for survivors and victims of sexual abuse[41], highlighted forced child labour in Ireland's industrial schools and the sexual exploitation of Irish children to the United Nations Working Group on Contemporary Forms of Slavery in Geneva.[42] He stated that the Holy See and the Irish Republic failed to protect children from abuse under the UN Declaration on the Rights of the Child and the UN Convention on the Rights of the Child. He found it difficult to understand

[38] O'Donnell, "Preventing the Ill-Treatment of Detainees" (2003) Vol.13, No.2, *Irish Criminal Law Journal*, pp 2-3

[39] *Observations on the Scheme of the Garda Siochana bill 2003*, 10th November 2003, Irish Human Rights Commission – available at www. ihrc.ie/

[40] Dr. Darius Whelan, *The Irish Times,* April 2003. See further: *Observations on the Criminal Law (Insanity) Bill 2002*, Irish Human Rights Commission, October 2003.

[41] See generally: www.oneinfour.org/

[42] E/CN.4/Sub.2/2003/31 28th Session, Geneva 16-20 June 2003
Mr. O'Gorman's invitation to the hearing arose from an interview he did with Fergal Keane on the BBC Radio 4 programme 'Taking A Stand', broadcast earlier this year.

"the absence of any acknowledgement from the Holy See of the experiences of children held within its institutions in Ireland and exploited through forced labour."

He argued that work, not education, was the lot of most children in Ireland's industrial schools and the effects of child sexual abuse can leave individuals enslaved to their traumatic experience long after childhood. As such they were entitled to have their rights vindicated under Article 39 of the UN Convention on the Rights of the Child.[43] The Irish experience was shaped largely by two States Parties to the UN Convention - namely the Republic of Ireland and the Holy See. He pointed out that from the foundation of the Irish State the Roman Catholic Church had a primary role in providing social care, education, the formation of legislation and social policy, and was in reality as powerful politically as the Government. He also said that the response of Catholic dioceses (under the direct governance of the Holy See) has been one that sought at all costs to protect the institution rather than honour its commitments under the UN's Declaration and Convention on the Rights of the Child.

He stated that: "…the Holy See has in recent years acknowledged its pain and distress at the suffering of children sexually abused and exploited by its priests but it has thus far failed to acknowledge the economic exploitation of children perpetrated by sections of the Catholic Church itself." The Holy See failed to live up to its responsibilities in the case of economic exploitation and forced labour involving children in institutions run by religious orders, but also continued to fail such children, now adults, under article 39 of the UN Convention on the Rights of the Child

He believed that human rights conventions should not just protect against future abuses but also respond to past failures and abuses. He also contended that the rights of abused children, now adults, are ignored and that any States Parties to the Convention had an obligation to vindicate abused children.[44] He recommended that the Working Group "urgently request that the Holy See put in place procedures that are enforceable and applied under its own Canon Law which require the immediate reporting of all suspicions or allegations of child abuse or exploitation perpetrated in institutions, organisations or bodies under its direct governance."[45]

Reasons for concern

In anticipation of increased number of migrant workers from new EU countries after May 2004 the Irish Government severely curtailed the work permits scheme for migrant workers. The scheme remains based on the principle that a permit attaches to an employer and not an employee and has the effect of restricting the employment choice of migrant workers. This aspect of the scheme has recently been criticised as approximating to a form of bonded servitude by the former UN High Commissioner for Human Rights, Mary Robinson, at a conference of the Immigration Council of Ireland organised in December 2003. This view was rejected by the Tanaiste (Deputy Prime Minister) who has ministerial responsibility for the scheme.

[43] Article 39 states; "States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child."

[44] *The Irish Times,* 18 June 2003; Mr. O'Gorman's second report on the sexual exploitation of Irish children was presented to the Working Group on 19 June 2003. He recommended that the Group "urgently request that the Holy See put in place procedures that are enforceable and applied under its own Canon Law which require the immediate reporting of all suspicions or allegations of child abuse or exploitation perpetrated in institutions, organisations or bodies under its direct governance."

[45] The request comes in the context of newspaper revelations in February 2003 that 24 of Ireland's 26 Catholic dioceses had taken out insurance between 1987 and 1990 to cover them in the event of claims arising from clerical child sex abuse. The further discovery that they had been covered for claims up to £200,000 (€253,947) per case, including legal costs, suggests that not only were they aware of the problem, but that they were also aware then of the potentially devastating effects of this abuse on a victim's life. (*The Irish Times,* 5, 6 February, and 14 June 2003)

CHAPTER II : FREEDOMS

Article 6. Right to liberty and security

National legislation, regulation and case law

Habeas Corpus:

On 9 May 2003, the High Court found that the detention of a Nigerian asylum-seeker, and the decision of the Minister for Justice, Equality & Law Reform to refuse her application for residency, was illegal. Ms Bola Ojo was the first parent of an Irish-born child to challenge a deportation since the Supreme Court ruled, on January 23rd last, that non-Irish parents of an Irish-born child have no automatic right to live in Ireland (that decision will be discussed under Article 7). She was arrested on January 27th last, after attending Waterford Garda station to register a new address. She was sent, with her six-week-old son, to the Women's Prison in Mountjoy. She challenged her detention on the basis that there were new circumstances - the birth of the child and the residency application - that superceded the original deportation order. The Court found that these needed to be considered before there could be a deportation, and her detention was illegal.

Ms. Ojo argued, and the Court accepted, that her detention was unlawful under Article 40.4 of the Constitution, which governs habeas corpus proceedings.[46] Ms. Ojo could only be legally detained if there was an immediate intention to deport her, and this could not exist as her residency application had not been decided upon.[47]

The High Court ordered the release of an Algerian asylum-seeker who was arrested on the day he was due to marry a Garda Sergeant. The decision followed a brief *ex-parte habeas corpus* application seeking an inquiry into the holding of Mr Mohammed Laihem in Limerick prison under Article 40.4 of the Constitution, which was not contested by the State.[48]

Practice of national authorities

On 9 December 2002, the Minister for Justice, Equality and Law Reform announced the closure of Shanganagh Castle, the only open detention centre for young offenders in the State, as part of his Department's efforts to meet its 2003 Budget Estimates. There was no proposal for a replacement facility. Shanganagh Castle had provided an essential and appropriate platform for rehabilitative and educational approaches for convicted 16-to-21-year-olds, and

[46] Article 40.4.2 reads; "Upon complaint being made by or on behalf of any person to the High Court or any judge thereof alleging that such person is being unlawfully detained, the High Court and any and every judge thereof to whom such complaint is made shall forthwith enquire into the said complaint and may order the person in whose custody such person is detained to produce the body of such person before the High Court on a named day and to certify in writing the grounds of his detention, and the High Court shall, upon the body of such person being produced before that Court and after giving the person in whose custody he is detained an opportunity of justifying the detention, order the release of such person from such detention unless satisfied that he is being detained in accordance with the law."

[47] The judge paid a lot of attention to the manner in which the Minister's decision to refuse residency had been made. She said the Minister had clearly considered a February 5th submission from Mr Charles O'Connell, assistant principal in the immigration division of the department. This submission said that there were habeas corpus proceedings in train, and "the successful defence or otherwise of the habeas corpus proceedings may rely to an extent on the Minister affirming or revoking the original deportation orders in light of the new information concerning Ms Ojo's Irish-born child." Ms. Justice Finlay Geoghegan noted that "There is an inescapable conclusion to be drawn from the content of the submission of Mr O'Connell ... that what triggered the submission was the conditional order made by this court at approximately 4.30 p.m. on 5th February." While not concluding that the Minister was influenced by the habeas corpus application in making his decision, the judge said that the timing and context were important.

[48] *The Irish Times,* 4 February 2003

its closure has been viewed as running counter to the spirit of the (as yet to be fully implemented) Children Act, 2001, which signalled a renewed faith in rehabilitation and early intervention as principal elements in the reform of the juvenile justice system. Close to 20 per cent of all Irish prisoners are under 21 - an extraordinary statistic by European standards, where frequently less than 5 per cent of prisoners are so young.[49]

The Inspector of Prisons and Places of Detention, in his first annual report, described the closure as a "retrograde step."[50] This was the only open centre available to the young offenders in St. Patrick's Institution and by its closure the offenders have no goals for which to achieve.[51] He asks, when one compares the facilities in St. Patrick's which has absolutely no open green spaces with that of Shanganagh, one wonders which centre should be closed? He describes Shanganagh Castle as the "jewel in the crown" of the prison system.[52]

The Law Reform Commission published a *Report on Penalties for Minor Offences* in March 2003.[53] The Commission recommended that the restriction on a citizen's liberty represented by a term of imprisonment of 6 to 12 months should only be visited on a person following a jury trial. They therefore exhorted District Court judges to reconceptualise the sentencing maximum for minor offences.[54] The Commission adhered to its recommendation in the 2002 Consultation Paper that a District Court judge should be required to give concise written reasons for any decision to impose a prison sentence rather than a non-custodial sentence.[55] In relation to fines, the Commission further recommended that effect be given in this jurisdiction to the principle of equality of impact so that the amount of a fine may be increased for more affluent offenders as well as decreased for those offenders of more limited means. Additionally, in relation to the fines which may be imposed for a minor offence, the Commission believed that there were solid grounds, most notably the fact that a corporation cannot be incarcerated, for saying that it would be constitutional to increase the maximum fine in the case of a corporation to a figure above that fixed for human beings.[56]

[49] Dr. Paul O'Mahony, *The Irish Times,* 9 December 2002

[50] First Annual Report of the Inspector of Prisons and Places of Detention, Section 9 (Conclusions)

[51] The judgement in *DG v. Ireland* ought to be recalled in this context, where the European Court of Human Rights found Ireland to be in breach of Article 5 (1) (d) ECHR. The case involved a minor who was detained in St. Patrick's Institution. The Court found that "in the context of the detention of minors, the words "educational supervision" [contained in Article 5 (1) (d) of the Convention] must not be equated rigidly with notions of classroom teaching… supervision must embrace many aspects of the exercise, by the local authority, of parental rights… the Court does not consider, and indeed, it does not appear to be argued by the Government, that St. Patrick's itself constituted "educational supervision". As noted above, it was a penal institution and the applicant was subjected to its disciplinary regime… the High Court considered St. Patrick's to be the best of four inappropriate options and that, accordingly, his detention there should be temporary." (Application No. 39474/98, paragraphs 80 and 81).

[52] On 12 March 2003, it was reported that the Department of Justice had made a submission to Dun Laoghaire Rathdown County Council to rezone the former Shanganagh Castle prison and its surrounding 24 acres at Shankill in south County Dublin (*The Irish Times)*.

[53] LRC 69 – 2003.

Ireland has one of the lowest reported crime rates, yet sends more people to prison every year than most other European countries. However, the actual detention rate - that is, the number of people in prison at any one time - is moderate in comparison to international standards. The explanation for this apparent paradox is two-fold. The first reason is the practice in Ireland of early release. The other, and the subject of the Commission's Report, is the heavy use of short sentences (arguably the sort of sentences which could be replaced by a stiff fine). In 1997, over 70% of all Irish sentences were for less than one year and over 50% were for under six months; quoted in the Consultation Paper on Penalties for Minor Offences (LRC-CP 18-2002).

[54] Paragraphs 2.31 and 2.32; a majority of the Commission was not able to recommend legislation giving effect to this principle. See paragraphs 2.35 and 2.36 for the recommended legislation of a minority of the Commission.

[55] Paragraph 3.17; see also Law Reform Commission, Consultation Paper on Penalties for Minor Offences 2002, paragraphs 6.29 and 9.3

[56] Paragraph 6.32. The Commission duly recommended that in the case of a corporation, the maximum fine possible should be increased by a factor of three times that applicable to a human person.

Reasons for concern

At the time of writing there is an escalating dispute between the Prison Officers' Association (POA) and the Prison Service / Department of Justice, Equality & Law Reform on the issue of overtime pay. This may lead to the closure of certain prison facilities and is giving rise to speculation that certain functions currently carried out by Prison Officers may be out-sourced or 'privatised'.

Article 7. Respect for private and family life

National legislation, regulation and case law

'Non-national' families with Irish-born children

The landmark Supreme Court decision in *Lobe & Osayande v. Minister for Justice, Equality and Law Reform,*[57] delivered on 23 January 2003, held that there is no automatic right of residence in the state for the parents and siblings of a child who is entitled to Irish citizenship by virtue of being born on Irish territory. Article 41.1 of the Constitution assigns to the family an exceptionally important status and role in society and in the "welfare of the Nation and the State." The Court sought to balance this status against the prerogative and sovereign power of the State to control the entry into and residence in the state of aliens.

The Court distinguished the various facts in this case from its 1990 decision in *Fajujonu v. Minster for Justice and Another,*[58] where it had upheld the rights of the non-national parents of three Irish-born children to continue to reside in the state. In *Fajujonu,* Finlay C.J. had stated:

> "I have come to the conclusion that where, as occurs in this case, an alien has in fact resided for an appreciable time in the State and has become a member of a family unit within the State containing children who are citizens, that there can be no question but that those children, as citizens, have got a constitutional right to the company, care and parentage of their parents within a family unit. I am also satisfied that *prima facie* and subject to the exigencies of the common good that that is a right which these citizens would be entitled to exercise within the State."[59]

The current Supreme Court distinguished the *Lobe* case from *Fajujonu* by pointing out that Finlay C.J. appeared to have attached significance to the fact that the plaintiffs had resided for an appreciable time in Ireland. In addition to the 'appreciable time' factor, there were other specific circumstances to which the court thought the Minister should have regard in *Fajujonu*, together with the constitutional rights of the family and any other matters relevant to their continued stay in the State which might come to the Minister's attention: the fact that

[57] [2003] IESC 1 (23 January 2003)
[58] [1990] 2 IR 151
[59] p.162 The Chief Justice continued; "Having reached these conclusions, the question then must arise as to whether the State acting through the Minister for Justice pursuant to the powers contained in the Aliens Act 1935, can under any circumstances force the family so constituted as I have described, that is the family concerned in this case, to leave the State. I am satisfied that he can, but only if, after due and proper consideration, he is satisfied that the interests of the common good and the protection of the State and its society justify an interference with what is clearly a constitutional right." He was also of the view that the reason which would justify the removal of the family from the State would have to be "a grave and substantial reason associated with the common good." The Minister did not invite the Court to overrule the decision in *Fajujonu* (*Lobe,* paragraphs 45 and 529). Accordingly, the Court held that the passages cited did not form part of the *ratio decidendi* of the case (paragraph 46).

the family had made its 'home and residence' in Ireland, and the fact that the first plaintiff had been offered employment.[60] None of these factors were present in *Lobe.*

The Chief Justice also distinguished *Lobe* from *Fajujonu* by pointing to the factual and statutory context in which the Minister is required to decide whether a deportation order should be made, which has altered radically since that case was decided. In particular, the Executive (Government) are entitled to take the view that the orderly system in place for dealing with immigration and asylum applications should not be undermined by persons seeking to take advantage of the period of time which necessarily elapses between their arrival in the State and the complete processing of their applications for asylum by relying on the birth of a child to one of them during that period as a reason for permitting them to reside in the State indefinitely.[61]

Fennelly J., (dissenting) stated that he could not discover: "…any legal reasoning in the passage that would suggest that the constitutional rights of an Irish-born child depend on the length of time during which his parents have resided in the State. It seems to me, in fact, that there could not be such a principle. Firstly, it is rightly conceded that the child in each of the present cases is in fact a citizen. It follows that the child enjoys the constitutional rights, as a member of its family, which are guaranteed by the Constitution and described in the case law… I would reject the argument based on the number of children in the family for similar reasons". The present question was whether the duration of residence of the Fajujonus in the State or the fact that they had three children constituted part of the *ratio decedendi* of that case so as to distinguish it from the present appeals. To be truly distinguishable, he argued, it must be shown that the principles it lays down - the constitutional status of the child as an Irish citizen, the right of the parents to elect Irish residence for him, the need to show grave and sufficient reason based on the common good - can be set aside for the purposes of this case.

When analysing the reasoning of *Fajujonu*, it is important to remember that the Supreme Court did not decide the issue of whether the Fajujonu family should be deported. It made an order permitting the plaintiffs to apply to the High Court (to include any appropriate application for amendment of pleadings) if they wished to challenge any further decision of the Minister granting or refusing a permit to remain in the State. The criteria to be applied by the Minister in making any such decision were laid down in the judgments and were that there would have to be *"grave and substantial reason"* (Finlay C.J.) or *"predominant and overwhelming"* reason (Walsh J) to justify a negative decision. That is the principle to be found in those judgments."[62]

The jurisprudential significance of the majority decision in *Lobe* lies in the fact that constitutionally protected family rights gave way to an Executive-centred view of process integrity in the context of asylum determinations. The decision was welcomed by Government on the basis that the Irish-born child route to residence was perceived as being abused by a significant number of immigrants. At the time of the decision, the Minister for Justice, Equality & Law Reform indicated that it would not lead to mass deportations but

[60] Paragraph 100. Keane C.J. thus stated that the 1990 case was an authority only for the proposition that, in the particular circumstances that arose in that case and which might, of course, similarly arise in other cases, the Minister was obliged to give consideration to whether, in the light of those circumstances, there were grave and substantial reasons associated with the common good which nonetheless required the deportation of the non-national members of the family, having as its inevitable consequence, either the departure of the entire family from the State or its break-up by the departure of the non-nationals alone with the consequent infringement of the constitutional rights of the Irish citizens who were members of the family.
[61] Paragraph 103
[62] Paragraphs 535 - 540

many of those affected by the decision are now the subject of deportation proceedings (this is discussed later under Article 19).[63]

Adoption:

The Minister of State for Children's Affairs, Brian Lenihan, TD, began a consultation process this year with a view to drafting new adoption legislation, including legislative proposals to ratify the 1993 Hague Convention on the Protection of Children and Co-operation in Respect of Inter-Country Adoption. The key issue in the proposed bill is that of access to records and making contact with birth parents or children.[64] The proposals read that "an adopted person aged 18 years and over has a right to and shall on application therefore be granted a copy of his/her original birth certificate." A birth parent will "have a right to and will on application be granted a copy of the adopted person's adoption certificate as soon as the adopted person is 18 years of age."[65] Adopted persons and birth parents will have the right to access information records, including personal information about themselves, and all other information on record with the exception of information which might identify a third party. An administrative mechanism for protecting the privacy of adoptive parents and birth parents who do not wish to be associated with or contacted by the other party, known as the National Contact Veto Register, is proposed. A Voluntary Contact Register containing the name of every person wishing to make voluntary contact with a person from whom he or she has been separated as a consequence of adoption is also proposed.

Other proposals for reform of the law in this area proved extremely controversial but the Minister indicated in October 2003 that he would take the concerns expressed on board and changed the Heads of Bill accordingly.[66]

Practice of national authorities

Mr. Joe Costello, T.D. (Labour Party Spokesperson on Justice) made a formal complaint to the Dail Committee on Procedures and Privileges in April 2003 following an incident whereby letters delivered by hand to Leinster House by a Garda to members of the Oireachtas, detailing human rights abuses in China against a *Falun Gong* member and her eight-month-old daughter, were intercepted, opened and read by An Garda Siochana before being delivered.[67]

[63] For a detailed analysis of the Lobe & Osayande case see: O'Connell & Smyth, "Citizenship and the Irish Constitution", in Harvey & Fraser (eds), *Sanctuary in Ireland* (Institute of Public Administration, Dublin , 2004) – forthcoming publication at time of writing.

[64] Legislative Proposals on Adoption Information, Post Adoption Contact and Associated Issues Bill (Department of Health and Children, 2003)

[65] Both rights are subject to exceptional circumstances, including situations where there are reasonable grounds for believing that release of the certificate in question would place another party at risk of serious harm.

[66] The consultation process outlined above had been described as flawed. In addition to its failure to address the issue of exclusively focusing on marital families under Article 41of the Irish Constitution, and the rights of unmarried fathers examined ten years ago by the European Court of Human Rights in the *Keegan* case, it failed to address the competing rights involved, i.e. the right to privacy against the right to information, a debate which in the international context has evolved to the areas of sperm and gamete donation; the definition of personal information excludes shared information; there is no provision for updating non-identifying information to take account of any late-onset illness; the Bill was supposed to be based upon reciprocity, but the proposals allowed the natural father to access information about his child, but the child had no corresponding right to access information about him; the proposed legislation also distinguished between birth certificates and other information on file which could identify a third party, and barred releasing the latter. In relation to birth certificates, standard practice until recently involved writing only the single mother's name on to the birth certificate. The result would have been general disclosure of the identities of all natural mothers, who were given guarantees of confidentiality, yet not the identities of most natural fathers, who tended not to be involved in the process and so were never given such guarantees of secrecy.

[67] The Irish Times, 18th April, 2003

Reasons for concern

The rather narrow definition of the family based on marriage between persons of the opposite sex (under Article 41 of the Irish Constitution) may come into sharper focus with the coming into force of the European Convention on Human Rights Act, 2003. Although the ECHR is being incorporated at a sub-constitutional level, conflicts between the Irish Constitution and the ECHR on the question of family rights may become more apparent in the context of domestic legal proceedings before the Irish courts. Equally, the privacy rights developed under the ECHR may go some way towards developing Irish constitutional jurisprudence on the question of privacy where less conflict would appear to exist between Irish and European standards. Much will depend on how the judiciary use the ECHR Act in the context of constitutional litigation. Strong reservations have, however, been expressed about the model of incorporation used in relation to the ECHR so it remains to be seen what impact, if any, the Act will have[68].

Article 8. Protection of personal data

National legislation, regulation and case law

Traffic Data Retention:

The Department of Justice, Equality and Law Reform's Telecommunications (Retention of Data) Bill would require telecommunications operators to store traffic information about fax, mobile and phone calls, and email and internet usage for three years, longer than any other EU state.[69] However, there is as yet no published draft of the Bill. The Department's proposals, which are currently in effect, have taken the form of Directions made under the Postal and Telecommunications Services Act, 1983 by the Minister for Public Enterprise in April 2002. The Direction was designed as a stopgap measure to retain data for criminal investigations until primary legislation to mandate retention could be brought in. It requires licensed operators to retain existing traffic data and future traffic data for not less than 3 years after the date of their generation.

In January, the Data Protection Commissioner, Mr. Joe Meade, threatened for a third time to take the Government to the High Court for a judicial review of the Cabinet direction. Mr. Meade stated that "I am greatly concerned that the Minister should seek to effect a significant derogation from the rights of data subjects (citizens) merely by way of an administrative direction issued by the Minister. I note with concern that it is intended that this ministerial direction should remain confidential and secret from data subjects." Mr. Meade obtained legal advice that the direction was "in breach of Article 15.2.1 of the Constitution", lacked "the character of law" and was "in breach of the principles of Community law."[70] The Direction has made Ireland the only western democracy with a mandatory data retention regime without a clear legislative basis. The regime has been in place for a considerable period of time without meaningful parliamentary or judicial review.

In response to a questionnaire from the Council of the European Union, from the General Secretariat to the Multidisciplinary Group on Organized Crime, the Government stated that "primary legislation is being prepared which will require licensed operators to retain

[68] See, for example, *Submission on the European Convention on Human Rights Bill,2001*, Irish Human Rights Commission, June 2002. This submission was made to the Joint Oireachtas Committee on Justice, Equality, Defence & Women's Rights and subsequently published by the Commission.

[69] The Department's proposals took the form of Directions made under the Postal and Telecommunications Services Act 1983 by the Minister for Public Enterprise in April 2002. The Directions require licensed operators to retain existing traffic data and future traffic data for not less than 3 years after the date of their generation.

[70] Karlin Lillington, *The Irish Times,* 23 June 2003.

information concerning the use made of telecommunications services provided by them. It is expected that traffic data in the primary legislation will be defined in the same manner as it has been in the Directions.

Traffic data will mean any data processed by the licensed operator in connection with transmitting or receiving a telecommunication message on a telecommunications network or charging for it and includes, in relation to any message, data concerning its routing, duration or time, the location of the sender's or recipient's terminal equipment; the network on which the message originates or terminates, and the beginning, end or duration of its connection to the network. The proposed primary legislation on the retention of traffic data will provide for compliance with any request from the police (Garda Síochána) or the Defence Forces for disclosure of data, in the interests of the prevention and investigation of serious crime, in the interests of national security and in the discharge by Ireland of its international obligations relating to terrorism."

The Government outlined the existing provisions, stating that there is a provision in law for the disclosure to the police (Garda Síochána) and the Defence Forces by licensed operators providing telecommunications services of information concerning the use made by any person of those services (the Postal and Telecommunications Act, 1983 as amended by the Interception of Postal Packets and Telecommunication Messages (Regulations) Act, 1993). This provision requires that such a request should be submitted in writing by a Chief Superintendent of the police (Garda Síochána) or a Colonel of the Defence Forces. When asked whether this procedure had proven to be efficient and effective, the government responded "yes". When asked whether any reports had been received from the law enforcement authorities indicating an obstruction of their work due to the non-existence of appropriate legal instruments concerning traffic data retention, the government answered "no".[71]

Data protection:

The Data Protection (Amendment) Act, 2003 came into force on 1 July 2003.[72] It will amend the prior applicable law in this area - the Data Protection Act, 1988[73] – and constitutes an additional measure to the provisions of the European Communities (Data Protection) Regulations, 2001 which took effect in April 2002. The Act amends the rights for data subjects, responsibilities for data controllers, rules governing the registration process for data controllers and powers and functions for the Data Protection Commissioner, Mr. Joe Meade, who will be able to conduct 'dawn raids' and privacy audits of businesses and organisations to ensure compliance. Under its terms, the law extends to manual as well as computer files.

Practice of national authorities

The *Annual Report of the Data Protection Commissioner*, published on 30 April 2003, describes a number of relevant case studies that arose in the previous year. Four cases are briefly outlined, in the areas of security services and police, employers, insurance companies, and medical or care staff:[74]

[71] Council doc. 11490/1/02 CRIMORG 67 TELECOM 4 REV 1

[72] Number 6 of 2003. Section 16 of the Act, relating to registration, will take effect following a consultation process. Section 4 (13) will not take effect pending a review; a section that will allow employers to vet information through An Garda Siochana will not come into force until a review of the Garda's vetting unit is complete.

[73] Section 9 of the Data Protection Act 1988 established the office of the Data Protection Commissioner.

[74] The Report contains eleven case studies. Other cases examined involved; the recording of telephone conversations by financial institutions; data protection in the telemarketing area; the relationship between the Garda and telecommunications companies; unauthorised disclosure and informed consent; disclosure of customer data to a third party company without consent; disclosure of data between government departments; inadequate protection of bank account details; and inappropriate use of the Personal Public Service Number (PPSN).

(a) The Commissioner was contacted by a person who believed that the Garda were holding data about her on the PULSE system which she believed was incorrect. She requested, under Section 4 of the Act, to view the relevant information, but she did not believe that her request had been fully complied with. Upon investigation, the Garda stated that a search had been carried out on the PULSE database, and it had revealed certain information regarding the complainant. The information was deemed inappropriate, and subsequently deleted. Under the terms of the Act, any personal data on the system on the date of request must be supplied; under Section 4(5) it is not permissible to delete or edit data following receipt of an access request. An Garda Siochana ought to have furnished the relevant data, and explained that upon examination, they had found the information to be inappropriate in accordance with Section 2 of the Act, which requires that all data be accurate and up to date. Information should only be recorded if it is of operational significance.

(b) A number of taxi drivers operating in Dublin Airport complained that *Aer Rianta* (the state body that runs Irish airports), when issuing permits, required that an application form be filled out, which included a request for their Personal Public Service Number (PPSN). Only public bodies that are designated under the Social Welfare Acts can request the PPSN number. Indeed, it is an offence for a body not specified under the relevant Social Welfare legislation to request the number. This is to ensure that the number does not become "a national identity number by the back door."

(c) In relation to motor insurance, the Commissioner received a complaint of excessive questioning of applicants, in particular with regard to marital status, which the complainant believed was not germane to the assessment of insurance risk. The company argued that the question was necessary in order to provide evidence against possible claims of discrimination filed under the Equal Status Act 2000. The argument was rejected; the Commissioner, citing Section 2 (iii) of the Data Protection Act 1988 which states that data should be "adequate, relevant, and not excessive", held that questions on marital status were irrelevant to the question of motor insurance, and he requested that they be deleted.

(d) A pharmacist contacted the Commissioner in relation to correspondence he had received from the Director of Public Health, Eastern Health Authority, regarding a proposed scheme whereby pharmacists would assist in the surveillance of tuberculosis. The letter requested detailed information on patients using anti-tuberculosis therapy prescriptions. Sections 11 and 14 of the Infectious Diseases Regulations 1981 require that responsibility to notify the Health Authority rests only with doctors. They have the statutory authority to issue prescriptions, and are also bound to report any incidence of an infectious disease. The Department accepted that the reporting by pharmacists should cease.

Reasons for concern

The Irish Council for Civil Liberties (the Irish affiliate body to FIDH) has been extremely critical of the regime for traffic data retention[75]. It is also clear that the attitude of the Data Protection Commissioner in relation to the apparent lack of urgency with regard to the creation of a legislative basis for traffic data retention is hardening and, in the absence of such legislation, it is probable that this matter may well end up before the courts. It is regrettable that little attention has been paid to the question of privacy. This is all the more regrettable

[75] For all statements and publications of ICCL see generally: www.iccl.ie/

when it is considered that the issue received extensive treatment in an excellent report of the Law Reform Commission published in 1998.

Article 9. Right to marry and right to found a family

Practice of national authorities

The National Economic and Social Forum released a report, *Equality Policies for Lesbian, Gay and Bisexual People: Implementation Issues* in April 2003.[76] Under the Employment Equality Act, 1998 (Section 6(2)(d)), and the Equal Status Act, 2000 (Section 3(2)(d)), lesbian, gay and bisexual people are protected from discrimination in relation to employment and in relation to the provision of services. However, recognition of same-sex partnerships is not addressed by Irish legislation. The issue of partnership rights, or the right to nominate a partner comparable to that afforded spouses, was identified by the Forum as "the issue which faces the most substantial barriers to implementation."[77]

There are currently no published legislative proposals for the implementation of such rights although Senator David Norris is due to publish a bill in the near future.

The full report of the Interdepartmental Committee on Reform of Marriage Law is due for publication in 2004.

Reasons for concern

As stated previously (in relation to Article 7) the narrow definition of the family and marriage under Article 41 of the Irish Constitution is of ongoing concern. While those living in atypical family situations no longer experience the same level of discrimination under the law as was previously the case in Ireland there are real and ongoing discriminations in respect of gay and lesbian couples as well as transsexuals. While formal legal equality has been achieved in certain contexts (employment and service provisions) the constitutional guarantee of equality is weak by comparison to the manner in which other rights are guaranteed by the Constitution.

Article 10. Freedom of thought, conscience and religion

Practice of national authorities

The number of cases of religious discrimination in schools coming before the Office for the Director of Equality Investigations (ODEI) in 2003 is increasing. Cases are being taken by pupils, their parents and teachers who believe they should not be forced to support the religious ethos of the patron bodies of schools. The Equality Tribunal has ruled against a Dublin secondary school, which set a quota on the number of Muslim girls it would admit. Under the Equal Status Act, 2000 the school could not refuse admission on the basis of

[76] Forum Report No. 27; The focus of the Report was the recommendations of the Equality Authority's report entitled 'Implementing Equality for Lesbians, Gays & Bisexuals', published on 22 May 2002. The Authority began its investigation of the issue with the publication in June 2000 of 'Partnership Rights of Same-Sex Couples', written by Dr. John Mee and Kate Ronayne, which details the obligations and privileges of Irish law as it applies to spouses, and thus catalogues the extraordinary breadth of the denial of rights to same-sex couples who are prohibited from marrying in the areas of workplace benefits, property rights, taxation, social welfare, protection against domestic violence, rights of partners in emergency situations, funeral and other arrangements upon death, immigration, legal aid, law of evidence and marital privilege, and wrongful death of a dependent.

[77] Paragraph 4.20

religious belief.[78] All of the cases which have been taken under the Equal Status Act have been settled through the mediation process, and are therefore unreported.[79]
Reasons for concern

While the purposive understanding of the religious freedom guarantee contained in Article 44 of the Irish Constitution can be used to serve the interest of minority religions well there is an overarching Christian ethos evident in the Constitution (an, in particular, its Preamble) which may give rise to increasing difficulties in the context of growing multi-culturalism in Ireland. While this may call for later constitutional reform it may well be resolved by sensitive and evolutive development of constitutional jurisprudence by the judiciary.

Article 11. Freedom of expression and of information

International case law and concluding observations of international organs

In *Murphy v. Ireland*[80], the European Court of Human Rights held unanimously that Ireland had not violated Article 10 of the Convention. The case involved the ban on religious advertising under Section 10(3) of the Radio and Television Act, 1988.[81] The applicant was prevented from broadcasting a religious advertisement and claimed that this constituted an interference with his right to freedom of expression. The Government maintained that the prohibition sought to ensure respect for the religious doctrines and beliefs of others so that the aims of the impugned provision werejustified on the basis of public order and safety together with the protection of the rights and freedoms of others; there was therefore a legitimate aim which the applicant did not directly contest.

In deciding whether the interference was necessary in a democratic society, the Court stated that a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion. Moreover, there is no uniform European conception of the requirements of "the protection of the rights of others" in relation to attacks on their religious convictions. The case was thus distinguished from, for example,

[78] 'Religious belief' is one of the nine grounds on which discrimination is unlawful under the Employment Equality Act 1998 and the Equal Status Act 2000. The ODEI - Equality Tribunal has emphasised education in its three-year strategic plan – see further: www.odei.ie/.
The only decision of the ODEI involving religious belief occurred in the case of *Ahmed v. ICTS (UK) Ltd.* (DEC-E2003-023, 12 June 2003), whereby the complainant alleged he was asked discriminatory questions, on the grounds of religion and race, in an interview for a position of security guard at Dublin Airport. The Equality Officer found that the respondent did not discriminate against the complainant on the grounds of religion and race within the meaning of the relevant provisions of the Employment Equality Act, 1998.
[79] *The Irish Times,* 6 May 2003
The Education Act 1998 states, in section 15(2)(b), that the board of management shall be accountable to the patron for upholding the "characteristic spirit of the school as determined by the cultural, educational, moral, religious, social linguistic and spiritual values and traditions which inform and are characteristic of the objectives and conduct of the school". On 19 December 2002, a parent resigned from the board of management of a primary school in Clontarf, Dublin, because he could not "in conscience support the introduction of religious discrimination" into enrolment policies there. His resignation followed a decision by the board of management on 12 December 2002 to reject an admissions policy for the school proposed by its parents' representatives and to adopt one consistent with that laid down by the patron, Cardinal Connell. The parents' representatives argued that "the core issue is the admission of non-Catholics who live in Clontarf." Under the parents' representatives' policy, a non-Catholic living in Clontarf would be priority number one, whereas under the Cardinal/patron's policy a non-Catholic living in Clontarf would be priority number four. Muslim and Church of Ireland leaders have also spoken out in favour of allowing patron bodies to determine the moral and religious education of pupils.
[80] Application no. 44179/98 (10 July 2003). While the applicant alleged a breach of both Articles 9 and 10 of the Convention, the Irish government, and the Court, considered that the matter concerned "primarily the regulation of his means of expression and not his profession or manifestation of his religion." (paragraph 61).
[81] Section 10 (3); "No advertisement shall be broadcast which is directed towards any religious or political end or which has any relation to an industrial dispute."

Vgt Verein gegen Tierfabriken v. Switzerland,[82] a case involving a restriction on political advertising, a matter of public interest to which a reduced margin of appreciation applied. The Court considered whether the interference corresponded to a "pressing social need" and whether it was "proportionate to the legitimate aim pursued". The Court noted that the prohibition related only to advertising. It found that this limitation reflected a reasonable distinction made by the State between, on the one hand, purchasing broadcasting time to advertise and, on the other, coverage of religious matters through programming.[83]

Consequently, other than advertisements in the broadcast media, the applicant's religious expression was not otherwise restricted. Such considerations provided, in the Court's view, highly "relevant reasons" justifying the Irish State's prohibition of the broadcasting of religious advertisements.[84] Finally, there was no clear consensus between the Contracting States as to the manner in which to legislate for the broadcasting of religious advertisements. The Court concluded that there has been no violation of the Convention.

On 16 October 2003, the European Court of Human Rights heard the case of *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland.*[85] The applicants are complaining under Article 10 of the Convention about a disproportionately large award in a defamation case taken by a politician and about the lack of adequate and effective safeguards in Ireland against such awards. They base their case on the principles established in *Tolstoy Miloslavsky v. the United Kingdom.*[86] A decision of the Court is expected in the current year.

National legislation, regulation and case law

Freedom of Information

The Freedom of Information (Amendment) Act, 2003[87] was passed amid considerable public controversy in 2003[88]. When the Government announced its intention to review an aspect of the original legislation (Freedom of Information Act, 1997) it was thought that this review would be confined to the issue of releasing certain sensitive state papers on a rolling basis after five years. It transpired, however, that the Government intended to amend other aspects of the legislation in significant respects. The Information Commissioner (who also holds the office of Ombudsman) was not consulted about the proposed amendments and issued his own suggested amendments to the 1997 Act in February 2003 based on his experience of the operation of the legislation and relevant court decisions.

The main changes introduced in 2003 relate to cabinet papers, communications between Ministers, certification by Secretary-Generals of government departments that certain information is part of an ongoing deliberative process and therefore cannot be released, the imposition of up-front charges for freedom of information requests and applications for review and mandatory exemptions for documents related to international relations.

[82] No. 24699/94, ECHR 2001-VI
[83] Paragraph 74; the Court also noted that advertising tends to have a distinctly partial objective: it cannot be, and is not, therefore subject to the principle of impartiality, and the fact that advertising time is purchased would lean in favour of unbalanced usage by religious groups with larger resources and advertising.
[84] Paragraphs 74 and 75
[85] 55120/00
[86] 13 July 1995, Series A no. 323
[87] No.9 of 2003
[88] See, for example, the following opinion articles published in *The Irish Times* on February 15th and March 10th by Maeve McDonagh and Eithne Fitzgerald, respectively. For a thoroughgoing analysis of the changes to the Freedom of Information Act, 1997 introduced by the 2003 Act, see further: McGonagle, *Media Law* (2nd Edition) (Thomson Round Hall, 2003), pp 357-379.

Defamation law reform and establishment of statutory Press Council:

The *Report of the Legal Advisory Group on Defamation*, established by the Minister for Justice, Equality and Law Reform, was published in March 2003. The recommendations in the Report form the corpus of a draft Defamation Bill which will repeal the Defamation Act, 1961.[89] The process included a review of an existing Defamation Bill from December 2001. The Group recommended, *inter alia,* that a defence, to be known as "the defence of reasonable publication" should be provided for which would be available where a defendant could show that the publication in question was made in the course of, or for the purposes of, the discussion of some subject of public interest, the public discussion of which was for the public benefit (paragraphs 6 to 15). Juries should continue to have a role in assessing damages in the High Court. However, the parties to the proceedings should be able to make submissions to the court, and address the jury, concerning damages (paragraphs 16 to 18).

A Press Council should be established, on a statutory basis, which would have a number of functions, including the preparation of a Press Code of Conduct and the investigation of complaints in respect of alleged breaches of that Code (paragraphs 23 to 38). A new defence, to be known as "the defence of innocent publication" should be provided for. This would replace the common law defence of innocent dissemination and should not be confined to distributors only but should embrace a broader category of person, for example, printers and broadcasters (paragraphs 46 to 50).

While the many of the Group's proposals have been welcomed by the media, the establishment of the statutory Press Council in the draft Bill has met with significant opposition. The Council would comprise nine members, all of whom would be appointed by the Government. It is argued that such a body would interfere with editorial integrity and the right to freedom of expression.

Since the publication of the Report a major public conference was hosted by the Minister for Justice, Equality & Law Reform in December 2003 to advance discussion on anticipated reforms.

On 31 July 2003, the High Court rejected a claim by an English barrister, Sir Louis Blom-Cooper QC, that a booklet written by him could not give rise to a claim for defamation by two members of the so-called 'Birmingham Six'. Mr Justice O'Caoimh rejected arguments that Sir Louis was entitled under the Irish Constitution and the European Convention on Human Rights to express freely the statements, convictions, opinions and ideas in his booklet and, therefore, the publication could not give rise to a defamation action. Mr Justice O'Caoimh said the court must recognise that the Constitution gave recognition and expression both to freedom of expression and to the right to a person's good name. He was not satisfied that the correct approach was to say that the right to freedom of expression should be viewed as superior to the right to one's reputation.

The decision, in calling for a balance between the right to freedom of expression and the right of the individual to his good name, introduced into Irish law the 'flexible approach' that had been adopted by the House of Lords in the libel action by the former Taoiseach (Prime Minister) of Ireland, Albert Reynolds, against the Sunday Times.[90] This approach was

[89] Paragraphs 37-62

[90] *Reynolds v. Times Newspaper Limited and Others*, [1999] 3 WLR 1010 (28 October 1999).
The ten criteria are: the seriousness of the allegation; the nature of the information and the extent to which the subject-matter is a matter of public concern; the source of the information; the steps taken to verify the information; the status of the information - the allegation may have already been the subject of an investigation; the urgency of the matter. News is often a perishable commodity; whether comment was sought from the plaintiff (however, an approach to the plaintiff will not always be necessary); whether the article contained the gist of the

deemed by O'Caoimh J as a factor when weighing the conflicting rights, and as an element in achieving the desired balance. The case outlined ten criteria to be considered when deciding whether the press ought to be protected. The approach was considered necessary by the House of Lords in order to satisfy its obligations under the ECHR. The result of the decision is that where the defendant in a libel action has followed good practice in publishing material that is of sufficient public interest it will be afforded legal protection.[91]

Reasons for concern

The changes to the Freedom of Information Act remain a cause of acute concern (especially to the media) and it is expected that the impact of those changes will be assessed by the office of the Information Commissioner in the coming months. Opposition parties have committed themselves to reversing the changes if elected to office.

The issue of a Government-appointed statutory Press Council is likely to remain extremely controversial and it remains to be seen if the Minister for Justice, Equality & Law Reform will amend his proposals regarding the appointment of such a Council.

Article 12. Freedom of assembly and of association

The Report of the delegation from the European Committee on the Prevention of Torture, (examined above under Article 4), also drew attention to allegations of use of excessive force by the police during a demonstration in Dublin on 6 May 2002 and, more particularly, to claims, apparently supported by video footage, that persons who had already been brought under control were repeatedly struck with batons in a potentially dangerous manner (e.g. on the head and side of the neck).[92]

The Director of Public Prosecutions has directed that seven police officers face charges in relation to assault. The CPT states in its Report that it would like to be informed in due course of the results of the criminal and disciplinary proceedings relating to the policing of the 'Reclaim the Streets' demonstration on 6 May 2002 and of the outcome of any individual complaints of ill-treatment.

The Government was required to respond as regards the CPT's recommendations, having regard to Article 10 of the Convention. The response in relation to the demonstration highlighted above was that: "on the 6th May, 2002 a 'Reclaim the Streets' demonstration took place in Dublin City Centre. The demonstration caused complaints to be made to the Garda Síochána Complaints Board of alleged police brutality. Two investigations took place – a Garda investigation lead by an Assistant Garda Commissioner, and an investigation by the Garda Síochána Complaints Board, carried out on their behalf under a retired Assistant Garda Commissioner. A total of forty-six people made complaints in relation to the conduct of An Garda Síochána – twenty were made at Garda Stations, eighteen to the Garda Síochána Complaints Board and eight came to light in the course of inquiries by the investigation team established by the Commissioner. Seven members of An Garda Síochána have now been charged with breaches of Sections 2 and 3 of the Non-Fatal Offences Against the Person Act, 1997. Criminal proceedings in the charges against six of these Gardaí are still before the Courts. Summary charges against the seventh Garda were dismissed by the District Court on

plaintiff's side of the story; the tone of the article - it need not adopt allegations as statements of fact; and the circumstances of the publication, including the timing (Lord Nicholls of Birkenhead, Conclusion).

[91] For a discussion on the significance of this decision to the Irish law on defamation see: Michael Kealey, *The Irish Times*, August 7th 2003

[92] Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 May to 28 May 2002, Strasbourg, 18 September 2003, paragraph 13

25 June, 2003. The Committee will be advised of the outcome of the criminal proceedings and of the outcome of the complaints under investigation by the Garda Complaints Board in due course."

On 26 June 2003, the first Garda to go on trial over the events at the Reclaim the Streets rally in Dublin was cleared of assault. The Garda Siochana Complaints Board has been very critical regarding the non-cooperation of certain police officers with its investigation.

Article 13. Freedom of the arts and sciences

National legislation, regulation and case law

The Arts Act 2003, the first comprehensive piece of arts legislation in thirty years, came into force on 14 August 2003.[93] Arts is defined as any creative or interpretative expression (whether traditional or contemporary) in whatever form, and includes, in particular, visual arts, theatre, literature, music, dance, opera, film, circus and architecture, and includes any medium when used for those purposes. The Arts Council continues to be the principal state agency with responsibility for the promotion and development of the arts. Under Section 24(2), the Council is recognised as being independent from the government in the disposal of funds.[94] However, the Minister has an increased policy-making role in relation to the arts under Section 5 of the Act.

Practice of national authorities

In April 2003, Mr. John Kelleher took up the position of Official Censor of Films, succeeding Mr. Sheamus Smith, who had held the post since 1986.[95] The first film to be banned by the new censor, 'Spun', was subsequently passed by the Films Appeal Board.[96]

Reasons for concern

The system of film classification and related matters, although improved considerably since the 1970's as a matter of practice, requires a clearer and updated legislative basis.

Article 14. Right to education

International case law and concluding observations of international organs

The OECD survey, *Education at a Glance*, published on 16 September 2003, noted that the percentage of national income per capita being spent on each secondary level student in Ireland was the lowest of the twenty-seven countries surveyed. Overall spending on education remained at just 4.6 per cent of national income. At primary level, average class size was 25 pupils, compared to an OECD average of 22. However, Irish primary pupils received 915 hours of teaching a year, more than 100 above the EU average. Ireland has one of the fastest

[93] Number 24 of 2003; the Act repeals the Arts Acts, 1951 and 1973.
[94] The Minister for Arts, Sport and Tourism, Mr. John O'Donoghue, appointed the thirteen members of the Arts Council on the day the Act came into effect, 14 August 2003. The appointments were generally well received and include many high-profile members of the arts community.
[95] Mr. Kelleher was appointed by the Minister for Justice, Equality and Law Reform, Mr. Michael McDowell. Over his 16 years as Censor, Mr. Smith had overseen a more relaxed attitude to State censorship of film. A much smaller number of films were refused an exhibition certificate by him than by any of his predecessors. The Office was established under the 1923 Censorship of Films Act.
[96] The last film to be censored by Mr. Sheamus Smith was 'Baise moi', in March 2003. The Films Appeal Board upheld his decision.

ageing teaching populations; 29 per cent of secondary level teachers were over the age of fifty in 2001. Nevertheless, the findings were broadly positive - the Report placed Ireland fifth in literacy rankings for reading, ninth in scientific literacy and fifteenth in mathematical literacy.

National legislation, regulation and case law

The Education for Persons with Disabilities Bill was published on 16 July 2003. The Bill follows the 2001 Supreme Court ruling in *Sinnott v. Minister for Education.*[97] The Explanatory Memorandum states that the purpose of the Bill is to make detailed provision through which the education of children who have special educational needs because of disabilities can be guaranteed as a right enforceable in law. The Bill is complementary to the provisions of the Constitution, which already provide that each child is entitled to free primary education, that the State has a duty to provide for that and a duty to ensure that each child receives at least a minimum level of education.[98] The Bill establishes the National Council for Special Education in order to provide a structure within which the Bill's provisions can be implemented. In Section 1 of the Bill, a 'child' is defined as a person not more than 18 years of age. However, Section 14 makes provision for the planning of a person's education, while that person is still a child, after the age of 18 years and for the continuation of education beyond the age of 18 in some circumstances.

In April 2003, the High Court upheld the conviction of a Co. Leitrim couple in the Circuit Court under the School Attendance Act 1926 for failing to send one of their children to school, where the child was alleged to have been struck by a teacher. The Act requires parents to see that their children attend school unless they can show the child is receiving suitable elementary education in some other manner. Gilligan J in the High Court found that the couple had failed to establish that their son had been observed pursuing any study period or method.

Practice of national authorities

On 24 May 2003, the Minister for Education, Noel Dempsey, announced that third-level fees would not be reintroduced. The announcement ended months of debate, which began following the publication of statistics which showed that the abolition of third-level fees in 1995 had failed to widen university access, and had benefited only the middle classes.[99] The Minister has instead proposed reform of the higher level grants system, whereby all capital assets, such as land and the value of business premises, would be taken into account when the children of farmers and the self-employed apply for grant support. The current means-test applies to income only.

Reasons for concern

The Irish Human Rights Commission and National Disability Authority have published observations on the Education for Persons with Disabilities Bill, 2003 which raise concerns about aspects of the legislation.

[97] [2001] 2 IR 505 (12 July 2001)
[98] Article 42.4 of *Bunreacht na hEireann* states; "The State shall provide for free primary education (…)"
[99] That the abolition of fees had failed in its objective to bridge the educational gap between rich and poor was highlighted by a May 2003 Department of Education Report entitled 'Supporting Equity in Higher Education', which showed that 21 per cent from the lowest income groups go to third level, compared to 97 per cent among the highest earners.

Article 15. Freedom to choose an occupation and right to engage in work

International case law and concluding observations of international organs

On 10 December 2002, the European Court of Justice found that Ireland had failed to adopt within the period prescribed the laws, regulations and administrative provisions necessary to comply with Directive 98/5/EC to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained.[100]

National legislation, regulation and case law

On 20 March 2003, the Competition Authority published a study, researched by Indecon International Economic Consultants, on the methods and practices affecting competition in the provision of certain professional services with a view to identifying any potential or actual restrictions on competition. It focused on solicitors, barristers, engineers, architects, veterinary surgeons, medical practitioners, dentists and optometrists. Thus, in relation to the solicitor's profession for example, the Report criticises the Law Society's monopoly on the provision of professional education and training.[101] The Competition Authority is producing a subsequent report on each individual profession.[102]

Practice of national authorities

In relation to discrimination in access to employment, there were thirty-four cases taken before the Equality Tribunal in 2003, alleging discrimination under the Employment Equality Act 1998.[103] In six cases, the Equality Officer found that the complainant had been discriminated against on one of the nine grounds. The means of redress included an order for the discontinuation of the discriminatory practice, an award of equal pay, or an order for compensation.

In the past four years, 100,110 work permits were issued to immigrants from outside the European Union. There were approximately 40,000 work permits issued or renewed in 2002.[104] The Immigration Council of Ireland stated at the launch of its *Handbook on Immigrants' Rights and Entitlements in Ireland* on 1 July 2003 that exploitation of migrant workers is quite widespread and that official information about their rights and entitlements is not accessible.[105]

Ireland has elected to allow full freedom of movement of workers from the new EU states, removing the need for work permits, immediately upon enlargement in May 2004. However, the Government has retained the right to reintroduce restrictions during the seven-year transition period if increased immigration causes a dramatic change in the labour market.

[100] *Commission of the European Communities v. Ireland*, C-362/01
[101] Section 4.129
[102] The Authority has so far released its Consultation Document on Engineers, the first of eight such documents to be issued.
[103] The Employment Equality Act 1998 prohibits discrimination on nine grounds: gender, marital status, family status, sexual orientation, religious belief, age, disability, race and membership of the Traveller community. For statistics in relation to the work of the Equality Tribunal see generally: www.odei.ie/
[104] Migrant Rights Centre Ireland. In 1999, the number was only 6,000. The relevant legislation is the Aliens Act 1935. The right to family reunification is seen as one of the more pressing issues – while holders of work visas can take their spouses with them to Ireland, they are issued only with dependent visas, which does not entitle them to work (Migrant Information Centre).
[105] Sister Stanislaus Kennedy, Chairwoman, Immigration Council of Ireland. The Handbook was launched by the Minister for Social and Family Affairs, Mary Coughlan.

Reasons for concern

See above (Reasons for Concern) under Article 5.

Article 16. Freedom to conduct a business

International case law and concluding observations of international organs

On 4 August 2003, it was reported that the European Commission had written to the state forestry body, *Coillte*, instructing the agency of its non-compliance with EU rules on a contract relating to the aerial fertilisation of forests by helicopter. The agency is required to list the contract in the EU's Official Journal within two months.[106] (see later, under Article 37, discussion of ECJ case involving *Coillte*).

National legislation, regulation and case law

The EU Code of Conduct on Arms Exports of 1998 is implemented in Ireland as an administrative practice in that the Department of Enterprise, Trade and Employment consults on sensitive issues in relation to export contracts with the Department of Foreign Affairs. It should also be noted that the Department of Enterprise, Trade and Employment have commissioned a review of this system (through *Forfas*, the National Standards Authority), Phase 1 of which has been published. The second Phase of the review is due for publication in the near future. A number of concerns have been raised by Amnesty International (Irish Section) regarding the lack of Irish legislation on arms-brokering and licence production and the weak system of post-export checks. Attention has also been drawn to the lack of an effective mechanism for parliamentary scrutiny of the issue of arms exports which, although tangentially relevant to a number of parliamentary committees, is not part of the core concern of any specific committee.

Practice of national authorities

A Special Report of the Office of the Comptroller and Auditor General[107], concluded that there had been breaches of the public procurement rules by An Garda Siochana in relation to a contract for the instalment of a system for recording interviews with suspects. The breaches noted were the failure to ensure the publication of a contract award notice within the times specified and give adequate reasons for the award decision made within the specified time. The non-publication of an indicative notice specifically relating to the type of equipment required may have constituted a further non-material breach of the Directive.[108] The Report noted that national guidance on procurement was "somewhat out of date." There was a need to, *inter-alia,* conduct pilot-testing in a manner which both allows and encourages the identification of as wide a range as possible of acceptable technology solutions or equipment options, create balanced evaluation teams which are, and can be demonstrated as being, simultaneously expert and objective, and comply with the provisions of public procurement law.

[106] The Irish Times, 4 August 2003; *Coillte* has consistently argued that it does not fall under the procurement rules because it is not a public entity. However, the Commission sees the forestry board as "a body covered by public law" in light of its role of maintaining national forests.

[107] The Office of Comptroller & Auditor General is provided for by Article 33 of the Irish Constitution, 1937 "to control on behalf of the State all disbursements and to audit all accounts of moneys administered by or under the authority of the Oireachtas".

[108] Office of the Comptroller and Auditor General, *Garda Interview Recording Systems*, Special Report Series No.5

Article 17. Right to property

National regulation, legislation and case law

Landlord & Tenant Law:

The Residential Tenancies Bill, published on 4 June 2003, amends the law of landlord and tenant in relation to the basic rights and obligations of each of the parties, and provides a measure of security of tenure for tenants of certain dwellings, according to its Long Title. The Bill establishes a body known as the Private Residential Tenancies Board for the resolution of disputes. Part II of the Bill applies to landlords and tenants regardless of whether or not there is a written tenancy agreement. In relation to the maintenance of buildings, for example, it imposes an explicit requirement on landlords to maintain the structure of the building. The obligations on tenants include a prohibition of anti-social behaviour (defined below). Part III states that the rent payable may not be greater than the open market rate, defined in Section 24 as "the rent that a willing tenant would give and a willing landlord would take for vacant possession having regard to the other tenancy terms and the letting values of dwellings of a similar size, type and character and located in a similar area."

Part IV provides for security of tenure on the basis of four year cycles. For the first six months of each tenancy, the landlord will be free to terminate without giving a reason. For the remaining three and a half years, termination will only be possible where one of the grounds in Section 34 is satisfied. These grounds include the tenant's failure to comply with the tenancy obligations, outlined in Section 16, which include the obligation to pay the rent provided for under the tenancy concerned on the date it falls due for payment. Where termination is by reason of the tenant's failure to comply with the tenancy obligations, the tenant must first be notified of the failure and the intention to terminate if the failure is not remedied within a specified reasonable time. The exception to this is in the case of serious anti-social behaviour, defined in Section 17 as "behaviour within the dwelling that constitutes the commission of an offence, causes danger, injury, damage or loss, or includes violence, intimidation, coercion, harassment, obstruction or threats. It also includes persistent behaviour that prevents or interferes with the peaceful occupation of their dwellings by others in the building or in its vicinity."

In addition to failure to comply with the tenancy obligations, Section 34 of the Bill outlines several other grounds whereby the landlord may, at any time, terminate the tenancy. These include the landlord intending to enter into a contract to sell the dwelling in the next three months, the landlord requiring the dwelling for own or family member occupation, the landlord intending to refurbish substantially the dwelling, or the landlord intending to change the business use of the dwelling. In addition, a landlord may terminate on the basis that the four years have expired.

Compulsory acquisition of land:

The Department of Transport has drawn up a bill designed to give the state the power to claim ownership of land underneath private property. The Infrastructural Bill, 2003 is intended to reduce the cost of the proposed Dublin metro.[109] The move to acquire underground property rights would raise constitutional questions, and it is understood that the Bill may be referred to the Supreme Court under Article 26.[110]

[109] *Luas*, a metro that will run throughout parts of Dublin city, is expected to cost €675 million. Nearly ten per cent of this is accounted for by land acquisition costs. The Minister for Transport, Mr. Seamus Brennan, has pointed to the experience of the Madrid metro, which was recently built for €600 million. He stated in an interview that land ownership was the key difference in costs between Ireland and Spain (*The Irish Times*, 5 May 2003).
[110] The Irish Times, 5 May 2003

Consequently, in July 2003, the Oireachtas Committee on the Constitution conducted two weeks of hearings on the issue of whether the articles in the Constitution on property rights should be amended. The right to own private property is a personal right guaranteed by Article 40.3 of the Irish Constitution and a separate right protecting private property in an institutional sense under Article 43.

Mr Michael Smith, the then Chairman of *An Taisce*,[111] said in his submission that the body did not believe that property should be a fundamental right - it should have the lower status of an entitlement. *An Taisce* believes that there should be more widespread use of Compulsory Purchase Orders by local authorities, whose implementation would result in cheaper and better housing. Dr Gerard Hogan, S.C. of Trinity College Dublin told the Committee that private property rights conferred by the Constitution were not a "free marketeer's charter." He pnointed to two Supreme Court rulings, one involving the Planning and Development Act 2000, over the past eight years that balanced the individual's right to own property against the common good.112 The Institution of Engineers in Ireland, in their submission, stated that one of the major reasons for the poor record of delivery to date of major projects is because sufficient emphasis is not placed on Article 43.2 which makes reference to the "exigencies of the common good."113

It is expected that the Committee will report its findings to the Government in early 2004.

Reasons for concern

Particular issues of concern arise in relation to the accommodation needs of members of the Traveller Community. Virtually all local authorities have failed to fulfil their statutory obligations in relation to Traveller accommodation under the Housing (Traveller Accommodation) Act, 1998. This problem has been exacerbated by the implementation of the Housing (Miscellaneous Provisions) Act, 2002 which criminalises trespass on private and public lands and is being used to evict Traveller families from campsites many of whom are awaiting housing provision by local authorities. An analysis of the impact of the 2002 legislation was published by the Irish Traveller Movement in 2003.[114]

Article 18. Right to asylum

International case law and concluding observations of international organs

The UNHCR was granted an *amicus curiae* application to appear before the Irish Supreme Court in May 2003. It was the first time the body exercised its right to intervene and make a submission to a tribunal or court with regard to the interpretation of the 1951 Refugee Convention in Ireland. The application related to an appeal that was to be heard on 25th November, 2003 on the issue of whether the 'internal flight' option may properly be regarded as a safe alternative for an asylum seeker.

[111] *An Taisce*, or the National Trust for Ireland, was established in 1948 and is the most influential environmental body in Ireland.
[112] Article 43.2.1 and 43.2.2 state that the exercise of property rights "ought…to be regulated by the principles of social justice", and that the State accordingly may reconcile the exercise of property rights "with the exigencies of the common good."
[113] The Institution of Engineers of Ireland, 'Property Rights', a Submission to the all Party Oireachtas Committee on the Constitution, May 2003
[114] *An Analysis of the use of the Housing (Miscellaneous Provisions) Act, 2002*, Irish Traveller Movement, November 2003.

National legislation, regulation and case law

The 1996 Refugee Act, as amended by Section 11(1) of the Immigration Act 1999 and Section 9 of the Illegal Immigrants (Trafficking) Act 2000, was further amended by Section 7 of the Immigration Act 2003. The amendments to the asylum procedure in Ireland, under the Immigration Act 2003 are as follows:

Withdrawn Applications:

If an asylum application is withdrawn or deemed withdrawn prior to the Refugee Applications Commissioner making a recommendation on a case, the investigation of the case by the Commissioner will cease and a recommendation will be made that the applicant should not be declared to be a refugee. There is no appeal against this recommendation. This recommendation will be forwarded to the Minister for Justice, Equality & Law Reform.

An asylum application may be deemed withdrawn for failing to live in a certain place, failing to report regularly when required, failing to furnish the Commissioner or the Refugee Appeals Tribunal with all relevant information, failing to inform the Commissioner of an address within 5 working days of the making of an application for a declaration as a refugee, failing to inform the Commissioner of a change of address, or failing to attend an interview on the date and at the time fixed for the interview and not furnishing a reasonable explanation for non attendance within 3 working days after that date.

Prioritisation of certain categories of application by the Minister:

Under the prioritisation provisions, the Minister may direct the Commissioner or the Chairperson of the Refugee Appeals Tribunal to give priority to certain classes of applications.

The Minister has stated that, following the designation of the specified countries as 'safe countries of origin', he intends to direct the Commissioner and Chairperson of the Refugee Appeals Tribunal to give priority to such applications with effect from 15 September 2003. Such a direction will mean that if an asylum seeker comes from one of the safe countries and s/he has not been interviewed by the Commissioner before 15 September 2003, his/her application will be given priority after that date and may be dealt with before other applications by the Commissioner and, if necessary, by the Refugee Appeals Tribunal. The 'safe countries of origin' are all countries due to join the EU in May 2004 and Romania and Bulgaria.

Credibility:

In accessing an applicant's credibility in connection with an asylum seeker's application for refugee status, the Commissioner or the Refugee Appeals Tribunal shall consider the following:

- Whether s/he has identity documents or has given a reasonable explanation for not having them,
- Whether s/he has given a reasonable explanation for any claim that Ireland is the first safe country in which s/he arrived after leaving his/her own country,
- Whether s/he has provided a full and true explanation of how s/he travelled to Ireland,
- If s/he did not apply immediately on arriving at a point of entry into Ireland, whether s/he gave a reasonable explanation for that,

- If s/he has forged, destroyed or disposed of identity documents, whether s/he has reasonable explanation for that,
- Whether s/he has given manifestly false evidence or has made false statements,
- Whether, without reasonable cause, s/he reapplies having previously withdrawn,
- Whether s/he applied for asylum following commencement of the deportation process,
- Whether s/he has complied with the duty to co-operate in the investigation of his/her case, to provide relevant information at the earliest possible opportunity, to not leave the State without the consent of the Minister, to keep the Commissioner informed of his/her address or to comply with any requirement to live at a particular place or to report regularly to a named person,
- Whether on appeal s/he brings forward new information which could have been but was not given to the Commissioner.

Negative Recommendations of the Commissioner and Right to Appeal to the Refugee Appeals Tribunal (the Tribunal):

Where the Commissioner's report on an application includes a recommendation that an applicant should not be declared a refugee because his/her application was withdrawn or deemed to be withdrawn, there is no appeal.

Otherwise, where the Commissioner's report includes a recommendation that s/he should not be declared a refugee, the normal position is that s/he may appeal to the Tribunal against the recommendation within 15 working days of the sending of the notice. S/he may request any such appeal to be conducted by way of oral hearing.

In certain circumstances, different procedures for appeal will apply as follows:

(i) If the Commissioner's negative recommendation includes among its findings any one of the additional findings as set out a (a) to (e) below, s/he may appeal to the Tribunal against the recommendation within 10 working days after the sending of the notice. Any such appeal will be determined without an oral hearing.

Additional findings of the Commissioner are:

(a) his/her application showed either no basis or a minimal basis for the contention that s/he is a refugee,
(b) s/he made statements or provided information in support of his/her application of such a false, contradictory, incomplete or misleading nature as to lead to the conclusion that his/her application is manifestly unfounded;
(c) without reasonable cause, s/he failed to make an application as soon as reasonably practicable after arrival in the State;
(d) s/he had lodged a prior application for asylum in another state party to the Geneva Convention (whether or not that application had been determined, granted or rejected)
(e) S/he is a national of, or has a right of residence in, a safe country of origin so designated by order of the Minister under Section 12(4) of the Act.

(ii) The Minister has the power to direct that certain categories of applications be dealt with in such a way that, should a negative recommendation be made by the Commissioner, and should any one of the additional findings listed above at (a) to (e) apply, s/he will have 4 working days to appeal against the recommendations to the

Tribunal instead of the 10 working days described at (i) above. Any such appeal would be determined without an oral hearing.

If the Minister issues such a direction and an application is to be dealt with under these procedures, the individual will be notified in writing in advance by the Commissioner.

Refugee Appeals Tribunal (the Tribunal):

If it appears that an asylum seeker is failing in his/her duty to co-operate or to provide information relevant to his/her appeal or that s/he is in breach of certain obligations under the Act then the Tribunal shall send a notice in writing asking the applicant to indicate whether s/he wishes to continue with his/her appeal. If s/he does not reply within 15 days of the notice being sent, his/her appeal will be deemed to be withdrawn.

If the asylum seeker does not attend for an oral hearing when scheduled, and s/he does not furnish to the Tribunal within 3 working days of the date fixed for the hearing, an explanation for not attending the hearing which the Tribunal considers reasonable in the circumstances, then his/her appeal will be deemed to be withdrawn.

S/he may withdraw his/her appeal to the Tribunal by sending a notice of withdrawal to the Tribunal.

Where an appeal is withdrawn or deemed to be withdrawn, then the Tribunal will inform the Commissioner and the Minister of this and the Minister will refuse his/her application for a declaration.

Detention and intervals between Court Appearances: 10 days extended to 21 days:

Under Section 9 of the 1996 Refugee Act (as amended), an asylum seeker may be detained where there is "reasonable cause" to suspect that s/he has not made reasonable efforts to establish his/her identity, has not complied with the requirement to provide fingerprints, intends to avoid removal from Ireland when s/he is subject to a Dublin Convention procedure, intends to avoid removal from Ireland after his/her asylum application has been unsuccessful, intends to leave Ireland and enter another country illegally, Section 9(8)(e), without reasonable cause has destroyed identity or travel documents or is in possession of forged identity documents.

If an asylum seeker is detained for any of these reasons while his/her application for asylum is being determined, the maximum interval between court appearances to review such detention is increased from 10 to 21 days.

Practice of national authorities

In figures release by the Department of Justice, Equality & Law Reform at the end of 2003 it was revealed that the number of applications for asylum in Ireland fell by 32% to 7,939 compared with 11,634 in 2002. The suggested reason for this reduction was the Supreme Court decision on the *Lobe & Osayande* case but the Irish Refugee Council pointed to the increased number of people refused entry to Ireland in the past year (4,500) as a contributing factor.[115]

In a report on the appeal stage of the refugee determination process, the Irish Refugee Council, issued a number of recommendations for improving the practice of the Refugee Appeals Tribunal. The Report recommended, *inter-alia*, that the Tribunal must continue to

[115] *The Sunday Tribune*, 4th January, 2004

maintain its independence from the Minister for Justice, Equality and Law Reform; the procedure for recruiting and appointing Members of the Refugee Appeals Tribunal must be open competition and not solely at the discretion of the Minister; provisions should be put in place for the removal of a Member of the Tribunal in the event of decision-making being of a consistently low standard; all decisions of the Tribunal should be published, while maintaining the anonymity of the appellants; there must be consistency between the decisions of the Members of the Tribunal; decisions of the Tribunal should be subject to continual internal monitoring; an independent body similar to the UK Council on Tribunals should be established to review the working of the Tribunal; the Tribunal should not automatically call into question the credibility of an appellant who claims to have suffered torture or inhuman treatment or punishment if the medico-legal report is not conclusive; the Tribunal should not make negative inferences with regard to the credibility of applicants if minor discrepancies arise; the Tribunal should adopt gender guidelines similar to those adopted by the Immigration Appeals Authority in the UK; appropriate training is needed for Tribunal Members and legal representatives to ensure greater sensitivity to trauma suffered by torture victims; appeal hearings should be inquisitorial, rather than adversarial; and professionally trained and impartial interpreters should be provided where necessary for hearings.[116]

Reasons for concern

It is clear from the reforms introduced to the procedure for determining asylum applications in 2003 that the standards – both procedural and substantive – applied to those seeking asylum in Ireland are rigorous. The quality of information available from the Office of the Refugee Applications Commissioner and the Refugee Appeals Tribunal has improved considerably and there is little doubt that the procedure has been expedited whatever about the implications that greater efficiency may have for the quality of the decisions reached. Now that Ireland has significant refugee and immigrant communities there are considerable problems with the level of integration of such communities in this country. While there has been much focus on reception issues there has been negligible attention paid to integration issues which require to be addressed as a matter of some urgency.

Article 19. Protection in the event of removal, expulsion or extradition

National legislation, regulation and case law

The amendments to the Refugee Act, 1996 (which came into effect with the passing of the Immigration Act 2003) provide for the operation and the making of orders to give effect to the Dublin Convention as well as to the new EU Regulation which replaces the Dublin Convention from 1 September 2003 (known as the Dublin II Regulation). The Act also provides for the possibility of bilateral agreements with other 'safe third countries' which would allow for the transfer of responsibility for certain applications for refugee status between Ireland and such third countries.[117]

The Immigration Act 2003 includes a provision that applicants from certain countries, notably the designated safe countries of origin, will be prioritised by the processing agency. The countries due to become EU members in May next year, along with applicant countries Romania and Bulgaria, were designated as "safe countries" for asylum-seekers from September 2003. Thus, while asylum applications by people from these countries will be considered, it will be up to individual applicants to rebut the assumption that they are not in

[116] Catherine Kenny and Dr. Joshua Castellino, *Asylum in Ireland: The Appeal Stage, A Report on the Fairness and Sustainability of Refugee Determination at Appeal Stage*, September 2003, p.9

[117] Irish Refugee Council, Submission on Article 19 to the EU Network of Independent Experts on Fundamental Rights.

need of refugee protection.[118] Nationals of these states will be able to appeal a negative initial decision in writing only, rather than through the normal oral hearing. Anyone whose case was deemed 'manifestly unfounded' would have four working days to appeal, as opposed to the current ten.[119]

Practice of national authorities

Following the Supreme Court decision in *Lobe v. Minister for Justice, Equality and Law Reform,*[120] (discussed above under Article 7), the Department of Justice, Equality & Law Reform have issued some 1,100 letters of intention to deport addressed to the non-EU parents of Irish-born children, since July 2003. Recipients were given fifteen days in which to make representations as to why they should not be deported.[121] The services of the Refugee Legal Service are not available to such persons as they are not considered to be asylum-seekers. The orders have been opposed by human rights and immigrant organisations (CADIC) in an open letter to the Minister for Justice, Equality and Law Reform.

The Irish Human Rights Commission, in a position paper, stated that the threat of deportation was putting such parents in an intolerable situation, and that it was concerned at the lack of readily accessible legal advice to them. The Commission noted that when the affected people made their original applications, it was generally accepted that they would be entitled to remain and many were so advised by the state and lawyers. The Commission therefore urged the Minister to allow this category, described as a limited and now closed category of persons, to remain in Ireland[122].

Reasons for Concern

The Irish Refugee Council has expressed concern that the Minister of Justice, Equality & Law Reform has failed to provide clear information on what exact procedures immigrant parents of Irish citizens should follow now that he has removed the right to apply for leave to remain solely on the grounds of being a parent of an Irish citizen. Legal aid was not provided to parents making representations to the Minister to remain in the State. There were approximately 11,000 applications pending at the time of the ruling, the majority from former asylum seekers who had withdrawn their asylum claims with the expectation that they would be granted residency in the State. The situation of such parents will now be determined on a case-by-case basis on the making of representations by them to the Minister.[123] The Council, in its submission to the Joint Committee on Justice, Equality, Defence and Women's Rights regarding the implications of the Supreme Court judgement concerning Irish children and

[118] *The Irish Times*, 15 September 2003; The list will particularly affect Romanians, who accounted for 11 per cent of the 5,397 asylum applications made this year until the end of July. A total of 145 nationals of the Czech Republic also registered asylum claims in this period. Mr Peter O'Mahony of the Irish Refugee Council expressed "grave concerns" about the move, particularly the effect on applicants from minority groups such as the Roma, who face persecution in states that might otherwise be considered safe. (*The Irish Times*, 18 August 2003).

[119] The [then proposed] list of 'safe countries' was criticised by the Chairman of the Bar Council, Mr. Conor Maguire SC, at a conference entitled 'Refugee Law in Ireland', held by the Council on 25 January 2003. He stated that the list "did not seem to be a good idea and not merely because it does not operate successfully in other jurisdictions...The presupposition that a person cannot be a refugee merely because they come from Germany or Russia suggests a black-and-white approach to a concept that is more often grey. The Geneva Convention counsels against such generalisations in favour of an examination of each individual case on its merits. If Canada had adopted the view that all Irish citizens must be assumed not to be refugees because Ireland is not regarded as a refugee-generating country, then we would probably not have had the landmark decision in the Ward case."

[120] [2003] IESC 1 (23 January 2003)

[121] Following the Supreme Court decision in January, the Minister stated that there would be no mass deportations, as those affected by the decision would be able to apply for leave to remain on humanitarian grounds. There are currently no figures or indications as to how many representations received within the fifteen day period have been accepted or rejected.

[122] For all documentation from the Irish Human Rights Commission see generally: www. ihrc.ie/

[123] Irish Refugee Council, *op.cit.*

their non-EU-national parents, requested that ministerial discretion be exercised appropriately and that those who had dropped an asylum claim with the legitimate expectation that they would be granted residency be entitled to re-activate their asylum applications or be granted permission to remain under Section 17(6) of the Refugee Act 1996 (as amended).[124]

CHAPTER III : EQUALITY

Article 20 – Equality before the law

International case law and concluding observations of international organs

Periodic reports submitted to the UN by the Irish Government in 2003 under CERD and CEDAW will be dealt with under subsequent headings.

National legislation, regulation and case law

Section 19 of the Intoxicating Liquor Act 2003 will transfer discrimination cases against publicans and hoteliers away from the Equality Tribunal and into the District Courts (ordinary courts of local and limited jurisdiction). While most discrimination cases (taken under the Employment Equality Act, 1998 and the Equal Status Act, 2000) will continue to be heard by the Equality Tribunal cases of discrimination (taken under the Equal Status Act, 2000) involving licensed premises will be heard by the District Court. The issue was discussed in a report of the Commission on Liquor Licensing, a body appointed by the Government to examine the licensing laws, which reported in December 2002 amid complaints by publicans of the high number of cases being taken to the Tribunal by members of the Traveller Community. In its deliberations, the Commission found that "no uniform approach is taken to the way in which hearings are conducted. The approach taken appears to be determined by the individual equality officer hearing the case."[125] The Commission was set up to examine the deregulation of the drinks industry and licensing issues in general. Its membership included representatives of the Licensed Vintner's Association and the Vintner's Federation of Ireland.

Reasons for concern

The introduction of Section 19 of the Intoxicating Liquor Act, 2003 is of particular concern.[126] The provision could be perceived as a major concession in the face of intensive lobbying by a vested interest - the licensed trade - which has consistently resisted the implementation of the Equal Status Act, 2000. In 2002, 75 per cent of all cases taken to the Equality Tribunal under the Equal Status Act, 2000 alleged discrimination on the grounds of membership of the

[124] Irish Refugee Council, Submission to the Joint Committee on Justice, Equality, Defence and Women's Rights regarding the implications of the Supreme Court judgement concerning Irish children and their non-EU-national parents, 13 May 2003. To do so, they must write to the Ministerial Decisions Unit and request that their application now be considered. Considering the fact that 1,097, or 23% of appeals were successful in 2002 (Refugee Appeals Tribunal – Annual Report 2002), the Irish Refugee Council submitted that it was imperative that individuals be given the right to appeal a decision of the Office of the Refugee Applications Commissioner.

[125] Commission on Liquor Licensing Third Interim Report, *Report on Admission and Service in Licensed Premises*, p.44

[126] The seriousness of the situation was highlighted in the nationwide blanket ban of members of the Traveller Community threatened by the Vintners' Federation of Ireland (VFI) following a ban imposed by some County Mayo publicans on such persons in July 2002. This blanket ban in Westport, Co Mayo, was only lifted following the signing of a statement by Mr. Chris Lavelle, Chairman of the local VFI branch: "Members of the Westport branch of the VFI have agreed today to lift their ban on serving members of the Traveller Community. This decision has been taken following the recent meeting with the Minister for Equality and Law Reform, Mr O'Dea, who has asked the chairman of the Commission on Liquor Licensing to prioritise deliberations on the issues relating to the rights of licence holders to refuse admission and service."

Traveller Community.[127] The Tribunal found in favour of complainants in just over half of these cases. The change was strongly opposed by the Equality Authority, the statutory body established to oversee the implementation of equality legislation and this opposition was supported by many NGOs working in the field of equality and non-discrimination.

Article 21. Non-discrimination

International case law and concluding observations of international organs

Ireland's First National Report to the Committee on the Elimination of Racial Discrimination (CERD) was circulated in draft form for the purpose of consultation in 2003. Ireland is expected to appear before the CERD Committee in 2004. A final version of the Report is due for publication shortly but is not yet in the public domain at the time of writing.
A number of issues are worth highlighting in relation to the Draft Report. Paragraph 3 states that: "In regard to the scope of the Report it should be noted that Irish Travellers do not constitute a distinct group from the population as a whole in terms of race, colour, descent, or national or ethnic origin. However, the Government is aware that members of the Traveller Community suffer discrimination on the basis of their social origin." This position, which has been confirmed in responses to a number of Parliamentary Questions, has proved quite controversial and has met with some opposition from NGOs and the National Consultative Committee on Racism and Inter-culturalism (NCCRI).[128]
The only reference to the situation of women members of minority communities, who are often the victims of multiple discrimination, is a single line in paragraph 13 of the Draft Report.[129]

The Draft Report contains no information on the demographic composition of the population referred to in the provisions of Article 1 of the Convention. In paragraph 10, the Government states that it "is aware that the Committee places particular importance on including an ethnicity question in the national census…The inclusion of a question on ethnicity was

[127] The Irish Times, 4 February 2003.
[128] "Recognising Travellers as an Ethnic Group", (December 2003) *Spectrum: The Journal of the National Consultative Committee on Racism and Inter-culturalism*, Issue 4, pp19-120. The approach adopted by the Irish Government may be inconsistent with the State's obligations as a party to CERD. In General Recommendation VIII, the CERD Committee states that; "Having considered reports from States parties concerning information about the ways in which individuals are identified as being members of a particular racial or ethnic group or groups, [the Committee] is of the opinion that such identification shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned." The Irish Traveller Movement, in their submission to the Development of the National Action Plan Against Racism state that "Although issues of racism and intolerance have only come to the forefront of public debate in Ireland relatively recently, in relation to the presence of new minorities, the Traveller Community (*as an indigenous ethnic group and a minority*) have always suffered and continue to suffer disadvantage, discrimination, and racism in all areas of life [emphasis added]." It is clear from this statement that the Traveller Community considers itself to be an ethnic group. See also: General Recommendation XXVII, 'Discrimination against Roma' – the Committee recommends that States parties "respect the wishes of Roma as to the designation they want to be given and the group to which they want to belong." (paragraph 3). In General Recommendation XXIV, the Committee drew attention to the fact that "the application of different criteria in order to determine ethnic groups or indigenous peoples, leading to the recognition of some and refusal to recognize others, may give rise to differing treatment for various groups within a country's population." (paragraph 3)
[129] CERD General Recommendation XXV on Gender Related Dimensions of Racial Discrimination (2000) notes that: "reports submitted by States Parties often do not contain specific or sufficient information on the implementation of the Convention with respect to women. State parties are requested to describe, as far as possible in quantitative and qualitative terms, factors affecting and difficulties experienced in ensuring the equal enjoyment by women, free from racial discrimination, of rights under the Convention. Data which have been characterized by race or ethnic origin, and which are then disaggregated by gender within those racial or ethnic groups, will allow the States Parties and the Committee to identify, compare and take steps to remedy forms of racial discrimination against women."

considered to be a sensitive issue and it was feared that the controversy it might cause could have a detrimental effect on census response rates."[130]

National legislation, regulation and case law

In relation to Council Directives 200/43/EC, Ireland has missed the July 2003 deadline for the implementation of the Directive.

Under Section 2(2)(a) of the Prohibition of Incitement to Hatred Act, 1989 "if the accused person is not shown to have intended to stir up hatred, it shall be a defence for him to prove that he was not aware of the content of the material or recording concerned, and did not suspect, and had no reason to suspect, that the material or recording was threatening, abusive or insulting." There have been very few prosecutions under the Act due to the above requirement that intention to stir up hatred must be proved. By 2000, there had been only one case involving an alleged breach of the Act referred to the DPP since its enactment in 1989, and that case was subsequently dismissed in the District Court. The former Minister for Justice, Equality and Law Reform, Mr. John O'Donoghue, announced a review of the Act in recognition of its problematic nature in 2000, however, it is not clear how this review is progressing.[131]

Practice of national authorities

The most up-to-date statistics for the period under review are the nine-month comparison figures issued by the ODEI-Equality Tribunal for the periods January-September 2002 and 2003.[132]

Reasons for concern

Comments made above in relation to the Draft Report submitted under CERD should be noted as reasons for concern.

At the end of 2003 it was announced by the Government that the Equality Authority and ODEI-Equality Tribunal are to be 'de-centralised' or re-located from Dublin to Roscrea, a town in Co. Tipperary. Concerns have been expressed that this may impact on the access to justice afforded to claimants by having the ODEI-Equality Tribunal in the capital city (which is generally more accessible given the public transport infrastructure that exists in Ireland) as well as on the centrality and proximity of the Equality Authority vis-à-vis other policy-making agencies located in Dublin.

[130] General Recommendation XXIV, on the Reporting of Persons Belonging to Different Races, National/Ethnic Groups, or Indigenous Peoples (1999), stresses that it is essential that States parties provide as far as possible the Committee with information on the presence within their territory of such groups.

[131] A recent example of the need for strengthened legislation occurred in June 2003, when the Mayor of Dungarvan, Co. Waterford, Ms. Nuala Ryan, stated on local radio that that the Army should be used to counteract "invasions" of travellers, when a group set up an encampment in a public area in the town. She urged "the Minister for Justice, Mr McDowell, and the Minister for Defence, Mr Smith, to make an arrangement so that when this type of situation occurs, the Gardai in a town can immediately call on reinforcements, whether these are from the Army or other Garda districts." (*The Irish Times*, 4 June 2003). The mayor acknowledged that the town did not have a transient halting site, despite the fact that Waterford County Council had undertaken in its Traveller Accommodation Programme drawn up in 2000 to provide three such transient sites.

[132] Available in chart form under "Statistics" at: www.odei.ie/. These figures are of limited value as some claims are taken on multiple grounds.

Article 22. Cultural, religious and linguistic diversity

National legislation, regulation and case law

Ireland has neither ratified nor signed the European Charter for Regional or Minority Languages.

The Official Languages Act, 2003[133] was signed into law on 14 July 2003. The primary objective of the Act is to ensure better availability and a higher standard of public services through Irish. The Act also specifies some basic general provisions of universal applicability, e.g. correspondence to be replied to in the language in which it was written, providing information to the public in the Irish language, bilingual publications of certain key documents, use of Irish in the courts, etc. The Act establishes an independent *Comisineir Teanga* (Language Commissioner) to monitor compliance by public bodies with the Act and investigate complaints (for example, with regard to 'corrupted Irish' road signs) by members of the public. Under Section 33(2) of the Act, where the Minister for Community, Rural and Gaeltacht Affairs makes a declaration in respect of a placename in a Gaeltacht (Irish-speaking) area, the English language version of the placename shall no longer have any force or effect.

Practice of national authorities

It is expected that the *National Action Plan against Racism* will be published in the near future.

Reasons for concern

Concerns regarding integration (expressed above under Article 18) are of relevance to this provision of the Charter also.

Article 23. Equality between men and women

1. International case law and concluding observations of international organs

Ireland's *Combined Fourth and Fifth Periodic Reports under the United Nations Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) were submitted to the UN on 10 June 2003.[134] The document highlights the increase in the female labour force, which grew from 601,700 in 1997 to 771,300 in 2002 and the increase in the female participation rate from 41.4% in 1996 to 48.9% in 2002. In addition, Ireland's reservation to Article 15.3 of the Convention was withdrawn in March 2000 and, following a review of the remaining reservations, Ireland will shortly be in a position to withdraw the reservation to Article 13 (b) and (c). The Employment Equality Act 1998 and the Equal Status Act 2000, which provided for the establishment of a new equality infrastructure, are described.

Under Article 3 of the Convention, the Report details, *inter alia,* the *National Plan for Women 2002*, gender mainstreaming, National Development Plan (NDP) Gender Equality Unit,[135] measures to tackle poverty with specific regard to women, lone parents, Traveller women, women with disabilities, lesbian women, refugee and migrant women and health services. Under Article 4, which requires details of special measures that have been enacted, the Report

[133] No.32 of 2003
[134] Available on the Department of Justice, Equality and Law Reform website at: http://www.justice.ie/80256976002CB7A4/vWeb/fsWMAK4Q7JKY
[135] The Department of Justice, Equality and Law Reform has a budget of E35.5m under the Equality for Women Measure of the National Development Plan 2000-2006 to support equality for women projects.

highlights Section 24 of the Employment Equality Act 1998 allows for measures to promote equal opportunity for men and women. Specific examples of such action include the introduction of a Government policy of a representation of 40% of both genders on state boards in 1993, which has led to the overall percentage of women on such boards rising from 15% in 1992 to 29% at December 2002, and the Gender Equality Policy for the Civil Service, with particular focus on the serious under-representation of women at senior management levels.

Under Article 7, regarding discrimination against women in political and public life, a commentary was provided by each of the each political parties. In 2002, 13.25% of Deputies in Dáil Eireann were women, up from 12.05% in 1997, 16% of local authority members are women, and 16.67% in Seanad Eireann (down from 18.33% in 1997). Women made up 14.3% of an Garda Síochána. Of the Diplomatic Staff in the Department of Foreign Affairs, 11.11% of Ambassadors/Assistant Secretaries are women, 19.12% of Counsellors, 21% of First Secretaries, and 59.78% of Third Secretaries. Of Irish staff in administrative positions in the European institutions, 57.63% are women, whereas in the United Nations, it is 33.85%. In education, at primary level, the percentage of girls in the body of students taking Leaving Certificate English, Irish and Mathematics is 51.5%. In Chemistry, it is 53%, however in Physics and Chemistry it is 29%. 60% of new entrants to Higher Education in 2000/2001 were female in the University sector, while in the Institutes of Technology, it was 47%.

Regular statistics on the gender pay-gap are not available for Ireland. The latest economy-wide data on the matter was published by the Economic and Social Research Institute in 2000 using 1997 data from the European Household Panel. This publication, *How Unequal?- Men and Women in the Irish Labour Market*, shows that Ireland had a gender pay- gap of 15.5% at that time. The largest single cause of the wage differential was time spent by women out of the workforce caring for and rearing children. Initiatives likely to have positive influence on the gender pay-gap include the increase to €6.35 per hour in the statutory minimum lwage and improvements to maternity leave provisions, and the work of the National Framework Committee on the Development of the Family-Friendly Policies at the Level of the Enterprise and the National Framework Committee for the Development of Equal Opportunities at the Level of the Enterprise.

Under Article 12, the National Breast-Screening Programme commenced in March 2000 with phase one of the programme covering the Eastern Regional Health Authority, Midland Health Board and North Eastern Health Board areas. Screening is being offered free of charge to all women in those areas in the target age group 50 to 64 years of age. The target population consists of approximately 136,000 women and it represents about 50% of the national target population. To end-October 2002, 106,199 women had been called for screening and 75,668 women have been screened, representing an uptake of 75%.

On the issue of abortion, the legal situation remains as it was following the defeat of a constitutional referendum in March 2002, i.e. that abortion is prohibited in Ireland except where it is established, as a matter of probability, that there is a real and substantial risk to the life, as distinct from the health, of the mother and that this real and substantial risk can be averted only by the termination of her pregnancy. This is something of a theoretical right as the ethical guidelines of the medical professions in Ireland do not permit abortion. Any developments in this regard will be communicated in the Third Periodic Report of Ireland to the UN Human Rights Committee under the International Covenant on Civil and Political Rights (ICCPR), which is due to be submitted to the UN in 2005.

On the issue of domestic violence, a National Steering Committee on Violence Against Women, chaired by the Minister of State at the Department of Justice, Equality and Law Reform was established in December, 1997. The Annual Report of An Garda Síochána 2001, records that there were 9,983 domestic violence incidents recorded in 2001 which represents a

decrease of 8% when compared with the corresponding figure for the previous year. Although the offenders were predominantly male some 11% of offenders were female. Of 9,983 reported incidents, there were 1,286 convictions.

Practice of national authorities

A move to promote women into senior positions in the civil service was part of the 'Action Plan' for all government departments published by the Department of Finance on 12 August 2003. At present, only about 20 per cent of principal officers and 30 per cent of assistant principals are women, despite the fact that 70 per cent of civil servants are female, and 80 per cent of clerical officers, the lowest-ranking clerical grade, are women. The plans, which are part of the benchmarking pay process, call for 25 per cent of principal officer posts to be filled by women by the end of 2005. A target of 35 per cent has been set for the proportion of jobs at assistant principal level to be occupied by women within the same timescale. However, departments will not be allowed to apply any form of 'positive discrimination'. The action plan will instead take the form of initiatives such as family-friendly work measures.[136]

The Equality Authority's *Annual Report*, published in March 2003, found that discrimination in employment on the ground of gender remained the largest single category of complaint dealt with by the Authority. This made up a third of all such cases, with pregnancy-related discrimination particularly common. The next-largest category of complaint was for harassment and sexual harassment, making up almost 16 per cent of the total.[137]

An 18-month study by three Trinity College Dublin academics, Professor Ivana Bacik, Ms Cathryn Costello and Ms Eileen Drew, entitled *Gender InJustice* (published by the Law School, TCD) reported widespread discrimination against women in the legal profession. Women now make up two-thirds of entrants to university law schools and half of the students taking professional courses at Blackhall Place (Solicitors' training college) and the King's Inns (Barristers' training college).

The study found that only 9 per cent of all Senior Counsel (or members of the Inner Bar) are women, with only 5 per cent of women barristers being Senior Counsel, compared with 22 per cent of all male barristers. Only one managing partner from 13 large solicitors' firms in Dublin is a woman. There is also a large discrepancy in earnings, with 42 per cent of male lawyers earning more than €100,000 per annum, compared with only 19 per cent of female lawyers. This is even more marked at senior levels, where 60 per cent of male lawyers over 50 earn more than this, compared with only 20 per cent of women of the same age. The gap in earnings also exists at junior levels, with 28 per cent of all male lawyers earning less than €35,000, compared with 35 per cent of women.

Male lawyers work longer hours than female lawyers (48 hours a week on average, compared with 43 for women) and are far more likely to have partners working full-time in the home. This is the case with almost 40 per cent of all men, but it is true of only 4 per cent of women. The number increases dramatically when there are children: 65 per cent of lawyer fathers rely on a partner for childcare, compared with 9 per cent of women.

Sexual harassment or bullying was experienced by 14 per cent of women lawyers, with nearly one in five having been asked to perform inappropriate tasks, like making tea, getting files or buying personal gifts on behalf of their employer. There was a widespread feeling among those surveyed that law was an "old boys' club" with almost one-third (31 per cent) of those surveyed experiencing exclusion from social networks, such as golf outings.

[136] *The Irish Times,* 9 August 2003
[137] *The Irish Times,* 6 March 2003. For access to the Annual Report itself see: www.equality.ie/

Furthermore, women lawyers who have experienced discriminatory behaviour in interviews or at work did not feel they could seek redress under equality legislation, as they feared that doing so would damage their careers.

Women constitute just over one in five of all judges in Ireland (21 per cent), the second highest in a common law jurisdiction.

Reasons for concern

The *Women's Human Rights Project*, a coalition of NGOs, is currently preparing a Shadow Report to the Government's Combined Fourth and Fifth Reports. The Project Co-ordinator has highlighted a number of recommendations due to appear in the Report, which will be published on 11 March 2004. Four general areas of concern to women in Ireland emerged from a questionnaire survey conducted nationwide: political representation, health, violence against women and barriers to education and employment.

Within the area of political representation, women remain seriously under-represented at all levels within formal political structures, with a lower number of female ministers in the current government than heretofore. A number of barriers to women's political participation are identified. These include an inhibitive political culture; family-unfriendly working hours and practices; overly complex structures and procedures and lack of support for women seeking to enter the political domain.

Within the area of health, high inequities in the system persist, and many marginalized women experience particular difficulties in accessing services. In relation to reproductive health, the background to the recent abortion referendum is outlined. The issue of cancer, in particular breast and cervical cancer, also emerges as a core concern for women.

Under the heading of domestic violence, court responses are characterised as lacking consistency. Less than 6% of domestic violence perpetrators receive a prison sentence whilst rape conviction rates, at 2%, are the lowest in Europe. Whilst the number of women in paid employment has risen significantly over the last decade, women continue to be concentrated in part-time, low-paid and low-skilled work.

Among the barriers identified to women progressing in education or employment was the issue of childcare. Childcare in Ireland is both scarce and expensive with Irish parents paying on average 20% of their earnings on childcare, compared to 8% for their EU counterparts. It is estimated that Ireland will need 83,000 new childcare places by 2010 to keep pace with demand.

In addition, the Shadow Report will provide a commentary on CEDAW's Concluding Observations from the last session involving Ireland, in order to examine whether its recommendations have been implemented.

Article 24. The Rights of the Child

International case law and concluding observations of international organs

Ireland is due to submit a periodic report to the UN Committee on the Rights of the Child in 2004.

Practice of national authorities

Part III of the Broadcasting Act 2001, dealing with standards in advertising, provides that the Broadcasting Commission of Ireland (BCI, formerly known as the Independent Radio & Television Commission (IRTC)) shall prepare a code specifying standards to be complied with and rules and practices to be observed in respect of advertising which relate to matters likely to be of direct or indirect interest to children.[138] The Commission is required to take into account the merits and feasibility of such a code containing a prohibition on a specified class or classes of such activity [i.e. advertising] in so far as those activities relate to children in general or children under a particular age.[139] The children's advertising code will apply only to indigenous broadcast media, such as RTE, TV3 and TG4 and Irish radio services.[140]

The BCI is developing the code in three phases, using a consultative approach. It is currently in the second phase, and the code is due to come into force in June 2004.

On the basis of submissions received from the first phase of the consultation process, the Commission has defined a child in principle as any person under-18 years.[141] Significantly, the Commission also found that different levels of protection are required by children of different ages, particularly very young children and those over 15 years, in the light of their relative maturity, cognitive ability and circumstances. It defines children's advertising as "advertising that promotes products, services, or activities that are deemed to be of particular interest to children and/or is broadcast during and between children's programmes."[142]

In its second submission to the BCI, the Children's Rights Alliance (a coalition of 75 NGOs concerned with the rights and needs of children) called for an outright ban on commercial broadcast advertising targeted at children under the age of twelve. The Alliance also called for restrictions on junk-food and alchohol advertising.[143]

In December, 2003 the first Ombudsman for Children, Ms. Emily Logan, was appointed by the Government in accordance with legislation passed in 2002.

Reasons for concern

The welfare provisions of the Children Act remain unimplemented despite reassurances from Government that progress was to be made on that issue. This contrasts with the expeditious manner in which the punitive aspects of the legislation were introduced.

[138] Section 19(1)(c)
[139] Section 19(7)(b)
[140] Conor Maguire SC, Chairperson of the Broadcasting Commission of Ireland (BCI), *The Irish Times*, 4 April 2003. Thus, In separate submissions made to the BCI, both Irish broadcasters claimed that there was a serious risk that advertisers will switch their business from Irish stations to foreign ones broadcasting into Ireland if they are unhappy with the Children's Advertising Code, due to come into force next year. The State broadcaster, RTE, argued that "there was a real danger of driving commercial revenue from regulated channels in Ireland to non-regulated channels broadcasting into the country." RTE also claimed that, because of the number of foreign channels Irish children are exposed to, any code would have an extremely limited impact (*The Irish Times*, 16 June 2003).
[141] Broadcasting Commission of Ireland, Phase 2 Consultation Document 2003, 'Outcomes of Phase One', paragraph 3.2
[142] *Ibid.*
[143] See generally: www.cra.ie/

Article 25. The Rights of the Elderly

Practice of national authorities

In *Older People in Long Stay Care*, a report written by Ms. Ita Mangan for the Irish Human Rights Commission, and published in May 2003, the quality of care for older people in residential care, the lack of clear rules about access to health board facilities and the absence of a complaints or appeals procedure within the health service were criticised. Community care is the preferred option for older people, however, entitlement to community care is unclear, and the provision of supports, like a home-help, varies in different parts of the country, resulting in an "unacceptable risk of arbitrariness in decision-making".[144] There is also no organised advocacy service for vulnerable, older people in care, and no provision for third-party complaints to be heard. The quality of care is a cause for concern – while the health boards are the inspector of private-sector providers, there is no external assessment of their own facilities. Thus, there is no information on the quality of care provided by the health boards, and furthermore, the reports by the inspectors of private nursing homes are not subject to systematic analysis. Other human rights issues raised in the document include inadequate provision of public care; the inadequacy of measures to ensure equity in the means test; and the incidence of inhuman or degrading treatment.[145]

The Law Reform Commission, in its *Consultation Paper on Law and the Elderly*, published in June 2003, examined the legal mechanisms for the protection of vulnerable elderly people.[146] The Paper cited research carried out by the National Council on Aging and Older People, which shows that the vast majority of people over 65 live independently in their own homes and want to continue to do so.[147] Only about 5 per cent of elderly people are in long-stay care.[148] It is clear that elderly people often want to remain at home but it is also clear, and officially accepted, that there are not enough long-stay care places for people who need them.[149] Admission to long stay public care requires an element of dependency.[150] Private nursing homes may admit any person but, in order to qualify for a financial subvention from the health board, a resident must be a dependent.[151] The inspection system for all long-stay care is inadequate and the needs of the elderly residents for protection or substitute decision-making on their behalf and in their interest may never be addressed.[152]

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[144] Mangan, *Older People in Long Stay Care*, (Irish Human Rights Commission, 2003)
[145] *Ibid.* See *The Irish Times*, 'Human Rights of Elderly Stressed in Report', 9 May 2003
[146] Law Reform Commission of Ireland, 'Consultation Paper on Law and the Elderly', LRC CP 23 – 2003, paragraph 1. The Principal Leal Researchers on the Paper were Ita Mangan, Dr. Mairéad O'Dwyer, and Jennifer Schweppe.
[147] See Garavan *et al, 'The Health and Social Services for Older People'* (HeSSop Report) (The National Council on Ageing and Older People 2001). The majority of people surveyed (87%) wished to continue to live in their own homes.
The central component of stated Government policy since the 1968 Report by the Interdepartmental Committee on the Care Of the Aged has been to enable older people to live in their homes for as long as possible. A recent study by the North Western Health Board of older people's preferences for long-term care found that 97 per cent wished to stay at home.
[148] National Council on Ageing and Older People's *Demography – Ageing in Ireland Fact File 1*
[149] See Department of Health and Children *Quality and Fairness – A Health System for You – The 2001 Health Strategy* (Department of Health and Children 2001).
[150] The rules in relation to admission to long stay public care are not clear. The legislation does not deal with the issue but health board guidelines do: see Mangan, *op.cit. Older People in Long Stay Care* (Human Rights Commission 2003), at p.25.
[151] Dependent person is defined in section 1 of the *Health (Nursing Homes) Act 1990* as "a person who requires assistance with the activities of daily living such as dressing, eating, walking, washing and bathing by reason of - (a) physical infirmity or a physical injury, defect or disease, or (b) mental
infirmity".
[152] Mangan, *op.cit.,* at p.27

The Commission made a number of provisional recommendations for change in the law, including a new system for protecting vulnerable adults.[153] Legislation should deal with "adults who may be in need of protection" and, if a decision is made that a person is in need of protection, then that adult becomes a "Protected Adult". An adult may be in need of protection even if legally capable. There should be two strands: a substitute decision-making system which it is proposed to call Guardianship. This would provide for the making of Guardianship orders in the case of people who do not have legal capacity and who are in need of guardianship (people who have a decision-making disability) and the appointment of Personal Guardians who would make some of the required substitute decisions; and an intervention and personal protection system which would provide for specific orders - services orders, intervention orders and adult care orders. These would be available for those who have legal capacity but who need protection and are unable to obtain this for themselves, and those people who do not have legal capacity but who do not need guardianship (probably because there is no need for a substitute decision maker because no decisions need be made).[154] The system would be supervised by a new independent Office of the Public Guardian with specific decision-making powers, the power to require the provision of certain services and an overall supervisory role over Personal Guardians and over those with powers of attorney. The Public Guardian would be subject to a Tribunal and Protected Adults would always have the right to appeal to the Tribunal against all substitute decisions.

The Report also expresses concern about elder abuse which has been increasing in recent years. The Commission agreed with the Working Group on Elder Abuse,[155] that the response to elder abuse must be placed in the wider context of health and social care services for older people, because the protection of vulnerable elderly people "cannot be guaranteed by legal mechanisms alone, and the need for protection would be considerably reduced if adequate health and social care services were available."[156]

Reasons for Concern

Around 25,000 people are accommodated in public and private nursing homes. There is no system of inspection or independent assessment at all for the state's 500 public nursing homes, and there are serious deficiencies in the system for the inspection of private homes. Legislation requires that all private nursing homes be inspected not less than once in every period of six months.[157] However, in a survey of health boards conducted by *The Irish Times*, the boards admitted that this frequently does not happen. The Western Health Board, for instance, says inspections are carried out "six-monthly to ten-monthly."[158] Just one private nursing home has been the subject of legal action in the courts in the past five years – however, more than 60 complaints have been made to boards about nursing homes in the past year.[159] The issue of private nursing homes is a topic on which the Ombudsman has commented critically in the recent past.

Article 26. Integration of Persons with Disabilities

National legislation, regulation and case law

A proposal to introduce an improved Disabilities Bill formed part of the Programme for Government (June 2002), including provision for rights of assessment, appeals, provision and

[153] paragraph 7.31
[154] *Ibid.*
[155] Working Group on Elder Abuse, *Protecting Our Future* (Stationery Office 2002)
[156] Introduction, paragraph 7
[157] Nursing Homes (Care and Welfare) Regulations 1993, section 24
[158] Inspection of Nursing Homes shown to be Inadequate', 2 August 2003
[159] *Ibid.*

enforcement.[160] This followed on the withdrawal of an earlier bill introduced at the end of 2001 which was severely criticised for attempting to restrict access to the courts for the purpose of vindicating the rights contained in the legislation.

The Disability Legislation Consultation Group (DLCG), brought together under the auspices of the National Disability Authority at the request of the Government to ensure effective consultation with the disability sector on the drafting of a new Disabilities Bill, published its proposals for core elements of disability legislation in February 2003. It stated that effective legislation must combine two approaches: positive rights to accessible services, needs assessment and advocacy that can be enforceable by individuals, and duties and requirements placed on bodies providing services to the public aimed at removing barriers to full participation of people with disabilities in Irish society.[161] Thus, a major emphasis given to the new disability legislation by the DLCG concerned the development of positive and enforceable rights for people with disabilities that go beyond anti-discrimination.[162] In relation to positive action, the Group stated that disability legislation should include a clause to the effect that nothing shall prevent the taking of such measures that will enable people with disabilities from fully participating in all aspects of life. A key issue for the DLCG was that 'reasonable accommodation' should not be limited by the concept of 'nominal cost' when applied to public bodies. Private and public bodies should be incentivised and adequately resourced to provide for reasonable accommodation (financial or fiscal measures, or best practice schemes and awards). The Group pointed out that the European Council Directive establishing a general framework for equal treatment in employment and occupation for people with disabilities (2000/78/EC) will, in any case, replace the 'nominal cost' test (that applies under Irish employment equality legslation) with a 'disproportionate burden' test. Although this only applies to the Employment Equality Act 1998, it was recommended that the same approach be adopted for the Equal Status Act 2000 (covering service provision etc.) when the Directive is transposed. [163]

At the time of writing no Disabilities Bill has been published but it is anticipated that legislation will be produced early in 2004. There has, however been quite an animated public debate on the justiciability of the social and economic rights of people with disabilities. The Minister for Justice, Equality & Law Reform has voiced strong opposition to the development of social policy by the courts through social and economic rights putting forward both principled and functional reasons for such opposition.

In a report written by Professor Brian Nolan (published by the Economic and Social Research Institute (ESRI)) and commissioned by the Department of Justice, Equality & Law Reform in October 2003, it was argued that: "A variety of approaches to delivering services, framing entitlements and instituting enforcement mechanisms can legitimately be seen as arising from a rights perspective… at the conceptual level rights need not necessarily be associated with the ability to have recourse to the courts, and in practice there may be alternative effective enforcement mechanisms."[164]

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[160] An Agreed Programme for Government between Fianna Fáil and the Progressive Democrats, Department of the Taoiseach, 'Building a Caring Society', June 2002; "We will complete consultations on the Disabilities Bill and will bring the amended Bill through the Oireachtas and include provisions for rights of assessment, appeals, provision and enforcement."

[161] Disability Legislation Consultation Group, 'Proposals for Core Elements of Disability Legislation', Part I, 6 February 2003. The Report of the Commission on the Status of Persons with Disabilities (1996) had also established a rights-based approach as the framework of reference.

[162] *Ibid.,* Part III

[163] *Ibid.*

[164] Economic and Social Research Institute, *On Rights-Based Services for People with Disabilities*, Dublin, October 2003. The study took a comparative approach, and based its conclusions on a review of the structures in place in the USA, New Zealand, the United Kingdom, Sweden and Australia, none of which, the Report found, had adopted a rights-based approach. A similar approach has been adopted by the National Economic and Social Council (NESC).

The DLCG and indeed many NGOs have maintained demands for "a human rights-based approach" to be adopted in the forthcoming legislation with the question of access to the courts (at least as a last resort) seen as a vital component of such an approach.[165]

Practice of national authorities

In the period January-September 2003 25 cases were taken on the disability ground under the Employment Equality Act, 1998 and 45 cases were taken on the disability ground under the Equal Status Act, 2000. This represented a decrease on the same period for 2002 under the employment legislation and an increase under the equal status legislation.[166]

The NDA made an extensive submission on the Education for Persons with Disabilities Bill, 2003 to the Joint Oireachtas Committee on Justice, Equality, Defence & Women's Rights in September 2003.[167]

Reasons for concern

While it clear that disability-specific legislation is imminent it remains to be seen whether or not the concerns voiced by the disability rights movement will be sufficiently addressed in the legislation. The Irish Human Rights Commission has already expressed concerns about aspects of the Education for Persons with Disabilities Bill, 2003 and it is clear that a satisfactory consensus has not yet been reached as to what is entailed by a "human rights-based approach" to disability.

CHAPTER IV - SOLIDARITY

Article 27. Workers' right to information and consultation within the undertaking

National legislation, regulation and case law

Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community was adopted in February 2002. The date for transposition into Irish national law is 23 March 2005, with certain transitional arrangements allowing for staged implementation up to March 2008. The Directive gives employees in undertakings[168] with at least 50 staff, or in establishments[169] with at least 20 staff, the right to information and consultation about the business in which they work, its prospects and the circumstances affecting their employment.[170] It is for each Member State to decide whether to apply the Directive to undertakings or establishments. Employees already have a right to information and consultation in Ireland, but this is limited to certain circumstances, such as where there is a transfer of ownership of a business or where collective redundancies are

[165] See further: *Observations on the Proposals Paper of the Disability Legislation Consultation Group (DLCG) From the Perspective of the International Covenant on Economic, Social and Cultural Rights*, Irish Human Rights Commission, June 2003.
[166] Statistics available at www.odei.ie/
[167] See: www.nda.ie/ under "Policy & Law"
[168] An undertaking is defined as a "public or private undertaking carrying out an economic activity, whether or not operating for gain, which is located within the territory of the Member States". This can be understood as a legal entity such as a company, partnership or co-operative. (Department of Trade and Enterprise)
[169] An establishment is defined as a "unit of business defined in accordance with national law and practice, located within the territory of a Member State, where an economic activity is carried out on an ongoing basis with human and material resources". In other words, it is a distinct physical entity such as a factory, branch office or retail outlet, which is part of a larger legal entity. Thus an undertaking may operate a number of establishments. (Department of Trade and Enterprise)
[170] Directive 2002/14/EC, Article 3

planned.[171] The new legislation will bring in a broader right to information and consultation on an ongoing basis. Mr Frank Fahey, Minister for Labour Affairs at the Department of Enterprise, Trade and Employment, published a Consultation Paper in July 2003 on the forthcoming legislation on information and consultation of employees. Once the consultation process is complete, it is intended to issue an 'Information and Consultation of Employees Bill' in the summer of 2004 with a view to enactment by March 2005.[172]
Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees is due to be transposed into Irish law by 8 October 2004. This Directive prescribes the rules for information, consultation and participation of employees in those companies which elect to become a European company (Societas Europaea). The rules on becoming a Societas Eoropaea are set out in Council Regulation (EC) 2157/2001.[173]

Article 28. Right of collective bargaining and action

National legislation, regulation and case law / Practice of national authorities

Sustaining Progress, the Social Partnership Agreement 2003-2005, was endorsed by the Irish Congress of Trade Unions (ICTU) and the Irish Business and Employers' Confederation, IBEC, in March 2003.[174] The Agreement is the sixth in a series of Agreements between government and the social partners dating back to 1987. Part II section I on Private Sector Pay and Related Issues states that the Agreement precludes strikes or other forms of industrial action by trade unions, employees or employers in respect of any matters covered by this Agreement, where the employer or trade union concerned is acting in accordance with the provisions of this Agreement.[175] Similarly, Part III on Public Service Pay and Related Issues states that the Agreement precludes strikes or other forms of industrial action by trade unions, employees or employers in respect of any matters covered by this Agreement, where the employer or trade union concerned is acting in accordance with the provisions of this Agreement.[176]

Where the parties cannot reach agreement through negotiations on any matters covered by the Agreement after local discussion, these will be referred to the Labour Relations Commission (LRC) and, if unresolved, shall jointly be referred to the Labour Court or, where appropriate, to other agreed machinery. If a dispute arises out of a claim of inability to pay by an employer, the onus will be on the employer to convince the Court of their case. The Court will issue findings only in respect of whether the employer can or cannot pay the terms of the Agreement at all and the parties will comply with the findings. Where a decision is taken to reject the Labour Court recommendation, a three week cooling-off period will apply during which every effort shall be made by the parties to resolve the issues. No strike or other forms of industrial action will be threatened, sanctioned or taken by trade unions or employees

[171] The Protection of Employment Act, 1977 (as amended) provides that employers planning collective redundancies must consult employees' representatives and notify the Minister for Enterprise, Trade and Employment at least 30 days before the redundancies commence. In the event of a transfer of ownership of an undertaking, an employer has certain obligations to inform and consult employees at least 30 days in advance of the transfer. The Transnational Information and Consultation of Employees Act 1996 applies to Community-scale undertakings and Community-scale groups of undertakings and provides for information and consultation of employees on transnational matters affecting those employees. The Social Partnership Agreement 2003-2005, *Sustaining Progress*, states in Section 1.10 of Part II that "if a dispute arises out of a claim of inability to pay by an employer, the onus will be on the employer to convince the union of the case and provide supporting arguments and full disclosure of information to the union."
[172] National Information and Consultation Directive 2002/14/EC, 'Consultation Paper on Transposition into Irish Law', Industrial Relations Unit, Department of Trade and Enterprise, July 2003-11-26
[173] *Ibid.,* Appendix 6
[174] The Agreement includes a timetable for payment of the benchmarking pay increases, worth an average 8.9 per cent, to public servants, as well as the productivity changes to be conceded in return.
[175] Part II section 1.5
[176] Part II section 19.6

during the cooling-off period and until appropriate ballots have taken place and due notice given to the employers.[177]

The basic pay increases in clause 1.7 of the agreement are to be negotiated between employers and unions through normal industrial relations machinery, "due regard being had to the economic, commercial and employment circumstances of the particular firm, employment or industry." Where a dispute arises, at LRC stage, assessors may be appointed from a pool, agreed with the employers and the unions, to examine the economic, commercial and employment circumstances of the employment involved.[178]

In a written response to a parliamentary question in May 2003, the Minister for Finance, Mr Charlie McCreevy, said a number of subsequent disputes raised questions about the credibility of 'Sustaining Progress'. His criticism was an implicit reference to, *inter alia*, a long-running strike by public health doctors. "All of the previous agreements contained industrial peace clauses but the provisions in 'Sustaining Progress' were reinforced and underlined to a much greater extent than previously…We are now only a few months on from the conclusion of the negotiations and ratification of the agreement and we find ourselves with a number of disputes which, in my view, are in breach of the peace terms of Sustaining Progress", he wrote.[179]

Article 29. Right of access to placement services

Reasons for concern

Just 15 of almost 4,000 new apprentices trained this year by the State's training and employment agency, FÁS, were female. The agency reported 3,943 new apprentices up to the end of August 2003, and the 15 females represent just 0.38 per cent of that total. There are currently only117 women among the 25,615 'live' apprenticeships, where recruits could be in any of the four years of their training.[180]

[177] Part II section 1.10 (ii) and (iii)

[178] See *The Irish Times*, 27 March 2003: The provision was described by Mr. Turlough O'Sullivan, Director-General of IBEC, as "a greater feature in the implementation of this agreement." However, unions may read this as a warning that a significant number of employers will plead inability to meet all or part of the pay terms of the deal. Mr. Seamus Dooley of the National Union of Journalists (NUJ), who supported the Agreement, stated "I strongly believe that this may well be the last national agreement of its type and in the coming 18 months we need to put our unions on a strong war footing and to prepare for a genuine battle with the Government and employers." Mr Larry Broderick of the Irish Bank Officials' Association (IBOA), stated that the binding arbitration element had taken away the right of unions to make decisions for their members and was an "extraordinary concession". IBEC, on the other hand, in a statement following its Council meeting on 26 March 2003, said binding arbitration of disputes would provide "a much more acceptable industrial relations climate". Opponents of the Agreement include the Community Platform, a group representing 26 organisations in the community and voluntary sector, the small firms association (ISME), which was highly critical of the pay elements, the Irish Federation of University Teachers (IFUT), the craft workers' union (TEEU), and some larger unions, notably MANDATE, the Communications Workers' Union and the Civil and Public Service Union. The Community Platform stated that the needs of people living in poverty and experiencing inequality had been "completely ignored" in the partnership process. Their spokeswoman, Ms Frances Byrne, stated that: "We are faced with an extremely socially conservative Government, where people are perceived as economic units and nothing more. The time has come for a new space and a new voice for radical social change." (*The Irish Times*, 26 March 2003). The social agenda of the Agreement is covered by ten 'special initiatives' in areas including the cost of insurance, migration, long-term unemployment, waste management, child poverty and drug abuse.

[179] The Irish Medical Organisation has consistently argued that their claims pre-date the current Agreement, and the three previous national agreements.

[180] The Irish Times, 6 September 2003

Article 30. Protection in the event of unjustified dismissal

According to the Employment Appeals Tribunal *Annual Report 2002*, published in November 2003, the number of claims and appeals referred to the Tribunal rose from 5,257 in 2001 to 6,259 in 2002. The greatest increase in cases referred were under the legislation on minimum notice and terms of employment, however the most significant increase in terms of the Tribunal's time and resources, according to the Report, is the increase to 1,311 from 957 in the number of claims and appeals referred under the Unfair Dismissals legislation.[181] The Tribunal was set up under the Redundancy Payments Act of 1967, and its remit was later extended to include responsibility for settling other disputes under various employment Acts. The average waiting period for unfair dismissal cases to come for hearing was 23 weeks in Dublin and 19 weeks outside the capital. Decisions of the Employment Appeals Tribunal can be appealed to the Circuit Court, and 48 decisions were appealed in 2002. Of these 18 were upheld, 4 were overturned, 1 was struck out and 25 have yet to be heard.[182]

With regard to compensation, for 183 determinations of unfair dismissal, the Tribunal awarded compensation amounting to €973,045.22. The average amount of compensation awarded by the Tribunal was thus €5,317.19. Re-instatement was ordered in 1 case and re-engagement was ordered in 3 cases.

Article 31. Fair and just working conditions

National legislation, regulation and case law

The *Report of the National Task Force on Medical Staffing* (or 'Hanly Report'), produced a set of wide-ranging proposals to take account of the need for shorter working hours for Non-Consultant Hospital Doctors (NCHD's) resulting from the European Working Time Directive (EWTD) which will come into force from 1 August 2004. The EWTD requires that, by 1 August 2004, NCHDs must no longer work for more than an average of 58 hours per week on the hospital site. Under EU legislation, a 48-hour working week for non-consultant hospital doctors must be introduced by 2009 - this requirement was the starting point for the Report.[183] At present, there are over 3,900 NCHDs in Ireland, delivering frontline services in more than 40 public acute hospitals and numerous other health agencies. They work an average of 75 hours per week on-site, often for continuous periods of more than 30 hours, with minimal rest. From 1 August 2004, these working arrangements will no longer be legally permissible. As the phased working limits of 58, 56 and 48 hours take effect, the ability of NCHDs to provide medical cover for long periods of time will diminish significantly. The Task Force's recommendations were centred on three key elements: reducing NCHD hours in line with the EWTD; introducing a consultant-provided service; and reforming medical education and training structures. The structural and organisational consequences of meeting these will inevitably require radical reform of the organisation of acute hospital services. The Report concluded that implementation of the reforms in medical education and training necessary for compliance with the EWTD and development of a consultant-provided service[184] should proceed as a matter of urgency. It has since been reported that the Irish Government may avail of an opt-out clause under the Directive

[181] The Employment Appeals Tribunal Thirty-fifth Annual Report 2002, Submitted in pursuance of Section 39(18) of the Redundancy Payments Act 1967, November 2003
[182] *Ibid.,* p.12
[183] *Report of the National Task Force on Medical Staffing*, Chairperson's Foreword (June 2003)
[184] A consultant-provided service is defined as a service delivered by teams of consultants, where the consultants have a substantial and direct involvement in the diagnosis, delivery of care and overall management of patients (*Ibid.,* paragraph 2.2.2). This contrasts with a consultant-led service, defined in the Health Strategy (2001) as a service supervised by consultants who lead and advise teams of doctors in training and other staff in the delivery of care to their patients.

An outright ban on smoking in pubs and restaurants was announced on 30 January, 2003 by the Minister for Health & Children, Mr Martin. The Tobacco Smoking (Prohibition) Regulations,[185] made under the Public Health (Tobacco) Act, 2002, which will come into effect on 26 January 2004, prohibit the smoking of tobacco products in specified places or premises, including a place of work, and a licensed premises, in so far as it is a place of work.[186] The ban was vehemently opposed by the newly-formed Irish Hospitality Industry Alliance (IHIA) comprising members from pubs, restaurants, bed and breakfasts, nightclubs, registered clubs and tourism venues. They produced a Regulatory Impact Assessment in August 2003, *On Draft Ministerial Regulations to Ban Smoking in the Workplace Including Hospitality Venues*, which noted, *inter alia,* that if Ireland proceeded with the proposed ban on smoking in the work place, this would set the highest standard in the developed world. The Report estimated that total compliance with the ban would cost the tourism and hospitality industry nearly €200m. The social impact of the ban was described in the concluding comments: "Pubs and other licensed premises are a core part of the essential custom of 'socialising' in Ireland. It is a deeply embedded trait of Irish life that the pub/club is the centre of activity, post-work, pre-match and during all types of adult entertainment. The not insignificant impact which a total ban on smoking in all hospitality venues will have on the very fabric of Irish society must be weighed up before final decisions are taken. Does Ireland wish to become a location where strict clinical controls are imposed in venues which are essential to our much publicised reputation in tourism marketing for conversation, contact and 'craic'?"[187]

The proposed ban is strongly supported on health and safety grounds by the trade union movement especially by those unions whose members work in the hospitality industry.

The final details of the regulations were submitted to the European Commission under the EU Transparency Directive on 12 November 2003, which means that the ban can be introduced three months from that date, i.e. 12 February 2004. There are, however, some further delays anticipated in the introduction of the regulations and it is likely that they will be challenged in the courts by affected parties. The Regulations allow for the following exemptions from the ban: psychiatric hospitals, nursing homes, hospices, the Central Mental Hospital, sleeping accommodation in hotels, guest houses, B&B's, hostels and student accommodation. These are in addition to exemptions already decided for prisons and outdoor workplaces.

Article 32. Prohibition of child labour and protection of young people at work

No significant development to be reported during the period under scrutiny

Article 33. Family and professional life

Dr Hanna Beate Schopp-Schilling, a member of the UN Committee on the Elimination of Discrimination Against Women, cited the lack of affordable childcare and the fact that parental leave remained an unpaid option in Ireland as having the effect of placing primary responsibility for family work and childcare on women. This perpetuated a situation where women held the majority of part-time jobs and earned less than men, and where women were less likely than men to become involved in politics or hold senior management positions.[188]

[185] S.I. No. 481 of 2003

[187] Irish Hospitality Industry Alliance, 'Regulatory Impact Assessment on Draft Ministerial Regulations to Ban Smoking in the Workplace, Including Hospitality Venues', A&L Goodbody Consulting, August 2003

[188] The Irish Times, 8 April 2003

A Parental Leave Bill is due to be considered in 2004, which will give effect to the recommendations of the Working Group on the Review of the Parental Leave Act 1998.[189] The Review noted that 20% of eligible employees have taken parental leave with 84% of the leave being taken by women.[190] The recommendations include payment for parental leave, however, it is as yet not known if this recommendation will be incorporated into the proposed bill.[191]

One-third of the cases before the Equality Authority last year were on gender grounds, and the majority of these involved maternity or pregnancy-related discrimination.[192]

Article 34. Social security and social assistance

No significant development to be reported during the period under scrutiny

Article 35. Health care

The publication, in June 2003, of the Brennan Report and the Prospectus Report, heralded the beginning of substantive structural reform of the health sector in Ireland.[193] The Reports recommend that a new Health Service Executive agency should take over the management of the health service from the Department of Health and tackle what the Brennan Report describes as a "management vacuum" at the heart of the health system.[194] The Executive would replace the current ten existing health boards, which have been in place since the 1970 Health Act. It will be established on a statutory footing by 2005. The first stage in the most radical reform of the health sector in thirty years was completed with the publication later on in the same month of the Report of the National Task Force on Medical Staffing (Hanly Report).[195]

A presentation at the Annual General Meeting of the Irish College of General Practitioners (ICGP) identified a lack of interpreters in the health system as the single biggest barrier to offering quality medical care to asylum-seekers and ethnic minority patients, according to 1,000 GP's surveyed.[196]

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[189] Report of the Working Group on the Review of the Parental Leave Act 1998, April 2002

[190] *Ibid.,* p.50

[191] The Framework Agreement on Parental Leave (96/34/EC) does not provide that parental leave provision in Member States is paid. The Framework Agreement annexed to the Directive sets out minimum requirements on parental leave and *force majeure* leave and allows Member States the option of providing more favourable provisions than those set out in the Framework Agreement.
Parental leave in Ireland is unpaid. The Review of the Parental Leave Act recommends that "Parental leave should become a paid entitlement. The question of whether or not payment should be made by employers or by the State is a matter for the Government. If it were to be decided that the provision of a social insurance payment were the preferred option, the National Women's Council of Ireland would wish the payment to follow the model of the current Maternity Benefit payment (NWCI)." The Department of Justice, Equality and Law Reform has stated that while it was considering recommendations of the review of the Parental Leave Act, payment for parental leave remained unlikely (*The Irish Times*, 1 March 2003).

[192] Office for the Director of Equality Investigations (ODEI – The Equality Tribunal), Annual Report 2002; 78 cases were taken alleging gender-based discrimination under the Employment Equality Act 1998.

[193] Commission on Financial Management and Control Systems in the Health service (Brennan Report), 10 June 2003, Audit of Structures and Functions in the Health System (Prospectus Report), 10 June 2003.

[194] Brennan Report, *Ibid.,* p.8, Prospectus Report, *Ibid.,* p.77
The need for reform and greater efficiency in the sector was starkly illustrated by the fact that the projected tax revenue from income tax this year, 2003, is E9.3 billion - gross expenditure on health in 2003 will be €9.15 billion. The Taoiseach, Mr. Ahern, remarked in the Dáil (18 June) that the Government was resourcing the health service, and "now we need to manage it better".

[195] For a discussion of the content and issues surrounding the Hanly Report, see *infra*, Article 31

[196] Dr. Philip Crowley and Pauline Tierney, 'General Practice Care in a Multicultural Society', presented at IGCP AGM, May 2003. See also Dr. Philip Crowley, 'General Practice Care in a Multicultural Society - Information

The 2003 report from The National Health & Lifestyle Surveys, published in April, found that 12 per cent of Irish men and 7 per cent of women smoked cannabis in the past year. Among schoolchildren, 11 per cent reported having taken the drug in the past year. The rates of cannabis use are notably higher among third level educated people.[197]

Article 36. Access to services of general economic interest

National legislation, regulation and case law

The Commission for Communications Regulation, ComReg, published a framework document on regulating universal service in the telecommunications market in June 2003.[198] The Document re-designated Eircom as Ireland's Universal Sercive Provider (USP), under forthcoming EU legislation. As well as providing telephone lines across the State, the USP designation will require Eircom to draw up a customer charter on all services falling under its remit, including the provision of fixed location connections, pay phones, phone books and services for disabled users.[199]

Reasons for Concern

Currently in Ireland, one in six Irish households does not have a home phone.[200] ComReg defines universal service as seeking "to ensure that users can have reasonable requests for basic services at an affordable standard prices", in line with the EU definition. According to Dr. Roddy Flynn, Lecturer in the School of Communications at Dublin City University, this minimalist notion of universal service "is accounted for by Irish universal service policy's being framed in an EU context. Despite occasional nods to the social role of telecoms, the European Commission has mainly focused on liberalising telecoms markets. 'Equal access' in this policy context means levelling the playing field for new market entrants seeking access to subscribers, not to facilitating universal access to services for citizens."[201] Dr. Flynn points out that universal service was only brought into the EU equation by public telecoms operators defending their monopoly status by arguing that their unprofitable customers were cross-subsidised with the profits from their low-cost subscribers. Competition, they argued, would erode those profits. Ironically these same - now largely privatised - operators now bridle at the thought of facing any obligation other than those demanded by the market. Eircom's comments within the ComReg framework document highlight this point - for Eircom**,** universal service obligations means meeting minimum standards on the geographical reach of

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Pack', Chapter 3; "The failure to provide for interpretation may amount to institutional discrimination and needs to be addressed."

[197] The National Health and Lifestyle Surveys, SLÁN (Survey of Lifestyle, Attitudes and Nutrition), and HBSC (Health Behaviour in School-Aged Children), Centre for Health Promotion Studies, Department of Health and Children, April 2003

[198] Directive 2002/22/EC on Universal Service and Users' Rights relating to Electronic Communications Networks and Services (Universal Service Directive), 7 March 2002. Universal Service is defined as "the provision of a defined minimum set of services to all end-users at an affordable price" (paragraph 4). A fundamental requirement of universal service is provide users on request with a connection to the public telephone network at a fixed location, at an affordable price (paragraph 8). Adequate provision of public pay telephones as well as services for the disabled are also required (paragraphs 12 and 13).
S.I. No.308 of 2003, European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2003 give effect to the Universal Services Directive.

[199] In February 2003, Eircom, formerly state-owned and privatised in 1999, stated its wish to abandon its role as USP, which it claimed was costing it €40 million per year. It is now owned by Valentia Telecommunications, a group run by Sir Anthony O'Reilly and US private investors. The company contends that it should not be the sole USP when it only generates 38 per cent of the Republic's telecoms revenues. The remainder comes from mobile phone companies and alternative fixed-line providers. The company also made clear its wish to reduce further the number of pay telephones it operates and to have private developers fund the public's access to telecoms services in all new housing developments (Submission to the Commission for Communications Regulation, February 2003).

[200] According to ComReg, between 207,300 and 248,760 Irish households do not have land-line telephones.

[201] *The Irish Times*, 25 June 2003

the network, on pay-phone availability and on offering directory inquiry services. Eircom expressed surprise at the notion that telephone penetration of households could be in any way relevant to assessing the extent to which universal service obligations were being met. Similarly the company's understanding of a 'reasonable' request for service appears quite restrictive: Eircom considered in situations where the capital cost of providing the line is unlikely to be recovered from the customer that such cases should not be deemed reasonable. Thus, the working definition of universal service for Eircom, the designated USP in Ireland falls well short of operatively expanding the current subscriber base. ComReg rejects much of the Eircom perspective. Nonetheless, it largely shares Eircom's assumption that lack of access is a market issue. The furthest ComReg will go on allowing the possibility that some people genuinely cannot afford a telephone in Ireland is to acknowledge that the existence of those without a telephone connection "may reflect the position that consumers' payment options are limited, particularly where payment difficulties are experienced.[202]

Article 37. Environmental protection

International case law and concluding observations of international organs

There have been two important decisions and one opinion from the European Court of Justice which arise under the heading of environmental protection:

Opinion - Protection of waters against pollution caused by nitrates from agricultural sources:

In the *Commission of the European Communities v. Ireland*, the Commission brought an action for failure to fulfil obligations owing to the fact that Ireland had not in due time adopted measures in order fully to comply with its obligations under Articles 3, 4, 5 and 6 of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources.[203] Advocate General Geelhoed confined himself in his Opinion (delivered on 26 June 2003) to the legal dispute of whether or not the measures adopted by Ireland may or may not be regarded as action programmes within the meaning of Article 5 of the Directive. If those measures may be regarded as such Ireland would have been exempt under Article 3(5) of the Directive from the obligation to identify vulnerable zones.[204] The Commission disputed Ireland's claim that it had established action programmes as mentioned in the Directive. Those action programmes are to take into account available scientific and environmental conditions in the relevant regions.

Neither in Article 2 (definitions) nor in Article 5 (action programmes) does the Directive provide a definition of action programme. Nor does it lay down any express requirements concerning the form of the action programmes to be established by the Member States. That may be accounted for by the fact that it is to a certain extent obvious what is meant thereby. In general terms it will be a document which serves as an overarching framework for a series of projected measures aimed at the attainment of a specific objective within a specific time span.

[202] *Ibid.*
[203] C-396/01
[204] Article 3 imposes the following obligations on Member States: Waters affected by pollution and waters which could be affected by pollution if action pursuant Article 5 is not taken shall be identified by the Member States in accordance with the criteria set out in Annex I (Art. 3(1)). Member States shall, within a two-year period following the notification of this Directive, designate as vulnerable zones all known areas of land in their territories which drain into the waters identified according to paragraph 1 and which contribute to pollution. They shall notify the Commission of this initial designation within six months (Art. 3(2)). Article 3(5) contains the following exception to that obligation: Member States shall be exempt from the obligation to identify specific vulnerable zones, if they establish and apply action programmes referred to in Article 5 in accordance with this Directive throughout their national territory.

The notion of an action programme further presupposes that those measures are appropriate to that objective and that they are sufficiently coherent.[205]

In other words an action programme is a self-standing policy instrument that is generally drawn up prior to the measures adopted for attainment of the policy objective concerned. Naturally that chronology does not preclude existing measures from also being incorporated into such a programme. The material factor is that an action programme constitutes an autonomous and recognisable framework for a set of measures by which it is sought to achieve a policy objective. That means that an action programme cannot merely by implication comprise a series of measures established for a specific objective.[206]

That an action programme constitutes a more comprehensive whole than a series of measures is also apparent from the wording and structure of that provision. Indeed, although in certain language versions of Article 5(4) an action programme may be regarded as equivalent to the measures to be adopted (bestaan uit ... maatregelen, consist of ... measures, consisterن en ... medidas), other language versions suggest that the action programme must in fact be more comprehensive (contiennent les mesures ..., enthalten ... Maكnahmen, comprendono le misure ...). That the latter construction is the correct one is confirmed by Article 5(5) in which all language versions provide that, in the framework of the action programmes, the Member States, are to adopt additional measures or reinforced actions in the situation referred to.[207]

The Advocate General pointed out that reliance by the Irish Government on the exception in Article 3(5) was weakened by the fact that, in regard to the action concerning infringement of Article 5, it had conceded that the measures adopted did not wholly satisfy the requirements of that provision.[208] Nonetheless, the requirements the Directive laid down in connection with the action programmes to be established by the Member States, and whether the Irish measures complied with them, had to be examined.

He stated that first and foremost it was plain that the measures mentioned by the Irish Government did not form part of a general policy framework aimed at the attainment of a closely defined objective, as required by Article 5(1) of the Directive. Moreover, those measures did not demonstrate a sufficient degree of coherence in order themselves to be deemed to constitute by implication an action programme. In addition there was no clear timetable for the attainment of a predetermined result. Nor, finally, did the Irish measures, in view of the fact that they were non-mandatory, comply substantively with the requirements laid down in Article 5(4) in conjunction with Annex III.

A clear distinction must be drawn between, on the one hand, an action programme and, on the other, the measures adopted within that framework. Measures which may be adopted outside that framework cannot, even when viewed together, provide a substitute for the action programmes required by Article 5 of the Directive.[209]

In those circumstances and on the basis that the Irish Government did not contest the Commission's allegations, the Advocate General was of the view that the Irish Government had failed to fulfil its obligations under Article 3(1), (2) and (4), Article 5 and Article 6(1)(a), (b) and (c) of the Directive.

He accordingly proposed that the European Court of Justice should declare that Ireland had failed to fulfil its obligations under Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources by failing, within the time-limits

[205] Paragraph 16
[206] Paragraph 17
[207] Paragraph 18
[208] Paragraph 14
[209] Paragraph 28

provided for in the Directive, to completely identify waters pursuant to Article 3(1) in accordance with the criteria set out in Annex I and to notify these to the Commission, to designate vulnerable zones pursuant to Article 3(2) and/or 3(4), to establish action programmes in accordance with Article 5, and to correctly and completely carry out monitoring and review of waters in accordance with Article 6(1)(a), (b) and (c).

Judgement – Quality of shellfish water:

On 11 September 2003, the European Court of Justice, in the case of *Commission of the European Communities v. Ireland*,[210] held that Ireland had failed in its obligations under Article 5 of Council Directive 79/923/EEC of 30 October 1979 on the quality required of shellfish waters. Article 5 provides that Member States shall establish programmes in order to reduce pollution and to ensure that designated waters conform, within six years following designation in accordance with Article 4,[211] to both the values set by the Member States in accordance with Article 3 and the comments contained in Columns G and I of the Annex.

Ireland transposed the Directive by adopting the Quality of Shellfish Waters Regulations of 18 July 1994 (SI No 200 of 1994). By the same regulations, it also made the designations required under Article 4 of the Directive. It followed that Ireland had to establish the programmes in accordance with Article 5 of the Directive within a period of six years from that date.

In its defence, the Irish Government did not contest the alleged infringement. It drew attention, however, to the draft programmes which the competent authorities had drawn up and requested the Court to suspend the proceedings in order to enable the Commission to consider them.[212] The Commission replied that, as well as maintaining its action against Ireland, those draft programmes did not comply with the requirements of the Directive.

Consequently, the Court declared that, by not adopting programmes for all its designated shellfish waters in accordance with Article 5 of Council Directive 79/923/EEC of 30 October 1979 on the quality required of shellfish waters, Ireland has failed to fulfil its obligations thereunder.

Judgement – Ineligibility of state forestry company for loss of income grants:

On 26 November 2003, the European Court of Justice ruled that only farmers, i.e. private individuals, were entitled to payments under EU Regulation 2080/92 which instituted community funding for farmers to plant trees on their holdings from 1993 - 1999 giving grants for the establishment of the plantations and as well as "loss-of-income" grants intended to replace the income lost by farmers from their traditional crops while their plantation matured. *Coillte Teoranta*, the State forestry company, will lose up to €39 million as a result of the judgement. The company will also be required to return more than €8 million it had

[210] C-67/02

[211] Article 4(1): Member States shall, initially within a two-year period following the notification of this directive, designate shellfish waters.

[212] In this regard, according to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes (see, *inter alia*, Case C-177/01 *Commission* v *France* [2002] ECR I-5137, paragraph 13.
In this instance, the Commission, having given Ireland formal notice to submit its observations, issued its reasoned opinion in accordance with the procedure laid down in the first paragraph of Article 226 EC by letter of 25 July 2001, inviting Ireland to establish the pollution-reduction programmes required by Article 5 of the Directive within two months of notification of the opinion. Since the information communicated to the Commission by the Irish authorities in response to that opinion showed that Ireland had not adopted all the measures necessary to comply with the provisions of the Directive in relation to the establishment of the programmes required by Article 5, the Commission decided to bring the action.

already drawn down under the scheme. The case was supported by the Friends of the Irish Environment, who stated that *Coillte* had claimed grants for loss of income from land the company had only just bought from farmers, and had used the funding stream to borrow funds to purchase more land.[213] As the Government had participated in the negotiations on the funding package, the Court stated that it must have known the grants were not intended for public undertakings like *Coillte***.** The cause of the grants being disallowed by the EU EAGGF [European Agricultural Guarantee Guidance and Guarantee Fund] Accounts Committee is that as a public authority *Coillte* had no "legitimate expectations" of a grant intended to assist farmers who were trying to restructure their holdings and keep their families in the countryside.[214]

Article 38. Consumer protection

The Annual Report for 2002 from the Office for the Director of Consumer Affairs (ODCA) was published in March 2003. Among the issues raised in the report was the safety of roller blinds. The Dublin City Coroner contacted ODCA in January 2002 to express concerns about the safety of pull cords on roller blinds. This arose following two fatal incidents in which small children had been strangled (one in 1998 and one in 2001). ODCA approached the European Commission and the EU Working Group on Product Safety regarding the possibility of drawing up an appropriate European standard for roller blinds. In mid 2002, the Commission gave a mandate to CEN (the European standards working group) to develop an appropriate standard for roller blinds.[215]

The powers of the Director's authorised officers to investigate breaches of orders made under Section 44 of the Industrial Research and Standards Act, 1961 were inadvertently removed with the enactment of the National Standards Authority of
Ireland Act, 1996. This has posed significant difficulties for ODCA. At the Director's request, the Department of Enterprise, Trade and Employment is currently working on
arrangements for the restoration of the authorized officers' powers. In the absence of these powers the Director is endeavoring to enforce the various orders by administrative means. The two most important of these relate to fire safety of furniture and hood cords for children's clothing.[216]

CHAPTER V - CITIZEN'S RIGHTS

Article 39. Right to vote and to stand as a candidate at elections to the European Parliament

Foreign nationals have been identified as potential key voters in the forthcoming local and European elections (11 June 2004) - more than 10 per cent of the Irish population, or 400,000 people resident here, were born outside the State, with more than half of those born outside the State from Britain and Northern Ireland, and a further 50,000 from other European

[213] *The Irish Times*, 26 November 2003
[214] See also Case T-244/00 (25 April 2001), *Coillte Teoranta v. Commission of the European Communities*, an application by Coillte for annulment of Commission Decision 2000/449/EC of 5 July 2000 excluding from Community financing certain expenditure incurred by the Member States under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) (OJ 2000 L 180 p. 49) to the extent that that decision excludes from that financing expenditure declared by the Irish accredited paying agency in respect of afforestation aid.
The Court of First Instance (Third Chamber) ruled in this case that Coillte's application was manifestly inadmissable.
[215] *Annual Report of the Director of Consumer Affairs 2002*; available at http://www.odca.ie/pdf/2002.pdf
[216] *Ibid.,* p.12

countries. The Department of the Environment has said that it is aware of the rising numbers of non-nationals and would be considering measures to promote their participation in next June's elections.[217]

Article 40. Right to vote and stand as a candidate at municipal elections

Ireland has not signed or ratified the Convention on the Participation of Foreigners in Public Life at Local Level. There have been no initiatives toward signature or ratification.

However, under Irish electoral law, the only criterion for registration as a local government voter is that the person must be ordinarily resident in the state for more than twelve months. Thus, for example, many asylum seekers will be eligible to vote and run as candidates at a local level in June 2004. Members of minority ethnic groups have announced that they will run for election in Tallaght, Galway and Ennis. There is no requirement that candidates be members of political parties. One former asylum-seeker, a Nigerian-born medical doctor, is to stand in the local elections in Ennis, Co Clare, as an Independent.

The local and European elections, to be held on 11 June 2004, will be the first to be carried out entirely on the electronic voting system. Some 7,000 electronic voting machines, similar to those used previously in Germany and the Netherlands, will replace the manual ballot at a cost of €36 million. Electronic voting was first used in the May 2002 general election in Meath, Dublin North and Dublin West. It was used in four more - Dublin Mid West, Dublin South West, Dublin South and Dun Laoghaire - during the second Nice Treaty referendum held in 2003.

Opposition parties have expressed concern over the electronic voting system,[218] in particular the lack of paper-based records, or an audit trail, to accompany the casting of individual votes.[219]

Article 41. Right to good administration

Not relevant

Article 42. Right of access to documents

Not relevant

Article 43. Ombudsman

Not relevant

[217] *The Irish Times*, 22 September 2003

[218] A study carried out for the Department of Environment and Local Government last year by two computer scientists from the National University of Ireland Maynooth (under the company name 'Zerflow') raised some concerns. The study warned that the voting machines could not properly protect ballots, while voters could be duped into voting for the wrong candidates. Zerflow said it had copied the control keys for one machine at a local shopping centre. The company recommended that keys should be abandoned and smart cards and PIN numbers used. If keys were kept in use, they should be sent separately from the machines. Last October, the Department said it had not accepted the complaints made by Zerflow, while the company itself had accepted that actions taken by the Department's franchise section had dealt with any concerns it had.

[219] Such a system has in turn been criticised by the Government as possibly violating voter anonymity. The issue is currently being examined by the Attorney General's office.

Article 44. Right to petition

Not relevant

Article 45. Freedom of movement and of residence

National legislation, regulation and case law

The enactment in May 2003 of section 13 of the Social Welfare (Miscellaneous Provisions) Act, means that asylum-seekers who leave their assigned accommodation will not be entitled to claim rent allowance.[220]

Reasons for concern

The Free Legal Advice Centres (FLAC) Ltd. published a report in July 2003 entitled *Discrete Discrimination?*, which criticised the system of direct welfare provision for asylum seekers. Under direct provision, asylum-seekers receive "comfort money" of €19.10 (for an adult) or €9.60 (for a child) per week. The report concluded that direct provision was "gravely detrimental to the human rights of a group of people lawfully present in the country and to whom the Government has moral and legal obligations under national and international law." It was suggested that the system may be unconstitutional, as it was introduced in 1999 by a ministerial circular rather than by legislation. The only aspect of direct provision which has been placed on a statutory footing is the aforementioned section 13 of the Social Welfare (Miscellaneous Provisions) Act, 2003.

Article 46. Diplomatic and consular protection

Not relevant

CHAPTER VI : JUSTICE

Article 47. Right to an effective remedy and to a fair trial

International case law and concluding observations of international organs

In *Doran v. Ireland*,[221]the European Court of Human Rights held that Ireland had violated Article 6(1) and Article 13 of the Convention. The case related to the purchase of a site for a house, which was subsequently discovered to have no right of access from the road. The Dorans sued the vendors in October 1993 before the late Mr Justice Liam Hamilton but the trial was beset by delays, including a wait of almost a year for the judge to deliver his ruling, part of which the Dorans appealed. The High Court awarded the couple damages of €256,738 in November 1998 and costs aspects were finalised more than a year later. Mr Doran subsequently represented himself and his wife in the action against the Government before the European Court of Human Rights, claiming the length of the proceedings constituted a breach of the "reasonable time" requirement laid down in Article 6(1) of the Convention. The Court reiterated that the reasonableness of the length of proceedings must be assessed in the light of

[220] Section 13 reads: "A person shall not be entitled to a payment referred to in subsection 3 ["a payment of a supplement towards the amount of rent payable by a person in respect of his or her residence"] where the person is not lawfully in the state or if the person has made an application to the Minister for Justice, Equality and Law Reform for a declaration under…the Refugee Act 1996 (…)"

[221] Application No. 50389/99; Judgement delivered on 31 July 2003

the circumstances of the case and having regard to the criteria laid down in the Court's case law, in particular the complexity of the case, the conduct of the applicants and of the relevant authorities, and the importance of what was at stake for the applicants in the litigation.[222]
National legislation, regulation and case law / Reasons for concern
In the Act to incorporate the ECHR into Irish law the courts are explicitly excluded from the definition of 'organ of the state' for the purpose of litigation arising under the Act. This aspect of the legislation was criticised by the Irish Human Rights Commission and numerous NGOs and was difficult to comprehend given the inclusion of Article 13 ECHR in the incorporated provisions of the Convention.

Article 48. Presumption of innocence and right of defence

International case law and concluding observations of international organs

The Report of the European Committee on the Prevention of Torture (CPT),[223] (discussed above under Article 4), found that formal arrangements were not yet in place for the choice/appointment of solicitors for detained persons who do not have their own lawyer (cf. CPT/Inf (95) 16, paragraph 50, and CPT/Inf (99) 15, paragraph 23); this continues to be organised informally by the police. Some persons told the delegation that they had chosen to waive their right to legal assistance because they felt that the solicitors proposed to them were not independent from the police. Further steps are required to ensure that detained persons who do not have their own lawyer feel that they can trust the solicitor proposed to them; this may well require creating panels of solicitors prepared to attend police stations, as proposed by the Law Society of Ireland (cf. CPT/Inf (99) 15, paragraph 23).
In the CPT's opinion, the right of access to a lawyer should include the right to have the lawyer present during police interrogations. While the Irish authorities do not dispute the merits of the approach advocated by the CPT, they consider that audio-video recording of police interviews, which was being tested at the time of the visit, is a preferable alternative (cf. CPT/Inf (99) 16, paragraphs 47 and 48). The CPT considered that the introduction of audio-video recording of interviews as an *additional* safeguard was a most welcome development; however, it remained persuaded of the importance, in the interests of the prevention of ill-treatment, of the possibility for lawyers to be present during interviews. In this context, the Committee had noted the information provided by the Irish authorities that the Irish courts have not so far held that there is a right to have a lawyer present during questioning. The Committee invited the Irish authorities to give further consideration to this issue, including the legislative measures which may be required in order to establish this right.[224]

In its response to the report, the Government pointed out that a national system for the audio-video recording of interviews of persons in Garda custody, following earlier pilot projects, has been progressively installed since July, 2001. The installation of the system is now almost complete, with over 220 rooms in up to 130 stations now fitted out and fully operational.[225] The Government reiterated its position that that the Irish courts have not so far held that there is a right to have a lawyer present during questioning.[226]

[222] See, for example, *Comingersoll v. Portugal* [GC], no. 35382/97, § 19, ECHR 2000-IV
[223] Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 May to 28 May 2002, Strasbourg, 18 September 2003
See also *infra,* article 49
[224] *Ibid.,* paragraph 22
[225] Response of the Government of Ireland to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Ireland from 20 to 28 May 2002, Strasbourg, 18 September 2003 (CPT/Inf (2003) 37)
[226] *Ibid.*

The Government has yet to respond in a legislative manner to the decision of the European Court of Human Rights in the Heaney, McGuinness and Quinn cases although it has communicated to the Committee of Ministers that Section 52 of the Offences Against the State Act, 1939 (the provision successfully impugned as a violation of Article 6 ECHR) is not being used.

Article 49. Principles of legality and proportionality of criminal offences and penalties

Ireland proceeded with the implementation of the EU anti-terrorism measures to add to the corpus of criminal legislation for dealing with terrorism and organised crime contained in the Offences Against the State Acts, 1939-1998. The Offences Against the State (Amendment) Act, 1998 was renewed for a further year in June 2003 and it is proposed to make further provision for organized crime and 'gangland crime' in forthcoming criminal justice legislation yet to be published.

Article 50. Right not to be tried or punished twice in criminal proceedings for the same criminal offence

No significant development to be reported during the period under scrutiny