

E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS
*RÉSEAU U.E. D'EXPERTS INDÉPENDANTS EN MATIÈRE DE DROITS
FONDAMENTAUX*

REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN IRELAND IN 2004

submitted to the Network by **Donncha O'CONNELL**

on 3 January 2005

Reference: CFR-CDF/IE/2004



The E.U. Network of Independent Experts on Fundamental Rights has been set up by the European Commission upon the request of the European Parliament. It monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. It issues reports on the situation of fundamental rights in the Member States and in the Union, as well as opinions on specific issues related to the protection of fundamental rights in the Union.

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Le Réseau UE d'Experts indépendants en matière de droits fondamentaux a été mis sur pied par la Commission européenne (DG Justice, liberté et sécurité), 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.

Le Réseau UE d'Experts indépendants en matière de droits fondamentaux se compose de Elvira Baltutyte (Lituanie), Florence Benoît-Rohmer (France), Martin Buzinger (Rép. slovaque), Achilleas Demetriades (Chypre), Olivier De Schutter (Belgique), Maja Eriksson (Suède), Teresa Freixes (Espagne), Gabor Halmai (Hongrie), Wolfgang Heyde (Allemagne), Morten Kjaerum (Danemark), Henri Labayle (France), M. Rick Lawson (Pays-Bas), Lauri Malksoo (Estonie), Arne Mavcic (Slovénie), Vital Moreira (Portugal), Jeremy McBride (Royaume-Uni), François Moyse (Luxembourg), Bruno Nascimbene (Italie), Manfred Nowak (Autriche), Marek Antoni Nowicki (Pologne), Donncha O'Connell (Irlande), Ian Refalo (Malte), Martin Scheinin (suppléant Tuomas Ojanen) (Finlande), Linos Alexandre Sicilianos (Grèce), Pavel Sturma (Rép. tchèque), Ineta Ziemele (Lettonie). Le Réseau est coordonné par O. De Schutter, assisté par V. Verbruggen.

Les documents du Réseau peuvent être consultés via :

http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_fr.htm

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The EU Network of Independent Experts on Fundamental Rights is composed of Elvira Baltutyte (Lithuania), Florence Benoît-Rohmer (France), Martin Buzinger (Slovak Republic), Achilleas Demetriades (Cyprus), Olivier De Schutter (Belgium), Maja Eriksson (Sweden), Teresa Freixes (Spain), Gabor Halmai (Hungary), Wolfgang Heyde (Germany), Morten Kjaerum (Denmark), Henri Labayle (France), M. Rick Lawson (the Netherlands), Lauri Malksoo (Estonia), Arne Mavcic (Slovenia), Vital Moreira (Portugal), Jeremy McBride (United Kingdom), François Moyse (Luxembourg), Bruno Nascimbene (Italy), Manfred Nowak (Austria), Marek Antoni Nowicki (Poland), Donncha O'Connell (Ireland), Ian Refalo (Malta), Martin Scheinin (substitute Tuomas Ojanen) (Finland), Linos Alexandre Sicilianos (Greece), Pavel Sturma (Czech Republic), Ineta Ziemele (Latvia). The Network is coordinated by O. De Schutter, with the assistance of V. Verbruggen.

The documents of the Network may be consulted on :

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PRELIMINARY REMARKS

This report on the situation regarding fundamental rights in Ireland covers the period 1 December 2003-1 December 2004. Where references are made to events that occurred in December 2004 they usually have a bearing on events that pre-date that month and which have been an ongoing concern.

The research upon which the report is based was carried out by Mr. Simon McCormack, B.A., LL.B., 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. The author is very grateful to Mr. McCormack for his work on and commitment to this project since September 2004.

In preparing this report all Government Departments, numerous statutory bodies and agencies and a broad selection of non-governmental organisations were consulted as to their views on the issues raised in the Network's template.

In the period under review.....

CHAPTER I : DIGNITY

Article 1. Human Dignity

Nothing to report.

Article 2. Right to life

Euthanasia (active and passive, assisted suicide)

Legislative initiatives, national case law and practices of national authorities

In 2003 the Director of Public Prosecutions (DPP) sought the extradition from the United States of two persons accused of assisting in the suicide of a Mrs. Toole-Gilhooly in 2002. The persons the subject of the extradition warrant are both members of an organisation that promotes the right to die by means of assisted suicide but have not yet been extradited in the period under review.

Rules regarding the engagement of security forces (use of firearms)

Legislative initiatives, national case law and practices of national authorities

The proceedings of the Barr Tribunal (a tribunal of inquiry established pursuant to the Tribunals of Inquiry (Evidence) Acts) established to inquire into the fatal shooting by members of the Garda Emergency Response Unit (ERU) of Mr. John Carthy at Abbeylara, Co. Longford in April 2000 concluded in early-December 2004. A report is expected in 2005 and, depending on its contents, further litigation by parties to the inquiry may ensue.

In October 2004 a Less-Lethal Weapons Conference organised by the Jane's Information Group (an international provider of intelligence and analysis on national and international defence, security and risk developments) took place in Dublin. A crowd of approximately 150 peace activists protested at the fact that the conference was taking place in Dublin. At the time of the conference it was reported that An Garda Síochána were preparing to reduce the use of live ammunition while introducing 'less than lethal' weapons for 'critical incidents' as opposed to crowd control. There are currently 1,600 armed Gardai 50 of whom are members of the Garda Emergency Response Unit (ERU).¹

The fight against the trafficking in human beings (including the use of technical means to prohibit the illegal crossing of borders)

Legislative initiatives, national case law and practices of national authorities

On December 2nd 2004 a Portuguese man, Luis Filipe Nogueira de Macedo pleaded guilty in the Dublin District Court to trafficking two women from Brazil to Ireland. He was sentenced to nine months imprisonment and fined €1000. This was the second conviction for people trafficking in Ireland.²

¹ *The Irish Times*, 20 October 2004.

² *RTE News*, see generally www.rte.ie/news

The National Observatory on Violence Against Women³ published its first country report on Ireland in May 2004. The report dealt with violence against women generally as well as with prostitution and trafficking in women. The report made the following recommendations :

- Research into the extent of prostitution and trafficking for the purpose of sexual exploitation in Ireland should be conducted ;
- A high-level ministerial working party should be set up to examine the role of the state in responding to the growth of the sex industry in Ireland ;
- Legislative changes need to be urgently introduced to enable the ratification of the UN Protocol to Prevent and Suppress Trafficking for Sexual Exploitation. The requirements outlined in the Protocol regarding the provision of protection and safety, psychological and economic support for the victims of trafficking need to be immediately resourced ;
- Leave to remain in Ireland should be granted to trafficked women or resources provided for return to the country of origin where this is safe. Leave to remain, in such circumstances, should not be dependent on testifying as a witness against traffickers;
- The Swedish model of legislation which has made the buying of sexual services illegal should be examined as a potential way forward for legislation in Ireland. Prior to the introduction of any new legislation the resources needed to minimise any negative impacts of women in prostitution must be identified and allocated. Resources must also be made available to ensure that legislation will be accompanied by adequate public awareness, training and monitoring mechanisms which are essential measures in ensuring that the enforcement of legislation will be consistent and effective;
- Research into the enforcement of the law in relation to all offences pertaining to the sex industry should be carried out. This should include a detailed analysis (including gender) of arrests, charges, convictions and sentences;
- The work of *Ruhama* and other NGOs working with women in prostitution and trafficked women should be recognised in the budget on violence against women;
- A dedicated specialist NGO should be set up to respond to and support trafficked women.

Domestic violence (especially as exercised against women)

Legislative initiatives, national case law and practices of national authorities

In its first country report on Ireland (discussed above), the National Observatory on Violence Against Women detailed the various policy and legislative contexts in which the issue of violence against women is dealt with. Having outlined the historical background of responses to violence against women the report went on to discuss positive and negative aspects of that response which are outlined below.

Positive aspects

The last two social partnership agreements, *Partnership for Prosperity & Fairness* and *Sustaining Progress*, contain specific objectives in relation to tackling violence against women in intimate relationships and rape and sexual assault. Between 1996 and 2004 the funding provided by the Department of Health & Children for services to female victims of violence has increased from IR£3.1 million to €11.95 million annually.

³ The Irish National Observatory was the first to be launched under the European Women's Lobby (EWL) Daphne project. The full text of the report is available at the website of the National Women's Council of Ireland : www.nwci.ie/

Arising from the deliberations of the National Steering Committee on Violence Against Women, the Department of Justice, Equality & Law Reform has commissioned important research (now due for publication) with three main dimensions:

- A national audit of service provision, with particular attention to identifying unmet need with a costing of services to respond to unmet need;
- The presentation of good practice models of service provision, including models from two similar jurisdictions to Ireland;
- An assessment of the effectiveness of mechanisms established to implement the recommendations of the Task Force on Violence Against Women (i.e. the National Steering Committee on Violence Against Women and eight Regional Planning Committees).

In the period under review the Irish Section of Amnesty International launched a high-profile campaign on violence against women in partnership with numerous women's rights groups.⁴

Reasons for concern

While the Department of Justice, Equality & Law Reform allocated additional funding to tackle violence against women (IR£101,000 in 1998 increased to €885,000 in 2002) this has decreased in the last two years from €840,000 in 2003 to €802,000 in 2004. The Department of Health & Children's budget has also seen a slow down with the 2004 budget remaining fixed at 2003 figures.⁵

While the *Report of the Task Force on Violence Against Women* (1996) is a comprehensive document with wide-ranging recommendations in relation to domestic violence, rape and sexual assault it does not contain targets, timeframes, budgets and measurable and quantifiable indicators of progress by Government Departments. This undermines the capacity to monitor Government performance and hold the state accountable for implementation of the Report. In its first country report the National Observatory on Violence Against Women state: "During previous administrations, the National Steering Committee was chaired by the then Minister of State in the Department of Justice, Equality & Law Reform thus ensuring that the issue of violence against women was addressed at cabinet level. The presence of the Minister ensured the attendance of senior public service officials from all relevant department at every meeting. This ministerial involvement has ceased and there is a resulting significant decrease in senior public service representatives at those meetings. This seems to indicate a downgrading of the issue at Governmental level. The position or rank of the person with responsibility for violence against women in Government is critical in ensuring a cohesive, transparent and accountable structure for the implementation of the Task Force report."⁶

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

In a High Court case, *Ramsayer v. Mahon, Acting Coroner for Co. Offaly*⁷ the right to life under Article 2 of the *European Convention of Human Rights Act 2003* was considered in the context of access for the applicant to depositions from the County Coroner regarding the deceased. Precedents were advanced to suggest that Article 2 ECHR and the provisions of the Constitution encompass an "adjectival obligation to investigate a death, which occurs as a

⁴ For details of the campaign see: www.amnesty.ie/

⁵ These figures are contained in the National Observatory on Violence Against Women first report at p. 2.

⁶ *Ibid* at p. 7.

⁷ *Ramsayer v. Mahon, Acting Coroner for Co Offaly* 23 April 2004.

result of the use of force (e.g. *Kaya v. Turkey*, *Yasa v. Turkey*)⁸ or where agents of the state have been involved. This argument was rejected by Murphy J. who held that the relevant jurisprudence applied only where the state or its agents were involved in the death under examination or where one was dealing with a death in custody.

Reasons for concern

Concerns raised in last year's Annual Report about the state of Irish law in relation to post-mortem inquiries and the failure of the state to observe the procedural requirements of Article 2 ECHR endure.

Article 3. Right to the integrity of the person

Breaches of the right to the integrity of the person (general)

Legislative initiatives, national case law and practices of national authorities

In the period under review the Irish Medical Council published the sixth edition of its *Guide to Ethical Conduct and Behaviour* for the medical profession.⁹

Rights of the patients

Legislative initiatives, national case law and practices of national authorities

Section B of the Medical Council Guide (referred to above) deals specifically with the issue of the relationship between doctors and patients. Section 2.1 sets out the responsibility to patients, stating doctors must do their best to preserve life and promote health and that once they have undertaken to care for a patient this care should continue for the duration of the illness.¹⁰ The guide also provides that patients with disabilities are entitled to the same level of care as any other patient¹¹ and that treatment must never be refused on grounds of moral disapproval of a patient's behaviour.¹² In the section entitled 'Dignity of the Patient' it is stated "Patients must always be treated with dignity and respect. Rude and insensitive behaviour towards patients and their relatives is unacceptable."¹³ The patient must be provided with as much information as it is possible for the doctor to provide concerning his/her condition and subject to the patients consent this must also be extended to the patient's family.¹⁴ The section states that this information should be provided carefully and in non-technical terms with the aim of promoting understanding and compliance with recommended therapy.

Protection of persons in medical research.

Legislative initiatives, national case law and practices of national authorities

The Medical Council Ethical Guide makes a number of points in the area of medical research to which members must adhere. Here the guide states that where clinical trials or research is carried out, the patient must first give informed, written consent and the aims and methods of

⁸ [1998] 28 E.H.R.R. 1, [1999] 28 E.H.R.R. 121

⁹ Irish Medical Council, *A Guide to Ethical Conduct and Behaviour*, 6th Edition.

¹⁰ *Ibid.*, para. 2.1

¹¹ *Ibid.*, para. 2.2

¹² *Ibid.*, para. 2.5

¹³ *Ibid.*, para. 3.4

¹⁴ *Ibid.*, para. 3.3

the research must be clearly explained.¹⁵ The guide also states that a patient's anonymity must always be maintained unless permission for use of the patient's name is obtained and that refusal on the part of the patient to participate in research must not in any way affect the level of care given to the patient.¹⁶ The Council also affirms in the Guide its support for the measures contained in the Helsinki Declaration.¹⁷

Reasons for concern

In October 2004 the National Diagnostic Centre, a private laboratory attached to the National University of Ireland, Galway, suspended genetic testing for a condition known as *Fragile X Syndrome* after it was found to have reported inaccurate test results on a number of patients. Some 52 patients from five different health boards who underwent testing at the Galway centre are now being re-tested and counselled by the National Centre for Medical Genetics at Our Lady's Hospital for Sick Children, Crumlin, Dublin. An internal review of the Galway Centre is currently under way but the controversy has led to the expression of concerns about the existence of a two-tier system for patients seeking genetic testing in the state.¹⁸

Other relevant developments

Reasons for concern

The Commission on Assisted Human Reproduction was due to issue its report in January of 2004. However, this was postponed due to apparent disagreement between a number of the members, who are consultants and the medical council regarding insurance. The report has not yet been published.¹⁹

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

Conditions of detention and external supervision of the places of detention

Penal institutions

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

In the year under review there was no international case law or concluding observations of international organisations of relevance to Ireland. It is worth noting, in this connection, that the vacancy arising from the retirement (a number of years ago) of the Irish member of the European Committee for the Prevention of Torture has yet to be filled.

Legislative initiatives, national case law and practices of national authorities

In the period under review the Inspector of Prisons, a non-statutory office established in 2002 and held by a former judge of the High Court, published reports on the following prisons: Portlaoise, Limerick, Cloverhill, Arbour Hill, Loughan House and Wheatfield Prison.

Visiting Committees to the following prisons also published annual reports for the year 2003 in the period under review: the Curragh, Cork, Shelton Abbey, Mountjoy, Loughan House,

¹⁵ Medical Council, *A Guide to Ethical Conduct and Behaviour*, 6th Edition, para. 20.1

¹⁶ *Ibid.*, para. 20.2, 20.3

¹⁷ *Ibid.*, para. 20.6

¹⁸ Dr. Muiris Houston, 'Overhaul needed for genetic screening services', *The Irish Times Health Supplement*, 21 December 2004, p.6.

¹⁹ *The Irish Times*, March 10th 2004

Arbour Hill, St. Patrick's Institution, Portlaoise, Cloverhill, Midlands, Castlereagh, Limerick, Wheatfield, Training Unit and Spike Island (Fort Mitchel Place of Detention).²⁰

In November 2004 the Irish Human Rights Commission submitted its observations to Government on the Third Report of the ECPT published in 2003 following a periodic ECPT visit of 2002. Among the main recommendations contained in the Human Rights Commissions' submission were the following:

- Immediate steps should be taken to end the use of padded cells for the detention of mentally-ill prisoners;
- In line with its commitment to the ECPT the Government should amend the Criminal Law (Insanity) Bill 2002 to provide protection for those persons transferred from prison to the Central Mental Hospital whether on remand or following sentence by Ministerial Order;
- In line with the ECPT Standards, the Garda Síochána Bill 2004 should be amended to give the Ombudsman Commission the power to visit and inspect a Garda station of its own volition in a regular and unannounced fashion;
- The Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997 should be amended to require members of An Garda Síochána to video-record all interviews carried out with suspects in custody. Only exceptional extenuating circumstances should justify non-compliance with this requirement;
- Human rights concepts should be fully integrated into all the training of An Garda Síochána and the commissioned human rights audit of all Garda policies and strategies should be published;
- The independence, functions and powers of the Inspector of Prisons should be laid down in statute as a matter of priority. In addition, an independent and impartial individual complaints mechanism for prisoners such as a Prison Ombudsman should be established;
- A systematic audit of prison conditions should be carried out with reference to the ECPT Standards and a long-term prison strategy should be put in place to address the conditions of detention. Many Irish prisons are persistently over-crowded, they lack adequate sanitation facilities and have insufficient education and employment programmes. The ECPT has been highlighting these issues since its first visit to Ireland in 1993 but there is little evidence of progressive improvement in prison conditions over this time;
- Prison is not a suitable institution in which to hold persons who are subject to a deportation order and who have not been convicted of a criminal offence;
- The proposal of the Government to re-develop the new Central Mental Hospital on the same site as the new Mountjoy prison is a matter of grave concern;
- A comprehensive legislative framework should be put in place to regulate the admission and treatment of persons with intellectual disabilities in residential centres and psychiatric hospitals;
- The remaining parts of the Children Act 2001 should be commenced without further delay and sufficient resources should be provided to fund early intervention programmes and community-based sanctions to ensure that the principle of detention of juveniles as a measure of last resort is effectively complied with. Children should not be detained under any circumstances in police stations or prisons because there are no places available for them in a suitable institution.

In its Annual Report published in November 2004, the National Economic & Social Forum (NESF) considered, *inter alia*, the issue of the reintegration of prisoners²¹. In introducing this

²⁰ All of these reports are available in full on the prisons section of the Department of Justice, Equality & Law Reform website at : www.gov.ie/

topic the Forum indicated its awareness of many well-regarded reports on this issue over the years and went on to state:

“...these [have] been neglected or at best were not as fully acted on as they should have been. The missing link in this was the gap between policy design, on the one hand, and policy implementation on the other and the absence of coherent mechanisms or models to follow through on this”²².

Among its main findings the Report concludes (at para. 3.5) that:

- The majority of Irish prisoners are male, young and from the most deprived backgrounds and lack basic educational and employment skills;
- The running weekly costs alone amount to almost €1,300 per prisoner, while that for community service or supervision orders comes to only €50-75;
- Despite the foregoing and the consensus view of experts in favour of non-custodial punishment options and the drop in crime over recent years, the Irish imprisonment rate is increasing and is now triple that of England and Wales and quadruple that of the Scandinavian countries;
- Irish prisoners have one of the highest re-offending rates in Europe.

In *Holland v. Governor of Portlaoise Prison*,²³ McKechnie J., noting that Costello J. had relied on a US decision, *Procunier v. Martinez*,²⁴ in *Kearney v. Minister for Justice*,²⁵ held that limitations on the constitutional rights of prisoners in the interests of prison security must not only be reasonable, but also necessary and proportionate to the objective to be achieved. He also held that any abolition, restriction or curtailment of a prisoner's constitutional rights should be strictly construed, with the onus of proof resting on the person asserting the need for the curtailment. In the instant case, the judge held that a blanket policy of denying prisoners access to the media was contrary to the plaintiff's entitlement under the Prison Rules to have his request for such access properly considered and evaluated. In the course of his judgment, he set out the following principles for the guidance of prison authorities when considering the imposition of restrictions on a prisoner's constitutional rights:

1. That when serving a prison sentence, lawfully imposed, a prisoner must suffer a diminution or compromise on the exercise of certain constitutional rights.
2. The rights so affected, the "affected rights" for the duration of the sentence, are in the first instance his right to liberty and secondly certain other rights (i) which are affected by the loss of this right and (ii) which are consequential on the convicted prisoner having to serve his sentence in a place of detention, namely a prison.
3. These "affected rights" are not capable of exhaustive definition but will depend on the circumstances of each case.
4. To be lawful, any limitation, either complete or partial, on the exercise of these "affected rights" must have as their objective:-
 - (i) the incarceration of the prisoner so as to serve his sentence and
 - (ii) the maintenance of security, discipline and good order within the prison; these being the basis of the justification advanced in this case.

²¹ Two years ago the NESF published Report no. 22 which dealt specifically with the question of the integration of prisoners.

²² NESF Annual Report 2004, para 3.3 at p.47.

²³ *Holland v. Governor of Portlaoise Prison*, (June 2004) H.C. Unrep.

²⁴ *Procunier v. Martinez* (1973) 416 U.S. 296.

²⁵ *Kearney v. Minister for Justice* [1986] IR 116, [1987] ILRM 52

5. The objective underpinning of the restriction must be of such significance or value in a democratic society so as to warrant the position of overriding a right which is constitutionally based,

6. The interference on restriction:-

(i) must be rationally connected to the said objective and must not be arbitrary, unfair or based on irrational considerations

(ii) must be necessary or essential in order to achieve the legitimate aim to which it is addressed

(iii) must be not more extensive than the minimum required to achieve its intended aim and

(iv) must otherwise be proportionate to that objective.

7. Each application by a prisoner must be individually considered by the governor or his deputed officer and must be decided upon by reference to the above criteria, which is general in character and outline, and

8. The Governor, when applying rr. 59 and 63 [of the Prison Rules, dealing with communications to and from prisoners], is vested with a discretion derived from statute, and as such, while he may have regard to a policy or guidelines, he cannot rely upon either in such a way as to deprive him or otherwise fetter the exercise of this discretion.

Positive aspects

In the Government spending estimates for 2005 (published in November 2004) the Department of Justice, Equality & Law Reform saw an increase in its estimate of 5% over 2004. The Prison Service which saw a cut in funding last year of €30 million (as part of the reduction in spending on Prison Officers' overtime) had its allocation increased by €21.9 million. The Probation and Welfare Service had its allocation increased by €5.6 million or 9% but its allocation had also been cut in the previous year.²⁶

Reasons for concern

The lack of progress in relation to prisons legislation noted in previous reports remains a cause of enduring and serious concern. The Prisons Bill has yet to be enacted into law and the revised 1947 Prison Rules remain the parliamentary draftsman's office. Both the Office of Prisons Inspector and the Parole Board continue to exist on a non-statutory basis.

In terms of penal planning, there has been considerable media attention in the past year to the plans of the Minister for Justice, Equality & Law Reform to sell the inner-city Mountjoy Prison complex in Dublin (including the new Women's Prison) and move to a new site adjacent to the M50 motorway on the perimeter of Dublin city, 25 kilometres from the city centre. This new site will be a considerable distance from the parts of the city from which most prisoners come adding considerably to the difficulties encountered by their families in exercising visitation rights.

²⁶ *The Irish Times*, 19 November 2004.

In its Annual Report, *Human Rights Issues for Prisoners*, published in November 2004 the Irish prison chaplains condemned the ‘appalling’ lack of progress in addressing human rights concerns in the Irish prison service. Focusing on living conditions, padded cells, mentally ill prisoners, temporary release and deportation the report claimed that the service had changed gear ‘from slow progress to steady regression’.²⁷

Institutions for the detention of persons with a mental disability

Legislative initiatives, national case law and practices of national authorities

In its Observations to the Government on the Third Report of the ECPT submitted in November 2004 (discussed above) the Irish Human Rights Commission condemned the continued use of padded cells for holding mentally-ill prisoners while acknowledging the Government’s commitment to end the use of such facilities.

Reasons for concern

Strong concern has been expressed about the proposal to build a new Central Mental Hospital beside the proposed new prison complex off the M50 motorway. This psychiatric institution, which is used to treat patients, some of whom are the subject of criminal proceedings, is currently situated in the Dublin suburb of Dundrum. The proposal to move it to a site adjacent to the new prison complex has been criticised for adding to the stigmatisation of mental illness.

Centres for the detention of juvenile offenders

Reasons for concern

In the period under review, the juvenile detention centre (for over 16 year olds) at Spike Island (Fort Mitchel Place of Detention), which served the general Munster region, was closed with the result that the St. Patrick’s Institution in Dublin is now the only detention centre for juveniles over the age of 16 years. Apart from the distance between Dublin and the Munster region, the closure of Spike Island was regrettable as a loss of an experienced education unit.

In September, the London newspaper, *The Observer*, reported serious drugs problems among inmates at St. Patrick’s Institution, the closure of workshops, the holding of juveniles alongside adults and clashes between rival gangs in the exercise yard.²⁸

Centres for the detention of foreigners

Legislative initiatives, national case law and practices of national authorities

The most recent statistics contained in the 2003 Annual Report of the Prisons Service are discussed under Article 6.

Reasons for concern

Cloverhill Remand Centre continues to be used for the detention of non-Irish nationals pending deportation sometimes for periods amounting to weeks prior to deportation (Prisons Service Annual Report). Apart from the question of detaining deportees some concern arises about the appropriateness of detaining such persons with mixed groups of prisoners whose

²⁷ *The Irish Times*, 22 November 2004.

²⁸ *The Observer*, 12th September 2004.

ages, offences and remand statuses are quite divergent. This is also exacerbated by the problem of overcrowding in Cloverhill.

Behaviour of security forces (including during demonstrations)

Legislative initiatives, national case law and practices of national authorities

In the period under review the Garda Síochána Bill 2004²⁹ was published with the aim of reforming the law relating to the administration and management of An Garda Síochána (the Irish police force) and also to provide for the establishment of an independent body, to be known as the Garda Síochána Ombudsman Commission to ensure openness and transparency in dealing with complaints against members of the Irish police service.

In the period under review one member of An Garda Síochána, Garda Paul Daly, was convicted (by a jury majority of 11-1) of an offence arising out of the controversial Reclaim the Streets May Day protests of 2002³⁰ (discussed in last year's Annual Report). In another high-profile case taken against a Garda Corcoran a jury unanimously acquitted the defendant.³¹

Positive aspects

Regardless of its shortcomings (discussed below) the Garda Síochána Bill 2004, in making provision for an Ombudsman Commission, is moving towards an improvement on the current system for handling civilian complaints against member of An Garda Síochána presided over by the Garda Síochána Complaints Board.

Reasons for concern

In its observations on the Garda Síochána Bill 2004 the Irish Human Rights Commission accepted that a number of its previous recommendations had been accepted and incorporated into the Bill.³² However, the Commission suggested that further improvements could be made which include:

- explicit reference to non-discrimination should also be included in the Bill by inclusion at section 7 (4) of the phrase, "shall have regard to the upholding of human rights and ensuring fair and equal treatment and respect for all"
- provision should be made for a non-religious affirmation to be taken by members of the Garda in place of the religious oath provided for in the Bill
- Schedule 5 of the Bill defining "breaches of discipline" should be amended to incorporate breaches of the Code of Ethics as coming within the definition of "breaches of discipline" under Part 4 of the Bill
- as members of the proposed auxiliary service will be subject to the same duties and obligations as members of the Garda Síochána, they might be more appropriately referred to as 'part-time members' rather than 'volunteer members'. The HRC retains grave reservations about the possibility that police powers should be vested in individuals that are not properly trained, are not fully accountable or are not clearly identifiably as police officers

²⁹ No. 8 of 2004.

³⁰ *The Irish Times*, 7 December 2004.

³¹ *The Irish Times*, 16 November 2004.

³² Irish Human Rights Commission, *Observations on the Garda Bill 2004*, full text available at: www.ihrc.ie/

- The HRC continues to be concerned that “death or serious harm” is too narrow a category of complaint for mandatory investigation by the Ombudsman Commission. It is the view of the HRC that investigation of complaints by the Garda Commissioner should be confined to limited circumstances relating to minor complaints and that there should be an explicit presumption in favour of investigation by the Ombudsman Commission. Therefore, the HRC recommends that section 84 should provide that the Ombudsman Commission may refer a complaint to the Garda Commissioner only in cases where the Commission is of the view that the complaint does not appear to relate to the commission of an offence or serious misconduct

The HRC is concerned that the provisions in section 91 in relation to ‘designated stations’³³ seem unnecessarily restrictive. Under the ECHR, national security is recognised as a legitimate ground for restricting accountability and transparency. However, the HRC believes that the objective of ensuring national security can be affected without creating this category of designated stations, which might be open to abuse. The HRC notes that investigating staff of the Ombudsman Commission will be bound by the same duties as members of the Garda Síochána, which will include the Official Secrets Act 1963, and that any warrant for search of a station will be restricted to material relevant to an instant complaint. It is also significant that investigators from international bodies such as the Council of Europe Committee for the Prevention of Torture have the power to enter any Garda station on demand, therefore to restrict the powers of the Ombudsman Commission in this way would seem anomalous. The HRC recommends that this section be reconsidered to ensure that nothing in the section could have the effect of restricting the general right of access by the Ombudsman Commission to Garda stations on demand

Article 5. Prohibition of slavery and forced labour

Fight against the prostitution of others (general)

Legislative initiatives, national case law and practices of national authorities

At the Annual NGO Forum on Human Rights in December 2004 organised by the Department of Foreign Affairs, Sgt Alan Bailey, a member of the Garda Síochána task force set up to combat trafficking in women, said that women working in lap-dancing clubs, most of whom are non-Irish nationals, are frequently subjected to violence and economic exploitation.³⁴ He spoke of the Garda operation carried out this year in which five lap-dancing clubs were raided in March 2003, in which 100 women were arrested, all of whom were released immediately. 27 different nationalities were represented amongst the women.

Reasons for concern

See (under Article 2) the concerns raised by the National Observatory on Violence Against Women in relation to trafficking in women and prostitution.

³³ Sub-section 91 (3) provides that certain stations, to be designated by the Minister under section 109 of the Bill, may only be searched to the extent designated by the Minister and that notification must be given to the Commissioner and the Minister in respect of any proposed authorisation for search of such a station. Under sub-section 91 (4) the Commissioner may object to such an authorisation and this objection would immediately go to the Minister for consideration. The Minister may then make directions as to the extent of any proposed search of the station in question

³⁴ *The Irish Times*, December 6th 2004

Trafficking in human beings (in particular for sexual exploitation purposes)

Legislative initiatives, national case law and practices of national authorities

In 2004 the International Organisation for Migration published a report entitled *Trafficking In Unaccompanied Minors In Ireland*. The report had three objectives: firstly to examine the legal framework under which prosecution of traffickers in minors are prosecuted, secondly to examine the institutions that exist to provide protection for unaccompanied minors in Ireland and finally to identify policy responses to deal with trafficking of minors.³⁵

While the study found that a “relatively modern and comprehensive legal framework” was in place to prosecute suspected traffickers of children, “this has not manifested itself in successful prosecutions.”³⁶

The report found that Ireland had been a destination for trafficking in minors for purposes of labour and sexual exploitation with South-East Europe and West Africa the origin regions for many of the minors concerned. The study also found that many of the children had been sexually abused *en route* to Ireland.³⁷

The author made the following key observations:

- More detailed reporting on child trafficking in the Annual Reports of the Office of the Refugee Applications Commissioner (ORAC) and the Refugee Appeals Tribunal would heighten awareness of the issue
- The absence of a clear legal status for child victims who are not asylum seekers, programme refugees or displaced persons posed dilemmas for planning their future
- The accommodation for children outside of designated Residential Children’s Centres is unsatisfactory from the point of view of supervision and care
- The staffing level of social workers for children’s services within Health Boards was below that which could reasonably provide a comprehensive child-centred service to child victims³⁸

Good practices

In September 2004 An Garda Siochana and the Police Service of Northern Ireland (PSNI) published for the first time a Cross-Border Organised Crime Threat Assessment the aim of which is to begin the development of a response to the threat from cross-border organised crime.³⁹ The scheme aims to combat criminal activity including illegal immigration and the trafficking of human beings.

Reasons for concern

Women’s Aid, a non-governmental organisation, reported that they had this year received calls from women who had been trafficked to Ireland.⁴⁰ The Director of the organisation, Margaret Martin, said that while the calls had been limited in number they “represented a new and worrying trend.”

³⁵ International Organisation for Migration, *Trafficking In Unaccompanied Minors*, 2004

³⁶ *Ibid.*, p. 9

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Department of Justice, see generally www.justice.ie, press releases

⁴⁰ *The Irish Times*, October 28th 2004

Protection of the child (fight against child labour – especially with purposes of sexual exploitation or child pornography - and fight against the sexual tourism involving children)

Legislative initiatives, national case law and practices of national authorities

The Child Trafficking and Pornography (Amendment) (No.2) Bill 2004 proposes amending the Child Trafficking and Pornography Act 1998 in order to cover the circumstances whereby an adult uses the internet to meet young children for the purposes of sexual exploitation, also known as “internet grooming”.⁴¹ The 1998 act made it an offence for an adult to arrange for a child to travel for the purposes of sexual exploitation and is directed at stemming child trafficking. However, under the Act coercion was a necessary element of the offence and was not appropriate for prosecuting those engaged in “internet grooming”, where the child may agree to travel of their own free will. Section 2 of the Bill also proposes a new definition of ‘sexual exploitation’ for the purposes of the Bill which includes, but is not limited to:

- (a) inviting, inducing or coercing the child to engage in prostitution or the production of child pornography,
- (b) using the child for prostitution or the production of child pornography,
- (c) inviting, inducing or coercing the child to participate in any activity which is an offence under any enactment,
- (d) the commission of any such offence against the child, or
- (e) inviting, inducing or coercing the child to participate or observe any activity of a sexual or indecent nature.”

Under section 3 of the Act the following is to be made an offence, subject to a term of imprisonment not exceeding 14 years:

3A.—(1) Any person who within or outside the State—

- (a) intentionally meets or travels with the intention of meeting a child, having met or communicated with that child on two or more previous occasions, and
- (b) either during or after that meeting does, or intends to do anything which would constitute sexual exploitation

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

In December 2004 it was announced by the Minister for Justice, Equality & Law Reform that measures would be introduced on 1 January 2005 to change arrangements concerning access to employment and the renewal of permission to remain of non-EEA students in Ireland on student visas. The motivation for this change arose from a concern that student visas were being exploited by certain private educational establishments as a means of providing access to the casual employment market for visa-holders. Henceforth such access will only be

⁴¹ Child Trafficking and Pornography (Amendment) (No.2) Bill 2004, www.oireachtas.ie

granted is the holder of the student visa is attending an educational establishment approved by the Minister for Education & Science.⁴²

⁴² For full details of the changes see the website of the Department of Justice, Equality & Law Reform at : www.gov.ie/

CHAPTER II : FREEDOMS

Article 6. Right to liberty and security

Pre-trial detention

Legislative initiatives, national case law and practices of national authorities

The Criminal Justice Bill 2004⁴³ was published during the period under review but has yet to be passed into law. The Heads or Scheme of the Bill had been published in 2003 and the Irish Human Rights Commission published its observations on same in January 2004.⁴⁴

The Bill makes provision for, *inter alia*, extended pre-trial detention. Section 8 empowers a member of An Garda Síochána not below the rank of Chief Superintendent to direct that a person should be detained for a period of twelve hours in addition to the usual twelve hours (authorised under Section 4 of the Criminal Justice Act 1984) if s/he has reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence.

Reasons for concern

In relation to the provision for extended pre-trial detention contained in Section 8 of the Criminal Justice Bill 2004 the Irish Human Rights Commission has made the following observation: "...the case for an increase of a further 12 hours without judicial supervision in the case of all arrestable offences has not been made and ...is not strictly necessary. It has not been demonstrated in a concrete manner with reference to practical examples that the period of 12 hours currently provided for is inadequate for the proper investigation of all arrestable offences. The HRC believes that thorough and practical justifications need to be provided to demonstrate the actual need for this reform proposal. If it can be demonstrated in the case of more serious offences that involve complex investigations that an increased period of 12 hours is necessary, the increased periods of detention should be targeted on the more serious offences and not applied to every offence punishable for five years or more."⁴⁵

In connection with any concern about pre-trial detention in Ireland it should be noted that, although detainees are entitled to have access to a lawyer they are not entitled to have a lawyer present during questioning.

Detention following a criminal conviction (including the alternatives to the deprivation of liberty and the conditions for the access to release on parole)

Legislative initiatives, national case law and practices of national authorities

The most recent prison statistics are for year 2003 and were published in the Irish Prison Service's Annual Report on 21 December 2004. Overall, 9,814 people were sent to prison in 2003 compared to 9,716 in 2002, an increase of 1%. The average daily number of people in custody in 2003 was 3,176, an increase of 0.3% on 2002. Of the 11,775 committals to prison in 2003, almost 45% were committals under sentence, about 16% were under immigration laws and 39% were on remand.⁴⁶

⁴³ No. 34 of 2004.

⁴⁴ For the full text of its observations see: www.ihrcc.ie/

⁴⁵ @ p.18 of its observations.

⁴⁶ The full text of the report is available at: www.irishprisons.ie/

The Parole Board was established by the Minister for Justice, Equality & Law Reform on a non-statutory basis in 2001 to replace the Sentence Review Group. Its function is to review the cases of prisoners with longer-term sentences (usually eight years or more) referred to the Board by the Minister or upon application by the prisoner. In the second Annual Report of the Parole Board for the year 2003 (published in May 2004) it was documented that the cases of some 72 prisoners were referred to the Board during 2003. Of these, 56 accepted an invitation to participate in the review process which was a similar figure for 2002. The Board made recommendations to the Minister for Justice, Equality & Law Reform in 74 cases – 65 of these were accepted in full, 3 in part, 4 were not accepted and a Ministerial decision was pending in 2 cases at the time of writing of the report. In addition to new referrals, the Board reviewed some 36 cases for the second time, a marked increase on 2002.⁴⁷

Reasons for concern

There is a lack of clarity about what precisely the Parole Board exists to do – is it to make risk assessment about the likelihood of a prisoner re-offending or does it exist as an element in an infrastructure for retributive justice? If the latter applies, is the Board an agent for Executive re-sentencing? This lack of clarity about the precise purpose of the Board is reflected in comments made Chairman's Foreword to the Second Annual Report:

“The Board continues to be gravely concerned about the spate of violence in this country. In the year under review murders continued unabated. The prospect of retribution does not seem to be a deterrent to what are in many cases warring factions. There has been much media publicity suggesting that persons convicted of murder can frequently get early release. The Board wishes to make perfectly clear that this is not so. The Board endorses the serious view the Minister [for Justice, Equality & Law Reform] has taken of such murders and wishes to point out – and point out firmly – that unless there are the most extenuating circumstances a person convicted of murder can expect no clemency until he or she has served an extremely lengthy sentence.

Similarly persons concerned in acts of lawlessness on the streets must realise that retribution lies in wait.”⁴⁸

While there is much dispute between prisoner's rights organisations and the Minister for Justice, Equality & Law Reform about the rate of incarceration in Ireland and its comparison with that of other countries there is, undoubtedly, in Ireland very heavy use of short sentences (under 3 months) and a significant increase in the prison population over the past ten years at a time when crime rates were on the decrease.⁴⁹

Deprivation of liberty for foreigners (in order to prevent their unauthorised entry on the territory with a view to their removal, including their extradition)

Legislative initiatives, national case law and practices of national authorities

In the most recent prison statistics (published in December 2004 for the year 2003) it was shown that people born outside Ireland accounted for one quarter of all committals to prison in 2003. Of 2,500 foreign nationals in prison, 1,464 (or 79%) were detained under immigration laws. Most of these prisoners (70%) were detained for less than a week while

⁴⁷ The full text of the Parole Board report is available at the website of the Department of Justice, Equality & Law Reform on www.gov.ie/

⁴⁸ @ p.5 of the Report.

⁴⁹ See generally: O'Donnell, 'Imprisonment and Penal Policy in Ireland', (2004) *Howard Journal of Criminal Justice*, Vol. 43, No.3, pp 253-266.

almost 20% were detained for more than 51 days. Typically, these prisoners were awaiting deportation.⁵⁰

Reasons for concern

Apart altogether from considerations as to the appropriateness of detaining those facing deportation it remains a cause of concern that Ireland has no dedicated immigration detention centre and the that purpose is fulfilled by the use of a remand centre, Cloverhill.

Article 7. Respect for private and family life

Private life

Criminal investigations and the use of special or particular methods of inquiry or research

Legislative initiatives, national case law and practices of national authorities

Ireland does not have a separate or independent intelligence service and this type of security function is carried out by An Garda Síochána. The Morris Tribunal was set up in March 2002 to investigate allegations concerning members of An Garda Síochána in the Donegal Division in the north-west of Ireland. In its Interim Report entitled, *Explosives 'Finds' in Donegal*, which was published in July 2004, Mr. Justice Morris (the retired President of the High Court and sole member of the tribunal of inquiry) made a number of recommendations regarding the running of certain aspects of the Garda intelligence service not least in the area of handling of informants – “Perhaps the most important aspect of police work that was touched on during the course of the hearings of the tribunal was the handling of informers.”⁵¹

The Report states that the use of informers by the police force in Ireland is subject to self-regulation. A document was submitted to the tribunal that set out the updated procedures which had been implemented in dealing with informants since 1990. This document was submitted in closed session as the Commissioner of An Garda Síochána claimed privilege over it, on the basis that disclosure would be contrary to public policy or national security. In his report, Mr Justice Morris said: “...the Tribunal is absolutely satisfied that there is nothing in it, which the public should not know about. The Tribunal was astonished to hear that the document was restricted to senior members of An Garda Síochána and that there was very little knowledge of it amongst members...below the rank of Inspector.”⁵² The tribunal recommended a review of the document and its implementation to be carried out by some officer or body outside the auspices of the Gardai. The report also recommended a study of other international models, before considering the situation that exists in this area in other states, including Canada and New South Wales, Australia.

The section of the report on informants concludes with a list of 17 recommendations which include the production and circulation of an informant handling manual,⁵³ training on the handling of informants for Garda members,⁵⁴ a periodic independent audit of the operation of

⁵⁰ *Annual Report of the Irish Prison Service, 2003.*

⁵¹ Report of the Tribunal of Inquiry Set up Pursuant to the Tribunal of Inquiry (Evidence) Acts 1921-2002 into Certain Gardai in the Donegal Division – Interim Report on Explosives ‘Finds’ in Donegal, para. 13.23. The full text of the Report is available at : www.morristribunal.ie/

⁵² *Ibid.*, para. 13.43

⁵³ *Ibid.*, para. 13.92.1

⁵⁴ *Ibid.*, para. 13.92.2

the procedure involved in handling informants⁵⁵ and the introduction of mandatory registration of informants.⁵⁶

Reasons for concern

The concerns relating to informality, lack of transparency and self-regulation set out above in the interim report of the Morris Tribunal are a cause of serious concern and although the problems arising therefrom are addressed to some extent in the provisions for external scrutiny by a Garda Ombudsman Commission in the Garda Síochána Bill that legislation has already been criticised by, among others, the Irish Human Rights Commission (this is discussed under Article 4).

Controls imposed on potential candidates in employment (in particular security checks with regard to applicants for “sensitive positions”)

Legislative initiatives, national case law and practices of national authorities

The Annual Report of the Data Protection Commissioner for 2003 (published during the period under review) looks at the issue of vetting of persons for employment purposes, which is an issue of some topicality in the aftermath of the Soham murder cases in the United Kingdom. The Irish police force currently provide a vetting service, the Central Vetting Unit, which provides information on potential employees in a number of employment areas, including child access and government Employment.⁵⁷ This procedure can only be performed with the written consent of the individual concerned with the application.

The Annual Report recommends the introduction of legislation concerning “spent convictions” for minor offences, which would not be relevant to an assessment by the Gardai as to whether a person is law-abiding. Section 2(1)(c)(iv) of the Data Protection Act 1988 provides that personal data held on a computer “shall not be kept for longer than is necessary for (the) purpose.” The Data Protection Commissioner notes in his report that in his discussions with An Garda Síochána on this matter he suggested that only information of relevance to any particular employment should be disclosed to a potential employer – “Obviously if someone has a conviction relating to child sexual abuse, that information is of primary significance to an employer in the childcare sector or in other areas where access to childcare arises. Conversely, information about an individual’s payment of a fine for perhaps bicycling offences in his youth...would not be relevant, and it may be inappropriate...to provide this information in response to a vetting request.”

However, under advice from the office of the Attorney General the Gardai feel that it is their duty to provide all information on previous convictions when so requested. The report recommends that this should be reviewed. The report also suggests that extending the vetting service to all employment sectors would be disproportionate and that there is a need for the service only in sensitive areas “for which vetting information is relevant and desirable from a crime prevention viewpoint.”

Reasons for concern

While the importance of effective vetting procedures for employment in sensitive areas cannot be overstated it is also important to protect against discrimination against prospective employees based on previous or spent convictions. In this connection it is noteworthy that proposals to extend the prohibited grounds of discrimination under the equality legislation to

⁵⁵ *Ibid.*, para. 13.92.5

⁵⁶ *Ibid.*, para. 13.92.6

⁵⁷ *Annual Report of the Office of the Data Commissioner, 2003.*

include previous convictions has not yet been adopted by Government. (This is discussed later in Chapter III – Equality).

Right to the protection of family life and right of the public to have access to information

Legislative initiatives, national case law and practices of national authorities

Section 40(3) of the Civil Liability and Courts Act 2004⁵⁸ modifies the *in camera* provisions contained in a number of previous statutes. Under the new provision nothing shall operate in the previous Acts⁵⁹ to prohibit –

“...the preparation by a Barrister at Law or a Solicitor or a person falling within any other class of persons specified in regulations made by the Minister and publication of a report of the proceedings...”

The report must not allow for the parties to the proceedings or any child to which the proceedings relate to be identified. The purpose of this enactment is to allow for greater openness and transparency in the reporting of proceedings before the family courts. While some practitioners and judges have called for such change for a considerable time, the more recent impetus for change has come from non-governmental groups concerned with parental equality and the rights of birth fathers in family litigation.

The Barr Tribunal (mentioned earlier under Article 2-Right to Life) heard evidence relating to the broadcast of information pertaining to John Carthy on a national radio programme *5-7 Live* while the siege was still in progress. It was suggested that this broadcast, which included the deceased's name and details of his medical condition and may have been heard by Mr. Carthy, could have contributed to the tragic situation which occurred as a result of the stand-off at Abbeylara. This matter will be dealt with in the report of the tribunal to be published in 2005.

Voluntary termination of pregnancy

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

There was no international case law or concluding observations of expert committees in respect of Ireland in the period under scrutiny. In October and November 2004, newspapers reported that an application against Ireland had been lodged before the European Court of Human Rights complaining of a number of violations of the European Convention on Human Rights.⁶⁰ The applicant, D, claimed to have suffered a violation of Articles 3 and 8 ECHR by being forced to travel to the United Kingdom for the purpose of obtaining an abortion due to the lack of lawfully available abortion services in Ireland. The applicant did not come within the circumstantial definition for permitted abortion under Irish constitutional law – where there is a real and substantial risk to the life as opposed to the health of the mother including the risk of self-destruction – which provides, in any event, for a theoretical right to abortion in Ireland arising from the non-availability of abortion services in Irish hospitals. According to

⁵⁸ No. 31 of 2004.

⁵⁹ Legitimacy Act 1931, Courts (Supplemental Provisions) Act 1961, Family Law (Maintenance of Spouses and Children) Act 1976, Status of Children Act 1987, Maintenance Act 1994, Domestic Violence Act 1996

⁶⁰ See, for example, *The Sunday Times*, 31 October 2004.

newspaper reports, the Irish Government will seek to have the application declared inadmissible for failure to exhaust domestic remedies.⁶¹

Reasons for concern

In July 2004 Gardai began an investigation into reports that a number of non-national women had resorted to illegal 'back-street abortions' in Dublin.

Although non-national women on restricted visas or seeking asylum can travel to Great Britain for abortion services, many of these would be unaware that this was an option according to the Crisis Pregnancy Agency (CPA). This has led the CPA to translate its literature on this issue into five languages – Chinese, Arabic, French, Romanian and Russian.⁶² However, as asylum-seekers are entitled to only €19.10 per week, this could have the effect of restricting the possibility of travel overseas to have an abortion. Another possible factor in the decision to seek an illegal abortion was the work permit system, which allows for an employer not to renew work permits of a non-national woman if she becomes pregnant.

The Department of Justice Equality & Law Reform published figures in 2004 that showed that more than forty asylum-seekers living in Ireland had been granted permission to travel to Britain in order to terminate their pregnancies. A spokesperson for the Department said that when applying for permission to temporarily leave the state, people are not asked whether they are going for abortions. He said however, that if they said that this was the reason for their application, the Department "would issue them with a docket."⁶³

Personal identity (including the right to gain access to the knowledge of one's origins)

Legislative initiatives, national case law and practices of national authorities

The proposed Adoption Bill, which is intended to ratify the Hague Convention on Inter-country Adoption and also establish a new Adoption Authority to replace the Adoption Board (An Bord Uchtala), is currently at the preparatory stage and is not expected to be published until 2005. The Board operates an adoption information-tracing unit which assists those who have been involved in the adoption process to trace their parent or, in the case of the parent, the child. There are plans at present to launch a new service called the National Contact Preference Register under the auspices of the Adoption Board, which will allow for adoptive children and birth parents to voluntarily register their details and make contact if they so wish. This will alleviate the need to trace through the original adoption agency or Health Board where both parties wish to trace the other. However, it is envisaged that support services will still be available for the Health Board or the agency.

Reasons for concern

It is still not possible for people who have been adopted to attain their birth certificates. Although this is a measure to protect the privacy of the birth parent, it can lead to humiliation for adoptive children who when asked to produce a birth certificate - which is a requirement for a number of things, such as passport application - can only proffer an adoption certificate instead.⁶⁴

Family life

⁶¹ *The Irish Times*, 2 November 2004.

⁶² *The Irish Times*, 9 July 2004.

⁶³ *The Irish Times*, 12 July 2004.

⁶⁴ Nestor, *Law of Child Care*, (Blackhall Publishing, 2004), pp 95-97.

Protection of family life (in general, developments in family law)

Legislative initiatives, national case law and practices of national authorities

Census 2002 revealed the figure for lone-parent families to be 153,863 in 2002, up from 129,116 in 1996. Of these 130,364 were lone mothers with 23,429 lone father declarations.

At the launch of a new report entitled *Strengthening Families Through Fathers* completed under the Government's Family Research Programme, the Minister for Social and Family Affairs, Seamus Brennan, T.D., called for support services and family law courts to be more sensitive to the rights of fathers. The Minister said: "We should be putting in place a means by which young men are encouraged to get involved with their partner and child, not deterred. We shouldn't fall into the assumptions that exclusion is better than inclusion."⁶⁵

The All-Party Oireachtas Committee on the Constitution, which is charged with reviewing the Constitution in its entirety, is currently accepting submissions on constitutional provisions pertaining to the family. The Committee has invited submissions in the following areas:

- How should the family be defined?
- How should one strike the balance between the rights of the family as a unit and the rights of the individual?
- Is it possible to give constitutional protection to families other than those based on marriage?
- Should gay couples be allowed to marry?
- Is the Constitution's reference to woman's 'life within the home' a dated one that should be changed?
- Should the rights of a natural mother have express constitutional protection?
- What rights should a natural father have, and how should they be protected?
- Should the rights of the child be given an expanded constitutional protection?
- Does the Constitution need to be changed in view of the UN Convention on the Rights of the Child?

Reasons for concern

An ongoing concern and one which is likely to be addressed in the near future by the All-Party Oireachtas Committee on the Constitution is the privileged position afforded to the family base upon marriage in Article 41 of the Irish Constitution. The difficulties posed for those living in atypical family situations are likely to be brought into sharper focus now that the European Convention on Human Rights Act 2003, which incorporates the ECHR into Irish law, has come into force. As the Convention has been incorporated at a sub-constitutional level the Irish constitutional standard will retain primacy in any case of an incompatibility between Irish constitutional law and ECHR law. While litigants may be able to obtain declarations of incompatibility from the courts (under Section 5 of the ECHR Act) the practical impact of such a remedy, in legal terms, will be nugatory.

Removal of a child from the family

Legislative initiatives, national case law and practices of national authorities

In *F.N. v. C.O.*⁶⁶ Finlay Geoghegan J. adopted a child-centred approach to the question of custody. In this case, maternal grandparents sought, *inter alia*, custody of their two teenage

⁶⁵ *The Irish Examiner*, 22 November 2004.

⁶⁶ *F.N. v. C.O.*, 26 (March 2004) H.C. Unrep.

granddaughters and were opposed by the girls' father.⁶⁷ The girls' parents had separated in 1993 and, following the death of their mother, the girls lived with their grandparents since January 1996. The judge considered that the grandparents were fit and proper persons to be awarded custody, as was the father, though he had failed in his parental duty to provide normal day to day care for the girls between 1993 and 2004. The judge also found that, though the girls loved their father and wished to have access to him, they regarded their grandparents as their *de facto* parents.

In relation to questions of guardianship and custody, the judge held that children of a certain age and understanding had a personal right under Article 40.3 of the Irish Constitution to have their personal wishes taken into account by the court and that this right was vindicated by s.25 of the Guardianship of Infants Act 1964. Moreover they had a right, again protected by Article 40.3, to have such decisions taken in the interests of their welfare and so she considered that it was 'feasible' to construe and apply s.3 of the Guardianship of Infants Act 1964 in accordance with the Constitution.

Moreover, following *Re Article 26 and the Adoption (No.2) Bill 1987*,⁶⁸ the court was obliged, in considering the child's welfare, to have due regard to the natural and imprescriptible rights of the child. In the instant case, Finlay-Geoghegan J. held that there were compelling reasons why the welfare of the girls could not be achieved by granting custody of them to the father.⁶⁹ Both children were doing well in Ireland and a move now against their wishes would cause significant damage to their educational and social development.

Reasons for concern

The Irish Foster Care Association claim that 4,500 children are currently in the care of 2,000 foster homes in Ireland, but claims that there is still a pressing need for foster carers throughout the country. In May 2004 the Northern Area Health Board (NAHB) issued an urgent appeal for those willing to foster children, stating that the greatest need was for those aged from six to twelve years.⁷⁰ The Health Board stated that almost 350 children were received into the care of the NAHB last year with thirty-four percent admitted due to parental addiction problems, fourteen percent due to neglect and a further fourteen percent due to physical abuse. Five children out of one hundred surveyed last year were placed in care because of sexual abuse.

The right to family reunification

Reasons for concern

In September the Immigrant Council of Ireland launched a report called *Voices of Immigrants – The Challenges of Inclusion* in which the difficulties experienced by immigrants living and working in Ireland in trying to get family members including their children to join them were detailed.

⁶⁷ All of the parties to this litigation were Belgian but as the habitual residence of the children was Ireland, Finlay Geoghegan J. held that the Irish courts had jurisdiction to deal with the guardianship, custody and access issues.

⁶⁸ *Re Article 26 and the Adoption (No.2) Bill 1987* [1989] IR 656;

⁶⁹ In the light of this conclusion, the judge considered that it was unnecessary for her to decide whether the decision in *Re Article 26 and the Adoption (No.2) Bill 1987* [1989] IR 656 altered the contention accepted by the court in another case (*In re J.H., an infant*) that s.3 of the 1964 Act must be construed as involving a constitutional presumption that the welfare of the child is to be found within the family. She did note, however, that *J.H.* involved a very young child, perhaps hinting that a different approach might be possible where older children are concerned.

⁷⁰ *The Irish Times*, 18 May 2004.

At a conference on the family rights of migrant workers organised in November 2004 by the Immigrant Council of Ireland, the Irish Refugee Council and the Irish Council for Civil Liberties the Government was urged to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990 and to place the issue of family reunification for migrant workers on a statutory footing.

Private and family life in the context of the expulsion of foreigners

Legislative initiatives, national case law and practices of national authorities

In the period under review the Government began a process of deporting families of non-nationals with Irish-born children (with Irish citizenship) as a result of a decision of the Irish Supreme Court in January 2003, *Lobe & Osayande v. Minister for Justice, Equality & Law Reform* – this is discussed in greater detail under Article 19.

Positive aspects

At the end of 2004 it was announced that many of the families that were likely to be deported as a result of the abovementioned Supreme Court decision would now be allowed to apply for a right to remain on the basis of published criteria – also discussed under Article 19.

Article 8. Protection of personal data

Independent control authority (evolution of its powers, competences)

Legislative initiatives, national case law and practices of national authorities

Under the Data Protection (Amendment) Act 2003 the powers of the Office of the Data Protection Commissioner were extended to allow for ‘dawn raids’ and privacy audits of businesses and organisations to ensure compliance. A number of audits have been carried out in 2004 under these new powers, most notably the first formal audit of An Garda Síochána, which is expected to have a significant impact. However, the results of this will not be available until the 2004 report of the Data Protection Commissioner is published in Spring 2005.

Positive aspects

In February 2004 the first successful prosecutions were taken by the Office of the Data Protection Commissioner against two firms of solicitors in Dublin and Wicklow, which had failed to register with the office. The Probation Act was applied and costs were awarded to the Data Protection Commissioner, with the requirement that one of the firms also pay €500 to a local charity. However, the cases were heard *in camera* and therefore the names of these firms are not available. In his report the Commissioner stated his intention to prosecute in similar situations, where necessary in the future.⁷¹

Protection of personal data (in general, right of access to data, to have them rectified and right to a remedy)

Legislative initiatives, national case law and practices of national authorities

At a Law Society of Ireland conference entitled *Protecting Privacy*, held in October 2004, the Data Protection Commissioner, Joe Meade, summarised the law on data protection in Ireland. In his presentation he noted the rights attaching to individuals in this area, which include the

⁷¹ *Report of the Office of the Data Protection Commissioner, 2003.*

right to have data processed in accordance with principles, the right to attain a copy of one's personal information held by another, the right to have information corrected if it is wrong and the right to make a complaint to the Data Protection Commissioner.⁷² Areas exempt from a request for access to information include data relating to a criminal investigation, data covered by legal privilege and data relating to a claim of liability.⁷³

Protection of the private life of the worker and the prospective worker

Legislative initiatives, national case law and practices of national authorities

In the Health, Safety and Welfare at Work Bill 2004 there is provision for drug-testing in the workplace which has led to criticisms by the Irish Council for Civil Liberties – this is discussed further under Article 31 – Fair and just working conditions.

At the Law Society conference (referred to above) the Data Protection Commissioner outlined the safeguards in place for workers to ensure that their right to privacy is not breached. Although employees do enjoy a right to privacy in the workplace, this right must be balanced with the employer's legitimate interests. In his presentation the Commissioner stated that any monitoring that occurs in the areas of phone, e-mail or by use of CCTV cameras should be notified to the employee regarding the nature, extent and purpose of the surveillance. The Commissioner suggests that ideally a general policy in this area should be available and this policy should be preventive rather than restrictive.⁷⁴

Reasons for concern

A matter of concern highlighted by employees in a number of industries has been the increased use of biometrics in the workplace, in particular in areas where it does not seem appropriate that such information is stored on employees. A dispute came before the Labour Relations Commission taken by SIPTU this year regarding this issue.

Protection of the private life in the processing of medical data

Legislative initiatives, national case law and practices of national authorities

A joint code of practice being compiled by the Department of Justice, Equality & Law Reform and the Office of the Data Protection Commissioner was due to be published in 2004. However, due to resourcing difficulties, this has not yet been published and the DPC has decided to publish its own code of practice in this area.

The General Practitioners' Information Technology Group has also published a code of practice in this area this year.

The Medical Council of Ireland issued the sixth edition of *A Guide to Ethical Conduct and Behaviour* in 2004, section E of which deals with confidentiality and consent matters. The Guide states that a doctor must not disclose information to any person regarding a patient subject to the following exceptions:

- When ordered by a judge in a court of law, or by a tribunal established by an Act of the Oireachtas

⁷² *Protecting Privacy*, Special Conference organised by the Law Society of Ireland, October 9th 2004

⁷³ *Ibid.* p. 16

⁷⁴ *Ibid.* p. 17

- When necessary to protect the interests of the patient
- When necessary to protect the welfare of society
- When necessary to safeguard the welfare of another individual or patient⁷⁵

The Guide also states that doctors are required to ensure that medical records, regardless of the format in which they are kept must be safeguarded and that doctors have a responsibility to comply with the Data Protection and Freedom of Information legislation.⁷⁶

With regard to access to information for insurance companies, doctors are required under the Guide to ensure that details are not provided without the informed consent of the patient, who should be informed that any report issued may be read by non-medical personnel. The doctor is advised to send any information to the medical officer acting on behalf of the company requesting the information.⁷⁷ With regard to deceased patients, doctors are advised that the medical records of a deceased person remain confidential as death does not negative the duty of confidentiality and that if an insurance company requests such records, these should only be provided with the consent of the deceased's next of kin.⁷⁸

Intelligence and security services

Legislative initiatives, national case law and practices of national authorities

The Data Protection Commissioner believes that although the area of national security and crime are of great importance, proportionate actions on behalf of the security services are required.⁷⁹ The Commissioner questions whether the data matching, biometrics and visa proposals at EU level are necessary or "just a convenient excuse to obtain measures that would not normally be acceptable."⁸⁰ He suggests that the danger exists that the right to privacy is being "eroded in the 'guise' of greater security."⁸¹

Speaking of the formerly proposed legislation by the Department of Justice, Equality & Law Reform on communications traffic data retention, the Commissioner said that such data could be used as a means of surveillance on citizens that could easily reveal who a person had been talking to and where they were making the communication from. This data would be kept even where there was no criminal activity either carried out or contemplated by the person.⁸² The Government has since abandoned plans to introduce any such legislation at the domestic level, partly due to strong opposition from civil liberties organisations. However, during the period when Ireland held the rotating presidency of the European Union in 2004, proposals were introduced by the Irish presidency to implement such data retention laws at EU level, which would eventually lead to their transposition at domestic level, perhaps circumventing the criticism that would otherwise be encountered.

Reasons for concern

The vagueness of Irish law on privacy – which is rooted in the constitutional doctrine of unenumerated or unspecified rights – presents particular problems when balanced against interests such as national security. Albeit in the context of media law reform, the Minister for Justice, Equality & Law Reform has already acknowledged that Ireland is "...in the red zone

⁷⁵ Irish Medical Council, *A Guide to Ethical Conduct and Behaviour*, para 16.3

⁷⁶ *Ibid.*, para. 16.4

⁷⁷ *Ibid.*, para. 16.7

⁷⁸ *Ibid.*, para. 16.8

⁷⁹ *Supra* n. 24, p. 17

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*, p. 18

in relation to our failure to protect privacy”.⁸³ This problem has been recognised since the publication of a Law Reform Commission Report on Privacy in 1998. It would be regrettable if the necessary balance between security and privacy that ought to be struck as a matter of national law in all member states were to be transcended by an EU measure on communications traffic data retention that paid insufficient regard to that necessary balance in a democratic society.

Video surveillance in public fora

Legislative initiatives, national case law and practices of national authorities

At the aforementioned Law Society conference on privacy in October 2004 Mr. Michael Staines, a Solicitor and specialist in criminal law, proposed that the use of CCTV cameras in public places should require ministerial permission. He also believes that notices should be displayed which inform people of the such technology is being operated in the area. Mr. Staines argued that “competing interests such as the investigation of crime or the protection of State security may have to dilute that right (privacy). However, any such diminution of the right to privacy must be regulated and stringent safeguards put in place.”⁸⁴

Reasons for concern

While the use of CCTV as an instrument of crime control appears to enjoy widespread public support and is generally welcomed when introduced in different parts of the country there has been little by way of informed public discussion about the real benefits of such schemes. The displacement effect of CCTV has never been authoritatively examined and alternative methods of preventing street crime are not always analysed in terms of their relative advantages over CCTV.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

The DPC in his Annual Report for 2003 (published in Spring 2004) raised the issue of non-compliance by politicians with data protection legislation by failing to register as data-holders arising from the fact that they held data on constituents.

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

Marriage

Legislative initiatives, national case law and practices of national authorities

The All-Party Oireachtas Committee on the Constitution is currently taking submissions from the public on the issues of the rights of cohabiting couples and in particular those who are in a same-sex relationship. The Committee is expected to conclude its discussions in Summer 2005 and issue a report.

⁸³ Speaking at the Law Society conference on Privacy – comments reported in *The Irish Times*, 11 October 2004.

⁸⁴ *The Irish Times*, October 11th 2004

Legal recognition of same-sex partnerships

Legislative initiatives, national case law and practices of national authorities

In 2004 The Law Reform Commission published a recommendation proposing a scheme whereby cohabiting couples would be entitled to many of the same rights afforded married couples, provided that they were in a “marriage-like” relationship for a period of three years or two years where the couple had a child.⁸⁵ This would be a presumptive scheme, which would not require any registration. However, the scheme would not apply, under the recommendation, to those who were already married, although that marriage had failed, and who were now cohabiting with another person, in order that the protection of marriage under the Constitution would not be affected. The scheme would also not apply to those who were co-habiting, but who were not in a “marriage-like” relationship.

Leave to seek judicial review was recently granted by the High Court to a same-sex couple, Katherine Zappone and Ann-Louise Gilligan, married in Canada. They sought to have their marriage recognised by the Revenue Commissioners so that they could avail of married couple tax status. The presiding judge in the case, Mr. Justice McKechnie, stated that having considered the documents and legal authorities, the couple had demonstrated an arguable case, which entitled them to take proceedings.⁸⁶ He also stated that if the couple succeeded “a stream of consequences, legal, cultural, ethical and religious” would follow.⁸⁷

The proceedings initiated by Zappone and Gilligan gave rise to considerable public discussion of the issue of same-sex civil union / marriage and, in a recent interview, the Taoiseach (Prime Minister) suggested that he was in favour of introducing some type of system under which same-sex couples would be entitled to the same rights as married couples, although he seemed to be against the idea of same-sex marriage. The main opposition parties appear to favour a similar approach. At the end of 2004, the Independent Senator and prominent gay right activist, David Norris, published a private member’s bill, the Civil Partnership Bill 2004⁸⁸ which is likely to be debated in the next parliamentary session.

Positive aspects

Given that certain homosexual acts were criminalised in Ireland until 1993 it is perhaps surprising that incitement to hatred on the basis of sexual orientation was criminalised prior to that date and that formal legal equality (for many purposes) was achieved in the period 1998-2000. Bearing that historical context in mind it is to be welcomed that there appears to be a good degree of political consensus on treating same-sex couples equally to opposite-sex couples for the purposes of tax, inheritance and other important legal issues that arise in most committed human relationships. The benefits arising from law reform in this area for others in relationships of dependency (such as siblings) may well prove immensely beneficial.

Reasons for concern

While the proposals for reform in the area of same-sex unions have been broadly welcomed by gay rights groups and other non-governmental organisations concerned with human rights it is clear that these reforms will not go as far as providing for full equality between opposite-sex and same-sex couples in marital relationships. This has not been suggested as a reason for not proceeding with the current reform proposals but some cautionary notes have been raised

⁸⁵ The Law Reform Commission, *Consultation Paper on the Rights and Duties of Cohabitees* (LRC CP 32-2004) April 2004, www.lawreform.ie

⁸⁶ *The Irish Times*, 10 November 2004.

⁸⁷ *Ibid.*

⁸⁸ No. 54 of 2004.

about ongoing inequalities between gay and heterosexual couples. There are, however, real political difficulties with legislating for 'gay marriage', so-called, and it is almost certainly the case that such reform would require a referendum of the people to amend the Irish Constitution.

Recognition of the right to marry for transsexuals

Legislative initiatives, national case law and practices of national authorities

Under current Irish Law there is no provision allowing for the official recognition of transsexual people in the gender with which they identify. As a result of this, transsexual people cannot marry in their reassigned gender and cannot have their birth certificates revised. An appeal is currently pending before the Supreme Court on the latter issue in a case taken by a male-to-female transsexual, Lydia Foy.

Reasons for concern

The High Court decision in the abovementioned Foy case was given immediately before the European Court of Human Rights decision in *Goodwin v. United Kingdom*. In the light of the latter decision, Irish law in this area is clearly out of line with the position under the European Convention on Human Rights. This may provide a basis for the settlement of the Foy appeal currently before the Supreme Court or for the granting of a declaration of incompatibility with the ECHR under Section 5 of the ECHR Act 2003. While the equal treatment of transsexuals may not be required under the Irish Constitution such equal treatment, if provided for by law so as to bring Irish law into line with the ECHR, is unlikely to be found to be unconstitutional.

Control of marriages suspect of being simulated

Legislative initiatives, national case law and practices of national authorities

In *C.K. v. J.K.*,⁸⁹ Murray J. took the view that it was 'a direct attack on the constitutional rights of a person for another to induce them or cause them to enter into a duly solemnised marriage contract by deceit when the latter knows that he lacks the capacity to enter into a valid marriage by reason of a pre-existing and subsisting marriage.' In the instant case, he suggested that the applicant, who went through a marriage ceremony with the respondent on the mistaken assumption that he was lawfully divorced from his first wife, had a remedy in law for actionable deceit grounded on his fraudulent misrepresentations.⁹⁰

Reasons for concern

In the period under review the Irish Council for Civil Liberties (ICCL) criticised the Department of Justice, Equality & Law Reform for requiring Muslim men seeking naturalisation on the basis of their marriage to an Irish woman to swear an affidavit indicating that they did not have or did not intend to have a second wife.⁹¹

⁸⁹ 31 March 2004 S.C. Unrep.

⁹⁰ No other member of the Supreme Court in this case addressed this point.

⁹¹ *The Irish Times*, 18 June 2004.

Article 10. Freedom of thought, conscience and religion

Reasonable accommodation provided in order to ensure the freedom of religion.

Reasons for concern

Section 37(1) of the Employment Equality Act 1998 provides that:

“A religious, educational or medical institution which is under the direction or control of a body established for religious purposes or whose objectives include the provision of religious services in an environment which promotes certain religious values shall not be taken to discriminate against a person for the purposes of this [Act] if –

- (a) it gives more favourable treatment, on the religion ground, to an employee or prospective employee over that person where it is reasonable to do so in order to maintain the religious ethos of the institution, or
- (b) it takes action which is reasonable necessary to prevent an employee or a prospective employee from undermining the religious ethos of the institution.”

This provision remains unaffected by the changes introduced in the Equality Act 2004 and is defended on the basis that it provides protection for the manifestation of religious belief in certain employment contexts. While there is no doubt that the provision applies equally to majority and minority religious beliefs the exemption from discrimination claims that it provides will clearly have a disproportionate beneficial impact on majority religions that control religious, educational and medical institutions.

Article 11. Freedom of expression and of information

Freedom of expression and information (in general)

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

A decision of the European Court of Human Rights in the case taken by Independent Newspapers Ltd complaining about the allegedly excessive nature of the award of damages for libel in a case taken against one of its newspapers by the politician, Proinsias De Rossa, is pending at the time of writing.

Legislative initiatives, national case law and practices of national authorities

Freedom of Information –

In June 2004 the Office of the Information Commissioner (which is held by the Ombudsman) issued a review of the Freedom of Information (Amendment) Act 2003.⁹² The 2003 Act introduced a number of controversial changes to the Freedom of Information Act 1997 (discussed in last year’s Annual Report). The main changes related to cabinet papers, communications between Ministers, certification by Secretary-Generals of government departments that certain information was part of an ongoing deliberative process and therefore could not be released, the imposition of up-front charges from freedom of information requests and applications for review and mandatory exemptions for documents related to international relations.

⁹² Office of the Ombudsman, *Review of the Freedom of Information (Amendment) Act 2003, An Investigation by the Information Commissioner into the effects of the Amendment Act and the introduction of fees on access requests by members of the public*. The full text of this report is available at: www.ombudsman.ie/

The 2004 review notes that public servants and Ministers “recognise that the culture of official secrecy has no place in a modern, customer-focused administration”⁹³ and states that the Irish public service has reacted positively to the changes required under the freedom of information regime. However, the review suggests that there are considerable negative impacts associated with the introduction of the new Act, especially the scheme whereby not insubstantial fees are levied on requests for access to certain information. The review notes the following effects:

- 1) overall usage of the Act has fallen by over 50% while requests for non-personal information has declined by 75%;
- 2) the media, a key element of an open and properly functioning democracy, are now less likely to use the Act. Usage by journalists declined steadily throughout 2003. Between the first quarter of 2003 and the first quarter of 2004 the number of requests fell by 83% and still continues to decline.
- 3) other users of the Act, individuals and representative bodies, use the Act far less than before to access information on decisions that affect them directly or indirectly.⁹⁴

In the review the Information Commissioner recommends that before any future review of the Freedom of Information legislation occurs there should be “an extensive review of submissions from all interested parties.”⁹⁵

In July 2004 the principal of a school in Dublin lodged an appeal to the Supreme Court after his attempt to prevent the publication of school inspection reports failed at the High Court. The Office of the Information Commissioner had decided to publish the school reports, but Mr. Sheedy, the school principal claimed that the release of such information would lead to compilation of school-league tables and a “chilling” impact on relations between schools and inspectors.⁹⁶ However, in the High Court Gilligan J. dismissed this claim stating that there was no evidence in support of Mr. Sheedy’s argument and that the clear intention of the FOI Act was to allow access to information held by public bodies to the greatest extent possible.⁹⁷

Freedom of Expression –

In 2004 the Broadcasting Commission of Ireland launched a *Children’s Advertising Code*. The code covers a number of areas including violence, diet and nutrition and parental responsibility. The code is to apply to broadcasters under the jurisdiction of the Republic of Ireland or to those who make use of frequency or satellite capacity in the Republic.⁹⁸ Many aspects of the code are controversial and have been criticised by those in the advertising industry, an example of such being the requirement that all children’s advertising for fast-food products be accompanied by an acoustic or visual message stating “should be eaten in moderation and as part of a balanced diet.”⁹⁹ This is seen as a reaction to figures which suggest a large increase in the level of obesity among young people in Ireland. The code also prohibits advertising aimed at children of betting and gaming services, slimming products, introduction and dating services and services of a sexual nature.¹⁰⁰ The Code was welcomed

⁹³ *Ibid.*, pg. 26

⁹⁴ *Ibid.*, p. 28

⁹⁵ *Ibid.*, p. 31

⁹⁶ *The Irish Times*, July 21, 2004

⁹⁷ *Ibid.*

⁹⁸ Broadcasting Commission of Ireland, *Children’s Advertising Code*, 2004, p. 4

⁹⁹ *Ibid.*, p.14

¹⁰⁰ *Ibid.*, p.18

by the Children's Rights Alliance (a large alliance of non-governmental organisations) but criticised for not going far enough.

The Director of Public Prosecutions (DPP) announced, in May 2004, at the annual prosecutor's conference in Dublin that eight trials had to be postponed in the previous year due to publication by the media of prejudicial material.¹⁰¹ This led to increased calls for the establishment of a body to monitor the media and reform the contempt of court laws.

A proposed bill on defamation, not yet published by the end of 2004, is to provide for the establishment of a new voluntary press council. This body will be recognised under statute but will not state-appointed as originally discussed in the report of an expert group appointed by the Minister for Justice, Equality & Law Reform. The Minister for Justice said in December that he favoured the introduction of a voluntary press council, which would be backed by statutory powers. This, he believes would enable the censure of newspapers and magazines that infringe the laws on privacy, yet would not lead to state interference with the right to freedom of expression. In an interview carried out on RTE Radio 1 the Minister said that he was not in favour of a state-appointed press council as currently exists in other EU member states. The Minister said, "If the media interests and the public interests are capable of putting together the press council which could be recognised under statute, that press council could be given State powers. During the interview the Minister re-iterated his intention to introduce new defamation legislation, which he hopes will lead to a less-restrictive system in Ireland."¹⁰²

The print media have adopted a model for an independent Press Council and Ombudsman based on the Swedish model and have already adopted a code of practice on which the system will operate.

Reasons for concern

The implications of the changes introduced to Freedom of Information legislation (outlined above) are a clear cause of concern and such concerns were articulated by parliamentarians at the time of presentation of the Information Commissioner's report.

The Broadcasting Commission of Ireland, in June 2004, banned advertisements for an anti-war concert on the basis that they contravened the Radio and Television Act 1988.¹⁰³ The concert was planned as a fund-raising event before a visit to Ireland by the US President and was promoted by the "Stop Bush Campaign", which had been registered as a political party. Under the Act, political and religious advertising and advertising in relation to a trade union disputes are prohibited. Radio adverts urging the public to attend protests against Mr. Bush were also refused by the BCI.¹⁰⁴

Media pluralism and fair treatment of the information by the media

Legislative initiatives, national case law and practices of national authorities

In the period under review the Broadcasting Commission of Ireland, for the first time, licensed a local television service in the Waterford area, which is owned and operated by the local radio operator in the area, WLR FM. It has already begun broadcasting to an estimated 21,000 homes using the NTL platform.

¹⁰¹ *The Irish Times*, May 24th 2004

¹⁰² *Irish Times*, 14th December 2004

¹⁰³ IRIS 2004 -8, Legal Observations of the European Audiovisual Observatory –Marie McGonagle

¹⁰⁴ *Ibid.*

Positive aspects

In April this year an asylum seeker from Ghana began broadcasting a show on a local radio station in Donegal, *Highland Radio*. The programme focuses on African music and culture, but the broadcaster was not able to accept payment for her work, as asylum seekers are not able to gain employment while the outcome of their asylum application is pending.

Secrecy of journalistic sources*Reasons for concern*

In December 2004 a journalist for the *Sunday Business Post* newspaper, Barry O’Kelly, appeared before the Mahon Tribunal (a tribunal of inquiry into allegations of impropriety and corruption in planning matters) where he was asked to reveal the source of documents he had used in two articles relating to the Tribunal, which had come from the inquiry. Mr. O’Kelly refused to reveal his sources and was warned by the chairman of the tribunal, Judge Alan Mahon that he could face imprisonment for non-cooperation if the matter was referred to the High Court. Judge Mahon said that no “sacrosanct journalistic privilege” existed before the Irish courts. The matter is now before the courts.

Article 12. Freedom of assembly and of associationFreedom of peaceful assembly*Positive aspects*

The anti-war protests for the visit to Ireland of the President of the United States of America, George W. Bush, in the summer of 2004 passed off peacefully although there was a massive Garda presence at these events.

The May Day 2004 marches in Dublin passed off without serious incident. There was also a huge security presence at this protest and equipment such as water cannons were present as a reminder to protesters that should events get out of hand they would be severely dealt with. This protest coincided with the Day of Welcomes in Dublin when ten new member states acceded to the European Union.

Reasons for concern

Concerns have been expressed by, among others, anti-globalisation groups that there is a disproportionate focus on their activities and events in terms of policing in contrast to the treatment of protests by interest associations and trade unions.

Freedom of political association*Legislative initiatives, national case law and practices of national authorities*

In November 2004 the non-jury Special Criminal Court convicted two men, Niall Binead and Kenneth Donohoe, of membership of the Provisional IRA. They were both sentenced to four years imprisonment. The case aroused considerable controversy because of the close political connection between one of the accused (Mr. Binead) and a Sinn Féin member of Dail Éireann. The conviction was based on the opinion of a Chief Superintendent of An Garda Síochána, the silence of the accused in response to questions put by Gardai and written evidence in support of the opinion of the Chief Superintendent seen only by the prosecution and the three presiding judges of the Special Criminal Court. The case is currently being appealed before the Court of Criminal Appeal.

Freedom of association for trade unions

Reasons for concern

PDFORRA and the GRA (representative bodies for members of the Defence Forces and An Garda Síochána, respectively) have for some time been looking for recognition as trade unions and also rights to join negotiations in the social partnership agreements that have been adopted in Ireland since the 1980's. However, this has not yet occurred and the Irish Congress of Trade Unions have been negotiating a possible alternative status for these groups that would see them become associate members of the ICTU with some negotiating rights.

Article 13. Freedom of the arts and sciences

Freedom of the arts

Legislative initiatives, national case law and practices of national authorities

The Irish Film Censor's Office established a website in September 2004 aimed at informing the public about the work that it carries out, but also at providing information on the content of films and the reasons for the classification given to them. Mr. John Kelleher, the Irish Film Censor, said at the launch: "the previous ethos was not to explain decisions. But that was from another era. We have moved from the age of censorship to one of classification."

Last year 213 feature films and 6,504 videos and DVDs were certified. No feature films were banned, but 16 videos were.¹⁰⁵

In September 2004 the results of a survey on the views of parents in relation to film classification were published by the Office of the Irish Film Censor. The survey found that a significant number of parents felt that the current classifications 12PG and 15PG were too strict.¹⁰⁶

In December 2004, speaking at the European Conference of Film Classifiers, Mr. Kelleher announced that from 1 January 2005 two new film certificate categories would come into effect.¹⁰⁷ A new 16 certificate would be introduced, which it is envisaged will bridge the gap which had existed between the 15PG and 18 certificates, and also the 12PG and 15PG certificates would be replaced by 12A and 15A classifications.

In October this year a controversial movie, *9 Songs*, which includes a number of sexually explicit scenes was passed by the Irish Film Censor uncut. However, the previous month a Korean film, *The Isle*, was passed only after cuts had been made.

Freedom of research

Legislative initiatives, national case law and practices of national authorities

In January 2004 the Medical Research Charities Group published a submission on the EU Clinical Trials Directive to caution the Minister for Health & Children about the likely impact this legislation could have in the area of medical research. The aims of the Directive are the protection of the rights and safety of trial participants and also the harmonisation of administrative provisions governing clinical trials. The submission argued that the implementation of the Directive into Irish law would have a significant impact on

¹⁰⁵ IRIS 2004-9, Candelaria van Strien-Reney

¹⁰⁶ IRIS 2004-9, Candelaria van Strien-Reney

¹⁰⁷ *The Irish Times*, December 10th 2004

academic/investigator-led research. In investigator-led research, drugs that are already available on the market are administered to patients using new treatment protocols.¹⁰⁸

This type of research has led to previous medical breakthroughs, such as the discovery of the benefits of aspirin in treating heart disease.¹⁰⁹ However, with the introduction of the new legislation to transpose the Directive, the cost for this type of research, previously borne by pharmaceutical companies and health authorities, would be transferred to the party carrying out the research and would therefore be prohibitive.

Dr. John Kennedy, Consultant Medical Oncologist at St. James Hospital, who is also chairman of the Irish Cancer Society Medical Committee said that “whilst the translation of the EU clinical trials directive will bring many benefits to the Irish clinical research environment...the implications for investigator led research will be disastrous.”¹¹⁰

The Health Research Board, in its submission on the Directive echoed these concerns stating that “without a sponsor, non-commercial clinical trials in Ireland and possibly in the rest of the EU will come to a halt” and that “academics may abandon clinical research and patients will be deprived of future benefits.”¹¹¹

The Directive has been implemented by Statutory Instrument although the Department of Health and Children argues that it will not have the adverse effects claimed by the parties above. The Department believes that all necessary measures have been taken to ensure that clinical trials research on a non-commercial basis will continue, including exempting the need for those carrying out this type of research to be required to pay for samples used in the trials. Instead these samples can be donated by the manufacturers or funded by the health authority.

Section F of the *Guide to Ethical Conduct and Behaviour* published in the period under review by the Medical Council, deals with genetic testing and reproductive medicine. Here it is stated that the “creation of new forms of life for experimental purposes or the deliberate and intentional destruction of in-vitro human life already formed is professional misconduct.”¹¹² The guide states that gene therapy is ethical provided the benefit outweighs the risk and that genetic testing may also be beneficial in detecting and diagnosing current or future illness.¹¹³

The Guide also clearly sets out its policy on artificial insemination by a donor. Here it is stated that there is “no objection to the preservation of sperm or ova to be used subsequently on behalf of those from whom they were originally taken.”¹¹⁴

With regard to in-vitro fertilisation it states, “if couples have validly decided they do not wish to make use of their own fertilised ova, the potential for voluntary donation to other recipients may be considered.”¹¹⁵ This means that couples who are incapable of reproducing themselves may now use the fertilized eggs of another couple which have been produced by IVF.

¹⁰⁸ The relevant section of the Directive states: ‘Sponsor means, in relation to a clinical trial, the person who takes the ultimate responsibility for the initiation and management (or arranging the initiation and management) of, and the financing (or arranging the financing) for, the trial.’

¹⁰⁹ <http://www.diabetesireland.ie/view.asp?ID=1082>

¹¹⁰ *Ibid.*

¹¹¹ HRB Submission on the Draft Regulations to Implement the EU Clinical Trials Directive (2001/20/EC) in Ireland

¹¹² Medical Council, *A Guide to Ethical Conduct and Behaviour* (6th Edition), para. 24.1

¹¹³ *Ibid.*, para. 24.2, 24.3

¹¹⁴ *Ibid.*, para. 24.4

¹¹⁵ *Ibid.*, para. 24.5

Reasons for concern

The issues raised (above) in relation to the Clinical Trials Directive are an obvious cause of concern in relation to freedom of research.

Academic freedom*International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up*

The possible implications of an OECD Report on higher education and other reforms in the area of higher education may have implications for academic freedom in Ireland - these are discussed under Article 14.

Article 14. Right to educationAccess to education*International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up*

In September 2004 the OECD published a major report on third-level education in Ireland. The report had been requested by the Irish Government in 2003 in the context of the state's strategic objective of placing its higher education system in the top rank of the OECD in terms of both quality and levels of participation and by the priority to create a world class research, development and innovation capacity and infrastructure in Ireland as part of the wider EU objective for becoming the world's most competitive and dynamic knowledge-based economy and society as agreed at Lisbon in 2000. The report made 52 recommendations

The report states that in Ireland, more so than perhaps any other country in Europe, tertiary education is a key driver for the economy.¹¹⁶ The Report recommends that the division between institutes of technology and universities be retained recognising the important function that the former make to the local economy of a given area, whilst also appreciating that universities should carry out the major research role in fundamental/basic research.¹¹⁷ However, according to the review the current system under which both these sectors receive funding should be rationalised to create a unified structure, or Tertiary Education Authority (to replace the Higher Education Authority), that would prevent what the report terms "mission drift."¹¹⁸

While the expansion of the third-level sector to meet the needs of ever-increasing student demand is praised for having been achieved without sacrificing quality, the report states that the "beneficiaries have primarily been drawn from the managerial and professional classes."¹¹⁹ The Committee proposes in the report that both social equity and economic arguments suggest that a further entrenchment of this situation should be avoided and makes a number of recommendations as to how this might be achieved, which include improvements at pre-school and primary level and also better allocation of funding for those who need financial assistance in accessing third-level education.

¹¹⁶ OECD Education Report, p. 60. For the full text of the report see the Department of Education & Science website at: www.gov.ie/

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*, p. 61

Funding also needs to be significantly increased at postgraduate level in order to safeguard Ireland's economic position; "The numbers (postgraduate students) need to be doubled as a matter of urgency."¹²⁰

Another key recommendation of the report is that, subject to means-testing, fees for undergraduate studies at higher education institutions be re-introduced and that the 'Free Fees' system currently in place be withdrawn¹²¹ and that a Government-supported loans initiative be introduced to assist students at third-level.

In its preliminary and second report to the Committee for the Elimination of all forms of Racial Discrimination (CERD) the Government included, in Annex 1 thereto, a report on the Irish Traveller Community. Under the Annex the issue of access to education for Travellers is considered. The Government states that the objective is "full participation of Traveller children in an intercultural education system."¹²², which the report says is to be achieved through a policy of full integration of traveller children into mainstream education provision.

Paragraph 18 of the Annex states that although the Department of Education and Science does not keep statistics specific to the Traveller Community in terms of literacy levels compared with the general population, the Visiting Teacher's Service, organised by the Department, indicates that Traveller children are underachieving and "a significant number are roughly two years behind their peers in attainment levels."¹²³

Legislative initiatives, national case law and practices of national authorities

The Minister for Education proposed changing the definition of disability under the Education Act 1998 in order, according to the Department, to allow for consistency of legislation with the Education for Persons with Special Needs Act 2004. This would include removing the medical-based definition in the legislation and providing the Minister with the power to decide whether certain medical conditions came within the scope of the Act thereby entitling the person to educational supports. However, this move drew opposition from disability rights groups who believed that this could lead to fewer children, who are in need of these educational services, being provided with proper access.

Positive aspects

One of the areas of service provision focused on by the Equality Authority in 2004 was Education and school practice. A joint conference was organised with the Irish National Teachers' Organisation in the period under review and the Authority also worked with the Department of Education & Science on the equality dimension of school planning, school evaluation and codes of behaviour.

A second Muslim school with funding from the state has been established in North County Dublin, bringing the total number of Muslim schools in the state to two. There are now approximately 20,000 Muslims living in Ireland.

Reasons for concern

Since the publication of the OECD Report some heads of Irish universities have expressed concerns about the commitment of the Irish Government to implementing the recommendations. Equally, some academics have expressed concern about the adverse

¹²⁰ *Ibid.*

¹²¹ *Ibid.*, p. 66, no. 50

¹²² CERD Report – Ireland.

¹²³ *Ibid*

implications of the report for higher education.¹²⁴ The context in which the report was received was one of intensified reform of the third-level sector which has also been quite controversial in some of the third-level educational institutions.

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

The right for nationals from other member States to seek an employment, to establish himself or to provide services

Legislative initiatives, national case law and practices of national authorities

The transposition of the EU Framework Employment Directive into Irish law through the Equality Act 2004 places a greater duty of non-discrimination on employers but the exemption contained therein in respect of non-nationals may lessen the impact of the legislation in the area of access to employment. (This is discussed further in Chapter III – Equality).

The Minister for Enterprise, Trade and Employment changed regulations covering the spouses of foreign workers to allow such persons to gain access to the labour market during the period under review. The Irish Nurses' Organisation (INO) was particularly vocal in lobbying for a change in the legislation, which was causing many foreign workers to leave employment in Ireland and travel to other states such as the UK where their spouse would also be able to gain employment.

Positive aspects

Figures from the Department of Social & Family Affairs released in August 2004 revealed that nearly 23,000 people from the new member states had sought employment in Ireland since 1 May 2004. FAS (the state vocational training agency) declared that, in the four months after the accession of the new member states, 31,416 people had obtained PPS numbers, which all employees are obliged to hold in order to gain employment.

Good practices

With the enlargement of the European Union in May 2004, the Government made the decision not to impose any barriers on the rights of citizens of the new EU member states to gain access to employment in Ireland. However, limitations were placed on their ability to seek social assistance in the state, unless they had a substantial connection with the state that is deemed to exist if they have resided in Ireland for a period of more than two years. (This habitual residency condition is discussed further under Article 34 – Social Security & Social Assistance).

Reasons for concern

Post-EU enlargement there was, according to the trade union SIPTU, an increase in the number of non-EU workers losing their jobs in Ireland to be replaced by workers from new EU member states. This was partly motivated by the requirement for employers to secure a work permit for the non-EU worker at a cost of EUR 500, while no permit is required for EU workers. This has had the effect of placing non-EU workers in a very vulnerable position where some could face deportation if they cannot secure alternative employment.

¹²⁴ See, for example, Professor Kathleen Lynch, 'OECD Report on education reeks of utilitarianism', *The Irish Times*, 19 October 2004.

The National Disability Authority (NDA) Report on transport published this year criticised the provision of transport services for people with disabilities which it states leads to isolation and an inability to access employment.¹²⁵

The prohibition of any form of discrimination in the access to employment

Legislative initiatives, national case law and practices of national authorities

Cases taken under the Employment Equality Acts 1998-2004 on the basis of discriminatory denial of access to employment can be accessed via the database of decisions on the website of the Office of Director of Equality Investigations (www.odei.ie/) but statistics regarding the number of cases based on access (as opposed to terms and conditions of employment) are not readily available and can only be ascertained by a case-by-case analysis of the decisions contained in the database.

Reasons for concern

The exclusion of domestic workers from access cases (discussed under Article 20 – Equality before the law) is a cause of concern and is likely to be indirectly discriminatory in impact because of the number of migrant workers engaged in such work.

Access to employment for asylum seekers

Reasons for concern

A study carried out by Spiritan Asylum Services Initiative (SPIRASI) as part of a EU-wide research programme showed that refugees face a number of barriers in gaining access to appropriate employment commensurate with their skills, in Ireland.¹²⁶

Once granted refugee status a person is entitled to the same work and welfare rights as an Irish Citizen. However, unofficial estimates suggest that the employment rate among refugees in Ireland currently stands at thirty to forty percent.¹²⁷ The report found that many refugees are employed in jobs that often do not correspond with the level of experience or qualification attained by them before arriving in Ireland. It found that this applied, in particular, to the medical profession where refugees with medical expertise were unable to find appropriate employment due to the lack of recognition of their qualifications by the Irish Medical Council. This refusal of recognition was not confined to this area however and other refugees have been affected by non-recognition of academic and other qualifications by Irish professional bodies.

The report also found that the length of time involved in securing refugee status can lead to further complications in gaining access to the employment market as asylum seekers cannot work while their applications are pending and therefore spend a considerable amount of time unemployed. The gap in employment can have a negative impact on the refugee's prospects of re-entering employment. Health problems, particularly mental health difficulties, which include self-esteem issues can also have an adverse impact.

¹²⁵ National Disability Authority, *Towards Best Practice in Provision of Transport Services for People with Disabilities in Ireland*, 2004, www.nda.ie

¹²⁶ *The Irish Times*, March 12th 2004

¹²⁷ *Ibid.*

Article 16. Freedom to conduct a business

Freedom to conduct a business

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

In June 2004 the Court of Justice of the European Communities issued a judgment against Ireland for failure to implement EC Directive 2000/52/EC.¹²⁸ The Directive required the implementation of measures to facilitate the transparency of financial relations between Member States and public undertakings. In its defence Ireland argued that the Directive would be implemented within three months of the date of defence. However, the court held that Ireland had failed to fulfil its obligations under EC law and made an order for costs.

Legislative initiatives, national case law and practices of national authorities

In *Casey v. Minister for Arts, Heritage, Gaeltacht and the Islands*,¹²⁹ the Supreme Court, per Murray J. (as he then was) held that the right to earn a livelihood does not entitle a person to have access to the property of third parties. Accordingly, a ministerial decision refusing to grant the plaintiff permission to land passengers on Skellig Michael did not infringe his right to earn a livelihood.

Up to August 2004 the Food Safety Authority of Ireland had issued 33 closure orders to business that were found in breach of food safety legislation.

The imposition of the workplace smoking ban (which came into effect in 2004) and the new prohibition on children cannot entering licensed premises where alcohol is being served after 21.00 hours have, according to groups representing the interests of the drinks industry, had an effect on publicans' ability to carry out an economic activity.

In February 2004 the Competition Authority of Ireland issued its Annual Report for 2003. This was the first full year of the Authority's operation under new legislation and a number of significant developments are mentioned, which impact on the ability of undertakings to pursue anti-competitive practices in conducting a business. Of particular note was the expansion of the Authority's powers to supervise merger activity in Ireland and also the progress made in enforcement of competition laws. The latter includes the initiation of a criminal prosecution for an anti-competitive agreement and also obtaining an injunction on the Irish League of Credit Unions from disaffiliating a number of credit unions that would have led to a reduction of competition in the market.¹³⁰

Imposition of certain standards, for instance standards restricting the awardance of public contracts (ethical, social, environmental criteria)

Legislative initiatives, national case law and practices of national authorities

The Annual Report of the Office of the Comptroller and Auditor General¹³¹ for 2003 was published in September 2004. The report mentioned concerns which had been raised both in the Dáil and in the media relating to the procurement policy pursued by the Office of Public Works in the lead in to the Irish presidency of the European Union.

¹²⁸ C-99/03 *Commission v. Ireland*

¹²⁹ *Casey v. Minister for Arts, Heritage, Gaeltacht and the Islands* (24 February 2004) S.C. Unrep.

¹³⁰ The Competition Authority, *Annual Report 2003*, www.tca.ie

¹³¹ The Office of Comptroller & Auditor General is provided for by Article 33(1) of the Irish Constitution '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.'

These included:

- Formal tendering procedures had not been applied to the provision of audio-visual services which had been acquired from a sole supplier since 1997
- No tender process was applied for the appointment of Mechanical & Electrical consultants (€395,065)
- Only a restricted tender process was applied for the acquisition of temporary structures for the Punchestown and Tullamore Council of Ministers meetings (€302,994 and €503,034 respectively)
- Only a restricted tender process was applied for the acquisition of electrical goods and services including €350,000 for one meeting in Galway
- Only a restricted tender process was applied for the acquisition of labour services for loading and unloading trucks, movement of equipment (€1,487,249)
- A possible conflict of interest in the procurement function.¹³²

In the Sixth Progress Report on the current social partnership agreement, *Sustaining Progress*, issued in September 2004 the Government made the following statement as regards its public procurement policy:

“8.1 The Government recognises the importance of having clear and consistent guidelines which provide the basis by which goods and services are procured on behalf of public authorities. The Government recognises the importance of a balanced approach to public procurement and will seek to obtain value for money while having regard to standards of employment”.¹³³

Reasons for concern

While improprieties in public procurement are, of themselves, a real cause for concern there is also a further reason for concern arising from the failure to realise the full potential of public procurement processes as an instrument of positive action to combat discrimination. With the strengthened provisions for positive action on nine grounds of prohibited discrimination introduced in the Equality Act 2004 it is to be hoped that this deficit will be addressed in the near future.

Article 17. Right to property

The right to property and the restrictions to this right

Legislative initiatives, national case law and practices of national authorities

In October 2004, the Law Reform Commission (LRC) published a consultation paper on the modernisation of Irish land law and conveyancing law.¹³⁴ The project involves three stages: (1) screening pre-1922 statutes which could be repealed without replacement as they were obsolete or inappropriate; (2) a consultation process with the publication of the LRC's recommendations; and (3) the drafting of a bill to give effect to the conclusions of the second stage.

¹³² *Annual Report of the Office of the Comptroller and Auditor General 2003*, Chapter 4, pp 47-48

¹³³ Progress Report ///

¹³⁴ <http://www.lawreform.ie/Consultation%20Paper%20Modernising%20Land%20Law.pdf>

In its Consultation Paper the Commission recommends the abolition of certain feudal concepts of tenure (such as fee tail estates) and the repeal and amendment of many pre-1922 statutes.¹³⁵ The LRC also makes recommendations in the areas of future interests¹³⁶, settlements and trusts of land¹³⁷, powers of appointment¹³⁸, co-ownership¹³⁹, appurtenant rights¹⁴⁰, contracts and conveyances¹⁴¹, mortgages¹⁴², judgment mortgages¹⁴³, registration of deeds¹⁴⁴, adverse possession¹⁴⁵ and other miscellaneous matters.¹⁴⁶

The LRC also published in March 2004 a consultation paper dealing specifically with the issue of judgment mortgages.¹⁴⁷

A further LRC consultation paper deals with the rights of cohabitants and looks at a number of issues including property rights and succession.¹⁴⁸ The Commission states that it does not believe that cohabitation agreements between unmarried couples in a “marriage-like” relationship are unenforceable and that bodies such as the Family Mediation Service should publicly encourage them. The Commission also argues that the *Family Home Protection Act 1976* should be extended to bring qualified cohabitants within the scope of the protection provided by the legislation.¹⁴⁹ The consultation paper also recommends that the laws pertaining to succession rights be modified in order to provide qualified cohabitants to enjoy the same protection as those who are in a married relationship under the current legislation, the *Succession Act 1964*.¹⁵⁰

In April 2004 the All-Party Oireachtas Committee on the Constitution published a major report on private property. The Report recommended a number of changes that should be introduced to make the private property system in Ireland more effective, including a simplified, more efficient land registration system and a proposal that a developer’s options to purchase land be publicly recorded to achieve transparency in property markets.

The core recommendation of the Report was that no constitutional amendment was necessary in relation to state action on interference with development land ownership in the interests of the common good. It proposed a conceptual shift to a ‘different mind-set’ to recognise that “different legal treatment is required between property as people use it and property, or land,

¹³⁵ E.g. Forfeiture Act (Ireland) 1639, Tenures Abolition Act (Ireland) 1662, Copyhold Acts 1843-1887, Crown Private Estates and Crown Lands Acts 1800-1913, Fee Farm Rents (Ireland) Act, Statute of Westminster II 1285 (*De Donis Conditionalibus*, Fines and Recoveries (Ireland) Act 1834, Life Estates Act (Ireland) 1695, Timber Act (Ireland) 1767, section 11, Leases for Lives Act (Ireland) 1777, section 11, Tenantry Act (Ireland) 1779, Renewal of Leases (Ireland) Act 1838, Renewable Leasehold Conversion Act 1849, Renewable Leaseholds Conversion (Ireland) Act 1868.

¹³⁶ Law Reform Commission, *Consultation Paper on the Modernisation of Land law and Conveyancing Law in Ireland*, Chapter 3

¹³⁷ *Ibid.*, Chapter 4

¹³⁸ *Ibid.*, Chapter 5

¹³⁹ *Ibid.*, Chapter 6

¹⁴⁰ *Ibid.*, Chapter 7

¹⁴¹ *Ibid.*, Chapter 8

¹⁴² *Ibid.*, Chapter 9

¹⁴³ *Ibid.*, Chapter 10

¹⁴⁴ *Ibid.*, Chapter 11

¹⁴⁵ *Ibid.*, Chapter 12

¹⁴⁶ *Ibid.*, Chapter 13

¹⁴⁷ <http://www.lawreform.ie/Consultation%20Paper%20on%20Judgment%20Mortgages.pdf>

¹⁴⁸ Law Reform Commission, *Consultation Paper on the Rights and Duties of Cohabitants 2004* <http://www.lawreform.ie/Cohabitants%20CP%20%20April%202004.pdf>

¹⁴⁹ *Ibid.* para. 3.62

¹⁵⁰ *Ibid.* para. 4.28

as capital.”¹⁵¹ Dr. Padraic Kenna, a property specialist at the National University of Ireland, Galway described the report as “outstanding and modernising in many ways, particularly in the way it addressed the dynamics of the Irish housing market and the need to reconceptualise land in Ireland.”¹⁵²

Submissions were also invited by the Committee in relation to the right to shelter. Nineteen such submissions were made and these were included in the Appendix to the Report. It emerged from the submissions that the right to shelter ought only to be seen as one element of the internationally accepted right to housing.

The Residential Tenancies Act was passed in 2004 and establishes a new regime for private rented housing. It codifies and updates many of the existing landlord and tenant procedures and regulations. The Private Residential Tenancies Board (PRTB), a quasi-judicial body, will deal with all disputes between landlords and tenants including establishing market rents. Under the Act a tenancy of over six months (oral or written) automatically converts to a four-year tenancy with implications for notice periods on the part of landlords.

Reasons for concern

Landlords are required to register with the PRTB but only 20,000 out of an estimated 140,000 did so by the required date.¹⁵³

One of the provisions contained in the Residential Tenancies Act allows the PRTB to make determinations in relation to complaints of anti-social behaviour and allows landlords to give seven day’s notice to evict tenants in relation to such behaviour. For the purpose of such a process in the public or social housing sector the ordinary courts would be charged with making such a determination.¹⁵⁴ While the process before the PRTB is judicially reviewable this does not afford the same right of access to a court to tenants in the private rented sector as tenants in the public or social housing sector.

Public expropriations and compensation

Legislative initiatives, national case law and practices of national authorities

In its draft development plan Dublin Corporation has proposed that religious land suitable for building be zoned for development of affordable and social housing or community facilities thus restricting the development value of such land. Religious organisations have responded with a threat to challenge this action constitutionally in the High Court.¹⁵⁵

Article 18. Right to asylum

Asylum proceedings

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

There was no international case law or concluding observations of expert committees in respect of Ireland during the period under review. However, quarterly figures published by UNHCR during the period under review (16 November 2004) indicate that Ireland with 1,238

¹⁵¹ Kenna, ‘New mind-set needed to control land use here’, *The Irish Times*, 6 August 2004.

¹⁵² *Ibid.*

¹⁵³ *The Irish Times*, 2 December 2004.

¹⁵⁴ Housing (Miscellaneous Provisions) Act 1997.

¹⁵⁵ *The Irish Times*, November 22nd 2004

new applications for asylum in the period July-September 2004 was 15th on the list of industrialised countries surveyed, one place behind Poland while Cyprus and Slovakia had twice as many asylum applications as Ireland during the same period.

Legislative initiatives, national case law and practices of national authorities

Although not directly concerned with refugee determination issues, the Oireachtas passed the Immigration Act 2004¹⁵⁶ during the period under review.

The period under review was also the first operative year of the Immigration Act 2003 which contains provisions for the assessment of credibility of asylum applicants, establishes a new 'manifestly unfounded' regime including fast-track and super fast-track procedures and makes provision for the prioritisation of applications by reference to criteria such as safe country of origin and safe third country.

Positive aspects

The Office of Refugee Applications Commissioner now publishes monthly detailed statistics on asylum applications indicating. This enhances the transparency of the system for determining asylum applications.

Reasons for concern

In November 2004 the Master of the High Court expressed concern that the assessment of credibility of asylum applicants carried out by the Refugee Appeals Tribunal was not sufficiently fact-based. His comments were based on his initial consideration of applications for judicial review coming before the High Court and on the fact that certain cases were settled by the state.¹⁵⁷

Unaccompanied minors seeking asylum

Legislative initiatives, national case law and practices of national authorities

The 2003 Annual Report of the Office of the Refugee Applications Commissioner (ORAC) stated that in that year 841 persons claiming to be unaccompanied minors seeking to make an application for a declaration of refugee status or to be reunited with their families. Of these, 729 were referred to the health boards and the remainder were judged to be adults and admitted to the asylum process on that basis.¹⁵⁸ In the report it is stated that the "position regarding persons who present at ORAC and claim to be under 18, but appear older, continues to be a cause of concern, not least in relation to child protection issues."¹⁵⁹ An assessment is made by ORAC staff on the basis of an interview which takes into account the persons background and their intellectual and physical maturity. However, immigrant rights groups, including the Children's Rights Alliance, the Immigrant Council of Ireland and Migrant Rights Centre, consider this to be a wholly unsatisfactory means of making such a determination and feel that it can lead to arbitrary decisions which could have negative consequences for minors who have incorrectly been deemed to be adults.

Interim figures released by ORAC in October 2004 revealed that 87 applications for asylum had been received by unaccompanied minors.¹⁶⁰ The Irish Refugee Council claimed that eight

¹⁵⁶ No. 1 of 2004.

¹⁵⁷ *The Irish Times*, 20 November 2004.

¹⁵⁸ *Office of the Refugee Applications Commissioner Annual Report 2003*

¹⁵⁹ *Ibid.*, p.41

¹⁶⁰ *The Irish Times*, October 27th 2004

child asylum-seekers, including a three year old boy had gone missing from care since the start of 2004.¹⁶¹ These were in addition to five missing young asylum seekers who had gone missing in October and were the subject of a Garda search. It was believed that the children had travelled to the United Kingdom.

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

Collective expulsions

Legislative initiatives, national case law and practices of national authorities

Following a decision of the Irish Supreme Court in January 2003¹⁶² (discussed in last year's Annual Report) that opened up the possibility of deporting non-national parents of Irish-born children with an automatic entitlement to Irish citizenship the Department of Justice, Equality & Law Reform embarked on a process of deporting such parents many of whom had been presumed to be 'immune' to deportation on the basis of a dependent right of residency arising from the Irish citizenship of their children. This gave rise to a variety of humanitarian concerns largely arising the constructive deportation of Irish citizen children expressed through a coalition of NGOs (CADIC – the Coalition Against the Deportation of Irish Children) and supported by others like the Irish Human Rights Commission. There was also some concern about the compatibility of some deportations arising from the decision of the European Court of Justice in *Chen v. UK*.¹⁶³ It is worth noting, in this connection, that a referendum to change the basis upon which Irish citizenship is achieved was passed by a large majority in the summer of 2004 and the issue of the children of non-Irish national parents gaining Irish citizenship as an automatic entitlement of birth on the territory of Ireland was central to the campaign that preceded it.

At the time of writing there are a number of judicial reviews pending before the High Court challenging deportation orders issued by the Minister for Justice, Equality & Law Reform.

Section 2 of the Immigration Act 1999 provides that all of the orders made pursuant to the Aliens Act 1935,¹⁶⁴ are now deemed to have statutory effect as if they were Acts of the Oireachtas. The constitutionality of this arrangement – which had been challenged successfully before the High Court – was upheld on appeal by the Supreme Court in *Leontjava v. Director of Public Prosecutions*¹⁶⁵ in which the Court also held that s.5(1)(h) of the 1935 Act was consistent with the Constitution. The Court further held that article 5(6) of the Aliens Order 1946, dealing with the power to impose restrictions and conditions on aliens in respect of their landing in or entering the State, was *ultra vires* Section 5 of the 1935 Act.

Positive aspects

In December 2004¹⁶⁶ the Minister for Justice, Equality & Law Reform announced that the some of the families affected by the Lobe & Osayande decision facing the probability of deportation would be allowed to apply for rights of residency to be assessed on a case-by-case basis. Although it was insisted that this did not amount to a regularisation programme the announcement was broadly welcomed by the various groups that campaigned against the

¹⁶¹ *Ibid.*

¹⁶² *Lobe & Osayande v. Minister for Justice, Equality & Law Reform* [2003] IR.

¹⁶³ Case C-200/02.

¹⁶⁴ Other than Article 13 of the 1946 Order and the Aliens (Visas) Order 1999 (SI 25/1999)—see s 2 of the 1999 Act.

¹⁶⁵ *Leontjava v. D.P.P.* (23 June 2004) S.C. Unrep.

¹⁶⁶ *The Irish Times*, 15 December, 2004.

deportation of such families while at the same time raising some initial concerns to be applied in the assessment of applications for residency.¹⁶⁷

Subsidiary protection

Legislative initiatives, national case law and practices of national authorities

In *M.J.L. v. Minister for Justice, Equality and Law Reform*,¹⁶⁸ Laffoy J. held that the European Convention on Human Rights Act 2003 does not incorporate the Convention into domestic law but rather creates new domestic statutory rights expressed in the same terms as those of the Convention. In the instant case, the applicant had previously been refused leave to challenge a deportation order on the ground that the order was in breach of Articles 2 and 3 of the Convention (though she did obtain leave to challenge the order on another ground). Following the enactment of the 2003 Act, she sought leave to add the disallowed ground. Following the reasoning of the House of Lords in *In re McKerr*,¹⁶⁹ Laffoy J. refused such leave, holding that the 2003 Act had created new domestic rights that post-dated the making of the deportation order. As the Act was not retrospective, it followed that the deportation order was immune from challenge under the Act.

Despite this particular decision the scope for subsidiary protection may be enhanced by the coming into force, at the start of 2004, of the European Convention on Human Rights Act 2003. This Act incorporates the ECHR and its protocols into Irish law by means of an interpretative technique at a sub-constitutional level.¹⁷⁰

Reasons for concern

The legal basis of subsidiary protection in Ireland is the Immigration Act 1999 which provides for a system of temporary leave to remain on 12 grounds, one of which is leave to remain on humanitarian grounds. This option is discretionary and the discretion is that of the Minister for Justice, Equality & Law Reform. To that extent, it is not a justiciable right in the sense in which that concept is generally understood. The rights arising from a grant of temporary leave to remain are not set out in a transparent manner and are also discretionary in nature. While the infrequent granting of such leave is, of itself, a reason for concern so too is the lack of transparency that surrounds the granting of such leave.

¹⁶⁷ The terms of this scheme are set out on the website of the Department of Justice, Equality & Law Reform at: www.gov.ie/

¹⁶⁸ (30 April 2004) HC.

¹⁶⁹ (11 March 2004) HL.

¹⁷⁰ For a discussion of the implications of incorporation see: Egan, Chapter 4 in Kilkelly (ed.), *ECHR and Irish Law* (Jordans Publishing, 2004).

CHAPTER III : EQUALITY

Article 20. Equality before the law

Equality before the law

Legislative initiatives, national case law and practices of national authorities

The Equality Act 2004 (discussed further under Article 21) contained a broad exemption for non-nationals the scope of which has given rise to much criticism.¹⁷¹

In *O'Neill v. Governor of Castlereagh Prison*,¹⁷² the Supreme Court held that a distinction drawn between prisoners tried and convicted before the signing of the Good Friday / Belfast Agreement 1998 and those tried and convicted after that date for the purposes of determining who qualified for early release under the Agreement did not amount to a form of unjust discrimination contrary to Article 40.1 of the Irish Constitution, the provision guaranteeing equality before the law.

In *Murray v. Commission to Inquire into Child Abuse*,¹⁷³ Abbott J. rejected the contention that the Commission to Inquire into Child Abuse Act 2000 infringed Article 40.1 because of the difficulties involved in investigating complaints of child abuse against persons who were dead or incapacitated. According to the judge, such complaints could have been made against the relevant parties at any time and the difficulties in question had not been introduced by the Act.

Reasons for concern

While many of the provisions of the Equality Act 2004 are praiseworthy (and are discussed under other headings of this report) serious concern has been expressed by, among others, the Equality Authority and the non-governmental alliance, the Equality Coalition, about the broad exemption for non-Irish nationals under the legislation. It has been suggested that the exemption affords too much discretion to low-level officials and may, in its operation, be unconstitutional or contrary to the EU Race Directive.¹⁷⁴

Furthermore, while the blanket exemption of those employed in a private household from the scope of protection of the Employment Equality Act 1998 has been removed the definition of 'employee' in the new Equality Act 2004 is such as to exclude prospective employees seeking work in a private household. Thus, for the purpose of discrimination claims concerning terms and conditions of employment those working in private households are covered by the

¹⁷¹ The phrase 'non-national' now used in Section 14(1)(aa) of the Equal Status Acts 2000-2004 has the meaning given to it by the Immigration Act 1999. Section 14(1)(aa) provides:

'Nothing in this Act shall be construed as prohibiting –

(aa) on the basis of nationality –

(i) any action taken by a public authority in relation to a non-national –

(I) who, when the action was taken, was either outside the State or, for the purposes of the Immigration Act 2004, unlawfully present in it, or

(II) in accordance with any provision or condition made by or under any enactment and arising from his or her entry to or residence in the State.'

The Section goes on to define the phrase 'public authority' in very wide terms.

¹⁷² (29 January 2004) S.C. Unrep.

¹⁷³ *Murray v. Commission to Inquire into Child Abuse*, (27 January 2004) H.C. Unrep.

¹⁷⁴ As well as the broad exemption for non-nationals it should further be noted that Section 10 of the Equality Act exempts from claims for discrimination any act arising from the Employment Permits Act 2003.

legislation but not for the purpose of a discrimination complaint concerning access to employment. This will give rise to a significant inequality before the law for this category of employee (many of whom are migrant workers) in access cases.

Article 21. Non-discrimination

Protection against discrimination

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

In the period under review Ireland submitted its report to the CERD Committee of the United Nations. The Report, which was co-ordinated by the Equal Status Division of the Department of Justice, Equality & Law Reform, was published in May 2004. Hearings have not yet taken place and a comprehensive Shadow Report prepared by a large group of NGOs is nearing completion.

Legislative initiatives, national case law and practices of national authorities

The Equality Act 2004 (which implements the EU Race Directive (2000/43/EC), Framework Employment Directive (2000/78/EC) and Revised Gender Equal Treatment Directive (2002/73/EC)) introduced a number of significant improvements to the pre-existing equality code as contained in the Employment Equality Act 1998 and Equal Status Act 2000¹⁷⁵.

The scope of the Employment Equality Act was expanded to include self-employed persons, partners in partnerships and people in domestic employment. The definition in the employment legislation was also broadened to include discrimination by association and imputed discrimination. Provision for positive action to achieve full equality in practice (which, previously, applied only to gender discrimination) was extended to all of the nine prohibited grounds of discrimination: gender, marital status, family status, sexual orientation, race, religion, age, disability and membership of the Traveller Community. The definition of sexual and other forms of harassment in employment was improved and now includes same-sex harassment (discussed later under Article 31 – Fair & Just Working Conditions); the upper age limit for cases of age discrimination was removed; and the nominal costs qualification on the mandatory provision to make reasonable accommodation for persons with disabilities (through special treatment and facilities) was replaced by the ‘disproportionate burden’ criterion for the sole purpose of employment discrimination claims. The provision on victimisation was also improved.

The nine grounds of prohibited discrimination in employment were not, however, extended. A report on the possible extension of the grounds was completed by legal academics in University College Cork for the Department of Justice, Equality & Law Reform. It proposed three additional grounds of prohibited discrimination: former imprisonment, trade union membership and social origin.¹⁷⁶

In Equality Tribunal statistics released by the Office of Director of Equality Investigations for the period January-September 2004¹⁷⁷ for employment and equal status cases it was revealed

¹⁷⁵ These Acts are now to be referred to as the Employment Equality Acts 1998-2004 and the Equal Status Act 2000-2004.

¹⁷⁶ Kilcommins, McClean, McDonagh, Mullaly and Whelan, *Extending the Scope of Employment Equality Legislation: Comparative Perspectives on the Prohibited Grounds of Discrimination*, October 2004, Government Publications.

¹⁷⁷ Available at: www.odei.ie/

that the following number of cases were taken by individual complainants under the various grounds of prohibited discrimination:

Employment:

Gender	37
Traveller Community	3
Race	49
Disability	27
Age	41
Marital Status	1
Family Status	7
Sexual Orientation	4
Religion	2
Multiple grounds	69
No grounds listed	16

Total no. of individuals 256

Equal Status:

Gender	6
Traveller Community	185
Race	19
Disability	41
Age	21
Marital Status	4
Family Status	5
Sexual Orientation	5
Religion	0
Multiple Grounds	38
No grounds listed	3

Total no. of individuals 327

It is noteworthy that there was drop of 35% in the number of cases taken by members of the Traveller Community under the Equal Status Act 2000 which, no doubt, arose from the transfer of discrimination taken cases against licensed premises from the Equality Tribunal to the District Court under the Intoxicating Liquor Act 2003. The low number of cases taken on the basis of the sexual orientation and religion grounds under both the employment and equal status legislation remains a constant.

Positive aspects

Apart from the improvements contained in the Equality Act 2004 (discussed above) the Equality Authority continues to convene the Equal Opportunities Framework Committee established under social partnership agreements and 2004 was quite a productive year in which the social partners agreed on the need for enterprises to be “planned and systematic” in their approach to equality. A number of guidance policies have been developed to advance this commitment.

The Authority also worked to advance voluntary approaches to equality-proofing in policy-making with three Government Departments – Social & Family Affairs, Justice Equality & Law Reform and Enterprise Trade & Employment – in relation to the following initiatives:

the Social Inclusion Action Plan 2003, the Back to Education Expenditure Review, the Employment Action Plan and the soon to be published National Action Plan Against Racism.

Reasons for concern

A group of twenty-five NGOs, the Equality Coalition, was very critical about the inadequate nature of the consultation that preceded the passing of the Act and of the Act's inaccessibility.¹⁷⁸

In order to fully realise its ambitious mandate and make full use of its considerable powers (in areas such as the carrying out of equality reviews and action plans) the Equality Authority will require an increase in its budget. Bearing that in mind, it is somewhat disappointing that, at a time of considerable increase in the spending estimates for the Department of Justice, Equality & Law Reform, the Authority should experience a net decrease in its budget by being awarded an increase of 1%, i.e. an increase below the rate of inflation.¹⁷⁹

Despite the fact that no member of the staff of the Equality Authority applied to participate in the proposed decentralisation of the Authority to Roscrea, Co. Tipperary it remains the Government's intention to proceed with the decentralisation plan. The reasons why this might impact adversely on the work and effectiveness of the Authority were set in last year's Annual Report and remain a cause of ongoing and serious concern.

Fight against incitement to racial, ethnic, national or religious discrimination

Legislative initiatives, national case law and practices of national authorities

In its report on racist incidents from May-October 2004, the National Consultative Committee on Racism and Interculturalism (NCCRI) reported that there were 70 incidents reported to it in that six-month period 63% of which were reported as occurring in the greater Dublin area. The majority of the incidents were targeted at adults. The incidents reported related to three main areas: assaults, abuse and harassment; delivery of public and private services; and misinformation and the circulation of offensive material.¹⁸⁰

In November 2004 the Minister for Justice, Equality & Law Reform announced a marked decrease in the number of incidents with a racial motive recorded by An Garda Síochána up to 8 November 2004. In 2002 there were 102 such incidents, compared to 69 in 2003 and 42 in 2004.

Positive aspects

The National Action Plan Against Racism (pursuant to the World Conference Against Racism held at Durban in 2001) has been finalised and will be published in January 2005. A summary of the consultation process leading to the plan, *Diverse Voices*, has already been published.

Reasons for concern

The Department of Justice, Equality & Law Reform has been carrying out a review of the Prohibition on Incitement to Hatred Act, 1989 since 2000 and its conclusions are awaited with interest. The review was prompted by concerns that the 1989 Act was not especially useful in the fight against incitement to hatred arising from the very low number of prosecutions

¹⁷⁸ Equality Coalition, *Submission on the Equality Bill 2004*, (March 2004).

¹⁷⁹ This was reported in *The Irish Times*, 19 November 2004.

¹⁸⁰ 2004 Report and previous reports available at www.nccri.com/

brought under the Act. This perception may have altered as a result of some recent successful prosecutions which may explain the ongoing delay with the review.¹⁸¹

In terms of religious discrimination there are concerns that the exemption from employment discrimination claims for institutions with a religious ethos contained in Section 37 of the Employment Equality Act 1998 is not affected by the Equality Act 2004. Although this provision is defended on the basis that it protects the manifestation of religious ethos and promotes religious diversity it is also criticised for overbreadth and institutionalising the privileges of the dominant Christian faiths in areas such as health and education.

Remedies available to the victims of discrimination

Legislative initiatives, national case law and practices of national authorities

In the Equality Act 2004 the ceilings on compensation for discrimination claims taken on the non-gender grounds were not removed. The option that exists in gender discrimination claims to bring an action in the Circuit Court has not been extended to the other eight prohibited grounds of discrimination. In cases regarding discrimination in terms of access to employment a ceiling of IR£10,000 on compensation remains.

Positive aspects

Since the passing of the Equality Act 2004 there is now greater flexibility for the Director of Equality Investigations regarding the requirement of written notifications under the Equal Status Acts 2000-2004. While it is debateable whether such a requirement should actually exist it does represent a small improvement on the more strict requirements under the original Equal Status Act 2000.

Reasons for concern

As of 2003 discrimination cases under the Equal Status Act 2000 taken against licensed premises must now be taken in the ordinary District Court (which has jurisdiction in licensing matters) instead of the specialist Equality Tribunal. This change arose out of a controversy arising from discrimination cases taken by members of the Traveller Community (documented in the Annual Report for 2003). In the cases that remain to be heard by the Equality Tribunal the level of awards of compensation has been very low and, as expected, the number of discrimination claims taken by members of the Traveller Community against licensed premises has reduced considerably.

A further and, perhaps, unintended consequence of transferring cases to the District Court under the Intoxicating Liquor Act 2003 arises from certain omissions in the Appendix to that legislation which does operate so as to reduce the jurisdiction of the Equality Authority to deal with discrimination issues – through a variety of means including information provision, development of codes of practice and the execution of equality reviews and action plans – within the licensed trade.

The Equality Act 2004 did nothing to remove the ceilings for compensation in discrimination cases taken on the non-gender grounds. The Act also removes the theoretical possibility of different sets of compensation being awarded when a discrimination claim is taken on multiple grounds.

¹⁸¹ Since the review began in 2000 18 cases have been taken under the 1989 Act resulting in 7 convictions. In its First Report under CERD the Irish Government state (@ para 13, page 10): ‘The growing body of caselaw under the Act suggests that application of the legislation is adapting to the growing problems with racism in Ireland. The review is expected to be completed soon.’

Reasonable accommodation of the specific needs of certain groups, especially religious or ethnic minorities

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

On the issue of ethnicity and whether or not members of the Traveller Community constitute a distinct ethnic minority a controversy that arose between some Traveller representative groups and the Government in the preparation of the state's First National Report under CERD (and which was documented in last year's Annual Report) endures. In the published version of the state's Report it was stated (@ para.27):

"...some of the bodies representing Travellers claim that members of the Traveller community constitute a distinct ethnic group. The exact basis for this claim is unclear. The Government's view is that Travellers do not constitute a distinct ethnic group from the population as a whole in terms of race, colour, descent or national or ethnic origin. However, the Government of Ireland accepts the right of Travellers to their cultural identity, regardless of whether the Traveller community may be properly described as an ethnic group. In line with this, the Government is committed to applying all the protections afforded to ethnic minorities by CERD equally to Travellers. As outlined in Ireland's Report under the [ICCPR], Travellers in Ireland have the same civil and political rights as other citizens under the Constitution and there is no restriction on any such group to enjoy their own culture, to profess and practice their own religion or use their own language.

28. The Government is committed to challenging discrimination against Travellers and has defined membership of the Traveller community as a separate ground on which it is unlawful to discriminate under equality legislation. This was not meant to provide a lesser level of protection to Travellers compared to that afforded to members of ethnic minorities. On the contrary, the separate identification of Travellers in equality legislation guarantees that they are explicitly protected. The Government notes that the Durban Declaration and Action Plan recognised the need to develop effective policies and implementation mechanisms for the full achievement of equality for Roma/Gypsies/Sinti/Travellers and has included at Appendix 1 a report on legislative, administrative and other initiatives taken to combat discrimination against members of the Traveller community."

Legislative initiatives, national case law and practices of national authorities

In September 2004 the Labour Court found that Aderonke Rasaq had been discriminated against in her dismissal by Campbell Catering and identified a positive duty on employers to take account of the practical implications of the cultural and linguistic diversity of their workforce in the case of disciplinary procedures. Aderonke Rasaq was dismissed after being wrongfully accused of stealing bananas from the workplace. In the early stages of pregnancy she took three bananas from the kitchen which she intended to eat before leaving work. She believed she had a right to take food for consumption at work and this was not disputed by the company. The Labour Court found that the company's decision to dismiss her from her job at a hostel for refugees and asylum seekers was discriminatory on the race ground. It stated that she was not offered fair procedures in that she was not informed that her dismissal was in contemplation before the decision was taken, she was not informed of her right to be represented at the disciplinary hearing and there was no investigation in any meaningful sense of the allegation made against her. In finding that she was treated less favourably than other employees facing allegations of serious misconduct the Labour Court awarded her €15,000.

In its decision the Labour Court stated that in: "...disciplinary procedures employers have a positive duty to ensure that all workers fully understand what is alleged against them, the

gravity of the alleged misconduct and their right to mount a full defence including the right to representation. Special measures may be necessary in the case of non-national workers to ensure that this obligation is fulfilled and that the accused worker fully appreciated the gravity of the situation and is given appropriate facilities and guidance in making a defence.” The decision was viewed by the Equality Authority, which represented the applicant, as important and ground-breaking.

Reasons for concern

There are concerns that, in a number of respects, the Equality Act 2004 may be in breach of the EU Race Directive. The statutory exemption in the Equality Act 2004 effectively allows for discrimination if required by another statute. The definition of ‘service’ in the Act has not been extended to include the identified functions of the state that are named in the Directive. To that extent the Act does not adequately reflect the scope of the Directive.

In its submission on the Equality Bill, the Equality Authority proposed that the concept of ‘reasonable accommodation’ be extended to all of the nine prohibited grounds of discrimination covered by the equality legislation. This proposal was not accepted.

In its response to the Government’s Report under CERD (published in December 2004) the Irish Traveller Movement (ITM) is trenchant in its criticism of the Government’s position on Traveller ethnicity and of a broad range of legal discriminations against members of the Traveller Community.

Positive actions aiming at the professional integration of certain groups

Legislative initiatives, national case law and practices of national authorities

The provisions for positive action contained in the Equality Act 2004, which now cover all of the nine prohibited grounds of discrimination, are a considerable improvement on the pre-existing equality legislation which provided mainly for positive action on the gender ground and limited positive action on the grounds of age, disability and membership of the Traveller Community. Although this improvement was generally welcomed, the Equality Coalition highlighted the inherent limitations of such provision arising from the individualised basis upon which cases can only be taken under the Equality Act.¹⁸²

Reasons for concern

While the improvements in provision for positive action contained in the Equality Act 2004 are to be welcomed it does not provide for an equivalent obligation (in the sense of a statutory ‘positive duty’) as that contained in the law of Northern Ireland. This is not merely an academic point of unfavourable comparison given the legal obligation under the Good Friday / Belfast Agreement 1998 to provide equivalent levels of rights protection in the Republic of Ireland to those existing in Northern Ireland.

Article 22. Cultural, religious and linguistic diversity

Protection of religious minorities

Reasons for concern

In July 2004 the Irish Council for Civil Liberties (ICCL) criticised the Department of Justice, Equality & Law Reform for requiring Muslim men to swear that they do not have and do not intend to have a second wife when seeking naturalisation on the basis that this was a discriminatory requirement based on a mistaken assumption about the polygamous intentions

¹⁸² submission at p.4.

of Muslim men. In making this criticism the ICCL insisted that it was not condoning polygamy.¹⁸³

Protection of linguistic minorities

Legislative initiatives, national case law and practices of national authorities

Under the Official Languages Act 2003¹⁸⁴, the primary objective of which is to ensure better availability and a higher standard of public services through Irish, a number of Government Departments and public bodies commenced the process of developing language schemes (as provided for under Section 11 of the Act) by initiating public consultations. These schemes, which must be submitted to and approved by the Minister for Community, Rural and Gaeltacht Affairs, and are agreed on a three-year renewable basis will set out measures to be adopted to ensure that services that should be provided and are not being provided through the medium of Irish will be so provided over a period of time.

Reasons for concern

Although there appears to be broad public support for measures aimed at promoting the use of the Irish language some concern has been expressed about the cost of implementing the Official Languages Act.

Article 23. Equality between man and women

Gender discrimination in work and employment

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

In response to the *UN Questionnaire to Governments on Implementation of the Beijing Platform for Action (1995) and the Outcome of the Twenty-Third Special Session of the General Assembly (2000)*, Ireland submitted its National Report in June 2004.¹⁸⁵ In analysing the main developments in the period 1995-2004 the following issues were highlighted in the Report:

- An increase in women's labour force participation to 55% (for those aged 15-64);
- A narrowing of the gender pay gap from 18% to 15% during the period 1994-2000;
- Among significant mainstream measures to benefit women was the introduction of the Statutory Minimum Wage in 2000;
- There have been improvements in women's representation at management levels. The 2002 Census shows that the percentage of women who are employers and managers is 45.8% in the Border, Midland and Western Region and 47% in the Southern and Eastern Region. However, only 3% of CEOs in private companies and 6% of Secretary Generals of Government Departments are women;
- Women now constitute 30% of state board representatives and 36% of Government nominees to these bodies;
- A strengthening of the anti-discrimination legal framework and institutional framework of enforcement;
- The adoption of a strategy to gender mainstream most of the expenditure of €50 billion under the National Development Plan 2000-2006. A new unit which is co-

¹⁸³ *The Irish Times*, 3 July 2004.

¹⁸⁴ No. 32 of 2003.

¹⁸⁵ The full text of the report is available at the Department of Justice, Equality & Law Reform page of : www.gov.ie/

financed by EU Structural Funds, the NDP Gender Equality Unit, was established in 2000 in the Department of Justice, Equality & Law Reform to advance the implementation of this strategy;

- The introduction of a new budget line of €35 million under the National Development Plan to fund the Equality for Women Measure, a positive action initiative for women;
- Improvements in family-friendly working arrangements including legislative provisions, childcare supports and funding for the development of family-friendly working. The Irish Civil Service has introduced a comprehensive range of family-friendly working arrangements;
- Improved performance rates of girls in second-level state examinations as compared with boys and increased transfer rates for girls to third-level education. A new unit, which is co-financed by EU Structural Funds, has been established within the Department of Education & Science to support the incorporation of a gender equality perspective in the education system;
- The development of a women's health strategy in 1997;
- The publication in 2000 of a report on women's issues in agriculture and in rural communities;
- The incorporation in 1996 of a gender equality perspective in Ireland's overseas aid programme;
- Improved structures for combating violence against women;
- The adoption of gender goals for certain senior positions in the Civil Service;
- The ratification by Ireland of the Optional Protocol to CEDAW in 2000;
- The election / appointment of women to key public positions. At 31 March 2004 women held the positions of President, Tanaiste (Deputy Prime Minister), Supreme Court judge (2), Permanent Representative of Ireland to the European Communities, Irish Member of the European Court of Auditors, Irish Member of the European Court of Justice, Ombudsman, Leader of the Seanad (Senate or Upper House of Parliament), Government Chief Whip and Government Press Secretary.

Legislative initiatives, national case law and practices of national authorities

Although recognised in case law as a form of direct discrimination, the Equality Act now explicitly includes pregnancy-related discrimination as a form of gender discrimination. Improvements were also introduced in the Maternity Protection Act 2004 and equivalent improvements are under way in relation to adoptive leave.

Positive aspects

Through the National Framework Committee on Work-Life Balance, chaired by the Department of Enterprise, Trade and Employment and involving social partners such as the ICTU and IBEC as well as statutory agencies like the Equality Authority, the state has sought to address problems of retention and progression experienced by women in the workplace. A variety of strategies have been used to this end including an Annual Work-Life Balance Day (1st March), pilot projects and the making available of specialist consultants to small and medium-sized enterprises.

Reasons for concern

It is, perhaps, regrettable that in implementing the Revised Gender Equal Treatment Directive that the Equality Act 2004 did not make explicit provision for a positive *duty* regarding gender equal treatment as opposed to a permissive provision for positive action. Such an approach would be more consistent with the terms of the Directive.

Gender discrimination in the access to goods and services

Legislative initiatives, national case law and practices of national authorities

In a case taken by the Equality Authority against Portmarnock Golf Club the District Court found that the club had acted in breach of the Equal Status Act 2000 by excluding women as members and, in May 2004, suspended its drinks licence for seven days. The enforcement of the suspension was stayed pending the outcome of High Court proceedings challenging the constitutionality of the Act.¹⁸⁶

Remedies available to the victim of gender discrimination (burden of the proof, level of penalties, standing of organisations to file suits)

Legislative initiatives, national case law and practices of national authorities

The Equality Act 2004 explicitly provides for a burden-shifting approach but this improvement has been limited by the failure to make more meaningful provision for a right to information regarding comparators and general work practices for claimants claiming less favourable treatment on a prohibited ground of discrimination. This can be a particular difficulty for claimants who have not had access to a service or employment the subject-matter of her/his complaint.

Reasons for concern

Because litigation is structured on an individualised basis under equality legislation the potential for the development of public interest litigation in this vital area of concern, through the involvement of non-governmental groups like the National Women's Council acting as *amicus curiae*, is severely hampered.

Participation of women in political life

Reasons for concern

In 2004, only 13.3% of TDs in Dail Eireann (elected Members of the Irish Parliament) were women, a rate well below the EU 25 average of 22.1%. Around 59% of women in the Civil Service were clerical officers as compared with only 10% in senior positions such as Assistant Secretary of a Government Department.¹⁸⁷

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

In December 2004 the Central Statistics Office published a major report entitled *Women and Men in Ireland 2004* which compared the differences in the social and economic lives of men and women in Ireland.¹⁸⁸ Its main findings were as follows:

- The employment rate for women aged 15-64 in Ireland in 2003 was 55.3% (just above the EU 25 average of 55%). The employment rate for men in Ireland in the same year was 74.7% (considerably above the EU 25 average of 70.8%);

¹⁸⁶ *The Irish Times*, 19 May 2004.

¹⁸⁷ These figures are sourced in *Women and Men in Ireland 2004* published by the Central Statistics Office in December 2004. The full text of the report in PDF format is available at: www.cso.ie/

¹⁸⁸ *ibid.*

- Ireland already exceeds the Stockholm Council employment rate 2010 target of 50% for men in the 55-64 years age group – it was 64.7% in 2003; whereas the 2003 figure for women was 33.4%, considerably below the 50% target;
- The employment rate for women aged 20-44 years varied from 87.2% for women with no children to 52.4% for women whose youngest child was aged 3 or under;
- Men worked almost 10 hours longer per week than women in 2004;
- Female income liable for social insurance payments in 2002 was 63.3% of male income. After an adjustment for differences in hours worked, women's income was 82.5% of men's income;
- Life expectancy for men is about 5 years less than for women;
- The proportion of lone parent families with children under 20 headed by women has increased from 87% in 1994 to 91% in 2004;
- Less than 1% of persons whose principal economic status was looking after the home an family in 2004 were men;
- The early school leavers rate among men aged 18-24 in 2003 was 14.7% compared to 9.4% for women. Both of these rates were better than the comparable EU 25 average rates of 17.9% for men and 14% for women;
- Around 95% of pupils taking the higher-level Leaving Certificate Engineering, Construction Studies and Technical Drawing papers were boys. At third-level, 71% of graduates in Engineering were men while 82% of graduates in Health and Welfare were women;
- Around 86% of primary school teachers were women but women held only 51% of primary school management posts;
- The proportion of women at risk of poverty, after pensions and social transfers, was 23% in Ireland in 2001. This was the highest rate in the EU 25;
- Men were generally more likely to die at a younger age than women, with the risk almost three times higher in the 15-24 years age group. This reflects a greater tendency for young men to commit suicide and to be victims of motor vehicle accidents;
- The rate at which Irish women were undergoing a range of preventative medical examinations in 2002 was considerable lower than the rate for women in other EU member states.

Reasons for concern

A number of the issues set out (above) in the CSO Report are a reason for concern.

Article 24. The rights of the child

Possibility for the child to be heard, to act and to be represented in judicial proceedings

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The second Irish Report to the UN Committee on the Rights of the Child was due for submission in October 2004 and is now likely to be submitted in early 2005 for hearing in June 2006. Drafting of the report has been co-ordinated by the National Children's Office and already considerable disquiet has been expressed by non-governmental organisations consulted in the preparation of the draft. A comprehensive shadow report will be published by Children's Rights Alliance in 2005.

Legislative initiatives, national case law and practices of national authorities

In *F.N. v. C.O.*,¹⁸⁹ Finlay Geoghegan J. held that a child of a certain age and understanding had a personal right under Article 40.3 to have his or her wishes taken into account in guardianship or custody cases and that a child has a similar right to have decisions in such cases taken in the interests of his or her welfare – this case is discussed in greater detail under Article 7 – Respect for private and family life.

In 2004 Mr. Justice Abbott in the High Court made an order for a five month-old girl to receive heart surgery against the wishes of her parents on religious grounds. The child's parents were Jehovah's Witnesses.

In September Mr. Justice Herbert discharged a ward of court order under which the doctor's at Our Lady's Hospital for Sick Children in Dublin were able to provide the treatment necessary to save the baby's life. The child made a full recovery and all injunctions restraining travel were vacated so that the child could join her mother and the rest of her family in England.¹⁹⁰

The introduction of the Civil Registration Act 2004¹⁹¹ can, perhaps, be seen as a missed opportunity to provide for the compulsory registration of the father's name in birth certificates, as is recommended by the UN Committee on the Rights of the Child. However, the Act made provision instead which requires the registration of the mothers and father's RSI numbers, a measure that has raised concern that this might deter fathers from registering.

Further provisions of the Children's Act 2001¹⁹² have been implemented although a substantial part of the legislation is still awaiting enactment. This is due mainly to a lack of resources although this may be alleviated somewhat by the allocation of additional funding for the Probation & Welfare Service in the 2005 spending estimates (published in November 2004) for the Department of Justice, Equality & Law Reform.

Positive aspects

In March 2004 the first Ombudsman for Children took up office and to coincide with her appointment the Children's Rights Alliance published an ambitious paper on the possibilities presented by the creation of that office.

A Youth Justice Project Team was established within the Department of Justice, Equality & Law Reform to explore a range of possibilities including the establishment of a new youth justice agency. While the establishment of such is to be welcomed the fact that it is based in the Department of Justice will pose some challenges in terms of capacity to impact in education sphere, which is under jurisdiction of the Department of Education and Science.

Reasons for concern

The legislative provision for independent advocacy for children by means of a guardian ad litem¹⁹³ has never been commenced with the effect that children remain inadequately represented in public and private law court proceedings that may affect their interests. In

¹⁸⁹ *F.N. v. C.O.*, (26 March 2004) H.C. Unrep.

¹⁹⁰ *The Irish Times*, September 21 2004

¹⁹¹ No. 3 of 2004.

¹⁹² No. 24 of 2001.

¹⁹³ This provision is contained in the Children Act 1997 which amended the Guardianship of Infants Act 1964. The failure to implement this legislation is clearly in breach of Article 12 of the UN Convention on the Rights of the Child.

March 2004 a review by Capita Consulting (a UK firm of consultants) commissioned by the National Children's Office was published. *Barnardos*, a children's rights organisation that runs a guardian service, has refused to co-operate on the basis of the review.

Juvenile offenders

Positive aspects

Parts II and III of the Children Act 2001 providing for special care orders were commenced in the period under review but Special Care Units await certification by the Department of Health & Children

Reasons for concern

While the progressive implementation of the Children Act 2001 is to be welcomed significant parts of that legislation remain unimplemented. For example, Section 77 allowing the Children's Court to divert child offenders at risk to the care of a Health Board has not yet been commenced; Part V raising the age of criminal responsibility from 7 to 12 years of age has not been commenced; and the commencement of family conferencing (under Part VIII of the Act) in September 2004 is minimised in impact in the absence of adequate resources. The most important part of the Children Act – Part IX dealing with non-custodial / community sanctions – is still not implemented nor has the office of Inspector of Children's Detention Schools (under Part X) been established.

Other relevant developments

Reasons for concern

A shortage in psychiatric services resulted in 24 children under the age of sixteen being admitted to adult psychiatric care facilities in 2004.¹⁹⁴ The Department of Health and Children accepted that "treatment in an adult psychiatric unit was considered inappropriate for children."¹⁹⁵ There are only 20 in-patient beds with specialised services for children or adolescents in the country, with an estimated 2,000 children on waiting a waiting list for psychiatric assessments and treatments. The second report of the Working Group on Child and Adolescent Psychiatric Services was published in 2003 and stated that a total of 421 children aged between 16-18 years received in-patient treatment in adult psychiatric hospitals in 2001.¹⁹⁶ The Report of the Inspector of Mental Health Hospitals for 2003, which was published in 2004, states that "on one point there could be no disagreement, and that was that the virtual absence of in-patient residential places for children and adolescents was a serious national short-coming."¹⁹⁷

In November 2004 the Irish Times Newspaper reported the story of one autistic boy, aged 15 years, who had been detained in an adult psychiatric unit in Limerick's Mid-West Regional Hospital for two years.¹⁹⁸ It was reported that he was not receiving adequate treatment but instead was being given low doses of anti-psychotic drugs. In December 2004 a fifteen year old boy was found dead after he had run away from an adult psychiatric hospital. The Irish College of Psychiatrists said that the boy's death was "a situation waiting to happen."¹⁹⁹

¹⁹⁴ Irish Times, Nov 22 2004

¹⁹⁵ *Ibid.*

¹⁹⁶ Department of Health and Children, Second Report of the Working Group on Child and Adolescent Psychiatric Services, 2003, Table 3A

¹⁹⁷ Department of Health and Children, Report of the Inspector of Mental Hospitals, 2003

¹⁹⁸ *Supra*, n.53

¹⁹⁹ Irish Times, 16 Dec 2004

Article 25. The rights of the elderly

Nothing to report.

Article 26. Integration of persons with disabilities

Protection against discrimination on the grounds of health or disability

Legislative initiatives, national case law and practices of national authorities

The Education for Persons with Special Education Needs Act 2004²⁰⁰ is intended to guarantee the right of children with disabilities to an education. The Act provides for the establishment of a National Council for Special Education, the function of which is to ensure that the requirements of the legislation are adhered to in providing support services to those with special needs in accessing educational facilities. The Act sets out a range of services which must be provided, including assessments and support services as well as providing for an appeals and mediation service where it is felt that the access to education is deficient.

In its submission to the Joint Committee on Education and Science, the Children's Rights Alliance argued for a change to Section 12 of the Act, which makes many of the provisions in the legislation subject to resources and financial considerations. The submissions states that the "assessment and provision of services must be based on the individual needs of the child and not on external considerations such as the current economic climate or the numbers of special needs children seeking support in a particular year."²⁰¹ The paper in particular urged for the deletion of the phrase, "*with the consent of the Minister for Finance*" from the Act. However, this remained unaltered with the enactment of the legislation.

In the period under review the Government published the long-awaited Disability Bill 2004²⁰² which was announced as a positive action measure providing a statutory basis for mainstreaming. On the day on which the Bill was published the Government also launched a series of sectoral plans to deal with a range of disability issues covered by various Government Departments and the Comhairle (Amendment) Bill 2004²⁰³ to provide a statutory basis for advocacy services for people with disabilities.

The Disability Bill provides a statutory basis for: an independent assessment of individual needs and a related service statement; access to public buildings, services and information; sectoral plans for six key Government Departments; an obligation on public bodies to be proactive in employing with disabilities; restrictions on the use of information from genetic testing for employment and insurance purposes; a Centre for Excellence in Universal Design.

Positive aspects

In the Budget for 2005, published at the start of December, the Government announced a €900 million package to assist persons with disabilities and their carers over the next five years.

²⁰⁰ No. 30 of 2004.

²⁰¹ *Children's Rights Alliance Submission to the Joint Committee on Education and Science in Relation to the Education for Persons with Disabilities Bill 2003*, September 2003.

²⁰² No. 39 of 2004.

²⁰³ No. 38 of 2004.

Reasons for concern

Although the publication of the Disability Bill and related proposals has been welcomed by the National Disability Authority, non-governmental groups and other statutory bodies (including the Equality Authority and the Irish Human Rights Commission) some serious reservations have been expressed about its apparent shortcomings and whether or not the Bill represents ‘a rights-based approach’ to the issue of disability.

In its submission on the Disability Bill and the Comhairle (Amendment) Bill the Equality Authority made the following recommendations:

- The definition of disability contained in the Bill should be broadened to include episodic disabilities, people with mental health issues and people who will acquire enduring disabilities without early intervention;
- As the provisions in Section 5 of the Bill on resourcing of services may undermine the currently legally enforceable rights under the Equal Status Acts 2000-2004 by allowing public service providers to rely on its provisions as a defence to a claim for discrimination and claims for failure to provide reasonable accommodation, the section should be reviewed to ensure that it does not undermine enforceable rights under equality legislation and to ring-fence resources necessary for the implementation of the Disability Bill;
- In order to avoid unnecessary duplication of resources any assessment of need should be broad enough to constitute an assessment of the full spectrum of needs for the purposes of the provision of reasonable accommodation in relation to all of the services provided by a health board and in relation to education and other public bodies, alongside the assessment of their need for disability-specific services;
- The entitlement to services identified in the service statement should be strengthened and less dependent on the allocation of resources;
- As the provisions on access to buildings and services would appear to fall short of that already provided under equality legislation, the development of a requirement on public sector bodies to make reasonable accommodation for service users with disabilities subject to a disproportionate burden should be included as an effective way of addressing access issues. This could be further developed with the imposition of a duty on public sector bodies to have due regard to equality (in the broader sense) in carrying out their functions;
- The lack of enforceable rights reflects a move away from the model of enforceable rights and accessible. Low-cost remedies through the Equality Tribunal provided for in the equality legislation. The compliance models contained in the Disability Bill are bureaucratic and will require significant resources and the number and types of compliance mechanisms are disproportionate to the end result. The compliance / enforcement mechanisms should build on the existing equality infrastructure;
- The Disability Bill should state explicitly that nothing in it shall reduce the current liabilities of the public sector employers and service providers under the Employment Equality Acts 1998-2004 and the Equal Status Acts 2000-2004.

Much of the criticism levelled at the Disability Bill has centred around the issue of enforcement and the Irish Human Rights Commission, in its observations, stated: “The general exclusion of court proceedings is a central aspect of the Bill and restricts the justiciability of any of the determinations or decisions of the various administrative agents referred to in the Bill. The standard of justiciability required by international human rights law is effectiveness. If judicial remedies are excluded, the onus is on the State to demonstrate that the proposed administrative remedies are effective.”²⁰⁴

²⁰⁴ @ p.4 of IHRC submission.

Professional integration of persons with disabilities: positive actions and employment quotas*Reasons for concern*

In its submission on the Disability Bill 2004, the Equality Authority criticise the unenforceable 3% quota on public sector employers on the basis that it may be less onerous than the enforceable obligations contained in the Employment Equality Acts 1998-2004 to take appropriate measures in relation to access to employment for people with disabilities. The Authority proposes the imposition of a positive duty on the public sector to have due regard to equality in carrying out its functions including that of employer.²⁰⁵

Reasonable accommodations*Legislative initiatives, national case law and practices of national authorities*

In the Equality Act 2004 the provision for reasonable accommodation for persons with disabilities contained in the Employment Equality Act, 1998 was considerably improved. Previously, an employer was not required to make such reasonable accommodation (in the form of special treatment and facilities) if it entailed a cost other than a nominal cost to the employer. Although this qualification on the obligation to make reasonable accommodation was capable of progressive interpretation it clearly undermined the potential of the reasonable accommodation concept in the context of disability discrimination claims.

Positive aspects

In the period under review the Equality Authority intensified its work on awareness-raising in relation to reasonable accommodation in service provision for persons with disabilities with representatives of the following services: libraries, pharmacies and retail grocers.

Reasons for concern

It is regrettable that the improvements in provision for 'reasonable accommodation' have not been extended to the obligation as it applies to the provision of goods and services. While constitutional objections might be raised in defence of this criticism it would have been possible to extend the improved obligation to the provision of goods and services by the state and its agents without offending any constitutional principle.

²⁰⁵ @ p.19 of the EA submission

CHAPTER IV : SOLIDARITY

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

Workers' information on the economic and financial situation of the undertaking

Legislative initiatives, national case law and practices of national authorities

The deadline for transposition of Directive 2002/14/EC is 25 March 2005. However, the draft legislation has not yet been published in Ireland, despite assurances from the Department of Enterprise, Trade and Employment that this would be achieved in the summer of 2004. The Directive is to apply to undertakings with at least 50 employees or establishments with 20 or more employees.

Under the current legislative regime (transfer of undertakings legislation and the Trans-national Information and Consultation of Employees Act 1996) employers are required to consult with employees in the event of collective dismissals or on the transfer of undertakings. The introduction of the new legislation will require employers to consult with employee representatives in all situations involving major workplace changes. However, until the draft legislation has been published it is impossible to tell with any degree of certainty what the Government views as appropriate in terms of implementing the Directive.

Article 28. Right of collective bargaining and action

Social dialogue

Legislative initiatives, national case law and practices of national authorities

The mid-term review of the multi-annual national social partnership agreement, the current version of which is called *Sustaining Progress*, was completed in 2004. The main parties to this agreement are the Government, the Irish Business and Employers Confederation (IBEC) and the trade unions, represented by the Irish Congress of Trade Unions (ICTU). In the talks that occurred this year the social partners reiterated their commitment to the principles which had been agreed to in the negotiations which formed the basis of the Sustaining Progress Agreement of 2003.²⁰⁶

In the private sector the partners agreed to pay increases covering the forthcoming eighteen months as follows:

- In Phase One, by 1.5% for six months, as it applies in each particular employment or industry – except for those employees on an hourly basic rate of EUR9 per hour or less on commencement of the first Phase, where a 2% increase will apply.
- In Phase Two, by 1.5% for six months, as it applies in each particular employment or industry.
- In Phase Three, by 2.5% for six months, as it applies in each particular employment or industry.²⁰⁷

In the public sector the pay increases agreed to were as follows:

²⁰⁶ Mid-Term Review of Part Two of Sustaining Progress-Pay and the Workplace 2004, para. 2.1

²⁰⁷ *Ibid.*, para. 2.4

- 1.5% from 1 June, 2005, except for those earning up to and including €351 per week (€18,315 per annum) where a 2% increase will apply;
- 1.5% from 1 December, 2005; and
- 2.5% from 1 June, 2006.

Intervention of the judiciary into collective actions

Legislative initiatives, national case law and practices of national authorities

In March 2004 *Ryanair* began an action in the High Court seeking to enjoin members of the trade union SIPTU from striking at Dublin Airport. The company was initially refused an interim injunction but was permitted to seek further relief. However, by the time the proceedings came before the court the Taoiseach (Prime Minister), Mr. Ahern, had intervened to reach a settlement between the company and the union.²⁰⁸ *Ryanair* had previously issued a statement saying that it was concerned that it as a private party had to take this action in order to keep the airport open.²⁰⁹ The union maintained that *Ryanair* had no cause of action.²¹⁰

In May 2004 *An Post*, the Irish postal services company, secured an interlocutory injunction restraining 43 postmasters/postmistresses from closing post offices. The dispute arose out of a dispute between *An Post* and the Irish Postmasters' Union (IPU) over the opening of certain post offices on the Saturday of bank holiday weekends.²¹¹ In July 2004 the IPU agreed to abide by a High Court order restraining it from supporting any action by its members that would result in the closure of post offices on Saturdays of bank holiday weekends.²¹² *An Post* issued a statement that said the IPU had agreed to the court making a perpetual injunction against it.²¹³

The right of collective action (right to strike) and the continuity of public services

Legislative initiatives, national case law and practices of national authorities

In May 2004 doctors who work in Irish prisons began a strike over pay and conditions that continued until August 2004. During the time that the strike continued army doctors provided some cover in prisons, but quite a number of cases were sent to the accident and emergency units of public hospitals.²¹⁴

Article 29. Right of access to placement services

Access to placement services

Legislative initiatives, national case law and practices of national authorities

In May 2004 the Department of Enterprise, Trade and Employment published a discussion paper entitled *Review of the Employment Agency Act 1971*. In the review the idea of introducing a code of practice by which the employment agency sector would be regulated as to standards and practice was suggested. The review states that this code could be either voluntary or non-voluntary although a voluntary code “would bring no added value to the process and would not be beneficial to employment agencies, agency workers, or user-

²⁰⁸ *The Irish Times*, March 26th 2004

²⁰⁹ *The Irish Times*, March 17th 2004

²¹⁰ *Ibid.*

²¹¹ *The Irish Times*, June 17th 2004

²¹² *The Irish Times*, July 23rd 2004

²¹³ *Ibid.*

²¹⁴ *The Irish Times*, 12 July 2004.

enterprises/companies that regularly recruit such workers.”²¹⁵ The review, instead, seems to favour the introduction of a binding code that would have the force of law and be enforceable by the Minister for Enterprise, Trade & Employment.

The review recommends that the code of practice should cover standards in the sector including those relating to educational qualifications of persons running employment agencies and the rights of agency workers under various employment rights legislation. These rights, it suggests should be clearly laid out for the “avoidance of doubt”.²¹⁶ It is also proposed that any future code could address the following –

- An employment agency shall not charge any fee solely for agreeing to seek employment for another person or for placing another person in employment or solely for agreeing to seek persons who will give or accept employment.
- An employment agency shall not solicit, persuade, or induce an employee to leave any employment in which the agency has placed the employee; nor shall any agency persuade or induce or solicit any employer to discharge any employee.
- An employment agency shall not circulate a job seeker’s Curriculum Vitae, or Personal Sensitive Data without his/her consent as required under the Data Protection Acts 1988 to 2003. A similar provision exists in the U.K Regulations.
- Employment agencies located outside Ireland, which seek to place either job-seekers in employment in Ireland, or Irish jobseekers in employment outside Ireland, shall be obliged to be licensed in Ireland. Irish employment agencies which deal with such agencies will be required to notify the Department of Enterprise, Trade and Employment of any dealings they have with such foreign agencies.
- Where an Irish Agency is dealing with Work Permits as a “middleman” between the Irish employer and the foreign worker sourced through a foreign agency, the Irish agency shall be compelled to produce evidence that the foreign agency is registered under the legislation of the foreign country concerned.
- Where a jobseeker is referred to the same employer by two agencies, the fee shall be paid to the agency who first contacted the jobseeker concerning the position for that applicant; provided that the agency has given the name of the employer to the applicant and has, within 5 working days, arranged an interview with the employer and the applicant was hired as a result of that interview. (A provision on these lines exists in Washington State Legislation.)
- An employment agency in its dealings with job seekers shall abide by the terms of all Employee Protection, Equality and Data Protection legislation in force in Ireland.
- An employment agency shall, if the work does not start or, upon it ending, either arrange free travel for the jobseeker’s return journey overseas or pay his/her return fare, or obtain an undertaking from the hirer that he/she will arrange free travel or pay the return fare.
- An employment agency shall give notice to the jobseeker setting out the details of the free travel or payment of fares including any conditions on which the same are offered.
- An employment agency may not supply workers to an employer as direct replacements for employees who are in industrial dispute with the employer, to do the work normally

²¹⁵ <http://www.entemp.ie/publications/employment/2004/agencyactdiscussionpaper.pdf>

²¹⁶ *Ibid.*, Section 5

performed by those employees. (A provision along these lines for official disputes exists in UK legislation.)

- An employment agency may not introduce or supply a jobseeker to an employer without having first obtained and verified copies of any relevant qualifications or authorisations of the jobseeker. (A similar provision exists in the U.K Regulations).
- In the event of an employee proving unsatisfactory after a probationary period the employment agency shall be liable for the cost of repatriation.²¹⁷

The review also suggests that the code of practice could also include a list of non-statutory rights that should also be enjoyed by agency workers. These include –

- No employment agency shall circulate C.V.'s of jobseekers to employers without first obtaining the consent of the jobseekers.
- Employment Agencies shall not seek references from current or past employers without the consent of the job seeker.
- Job seeker should have the right to know the identity of a prospective employer before his/her identity is disclosed to the employer.
- Employment Agencies shall not disclose results of any drug or medical testing on employees to third parties.
- Migrant workers should be informed in their own language of their terms and conditions of employment. The terms of employment should be issued in migrant's native language and a copy given to the migrant worker.
- An employment agency shall ensure that - (a) all terms in respect of which the agency has obtained a jobseeker's agreement are recorded in a single document; and (b) a copy of any such document is given by an agency to the jobseeker with whom they are agreed, before an agency provides any services to the jobseeker to which the terms contained in such a document relate.
- An agency may not vary any terms set out in a document issued, unless the jobseeker to whom they relate agrees to the variation.
- If an agency and the jobseeker agree to any variation in the terms set out in the document referred to above, an agency shall as soon as possible, and in any event no later than the end of the fifth business day following the day on which an agency and the jobseeker agree to the variation, give to the jobseeker a single document containing details of the terms as agreed to be varied and stating the date on, or after which, it is agreed that the varied terms are to apply.
- An employment agency may not make the continued provision of any services by it to a jobseeker conditional on the agreement by the jobseeker to any such variation. This requirement shall not apply in the case of an agency where the only service provided to the jobseeker concerned is the provision of information to him/her in the form of a publication.²¹⁸

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

Reasons for concern

In 2004 the Migrants Rights Centre Ireland published a report on the experience of migrant women employed in private homes in Ireland.²¹⁹ The report says of recruitment agencies that, although they can play a positive role, some in fact have a negative impact on the rights of workers and can treat non-national workers very harshly in some circumstances.²²⁰

Age Action Ireland (a non-governmental organisation working for the rights of older people) complain that older people face discrimination in a number of areas in gaining access to employment and services. FAS schemes are not open to those over 65.

Article 30. Protection in the event of unjustified dismissalReasons for dismissals*Legislative initiatives, national case law and practices of national authorities*

The Industrial Relations (Amendment) Act 2004 changes the Industrial Relations (Amendment) Act 2001. The legislation gives new powers to the Labour Court and provides a definition of victimisation. A number of Labour Court decisions have been given since this Act was passed.

Section 4 of the 2004 Act replaces section 10 of the 2001 Act to allow for a trade union or an excepted body to apply to the Circuit Court for the enforcement of a decision of the Labour Court. Section 8 provides a definition of victimisation and prohibits victimisation based on an employee's membership or actions on behalf of a trade union.

The European Industrial Relations Observatory (EIRO) believes that 'right to bargain' procedures are enhanced under the current legislation, which has led to criticism from employers. There is little doubt that the court has adopted a more expansive interpretation of the legislation covering disputes than previously.²²¹ As of the 22 September, the Labour Court had issued 8 recommendations under this legislation.

The Civil Service (Regulation) Amendment Bill 2004 allows for changes in previous legislation, including the Public Services Management Act 1997 and the Civil Service Regulation Act 1956, in order to make it easier for the "appropriate authority", whether that be the Secretary General of the Department or the Minister, to dismiss civil servants from their posts. The Bill in particular will introduce the following provisions:

- civil servants (as office holders), other than those dismissed by Government, will be brought within the scope of the Unfair Dismissals Acts;
- civil servants (as office holders), will be brought within the scope of the Minimum Notice and Terms of Employment Acts;
- disciplinary action may be taken in cases of underperformance;
- the range of possible disciplinary sanctions will be broadened to include suspension without pay, and it will provide that hardship payments made to civil servants on suspension without pay may be varied or halted.²²²

²¹⁹ Migrant Rights Centre Ireland, *Private Homes, A Public Concern, The Experience of Twenty Migrant Women Employed in the Private Home in Ireland*, December 2004

²²⁰ *Ibid.* p. 20

²²¹ <http://www.eiro.eurofound.eu.int/2004/09/feature/ie0409204f.html>

²²² Civil Service (Regulation) Amendment Bill 2004, see generally www.oireachtas.ie

In a High Court decision of March 2004 it was decided that a statutory claim for unfair dismissal and a common law claim for wrongful dismissal are mutually exclusive.²²³ KAO Information Systems had employed the plaintiff in 1995 and, following a transfer of the undertaking to the defendant company in 1999, his employment continued with the defendant company. In November 2003 the defendant decided to merge the plaintiff's role with that of Contact Centre Manager. The plaintiff applied for the position but was unsuccessful and following this was given two months notice of termination of his contract of employment together with statutory redundancy. The plaintiff informed the company that the "purported redundancy is not accepted ... (I) continue to reserve my position pending the outcome of further negotiations." The plaintiff sought an injunction preventing the termination of his employment.

The plaintiff argued that there was an implied term in his contract of employment that the employer must act reasonably and fairly. The defendant argued that the issue of unfair dismissal is governed by the Unfair Dismissals Acts and as such could not be invoked in a common law action for damages. Carroll J. stated the plaintiff was seeking to introduce a new obligation under the common law for an employer to act reasonably and fairly in cases of dismissal. But under common law an employer is merely required to give adequate notice to an employee and does not need to provide any reason for the dismissal whatsoever. In this instance the employee had been provided with adequate notice in line with the requirements of his contract of employment. The plaintiff's application was refused.

In August 2004 the Labour Court awarded a Nigerian woman €15,000 for a wrongful dismissal for allegedly stealing bananas from her workplace, Campbell Catering.²²⁴ The Court found that she had not been given access to fair procedures and that employers must ensure that all workers must be fully informed of their rights in dismissal cases, which include the right to be informed of the reasons for the dismissal and also the right to a fair hearing and defence. The Equality authority hailed this decision as groundbreaking²²⁵ as it acknowledges that cultural and linguistic diversity had practical implications for employers. (This is discussed further in Chapter III – Equality).

Compensation due in the event of an unjustified dismissal

Legislative initiatives, national case law and practices of national authorities

The most recent Employment Appeals Tribunal statistics are for the year 2002.

A worker at Castletownbere harbour in Co. Cork was awarded €20,000 by the Employment Appeals Tribunal for his dismissal by the Department of Communications, Marine and Natural Resources.²²⁶ The Tribunal awarded the appellant compensation as the Department had failed to abide by its own procedures in dismissing the man in not allowing him adequate opportunity to appeal the initial decision by which he was dismissed. The Department's appeal procedure in this instance consisted only of a paper review of procedures in the initial hearing, which was described by the tribunal as "inadequate as an appeals process."

In one of the largest awards given by the Employment Appeals Tribunal, a Dublin-based executive with a multi-national electronics based company was awarded

²²³ *Robert Orr v. Zomax Ltd.* [2004] IEHC 47 (25 March 2004)

²²⁴ *The Irish Times*, August 17th 2004

²²⁵ *The Irish Times*, September 6 2004

²²⁶ *The Irish Times*, December 2nd 2004

€215,000 for unfair dismissal.²²⁷ The man had been in charge of global accounts and had little or no connection to the Irish section of the business, yet was made redundant when the Dublin operation was closed. The award consisted of €175,000 for unfair dismissal and €40,000 for outstanding wages.

The Employment Appeals Tribunal dismissed a claim for costs by Gaelscoil Thulach na nOg in Co. Meath.²²⁸ This arose out of the dismissal of the principal of the school on the grounds that he refused to conduct religious education during normal school hours. Mr. Tomas O Dulaing refused to teach the subject on the grounds that it would lead to segregation of the class as children of a non-catholic faith would have to leave the classroom or else could not be included in the instruction. However, before the Tribunal decided upon the matter his claim for unfair dismissal was withdrawn. In a unanimous decision by the Tribunal the schools claim for costs was rejected.²²⁹

Remedies against the decision of dismissal

Reasons for concern

It remains an ongoing concern that the re-employment remedies (of reinstatement and reengagement) provided for under the Unfair Dismissals Acts are availed of too infrequently in preference for the remedy of compensation.

Article 31. Fair and just working conditions

Health and safety at work

Legislative initiatives, national case law and practices of national authorities

The Safety Health and Welfare at Work Bill 2004 is due to be enacted in 2005. The Bill proposes a number of changes to the law in this area, but particularly relating to risk assessments of hazards in the workplace. Under sections 18 and 19 an employer is required to appoint one or more competent persons who will advise the employer on measures which should be implemented to comply with health and safety rules and also to identify hazards at the place of work. The Bill also provides for the extension of the measures contained in the legislation on health and safety to be extended to the defence forces (except when on active duty) and to self-employed people as if they were employers and they were their own employees.

In October 2004 Smurfit News Press Ltd. was fined €1 million in a Circuit Court case for breaches of the health and safety regulations.²³⁰ Judge Raymond Groarke at Trim Circuit Court described the company's actions as showing "gross disregard for the principles of safety." The action arose out of a workplace accident in April 2002 in which an employee sustained serious injuries from the machinery with which he was working leading to the amputation of his leg from below the knee. In May 2002 another employee sustained a workplace injury in an almost identical fashion after which he had to have skin grafts. At the hearing a health and safety officer for the Health and Safety Authority (HSA) said that although the company had a safety statement it had failed to identify this particular risk. In his judgment Groarke J. said that the company should have moved to resolve the situation after the first incident but instead had displayed a "cavalier regard" in failing to do so. This is the

²²⁷ *The Irish Times*, December 2nd 2004

²²⁸ *The Irish Times*, January 10th 2004

²²⁹ *The Irish Times*, January 10th 2004

²³⁰ *The Irish Times*, October 30th 2004

highest fine to be issued by the Irish courts for a breach of the health and safety laws, the previous largest fine (for €300,000) having been issued by the same judge in November 2001.

Positive aspects

In March 2004 Ireland became the first country in the world to introduce a ban on smoking in enclosed workplaces. The ban was to come into effect on January 1st 2004, but was postponed due to the need to introduce exemptions for certain places of work such as prisons. There was considerable opposition to this measure from publicans and others in the hotel and catering industry. Figures produced by the Department of Finance in November 2004 show that the sale of tobacco products is significantly down on previous years with tax receipts for this sector showing a reduction of 17.6 percent below the same period last year.

Reasons for concern

The Irish Council for Civil Liberties (ICCL) have raised particular concerns about an aspect of the Safety, Health and Welfare at Work Bill 2004 – Section 13(c) which permits drug and alcohol testing in the workplace – the basis that it pays insufficient regard to the right to privacy under Article 8 ECHR.²³¹

Sexual and moral harassment at work

Legislative initiatives, national case law and practices of national authorities

Under new equality legislation introduced in 2004 (discussed extensively in Chapter III – Equality) the definition of sexual harassment has been improved. Sexual harassment (as well as harassment on non-gender grounds) is defined in the new Act as unwanted verbal, non-verbal or physical conduct of a sexual nature, which leads to a violation of the person's dignity and creates an intimidating, hostile, degrading, humiliating, or offensive environment for that person.²³² Under the Act harassment is prohibited by an employer, colleague, client, customer or other business contact of the employer. The definition of harassment under the Employment Equality Act 1998 required that the conduct be unwelcome to the victim and that it could be reasonably regarded as being unwelcome, offensive etc. Thus, the old definition mixed subjective and objective factors in any assessment of behaviour alleged to constitute harassment. The new provision is based more on a subjective perspective of the complainant.

In December 2004 the Equality Tribunal awarded damages of €21,000 to a woman who was employed as a cleaner at a shopping centre. The woman had suffered sexually offensive remarks from a security guard who also worked at the centre. The security guard had also made inappropriate physical contact with the victim on one occasion. A company supervisor who had witnessed the abuse dismissed the guard's actions as a joke and the woman's employers said they would terminate her contract of employment if she did not withdraw her complaint to the Gardai. The tribunal's award amounts to the equivalent of 104 week's salary and is the largest amount the Tribunal could give under the present law for sexual harassment.

Working time

Legislative initiatives, national case law and practices of national authorities

To date, implementation of the EU Working Time Directive has proved difficult due to opposition from various professional bodies. As it stands Ireland is currently in breach of this

²³¹ For the full text of the ICCL submission on the Bill see: www.iccl.ie/

²³² Equality Act 2004

EC legislation for non-implementation and there has still has not been any change in the working hours required of junior doctors.

Reasons for concern

The reason that working time legislation exists and ought to be applied to junior doctors is to ensure that the needs of patients are adequately addressed and that conditions in hospitals are as safe as possible. As well as this there is a health risk for junior doctors by working long hours under considerable emotional and physical stress. A failure to address these dual imperatives based on a shortage of medical personnel fundamentally fails to address the very issue sought to be alleviated by working time legislation.

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

Protection of minors at work

Legislative initiatives, national case law and practices of national authorities

Under the Protection of Young Persons (Employment) Act 1997 employers may not employ those under the age of 16 in a full time job. 14-15 year olds may be employed during school holidays on a part-time basis to perform light duties as part of a work-experience or educational programme. In the guide to the Employment of Young Persons on the Department of Enterprise, Trade and Employment website (www.gov.ie/) there is information on offences and penalties under the Act, complaints and inspection procedures, details of the processes before a Rights Commissioner or the Employment Appeals Tribunal. In July 2001 the Department published a Code of Practice for the Employment of young persons and two statutory instruments were subsequently passed in this area.

In February 2004 a case involving the dismissal of a minor came before the Employment Appeals Tribunal.²³³ The appellant had worked for the respondent company since she was 14 years old, which was below the minimum working age. She had ceased employment with the company in March 2003 and at the time of the hearing she was 17 years old. The applicant claimed she had been unfairly dismissed from her employment. The Tribunal found that although there was some conflict of evidence in the case the appellant's evidence was acceptable. It found that the employer did not adhere to fair and proper procedures in the dismissal of the appellant. The dismissal was therefore unfair and the appellant was awarded compensation.

Article 33. Family and professional life

Parental leaves

Legislative initiatives, national case law and practices of national authorities

The Maternity Protection (Amendment) Act 2004 amends the provisions of the Maternity Protection Act 1994 to provide further maternity protection of employees. The main provisions of the Act include:

- provision, subject to the employer's agreement, for the termination of (unpaid) additional maternity leave in the event of sickness;
- provision, subject to the employer's agreement, for the postponement

²³³ UD845/2003, *Katrina Dalton v. CCAS Accommodation Services* 2004

of maternity leave/additional maternity leave in the event of the hospitalisation of the child;

— provision for expectant mothers to attend one set of ante-natal classes without loss of pay;

— provision of a once-off right to fathers to paid time off to attend the last 2 ante-natal classes;

— provision for breastfeeding mothers who have given birth within the previous 4 months with an entitlement, without loss of pay, to either breastfeeding breaks, where breastfeeding facilities are provided by the employer or a reduction of working hours and;

— provision that an employee's absence from work on additional maternity leave will count for all employment rights associated with the employment (except remuneration and superannuation benefits), such as seniority and annual leave. It also provides for some technical amendments to the Maternity Protection Act 1994 (the Principal Act) to clarify that certain provisions apply to both female and male employees.²³⁴

The Government also published an Adoptive Leave Bill in 2004, which will provide some of the same benefits as are available to those covered under the Maternity Protection Acts. The proposed Bill will amend the provisions of the Adoptive Leave Act 1995 and will have the following effects:

- Provision for a further increase in the duration of adoptive leave by 2 weeks, bringing the period of leave attracting payment/benefit to 16 weeks.

- Provision of time off from work, without loss of pay, for employees to attend pre-adoption classes and meetings which they are obliged to attend.

- Provision for termination of additional adoptive leave in the event of the employee's illness (which would allow transfer onto paid sick leave from unpaid additional adoptive leave).

- Provision for an employee to split the period of adoptive leave and additional adoptive leave in the event of the hospitalisation of the child.

- Provision that an employee's absence from work on additional adoptive leave will count for any employment rights associated with the employment (except remuneration, superannuation benefits) such as annual leave and seniority.²³⁵

Some criticism has been made of the provisions of the Bill however, in that it does not address the issue of extending the same rights that are given to the adoptive mother to fathers of adopted children. Where a biological mother has different rights to a biological father under the maternity protection legislation, there can be no justification for discrimination under the adoptive leave legislation where neither party is actually physically affected by the (carrying) or birth of the child.

A Report on the family that was compiled after public consultation, which occurred in the form of a number of public meetings around the country, was published in February 2004.²³⁶ The report looks at the role of the family in modern Ireland and addresses a number of issues, including reconciling the family-professional life balance. A number of recommendations in

²³⁴ Maternity Protection Amendment Act 2004

²³⁵ Adoptive Leave Bill 2004, Explanatory Memorandum

²³⁶ Department of Social and Family Affairs, *Families and Family Life in Ireland – Challenges for the Future, Report of Public Consultation Fora*, February 2004

this connection are made in the Report. These include recognition by the State of the change in Irish life that often requires two parents, or one, in the case of a single parent family to be in employment. The report suggests that better provision should be made for child and elder care, both by the State and also by private enterprise.

The consultation process made clear that there was a general consensus that a scarcity of adequate childcare and crèche facilities exists in Ireland. Another point made was that there is little or no regulation of standards of childcare provision.

Throughout the consultation period a major criticism advanced related to the lack of family-friendly work practices and policies by employers. Provisions such as part-time work and flexi-time and workplace crèches are only available on a limited basis. Some believed that employers should take the practices introduced by the civil service in this area on board in private enterprise.

Positive aspects

Under *Sustaining Progress* a commitment on the work-life balance is included. Under the Agreement a National Framework Committee for Family-Friendly Policies was established with representatives of the social partners. Its aim is to support and facilitate the development of family-friendly policies through the development of practical measures.

Under the Sustaining Progress Interim Review the Government had made a commitment to restore maternity benefit to 80 per cent of earnings from its current level of 70 per cent of earnings. This was achieved in the budget in December this year.

Protection against dismissal on grounds related to the exercise of family responsibilities

Legislative initiatives, national case law and practices of national authorities

Family status is a prohibited ground of discrimination under the Employment Equality Acts 1998-2004 and any dismissal on this basis is considered to be a discriminatory dismissal. For the purpose of the Unfair Dismissals Acts any pregnancy-related dismissal is considered 'automatically unfair'.

The incidence of discrimination claims brought on the family status ground is very low by comparison to other prohibited grounds of discrimination (see ODEI statistics in Article 21, Chapter III – Equality).

Family life and professional promotion

Legislative initiatives, national case law and practices of national authorities

Since the passing of the Equality Act 2004 provision for positive action to combat discrimination has been extended to all of the nine prohibited grounds of discrimination including family status thus providing a stronger statutory basis for proactive innovation in the area of family-friendly work practices.

Employers' initiatives to facilitate the conciliation of family and professional life

Positive aspects

1 March 2004 was inaugurated as the first national *Work-Life Balance Day*. This initiative had the support of employers' organisations and trade unions and was launched in the Equality Authority.

Article 34. Social security and social assistance

Social assistance and fight against social exclusion (in general)

Legislative initiatives, national case law and practices of national authorities

The Social Welfare (Miscellaneous Provisions) Act 2004 was introduced to allow for measures announced in the budget of 2003 to be implemented. However, the Act also contained a provision that discriminated against gay people and represented a reversal of a right that had been acknowledged by the state in a settlement of a previous claim that had been taken under the Equal Status Act 2000.

In this case one member of an older same-sex couple had been given a free travel pass but had been refused one for his partner. The Department of Social and Family Affairs had settled the case accepting that this had been discriminatory (on the ground of sexual orientation under the Equal Status Act 2000) as usually when a member of a married or cohabiting couple becomes eligible for a pass the other is also eligible. The contentious measure is contained in Section 19 of the Act, which restricts the definition of 'spouse' or 'couple' to a married couple and to an opposite-sex cohabiting couple for state welfare schemes thus reversing the basis on which the Department settled the earlier case.

Positive aspects

In the Budget for 2005 published in December 2004 significant increases in social welfare spending were announced. Improvements were also made in respect of the minimum wage.

Reasons for concern

In its submission on the Social Welfare (Miscellaneous Provisions) Bill 2004 a large alliance of NGOs, the Equality Coalition,²³⁷ state that Section 19 is : "...a regressive move which goes against law and practice in other European jurisdictions, [and] is contrary to the European Convention on Human Rights and current opinion in the European Parliament."²³⁸ Given the more progressive approach evident in relation to the legal recognition of same-sex couples towards the end of 2004 (discussed under Article 7) it is especially difficult to understand the principle underpinning Section 19 especially at a time in which spending on social welfare is increasing significantly.

Social assistance for undocumented foreigners and asylum seekers

Reasons for concern

About 1,000 asylum seekers from the new accession states of the European Union were left in a difficult situation when their countries became member states as they were no longer entitled to benefits or accommodation. The Government informed these people that they would no longer be entitled to reside in accommodation provided for asylum seekers. However, as they had only been entitled to €19.00 per week whilst waiting for their asylum application to be processed and they were not allowed to engage in any economic activity

²³⁷ The Equality Coalition includes Amnesty International (Irish Section), Age and Opportunity, Ireland, Cherish, Community Workers Co-operative, European Anti-Poverty Network, Gay and Lesbian Equality Network, Free Legal Advice Centre, Forum for People with Disabilities, Integrating Ireland (Comhlámh), Irish Council for Civil Liberties, Immigration Council of Ireland, Irish National Organisation for the Unemployed, Irish Refugee Council, Irish Traveller Movement, National Lesbian and Gay Federation, National Women's Council of Ireland, NEXUS, One Parent Exchange Network, Outhouse, Pavee Point

²³⁸ Equality Coalition, *Submission on the Social Welfare (Miscellaneous) Bill 2004*, March 2004

during this time, it is unclear as to how the Government expected citizens of the new member states to obtain alternative accommodation after May 1st 2004.

Social security in favour of persons moving within the Union

Legislative initiatives, national case law and practices of national authorities

Before the accession of the ten new EU Member States in May 2004 social welfare laws were amended to require claimants of social assistance, child benefit and a number of other benefits to be habitually resident in Ireland or the UK for a period of not less than two years before an application for such assistance could be made.

Some exceptions may be made to the two-year rule, however, and other factors will be considered in determining whether a person satisfies the habitual-residency test. These include the claimant's length and continuity of residence, employment prospects, reasons for coming to Ireland, future intentions and "centre of interest" which covers family and home connections to the State.

Measures promoting the right to housing

Reasons for concern

Concerns were raised in the Annual Report of the Office of the Ombudsman for 2003 about a lack of transparency in access to local authority housing. In the report the Ombudsman drew attention to her predecessor's report of 1999 wherein he described a situation in which a woman had complained about the refusal of Kildare County Council to provide her with details of her position on the housing list. In the 2003 Annual Report the Ombudsman stated that she was "disappointed, therefore, to receive a similar complaint against Kildare County Council in 2002."²³⁹

The Department of the Environment has piloted a model scheme, by which people on waiting lists are awarded points depending on their particular circumstances, which improves transparency and allows for an applicant to see his position on the list. The Department has sent a general circular to each of the local authorities in the state. However the circular does not have legal effect and it appears that some local authorities have not implemented its provisions. This gives rise to too much discretion on the part of local authorities and significant complaints to the Office of the Ombudsman.

Article 35. Health care

Access to health care

Legislative initiatives, national case law and practices of national authorities

The Health (Amendment) (No.2) Bill²⁴⁰ was passed by the Dáil under expedited procedures in December 2004. The legislation provides for elderly people to be charged up to 80% of their old-age pension for long-term care in public nursing homes, leaving them with in some cases a minimum of €5.00 per day. This legislation followed upon a newspaper revelation that elderly people with medical cards, who were entitled to free health care were being charged for medical services in publicly funded nursing homes. The Minister for Health and Children announced in December that twenty thousand pensioners who had been illegally charged

²³⁹ Office of the Ombudsman, *Annual Report 2003*. For the full text of the report see: www.ombudsman.ie/

²⁴⁰ No. 57 of 2004.

would receive a once-off payment of up to €2000. The Minister said that the state does not have an obligation to repay the full sum of money taken from residents of long-stay homes as contributions towards their expenses.²⁴¹ Since then, the President following a consultation with the Council of State decided to refer the Bill to the Supreme Court under Article 26 of the Constitution to test its constitutionality. A decision is likely to be given by the Court in early-2005.

The Health and Social Care Professionals Bill 2004²⁴² aims to establish a Health and Social Care Professionals Council to regulate these occupations and also sets out a number of practice areas to come within the terms of the legislation, with powers for the Minister for Health & Science to include others by ministerial order in the future. Part III of the Bill requires the establishment of a number of registration boards which will be entrusted with regulating the professions for which they have competence. The Bill provides that the following professions will be subject to the legislation: chiropodists, clinical biochemists, dieticians, medical scientists, occupational therapists, orthoptists, physiotherapists, psychologists, radiographers, social care workers, social workers, and speech and language therapists.²⁴³ The object of the Council in carrying out its functions will be to protect the public by promoting high standards of professional conduct and professional education, training and competence among registrants of the designated professions.²⁴⁴ The legislation includes a complaints and disciplinary procedure by which the Council may adjudicate on actions taken with regard to any of the professions covered by the legislation.

The new Minister for Health and Children, Mary Harney, T.D. made a commitment to provide a further 250,000 medical cards to those who previously were just over the threshold for access to a medical card.²⁴⁵ However, the new cards will not provide the same level of access to health care as under the previous scheme and will allow for free access to a General Practitioner only. The Minister also proposed an improvement to the health service in terms of personnel and infrastructure in the area of good practices. The Minister for Finance approved much of the funding required for these improvements in the 2005 Budget. Government spending on the health service in Ireland now accounts for one-third of state expenditure.

In the period under review the process of implementing the controversial Hanly Report of 2003 continued. The report is controversial in that it suggests closing down a number of hospitals or facilities in hospitals and allows for greater centralisation of services in with a concentration of staff in those areas.

Positive aspects

In the 2005 Budget published in December the government announced a €900 million package aimed at the care of those with disabilities, which is to provide thousands of residential, day and respite places for disabled people over the next five years. The measures are also aimed at enhancing education services for disabled people, improving access to public buildings and providing community based mental health facilities.

²⁴¹ <http://www.rte.ie/news/2004/1215/health>

²⁴² No. 43 of 2004.

²⁴³ Health and Social Care Professionals Bill, 2004, section 4

²⁴⁴ *Ibid.*, section 8

²⁴⁵ *The Irish Times*, October 15th 2004

Reasons for concern

Crumlin Hospital which caters for sick children has asked the Eastern Regional Health Authority to investigate the possibility of sending children in need of acute psychiatric care overseas to secure medical attention because of the lack of treatment facilities here.

Drugs (regulation, decriminalisation, substitutive treatments)*Legislative initiatives, national case law and practices of national authorities*

The National Advisory Committee on Drugs²⁴⁶ published a report²⁴⁷ in November 2004 on access to adequate health care for those with mental illness who are addicted to substance. The Report said that many patients were being excluded from treatment services on the basis of their dual diagnosis. An example given was that some mental health services would not treat a person on a methadone treatment programme. It suggests “cultural differences, treatment ideologies and the paucity of education and understanding in relation to dual diagnosis needs to be addressed.”²⁴⁸ The report recommends further study in this area, which is only now becoming visible in healthcare provision in Ireland in order to ensure that dual diagnosis “is firmly on the agenda for services involved in the provision of care.”²⁴⁹

A report entitled *Adolescents and Alcohol/Drug Addiction Services* by the Drugs Prevention Alliance was published by an organisation called *The Wheel*²⁵⁰ in February 2004. It stated that the Government’s methadone maintenance programme “imprisons teenagers in a life of addiction and crime” and called for a review of the procedures used.²⁵¹ The Report said that methadone was a more addictive substance than heroin and leads to further addiction.

The Irish Pharmaceutical Union (IPU) also raised concerns in January 2004 about the effectiveness of the methadone programme, as it seemed that there was an ever-increasing demand being put on the service provider and that instead of reducing the amount of addiction it was instead leading to an increase in users.²⁵²

At the launch of a report by the National Advisory Committee on Drugs in September 2004, entitled *An Overview of Scientific and other Information on Cannabis*, the Minister of State with responsibility for drugs strategy stated that cannabis would not be made legal for recreational purposes. However, he did not rule out the possibility that it could be used for medicinal purposes under controlled circumstances. The Minister said: “we have to make a huge distinction between it being licensed under strict rules and criteria for medical purposes and any move towards legalising it for recreational purposes.”²⁵³ The Minister seemed to suggest that if medical opinion favoured the use of cannabis in treating patients with certain chronic illnesses, he would not object to its use.

²⁴⁶ The National Advisory Committee on Drugs (NACD) was established in response to the drug problem to assist in the need to improve knowledge and understanding of problem drug use. The goal of the NACD is to advise the Government on problem drug use in Ireland in relation to prevalence, prevention consequences and treatment based on an analysis and interpretation of research findings.

²⁴⁷ Mental Health and Addiction Services and the Management of Dual Diagnosis in Ireland, 2004

²⁴⁸ *Ibid.*, p. 92

²⁴⁹ *Ibid.*, p. 93

²⁵⁰ *The Wheel* was established in 1999 as an open, independent and self-governing network of groups and individuals working in the Community and Voluntary Sector in Ireland. A registered charity, *The Wheel*’s remit is to advance a community-oriented society, characterized by active citizenship and mutual connectedness, through assisting the Irish Community & Voluntary Sector to become for itself a powerful voice for change.

²⁵¹ *The Irish Times*, February 3rd 2004

²⁵² *The Irish Times*, January 27th 2004

²⁵³ *The Irish Times*, September 2nd 2004

Other relevant developments

Positive aspects

In the period under review the Equality Authority prioritised two areas of service provision: Health and Education. In relation to Health, it focused on the need to provide equality-competent health advisers and, to this end, organised a joint conference with the Irish Medical Organisation in November 2004.

Article 36. Access to services of general economic interest

Access to services of general economic interest in the economy of networks: transports, posts and telecommunications, water-gas-electricity

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

In November 2004 the Court of Justice of the European Communities found Ireland had failed to fulfil its obligations under EC law in not implementing within the appropriate time period the laws, regulations and administrative provisions necessary to comply with Directive 2001/14/EC.²⁵⁴ The Directive is intended to replace Directive 95/19/EC and introduces measures covering capacity allocation, charging and safety certification with regard to member state rail networks. Under the Directive each member state is required to establish an independent regulatory body and is required to create a system whereby costs for track access are charged in a transparent fashion. In its defence Ireland argued that it had taken measures for the implementation of the Directive, but due to a heavy legislative programme more time was needed in order that the process be completed. The Court rejected this argument and issued a finding that Ireland was in breach of its obligations under the Directive.

Legislative initiatives, national case law and practices of national authorities

The State Airports Act 2004 provides the legislative basis for the restructuring of *Aer Rianta* (the Irish Airports Authority), and provides for the establishment of separate authorities to govern Dublin, Cork and Shannon airports independently. On the making of a ministerial order *Aer Rianta* was renamed Dublin Airport Authority (DAA) and Cork and Shannon Airport Authorities will have their relevant airport assets vested in them, with the capacity to contract with DAA. The change in the state airports structure is intended to lead to greater competition in the market and allow greater flexibility for each Airport Authority to grow and expand to meet its own specific needs.

In October 2004 the Sixth Progress Report (discussed previously) on *Sustaining Progress* was published. One of the special initiative measures being considered by the social partners under the Agreement is the cost and availability of insurance. The Report states that the aim and objective of the Government's Insurance Reform Programme is "to bring about a reduction in insurance costs by the insurance industry, for the benefit of consumers and business, by means of :

- Improving the functioning of the insurance market
- Decreasing the cost of delivery of compensation
- Investigation the competitiveness of the market²⁵⁵

²⁵⁴ Case C-482/03, *Commission v. Ireland*, November 18th 2004

²⁵⁵ Sustaining Progress, Social Partnership Agreement 2003-2005, Sixth Progress Report, October 2004, p. 16

Key elements in the implementation of the Government's policy include the implementation of the Motor Insurance Advisory Board (MIAB) Plan, the establishment of the Personal Injuries Assessment Board (PIAB) and a Competition Authority study on the insurance sector in Ireland. The Government suggests that the action plan has contributed to a reduction in insurance costs in the Irish market and hopes that further increases will be possible as the plan is fully implemented. Central Statistics Office figures on the insurance market show a reduction of 14.1 per cent in motor car insurance between April 2003 and August 2004.

The fundamental change that occurred in 2004 as part of the above scheme was the introduction of PIAB. The board is charged, under the Personal Injuries Assessment Board Act 2004, with the making of assessments, without the need for legal proceedings to be brought, of compensation for personal injuries.²⁵⁶

In December 2004 a factory worker initiated a challenge in the High Court against a decision of the Personal Injuries Assessment Board to deal directly with clients rather than communicating through the client's solicitor.²⁵⁷ Mr Declan O'Brien, with an address in Tullamore, Co. Offaly is claiming that his constitutional right to be represented by a solicitor is being breached by the actions of the PIAB by its insistence on dealing directly with him rather than through his legal representative. The claim arose out of an injury sustained by Mr. O'Brien at a meat factory in Co. Westmeath.

In December 2004 the Commission for Communications Regulation, *ComReg*, issued its conclusions and notifications to the Commission of the European Communities on the Wholesale Mobile Access and Call Origination Market. It found that the mobile telecommunications companies, *Vodafone* and *O2*, have joint dominance and have proposed to open the networks of these operators to alternative service providers.²⁵⁸ The Competition Authority agreed with the proposed course of action in discussions with *ComReg*.²⁵⁹

Other services of general interest

Legislative initiatives, national case law and practices of national authorities

In April 2004 the *Second Report of the Public Transport Partnership Forum*, which was established under the *Sustaining Progress*, was published. In the report the Forum reiterates its support for its statement on the Department of Transport's strategy and continues to urge the Minister with responsibility for transport matters to focus on regulatory and structural reform.²⁶⁰

In the latest Progress Report under *Sustaining Progress*, the Government has signalled its intention to improve bus services in urban areas and accelerate their provision in other urban areas in the state. A commitment is also made in the Report to develop an integrated ticketing system to be used on various forms of public transport, including the LUAS light rail system, which finally came online in Dublin this year and has already made a significant contribution to public transport provision in the city. The report also mentions the Government's intention to introduce a Dublin Metro Bill in order to proceed with its plans to introduce a metro system

²⁵⁶ Personal Injuries Assessment Board Act 2004, Explanatory Memorandum

²⁵⁷ *The Irish Times*, December 15th 2004

²⁵⁸ Commission for Communications Regulation, Media Release, December 9th 2004, see www.comreg.ie

²⁵⁹ *Ibid.*

²⁶⁰ Second Report of the Public Transport Partnership Forum July 2002- December 2003, Appendix II, para. 3

in Dublin. The Bill would make provision for a streamlined process whereby public consultation and compulsory purchase of land processes would be greatly expedited.

The Progress Report states that the : “...Irish electricity market will open fully to competition on 19 February 2005.”²⁶¹ It is anticipated that this move will lead to greater reductions in the cost of electricity and lead to greater access for consumers. The report also states that in July 2004 the relevant Minister “further liberalised the natural gas market so that all non-domestic customers (a total of around 17,000) are now eligible to switch suppliers.”²⁶²

Article 37. Environmental protection

Right to a healthy environment

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Judgment – End-of-life Vehicles

*Commission of the European Communities v. Ireland*²⁶³

In October 2004 the European Court of Justice found Ireland in breach of its obligations under EC law for failure to adopt laws, regulations and administrative provisions necessary to comply with the provisions of Directive 2000/53/EC on end-of-life vehicles. The Directive aims primarily to minimise the negative impact of end-of-life vehicles on the environment and also in doing so to avoid harmful distortions of competition within the internal market. The Directive seeks to harmonise the procedures across the Community under which end-of-life vehicles are disposed of in an environmentally sound manner making use of recycling technology wherever possible and implementing a regulatory system for the safe disposal of waste products associated with vehicles. Ireland notified the Commission of the measures which it intended to take by which the provisions contained in the Directive would be transposed into domestic law. However, the Court held that this was insufficient to prevent a finding of non-compliance with its obligations under the Directive.

Judgment – Substances Depleting the Ozone Layer

*Commission of the European Communities v. Ireland*²⁶⁴

Also in the period under review the court issued a finding that Ireland had breached its obligation under Articles 16 (5) and (6) and Article 17 (1), requiring member states to provide the Commission with information regarding the quantities of ozone depleting substances recovered, reclaimed, recycled or destroyed and also under Article 17 (2), which requires the definition by the Member State of the minimum qualification requirements for personnel involved in taking precautionary measures to prevent and minimise leakages of methyl bromide. Ireland argued that certain steps had been taken to attain these measures, but that the complexity of this particular piece of EC legislation was making the process slower than anticipated. The Court held that this could not be used as an excuse given that Ireland, as a Member State of the European Communities, had been involved in the legislative process and therefore found that Ireland was in breach of its obligations under EC law.

Judgment - Protection of Waters against Pollution Caused by Nitrates

²⁶¹ *Supra.* n.85, p. 68

²⁶² *Ibid.*

²⁶³ C-460/03

²⁶⁴ C-406/03

*Commission of the European Communities v. Ireland*²⁶⁵

This case arose out of the alleged failure of Ireland to implement the measures required by Council Directive 91/676/EEC, which concerned the protection of waters against pollution by nitrates from agricultural sources. The Commission brought an Article 226 action seeking a declaration that Ireland had failed to meet its obligations under the Directive in not complying with Articles 3 (1), 3 (2), 3 (4), 5 and 6 (1) (a), (b) and (c) of the legislation. In his Opinion reported in last years Irish Submission, Advocate General Geelhoed agreed with the Commission in finding that Ireland was indeed in breach of its obligations under EC law. When the case came before the Court of Justice in March 2004 the Court reached the same conclusion as the Advocate general in deciding Ireland had failed to comply with the aforementioned provisions of the Directive.

Opinion – Waste Framework Directive

*Commission of the European Communities v. Ireland*²⁶⁶

In September 2004 Advocate General Geelhoed issued an Opinion on the alleged failure of Ireland to comply with its obligations under Council Directive 75/442/EEC as amended by Council Directive 91/156/EEC. The case arose from a series of complaints received by the Commission regarding incidents involving the deposit of waste allegedly in violation of the Directives.²⁶⁷ Article 4 of the Directive encapsulates that core obligation with which the Member States must comply: that is to ensure that waste is recovered or disposed of without endangering human health or causing harm to the environment. The Directive also makes provision for the establishment of an integrated network of waste disposal to be carried out by registered private or public undertakings. During the period 1997 to 2000 the Commission received a number of complaints, twelve of which are listed in the opinion of the Advocate General covering violations of the provisions of the Directive in various parts of the territory of Ireland. In taking the action under Article 226 EC the Commission seeks to obtain a declaration that Ireland has infringed the directive in a “structural and general manner and has not ensured that the seamless chain of responsibility had been fully recognised and made effective.”²⁶⁸ In giving his opinion the Advocate General stated: “I do indeed consider that the failure to comply with Articles 4, 5, 8, 9 and 10, which constitute the core of the waste directive, has been persistent, widespread and serious so that there are sufficient grounds for establishing that Ireland has infringed the waste directive in a general and structural manner.”²⁶⁹

Legislative initiatives, national case law and practices of national authorities

The *Annual Drinking Water Report* for 2003 was published by the Environmental Protection Agency (EPA) in December 2004. It found that the water in private rural water schemes was of exceptionally poor quality and led to a recommendation from the EPA that water scheme operators that do not comply with the basic standards should face prosecutions. The Report states that “it is unacceptable that in 2004 a significant proportion of the population is still receiving water that is unfit for human consumption.”²⁷⁰ The report also points out that the European Communities (Drinking Water) Regulations, 2000 took effect in January 2004

²⁶⁵ C-396/01

²⁶⁶ C-494/01

²⁶⁷ *Ibid.*, para. 2

²⁶⁸ *Ibid.*, para 113

²⁶⁹ *Ibid.*, para. 123

²⁷⁰ Office of Environmental Enforcement, *The Quality of Drinking Water in Ireland, A Report for the Year 2003 with a Review of the Period 2001-2003*, Executive Summary, p. xvii

which requires a greater effort and a higher standard on the part of sanitary authorities and operators of group water schemes.

The EPA's *Annual Report for 2003* (which was published in May 2004) revealed that Ireland's greenhouse gas emissions are running at 31% above the levels reported in 1990. This could have significant implications for Ireland, given that under the newly operative Kyoto Protocol Ireland has committed itself to emissions not running above 13% of 1990 levels in the period 2008 – 2012.

The aforementioned Progress Report under *Sustaining Progress* notes in paragraph 2.4.9 that Sustainable Energy Ireland (SEI) is empowered by the Government to implement measures aimed at ensuring Ireland meets its obligations under the Kyoto Protocol. The SEI's budget from the Exchequer in 2004 amounted to €13.741 million.

The Report also mentions the *Alternative Energy Requirement Programme* which is used by the Government to increase electricity generation from renewable and alternative energy sources.²⁷¹ The results of the AER VI competition were announced in 2003 with the award of contracts totalling 365 Megawatts of capacity offered to the market. The projects must be completed by December 2004.

The EPA also notes in its annual report that 36 waste management licenses were issued in 2003, bringing the total number to 167 such licenses issued since 1995. The Report argues that this has helped strengthen and improve the national waste infrastructure. The report identifies the key challenges that must be met in the future as:

- responding to the threat of climate change
- managing waste and preventing litter
- reducing pollution of inland waters
- protecting natural resources (particularly fish stocks)
- protecting the urban environment, particularly from transport impacts.

The National Monuments (Amendment) Act 2004 was passed in the period under review, the effect of which is to grant the Minister for the Environment, Heritage and Local Government the power to issue a direction in respect of a national monument notwithstanding that such a direction may involve injury to, interference with or destruction in whole or in part, of the monument.²⁷² This legislation arose largely out of an ongoing dispute regarding the completion of the M50 motorway in Dublin and its proposed route which could endanger an archaeological site at Carrickmines Castle as well as the proposed motorway through the Hill of Tara area, one of Ireland's most ancient sites of enormous historical and archaeological significance.

Section 14 of the Act allows the Minister to make an order which could result in damage to these monuments, following consultation with the Director of the National Museum. However, under the legislation the consultation process need only last two weeks before the process of construction, which may endanger national monuments, can be restarted. There is concern that this time period is insufficient to ensure that the correct procedures are implemented.

²⁷¹ Sixth Progress Report, Pg 71

²⁷² National Monuments (Amendment) Act, 2004, Explanatory Memorandum

The right to access to information in environmental matters

Reasons for concern

EU Directives from 1992 and 1997 provide for a strong independent appeals body for information on environmental matters. As implementation of the directives predated the establishment of the office of the Information Commissioner, the environmental information appellate function is carried out by the Office of the Ombudsman, but only for bodies within the jurisdiction of the ombudsman, i.e. a narrower range of bodies than would be covered by the Directives. Furthermore, the Ombudsman acting in such a capacity can only make recommendations. The Department of the Environment favours the Information Commissioner carrying out this appellate function on an extra-statutory basis but this suggestion has not been progressed and contrasts with the procedure to be introduced in UK whereby the new Information Commissioner will be the normal avenue of appeal for the purpose of the directive.

Article 38. Consumer protection

Protection of the consumer in the law of civil procedure

Legislative initiatives, national case law and practices of national authorities

The requirements of the EU Directive on data protection, Directive 95/46/EC of the European Parliament and of the Council, were implemented in the Data Protection (Amendment) Act 2003. This Act is designed to protect consumers from receiving unwanted spam e-mails. There is a maximum fine of €3,000 per e-mail sent. The Data Protection Commissioner is responsible for enforcing this law but no prosecutions have yet been taken under these provisions. The regime that exists here should prevent Ireland from being used as a base from which to spam. The Deputy Data Protection Commissioner, Tom McGuire, stated in an interview in 2004, "We're investigating a number of cases that relate to SMS texts, but we haven't prosecuted anyone in Ireland for spam e-mail."²⁷³ He added that the office was about to sign an agreement with the other EU Data protection commissioners to make inter-EU cooperation easier, but that most spammers are based outside the EU and hence outside the jurisdiction.

Philip Nolan, a partner in the firm Mason, Hayes and Curran and a telecommunications law specialist believes that the tough anti-spam laws that exist in Ireland may in fact have a negative impact on some Irish firms carrying out legitimate business. He says in the report that marketing firms are being stifled due to the rigours of the legislation.²⁷⁴

On Oct 1 2004 *The Irish Times* carried a report about telephone fraud, which involved consumers being charged large amounts for calls to countries in the South Pacific and in Africa.²⁷⁵ This occurred due to software being installed on computers used by the consumer when accessing certain sites, which caused their computer to dial up to a server based in these locations.

Consumers had found their telephone companies totally uncooperative with regard to the issue and had complained to *ComReg*. Due to the lack of action on the part of the telecom companies, the Regulator introduced a ban on calls made to thirteen countries, which included those, which were most often used to perform the telephone fraud reported to the office. This is the first instance of this occurring in a western state and has led to criticism from the

²⁷³ *The Irish Times*, November 26th 2004

²⁷⁴ *Ibid.*

²⁷⁵ *The Irish Times*, October 1st 2004

developing countries concerned that fear that this may lead to similar actions by other western states that could lead to serious consequences for their economies. However, it is still possible for consumers to contact these countries for legitimate reasons using operator assistance.

ComReg also plan to introduce tougher measures on phone companies operating in Ireland, a number of which were involved in billing irregularities this year. Firms in breach of the provisions could be brought to court on criminal charges and face losing their authority to operate in Ireland. This year *Eircom*, *Vodafone* and *O2* admitted to overcharging their customers during 2004. Measures will also be introduced to prevent companies from engaging in aggressive marketing techniques to win telecom customers who have decided to switch to another operator. The regulations will provide that consumers cannot be contacted until at least three months after the time they switched to the competitor service.

AIB Bank was this year found to have overcharged its customers by €26 million on foreign exchange transactions. The IFSRA is currently investigating the matter and has ordered repayment of the fee with interest to the customers although the bank has asserted that it may not be possible to determine who these customers were.

A firm called *Realm Communications* sent SMS texts to mobile phone users about a free hotel offer. In order to avail of this, the text recipients had to dial a premium rate number.²⁷⁶ The Data Protection Commissioner took a case against the firm arguing that it used an automated process without peoples consent, even though personal details of the people contacted were not provided to the firm nor were these recorded.

Reasons for concern

Age Action Ireland believe that finance houses are discriminating against older people in the provision of finance, as applications are often assessed on the basis of whether the applicant is in full-time employment thus discriminating indirectly against older people.²⁷⁷

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

The Director of Consumer Affairs brought an action against retail multiples *Tesco* and *Dunne's Stores* for below-cost selling of baby food. Both were convicted on seven counts and ordered to pay a fine of €2,100 each at the District Court. It is noteworthy that the Competition Authority is of the view that the Grocer's Order should be changed to allow for below-cost selling in the food retail market. They argue that the law places the Director of Consumer Affairs in the uncomfortable position of having to protect consumers from low prices. However, RGDATA, a lobby group for independent retailers, welcomed the decision of the District Court in the *Tesco* and *Dunne's Stores* cases stating that these outlets were attempting to gain a dominant position or indeed strengthen their position of market power that would ultimately reduce consumer choice and therefore damage competition and the market.

²⁷⁶ Office of the Data Protection Commissioner, *Annual Report 2003*

²⁷⁷ *The Irish Times*, January 30th 2004

CHAPTER V: CITIZEN'S RIGHTS

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

Nothing to report

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

Participation of foreigners in public life at local level

Reasons for concern

In April 2004 Ms. Benedicata Atttoh said at a press conference, which was held to introduce five non-Irish nationals who were standing as candidates in the local elections this year, she was dismayed at the “lack of commitment, or unwillingness” on the part of the Government to raise awareness about eligibility to vote in elections.²⁷⁸ Ms. Atttoh, who was standing for Dundalk Urban District Council and Louth County Council said that potential voters were encountering serious difficulties in registering to vote as the green card issued to immigrants by the Garda National Immigration Bureau was deemed not acceptable.²⁷⁹ The card stated that the document was not to be accepted as valid identification and therefore Gardai would not allow immigrants who produced it to register to vote. The Gardai accepted passports and valid drivers’ licences as identification. However, many immigrants did not hold drivers’ licences and many asylum seekers did not have either a licence or a passport.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

In *Redmond v. Minister for the Environment*,²⁸⁰ Herbert J. held that the courts had full power to award damages, up to and including punitive damages in appropriate cases, against the Oireachtas where a constitutional right had been infringed by legislation. In the instant case, he awarded nominal damages to the plaintiff who had previously established that the statutory obligation on candidates for Dáil elections to pay a deposit was unconstitutional, holding, *inter alia*, that there was no evidence of any wilful and conscious wrongdoing by the legislative arm of the State acting in knowing disregard of the plaintiff’s constitutional rights. The judge further held that infringement of a constitutional right is actionable without proof of loss.

Article 41. Right to good administration

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

Article 42. Right of access to documents

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

²⁷⁸ *The Irish Times*, April 14 2004

²⁷⁹ *Ibid.*

²⁸⁰ *Redmond v. Minister for the Environment* (13 February 2004) H.C. Unrep.

Article 43. Ombudsman

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

Article 44. Right to petition

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

Article 45. Freedom of movement and of residenceRight to social assistance for the persons who have exercised their freedom of movement*Legislative initiatives, national case law and practices of national authorities*

The habitual residency condition upon which social assistance is contingent is discussed under Article 34 – Social security and social assistance.

Prohibition to enter certain zones or portions of the national territory during particular events*Legislative initiatives, national case law and practices of national authorities*

That the courts have power to restrict travel within the State in the context of granting bail was affirmed by O'Neill J. in *Rice v. Mangan*.²⁸¹ In this case a District Judge had made the granting of bail to the applicant conditional on him remaining outside of Co. Clare. O'Neill J held that such a condition was authorised by s.6(1)(b)(iv) of the Bail Act 1997. The context in which the case arose was in criminal proceedings arising from protests by anti-war campaigners at Shanon Airport protesting at the use of that airport for re-fuelling by the US military.

Reasons for concern

Strong concerns have been expressed by supporters of those the subject of court orders restricting their right of free movement in an around the vicinity of Shannon Airport.

Other relevant developments*Legislative initiatives, national case law and practices of national authorities*

An exploratory study of the topic of people displaced by the conflict in Northern Ireland into the border counties of Ireland was completed in 2004 under the auspices of the EU Programme for Peace & Reconciliation in Northern Ireland and the Border Counties (2000-2004). Peace II has as one of its objectives the addressing of legacies of the conflict in Northern Ireland. The research explores the extent to which the status of 'refugee' or 'internally displaced person' is applicable to those who fled conflict-related violence over the last thirty years. It will be published in April 2005.

Article 46. Diplomatic and consular protection

Nothing to report

²⁸¹ *Rice v. Mangan* (30 July 2004) H.C. Unrep.

CHAPTER VI: JUSTICE**Article 47. Right to an effective remedy and to a fair trial**Access to a court*Legislative initiatives, national case law and practices of national authorities*

In *White v Dublin City Council*²⁸² due to the failure of the defendant corporation to require the notice party to re-publicise his revised application for planning permission, the applicants were unaware of the nature of the planning permission granted and consequently failed to comply with the two-month limitation period prescribed by s 82(3B) of the Local Government (Planning and Development) Act 1963 when they sought to have this permission quashed. Upholding their challenge to the constitutionality of this section,²⁸³ the Supreme Court distinguished between civil actions and actions for judicial review, expressing the view that more lengthy limitation periods are laid down for civil actions between private persons or bodies and that it was not necessarily unconstitutional in such cases to omit a stipulation for extension of time where the wrong was not reasonably discoverable within the longer time allowed, given that anxiety, worry and cost for the defendant are important elements in those cases. Distinguishing an earlier case (*Tuohy v. Courtney*) on this basis, the Court noted that the protection of defendants from stale claims and the need for the courts to have before it oral evidence based on the accuracy of recent recollection and complete documentary evidence were less compelling justifications for the absence of a power to extend, where the limitation period was a mere two months. Turning to applications for judicial review, the Court said:

“The imperative of certainty in administrative decisions ... must be weighed against the equally important principle ... that, in a state based on the rule of law, any person affected by an administrative decision, has a constitutionally protected right of access to courts to contest its legality”.

In the instant case, the applicants had been deprived of an opportunity to challenge the validity of the planning permission through an unlawful act of the respondents and so the failure of the Oireachtas to permit an extension of the limitation period by law undermined the applicants' right of access to the courts.

In December 2004 Ms. Justice Mella Carroll in the High Court declared that section 260 of the Mental Treatment Act 1945, which had the effect of curtailing access to court, was unconstitutional.²⁸⁴ The impugned section prevented people challenging acts done under the Mental Treatment Act (e.g. involuntary psychiatric detention) unless the High Court was of the view that the acts were done in bad faith or without reasonable cause. Ms. Justice Carroll said the limitation on access to the courts on two specified grounds constituted an impermissible interference by the legislature in the judicial domain, contrary to Article 6 of the Irish Constitution (separation of powers) and, also, contrary to Article 34 thereof which provided for the administration of justice in the courts.

²⁸² *White v Dublin City Council* (10 June 2004) S.C. Unrep.

²⁸³ An earlier challenge to the constitutionality of this provision in *Blessington & District Community Council Ltd v Wicklow Co Co* [1997] 1 IR 273 had failed because of the plaintiffs' lack of standing.

²⁸⁴ *The Irish Times*, 8 December 2004.

Legal aid / judicial assistance

Legislative initiatives, national case law and practices of national authorities

In December 2004 the High Court ordered the state to pay almost €9,000 to a woman who experienced a 25-month delay in securing legal assistance from the Legal Aid Board for the purpose of family law proceedings. In finding that her constitutional right of access to a court had been violated by the unreasonable delay in granting a legal aid certificate the judge stated that this was not the fault of the Legal Aid Board or any of its personnel but, rather, arose from the failure of the state to adequately fund the Board between 1996 and 1999.²⁸⁵

Positive aspects

Additional funding of €3million was announced for the scheme of civil legal aid administered by the Legal Aid Board in late-2004. This will allow for the re-opening of the private practitioners' scheme in the Circuit Court which had closed in early-2003.

Reasons for concern

Despite the announcement of additional funding for civil legal aid the Free Legal Advice Centres (FLAC) Ltd and other independent law centres have complained of long delays in legal aid centres and of the fact that the legal aid scheme does not cover very important areas of litigation such as employment tribunal proceedings.²⁸⁶

Under the European Arrest Warrants Act 2004 there is no provision for legal aid despite that fact that such a requirement is contained in the relevant EU Framework Decision. If the practice of providing assistance through the discretionary Attorney General's Scheme – which was used in the past in extradition cases – is used, this will be most unsatisfactory in terms of securing adequate legal defence for those persons the subject of such warrants.

Independence and impartiality

Legislative initiatives, national case law and practices of national authorities

In the period under review a process was commenced to remove a member of the Circuit Court from judicial office. Judge Brian Curtin was charged with criminal offences connected with downloading child pornography from the internet. He was acquitted in 2004 by direction of the trial judge on the basis that the evidence obtained by the police from his dwelling and on which the prosecution was based was obtained after the search warrant had lapsed. The Irish Constitution provides (in the provision dealing with judicial independence, Article 35) that the Oireachtas can remove a judge (of the High or Supreme Court) from judicial office for 'stated misbehaviour' or incapacity. Judge Curtin has secured leave from the High Court to seek a declaration that the mechanism now being used to investigate his alleged misbehaviour which could, ultimately, result in his being removed from judicial office is unlawful and unconstitutional. A Select Committee of the Houses of the Oireachtas has recently ordered the judge to hand over his computer and other materials currently in the possession of An Garda Síochána and it is response to this order that the legal challenge has been commenced. The matter is likely to be decided by the High Court in early-2005 and, regardless of the outcome, is likely to be appealed to the Supreme Court.

²⁸⁵ *The Irish Times*, 22 December 2004.

²⁸⁶ *The Irish Times*, 9 October 2004.

Reasons for concern

There are concerns that, in the absence of detailed and explicit provisions for the removal of a judge from judicial office, that in the immediate case involving Judge Brian Curtin insufficient regard may be paid to the due process entitlements of a person the subject of such a procedure. Equally, there are concerns that the absence of such procedures makes it extremely difficult to deal with problems of judicial misconduct with all of the implications that has for judicial authority. The need for legislation and/or a constitutional amendment in this area is pressing.

Reasonable delay in judicial proceedings*International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up*

On 29 July 2004 the European Court of Human Rights delivered two judgments in cases taken against Ireland under Articles 6 and 13 ECHR. In *O'Reilly and Others v. Ireland*²⁸⁷ and *McMullen v. Ireland*²⁸⁸ the Court found that Ireland was in breach of Articles 6 and 13 because of unreasonable delays arising in two sets of domestic proceedings for which delay there was no effective domestic remedy.

Legislative initiatives, national case law and practices of national authorities

In *Maguire v. Director of Public Prosecutions*,²⁸⁹ the Supreme Court, per Hardiman J., rejected the contention that Section 2 of the Bail Act 1997 created a discrete, self-contained and exclusive jurisdiction in relation to cases where the section was invoked, in respect of which the issue of delay in bringing a case to trial could not be taken into account by the court. According to Hardiman J:

“the effect of the section is to add a ground – the prevention of the commission of a further serious offence by the applicant for bail – on which a bail application might be refused. So far from existing in isolation, the section is a statutory addition, rendered possible by the Sixteenth Amendment to the Constitution, to the important and ancient jurisdiction of the Court to consider and determine applications for bail.

The factors in addition to those mentioned in Section 2(2) which the court may consider on such an application are those which have been long established at common law and include a consideration of when the applicant's trial will, or will probably, take place. This is a factor which is of obvious relevance because I do not believe that any consideration of a bail application which excludes it vindicates the applicant's right to personal liberty or to a speedy trial. These are rights assured to him by the Constitution and by the European Convention on Human Rights.

Article 5 of the latter instrument requires that a person arrested on suspicion of having committed a crime "... shall be entitled to trial within a reasonable time or to release pending trial". If, as the Director [of Public Prosecutions] contends, Section 2 of the Act excludes any consideration of when the trial will take place, it appears to me that it would fly in the face of the Convention by evading the enforcement of this guarantee. More fundamentally, it would constitute a disproportionate invasion of the right to personal liberty under the Constitution if a court were precluded, by the invocation of

²⁸⁷ Application no. 54725/00

²⁸⁸ Application no.42297/98

²⁸⁹ *Maguire v. D.P.P.* (30 July 2004) S.C. Unrep.

Section 2 on the part of the Director, from considering the duration of the pre-trial incarceration which it is requested to bring about by refusing bail”.²⁹⁰

Article 48. Presumption of innocence and rights of defence

The rules governing the evidence in criminal matters

Legislative initiatives, national case law and practices of national authorities

Part 3 of the Criminal Justice Bill 2004 contains important new provisions regarding the admissibility of certain previous witness statements. The common law rule in Irish courts is that a previous statement made to Gardai cannot be admitted in evidence as proof of any fact contained in it. The fact that a witness may have previously said something different can be used to attack the credibility of the witness but the assertions in the earlier statement cannot constitute proof of those assertions. Aspects of the rule have already been changed by statute and Part 3 constitutes a further change based on principles applied by the Canadian Supreme Court to the admission of prior inconsistent statements by witnesses.

Section 15 of the Bill sets out the circumstances in which such statements can be admitted. Subsection (1) provides that where a person is sent forward for trial for an arrestable offence, a relevant statement made by the witness may be admitted as evidence of any fact contained in it if the witness is available for cross-examination but refuses to give evidence, denies making the statement or gives evidence which is inconsistent with it. Subsection (2) lists the conditions which a court may take into account in deciding on admissibility, i.e. confirmation by the witness or proof that s/he made the statement, satisfaction by the court that direct oral evidence of the facts in the statement would have been admissible in court as evidence, that it is voluntary, reliable and that it was given on oath or affirmation or contains a statutory declaration by the witness as to its truth or the court is satisfied that the person understood the requirement to tell the truth. A court is also required by subsequent subsections to take other factors into account.

Reasons for concern

In the Binead and Donohoe case (discussed under Article 12 – Freedom of political association) there are serious concerns about the procedure adopted by the Special Criminal Court whereby documentary evidence in support of the Garda Chief Superintendent’s opinion that the accused were members of the Provisional IRA was seen by the court but not made available to the defence. This matter is likely to be at the core of the appeal currently pending before the Court of Criminal Appeal.

The right to an interpreter

Reasons for concern

Although available for the purpose of court proceedings there are real problems with the availability of interpreters in locations outside Dublin. The problems are particularly acute in situations where foreigners are being interviewed by police as distinct from participating in court proceedings. Language problems at the police interview stage can have adverse implications later at the trial stage for both the defence and prosecution.

²⁹⁰ *White v. D.P.P.* (20 May 2003, HC) was cited with approval by the Supreme Court in *Maguire* in which the DPP had argued that, in exercising its jurisdiction under Section 3, a court could only take account of delay in bringing a case to trial where such delay was attributable to the DPP. Rejecting this contention, Hardiman J. held that the interests of justice require the courts to take into account the actual time spent in pre-trial custody, irrespective of who might be culpable for that or indeed whether anyone was culpable at all in the matter.

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

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

In the period under review the Criminal Justice (Joint Investigation Teams) Act 2004²⁹¹ was passed to implement the Framework Decision of 13 June 2002 of the Council of the European Union on joint investigation teams.

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

Nothing to report

²⁹¹ No. 20 of 2004.

APPENDIX: CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (O.J. C-364 OF 18.12.2000)

CHAPTER I: DIGNITY

Article 1: Human dignity

Human dignity is inviolable. It must be respected and protected.

Article 2: Right to life

1. Everyone has the right to life.
2. No one shall be condemned to the death penalty, or executed.

Article 3: Right to the integrity of the person

1. Everyone has the right to respect for his or her physical and mental integrity.
2. In the fields of medicine and biology, the following must be respected in particular:
 - a) the free and informed consent of the person concerned, according to the procedures laid down by law,
 - b) the prohibition of eugenic practices, in particular those aiming at the selection of persons,
 - c) the prohibition on making the human body and its parts as such a source of financial gain,
 - d) the prohibition of the reproductive cloning of human beings.

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

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 5: Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. Trafficking in human beings is prohibited.

CHAPTER II: FREEDOMS

Article 6: Right to liberty and security

Everyone has the right to liberty and security of person.

Article 7: Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 8: Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

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

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

Article 10: Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

Article 11: Freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

Article 12: Freedom of assembly and of association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.
2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.

Article 13: Freedom of the arts and sciences

The arts and scientific research shall be free of constraint. Academic freedom shall be respected.

Article 14: Right to education

1. Everyone has the right to education and to have access to vocational and continuing training.
2. This right includes the possibility to receive free compulsory education.
3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

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

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

Article 16: Freedom to conduct a business

The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.

Article 17: Right to property

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
2. Intellectual property shall be protected.

Article 18: Right to asylum

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.

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

1. Collective expulsions are prohibited.
2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

CHAPTER III: EQUALITY

Article 20: Equality before the law

Everyone is equal before the law.

Article 21: Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

Article 22: Cultural, religious and linguistic diversity

The Union shall respect cultural, religious and linguistic diversity.

Article 23: Equality between men and women

Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

Article 24: The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views

freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Article 25: The rights of the elderly

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

Article 26: Integration of persons with disabilities

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

CHAPTER IV : SOLIDARITY

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

Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices.

Article 28: Right of collective bargaining and action

Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

Article 29: Right of access to placement services

Everyone has the right of access to a free placement service.

Article 30: Protection in the event of unjustified dismissal

Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices.

Article 31: Fair and just working conditions

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.

2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

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

The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations. Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.

Article 33: Family and professional life

1. The family shall enjoy legal, economic and social protection.

2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

Article 34: Social security and social assistance

1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices.

2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices.

3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices.

Article 35: Health care

Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

Article 36: Access to services of general economic interest

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union.

Article 37: Environmental protection

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

Article 38: Consumer protection

Union policies shall ensure a high level of consumer protection.

CHAPTER V: CITIZENS' RIGHTS

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

1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.
2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

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

Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.

Article 41: Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.
2. This right includes:
 - a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
 - b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
 - c) the obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

Article 42: Right of access to documents

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.

Article 43: Ombudsman

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.

Article 44: Right to petition

Any citizen of the Union and any natural or legal person residing or having its registered

office in a Member State has the right to petition the European Parliament.

Article 45

Freedom of movement and of residence

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.

2. Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State.

Article 46: Diplomatic and consular protection

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State.

CHAPTER VI : JUSTICE

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

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Article 48: Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.

2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

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

1. No one shall be held guilty of any criminal offence on account of any act or omission

which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission

which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.

3. The severity of penalties must not be disproportionate to the criminal offence.

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

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

CHAPTER VII: GENERAL PROVISIONS

Article 51: Scope

1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.

Article 52: Scope of guaranteed rights

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under

the conditions and within the limits defined by those Treaties.

Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

Article 53: Level of protection

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

Article 54: Prohibition of abuse of rights

Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.